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February 7, 2008

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Sent via email: aws@ic.gc.ca

**Re: Reply Comments for 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,
and Extension of the Application Date in Gazette Notice DGRB-011/07 –
Licensing Framework for the Auction of Spectrum Licences for Advanced
Wireless Services and other Spectrum in the 2GHz Range**

Rogers Communications Inc. (Rogers) hereby submits our comments on the above-noted consultation.

The documents are being sent in Adobe PDF Version 8.0. Operating System: Microsoft Windows XP.

Yours very truly,

A handwritten signature in black ink, consisting of a stylized 'K' followed by a long horizontal line that loops back under the 'K'.

Kenneth G. Engelhart
Vice President – Regulatory
KGE/csh

Attachs.

**Reply 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

Published in the Canada Gazette, Part 1
dated November 28, 2007

February 7, 2008

Executive Summary

As explained in our comments dated January 22, 2008, Rogers submits that the Minister does not have the authority to amend Rogers' existing conditions of licence. All of our licences contain a provision that those licences will only be amended on an exceptional basis and there is no exceptional basis in the current circumstances. Throughout the remainder of this document, Rogers will provide its reply comments regarding the proposed conditions of licence, as though the Minister had the power to amend our licences. However, nothing in these reply comments should be taken as a waiver of our rights.

The *Policy Framework* is clear in that roaming, not resale, will be required as a condition of licence. The attempts of some parties to have resale and network unbundling imposed would require a material change to the *Policy Framework* and, therefore, must be rejected by the Department. These proposals are also hostile to the objective of fostering facilities-based competition in the wireless market and they reveal that the true intention of some parties is to avoid making the investments required to create new competitive wireless networks and innovative services.

The conditions of licence regarding roaming must strike a balance between the objective of helping new entrants while they build their networks with the need to provide incentives for all licensees to build out their networks and develop new and innovative services. Mandatory access to advanced data services and in-footprint roaming will not achieve this balance but will restrict the ability of competitors to differentiate themselves and reduce the competitiveness of the wireless market. This outcome would be diametrically opposed to what the Department is trying to achieve by setting aside spectrum for new entrants and requiring roaming.

By making the right strategic decisions to invest in the development of a national GSM network, Rogers will no doubt be the network of choice for parties seeking roaming arrangements. While this interest will serve to validate Rogers' earlier technology choices, it will also mean that a disproportionate level of roaming traffic will be presented to the Rogers network. This burden will only be made worse if roamers are provided with mandatory access to advanced data services and applications such as broadband Internet and video services. The Department should therefore limit the roaming requirement to digital voice and SMS services.

The *Policy Framework* is also clear in requiring that roaming and antenna tower and site sharing will be facilitated on the basis of commercial rates. Therefore, calls for the creation of a new regulatory apparatus to regulate roaming and sharing rates are misguided and should be disregarded by the Department. The *Policy Framework's* emphasis on commercial rates also makes the CRTC an

inappropriate candidate for the role of arbitrator since it has little or no experience as an independent arbitrator of commercial disputes. The use of neutral and experienced arbitrators such as the ADR Chambers would be far more appropriate. Furthermore, since the arbitrator will need to assess a number of business issues in determining the reasonableness of roaming and sharing arrangements, the use of final offer arbitration would be entirely inappropriate. Final offer arbitration does not provide for any such assessment.

The overwhelming consensus of stakeholders with experience in antenna tower and site sharing is that the timelines proposed by the Department for sharing are unworkable. The timelines proposed by Rogers are more realistic. While they are aggressive compared to the existing timelines that are observed in the industry, Rogers' proposed timelines reflect the fact that requesting parties have a significant role to play in the process and they have a major impact on the sharing timelines.

For the reasons provided in Rogers' comments and reply comments, Rogers recommends that the Department adopt the Conditions of Licence in Appendix A.

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 has proposed conditions of licence for the implementation of the Department’s policies regarding mandatory roaming and mandatory antenna tower and site sharing, and to prohibit exclusive site arrangements, and the Department has invited interested parties to submit comments regarding these proposals.
2. 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**, the Department extended the deadline for the filing of comments in response to the Consultation Paper. In a noticed titled **Reply Comment Period on Gazette Notice DGRB-010-07 — Consultation on Proposed Conditions of Licence to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements, and Extension to the Application Date in Gazette Notice DGRB-011-07 — Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range** the Department announced that it has included a reply comment period such that interested parties would have the opportunity to respond to the comments received, by no later than February 7, 2008.
3. Rogers Communications Inc. (“Rogers”) hereby files the following reply to the January 22, 2008 comments that were filed in response to the Consultation Paper.
4. Rogers stated its position on all of the issues in its comments. This reply is therefore limited to comments on proposals made by other parties. Failure to address any specific issue raised by other parties should not be taken by the Department as acquiescence with the position.

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?**

5. The timelines established by the Department must be grounded in reality and cannot simply be an academic exercise. Negotiating roaming agreements, assessing technical feasibility and determining site availability takes time,

people, effort, and money. Wanting the process to go faster to achieve a policy goal will not change the facts on the ground. Rogers has been developing roaming relationships and seeking and managing site sharing agreements for over 20 years. As Rogers has learned, conducting engineering studies and performing other key steps is highly dependent on the availability of key resources and cannot be rushed. Establishing unattainable timelines therefore will only result in carriers failing to meet their licence conditions, resulting in further disputes and litigation. They will not help new entrants deploy their wireless services any faster.

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

6. In the comments Rogers filed on January 22, 2008, we outlined the process that is currently used for antenna tower and site sharing requests. We noted that requesting parties have a significant role to play in the provision of information that is required to respond to their requests for sharing. Our comments demonstrated that requesting parties have a direct impact on the sharing request timelines. We also noted that the timelines proposed by the Department do not reflect the process that is used for sharing requests and that, as a result, they are unworkable. Rogers' proposed timelines are more practical and realistic because they account for the role that requesting parties play in this process.
7. Rogers notes that its position regarding the timelines and process has been corroborated in the comments filed by a number of other parties, including those with extensive experience with tower sharing. It is important to note that these parties span the whole range of stakeholders, including commercial mobile competitors, prospective new entrants, incumbent wireline carriers, broadcasters, public utilities and public safety agencies. All of these parties have urged the Department to modify and extend the sharing timelines.
8. EastLink has described virtually the same process that Rogers outlined in its comments and it has conceded that requesting parties have a significant role to play in the tower sharing request process and timelines. For example, EastLink states the following in this regard:

Typically, when a party signals its interest in sharing a tower structure owned by another party, the tower owner/operator sends a preliminary information package to the requesting party, which normally includes CAD drawings of the structure (with actual antennas and equipment installed) as well as an indication of the space the tower owner/operator wants to reserve for its own future use. This takes approximately 15 to 20 business days, although, at times, it will take longer.

After reception of this preliminary information package, the requesting party then performs the engineering of its proposed installation, taking into consideration the equipment actually installed on the tower, the future needs of the tower owner/operator and its own needs and requirements. This engineering is, of course, compliant with all codes and regulations in place and many technical aspects must be considered. Typically, this engineering takes another 15 to 20 business days. Thus, before an official sharing request is filed by the party requesting access, significant time has already elapsed. Then, the party requesting access submits its sharing request, including the appropriate plans, to the tower owner/operator and must wait for approval.¹

9. Rogers' description of the process has also been validated by SaskTel which stated the following in this regard:

[I]f there is a reasonable chance that sharing is feasible, a conditional approval letter must be issued. The conditional letter will require the requesting party to supply technical drawings detailing the manner in which they wish their equipment to be placed and may require the requesting party to obtain an assessment of technical feasibility from a third party tower analysis expert. The conditional letter will also include a proposed rate schedule for antennas, shelter and other related facilities. Conditions will be considered met upon receipt of a favorable technical assessment, approval of design drawings, agreement to the proposed rates and fulfillment of any other conditions specified.²

10. The Canadian Broadcasting Corporation (CBC) has indicated that a number of studies must be completed to respond to requests to share, including tower structural analysis, Safety Code 6 analysis, interference analysis, and an assessment of future requirements.³ In light of these requirements, the CBC has proposed that the timeline for responding to sharing requests be extended to at least 120 days.

