



TELUS

Submission of TELUS Communications Company to
Industry Canada
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Consultation on Proposed Conditions of Licence to Mandate
Roaming and Antenna Tower and Site Sharing
and to Prohibit Exclusive Site Arrangements

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1 Guiding Principles

TELUS is submitting the following comments in response to the Department's consultation on roaming, tower and site sharing and arbitration principles pursuant to Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range, published on November 28, 2007 (the "Decision"). In order to ensure fairness, foster competition and stimulate investment and innovation TELUS proposes that the Department's consultation be guided by the following principles:

- First the Department should continue to rely on market forces to the maximum extent feasible in making its determinations, including setting conditions of licence, guidelines and establishing the arbitration process;
- Second, the Department must promote a stable and predictable environment for all carriers to invest in infrastructure in a manner that encourages Radio Access Network ("RAN") facilities-based competition. This will promote investment in new facilities and maximize innovation; and
- Third, arbitration must be based on commercially accepted standards commonly applied in Canada, as well as other jurisdictions, rather than regulatory costing principles designed for access to former wireline monopoly or essential facilities.

First, TELUS believes that further determinations to be made through this consultation process should be guided by government policy to rely on market forces, not regulation, to the maximum extent feasible. Recent statements of government policy in this regard include the following, originating from recommendations contained in the *Telecommunications Review Panel Report*, that Canada move to maximum reliance on market forces:

- (a) The Commission should:
 - (i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives; and

- (ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;¹

Enabling Guidelines

- (a) Market forces should be relied upon to the maximum extent feasible.
...
- (d) Regulatory measures, where required, should be minimally intrusive, efficient and effective.
...
- (e) Regulation should be open, transparent and reasoned, and developed through public consultation, where appropriate.
...
- (h) Spectrum policy and management should support the efficient functioning of markets by:
 - clearly defining the obligations and privileges conveyed in spectrum authorizations.²

The policy framework for the upcoming AWS auction departs significantly from pure reliance on market forces in order to facilitate entry in the wireless market, by providing material competitive advantages to new entrants at the expense of incumbent carriers. TELUS considers that, far from promoting competition, public policy seems driven by a desire to resurrect the parameters of wireline regulation in a wireless world contrary to competitiveness and innovation. Putting our frustration aside there remain, however, significant determinations to be made through the consultation process. In this regard, TELUS submits that further deviation from a market-based approach, in the form of additional concessions to prospective new entrants, are not warranted. Rather, the Department, having granted significant concessions to new entrants, should make further determinations guided by the principle of maximum reliance on market forces.

¹ Governor in Council *Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, December 14, 2006* (the "Policy Direction").

² Spectrum Policy for Canada, DGPT-001-07, June 2007, page 9.

Second, the Department should make its determinations in a manner which encourages facilities-based competition and promotes investment in infrastructure to maximize innovation. For more than a decade the government has held the view that *efficient and effective competition will be best achieved through facilities-based competitive service providers*³. Predictability is critical for encouraging investment. Based on both investor expectations in anticipation of and the subsequent investor reaction to the actual terms of the Decision, TELUS and other incumbent wireless carriers have suffered billions of dollars in lost market capitalization, even though the Minister recognized that the market is, and remains, competitive. These impacts demonstrate the sensitivity of the market to public policy decisions, with consequent impacts on the ability to undertake new investments.

The principal cause was a 40MHz set aside of the most valuable 90MHz of AWS spectrum. That has limited the ability of all three incumbents to acquire a minimum 20MHz of spectrum which is critical to achieve scale in the AWS band. Further, one of the consequences of the set aside is that incumbents must overpay for spectrum to ensure they have the ability to roll out AWS.

What the government failed to consider is that significant capital investments have been made to date by TELUS, exceeding \$10 billion, including \$6 billion to acquire a national footprint. New entrants including incumbents who were unwilling to invest will receive mandatory access to this investment at a fraction of the cost and risk. Further, additional investments must be made by incumbents in infrastructure rebuilds over the coming years to remain competitive. These rebuilds will dwarf any capital deployment by new entrants and will contribute in a material way to the ability of the wireless industry to further the government's innovation agenda. Given the need for these major capital investments, TELUS believes that there must be predictability and certainty in the policy environment governing the provision of wireless services. In this regard, TELUS submits that, if the consultation process results in more unanticipated obligations on incumbents, these investment plans could be jeopardized. It is the obligation of all providers to build out radio access networks as quickly as possible in order to deliver the investment and innovation Canadians are expecting.

