

**Comments of Rogers Communications Inc.
(Rogers)**

Canada Gazette Notice No. DGRB-010-07

Consultation on Proposed Conditions of Licence to Mandate
Roaming and Antenna Tower and Site Sharing and to Prohibit
Exclusive Site Arrangements

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1. On November 28, 2007, the Department issued a consultation paper titled **Consultation on Proposed Conditions of Licence to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements - DGRB-010-07** (“the Consultation Paper”). In the Consultation Paper, the Department proposed conditions of licence for the implementation of the Department’s policies regarding mandatory roaming, mandatory antenna tower and site sharing, and the prohibition of exclusive site arrangements. The Department has invited interested parties to submit comments regarding these proposals. Subsequently, in a notice titled **Update on Clarification Questions for the AWS Policy Framework and Deadline Extension for the Consultation on Proposed Conditions of Licence (DGRB-010-07) – DGRB-012-07** (Policy Framework), the Department extended the deadline for the filing of comments in response to the Consultation Paper.
2. Rogers Communications Inc. (“Rogers”) hereby files the following comments in response to the Consultation Paper.
3. At the outset, we submit that the Minister does not have the authority to amend Rogers’ existing conditions of licence. All of our licenses contain a provision that those licenses will only be amended on an exceptional basis. Rogers submits that there is no exceptional basis that would justify the amendment of these licenses. Indeed the AWS Policy Framework and the Consultation Paper do not indicate what that exceptional basis would be.
4. The mandating of roaming and tower sharing must be assessed in light of the undertakings given by the Minister in connection with the 2000 PCS auction process. The final Policy and Licensing Procedures for the 2000 Auction of Additional PCS Spectrum in the 2 GHz Frequency Range expressly provided that:

“The spectrum licences that are issued pursuant to this auction will continue to be subject to relevant provisions in the Radiocommunication Act and the Radiocommunication Regulations. For example, the Minister continues to have the power to amend the terms and conditions of spectrum licences (paragraph 5(1)(b) of the Radiocommunication Act). Such powers would be exercised on an exceptional basis, and only after full consultation (p. 13).”

5. Exceptional or extraordinary circumstances, according to the 2000 policy and licensing procedures, would include such things as a change in international allocation or an overriding policy need relating to a national security issue (p. 13).
6. The undertaking was the culmination of an exhaustive consultative process and was an integral part of the market-driven auction process which was intended to generate significant revenues and to attract significant investments. According to the 2000 policy and licensing procedures, “[t]he Department believes that the spectrum being offered in this auction has a significant value, and is confident that the revenues generated will cover the relevant spectrum management costs and provide fair compensation to the Canadian public for the use of their spectrum resource” (p. 29).
7. The development of radiocommunication – cellular and PCS services in particular – is a costly proposition for companies that involves considerable technological investments. 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 licence. The Minister recognized this reality in deciding that it was consistent with the orderly development and efficient operation of radiocommunication in Canada, in accordance with subsection 5(1) of the Radiocommunication Act, that licence conditions only be amended on an exceptional basis.

8. The Minister has already exercised his discretion to amend licence conditions by undertaking that he would only do so in exceptional circumstances. The bidders in the 2000 PCS auction relied on that undertaking in bidding 1.5 billion dollars. In such circumstances, the Supreme Court of Canada has held that the Minister is bound to act in accordance with the undertaking: *Mount Sinai Hospital Center v. Quebec*, [2001] 2 S.C.R. 281.
9. Moreover, it is doubtful whether the Minister has the authority to require licensees to waive valid contractual rights to site exclusivity. The courts have refused to interpret broadly drawn powers so as to encroach on the economic freedom of regulated entities, depriving them of their rights: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140.
10. Justice Binnie commented in the *Mount Sinai* decision that, “[i]f this were a private law situation there would likely be a breach of contract” (para. 8). In the current case, the Minister’s breach of the undertaking would constitute a breach of the Deed of Acknowledgment bidders signed in order to participate in the 2000 PCS auction, in which bidders agreed to be bound by the terms and conditions of the auction in the 2000 Policy, and to pay any debt or obligation to the Crown resulting from the bidder’s auction participation, including withdrawal and forfeiture penalties. The Deed provided that:

In consideration of the Minister of Industry (“Minister”) holding an auction in accordance with the Policy and Licensing Procedures for the Auction of Additional PCS Spectrum in the 2 GHz Frequency Range dated June 28, 2000, the Minister’s approval of the Applicant’s participation in the auction, and other good and valid consideration, the receipt and sufficiency of which are hereby acknowledged by the Applicant and the Minister . . .
(emphasis added)

11. This unspecified consideration incorporates undertakings made in the policy – including the undertaking to only amend licence conditions on an exceptional basis – as a term of the Deed. The undertaking was an integral part of the spectrum auction process and was relied upon by Rogers in bidding substantial amounts. 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.

12. Throughout the remainder of this document, Rogers will comment on the proposed license conditions, as though the Minister had the power to amend our licenses. However, nothing in these comments should be taken as a waiver of our rights. Rogers reserves the right to utilize any and all remedies available to prevent an unlawful amendment of our license conditions.

Comments Invited

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

Timelines for Responding to Requests & Submitting Agreements, and Other Timelines

13. In the Consultation Paper the Department has proposed that requests for sharing of antenna sites must be responded to by licensees within 30 days. If the request to share is technically feasible, licensees must provide the requesting party with an offer to enter into a sharing agreement. If the request to share is not technically feasible, the licensee's response must detail the reasons why the sharing request is not technically feasible. The Department has also proposed that, where the

- parties cannot agree to the terms of an agreement within 90 days of the initial request, the licensee must agree to submit the matter to an arbitrator.
14. Rogers experience has shown that the proposed timeframes are unworkable. We propose instead, that conditional approval be granted or denied within 60 days of a full request, with all required information. Final approval will be granted or denied within 30 days of the requestor providing the needed plans, approvals and studies. The period during which the requestor provides the necessary documentation should not exceed 60 days. The arbitration on rates or other business issues would take place within 60 days of final approval being granted. All technical feasibility issues would be dealt with by Industry Canada, rather than the arbitrator. Finally, we would note that these timeframes are only workable if the volume of sharing requests stays roughly in line with current levels. If more requests are made, these timelines will have to be relaxed and Rogers will need to impose additional application fees to compensate it for hiring additional resources to process the requests.
15. With respect to the proposed requirement that licensees respond to requests within 30 days, Rogers notes that, implicit in this proposal, is the requirement that licensees must complete a technical feasibility analysis within 30 days. In Rogers' experience, a timeframe significantly greater than 30 days is required to complete any such analysis.
16. First, requests for sharing are often made without the complete technical details that are required to consider the request. In such cases, the licensee must advise the requesting party that additional technical information is required. This introduces delay for which the licensee is not responsible. Secondly, it must be understood that each and every antenna site is unique in terms of its characteristics and configuration. As

