

Gazette Notice DGRB-010-07

8 December 2007

Department of Industry

Radiocommunication Act

**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**

**Comments
of
Shaw Communications Inc.**

22 January 2008

Introduction

1. Shaw Communications Inc. ("Shaw") is filing these comments in accordance with the procedures established by *DGRB-010-07 - Consultation on Proposed Conditions of Licence to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements* (the "Notice").
2. As a preliminary matter, Shaw congratulates Industry Canada at taking such a progressive approach to the upcoming auction and licensing process. The proposed conditions of licence will help ensure that new entrants have a viable opportunity to develop innovative and competitive wireless service offerings. As a result, Canadians will benefit tremendously from the new, enhanced competitive market which will undoubtedly develop. This is a bold and extremely encouraging start to a new era in wireless services in Canada.
3. In the Notice, Industry Canada asks for comments on proposed conditions of licence for mandating antenna tower and site sharing and prohibiting exclusive site arrangements. These conditions would be added to all spectrum licences, radio licences and broadcasting certificates. Industry Canada also asks for comments on proposed conditions of licence to require mandatory roaming. These conditions of licence would apply to all licences in the cellular, PCS and AWS bands. These two sets of proposed licence conditions are included as Appendix A to these comments for ease of reference.
4. Shaw would reiterate its position as expressed in its May 25, 2007 comments, that roaming arrangements and tower sites sharing are critical potential barriers to market entry and that mandated roaming and tower sharing under reasonable terms and conditions are central to the viability of the new entrant entering a wireless market. In the Notice, Industry Canada specifically asks for comments on the proposed timelines for developing agreements and for any required arbitration processes, as well as more general comments on the arbitration process or on licence conditions to facilitate sharing and roaming:

Comments are invited on the proposed conditions of licence, specifically:

1. 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?

2. 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?

3. Are there any other licence conditions required to facilitate sharing and roaming?

5. Shaw has focused on two issues in its comments. First, Shaw discusses the importance of establishing conditions of licence which would be pragmatic and ensure the swift conclusion of sharing or roaming agreements. Second, Shaw discusses the need for a consistent and effective arbitration process. These two issues are discussed, in turn, below.

The Licence Conditions

6. Shaw has identified several concerns regarding the proposed conditions of licence set out in the Notice, both for site sharing and for roaming arrangements.

Site Sharing

7. First, it is unclear whether Industry Canada expects parties to enter into a separate site sharing agreement for each site. In Shaw's view, a single umbrella site sharing agreement would be adequate. This agreement could be subject to the laws of the province where the Licensee's head office is located or such other jurisdiction as the parties may choose. Individual sites would be identified in a schedule to the umbrella agreement. That schedule could be updated as required when new sites are added. If the parties were unable to agree to the rate or specialized terms to be incorporated into the schedule with respect to a new site, the determination of those terms could go to arbitration. As discussed below, this approach would help ensure that site sharing could take place on a timely basis since adding a site should be a simple matter.

8. Second, the second site sharing condition of licence proposed by Industry Canada permits an exception if a site is used "solely for personal enjoyment". Shaw understands and agrees with the purpose of this exclusion. However, Shaw suggests the phrase "and not for any commercial purpose" be added so as to ensure that "personal enjoyment" could not possibly be read broadly. That is, the exception

would read “solely for personal enjoyment and not for any commercial purpose”.

9. Third, in the third site sharing condition of licence a Licensee is required to respond to a request to share within 30 days. In Shaw’s view, 10 days would be ample. Site sharing agreements are common and should not require significant legal or other preparatory work, even in the case of an initial umbrella agreement. Similarly, 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. Shaw therefore submits that a period of 10 days to respond to a request would be adequate. This shorter time frame would also be more appropriate as it would ensure that the site sharing process is not unduly delayed.
10. Fourth, in the third site sharing condition of licence a Licensee who claims that sharing is not technically feasible should be required to have the appropriate technical information certified by a professional engineer. The licensee must then be prepared to discuss a resolution to the technical limitation or alternatively, propose a solution that would allow the new entrant to carry on its business. In the early days of competition, arguments of technical limitations or incompatibility were often used by incumbents to stifle the expansion of new wireline entrants and this tactic should not be tolerated in the wireless industry. The above requirement would help ensure that a Licensee does not raise frivolous technical objections to site sharing.
11. Fifth, in the fourth site sharing condition of licence the time limit for concluding an agreement should be lowered from 90 days to 45 days. As noted above, site sharing is common and consequently there should not be any significant contractual issues to be resolved other than the rate. In Shaw’s view, 45 days would be a practical timeframe for concluding all such matters. If the parties could not reach an agreement within 45 days, it is virtually certain that giving them a further 45 days to negotiate would not be helpful but would only introduce avoidable delay.
12. Finally, Shaw considers the arbitration process suggested by the third condition of licence to be unsatisfactory. Issues relating to the arbitration process are discussed below.