11. The Canadian Association of Broadcasters (CAB) has requested longer timeframes on the basis that its "*members' experience is that tower structural assessments alone can take more than 30 days, especially if the consulting engineer engaged for the task does not have the tower design data on file*".⁴

12. The Canadian Electricity Association (CEA) has recommended that at least 90 days be given to enable a proper analysis and respond to specific requests for sharing of antenna structures.⁵

¹ EastLink Comments, para. 17.

² SaskTel Comments, p. 9.

³ CBC Comments, p. 2.

⁴ CAB Comments, para. 8.

⁵ CEA Comments, para. 15.

13. For its part, Bell has stated the following in this regard:

The requirement to determine the technical feasibility of a sharing request, an unavoidable first step in the mandatory sharing process, makes it impossible that such requests can be uniformly turned around with a 30 day timeframe.⁶

14. Similarly, TELUS states that:

The fundamental problem here is that each site [tower or rooftop] is unique and requires a detailed assessment that takes up to three weeks to perform, and perhaps longer.⁷

15. MTS Allstream has acknowledged that parties requesting sharing must provide a minimum degree of information before their request can even be acted on by a licensee.

[A] formal request for tower/site sharing must include specific information regarding the Operator's technical and physical requirements.⁸

16. Clearly, as MTS Allstream has noted, sharing timelines cannot start until the requesting party has provided all necessary information.

17. While the specific timelines proposed by Rogers and other parties may differ, the clear consensus is that the timelines ultimately adopted must be longer than what the Department has proposed. For the reasons already provided by Rogers, we believe that the timelines we proposed are the most practical and realistic and should be adopted by the Department.

Technical Feasibility

18. A number of parties noted, as Rogers did, that several technical matters must be assessed in order to determine whether sharing is technically feasible. Many of these assessments must be made by a limited number of available qualified professionals. For example, SaskTel states the following in this regard:

The proposed timelines for reaching tower and site sharing agreements are problematic for three reasons. The first is that the assessments of technical feasibility are done by third party specialists and the tower owners cannot dictate timelines. The second is that, especially if new national players emerge, SaskTel anticipates bulk tower sharing request.

⁶ Bell Canada Comments, para. 46.

⁷ Telus Comments, p. 16.

⁸ MTS Allstream Comments, para. 39.

*Bulk tower sharing requests will strain the resources of both the tower owners and the third-party companies who evaluate technical feasibility. In such a situation, the proposed timelines are unachievable. Finally, even on smaller tower sharing requests, the timelines provided are not sufficient.*⁹

19. Rogers agrees that the limited supply of qualified third party professionals will undoubtedly affect the ability of all parties to complete the technical analysis required to determine the technical feasibility of sharing. Therefore, the timelines ultimately adopted by the Department must reflect these inevitable significant challenges.
20. EastLink claims that additional time is not required when requesting parties submit alternative proposals after their initial proposal has been determined to be technically infeasible. Rogers disagrees. Obviously, the licensee must undertake additional analysis, and more time must be provided for the completion of this additional work.
21. Those parties that have claimed shorter timelines for tower sharing requests are possible have little experience with tower sharing and clearly do not understand the process involved. For example, Shaw makes the hollow assertion that *“an assessment of whether sharing would be technically feasible at any particular site should be possible within 2 or 3 days of the initial request”*.¹⁰ Claims such as this have absolutely no basis in reality. The Department must ignore these unfounded claims or otherwise risk inviting the chaos that an oversimplified process and unrealistic timelines will cause.
22. Most parties with any relevant experience noted that sharing can only be determined on a case-by-case basis, which means that the process and timelines for responding to requests to share cannot always be standardized. It is precisely for this reason that the Department should ignore claims that the use of master agreements for tower sharing will reduce the time required to respond to sharing requests. For example, Shaw’s claim that *“adding a site would be a simple matter”*¹¹ betrays a lack of understanding of the work involved in responding to requests to share. Master agreements will not eliminate the need to complete a detailed technical analysis, conducted by qualified experts.
23. In some cases, there are also legal considerations that come into play. Since the underlying real estate is often not owned by the wireless carrier, tower sharing may require re-negotiation of underlying rights, which may be time consuming and may not always be successful. The Department cannot alter third party property rights by simply altering a carrier’s terms of licence.

⁹ SaskTel Comments, p. 8.

¹⁰ Shaw Comments, para. 9.

¹¹ Shaw Comments, para. 7.

24. Several parties have correctly cautioned the Department that any timelines that are adopted for a very limited volume of requests will not be achievable for multiple requests that are received simultaneously. For example, Bell states the following in this regard:

This will especially be a factor if multiple new entrants are licensed and all are building out their networks in a relatively short and concurrent timeframe.

[T]he Department in revising CPC-2-0-03 should cap the number of requests that a tower/site owner is expected to accommodate, for example no more than 12 new requests in a six month period.¹²

25. SaskTel raised similar concerns. Rogers agrees with these parties and we urge the Department to explicitly provide licensees with the necessary flexibility when dealing with a high volume of sharing requests.
26. Rogers agrees with several parties that have recommended that the Department revise its circular CPC-2-0-03 - *Radiocommunication and Broadcasting Antenna Systems* to incorporate the changes arising from this proceeding. Rogers strongly recommends that the timelines it has proposed be incorporated in the revised circular since they are based on the existing process and timeframes and, as a result, will be more workable.
27. The Department should ignore the misleading claim of Quebecor that time division duplex (TDD) and frequency division duplex (FDD) technologies can easily co-exist. The Department should understand that such co-existence is not easily achievable and, in any event, it will be determined by licensees on a case-by-case basis as they receive requests for sharing.

Timelines for Responding to Requests to Roam

28. Negotiating roaming agreements are anything but routine. Attempts by some parties to portray such discussions as “*unexceptional activities*”¹³ fail to illustrate all the considerations taken into account. These include: volumes; scope of services; network capacity; capital investments; new technologies; rates; and terms and conditions. Furthermore, almost all roaming agreements negotiated to date have been bilateral, with each carrier receiving the benefit of roaming on the other carrier’s network. The domestic roaming agreements mandated by the Department will be unilateral, an arrangement that some carriers have never entered into before and will have a significant impact on negotiated rates and terms.

¹² Bell Canada Comments, para. 49.

¹³ Quebecor Comments, p. 2.