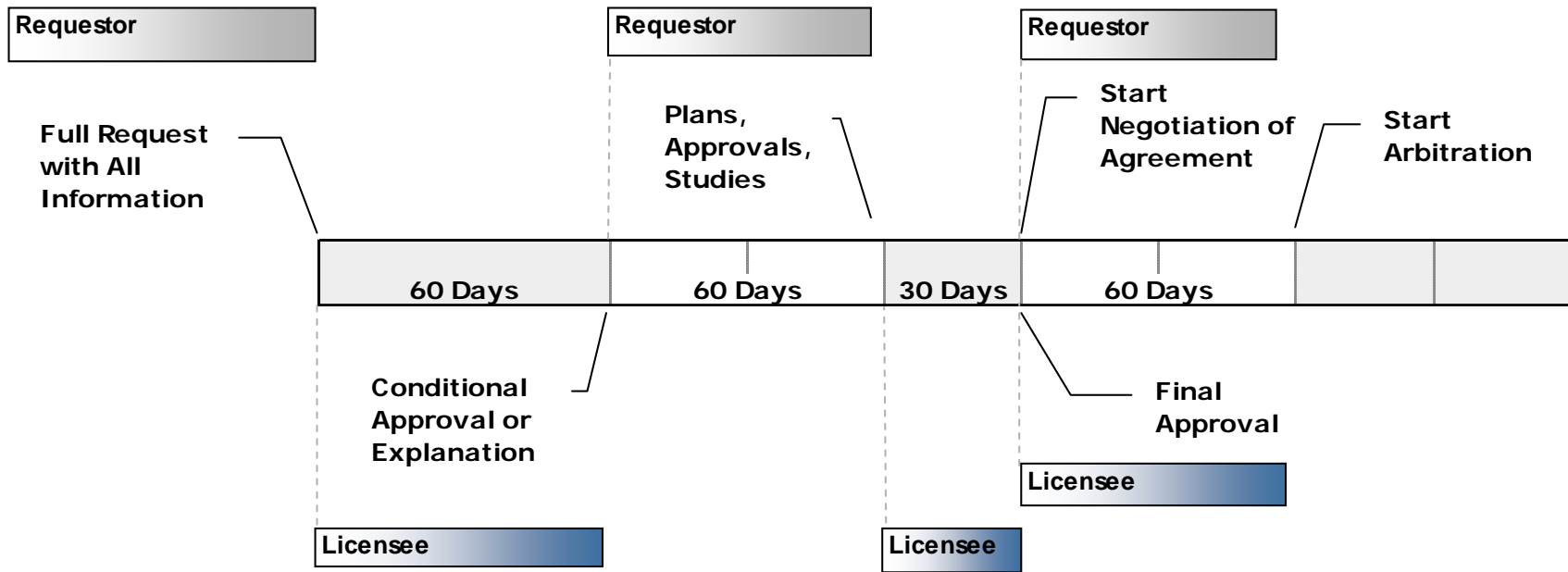
- a result, each sharing proposal can only be considered on a case-by-case basis and there is no opportunity to “short cut” or “rubber stamp” the technical analysis or design that is required to determine the technical feasibility of a given proposal.
17. Immediately following the receipt of a complete sharing request, the licensee must determine whether, and the extent to which, a sharing request can be accommodated and whether it conflicts with the incumbent’s current configuration of the antenna site, or with its future plans. This includes a review of the request by the licensee’s Network Planning, Radio Engineering, Transmission Engineering, Equipment Engineering, Civil Engineering and Field Services personnel, all of whom are qualified professionals. Typically, this review takes several weeks to complete, despite the fact that most of these tasks are completed in parallel. Once this preliminary review has been completed, only a conditional approval of the request can be granted.
18. At this early stage of the process, 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 or completed by either the requesting party or the licensee.
19. Once the requesting party has received conditional approval from the licensee, it is the responsibility of the requesting party to ensure that tasks such as, but not limited to, the following are completed by qualified professionals: a formal antenna site structural analysis; detailed technical drawings; a site plan; federal and municipal approvals; and Safety Code 6 calculations. These tasks must also take into consideration other parties that have leased space at the same antenna site for their antenna systems such that, among other things, the sharing proposal will not

- interfere with the other parties' systems. The site may be owned by a landlord and the requesting party may need to seek the permission of the landlord to the sharing. Typically, all of these activities are not completed by requesting parties until a number of months have passed. Requesting parties are currently given a maximum of 6 months to complete this work.
20. Once the licensee has taken receipt of the technical documents identified above, the licensee must then review this documentation. It is only at this stage that the licensee can conclusively determine that the proposal is technically feasible. Once the licensee provides its final approval for the sharing proposal the requesting party is then responsible for formally agreeing to the proposal. With these approvals secured, the licensee prepares a technical work order detailing the modifications that will be made to the site, and it is the responsibility of the requesting party to complete the work by means of qualified third party professionals, as well as to complete as-built diagrams and a site inspection report. Once again, typically, these activities are not completed by requesting parties until a number of months have passed.
21. It should be clear from the activities outlined above that requesting parties have a significant role to play in the process and that they also have a significant impact on the timelines associated with the process and, specifically, with the timeframes associated with the determination of the technical feasibility of the sharing proposal and the completion of a sharing agreement.
22. In light of the above, Rogers strongly recommends that the Department modify the proposed condition such that the timelines do not begin to run until the applicant has provided all reasonable information required to support a sharing request. Licensees will have 60 days to provide either a conditional approval or an explanation stating why a conditional approval

cannot be granted. Requesting parties must be required to provide all remaining necessary documentation within 60 days of receiving conditional approval, otherwise the licensee's resources and assets will be tied up indefinitely. The licensee should be required to provide its final approval for the proposal within 30 days after receipt of all remaining required documentation. An arbitration dealing with rates or other business issues should not commence until 60 days after final approval is granted. 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.

23. The following diagram illustrates the process and timelines that Rogers recommends the Department adopt:

Rogers' Proposed Antenna Tower & Site Sharing Process and Timelines



24. This timetable is only valid under the current volume of sharing requests. Where future volumes are greater than 150% of current volumes, incumbents must be given the flexibility to negotiate alternative timelines with requesting parties. Rogers would also note that there are limited third party professional resources in any given market that are available to licencees and requesting parties.
25. The proposed requirement that licensees and requesting parties conclude a sharing agreement within 90 days is not practical. Since the requesting party is responsible for the completion of activities such as the installation, as-built diagrams and antenna site inspection, the licensee should be under no timeline obligation during this part of the process.
26. Rogers would note that while the timelines that it has proposed are longer than the timelines proposed by the Department, they reflect the fact that antenna site sharing is a complex and iterative process that requires the efforts of both parties. Moreover, the timelines proposed by Rogers are in fact aggressive in that they are less than the timelines that are normally experienced in the wireless industry.
27. In any event, whatever timeframes the Department ultimately decides will apply, Rogers strongly urges the Department to clarify that any such timeframes will only apply to requests for sharing a single antenna site and that they will not apply to requests for sharing multiple antenna sites, or to multiple requests received in a short period of time since, obviously, such requests will require significantly more time to process.
28. Rogers currently processes about 15 to 20 tower sharing requests per month nationally. If the requests stay in that range, then the timelines set out above are possible. Requesting parties must not be permitted to deliberately deluge licencees with sharing applications. If a large number

of requests are received, additional resources will be required. In this event, the timelines will have to be relaxed and Rogers will need to hire additional resources and to charge additional application fees to pay for these resources. Accordingly, Rogers requests that the Department clarify in the condition of licence or otherwise state that these timeline obligations will not apply in exceptional circumstances such as those described above.