The Department has set aside spectrum to build more advanced networks, at a likely cost in subsidy from the Treasury of hundreds of millions of dollars and an increased cost to acquire spectrum for existing licensees. It is therefore critical that facilities-based (RAN) competition is promoted to achieve the ambitious goals set out in the Decision, namely:

Industry Canada is aware of the importance of a modern and innovative telecommunications infrastructure to Canada's overall competitiveness in

³ Telecommunications Policy Review, Final Report 2006, p. 3-32.

a global economy, and the growing reliance on wireless services by Canadians. As noted by the Telecom Panel, fostering the use of information and communications technologies (ICTs) is an important means of improving overall productivity in modern economies. An advanced telecommunications infrastructure is essential to fostering ICT usage.

The department is committed to government policies which seek to rely on market forces to the maximum extent feasible for the provision of telecommunications services to Canadians. This policy approach can only be pursued in an environment where market forces can be expected to deliver, now and in the future, a level of competition sufficient to protect the interests of users. Accordingly, in making this resource available, a critical consideration has been to implement an auction framework that will help ensure that market forces support a telecommunications infrastructure that delivers innovation and consumer choice at competitive prices.⁴

TELUS submits that, while conditions like mandatory roaming and tower sharing are intended to help facilitate entry during the initial period of start-up, these rules should not be used to create disincentives to build more advanced networks. Disincentives to build arise when it becomes cheaper, through regulatory rate-setting, to rely on another carrier's technology, infrastructure and services to compete rather than invest and offer innovative services to customers on one's own infrastructure. Further, conditions which discourage carriers from building can create incentives for players to participate in the auction simply to hoard and speculate on subsidized spectrum knowing that they can underbuild without consequence.

TELUS believes that the Department must require carriers benefiting from the set-aside and other concessions in the AWS policy framework to meet certain build-out obligations before receiving these benefits. TELUS therefore recommends that the Department establish conditions, first, that explicitly impose build-out requirements and, second, that ensure that access to roaming is not available unless and until AWS radio access network facilities are deployed in a specific centre.

Third, arbitration must be based on commercially accepted standards applied in Canada, as well as other jurisdictions, not regulatory costing principles designed for access to former monopoly wireline or essential facilities. In a commercial arrangement, incumbents are fully compensated at prevailing market rates for services provided and would not be placed at a competitive disadvantage *vis a vis* the new

⁴ Decision, page 2.

entrants as a direct result of fulfilling any requests or obligations from the new entrants. Intervention, in the form of arbitration to resolve commercial disputes, must be seen as an exception to what is an otherwise unregulated market, a market that has been subject to forbearance since 1984.

In this regard, there are helpful precedents in other jurisdictions. For example, Ofcom, as an alternative to regulation, has identified suitable dispute resolution organizations, including the International Chamber of Commerce's International Court of Arbitration, the London Court of International Arbitration and, with respect to mediation and other informal dispute resolution techniques, the Centre for Effective Dispute Resolution, a leading European mediation organization.

2 Defining Roaming

2.1 Roaming is a clearly understood industry practice

In the Decision, roaming is described as follows: "Roaming allows a subscriber from one network to access another carrier's network when outside the subscriber's home area (out of territory)."

On its Consumer Facts site, the FCC describes roaming as:

"Roaming" is the term that describes a wireless phone's ability to make and receive calls outside the home calling area under your service plan. Roaming occurs when a subscriber of one wireless service provider uses the facilities of a second provider. While the subscriber usually has no pre-existing agreement with the second provider to handle calls, the subscriber's provider may have a "roaming agreement" with the second provider. Under that agreement, the second provider agrees to handle calls placed by subscribers of the first provider and vice versa. When your phone is roaming, an indicator light on your phone may display the word "roam."

The practice and purpose of roaming is well understood and has been adopted not only in Canada and the US but many other jurisdictions. It is intended to support subscribers from one network on another network when outside the range of the home network. It is very different from resale, which is discussed below.

For greater clarity, TELUS respectfully requests that the Department adopt the following definition of roaming: "Roaming is an interconnection activity intended to enable a subscriber already

served by one carrier's network (home network) to originate or terminate calls on another carrier's network when out of range of the home network. A subscriber cannot roam unless he or she is already served on another radio access network (and unless the roaming service in question is in fact provided by the home carrier").

The implications of this definition are set out below.