29. Rogers therefore agrees with TELUS' proposed licence condition establishing a 120 day negotiation period, after which the parties would be sent to arbitration. This will provide sufficient time for Rogers to review a requesting carrier's volume forecasts together with the services requested. Depending on the size of the carrier, the expected volumes and the traffic patterns, Rogers' evaluation may also include assessing its network capacity and performing capital investment studies, all of which will have to be built into any rate. The current 90 day timeline does not provide incumbents enough time to assess all these considerations. The current timeline also poses Rogers, as the sole GSM carrier, a particular problem as it is very likely that we will receive multiple roaming requests at the same time. Rogers therefore must have sufficient time to properly evaluate all the proposals we receive.
30. As such, the accelerated timelines proposed by possible new entrants are simply not realistic. The 45 day negotiation period proposed by Shaw or even the 60 day period proposed by Look do not account for the work involved. There is no simple reference table to quickly establish roaming rates, terms and conditions.
31. Furthermore, placing additional obligations on an incumbent carrier within 30 days of the initial roaming request is also not realistic. Currently, an incumbent carrier is required to provide an "offer" within 30 days of a request for roaming. Shaw has asked that to be cut to 10 days while Quebecor has asked that the incumbent provide a full term sheet and draft agreement within the 30 day period. Both of these situations are not possible as there is no way Rogers can assess the requests sufficiently in order to meet these obligations. In fact, the 30 day period to provide an offer is insufficient, considering we are reliant on the requesting party to provide sufficient information of their planned service to develop rates and terms. Without the necessary information, Rogers cannot make a well informed offer, which will only cause the rest of the negotiations to become more protracted and difficult. Rogers, therefore, agrees with Telus' proposed licence condition which starts the 30 day clock from the date the requesting carrier provides the incumbent with the necessary information.

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?**

Who should act as arbitrator?

32. While it is in the interest of all the parties to resolve any site sharing and roaming negotiations privately, there does remain the significant possibility that important terms will be resolved through an arbitration process. It is therefore crucial that the arbitrators have both the impartiality required as well as the expertise to resolve these matters expeditiously. While Rogers remains open to suggestions as to who should be the arbitrators, we have issue with some of the recommendations made in the recent submissions.

ADR Institute

33. The ADR Institute has filed a submission to Industry Canada asserting, among other things, that the incumbent WSPs will be motivated to delay the implementation of the roaming and tower sharing arrangements to be required by the new Conditions of Licence. The ADR Institute makes recommendations as to how the Conditions of Licences should be structured to ensure this does not happen. Rogers is very concerned that the ADR Institute appears to be prejudging issues which are properly either issues of public policy and therefore the responsibility of Industry Canada, or issues which should be dealt with by a properly constituted arbitration panel, after it has heard submissions from the parties in accordance with the established procedural rules.

34. It is inappropriate and unprecedented for a putatively independent arbitral body such as the ADR Institute to be making these recommendations. We believe there is a reasonable apprehension of bias on the part of the ADR Institute, in favour of the new entrants. Rogers is not prepared to accept the appointment of any arbitrators associated with the ADR Institute.

CRTC

35. While Rogers respects the CRTC's leadership in regulating Canada's telecommunications industry, we do not believe that it has the appropriate skill set to make an ideal commercial arbitrator. No one can dispute the Commission's telecommunications experience, both in setting policy and resolving disputes. However, in a site sharing or roaming arbitration, the policy will have already been established. The dispute will be over rates and terms, not over who is compliant with a statute or regulation. These arbitrations will be completely commercial in nature. The CRTC has little or no experience as an independent arbitrator. Its decision making reference point is usually the public interest – not the private interests of the parties before it. Even the CRTC's background in costing will not be applicable as the Department has already established that the basis of the rates and terms will be comparable commercial agreements. As such, in this situation, a neutral

arbitrator with experience in resolving commercial matters would be more advisable than the Commission.

Arbitration Panel

36. Rogers therefore re-iterates its belief that panels of three legal experts, with no ties to the industry, would form the best arbitrators. Retired judges or senior lawyers would be preferable over “industry experts”, as suggested by MTS Allstream. Few could question the impartiality of an independent panel of judges and lawyers while most industry experts have established ties to one carrier or another. In addition, many of the legal experts will have had experience in commercial arbitrations and could use that background to resolve what effectively will be a commercial dispute. Having in-depth wireless industry experience will not necessarily be of assistance, and in fact, could pose a drawback with some experts already being predisposed to one opinion or another. For that reason, Rogers continues to recommend that the arbitration panel be formed by legal experts, with the ADR Chambers being one possibility for the Department to consider. Rogers encourages Industry Canada to consult with senior members of the litigation bar across Canada for recommendations of other appropriate arbitrators.

Final Offer Arbitration

37. In section 6 of its January 22, 2008 submission, at page 7, TELUS has proposed that a system of “final offer arbitration” be used to resolve disputes regarding roaming rates and tower access arrangements:

Final offer arbitration would be used. As is the case under Part IV of the Canada Transportation Act, final offer arbitration (“FOA”) would be used to expedite the arbitration process and to encourage parties to advance reasonable offers during negotiations. The arbitrators must pick between final offers, rather than substitute their judgment and the decision will remain in effect for a period of time agreed to by the parties, such period not to exceed the lesser of 5 years or the amount of initial grace period (the time period beginning when the licence was issued by Industry Canada and ending 5 years later) remaining in the Operator’s AWS licence.

38. Rogers strongly disagrees with TELUS’ proposal and urges the Department to adopt an arbitration process that, consistent with the Department’s AWS Policy Framework, will result in “commercial rates that are reasonably comparable to rates that are charged to others for similar services.”¹⁴

¹⁴ DGRB-010-07, p. 4.

39. Final offer arbitration involves a process whereby an arbitrator(s) must decide between offers made by each of the parties to the arbitration. The arbitrator(s) has no authority to decide on any other rate.
40. This approach might have merit in industries such as the transportation or the broadcasting sectors, where there is a long history of commercial dealings between multiple parties and well-established benchmarks for what constitutes a “commercial rate.” It has little or no merit in the Canadian wireless sector. Here, there is a very wide range of roaming rates which have been privately negotiated with the rates very much dependent on the relationship between the parties and whether the rights negotiated are reciprocal. Up until this point in time, tower access rates have depended on such variables as whether the arrangements are reciprocal, the location of the tower, the height of the tower and whether the tower will need to be upgraded to accommodate more radio equipment. In this environment, there is an important role for the arbitrator(s) to play in deciding what a fair economic rent might be for a shared tower in a particular location and what a fair commercial rate might be for delivering a certain volume of roaming traffic in a particular region of Canada.
41. The fact that towers are sitting on real estate and the value of that real estate, as well as the underlying property rights vary significantly from site to site, also makes it impossible to commoditize towers and tower sites.
42. In addition, arbitrators will need to consider the volume of roaming traffic that will be added to a carrier’s network. While sporadic roaming activity by customers of foreign wireless carriers might entail little or no additional network expenditures, and whereas reciprocal arrangements between such carriers with roughly equal volumes of roaming traffic might have made the negotiated rate irrelevant in the past, the new environment ushered in by Industry Canada’s domestic roaming policy is likely to produce very different costs and a significant imbalance in roaming traffic. New entrants are likely to make extensive use of incumbents’ networks – particularly during the initial years of their network rollout, whereas incumbents are likely to make little or no use of the new entrant’s network for roaming purposes. Moreover, since Rogers is currently the only operator of a GSM network in Canada, all new entrants will initially want to roam on Rogers’ network, rather than on TELUS’ or Bell’s. The volume of this traffic will undoubtedly cause Rogers to incur additional capital costs to increase the capacity of its network which, as the Department knows, is highly scaleable and is built to accommodate peak load conditions within acceptable parameters.
43. In addition to the rates, there will likely be a number of other business issues that the arbitrator will need to address. These may include issues such as a requirement to advise Rogers of the amount of roaming traffic it intends to place on the Rogers’ network and the mechanisms for compensating Rogers

for its investments to meet those forecasts. The presence of various business issues other than the issue of rates also makes final offer arbitration unworkable.