29. Under no circumstances should a licensee be considered non-compliant with their licence conditions simply due to an extraordinary number of sharing requests particularly in the initial stages of this new process. Licensees must not be forced into non-compliance by parties interested only in disrupting their business.

30. In light of the above, Rogers requests that the Department amend the proposed licence condition in Sections 3 and 4 under the heading **Conditions of Licence for Mandatory Antenna Tower and Site Sharing and Prohibition of Exclusive Site Arrangements** as follows:

3. *In order to fulfill the condition of sharing in accordance with this licence, the Licensee must respond to a request to share (including all reasonable information required by the Licensee) by any other Operator within 60 days as follows:*
 - a. *In the event that the request to share is technically feasible, the Licensee must provide the requesting Operator with a conditional approval and a conditional offer to enter into a sharing agreement. The department expects that Site-sharing arrangements would be offered at commercial rates that are reasonably comparable to rates currently charged to others for similar access.*

b in the event that the request to share is not technically feasible, the Licensee must provide the requesting Operator with a response detailing the reasons why it is not feasible (accompanied by any applicable technical information) in accordance with CPC-2-0-03.

4. The Licensee must respond to the provision of all final documentation within 30 days as follows:

a. In the event that the request to share is technically feasible, the Licensee must provide the requesting Operator with a final approval and a final offer to enter into a sharing agreement. The department expects that Site-sharing arrangements would be offered at commercial rates that are reasonably comparable to rates currently charged to others for similar access.

b in the event that the request to share is not technically feasible, the Licensee must provide the requesting Operator with a response detailing the reasons why it is not feasible (accompanied by any applicable technical information) in accordance with CPC-2-0-03

5. *Site sharing arrangements must be negotiated expeditiously and in good faith. If after 60 days following the delivery of a final offer, the Licensee and the Operator requesting a site-sharing arrangement cannot agree to the terms of any such agreements, the Licensee must agree to submit the matter to an arbitrator as agreed upon by the parties in accordance with the provisions of the applicable arbitration model. The Licensee agrees that the arbitrator shall have all necessary powers to determine all of the questions in dispute (including those relating to determining the appropriate terms of the Site-sharing arrangement and those relating to procedural matters under the arbitration) and that any arbitration under this section shall*

be legally binding. The Licensee must participate fully in such an arbitration and follow all directions of the arbitrator in accordance with any arbitration agreement or with the applicable legislation. At any time, the Licensee and the Operator requesting antenna tower and site sharing may agree to specific terms with regard to submitting their dispute to an arbitrator and may withdraw their arbitration, on agreed terms. In no event will the arbitrator have jurisdiction to determine technical feasibility. All issues of technical feasibility will be referred to Industry Canada.

Comments Invited

- b. Specific provisions regarding arbitration may vary from province to province. Would it be useful to adopt a national code such as the ADR Institute of Canada's *National Arbitration Rules* in default of any specific arbitration agreement? Are there any special provisions which should be made applicable to the arbitrators concerning sharing and roaming?**

31. In order to arrive at fair and expeditious resolutions of any disputes that may arise surrounding roaming and tower sharing, it is essential that a fair, streamlined arbitration process be adopted. The process must be impartial, must respect the rights and interests of the parties and must permit consistent decisions to be reached in a timely manner. Rogers therefore agrees with the Department's recommendation that a national code be adopted. Rogers recommends that unless the parties to the arbitration agree otherwise, all arbitrations should be conducted in accordance with the ADR Chambers Inc. Arbitration Rules, with hearings conducted in Ottawa, pursuant to the laws of Ontario. The ADR Chambers is Canada's largest and most prestigious alternative dispute resolution group, with senior experienced panel members from across Canada. Background information on the ADR Chambers, including its

Arbitration Rules, is attached as **Exhibit 1** and is also available at www.adrchambers.com.

32. Rogers also recommends that the following guidelines be adhered to in the arbitration process, consistent with the ADR Chambers Arbitration Rules. Unless otherwise agreed by the parties (for example, in the case of an arbitration involving the sharing of a single site);

1. All arbitration panels should be comprised of three independent arbitrators, as contemplated by the ADR Chambers Arbitration Rules. Having more than one arbitrator decide a case will inspire greater confidence in the decision making process, will diminish the risk that decisions might be made on the basis of factual or legal errors, and will reduce the need for and likelihood of appeals.

Arbitral panels should be comprised entirely of senior lawyers and retired judges. A panel comprised solely of lawyers and retired judges with no connection to the participants will ensure Industry Canada's goals of impartiality and a fair hearing are met. Rogers therefore recommends that all three arbitrators should be selected by mutual agreement from the list of arbitrators maintained by the ADR Chambers, or, in the event the parties can not agree, the ADR Chambers should select the arbitrators itself from the list, in accordance with its Arbitration Rules.

2. The parties should have a full right of appeal on questions of law, mixed fact and law and fact to a panel of three retired appellate justices in accordance with the Appeal Services of the ADR Chambers. The matters at issue in these arbitrations could affect substantially the rights and interests of the parties for periods as long as ten years, and it is imperative that full rights of appeal be accorded and respected.

For the purposes of any appeal that might be pursued, decisions of the Arbitral Tribunals should be treated as if they were decisions of single judges of the Provincial Superior Courts. The Appeal Services of the ADR Chambers provide for final, binding and expeditious appeal decisions.

3. Discovery rights should be curtailed, to the extent reasonably possible, in order to permit arbitrations to be conducted on an expeditious basis. The unlimited exchange of documents and examinations of witnesses will result in significant delays, undermining the entire arbitration process. Therefore there should be no right of oral discovery unless leave of the Arbitral Tribunal is sought and obtained. Leave to conduct oral examinations for discovery should only be granted in exceptional circumstances, where it would be unfair to require a party to proceed to the hearing of the arbitration in the absence of the requested discovery. Discovery of documents should also be limited to those documents that are directly relevant to the roaming and site sharing matters truly at issue in the arbitration. The arbitration process can not be used by parties as a means to obtain competitive information and trade secrets. Permitting otherwise risks the entire arbitration becoming nothing more than a fishing exercise. Moreover, the Arbitral Tribunals and Appellate Panels should be empowered and directed to implement arrangements that protect against the disclosure from one competitor to another of competitively sensitive information. These might include, for instance, implementing safeguards to ensure that competitively sensitive information is treated throughout on a strictly confidential basis, and to the extent that information of this nature must be disclosed, disclosure is limited to independent experts and external counsel.