2.2 In-Territory and Out-of-Territory roaming are functionally the same activity

As discussed above, the Department, in its Decision, stated that roaming was meant to allow a subscriber from one network to access another carrier's network when outside the licensed or home area (out of territory). The Department also suggested that roaming will be permitted to allow a subscriber from one network to access another carrier's network when inside the licensed or home area (in-territory) in order to facilitate entry during the build-out phase. The intent of in-territory roaming is to allow a home carrier's customers to use their phones in-region when traveling beyond the home carrier's signal coverage area. This concept of in-territory roaming is quite different from the regime that the Department has noted was recently adopted in the US. In the US, roaming is only required out-of-territory or out of the area for which a carrier holds a licence. However, in either case, the basic functionality is the same. Roaming is simply the ability of a subscriber to originate or terminate a call when outside the reach of his/her home network.

TELUS understands that the reason for an overly generous 5-year in-territory roaming provision is to provide a subscriber a reasonable level of coverage as they roam outside the signal of their home RAN. This does not obviate the need to build to roam. There must be an initial onus placed on the new entrant to build out their radio access network and supporting infrastructure in order to trigger any obligation to provide the new entrants with roaming capabilities. To suggest otherwise would be to incent the deferral of investment in the newer radio access networks. This build obligation would be consistent with the PCS COL issued in 1996, wherein the new entrants were required to meet build-out conditions as a quid pro quo to roam.

However, in both cases, the Decision clearly ruled that in order to roam you must first be a subscriber served by a radio access network. Simply put, you cannot roam if there is no network from which to roam.

TELUS requests that the decision in this consultation clarify that in-territory roaming and out-of-territory roaming are functionally the same, and that resale is not mandated in-territory. Moreover, the Department should require that roaming commences upon completion of construction of a local Tier 4 AWS calling area, not with the issuance of a licence.

2.3 Roaming is not intended to be used within a home coverage area

The intent of roaming is simply to ensure that subscribers on one wireless network can continue to use their phone when out of reach of the home network, whether inside or outside the home carrier's licensed territory. However, TELUS submits that roaming by definition is not intended to be provided to, nor necessary to support, customers within the coverage range of their home network.

- First, it is unnecessary since, by definition, the home carrier is providing service to the subscriber.
- Second, by definition, roaming begins outside of the home coverage area. Subscribers only need to roam when they leave the coverage area of their own network provider.
- Third, a coverage overlay, where a customer is served by two carriers, creates unnecessary complexity in terms of network engineering and customer service. Dual coverage creates unnecessary network complexity because of a significant additional volume in handoffs and required points of handoff. Engineering a dual layer network from two uncoordinated operators creates complexity in capacity management and service management.

For instance, outside of intentional handoff, a user on the home network may scan for other networks and still cause capacity and server management issues. This can load the incumbent's network and reduce incentives for the home carrier to build sufficient capacity into the new network (and can cause congestion on particular frequency bands if those bands are "preferred" by the new entrant's handset programming). In many ways, this can lead to significant "off-loading" of capacity from the new entrant's network to the incumbent's network causing significant and perhaps unmanageable network capacity and engineering issues while frustrating the Department's intention of incenting new facilities-based competition.

Finally, limiting roaming to outside a home network reduces incentives for a new entrant to underbuild an area (e.g., putting up only a few antennae to intentionally provide spotty coverage in a metro region) or to compete for customers locally by selling an existing carrier's Quality of Service. The whole point of setting aside spectrum and intervening in the market is to incent more competition, more investment and more innovation, not simply to repackage what is already offered.

It is inconsistent with the rationale of a set aside, which was to encourage the construction of advanced networks, to allow a new entrant to underbuild its network in a particular location and expect another

carrier to actually serve the home carrier's customer overflow. That actually degrades overall network quality and adds nothing in terms of innovation. Disincentives to build arise when it becomes cheaper, through regulatory rate-setting, to rely on another carrier's infrastructure and services to compete rather than invest and offer innovative services to customers on one's own infrastructure. Further, conditions which discourage carriers from building can create incentives for players to participate in the auction simply to hoard and speculate on subsidized spectrum knowing that they can underbuild without consequence.

TELUS respectfully requests the Department clarify that in-territory roaming does not extend to inside the home carrier's signal coverage footprint. It is not required and imposes unnecessary costs and complexity on incumbents. For greater clarity, a home carrier's local footprint should be defined to incorporate the full geographic boundary of the Tier 4 locations identified by the Department in the Decision.

TELUS submits that such a limitation is easy to implement. Local numbers associated with Tier 4 exchanges in a home carrier's network are recognized and served outside of the local area but rejected for roaming by switches serving the local home calling area.