44. This is not an appropriate environment for a roll of the dice or for the mandatory selection of one of only two possibly diverse offers.
45. In Rogers' view, the appropriate rates for roaming and tower sharing should be based on economic considerations including the relative value of tower sites and the cost of providing roaming services in different regions of the country.
46. While this information could be presented to the arbitrator(s) in the context of final offer arbitration, the arbitrator(s) may be forced by the limited scope of their authority to settle on an inappropriate rate. This could end up hurting one or the other of the parties and might not reflect in any way "commercial rates that are reasonably comparable to rates that are charged to others for similar services."
47. Rogers' proposal, on the other hand, would involve the well-accepted arbitration procedures embodied in ADR Chambers Inc.

Arbitration Rules

48. Under Rogers' proposal, a panel of three arbitrators would hear all of the evidence led by the parties and would determine rates that are reflective of the economic value of the services being provided and which constitute a reasonable commercial rate. Such a determination would also provide valuable guidance for future negotiations.
49. It is hoped that following the successful negotiation of commercial roaming rates or one or more arbitration proceedings, if such arbitrations are required, there will be better evidence of what a reasonably comparable commercial rate might be for roaming services and tower sharing. Final offer arbitration might make more sense at that point in time but that is still some time in the future. The parties would always have the ability to specify final offer arbitration if they felt that was the appropriate procedure. However, it should not be mandated by Industry Canada.
50. Until we reach that stage, Rogers' proposal for a more traditional form of professional arbitration should be the default position. Parties should be permitted to choose some alternative form of binding arbitration, if they mutually agree to it.

Timeframes

51. The arbitration timeframes adopted must be reasonable. The main consideration should be the amount of time necessary to properly resolve the matter. Each arbitration's facts will also influence the time necessary to administer any particular hearing. For those reasons, each arbitration's timetable should be established either by mutual agreement of the parties, or in the event they cannot agree, by the arbitrator. That is the only process that will provide the arbitrators with the needed flexibility to address each case.
52. Any of the suggestions by the other parties will not help the arbitration process. Establishing fixed timeframes as proposed by MTS Allstream and Shaw will simply tie the hands of the arbitrator and will ultimately prove unworkable. Shaw's timeline in particular, requiring the hearing to be conducted in less than a month from the initial request to arbitrate, would simply prove impossible in most cases. The Department and the parties should rely on the good judgment of experienced arbitrators as to the best timetable to hold the arbitration. Fixing unreasonable timelines in the licence conditions will only lead to more disputes, not less.

Documentation

53. As Rogers anticipated in its initial submission, many parties are suggesting very liberal access to documents. While Rogers does not oppose the production of relevant documentation, any automatic requirement to produce documents can be abused to obtain commercially sensitive information. Therefore, proposals such as MTS Allstream's to produce all documents 15 days prior to the hearing should not be adhered to. Even more objectionable is Look's proposal to create libraries of site plans and engineering studies and then make the information public. Such a recommendation would both provide crucial proprietary information to our competitors while also creating a possible security risk for our equipment. As discussed later, such a publication would also breach our agreements with Rogers' roaming partners worldwide as well as the rules of the GSM Association. Arbitrators have sufficient experience in these matters to establish fair discovery rules and ensure the confidentiality of each parties' materials. The Department should therefore leave the matter with the arbitrators as is currently done in the licence conditions.

Comments Invited

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

Other Licence Conditions – Mandatory Roaming

54. A lot of the submissions attempted to define or scope the concept of roaming. With all the different perspectives and opinions provided, it is worthwhile to take a clear direct look at roaming and the common processes behind it.
55. At the core, roaming is a relationship between two carriers that enable their subscribers to access the wireless network of the partner carrier when outside its home carrier's licensed territory. Each carrier must possess and operate a basic wireless network. In a GSM environment, that would include the following: membership in the GSM Association; a mobile switching centre; a home location register, radio base stations, PSTN points of interconnection; and central office codes for wireless telephone numbers.
56. The process then works as follows. A subscriber in Halifax travels to Vancouver, where his or her carrier does not provide service. The call would however be automatically received by their carrier's roaming partner. The call would be carried and rated by the partner who would then deliver the billing information to the traveler's own carrier. The traveler would then receive a bill for the call on his or her regular invoice.
57. Despite the best efforts of several potential new entrants, that is the extent of the relationship. The AWS policy did not mandate resale or the provision of unbundled facilities. Many of the submissions, however, attempt to expand the incumbents' obligations to provide resale and/or unbundled facilities to new entrants. These proposals are nothing more than attempts to avoid making investments, delay network deployments and derive as many considerations as possible from the incumbents. After already receiving a set aside of almost half the AWS spectrum and mandated roaming, new entrants are already attempting to abuse these privileges, trying to capture as many services as possible under the umbrella of "roaming". These attempts run contrary to Industry Canada's policy as well as the common understanding and practice of roaming.

Scope of Service

58. According to Industry Canada policy, mandated in-territory roaming is to provide temporary assistance to new entrants in order to provide them with sufficient initial coverage while they deploy their own network. It is not meant as a substitute for making the needed investment in technology. However, many new entrants are attempting to distort the definition of roaming to capture many services not considered by the Department. If allowed, these requests would contradict Industry Canada's long standing policy objective of facilities based competition.

59. Many submissions attempt to extend the roaming obligation beyond its intended purpose of temporarily levelling the coverage playing field. According to some parties, the roaming obligation must also eliminate the ability of carriers to differentiate themselves on the basis of technology. For example, Eastlink asked the Department to mandate “*roaming on 3G networks where possible*”.¹⁵ Quebecor goes even further asking that the roaming licence condition be rewritten as follows (Quebecor changes in bold):

*The services offered must include digital voice and data services such as internet access, **video**, e-mail, and other data services, **to be provided using current and future wireless technologies.***¹⁶

60. Both these suggestions exceed the scope of roaming set out by the Department, moving well past coverage issues and into technology. Carriers must be permitted to retain the competitive advantages associated with building new advanced networks. That is in keeping with past Industry Canada policy as well as the Federal Communications Commission (“FCC”). Both regulators wanted to ensure that new entrants were provided the proper incentives to deploy their own networks and technologies. For example, in 1995, the Department intentionally limited roaming to the previous generation of voice technology in order that the new entrants deployed their PCS networks as quickly as possible. This view was shared by the FCC, who when declining to include many data features and enhanced digital networks within mandated roaming explained their inclusion could “*undercut incentives to differentiate products and could chill innovation*”.¹⁷

61. Rogers acknowledges that a basic level of voice and SMS service must be provided in order for roaming to work. However, equalizing coverage is far different than equalizing technology. The purpose of the mandated roaming was to create new competition and encourage new facilities-based providers.

62. These attempts to access our 3G services by Quebecor, Eastlink as well as MTS Allstream are particularly troubling in light of the comments and arguments these parties made in their initial submissions as well as in public. Quebecor and MTS in particular were quite vocal that the incumbents lagged the rest of the world in deploying 3G services. In its May 25th submission, MTS Allstream stated that Canada “*has been slower to deploy the next generation of mobile wireless services and features, particularly those based on third generation or “3G” technology*”. Quebecor went even further when its CEO, Pierre-Karl Péladeau, told an audience at the Canadian Club on April 17, 2007 that 3G technology was “*available in virtually every industrialized country except for Canada.*” Now these carriers wish to take advantage of our

¹⁵ Eastlink Comments, para. 7.

¹⁶ Quebecor Comments, p. 11.

¹⁷ *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. 56.

3G technology that just months ago they considered either lacking or non-existent. Their positions are disingenuous and transparently self-serving and should be ignored by the Department.