Comments Invited

- c. Are there any other licence conditions required to facilitate sharing and roaming?**

Other Licence Conditions

Mandatory Roaming

Roaming is Generally Reciprocal

33. At the outset, Rogers believes it would be useful to put roaming into context. Roaming, in general, is reciprocal. Each party to a roaming arrangement provides benefits to the other parties. The roaming arrangements mandated by Industry Canada will not be reciprocal. Rogers will provide roaming to new entrants and to regional incumbents but will not receive any roaming benefits in return. Such imbalances of traffic impact the standard terms and conditions of roaming agreements. Accordingly, the roaming arrangements mandated by the Department have a great potential to distort the competitive market in Canada and lead to unintended consequences. The comments which follow are designed to prevent these unintended consequences from ensuing.

Definition of New Entrants and National New Entrants

34. In the first paragraph of the Conditions of Licence for Mandatory Roaming, the Department proposed the following text:

Where the conditions of licence refer to a "new entrant" or "national new entrant", definitions can be found in the document entitled Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range (November 2007).

35. The Policy Framework states, “To be eligible for the set-aside, a new entrant is defined as an entity, including affiliates and associated entities, which holds less than 10 percent of the national wireless market based on revenue.” The Policy Framework later continues, “A national new entrant is defined as a new entrant that has acquired licenses for all Tier 2 or Tier 3 service areas, or a combination of Tier 2 and Tier 3 service areas, covering all of Canada in the AWS or PCS bands. This definition includes a group of new entrants collectively holding all Tier 2 or Tier 3 service areas, or a combination of Tier 2 and Tier 3 service areas, covering all of Canada in the AWS or PCS bands and cooperating to provide a national service.”
36. Rogers believes that the definitions of “new entrant” and “national new entrant” are of sufficient importance that they should be specifically defined within the conditions of licence themselves and should not simply be incorporated by reference. Both definitions also require further clarification.
37. The definition of “new entrant” in the Policy Framework was not drafted specifically for the purpose of mandated roaming. Instead, the definition was established to determine eligibility for the set aside. The distinction is important as while there might be a policy reason to permit MTSAllstream and Sasktel to participate in the auction as new entrants based on their market share in Canada, there does not appear to be any policy reason to provide these carriers, who hold approximately 60% and 80% market share in their respective provinces, the privilege of in-territory roaming. The definition must therefore be amended specifically to deal with out of territory roaming. In addition, while the definition in the Policy Framework is indirectly tied to the AWS auction, it would clarify matters if the

relationship was specifically contained in the definition. Rogers therefore recommends the following definition be adopted:

*A New Entrant is defined as an entity, including affiliates and associated entities, which holds less than 10 percent of the national wireless market based on revenue **and which successfully obtains one or more radio spectrum licenses in the 2008 AWS auction.***

38. In addition, the Roaming paragraph should be amended as follows:

1. Roaming is to be offered:

b. To all new entrants, in their licensed areas **in which they hold less than 25% of market share (based on number of subscribers)**, for a period of 5 years commencing with the date of issuance of their licence.

39. Furthermore, the definition of “national new entrant” must also be amended. While this definition was contemplated with roaming in mind, it still lacks certainty, specifically when dealing with a group of new entrants cooperating to form a national new entrant. It remains unclear exactly what constitutes “cooperating”. It is important that the constitution of a national new entrant be formalized today to avoid a dispute tomorrow. In addition, the definition must make it clear that a consortium of new entrants coming together to form a national new entrant will have national coverage, with licences in each and every territory in Canada. Each member of the national new entrant group will therefore no longer be entitled to out-of-territory roaming. Accordingly, Rogers recommends the following amendments to the definition:

A national new entrant is defined as a new entrant that has acquired licences for all Tier 2 or Tier 3 service areas, or a combination of Tier 2 and Tier 3 service areas, covering all of Canada in the AWS or PCS bands. This definition includes a group of new entrants collectively holding

all Tier 2 or Tier 3 service areas, or a combination of Tier 2 and Tier 3 service areas, covering all of Canada in the AWS or PCS bands and cooperating to provide a national service.

A group of new entrants will be considered to be cooperating if they meet the following requirements:

- 1) They have entered into a formal legal agreement to cooperate and jointly offer wireless services on a national basis;***
- 2) They agree to roam over each others network;***
- 3) They plan their network facilities and operations jointly;***
- 4) They brand their products and services together on a national basis; and***
- 5) They market their products and services together on a national basis.***

A licensee who is a member of a group of new entrants cooperating to form a national new entrant will no longer be entitled to out of territory roaming.

Definitions of Roaming and Resale

40. In the second paragraph of the Conditions of Licence for Mandatory Roaming, the Department proposed the following text:

Where technically feasible, Licensees must offer automatic digital roaming on their cellular, PCS and AWS networks as follows:

41. In order to provide clarity and avoid future disputes, Rogers believes it is crucial that the Department clearly defines what constitutes “automatic digital roaming”. Confusion over this new obligation has already begun,

with many industry observers mistaking resale for roaming. The Department must therefore provide a clear definition of “automatic digital roaming” in the conditions, clearly distinguishing “automatic digital roaming” from “resale”.

42. Roaming is a long established term, quite distinct from resale. In the Policy Framework, the Department described roaming as follows, “In general, roaming allows a subscriber from one network to access another operator’s network when outside the subscriber’s home area”. This statement clearly illustrates that for roaming to exist, each party to the roaming agreement must have an operating wireless network within their respective home territories. One carrier provides services to the customer of another carrier. It is a relationship between equals.
43. On the other hand, resale only requires one operating network and fails to meet the policy objectives of Industry Canada. In a resale situation, one party simply purchases the wireless services of an underlying carrier and subsequently rebrands them to sell to its own customers. Resale is already a common practice in Canada and did not require any special considerations in the upcoming AWS auction. The Department did not need to set aside 40 MHz of spectrum to facilitate resale. The Department’s clearly established goal was to facilitate the entry of new operating networks, a goal not consistent with resale. The Department must therefore ensure there is no confusion between resale and roaming.
44. Accordingly, Rogers believes that the definitions of “Roaming”, “Automatic Digital Roaming” and “Resale” be clearly established and included in the conditions of licence and resolve any uncertainty regarding these important terms. Rogers recommends the following definitions:

“Roaming” is a contractual arrangement between two licensees, each operating a digital mobile radio access network providing real time, two-way switched voice and data services that are interconnected with the public switched network and utilize an in-network switching facility that enables the licensees to reuse frequencies and facilitate subscriber calls within their respective networks, where 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 place and receive calls outside their home territory.

“Automatic Digital Roaming” is Roaming which provides for the origination and termination of calls that are completed without the need for any special facilitation action by the customer.

“Resale” is an activity where one entity subscribes to the communications services and facilities of another entity and then re-offers these communications services to the public.