2.4 Digital roaming

The Department has stated that roaming should include access to digital voice, internet, e-mail and other data services. TELUS submits that the intent of roaming is to allow subscribers a basic or reasonable level of access to voice and IP connectivity when roaming outside the home coverage area. In other words, roaming is a form of interconnection of networks with connectivity meant to allow access back to the home carrier's voice, data and application services, like voice mail and e-mail.

Roaming does not involve service wholesaling and should not permit access to or use of the other carriers' services and applications, including any innovative features and services on another carrier's network. From a public policy perspective, this is a critical distinction which will allow the government, through the auction process, to meet its stated objectives of ensuring that new entrants compete through service differentiation and offering innovative services to their customers. It is critical to encourage all carriers to innovate in a manner that enhances consumer welfare over the long run. Allowing firms to reap the rewards of their new technologies creates the right incentives for innovative activity. For example, patent protection denies free riders the right to take advantage of the patent holder's ideas and research. This protection provides the spur to invest in innovation and research.

The provision of enhanced or feature-rich services has always been an issue of pure commercial negotiation, in cases where carriers have found a mutual interest. These types of arrangements should not be confused with provisioning access to basic functionality for services like circuit voice and IP connectivity. TELUS would draw a distinction between bearer services and value added services in this regard. For example, a voice call or a data interconnection in the roaming context can be viewed as a bearer service. The carrier-specific "value added" services that will "ride" on the bearer services are up to the home carrier to provide. As another example, value added voice services such as voice mail, dial plan services (such as * and # numbers), etc. and value added data services such as e-mail, WAP, etc. are services that must be provided by the home carrier over roamed-upon bearer services provided by the incumbent(s) as per the Department's Decision. Again, the intent of the Decision is to enhance the competitiveness of the market by stimulating investment in innovation of newer value added services by requiring bearer networks to provide initial support to new entrants while they build out their own radio access network and supporting infrastructure. TELUS submits that digital roaming is a temporary building block for increased competition and is not intended to substitute for investment in facilities or innovation by making new competitors overly reliant on existing networks for services. Mandating forced sharing by incumbent carriers of value added services (or services other than bearer services) creates disincentives for future investment in innovation by all carriers.

TELUS notes that some confusion would be removed if the Department were to clarify that roaming is technically a process of providing connectivity to enable a home carrier's bearer services rather than access to a home carrier's value-added services.

TELUS believes that this is consistent with the concept of automatic roaming which is predicated on the notion of connectivity being provided but not service unbundling. In this regard, we note that the FCC describes automatic roaming as follows: "Automatic roaming allows roaming mobile telephone customers to place calls as they do in their home coverage area, by simply entering a phone number and pressing 'send'."

TELUS respectfully requests that the Department clarify that automatic digital roaming is intended to provide a reasonable level of connectivity to support a subscriber's access to basic functionality like voice and provide IP connectivity back to their home network. Digital roaming is not intended to unbundle feature-rich services in another carrier's network. Further the Department should note that the provision of connectivity to support data roaming cannot be used to circumvent limitations on resale and other arbitrage arrangements.

TELUS notes that this approach is both consistent with past Canadian approaches to roaming and ensures that carriers are all incented to compete on innovation in order to differentiate offers and expand consumer choice and productivity.

2.5 Asymmetrical roaming

Under the proposed rules, all carriers must offer all other carriers cellular, PCS and AWS roaming “outside their licensed territory” for 10 years and in-territory to new entrants for 5 years. Specifically, *roaming is to be offered:*

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

To all new entrants, in their licensed areas for a period of 5 years commencing with the date of issuance of their licence; and

To national new entrants who have substantially met the 5-year roll-out requirements outlined in their licence, as determined by Industry Canada, for an additional 5 years.

TELUS submits that if the primary intent is to enable roaming for new AWS entrants on an equitable basis, these rules may be overly complex and create levels of inequity that are unfair and unnecessary. For example, provincial incumbents particularly MTS Allstream, an incumbent who could have had a national GSM licence for under \$2 billion, have the highest market shares in their respective operating territories yet are considered new entrants even inside their operating territories. TELUS also notes that both these carriers already have inter-carrier arrangements for their 800MHz and 1900MHz traffic. Other incumbents like TELUS and Rogers, with national licences yet lower market shares in those operating territories, are discriminated against by these rules and not allowed to obtain mandatory roaming. 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.

As a result of this Decision, there are now multiple roaming obligations and rights that will vary by carrier. It is possible the rules will be unique for every new entrant and incumbent.