Roaming

13. To begin, Shaw would like to emphasize that if enhanced competition in wireless services is to develop it is critical that the terms and conditions for roaming be just and reasonable. In particular, the rates for roaming must reflect the realities of the retail market. Without adequate roaming arrangements any new wireless competitor would be subject to

insurmountable disadvantages. In this regard, Shaw notes that in the United States even where roaming obligations have been put in place, roaming rates can be as high as \$1.00 per minute in circumstances where retail rates are only \$0.20 per minute. Clearly, this type of pricing disparity is not reflective of a truly competitive marketplace and cannot facilitate the development of meaningful rivalry. Shaw would argue that the amount of competition at the retail level is not a good measure of the level of competition at the wholesale level. For instance most Canadians have access to three or more retail mobile service provider. But a new entrant will have access to either one (in case of GSM) or at most two supplier of wholesale roaming. Therefore access to wholesale roaming on just and reasonable terms is a critical factor in determining entry costs, and the viability of a new entrant. Anti-competitive wholesale roaming rates can limit the ability of a firm to enter and offer innovative service offerings.

14. Next, it is unclear from the Notice whether Industry Canada expects parties to enter into a separate roaming agreement for each province where roaming would take place. Shaw assumes this is not the case and that a single roaming agreement covering the entire territory of a Licensee would be negotiated. This agreement could be subject to the laws of the province where the Licensee's head office is located or such other jurisdiction as the parties might choose.
15. Third, in the second roaming condition of licence a Licensee is required to respond to a roaming request within 30 days. In Shaw's view, 10 days would be ample. As with site sharing, roaming agreements are common and it should be easy to determine whether roaming would be technically feasible. Consequently, giving a Licensee 30 days to respond to a roaming request would only introduce unnecessary delay.
16. Fourth, in the second roaming condition of licence the time limit for concluding an agreement is set at 90 days. Once again, Shaw considers the 90 day limit excessive. The only significant issue to be negotiated should be the applicable rates. If the parties are going to be able to reach an agreement on roaming they should be able to do so within 45 days. A further 45 days would not be helpful and would only introduce delay. Consequently, the 90 day limit should be lowered to 45 days.
17. Finally, Shaw considers the approach to arbitration set out in the roaming conditions of licence to be inappropriate. The arbitration process is discussed in the next section.

The Arbitration Process

18. In the Notice Industry Canada proposes that arbitration be included as a settlement mechanism in both the site sharing and the roaming conditions of licence. That is, parties would be required to participate in a binding arbitration process if they were unable to conclude an agreement within the specified time frame.
19. Shaw agrees with the concept of binding arbitration as a mechanism for settling site sharing or roaming arrangements if the parties were unable to do so through negotiations. However, Shaw has a number of significant concerns about the approach to arbitration in the proposed conditions of licence.
20. First, as noted above, the wording of the conditions of licence make it unclear whether Industry Canada expects parties to conclude a separate roaming agreement for each province and a separate site sharing agreement for each site. As discussed above, Shaw believes that in each case a single agreement would be appropriate. This should decrease the need for arbitration overall.
21. Second, the Notice appears to suggest that arbitration could take place under many different forms, depending on the parties and the relevant provincial law. Shaw does not consider this appropriate. In Shaw's view a uniform arbitration mechanism should be required in order to ensure a timely, efficient and consistent process. In this regard, Shaw notes that the Canadian Radio-television and Telecommunications Commission has indicated in its submission a willingness to act as the arbitrator for disputes arising under the proposed licence conditions. Shaw fully supports this suggestion. The CRTC's independence and broad experience in telecommunications make it a natural candidate for the role of arbitrator. In addition, reliance on a single body would ensure consistency of process and decision-making, thereby helping to achieve a level playing field for all participants.
22. Third, in the Notice Industry Canada asks whether it would 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. Shaw does not believe it is necessary to have recourse to a generalized code such as the one developed by ADR Institute of Canada. Given the extremely narrow range of issues which would be the subject of arbitration, Shaw believes it would be more efficient for Industry Canada to establish a set of simple arbitration rules and incorporate them by reference into the conditions of licence. Shaw has included a proposed set of arbitration rules as Appendix B to these comments.