Roaming Policy

Selling outside Licensed Territory

45. The conditions of licence must ensure that the roaming obligation remains consistent with the policy objectives established by the Department. In the Policy Framework, the Department confirmed the new entrant position that roaming is “essential to the business case of any new entrant because of the importance of coverage in a high mobility service”. The Department felt that new entrants required mandated roaming to offer sufficient coverage to customers in order to effectively compete with the incumbents during their early stages while they were still deploying their network. Mandated roaming however was not intended to allow the out-of-territory

roaming provisions to act as a substitute for purchasing spectrum in the auction. Specifically, a new entrant must not be permitted to market and sell to subscribers outside of their licensed territory using local telephone numbers and relying on their out-of-territory roaming rights to provide service. For example, a new entrant can not purchase one spectrum licence in Newfoundland but then offer service to customers in Vancouver, using Vancouver telephone numbers, relying on its roaming rights to offer the service. Roaming is meant to be an incidental service, not the permanent source of a customer's wireless service. If a new entrant is interested in serving customers in a location, using local wireless telephone numbers, it must purchase spectrum and deploy a network in the area.

- 46.** 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. Again, as mentioned above, roaming is not a substitute for purchasing spectrum and deploying a network. A new entrant is free to compete for customers where it has network coverage but roaming cannot be used as an indirect method of resale.

Roaming within Home Footprint

- 47.** Rogers submits that the conditions of licence must state that there is no obligation to provide roaming to a carrier within that carrier's own network coverage footprint. As the Department stated, roaming is when a carrier's subscriber is provided service by another carrier "outside the subscriber's home area".

48. Specifically, a new entrant should not be able to use the roaming obligation as a means to improve and deliver network quality. According to Industry Canada, the purpose of the roaming privileges is to provide temporary coverage while the new entrant builds out its network. However, once a new entrant has established a footprint in an area, it has established its own coverage and no longer requires roaming assistance from other carriers. An incumbent's network should not be available as network infill, providing new entrants with capacity back-up and improving their network's reliability. That responsibility must be borne by the new entrants themselves, which can be accomplished through the intelligent deployment of their network facilities, which is consistent with the Department's policy of facilities' based competition. Indeed, this is an important means by which competitors can differentiate their services in a highly competitive market.

49. This policy was in fact already determined by the Alberta courts in *Microcell Connexions Inc. v. Telus Mobility Inc. and Mobility Personacom Canada Ltd.*, 1999. At the time, the PCS conditions of licence required incumbents to provide analog roaming to the new entrants, Microcell and Clearnet. Microcell had been provided roaming in the city of Calgary but Telus discontinued it once Microcell deployed its own network in the city. Microcell then attempted to force Telus to continue to provide roaming to its customers in Calgary despite having its own footprint in the area. The Court however ruled that Telus was entitled to stop providing roaming where Microcell had implemented its own wireless service.

50. This decision was confirmed by the CRTC in Telecom Decision CRTC 2006-33. In it, the CRTC found "that the purpose of roaming is to enable a wireless customer to obtain service outside the area where the customer's service provider is licensed to operate." Between 2001 and 2005, Superior Wireless and Thunder Bay Telephone (TBay Tel) had a roaming

agreement in place. However, in 2005, Superior expanded its coverage into TBay Tel territory. TBay Tel subsequently discontinued roaming wherever the networks overlapped. In response to Superior's complaint, the CRTC found that Superior was using roaming arrangements to provide service to its customers to fill gaps in its own coverage area and this use of roaming was "inconsistent with the purpose of roaming arrangements in general and with the 2001 roaming agreement in particular." It has therefore been established that in-coverage roaming has no legal or policy purpose.

Roaming Does Not Include Hand-Off

51. The roaming conditions of licence should not establish new technical obligations on the licensees. The requirement to provide roaming services should not be more onerous than with the carrier's current roaming services provided to its international partners. Any additional obligations could unfairly require the licensee to make capital expenditures. For example, Automatic Digital Roaming should not include hand-offs between the licensee's and roaming carrier's networks. This is consistent with the Department's approach in the 1995 PCS licensing process, the 2001 PCS auction, as well as the US Federal Communications Commission's (FCC's) automatic roaming requirements.

52. In the 1995 PCS licensing process, the Department did not impose as a condition of license or otherwise require cellular licensees to establish hand-offs between their network and the new entrant's network. This approach was maintained by the Department in the 2001 PCS auction process. Specifically, in its amended policy for the PCS auction, the Department stated in part that it was *"of the view that seamless roaming by subscribers between networks providing different services is a function*

*of the technical and commercial arrangements struck between PCS network operators”.*¹

53. Since 1996, the US 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.

54. In its August 1996 ruling, the FCC clarified that its definition of “automatic roaming” does not include hand-off between networks. Specifically, the FCC stated the following in this regard:

*This form of roaming is sometimes referred to as “seamless” roaming. However, some parties understand “seamless” roaming to include handoff of calls in progress as one moves from the service area of one provider to another. For the sake of clarity, we will use the term “automatic” roaming to refer to origination and termination of calls without the need for any special facilitating action by the subscriber.*²

55. With respect to the complexity of interconnection between networks, the FCC noted that:

*Neither originating or terminating roaming requires direct interconnection of carriers’ switches. Interconnection does appear to be necessary, however, if carriers desire to allow their customers to continue calls in progress when they enter another carrier’s service area. Such interconnection may be technically and administratively complex.*³

¹ *Amendments and Supplements and Clarification Questions to the Policy and Licensing Procedures for the Auction of Additional Spectrum in the 2 GHz Frequency Range*, October 17, 2000, p.24.

² *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Second Report and Order and Third Notice of Proposed Rulemaking, August 13, 1996, footnote 12.

³ *Ibid*, para. 7.

56. In the same ruling, the FCC was concerned *“that roaming regulation may impose significant costs and burdens on CMRS providers and that we should narrowly tailor our actions to avoid placing an undue burden on such providers”*.⁴ In light of these concerns, the FCC concluded that it would not impose a requirement for direct interconnection or for hand-off between networks. The FCC stated the following in this regard:

*One of the principle reasons for our tentative conclusion in the Second NPRM to monitor the development of roaming, rather than to propose rules at that time, was our concern that technical factors might render compliance with rules unduly costly for providers, or that our rules might inadvertently impede technological progress. Based on the comments that we received, we are not persuaded that a roaming rule would have such an effect unless it required direct interconnection of networks for the continuation of calls in progress. While handoff of calls in progress is available at this time in some cellular markets, it is much less widespread than originating or terminating access. More importantly, the record does not indicate that broadband PCS or cellular providers need to be able to obtain “continuation of calls in progress” roaming capability in order to compete. For these reasons, we do not propose to require continuation of calls in progress.*⁵

57. The FCC’s definition of “automatic roaming” and its exclusion of a requirement for hand-off and interconnection between networks has been affirmed in all succeeding determinations and proposals issued by the FCC since 1996. While the FCC is currently considering changing some policies, it is not currently reconsidering its policy with respect to hand-off and interconnection between networks.

⁴ *Ibid*, para. 11.

⁵ *Ibid*, para. 25.

Out-of-Territory Roaming

58. In Paragraph 1(a) of the Conditions of Licence for Mandatory Roaming, the Department proposed the following text:

1. *Roaming is to be offered:*

a. *To all cellular, PCS and AWS Licensees outside of their licensed area, for at least the 10-year term of AWS licences;*

59. The purpose of out-of-territory roaming is so that the customers of a regional carrier can have service when they are out of the licensed territory of the regional carrier. The policy is not intended to give national incumbent carriers roaming rights on the networks of other national incumbent carriers.