TELUS submits that it is critical to limit these asymmetries as much as possible to ensure some level of fairness. In simple terms, TELUS considers that roaming rights for any new entrant,

including incumbents like MTS Allstream and SaskTel, should only apply to AWS and not to existing agreements.

TELUS also requests that Industry Canada include a rule that mandatory roaming is only available to multi-band handsets that include access to the AWS band. To do otherwise would imply resale as opposed to roaming. TELUS considers that roaming on any other type of non-AWS handset would be a violation of the existing licence provisions which include a condition that licences will not be changed except on an exceptional basis. There have been no "out of the ordinary course of events or unusual or extraordinary circumstances" that could justify amending existing conditions of licence on an "exceptional basis."

TELUS is also concerned that confusion with the rules pertaining to incumbents may encourage carriers who already have roaming agreements to attempt to negotiate their way out of existing agreements at 800 or 1900MHz. The principle behind new entrant roaming for the regional incumbents is to encourage them to build new RAN facilities, not to amend their existing commercial arrangements.

In this regard, the Department has noted in this consultation that "***these conditions of licence would not supplant nor obviate*** any existing or pending rulings, decisions, or tariffs approved by the Canadian Radio-television and Telecommunications Commission (CRTC) or ***any existing agreements between licensees insofar as they are consistent with this policy.***"

While this language is helpful, TELUS requests, for the sake of fairness and consistency, that the Department clarify that carriers cannot use the arbitration process in this Decision to negotiate better terms and conditions for PCS and cellular roaming agreements.

3 Resale and Related Commercial Practices are Outside the Scope of the Consultation

Roaming is a common and well-understood industry practice and one clearly separated from resale, wholesale, MVNO or similar arbitrage arrangements.

TELUS submits that the rationale for mandating roaming in this auction is clear. It is to promote RAN-based competition by encouraging utilization of set aside spectrum while recognizing that, because it takes time to build out RAN facilities, subscribers on new entrant networks will need both in-territory and out-of-territory roaming until coverage is more substantial.

Resale on the other hand is a competitive wholesale activity that permits a provider to purchase minutes from a carrier and acquire numbers directly or from a third party in order to attract and sell services to customers, even if that service provider has no network of its own. While resale arrangements exist in Canada, these are market-based solutions which can and should continue to be determined on a commercial, not a mandatory basis. Further, it is clearly beyond the definition of roaming proposed by the Department. Further, resale is a substitute for facilities-based competition and creates an actual disincentive to build infrastructure, innovate and meet build-out commitments.

TELUS recognizes that the Department has not mandated resale even though parties to this proceeding requested resale. We also note that both the Department and the FCC have used the terms 'roaming' and 'resale' in past decisions to describe separate and unique activities. However, TELUS submits that maximum clarity on this point is required to prevent an interpretation of the Decision by arbitrators to include matters like resale, MNVO, wholesale and arbitrage involving the purchase of bulk minutes or additional number blocks under the banner of roaming. TELUS submits that such an interpretation would be a material change to the Decision, would undermine the rationale for a set aside and could result in further direct harm to TELUS.

Accordingly, in its decision on the issues in this consultation, TELUS respectfully submits it is of critical importance that the Department expressly state that roaming for either voice or data is not intended to be defined or used directly or indirectly for resale, MVNO, wholesale or other similar commercial activities

4 Tower and Site Sharing

Under Section 5.1(f) of the *Radiocommunication Act*, the Minister may "approve each site on which radio apparatus, including antenna systems, may be located, and approve the erection of all masts, towers and other antenna supporting structures." However, this power does not extend to setting commercial terms for the use of towers or affecting the economic use of private property. Further, it is beyond the power of the Minister to assign or delegate to an arbitrator a power the Minister does not have.

TELUS agrees that there are good public policy reasons to share towers and sites where technically feasible, if the terms of sharing accurately reflect commercial prices and practices and where the existing carrier has the legal ability to permit such sharing unilaterally, without requiring the consent or approval of any third party (including, without limitation, the legal owner of the real property on which such site is located).

Accordingly, while TELUS' position should not be taken to accept the authority of the Minister to force tower and site sharing in a manner that affects private property, TELUS is prepared to negotiate reasonable terms of sharing subject to the "guidelines" set out below. However, TELUS cannot be held responsible for abrogating the private property rights of landlords or other tower and site owners.

Further, the Decision should be applied on a go-forward basis so the sanctity of existing contracts will be respected. TELUS recognizes that in situations where disagreements on existing contracts arise, such as whether it is open to a Licensee to unilaterally waive exclusive arrangements, the dispute resolution process could be used to interpret existing contracts.