63. The growth in the scope of roaming was taken even further by Globalive and Look Communications. Not content with mandated roaming, both of these carriers are seeking mandated access to our entire network, applications, back office and IT systems. Globalive is seeking access to Rogers OSS system. Look goes even further, proposing that roaming include:

- a) *access to all network features and functionality (e.g. call forwarding and call waiting) afforded to Mobile Virtual Network Operators (“MVNOs”);*
- b) *the use of the incumbent’s billing systems;*
- c) *the incumbent’s administrative back office services;*
- d) *advance receipt of the incumbent’s automated provisioning protocols to ensure a transparent roaming set-up for the new entrant’s subscribers.*¹⁸

64. Finally, MobilExchange took the scope of roaming the farthest. They are still indirectly seeking the unbundling of the incumbent’s networks. MobilExchange calls for, among other features, white-listed International Mobile Equipment Identity (“IMEI”) for GSM roaming.¹⁹ Under the umbrella of “roaming”, MobilExchange wants full access to our entire network in order to sell our services under their own brand. This far exceeds any reasonable interpretation of roaming and in effect expropriates our assets.

65. In light of these interpretations, the Department must make the scope of roaming absolutely clear. Roaming is to provide extended coverage for a new entrant’s core voice and SMS service while they build their networks. It is not a licence to access an incumbent’s complete suite of services, technologies and applications.

Hand-Offs Between Networks

66. Seamless hand-offs between networks are not a common element of roaming. In both international and domestic roaming situations, seamless hand-offs are almost never provided. Making the necessary interconnections can be costly and complicated. That was the opinion of the FCC who in mandating roaming in the United States acknowledged that making the necessary interconnections was “*technically and administratively complex*”²⁰ and felt that such roaming regulations “*may impose significant costs and*

¹⁸ Look Comments, p. 7.

¹⁹ MobilExchange Comments, p. 4.

²⁰ FCC, *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, Second Report and Order and Third Notice of Proposed Rulemaking*, August 13, 1996, para. 7.

burdens on CMRS providers and that we should narrowly tailor our actions to avoid placing an undue burden on such providers.”²¹ As importantly, the FCC understood that seamless hand-offs were not commercially necessary stating “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.”²²

67. As such, the Department should disregard any attempts by the new entrants to expand the concept of roaming to include seamless hand-offs between networks, in which they minimize the cost while exaggerating their necessity. MTS Allstream argues that, in order to meet the policy objective of the Department, seamless hand-offs are required to provide customers with the same “service experience”.²³ Quebecor argues that roaming must be “*bi-directional and without interruption or disconnection to ensure a similar quality of service to all Canadian mobile consumers.*”²⁴ However, as seen above, seamless hand-offs between networks are not part of the definition of roaming.

68. Further, as Rogers noted in its comments, roaming should not be required inside a new entrant’s coverage footprint since it is only intended to help new entrants while they build out their networks. Roaming is not intended to help new entrants by providing them with capacity back-up or improving their grade of service in areas where they have built their networks. Network coverage, capacity and quality of service are important means by which competitors can differentiate themselves in a competitive market. A requirement for roaming in these circumstances would also eliminate incentives for licensees to build out their networks. It was partly for this reason that the FCC explicitly excluded a requirement for “*in-market or home roaming*”.²⁵ The FCC agreed with Cingular that, “*if a carrier is allowed to ‘piggy-back’ on the network coverage of a competing carrier in the same market, then both carriers lose the incentive to build-out into high cost areas in order to achieve superior network coverage*”.²⁶ The FCC therefore concluded by stating the following:

[W]e believe that requiring home roaming could harm facilities-based competition and negatively affect build-out in these markets, thus, adversely impacting network quality, reliability and coverage.²⁷

²¹ FCC, Interconnection and Resale Obligations para. 11.

²² FCC, Interconnection and Resale Obligations para. 25.

²³ MTS Allstream Comments, p. 8.

²⁴ Quebecor Comments, p. 11.

²⁵ FCC, *Reexamination of Roaming Obligations* (FCC 07-143), para. 48.

²⁶ *Ibid*, para. 49.

²⁷ *Ibid*.

International Roaming Agreements

69. In another attempt to avoid making the necessary investment in developing their own wireless business, several potential new entrants have also asked the Department to expand roaming even further by demanding incumbents allow new entrants access to the incumbents' international agreements. MobilExchange demands that the "*territory covered must include not only Canada but also all international territories for which any incumbent has a roaming agreement including, most especially, the United States in view of the large amount of roaming calls from below the border.*"²⁸ MobilExchange asserts this is in keeping with the FCC's recent roaming rules.
70. Mandating incumbents' to carry other carriers roaming traffic internationally, effectively "piggy-back" on their international agreements is not roaming. It is basically a resale of our international roaming arrangements. There is no precedent anywhere requiring carriers to allow other parties to ride on their privately negotiated contracts. This is simply another attempt by new entrants to extend the scope of roaming to include any service, relieving them of the need to make their own investments.
71. Mandated piggy backing is also an unacceptable interference in the incumbents' operations and business relationships. These agreements have been developed over years, and are based upon relationships between the companies. Furthermore, some agreements may forbid piggy-backing, or in the least, require that the incumbent notify its partners and receive their approval if this occurs. That could result in the incumbent having to re-open the terms of the arrangement. Most importantly, there is nothing stopping a new entrant from developing these same relationships. In fact there are clearing houses that provide new entrants access to dozens of international roaming partners. Forcing incumbent's to provide access to their international agreements is potentially harmful to the incumbent while proving no benefit to the new entrant that they cannot obtain on their own.
72. MobilExchange's use of the FCC's mandated roaming rules also does not support their argument. The FCC's rules do not require carriers to provide others with access to their third party agreements. In fact, contrary to MobilExchange's assertion that the FCC "*has recently confirmed in its common carrier rules required that its wireless licensees offer automatic digital roaming similar to what Industry Canada is now requiring and what MobilExchange is requiring in these comments*",²⁹ the FCC's rules are more measured than MobilExchange's claims. The FCC does not require piggy-backing on international agreements, seamless hand-offs or in territory-roaming. While the FCC did mandate roaming, it was far more reasonable in establishing the requirements than MobilExchange is now calling for.

²⁸ MobilExchange Comments, p. 5.

²⁹ MobilExchange Comments, p. 5, Footnote 8.

Resale and Alternative Arrangements

73. In its *Policy Framework* and *Licensing Framework*, Industry Canada clearly and intentionally mandated only roaming and did not create any other rights or obligations including the right to resale. Yet MTS Allstream still sought to expand their privileges to include “*alternative arrangements*”³⁰ including resale in the event roaming was not feasible. Furthermore, Primus defined roaming as the provision of wireless services by a “*carrier*” *on behalf of a “provider*”³¹ which leaves in question whether the provider is itself a wireless carrier or a reseller. Both are transparent attempts to add resale to the current set of obligations, completely contrary to the Department’s clear policy intention.
74. Resale permits new entrants to avoid making the necessary capital investments that a full roaming partner would have to make. Many new entrants are therefore eager to expand the definition of roaming to include resale. However, as Rogers mentioned in its first round comments, there was no need to set aside spectrum or mandate roaming in order to provide resale. Resale is in fact already quite prevalent in Canada. We reiterate our recommendation that the Department add our proposed definitions of “roaming” to the conditions of licence to clarify the matter. Roaming is a relationship between two networks, while resale is the simple re-offering of one carrier’s service by another.

Quality of Service

75. Rogers retains the right to manage its own network in order to meet the needs of its customers. A roaming arrangement cannot be permitted to interfere with or disrupt our regular operations. While Rogers will treat its partners fairly, Industry Canada must respect the fact that we cannot abide any roaming situation that would interfere with our network.
76. The legitimacy of Rogers’ concerns in this regard have been validated by the FCC in its proceeding regarding automatic roaming. To date, the FCC has avoided imposing roaming requirements that would compromise an incumbent licensee’s ability to offer its own customers with full access to advanced new services. Specifically, the FCC stated the following concern in this regard:

We seek comment on the effect that automatic roaming would have on the capacity of data networks and the ability of carriers to offer full access to their own customers. We would be concerned if requiring a carrier to offer

³⁰ MTS Allstream Comments, para. 20.