23. Fourth, Shaw is of the view that if Industry Canada does not adopt the CRTC as the arbitral body, then each arbitration should be decided by a single arbitrator. In order to ensure that the arbitration process can be initiated quickly, Industry Canada should develop and maintain a roster of arbitrators. Upon the expiry of the deadline in the relevant conditions of licence, the party seeking roaming or site sharing would contact Industry Canada and an arbitrator would be assigned to the dispute from the roster of arbitrators. The assignment would be made within 2 days of a request and would simply assign the next available arbitrator on the roster to the dispute. Parties would have two days to object to the assigned arbitrator on the basis of a conflict, in which case the next available arbitrator would be assigned to the dispute. No party would have the right to more than one objection.
24. Fifth, once an arbitrator is assigned - whether it be the CRTC or a single arbitrator assigned from a roster of arbitrators - the arbitration would take place in accordance with the rules set out in Appendix B. The decision of the arbitrator would be final and binding. The overall arbitration process would be subject to the laws set out as governing the proposed roaming or site sharing agreement, with the default being the laws of the province where the Licensee's head office is located.

Conclusion

25. In conclusion, Shaw is pleased that Industry Canada is taking such a progressive approach to the introduction of further competition into the wireless services market. The requirement for site sharing and roaming should greatly assist the roll-out of new services and provide significant benefits to the public.
26. In Shaw's submission, the changes proposed in these comments should help ensure that roaming and site sharing arrangements can be implemented in a timely and efficient manner. This, in turn will ensure that Canadians receive the full benefit of wireless competition as soon as possible.

Appendix A

Industry Canada's 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 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.*
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 by any other Operator 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 response and an 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. *Site-sharing arrangements will be negotiated expeditiously and in good faith. If after 90 days from the initial request, the Licensee and the Operator requesting a Site-sharing arrangement cannot agree to the terms of the arrangement, 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 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 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, so long as they agree to a Site-sharing arrangement.*

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 licences;*
 - b. *To all new entrants, in their licensed areas 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.*

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;*
 - b. *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; and*
 - c. *Roaming arrangements will be negotiated expeditiously and in good faith. If after 90 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.*

Appendix B Arbitration Rules

1. Once an arbitration request has been submitted (the Start Date) the parties shall have 14 days to make written submissions to the arbitrator, with each party serving a copy of its written submission on the other party on the same day as the submission is filed with the arbitrator.
2. Parties may make reply submissions within a further 5 days (i.e., 19 days after the Start Date), with each party serving a copy of its written submission on the other party on the same day as the submission is filed with the arbitrator.
3. The arbitrator may, in the arbitrator's sole discretion, convene an oral hearing no later than 10 days after the filing of reply submissions (i.e., 29 days after the Start Date). The arbitrator shall give the parties no less than 5 days notice of any such oral hearing. The conduct of any oral hearing shall be in the discretion of the arbitrator.
4. The record of the arbitration shall be deemed closed upon the conclusion of the oral hearing or, if no oral hearing is convened, upon the filing of any reply submissions under paragraph 3 (i.e., 19 days after the Start Date).
5. The arbitrator shall render a decision in writing and provide a copy to each of the parties within 14 days of the date of the close of the record of the arbitration.
6. The decision of the arbitrator shall be final and binding on the parties.
7. The costs of the arbitration, if any, shall be divided equally between the parties.