TELUS requests that the Department recognize that incumbent carriers and other tower or site users have no authority to compel third party performance or adherence to federal government policy directions where third party consents or approvals in respect of tower or site sharing are required at law, pursuant to bylaws, under contract, as a matter of mandatory corporate governance or consultative approaches commonly used in communities for site alterations. Such restrictions may apply, for instance, without limitation, to third party carriers' access to tower space, roof space, shelter space, ground space, cable runs, building core, utility rights of way, utility connections and ingress/egress rights of way.

4.1 Framework for successful negotiations

Successful commercial negotiations are preferable to disputes. Disputes can waste time and money and damage relationships. Making it easy to resort to binding arbitration makes it more difficult to have good faith bargaining, thereby depriving parties of the opportunity to reach an agreement in their mutual interest. The framework adopted by the Department for negotiations should therefore include the following guidelines:

Preamble: Both parties are responsible for the success of negotiations and must make best efforts to plan and prepare for negotiations with the intention of reaching a commercial agreement and avoiding the need for arbitration.

First, in order to allow a free exchange of information during the negotiation phase, privacy and confidentiality agreements, on usual commercial terms and conditions, would be entered into at the request of either party. TELUS believes that preserving the confidentiality of negotiations and commercial agreements will greatly assist a successful negotiation process. Otherwise, agreements will be regarded as "setting precedent" which will chill the ability of both parties to enter into practical and timely agreements, which reflect their situational interests.

Second, a reasonable negotiation period is needed. TELUS is concerned that the conditions of licence as currently drafted could have the unintended effect of actually encouraging dispute resolution over negotiations. In particular, the 30-day mandatory response to a request by any other Operator will not be feasible in many, if not most cases. **TELUS recommends that, particularly given the need to do a tower assessment before commercial negotiations, the Department remove the 30-day requirement as unworkable and indicate that a 90-day clock for negotiations commences only after the resolution of technical issues around individual site readiness. Ninety days to do a site sharing assessment is more than reasonable in relation to the interval of 18 months it ordinarily takes to develop a tower, considering the time associated with site acquisition, civil design, municipal and regulatory approvals and local consultation processes.**

Third, licensees wishing to access an incumbent's site must present sufficient information and take responsibility for all engineering and related costs and other commercially reasonable measures necessary to initiate and follow through with meaningful negotiations.

Fourth, the framework for negotiations should respect the private property of the owners and the objective of maximum reliance on market forces. For example, reservation by a tower owner of reasonable capacity to support future use without requiring that tower owner to incur costs for tower reinforcement/rebuild that are not required for that carrier's own current and future network design requirements would be permitted. 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. The CRTC has also determined that an incumbent is not required to provide spare capacity where doing so will unduly interfere with the rights of any joint-user or other licensee. In normal commercial negotiations, the future requirements of the owner are always given full consideration. These principles would apply to the finite transmission site resources that third party property holders have conceded to incumbent carriers. Only if there is capacity in excess of the current and reasonably foreseeable future needs of the incumbent carrier should sharing be mandated. TELUS considers that these are basic principles that can be used to ensure adequate capacity for additional network builds, including future services like AWS, and protect at the same time existing arrangements for sharing.

Fifth, carriers must have the right to protect sites and ensure network security. It is critical in the case of sites and towers that all forms of gated compounds, equipment shelters and closets remain in the control of the incumbent carrier. That is common industry practice today and does not interfere with the ability to use towers, run cables or put up antennae where sites and capacity are available.

TELUS requests that the Department clarify that tower/site access does not extend to sharing secure compounds, equipment shelters or closets.

Sixth, in 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.

Seventh, operators 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). Since staffing resources and significant management effort must be devoted solely to meet this obligation, TELUS requests that the forecast result in binding payments from the new carrier in order to perform this activity. Without the assurance of economic justification for the engineering effort, carriers should only be required to provide best efforts approaches to these requests.

5 Technical Feasibility

As stated in the consultation document, “*Where technically feasible, Licensees must offer automatic digital roaming on their cellular, PCS and AWS networks...*”. **To ensure that roaming is mandated under reasonable conditions as intended, TELUS submits that the Department should clarify that technical feasibility by definition includes a reasonableness standard that includes economic cost and practicality.**

Roaming and tower and site sharing must be both technically and economically feasible. First, by technically feasible, it is well understood that, if networks are based on incompatible standards, the carrier asked to provide roaming does not have to upgrade or alter its network (e.g., from CDMA to GSM) so that roamers’ handsets work. While any compatibility is technically possible if enough capital is spent, it is not reasonable to expect that a carrier would have to incur any significant economic costs and divert resources critical to its own business operations to facilitate another carrier. In effect, as discussed above, roaming is an automatic service to enable basic connectivity and is not intended to impose complex back office obligations to unbundle or resell the services that the host carrier provides to its own subscribers.