60. The policy is not based upon frequency band, but upon geography. Out-of-territory roaming rights are only to be offered to any cellular, PCS and AWS licensee outside their licensed area. A carrier that has licensed cellular, PCS or AWS spectrum in a given area cannot be considered to be outside of their licensed area. If a licensee only holds one of these types of spectrum in a region, then it is capable of providing its own coverage and delivering service to its subscribers and, therefore, does not warrant mandatory roaming rights.

License Conditions

61. Accordingly, Rogers recommends the Department add the following text to its conditions of licence:

Where technically feasible, Licensees must offer Automatic Digital Roaming, on their cellular, PCS and AWS networks as follows:

1 Roaming is to be offered:

- a. To all cellular, PCS and AWS Licensees outside of their licensed area, for at least the 10-year term of AWS licence. **For clarity, the licensed areas will be viewed as any area in which the licensee holds any of cellular, PCS or AWS spectrum;***
- b. To all new entrants, in their licensed areas **in which they hold less than 25% of market share (based on number of subscribers),** for a period of 5 years commencing with the date of issuance of their licence.; and*
- c. To national new entrants who have substantially met the 5-year roll-out requirements outlined on their licence, as determined by Industry Canada, for an additional 5 years.*
- d. **Only where the party requesting roaming operates a wireless network in its licenced territory comprising at a minimum, of a mobile switching centre, a home location register, radio base stations, PSTN points of interconnection, and central office codes for wireless telephone numbers.***
- e. **Only on wireless hand sets that operate over the spectrum frequencies obtained by the party requesting roaming in the AWS auction.***

2 Automatic Digital Roaming does not:

- a. **Include Resale, directly or indirectly;***

- b. Permit a licensee to sell or market wireless services to subscribers located outside of their coverage area; including, but not limited to, the use of local telephone numbers, or the establishment of a retail distribution network;**
- c. Include roaming within the licensee's network footprint;**
- d. Require handoffs between networks;**
- e. Require material capital expenditures to be made by a licensee.**

Technical Feasibility

62. Rogers submits that it would not be technically feasible to build all services and functions on all frequency bands. In other words, a new entrant cannot specify which frequencies it requires for roaming. Incumbents must continue to retain full flexibility to re-designate bands for different purposes as necessary. Rogers notes that the FCC has recognized the need for such flexibility in its roaming rule. Specifically, the FCC stated the following in this regard:

Furthermore, on the basis of the existing record, we believe any automatic roaming rule should be sufficiently flexible to permit a carrier to change its technology for legitimate business reasons (e.g. increasing capacity, spectrum efficiency, fraud control or the deployment of enhanced features) without any obligation to make its system accessible to roamers using different technologies, to the extent such a technology change is otherwise permitted by our rules.⁶

63. The incumbents must therefore be permitted to innovate and deploy new technologies according to their own schedule and technology plan.

⁶ *Ibid.* para.26

64. Should the Department believe such a consideration is not a matter of technical feasibility but would be better listed as a licence condition, Rogers recommends that the following text be added:

2. Automatic Digital Roaming does not:
 - f. Restrict an incumbent licensee's use and designation of any specific band or frequency

Scope of Roaming

65. In Section 2 a) under the heading **Conditions of Licence for Mandatory Roaming**, the Department has proposed the following text:

2. *In order to fulfill the condition of offering roaming in accordance with this licence:*
 - a. *The services offered must include digital voice and data services such as Internet access, e-mail, and other data services.*

Roaming Does Not Include Internet Access or Other Enhanced Services

66. The above-noted condition of licence for data services is inconsistent with the Policy Framework. The Policy Framework does not contain an explicit obligation on incumbents to provide roaming for enhanced data services. The Policy Framework states as follows:

In the AWS consultation, potential new entrants considered that mandated roaming is essential to the business case of any new entrant because of the importance of coverage in a high-mobility service. Some argued that new entrants cannot negotiate as equals with established players even in a market with multiple providers. New entrants asked for the same measures previously used by the department in 1995 with a somewhat

different implementation mechanism. This argument was reinforced when the Federal Communications Commission mandated out-of-territory roaming in the U.S. market for all commercial mobile radio services. The department agrees that mandated roaming is important to promote competition and supports the orderly development of radiocommunication in light of the policy objectives of the Telecommunications Act.

67. According to the Department, the roaming obligation was to mirror the “measures used by the Department in 1995 with a somewhat different implementation mechanism”. Roaming is also to mirror the out-of-territory roaming mandated by the FCC.
68. In 1995 the Department did not mandate roaming for all services and in fact only required licensees to offer analog voice services, the previous generation of voice technology. The Department’s policy was designed to ensure that new entrants built out PCS features and services as quickly as possible. At the same time, the viability of the new entrants was enhanced by giving them access to core services outside their home networks. The above-noted proposed condition mandates Internet access, email and other data services. Mandating roaming for all these services will not incent new entrants to expand advanced networks in Canada and does not involve the same measures used in 1995.
69. It is clear that a key consideration in the Department’s decision to set-aside spectrum for new entrants was to foster and promote the development of new and innovative services by new entrants. For example, a press release and issued by the Department with the Policy Framework, Minister Prentice states that “We are looking for greater competition in the market and further innovation in the industry”. Similarly, in a backgrounder released at the same time, the Department states, in part, that:

Advanced Wireless Services (AWS) promise access to a growing range of innovative wireless applications and enable the timely roll-out of next generation technologies like high-speed video and Internet, with faster access for cell phones, Blackberries and other hand-held devices. The availability of these services will accelerate innovation and choice in the wireless sector.

The government's role is to help foster a healthy and competitive telecommunications market that encourages and rewards innovation...

The goal is lower prices, more choice and increased innovation for consumers.

70. Clearly, the purpose of mandatory roaming is not to relieve new entrants of the incentive to invest in new and innovative services. Accordingly, as was the case in the 1995 PCS licensing process, Rogers believes that the Department's policy is to incent new entrants to build enhanced services in their own networks, while providing them with core services through roaming.

71. The Policy also asserted that the Federal Communications Commission ("FCC") has mandated out-of-territory roaming in the United States for "all commercial mobile radio services". In fact, outside of Short Message Service (SMS), the FCC has not required licensees to provide roaming for enhanced data services nor Internet access services. The FCC's automatic roaming order states:

For these reasons, we find that it is in the public interest to impose an automatic roaming obligation on push-to-talk and SMS offerings, subject

*to several provisos. Namely, the requesting carrier must offer push-to-talk and SMS to its subscribers on its own home network.*⁷

72. The FCC considered whether its automatic roaming requirement “should also apply to upgraded enhanced digital networks, such as 2.5G or 3G systems”.⁸ In its decision to not extend its automatic roaming requirement to include certain data features and enhanced digital networks, the FCC noted the concerns of some parties that expanding the requirement to include these services could “undercut incentives to differentiate products and could chill innovation”.⁹ The FCC therefore concluded that it would “decline at this time to extend the scope of the automatic roaming services definition to include non-interconnected services provided over enhanced digital networks, such as wireless broadband Internet access” and that “it is premature to impose any roaming obligation regarding enhanced data services that are not CMRS and not interconnected to the public switched network”.¹⁰

73. In the same Order, the FCC went on to state that it “declines to adopt a rule extending the automatic roaming obligation beyond that to offerings that do not fall within the scope of the automatic roaming services definition, such as non-interconnected services or features of services that are classified as information services or to services that are not CMRS.”¹¹

74. (We would also note that the language above speaks of the licensee offering services such as email. It would be more precise to say that licensees provide connectivity to permit the roamers to obtain services such as email.)

