

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**

**Reply Comments
of
Shaw Communications Inc.**

7 February 2008

Introduction

1. Shaw Communications Inc. ("Shaw") is filing these reply 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. Based on its review of the 22 January 2008 comments filed by other parties, Shaw has identified four areas for reply comment:
 - a) the status of the Minister's decision to require site sharing and roaming;
 - b) the negotiation and arbitration process;
 - c) site sharing issues; and
 - d) the nature and scope of roaming.
3. Shaw discusses each of these issues, in turn, below. As a preliminary matter, however, Shaw would like to emphasize the importance of site sharing and roaming to the successful launch of competitive services by new entrants. Given the critical reliance new entrants will place on these services, Shaw believes it is essential that the incumbent carriers be prevented from obstructing or delaying site sharing or roaming arrangements.
4. Shaw has made suggestions in its 22 January 2008 comments and further suggestions in these reply comments which it believes will help ensure that site sharing and roaming are implemented in a timely manner. However, Shaw also recognizes that the incumbent wireless carriers will have a significant incentive to delay the conclusion of such arrangements, no matter how focused and efficient the implementation requirements may be. The cost of any such delay would fall solely on the new entrants. In recognition of this fact, Shaw is of the view that a new entrant should be permitted to withhold 75% of the final auction payment until such time as comprehensive site sharing and roaming agreements (if applicable) are in place with the incumbent carriers.

The Status of the Minister's Decision

5. In their 22 January 2007 comments, Bell Mobility Inc. (Bell) and Rogers Communications Inc. (Rogers) each challenge the legality of the Minister's decision to require site sharing and roaming:

The Minister's proposal to amend the conditions of licence for previously issued wireless licences to impose mandatory antenna tower and site sharing, to prohibit exclusive site arrangements and require mandatory roaming are improper based on the following principles: the Minister failed to consider (and is acting in direct contravention of) his express representations and commitments made prior to the 2001 Auction of PCS licences and binding conditions incorporated into those licences, and subsequently incorporated into the Company's non-auctioned cellular and PCS licences, that he will only amend these licences on an "exceptional basis" and that such condition does not apply in the current circumstances.

Bell Mobility at paragraph 14

At the outset, we submit that the Minister does not have the authority to amend Rogers' existing conditions of licence. All of our licenses contain a provision that those licenses will only be amended on an exceptional basis. Rogers submits that there is no exceptional basis that would justify the amendment of these licenses.

Rogers at paragraph 3

6. Shaw is surprised to see Bell and Rogers make these comments in the context of this proceeding. Both of these companies had ample opportunity to make submissions in the process leading up to the release of the AWS Policy Framework. As SaskTel states in the Introduction to its 22 January 2008 submission, the matter is not open for debate:

SaskTel has reviewed the policy decisions made by Industry Canada in *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range* ('the AWS policy framework') and understands that **the Department's decision to mandate both the provision of digital roaming (for both voice and data services) and the sharing of antenna towers and sites, where feasible, is not open to debate**. SaskTel commends the Department for allowing the industry to provide input into the administrative rules governing how these policy decisions will be implemented. (emphasis added)

7. In Shaw's view there can be no doubt that the Minister has the authority to amend the existing wireless licences as proposed. The fact that Canada's wireless industry is insufficiently competitive and that Canada has fallen behind many industrialized countries in respect of wireless adoption and introduction of advanced wireless services undoubtedly qualifies as "exceptional" circumstances warranting governmental action.
8. The proposed amendments are minimally intrusive and fully necessary to enable the government to achieve its policy objective: to enhance the level of competition in wireless services. There can be no serious doubt that Minister has the authority to make the proposed amendments. The protests of Bell and Rogers are without merit.

The Negotiation and Arbitration Process

9. Shaw has identified two areas relating to the negotiation and arbitration process which warrant reply comment: the choice of arbitrator; and, the proposed timelines for concluding agreements.

The Choice of Arbitrator

10. There were numerous proposals submitted as to how arbitrations should be conducted under the proposed conditions of licence. In Shaw's view, three points are key.
11. First, all arbitrations under the conditions of licence will be narrowly focused - relating either to site sharing or to roaming - and consequently there is no need to rely on an arbitration framework which is generalized so as to be able to handle all types of commercial disputes. On the contrary a generalized framework is likely to be inefficient as it would undoubtedly include procedures which would be irrelevant to such narrowly constrained disputes - procedures which could be subject to abuse by a party wishing to delay the arbitration process.
12. Second, given the nature of the disputes which would go to arbitration and the need for timely decisions, it is important that the arbitrator(s) have expertise in this area. The suggestion of some parties that the roster of arbitrators should comprise senior lawyers and retired judges makes no sense whatsoever. It would be irrational to create a roster of generalist arbitrators when it is known in advance the exact type of expertise which would be required to make timely, informed decisions.