Second, technical feasibility must reflect fair use of time and resources. TELUS notes that the timeframes set for negotiating tower and site sharing simply do not reflect the work that goes into determining the feasibility of each sharing request. As discussed in the previous section, technical feasibility has to include a reasonable assumption of time and operational resources to assess on a site by site basis.

While a negotiation of rates may fit a 90-day clock, it is likely that there will be technical issues related to individual towers that need prior resolution. 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, in view of the interdependence of network sites that may be subject to widely varying legal contracts imposed by property owners.

6 Arbitration Process and Principles

TELUS believes it is necessary to carefully delineate who may serve as arbitrator, the scope of the arbitrator's authority, the terms of reference for arbitration, and the arbitration process.

The consultation document suggests the arbitrator could be a private arbitrator operating under provincial legislation as agreed to by the parties or appointed by the courts. However, the jurisdiction of the Department to trespass on federal authority through a provincial arbitrator is vulnerable to challenge.

TELUS submits that reliance on provincial arbitration to establish terms and conditions of access cannot be used as a surrogate for regulatory authority since that is both *ultra vires* and sets a dangerous precedent that turns back the clock to a time when there was conflicting federal and provincial regulation of communications.

TELUS therefore proposes an arbitration process based on well-accepted commercial practice clearly distinct from regulation in order to ensure maximum reliance on market forces.

1. TELUS recommends a 3-person arbitration model. TELUS submits that the most effective way to ensure that parties are relatively satisfied with the arbitration process is to allow each party to appoint an arbitrator and then let the two arbitrators select a third. TELUS considers that arbitrators may be lawyers, former judges or any other party with experience in dispute resolution.
2. The commercial arrangements determined through the arbitration process must be binding on both the incumbent carrier and the applicant as conditions of licence. Applicants will normally be Licensees **and reciprocal obligations should be added to the conditions of licence to ensure the arbitration process binds both parties.**
3. The arbitration process and the outcomes reached must be confidential. There are three reasons to maintain the confidentiality of the arbitration process and any resulting decisions. First, conflicting/inconsistent decisions could act to the detriment of efficient commercial negotiations. Second, expeditious and effective arbitration decisions are best accomplished through a confidential process,

where parties are not concerned with concessions made in the interests of reaching a reasonable solution. Finally, most commercial agreements that provide for arbitration stipulate that the processes and resulting decisions can be subject to confidentiality provisions. Unless waived by the parties, confidentiality would apply to any appeals of the arbitration decision.

4. The arbitrators should make their determinations and base rates on market practice, not traditional regulatory costing principles. Regulatory costing designed to govern monopoly or dominant carrier access is not appropriate to apply to markets already deemed competitive and where the services in question are not subject to economic regulation.

5. The arbitrators should be directed to consider commercial terms and conditions for similar services, having regard to arrangements made in the market that reflect normal commercial considerations (including volume discounts, degree of reciprocity) and whether the operator could use any other competitive means of providing service, including self-provisioning. The arbitrator must also have regard for the Spectrum Policy Framework for Canada and all relevant information provided by the parties.

6. The arbitrators would have no jurisdiction to make a decision in respect of the rights of third parties, including existing contracts and property rights, other than interpreting existing contracts, and would have no jurisdiction to order resale (as opposed to “roaming”).

7. 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.

TELUS appreciates the opportunity to comment on the matters raised in this consultation DGRB-010-07. In order to assist the Department, attached are blacklined changes to the draft conditions of licence in accordance with this consultation.