⁷ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking (FCC 07-143), August 7 2007, para. 55.

⁸ *Ibid*, para. 57.

⁹ *Ibid*, para. 56.

¹⁰ *Ibid.*, para. 60.

¹¹ *Ibid*, App C. para 27

75. Rogers submits that the above-noted license condition should restrict data roaming to SMS and push to talk services. Accordingly, Rogers recommends that the Department modify Section 2 a) to read as follows:

2. *In order to fulfill the condition of offering roaming in accordance with this licence:*

a. *The roaming offered must provide connectivity for digital voice and data services such as short message service. However, a carrier requesting roaming may only request services it provides its subscribers over its own network.*

In the Alternative, Roaming Should not extend to 3G or 4G Services

76. In the alternative, should the Department conclude that roaming should include Internet Access services, Rogers submits that such roaming should not include internet access services by means of enhanced digital networks such as 3G. Both incumbents and new entrants need to be incented to build advanced new networks. At the same time, as noted above, new entrants and regional carriers need access to a core group of services in order to provide their customers with connectivity outside their home territories. The Department could therefore adopt an analogous policy to that adopted in the 1995 auction. There, 2G new entrants were allowed to roam on 1G services while they built their 2G networks. The analogous policy in the current round would be to permit 3G new entrants to have access to 2G roaming while they build their 3G networks. This would provide them with the needed 2G connectivity while incenting them to complete their 3G rollout. 2G services are the most heavily used data services in Canada today by a considerable margin. In the case of Rogers, this would mean that roaming would not be available on our 3G network. This network is currently available in larger metropolitan areas.

77. Furthermore, the roaming requirement should not be extended to new networks that have not yet been built. Any requirement to include future advanced services in roaming arrangements would create a disincentive for licensees to invest in new and innovative services. The purpose of making such investments is to allow licensees to differentiate their service offerings in a highly competitive market. If licensees are unable to differentiate their service offerings by building 4G networks, Canada may fall behind our trading partners in the deployment of these networks.

78. Accordingly, in the alternative, Rogers recommends that the Department modify Section 2 a) to read as follows:

2. *In order to fulfill the condition of offering roaming in accordance with this licence:*
 - a. *The roaming offered must provide connectivity for digital voice and data services such as Internet access, e-mail, and other data services, but not including third generation or next generation services..*

Parties Receiving Roaming Must Offer the Services on a Home Network and Use Handsets Capable of Receiving the Services on a Home Network

79. Rogers believes that mandatory roaming is unjustified and unwarranted before a new entrant begins to operate a wireless network. Accordingly, Rogers believes that it is important that the Department clarify in the condition of licence or to otherwise state that roaming outside a new entrant's licensed area must be offered only to those new entrants that operate a wireless network. Similarly, roaming in a new entrant's given licensed area must be offered only to those new entrants that operate a wireless network in the same licensed area. More specifically, the

- Department should clarify or state that roaming in the circumstances outlined above must be offered only to new entrants that operate a network comprised of a mobile switching centre, a home location register, radio base stations, and PSTN points of interconnection, and that have acquired central office codes for wireless telephone numbers.
80. Rogers believes that the Department should also clarify that roaming must be offered only to the extent that the requesting party offers these services and forms of access on its own network. Rogers submits that this would be consistent with the FCC's approach, whereby automatic roaming for push-to-talk and short message service must only be offered if the requesting carrier offers the same services on its own network.
81. The FCC's policy is consistent with the Policy Framework, where the Department has stated that "roaming allows a subscriber from one network to access another operator's network when outside the subscriber's home area". The Department has also stated in the Policy Framework that the purpose of making roaming available to new entrants within their licensed service areas is to assist new entrants "while the licensee builds out its network". Similarly, in a press release and backgrounder issued by the Department with the Policy Framework, the Department stated that "Roaming can also be a means of accelerating market entry by allowing new entrants to roam on existing wireless networks for a fixed period of time while they build out their own wireless networks".
82. Rogers believes that the Department should require, as a condition of licence, that cellular, PCS and AWS licensees requesting roaming shall only offer services by means of handsets that are also capable of providing PCS and AWS in their licensed spectrum and in their chosen PCS and AWS standards. Rogers submits that this approach would be

consistent with the Department's approach to mandatory roaming in the 1995-1996 PCS licensing process.

83. In that licensing process, the Department imposed the following condition of licence on new entrant licensees: "For the purpose of paragraph 8.3 and 8.4 of this section, non-cellular PCS licensees shall only offer cellular services by means of handsets that are also capable of providing PCS in their chosen PCS standard".¹²

Roaming is Not Resale

84. Rogers believes that, absent the earlier clarifications, the roaming requirement may become the subject of abuse by new entrants and others seeking roaming that are determined to avoid investing in their own competitive networks. Moreover, some parties may wish to abuse the roaming requirement for purposes of offering wireless resale services. Rogers notes in this regard that the US FCC recognized this potential for abuse when it made the following statement in its August 2007 order regarding automatic roaming:

Finally, we also determine that the automatic roaming obligation under Section 201 and 202 and the home roaming exclusion are not intended to resurrect CMRS resale obligations. CMRS resale entails a reseller's purchase of CMRS service provided by a facilities-based CMRS carrier in order to provide resold service within the same geographic market as the facilities-based CMRS provider. We note that the Commission's mandatory resale rule was sunset in 2002, and automatic roaming

¹² Consultation on a New Fee and Licensing Regime for Cellular and Incumbent Personal Communications Services (PCS) Licensees - DGRB-004-02, dated December 2002, section 8.1, p. 29.

*obligations can not be used as a backdoor way to create de facto mandatory resale obligations or virtual reseller networks.*¹³

85. Rogers believes that the Department should similarly clarify in the condition of licence or otherwise state that the roaming requirement can not be used as a backdoor way to create a *de facto* mandatory resale obligation or virtual reseller networks.