13. Third, given that the central purpose of the proposed conditions of licence is to enable the development of enhanced competition on a level playing field, it is extremely important to have consistency both in the arbitration process and in the arbitration decisions. A patchwork of arbitrators, procedures and decisions would not result in a level playing field.
14. In light of these three points, Shaw remains of the view that the CRTC would be the best choice as an arbitrator. The use of a single expert arbitrator would ensure a simple, focused process which could be easily invoked on a timely basis and which would result in consistency in both process and decisions. Shaw acknowledges that the CRTC may need to develop additional expertise with respect to technical aspects of site sharing; however, this could easily be achieved. Among other possibilities, an expert from Industry Canada could be seconded to the CRTC on an *ad hoc* basis for the purpose of arbitrations.

The Proposed Timelines

15. Shaw notes that several parties argued that the timelines proposed in the Notice for negotiating an arrangement prior to invoking the arbitration process were too short. Shaw remains of the view that, if anything, the proposed timelines are too long and that its suggested revisions are appropriate.
16. With respect to site sharing, the engineering parameters for existing sites should be well known since those engineering issues must have been analyzed when the site was initially selected, approved and implemented. Consequently, the idea that prolonged analyses would be required when a request for sharing is submitted is not credible.
17. Similarly, the issues associated with roaming are discrete and well known. As stated by Telus Communications Inc (Telus) at page 5 of its 22 January 2008 submission: "The practice and purpose of roaming is well understood and has been adopted not only in Canada and the US but many other jurisdictions." There would be no need for a prolonged response time to a roaming request given that roaming is "well understood". Such a requirement would needlessly delay the conclusion of a roaming agreement or, if necessary, the initiation of arbitration.

Site Sharing Issues

18. Shaw has identified four issues relating to site sharing for reply comment: the availability of site-specific information; the cost of the application process; waiving exclusivity; and compensating for loss of exclusivity.

Site-specific Information

19. MTS Allstream Inc. (MTS Allstream) suggested at paragraph 38 of its 22 January 2008 submission that information about a site should be provided upon request:

MTS Allstream proposes that Industry Canada include in the conditions of licence a provision for an initial request for information from an Operator regarding tower/site ownership, tower loading, elevation and other site-specific information. Following such a request for information, a Licensee would have 10 days to provide this basic information.

20. Shaw supports this suggestion, although Shaw questions whether 10 days should be required to fulfill such a request. In Shaw's view, a shorter period, such as 5 days, should be adequate.

The Cost of the Application Process

21. Several parties suggested that the new entrant seeking access to a site should pay the cost of processing the site sharing application.
22. Shaw agrees that this would be appropriate provided that a mechanism exists to challenge any processing costs which appear unreasonable. In Shaw's view, any such disputes could be decided by the CRTC as an ancillary aspect of its role as arbitrator.

Waiving Exclusivity

23. At paragraph 9 of its 22 January 2008 submission Rogers argued that the Minister lacks the authority to force Rogers to waive its right to exclusivity with respect to sites:

Moreover, it is doubtful whether the Minister has the authority to require licensees to waive valid contractual rights to site exclusivity. The courts have refused to interpret broadly drawn powers so as to encroach on the economic freedom of regulated entities, depriving them of their rights: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140.

24. Rogers' claim on this point has no merit. Site selection and sharing is directly relevant to the use of spectrum licensed under the *Radiocommunication Act* and, consequently, licence conditions relating to sites fall directly within the Minister's authority. The Supreme Court case cited by Rogers involves a completely different statute, the sale of surplus real property by a regulated entity and the disposition of the proceeds of that sale. The case is irrelevant.

Loss of Exclusivity

25. At paragraph 98 of its 22 January 2008 submission Rogers argued that a new entrant should be required to reimburse a Licensee for any premium paid to obtain exclusivity with respect to a site:

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

26. In Shaw's view the notion of a "premium" for acquiring exclusivity at a site is speculative. Moreover, there would be no practical way of determining the amount of such a "premium" and, hence, no way of implementing the Rogers' suggestion even if it were conceded that Rogers was raising a valid point. The rate charged for access to the site should, of course, reflect the amount of money paid by the licensee to acquire the site. Nothing more is required. The Rogers' suggestion has no merit.

The Nature and Scope of Roaming

27. As a preliminary point, Shaw would like to emphasize the importance of roaming - both in-territory and out-of-territory - to the successful launch and ongoing operation of wireless services by new entrants. In the absence of full and pragmatic roaming rights, new entrants would be crippled from the start. The Government's goal of enhanced competition in wireless services would be unachievable.

28. Shaw has identified seven roaming issues for reply comment: the distinction between roaming and resale; proposed build-out requirements; proposed market share restrictions; proposed restrictions on co-operation; proposed limitations within built-out areas; proposed restrictions on hand-offs; and proposed technical restrictions.

The Distinction Between Roaming and Resale

29. Bell, Rogers and Telus each argue that there is a difference between roaming and resale and that a new entrant must not be permitted to use a roaming right as a basis for engaging in resale.
30. Shaw recognizes the distinction between roaming and resale. In addition, Shaw agrees that out-of-territory roaming should not be used as a mechanism to permit a new entrant to market and sell its services out-of-territory and, in effect, turn roaming into resale. However, Shaw disagrees with Rogers and Telus when they argue for similar restrictions in respect of in-territory roaming.
31. In Shaw's view, the purpose of granting a roaming right to a new entrant in-territory is precisely to allow that new entrant to sell and provide service throughout its entire licensed territory as it builds out its network. In other words, it is inherent to the concept of an in-territory roaming right that it can and will be used as a form of resale in those in-territory locations where a new entrant has not yet established coverage using its own network. The in-territory restrictions proposed by Rogers and Telus should not be accepted.