ATTACHMENT

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 as guidelines to facilitate antenna tower and site sharing on commercial terms and to limit 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 other than secure compounds, equipment shelters or closets ("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, provided that Licensee has the right to issue such waiver having regard to its contracts with third parties and duties and obligations owed to other stakeholders and local governments. 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 will use commercially reasonable efforts to respond to a request to share by any other Operator who provides necessary information and commits to pay all engineering and related costs, as follows:*
 - a. *In the event that the request to share is technically feasible, based on considerations of cost and practicality, the Licensee must provide the requesting Operator with a response and an offer to enter into a sharing agreement within 90 days from the date that either Licensee or Industry Canada has determined technical feasibility. 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 within 90 days from the date of a request.*
4. *Site-sharing arrangements will be negotiated expeditiously and in good faith by the Licensee and the Operator requesting antenna tower and site sharing. If after 120 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 arbitration as agreed upon by the parties in accordance with the provisions of the applicable provincial arbitration legislation. The Licensee and Operator will agree that the arbitrators 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 and Operator must participate fully in such an arbitration and follow all directions of the arbitrators 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 arbitrators and may withdraw their arbitration, on*

agreed terms, so long as they agree to a Site-sharing arrangement. Unless otherwise agreed by the Licensee and the Operator requesting antenna tower and site sharing, the following terms of arbitration and negotiation shall apply:

- a. Three arbitrators will be used, with each party appointing an arbitrator and the two arbitrators selecting a third. All discussions, documents and information exchanged during negotiations, documents and information submitted to the arbitrators, the arbitration proceeding, the arbitrators' decision and any appeal will be kept confidential.
- b. The arbitrators must select between final offers submitted by each party at the commencement of arbitration and base their decision on commercial terms for similar arrangements negotiated at arm's length in the Canadian market, whether the Operator could use any other feasible alternative, and reasonable reservations of capacity to meet the Licensee's anticipated future service requirements. The arbitrators must have regard for the Spectrum Policy Framework for Canada and shall not base their decision on regulatory costing methods.
- c. The parties shall split the cost of the arbitration unless otherwise ordered by the arbitrators.

Conditions of Licence for Mandatory Roaming

The conditions of licence described below will apply as guidelines to all licences in the cellular, PCS and AWS bands to facilitate roaming arrangements for AWS subscribers served on other radio access networks ("RANs") on commercial terms.

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). In the conditions of licence "roaming" means an interconnection activity intended to enable a subscriber already served by one carrier's RAN (home network) to originate and terminate voice calls and basic email on another carrier's network when out of range of the home network. For greater certainty, roaming does not extend to any area within the home carrier's coverage area, including the full geographic boundary of the Tier 4 locations and in no event does roaming permit access to another carrier's value-added services.

Where technically feasible, based on considerations of cost and practicality, Licensees must offer automatic digital roaming on their cellular, PCS and AWS networks for multi-mode handsets that include access to the AWS band as follows:

1. Roaming is to be offered under commercially reasonable terms and conditions:
 - 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 completion of their first year roll-out requirement outlined in 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 circuit voice and IP connectivity other than value-added services. Roaming services provided under these conditions cannot be resold.
 - b. When requested, Licensees will provide an offer to enter into a roaming arrangement to provide roaming services on reasonable terms within 90 days from the date the requesting Licensee provides necessary information and commits to pay all engineering and related costs. 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 similar volumes.
 - c. The roaming arrangement is to be offered in those licensed areas that are common to the Licensee and requesting Licensee and only where the requesting Licensee has not already negotiated a cellular roaming, PCS roaming or AWS roaming arrangement with Licensee or any other carrier within the Licensee's coverage area applicable to such service.
 - d. Once a roaming arrangement is negotiated and accepted by the new entrant, the obligation for that license area on remaining incumbents (if any) is deemed fulfilled.
3. Roaming arrangements will be negotiated expeditiously and in good faith by the Licensee and the party requesting roaming. 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 arbitration as agreed upon by the parties or in accordance with the provisions of the applicable provincial arbitration legislation. The Licensee and the party requesting a roaming arrangement will agree that the arbitrators 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 and the party requesting a roaming arrangement 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 a roaming arrangement may agree to specific terms with regard to submitting their dispute to arbitration and may withdraw their arbitration, on agreed terms, so long as they agree to a roaming arrangement. Unless otherwise agreed by the Licensee and the party requesting a roaming arrangement, the following terms of arbitration and negotiation shall apply:
 - a. Three arbitrators will be used, with each party appointing an arbitrator and the two arbitrators selecting a third.
 - b. All discussions, documents and information exchanged during negotiations, documents and information submitted to the arbitrators, the arbitration proceeding, the arbitrators' decision and any appeal will be kept confidential.
 - c. The arbitrators must select between final offers submitted by each party at the commencement of arbitration and base their decision on commercial terms for similar arrangements negotiated at arm's length in the Canadian market and whether the requesting Licensee could use any other commercial alternative. The arbitrators must have regard for the Spectrum Policy Framework for Canada and shall not base their decision on regulatory costing methods.
 - d. The parties shall split the cost of the arbitration unless otherwise ordered by the arbitrators.