Rollout Requirements Must be Met

86. On a separate matter, Rogers notes that the Department has employed language in the proposed licence condition regarding roaming that is not consistent with the language it has used in the Licensing Framework. Specifically, in Section 1.c. under the heading Conditions of Licence for Mandatory Roaming, the Department has proposed the following text:

1. *Roaming is to be offered:*

c. *To national new entrants who have substantially met the 5-year roll-out requirements outlined on their licence, as determined by Industry Canada, for an additional 5 years.(emphasis added)*

87. However, the Licensing Framework (DGRB-011-07) states that, in order to be eligible for the additional 5 years of roaming, the national new entrant must demonstrate that “the spectrum was used in accordance with the roll-out targets specified in Appendix C”. In light of this inconsistency between the proposed licence condition and the Licensing Framework, Rogers requests that the Department amend the proposed licence condition such that it will read as follows:

¹³ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Report and Order and Further Notice of Proposed Rulemaking (FCC 07-143), August 7 2007, Para. 51.*

1. *Roaming is to be offered:*

- c. *To national new entrants who have satisfied the 5-year roll-out requirements outlined on their licence, as determined by Industry Canada, for an additional 5 years.*

Commercial Terms and Rates

88. In paragraph 2 (b) of the conditions of licence, the Department states, *“When requested, Licensees will provide an offer to enter into a roaming arrangement to provide roaming services on reasonable terms within 30 days. Industry Canada expects that roaming would be offered at commercial rates that are reasonably comparable to rates that are currently charged to others for similar services”*;

89. Current roaming activity on Rogers’ network typically involves a small volume of traffic compared to the traffic generated by Rogers customers. In the event that roaming traffic from new entrants is substantial compared to our existing customer base (in a given area) this will have a number of consequences for the Rogers network. We provision our network so that we can meet the peak demands of our customers. We do not build network capacity that is not required. Consequently, a large amount of roaming traffic from new entrants could cause demands on the network to exceed capacity leading to poor service both for our own customers and for roaming customers. Under no circumstances should this become detrimental to Rogers’ own customers and network.

90. The FCC was also mindful of this important issue when it stated that, “We would be concerned if requiring a carrier to offer roaming service on its

enhanced network to the customers of other carriers resulted in the carrier facing capacity constraints that adversely affect its own customers.”¹⁴

91. Furthermore, in the event that Rogers did provision additional network capacity for roaming customers, there is a risk that this investment could turn out to be stranded. For example, the roaming customers may temporarily utilize portions of the Rogers network where we do not have significant current or anticipated demand. Accordingly, we might build out a large amount of network capacity for a short period of time. Once the new entrant has completed their network, this investment would be stranded.

92. Accordingly, Rogers submits that it may be necessary to enter into roaming agreements with new entrants that differ somewhat from the roaming agreements it enters into with very small domestic carriers and international roaming partners. In particular, new entrants may be required to provide Rogers with forecasts of the amount of their roaming traffic which they believe will use the Rogers network. Rogers will then be in a position to include these demands in its network planning and network building.

93. Furthermore, Rogers may charge the new entrant for planned capacity whether it is used or not. Otherwise, the cost of the additional unused network will place an undue burden on Rogers customers and Rogers shareholders.

94. Finally, if the usage of the additional capacity on Rogers network is relatively short lived, Rogers may need to reflect the stranded investment it incurs in the roaming rates it charges to new entrants.

¹⁴ Re-examination of Roaming Obligations of Commercial Mobile Radio Service Providers – Automatic & Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, Memorandum Opinion & Order and Notice of Proposed Rulemaking, August 31, 2005, para. 46.

95. Accordingly, Rogers recommends the following changes to the clause:

“When requested, Licensees will provide an offer to enter into a roaming arrangement to provide roaming services on reasonable terms within 30 days. Industry Canada expects that roaming would be offered at commercial rates that are reasonably comparable to rates that are currently charged to others for similar services,

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.

Mandatory Antenna Tower and Site Sharing

96. In Section 1 under the heading **Conditions of Licence for Mandatory Antenna Tower and Site Sharing and Prohibition of Exclusive Site Arrangements**, the Department has proposed the following text:

- 1. Licensees must facilitate sharing of antenna sites, including rooftops, and supporting structures (“Site(s)”) and not cause or contribute to the exclusion of other radiocommunication antenna operators (“Operator(s)”) from gaining access to Sites. Without limiting the generality of the foregoing, where a Licensee is party to an agreement that includes a provision excluding other Operators from the use of a Site, then, in order to facilitate the sharing of Sites, the Licensee must consent to waiving that portion of the agreement to facilitate a request to share. Further, Licensees must not enter into or renew agreements that exclude other Operators from using a Site.*

97. Rogers recommends that this condition be modified as follows:

1. *Licensees must facilitate sharing of antenna sites, including rooftops, and supporting structures (“Site(s)”) and not cause or contribute to the exclusion of other radiocommunication antenna operators (“Operator(s)”) from gaining access to Sites. Without limiting the generality of the foregoing, where a Licensee is party to an agreement that includes a provision excluding other Operators from the use of a Site, then, in order to facilitate the sharing of Sites, the Licensee must consent to waiving that portion of the agreement to facilitate a request to share on appropriate terms and conditions. Further, Licensees must not enter into or renew agreements that exclude other Operators from using a Site.*

98. In entering into exclusive agreements, licensees such as Rogers deliberately pay premium rental rates for the right to place their antenna systems in optimal locations on the tower or roof-top. This legitimate practice is important in a highly competitive market where the placement of antennas will determine the quality of service coverage that a licensee is able to provide to its customers. Given the premium paid by licensees for these legitimate rights, it is only reasonable to require that, in the event that such rights must be waived to facilitate sharing requests, the requesting party shall be responsible for paying the licensee an amount equal to the value of the premium paid by the licensee for the foregone rights. Rogers requests that the Department clarify in the condition of licence or otherwise state that requesting parties will be responsible for such payments.

99. As noted above, one of the determinations that must be made in considering sharing requests is whether the sharing proposal complies

with Safety Code 6. Rogers requests that the Department clarify in the condition of licence or otherwise state that requesting parties will be responsible for demonstrating that their proposed antenna systems will comply with all applicable federal, provincial or municipal rules or regulations, including Safety Code 6 or any successor requirements. The Department should further clarify that, in the event that a sharing proposal would cause the antenna tower or roof-top site to no longer be in compliance with Safety Code 6, the licensee may legitimately conclude that the sharing proposal is not technically feasible.

100. On a separate matter, Rogers notes that the Department has proposed that parties may agree to withdraw their arbitration only if they agree to a Site-sharing agreement. Rogers believes that this is too restrictive in that it does not permit the parties to agree to withdraw their arbitration without a Site-sharing agreement. Rogers believes that there would be legitimate circumstances in which the withdrawal of arbitration absent an agreement to share would be justified. For example, the requesting party may find an alternative antenna site during the arbitration process and may no longer require sharing at the antenna site that is subject to arbitration.

101. In this regard, the Department has also proposed the following text in Section 4 under the same heading, which reads in part:

4. At any time, the Licensee and the Operator requesting antenna tower and site sharing may agree to specific terms with regard to submitting their dispute to an arbitrator and may withdraw their arbitration, on agreed terms, so long as they agree to a Site-sharing arrangement.

102. For the reasons outlined above, Rogers recommends that this text be modified as follows:

4. *At any time, the Licensee and the Operator requesting antenna tower and site sharing may agree to specific terms with regard to submitting their dispute to an arbitrator and may withdraw their arbitration, on agreed terms.*