³¹ Primus Comments, para. 17.

*roaming service on its data network to the customers of other carriers resulted in the carrier facing capacity constraints that adversely affect its own customers. We therefore ask whether a carrier should have the right to limit access to its network by roamers, and what parameters should be considered as justification for such limits. We invite commentors to suggest specific standards for determining when the requirement should or should not apply.*³²

Rates and Terms

77. The Department stated in the draft licence conditions, “*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*”.³³ Comparable commercial rates however can only be determined using comparable commercial elements. Supply, demand, volumes, geography, traffic patterns, required investments, etc. must all be considered. There can and will be differences between the agreements reached for different new entrants.

78. Some parties however have alleged that roaming rates must be regulated by the Department or the CRTC and that they must be uniformly applied, regardless of the circumstances of each individual roaming arrangement. MobilExchange claims that “*The simplest, clearest and most expeditious mechanism of ensuring equal and equitable automatic roaming would be through a Most Favoured Nation approach*”.³⁴ Under this policy all new entrants are afforded “*automatic roaming that is no less favourable than the most favoured terms afforded by a licensee to the most favoured third party to whom it provide roaming*”.³⁵ Apart from overstepping the provisions of the Policy Framework, these proposals are also inconsistent with determinations that have been made by the U.S. FCC.

79. Specifically, the FCC has explicitly declined requests that it “*adopt a rule requiring that large nationwide carriers offer the same roaming arrangements to Tier IV providers as they offer to their “most favored” roaming partners*”.³⁶ In making this determination, the FCC found that “*the value of roaming services may vary across different geographic markets due to differences in population and other factors affecting the supply and demand for roaming services*”³⁷ and the FCC concluded significantly that “*automatic roaming rates will reasonably vary*”.³⁸ The FCC further concluded that, to do otherwise,

³² *Reexamination of Roaming Obligations*. (FCC 07-143), para. 80.

³³ DGRB-010-07, p. 4.

³⁴ MobilExchange, p. 5.

³⁵ MobilExchange, p. 5.

³⁶ *Reexamination of Roaming Obligations*. (FCC 07-143), para. 43.

³⁷ *Reexamination of Roaming Obligations*. (FCC 07-143), para. 44.

³⁸ *Reexamination of Roaming Obligations*. (FCC 07-143), para. 44.

*“would distort competitive market conditions, resulting in unjust and unreasonable practices and discriminatory treatments”.*³⁹

80. Even more problematic is the call by several carriers to regulate roaming rates. Look proposed to take a step backward to a regime in which the CRTC set tariffed rates. In a similar vein, Primus has called for Phase II costing, *accusing Rogers of holding a “monopoly” in GSM technology.*⁴⁰ Niagara Networks and Globalive proposed tying the rates to retail rates. All of these proposals run completely contrary to both Industry Canada's and the CRTC's policies to let market forces operate and to stimulate facilities-based competition. They also run contrary to the precedent set in the U.S., where in mandating roaming, the FCC similarly declined *“to impose a price cap or any other form of rate regulation on the fees carriers pay each other when one carrier's customer roams on another carrier's network”.*⁴¹ The FCC was *“not persuaded that consumers would be harmed in the absence of a price cap or some other form of rate regulation”.*⁴²

81. The FCC also found that capping roaming rates could have negative consequences. Specifically, the FCC agreed:

*“with concerns raised in the record that rate regulation has the potential to distort carriers' incentives and behavior with regard to pricing and investment in network build out. Capping roaming rates by tying them to a benchmark based on larger carriers' retail rates may diminish larger carriers' incentives to lower retail prices paid by their customers, and perhaps even give them an incentive to raise retail rates. At the same time, by requiring larger carriers to offer national roaming coverage to their competitors' customers at nearly the same rates offered to their own customers, this form of rate regulation may also give smaller regional carriers an incentive to reduce or even eliminate, the discounts they offer on regional calling plans, thereby driving up the prices regional subscribers pay for calls within their plan's calling area ”.*⁴³

82. The FCC's decision was also based on the negative impact that rate regulation would have on incentives for carriers to build out their networks. The FCC stated the following in this regard:

Similarly, regulation to reduce roaming rates has the potential to deter investment in network deployment by impairing build out incentives facing both small and large carriers. By enabling smaller regional carriers to offer their customers national roaming coverage at more favorable rates

³⁹ *Reexamination of Roaming Obligations.* (FCC 07-143), para. 44

⁴⁰ Primus Comments, para. 4

⁴¹ *Reexamination of Roaming Obligations.* (FCC 07-143), para. 37.

⁴² *Reexamination of Roaming Obligations.* (FCC 07-143), para. 37.

⁴³ *Reexamination of Roaming Obligations.* (FCC 07-143), para.39.

without having to build a nationwide network, rate regulation would tend to diminish smaller carriers' incentives to expand the geographic coverage of their networks. In addition, by reducing or eliminating any competitive advantage gained as a result of building out nationwide or large regional networks, rate regulation would impair larger carriers' incentives to expand, maintain, and upgrade their existing networks".⁴⁴

83. Similarly, Rogers disagrees with those parties that have asserted that roaming agreements must be made publicly available, or that they must be shared by licensees with parties requesting roaming. Rogers submits that such agreements are confidential and competitively sensitive. Each of these agreements contain confidentiality clauses and publicly publishing them will in fact breach the agreements and harm our roaming partners, damaging crucial business relationships Rogers has taken years to foster. In addition, publishing the roaming agreements would also breach the rules of the GSM Association, again damaging an essential business relationship. Rogers' views in this regard are also entirely consistent with the findings of the FCC. Specifically, the FCC stated the following in this regard:

We decline to impose an affirmative obligation on CMRS carriers to post their roaming rates. As is generally the case with commercial agreements, roaming agreements are confidential and filing them would impose administrative costs on the carriers... We need not burden CMRS carriers by requiring them to file roaming agreements. Furthermore, disclosure of roaming agreements would enable CMRS carriers to ascertain competitors' prices which could encourage carriers to maintain artificially high rates. In a market where competition disciplines the rates, creating transparency in rates may have the effect of restricting competition and raising rates above competitive levels. Therefore, we do not find that the public interest would be served by requiring CMRS carriers to disclose their agreements or to undertake the costs required to make them public.⁴⁵

84. Rogers also takes great exception with Primus' description of Rogers as a monopoly. While it is true that Rogers is the only major carrier using GSM in Canada, it is not a monopoly and the technology is available to any party wishing to use and deploy it. The idea that Rogers should be regulated for making an intelligent investment decision, that any other company could have made, would set a terrible precedent affecting every innovative, technology driven industry.

⁴⁴ *Reexamination of Roaming Obligations*. (FCC 07-143), para. 40.

⁴⁵ *Reexamination of Roaming Obligations*. (FCC 07-143), para. 62.

Unilateral vs. Bilateral Rates

85. Another factor that must be taken into account when establishing rates is the unilateral nature of these domestic roaming agreements. The overwhelming majority of roaming agreements are bi-lateral, with each carrier receiving a benefit in the form of extended coverage for its subscribers. In the current situation however, there will be little to no need for any of the incumbents to roam on a new entrant's network which will overlap its own. The incumbents are therefore missing a form of compensation and benefit that must be accounted for in the rates established. Some parties however, such as MTS Allstream, have specifically called upon Industry Canada to use the rates from bi-lateral agreements to set the rates in these unilateral agreements. Such an interpretation however would deprive the incumbents of fair compensation for the services they are delivering, completely contrary to the Department's stated policy of comparable commercial rates. Unilateral agreements are not comparable to bi-lateral agreements and should not be treated the same when establishing rates.