Proposed Build-out Requirements

32. Bell, Rogers and Telus each propose some form of build-out requirement in connection with roaming. Bell argues that in order to be entitled to roaming, new entrants must have first made service available to 50% of the minimum population coverage specified in the five year Roll-out Targets, as contained in Annex 2 of the AWS Policy Decision. Rogers argues that roaming should be available only once a new entrant operates a wireless network in its licenced territory comprising at a minimum, of a mobile switching centre, a home location register, radio base stations, PSTN points of interconnection, and central office codes for wireless telephone numbers. Telus argues that a new entrant should not be entitled to exercise its roaming rights until it has completed the construction of a local Tier 4 AWS calling area.

33. Shaw accepts that a new entrant should have a network to roam from and that permitting a new entrant to operate on a pure roaming/resale basis without building any of its own facilities first would not accord with the Government's objectives. Shaw submits that a new wireless entrant must demonstrate a commitment to building-out its network, which includes some of the requirements proposed by Rogers. Once such facilities are in place and service is being offered to the public using those facilities, roaming would be permitted.
34. Shaw would like to emphasize, however, that the requirement for facilities build-out and service initiation in order to turn up roaming should not prevent a new entrant from concluding, in advance, roaming agreements pursuant to the conditions of licence. A new entrant should be able to "line up its ducks" so that it can initiate its own service and the associated roaming all at once. The new entrant should not be required to accept a delay in the implementation of roaming since this would severely disadvantage it in the marketplace.

Proposed Market Share Restrictions

35. At paragraph 38 of its 22 January 2008 submission Rogers suggests that in-territory roaming should be required only until a new entrant has a 25% market share in its licensed territory.
36. Shaw disagrees with this proposal. A new entrant could be licensed to serve an entire province and could have achieved significant coverage and market penetration in all the major urban centres but not yet have built out its network to more remote or less densely populated areas, including along major highways. Terminating the new entrant's in-territory roaming rights in such a situation could significantly harm its competitive position. In Shaw's view, the time limit proposed by the Notice provides an appropriate incentive for the new entrant to fully build out its network and will act as an appropriate termination mechanism.

Proposed Restrictions on Co-operation

37. Rogers argues at paragraph 39 of its submission that new entrants who co-operate on a national basis should be denied out-of-territory roaming.
38. Shaw disagrees with this proposal. The Government should not create a disincentive to business arrangements between two or more new entrants. The fact that new entrants may seek to co-operate in order to help overcome the tremendous incumbency advantages enjoyed by Rogers, Telus and Bell should not handicap those new entrants in developing a competitive service - a service which necessarily includes national roaming.

Proposed Restrictions Within Built-out Areas

39. Bell, Rogers and Telus each argues that roaming should not be permitted within the footprint of a new entrant's network.
40. Shaw accepts this as a reasonable restriction. A new entrant should be expected to build sufficient capacity to handle its own customers within the footprint of its own network.

Proposed Restrictions on Hand-offs

41. Rogers argues at paragraph 51 of its submission that there should be no requirement to provide hand-offs between networks.
42. Shaw disagrees. A wireless service would be highly unacceptable to consumers if calls were dropped every time a customer moved from a roaming area (e.g., in-territory, not built-out) to the home network area (e.g., in-territory, built-out). Hand-offs should be required as part of the roaming arrangements.

Proposed Technical Restrictions

43. Bell, Rogers and Telus each propose technical limitations with regard to roaming. Bell argues handsets must be multi-band for use in roaming situations. Rogers argues that roaming should not include Internet access or enhanced services. Telus argues that roaming is meant to allow access back to the home carrier's voice, data and application services and that roaming does not involve service wholesaling and should not permit access to or use of the other carriers' services and applications.
44. Shaw agrees with the handset requirement proposed by Bell and agrees in principle with the views expressed by Rogers and Telus to the extent that they imply that roaming should not involve resale of another carrier's Internet, voice mail or other enhanced services. That said, roaming should facilitate customers using the enhanced services provided by the customer's home carrier.

Conclusion

45. Once again, Shaw would like to congratulate Industry Canada on 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 wireless services and provide significant benefits to the public.

46. In Shaw's submission, the changes proposed in its 22 January 2008 submission and the comments included in this reply should help ensure that roaming and site sharing arrangements can be implemented in a timely and efficient manner. At the same time, in order to prevent new entrants being disadvantaged by delay tactics of the wireless, incumbents, new entrants should be permitted to withhold 75% of the final auction price it bid for spectrum until such time as comprehensive site sharing and roaming agreements (if applicable) are in place with the incumbent carriers.
47. Shaw is confident that if the Government establishes the proper conditions, competition will flourish and that along with enhanced competition will come tremendous innovation and price benefits for Canadians. The future of wireless services in Canada will be bright.