86. Rogers' position in this regard is consistent with the view of the FCC. In its proceeding regarding automatic roaming, the FCC sought comment "*on whether it would serve the public interest to require carriers to make roaming service available to other carriers in one-way agreements under the same terms and conditions as under reciprocal agreements*".⁴⁶ Subsequently, in its automatic roaming report and order, the FCC determined that it would not require carriers to make roaming available in one-way agreements under the same terms and conditions as under reciprocal agreements. The FCC stated the following in this regard:

*We decline to regulate the automatic roaming rates, instead allowing the rates to be freely determined through negotiations between the carriers based on competitive market forces.*⁴⁷

Mobile Virtual Network Operator Terms

87. Several submissions, including Globalive, have called upon the Department to use the rates and terms of MVNO agreements as comparables in developing rates and terms for roaming agreements.⁴⁸ While the licence conditions asked for rates "*comparable to rates currently charged to others for similar access*"⁴⁹, as mentioned before, roaming and resale are not similar but in fact are quite different. Each relationship bears different costs and other considerations. These include substantial differences in back-office

⁴⁶ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Memorandum Opinion & Notice of Proposed Rulemaking (FCC 05-160), August 31 2005, para. 36.

⁴⁷ *Reexamination of Roaming Obligations*. (FCC 07-143), para. 18.

⁴⁸ Globalive Comments, p. 3.

⁴⁹ DGRB-010-07, p. 4.

operations including network operations, IT and billing. Rogers treats each type of agreement differently, measuring the costs and rates quite distinctly. As there are roaming agreements available as comparisons, using MVNO agreements will only raise elements that will cause the roaming rates to differ from other roaming relationships.

Starting Dates

88. As mentioned before, roaming is a relationship between two wireless carriers. Each partner must therefore have an operating wireless network. This view is supported by both Bell and TELUS. Therefore a carrier is only obliged to provide roaming to a new entrant once their network has become operational and an agreement has been reached. Suggestions by Quebecor that roaming simply starts the date arbitration begins sidesteps this requirement completely.

89. As importantly, coming to terms is essential before roaming can start. To begin with, there is more to a roaming agreement than just rates and many key terms may yet to have been agreed upon. It is uncertain when a final agreement will be completed and it is unfair to require a carrier to provide a service when the amount and timing of the payment and other key terms are unresolved. Roaming should therefore only begin once a new entrant has an operating network and all rates and terms have been established.

Out-of-Territory Roaming

90. In section 2.5 of its submission, in the section entitled *Asymmetrical Roaming* at page 10, TELUS has suggested that the Department's new roaming policy is asymmetrical and that such asymmetries should be limited as much as possible. By way of example, TELUS has cited its own situation in respect of the 800MHz and 1900MHz spectrum bands:

In the case of TELUS, the application of the rules are even more ambiguous since TELUS has a national PCS licence but regional cellular licences and therefore can obtain "cellular" roaming at 800MHz but not PCS roaming at 1900 MHz. Since Bell does not hold licences in Saskatchewan and Manitoba, it can roam in those provinces but not in others. (Emphasis added)

91. TELUS has misinterpreted the roaming rules established by the Department. The rules make it clear that roaming is only available to cellular, PCS and AWS licensees outside their licensed area. Since TELUS has a national PCS licence, it cannot argue that it is entitled to roaming on Rogers' or Bell's cellular 800 MHz network in areas where TELUS does not have cellular licences. The ambiguity that TELUS is trying to cure in this instance does not exist. For the same reason, the fact that TELUS' licensed territory extends

across Canada means that it will be precluded from roaming on other carriers' networks. The new roaming rules are designed to assist regional wireless carriers, whether they are new entrants or incumbents, in competing with national carriers. TELUS is not a regional carrier. It has been a national wireless carrier ever since its purchase of Clearnet. It cannot use the fact that its national network includes a mix of cellular and PCS spectrum as a reason for expanded roaming privileges.

92. As discussed above, Rogers competes head-to-head with TELUS across Canada on the basis of coverage, rates and services. The new roaming policy is designed to enhance competition by assisting new entrants and regional players who need roaming arrangements to succeed in the market while they build their own network. It is not intended to neutralize competition between incumbents by forcing one national carrier to transfer to another national carrier an advantage which it has derived from investing more capital in network expansion and upgrades than its competitor. The fact is that both TELUS and Rogers are at liberty to build out their wireless networks in any region of Canada that they choose. A policy that is interpreted to neutralize network advantages among national carriers will not promote competition and network construction and is inconsistent with the express intentions of the Department's stated policy. TELUS' interpretation should therefore be rejected.

Affiliate Status

93. In its pre-auction questions to Industry Canada, Look asks whether incumbents that are "affiliated or associated" by virtue of other spectrum holdings will automatically be considered "affiliated or associated" for purposes of the AWS auction.⁵⁰
94. This question has important ramifications for Rogers since its affiliate Rogers Wireless Partnership ("RWP") is a partner of Bell Canada in Inukshuk Wireless Partnership ("Inukshuk").
95. Clearly the definitions of "affiliated" and "associated entities" set forth in the AWS Licensing Framework do not lead to a conclusion that RWP and Bell Canada are affiliates or associates for purposes of the AWS spectrum auction.
96. An affiliate is defined in section 5.3.1 of the *AWS Licensing Framework* as follows:

A person who controls the entity, or who is controlled by the entity or by any person who controls the entity. "Control" means control in any manner that results in control in fact, whether directly through the

⁵⁰ Look Comments, Appendix B p. 16

ownership of securities or indirectly through a trust, agreement or arrangement, the ownership of a body corporate or otherwise. Control in fact is the ongoing power or ability, whether exercised or not, to determine or decide the strategic decision-making activities of an enterprise, or to manage or run the day-to-day operations of an enterprise.

97. Bell Canada does not control RWP and RWP does not control Bell Canada – either directly or indirectly by virtue of other indicia of control in fact. Therefore their joint ownership of Inukshuk does not make RWP and Bell Canada “affiliates” for purposes of the AWS auction and does not preclude them from bidding as separate entities in the AWS auction.

98. An associated entity is defined in section 5.3.2 of the *AWS Licensing Framework* as follows:

Any entities who enter into any partnerships, joint ventures, agreements (including agreements in principle) to merge, consortia or any arrangements, agreement or understandings of any kind, either explicit or implicit, relating to the acquisition of the licences being auctioned or relating to the post-auction market structure, will be treated as Associated Entities. The existence of such agreements, arrangements or understandings must be disclosed in writing to the Department at the time of application and this information will be disclosed to other bidders and to the public. Changes made after the application deadline which create an Association with another applicant are not permitted, and any applicant who has formed such an Association will be disqualified from participating in the auction. (Emphasis added)

99. It is important to note that the definition drafted by Industry Canada specifically requires that the arrangements, agreements or understandings in question must relate to “the acquisition of the licences being auctioned” or to “the post-auction market structure” in order to create an associated entity relationship between the parties.

100. The Inukshuk does not relate to the AWS spectrum being auctioned. It relates to the deployment and use of a fixed wireless network using spectrum that was not licensed in an auction process and which is subject to significantly different terms and conditions of licence that the “spectrum being licensed” in the current process.

101. In addition to these definitions, section 5.3.3 of the *AWS Licensing Framework* creates a rebuttable presumption of affiliated or associated entity status exists when the following test is satisfied:

If a person owns, directly or indirectly, at least 20% of the entity’s voting shares where the entity is a body corporate or where the entity is not a

body corporate, at least 20% of the beneficial ownership in such entity, this will result in a refutable presumption that the person controls the entity. A person may attempt to refute the presumption of an affiliate relationship by submitting an affidavit or declaration, signed by an officer or other appropriate official, which sets out the specific ownership holdings of any person with a 20% or greater holding in the entity, affirms that the person does not control the entity, and sets out the reasons as to why the person does not control the entity.

102. Since neither RWP, nor Bell Canada, nor any of their respective affiliates, directly or indirectly own 20% of the other entity, no presumption of affiliated or associated entity status arises in this instance.
103. For all of these reasons, RWP's and Bell Canada's participation in the Inukshuk Wireless Partnership does not preclude Bell or Rogers from participating in the AWS auction as separate entities.

Mandatory Antenna Tower and Site Sharing

104. Consistent with Rogers' position, prospective new entrants, such as EastLink and Quebecor, as well as incumbents, agreed that it is perfectly legitimate for licensees to take their future requirements into account when responding to sharing requests.
105. For example, EastLink has acknowledged that "*tower owner/operators should be allowed to reserve tower space for their own use*".⁵¹
106. Quebecor similarly recognized that requesting parties could reinforce antenna structures "*to accommodate the current and immediate future needs of the owner/existing user of a tower*".⁵²
107. TELUS also noted significantly that the CRTC has already approved this practice in the context of regulated tower access services that are provided by incumbent local exchange carriers. TELUS states the following in this regard:

*Even in regulated situations, the CRTC has defined spare capacity (e.g., in the case of telephone company support structures) as net of capacity required by an incumbent to meet its anticipated future service requirements...In normal commercial negotiations, the future requirements of the owner are always given full consideration.*⁵³

108. While they agree that incumbents must be permitted to take their future requirements into account, some prospective new entrants, such as EastLink

⁵¹ EastLink Comments, para. 24.

⁵² Quebecor Comments, p. 6.

⁵³ Telus Comments, p. 14

and Look, have suggested that the incumbents' future plans must be constrained or be subjected to the Department's ongoing management and oversight.

109. Rogers submits that there is no need for the inefficient and heavy-handed regulation proposed by these parties to address their concerns. Of course, if a party believes that another party is abusing the legitimate practice of taking future requirements into consideration, then they will be free to bring any such alleged abuse to the Department's attention. There is no need for the inefficient and heavy-handed regulation proposed by these parties to address their baseless concerns.
110. For the same reasons, Look's claim that incumbent licensees must be prevented from sharing other parties' towers and sites for an initial 5 year period should be disregarded by the Department. This claim also flies in the face of the Department's primary objective of imposing sharing, which is to reduce the number of towers that are built in communities throughout Canada.
111. EastLink has also proposed that requestors must be entitled to use licensees' future space requirements and that they should only be required to vacate this space, or to strengthen or extend the tower, at the time that the licensee wishes to use the space. Clearly, this would unfairly impede each licensee's ability to modify, develop and expand their radiocommunication networks and enhance their services in a timely manner. Since licensees must be permitted to continue to swiftly make any such modifications so that they may differentiate their service offerings in a highly competitive market, the Department should reject EastLink's request.
112. Rogers agrees with parties such as Bell and Telus that licensees cannot be held responsible for landlords and owners that may refuse to permit sharing of their private property. Industry Canada does not have jurisdiction to dictate changes to property rights owned by third parties. Rogers agrees that the conditions of licence must reflect this important point.
113. Look's claim that the incumbents should be required to publicly disclose their detailed site designs and site capacity constraints is without merit for the reasons set out by the FCC described above.
114. The attempt by parties, such as Look, to have the antenna tower and site sharing requirement significantly broadened to include the unbundling of competitor networks, such that site shelter space, power, antennas, and back-haul transmission would need to be shared should be rejected by the Department. Incorporating these unbundling and resale provisions would require a material modification of the *Policy Framework* and would also be

hostile to the Department's objective of encouraging the development of new facilities-based networks.

115. Some parties are mistaken in their belief that the *Policy Framework* requires that antenna tower and site sharing rates should be regulated and that they should be subject to regulatory costing models used in the regulation of monopoly wireline networks. Some have even asserted that licensees should be required to file tariffs and seek CRTC approval. All such claims related to this fundamental misunderstanding should be dismissed by the Department since it is clear that the *Policy Framework* requires that sharing will be facilitated, and arbitrated where necessary, on the basis of commercial rates.
116. On a related matter, Rogers agrees with a number of commentators that parties requesting sharing are responsible for costs associated with the modifications required to accommodate sharing. This reasonable commercial practice must be permitted going forward. There is no justification for a requirement that requestors' costs be subsidized by licensees. For the same reason, licensees must not be required to interact with, negotiate with, or persuade other parties, such as landlords, on behalf of requestors. There is nothing preventing any requestor from performing these activities itself.
117. Rogers also agrees with commentators such as Telus that parties requesting sharing must provide a deposit and be prepared to enter into a binding forecast of their requirements. Specifically, Rogers agrees with the following comments made by Telus in this regard:

[I]n order to expedite the process and to encourage serious proposals, a reasonable deposit must be provided by the applicant to cover the assessment and future opportunity costs in the event that parties requesting site/tower sharing do not subsequently commit. This is standard commercial procedure.

[O]perators requesting site analysis should be prepared to enter into a binding forecast of their requirements such that TELUS or other carriers can ensure that the appropriate personnel are hired and trained according to the forecasts submitted by the new carrier(s).

Without the assurance of economic justification for the engineering effort, carriers should only be required to provide best efforts approaches to these requests.⁵⁴

⁵⁴ Telus Comments, p. 15

118. Rogers strongly agrees with other parties, such as Bell, that have recommended that the Department arbitrate disputes regarding the technical feasibility of sharing. Unlike the CRTC and other potential arbitrators, the Department has extensive expertise in this area.

Appendix A

Rogers Proposed Conditions of Licence

Conditions of Licence for Mandatory Antenna Tower and Site Sharing and Prohibition of Exclusive Site Arrangements

Industry Canada proposes to add the following conditions of licence for mandating antenna tower and site sharing and prohibiting exclusive site arrangements to all spectrum licences, radio licences and broadcasting certificates (Licensees).

1. Licensees must facilitate sharing of antenna sites, including rooftops, and 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.
2. Licensees must share where technically feasible except where national security concerns exist or the Site is used solely for personal enjoyment.
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.

Conditions of Licence for Mandatory Roaming

The conditions of licence described below will apply to all licences in the cellular, PCS and AWS bands.

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).

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 licensed 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
 - f. Restrict an incumbent licensee's use and designation of any specific band or frequency.
3. 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 over its own network.

In the alternative:

- a. The roaming offered must provide connectivity for digital voice and data services such as Internet access, email and other data services, but not including third generation or next generation services.

- b. When requested, Licensees will provide an offer to enter into a roaming arrangement to provide roaming services on reasonable terms within 30 days from the date all the necessary information is provided by the requesting Licensee. 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.

- c. Roaming arrangements will be negotiated expeditiously and in good faith. If after 120 days from the initial request, the Licensee and the party requesting a roaming arrangement cannot agree to the terms of the roaming arrangement, the Licensee must agree to submit the matter to an arbitrator as agreed upon by the parties or in accordance with the provisions of the applicable provincial arbitration legislation. 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 roaming 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 party requesting roaming 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 roaming arrangement.