



TELUS

Reply comments 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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Introduction

Throughout 2007 the wireless industry was systematically criticized in public by many parties to this proceeding for being uncompetitive, investing in sub-standard networks and lagging its trading partners in terms of wireless innovation. These attacks were motivated primarily by a strategy of some of Canada's largest cable companies and others to convince government to set aside spectrum for the exclusive use of "new entrants." Those parties promised that, if they were granted set asides, they would invest in Next Generation Networks (NGNs) in order to deliver more innovative services to consumers. While the government agreed, as it always has, that the wireless market is competitive, it accepted the promises of new investment, more competition and innovation from prospective entrants. The government set aside 40 MHz of the 90 MHz of spectrum available for Advanced Wireless Services for the exclusive use of those new entrants in its Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range (the Decision).

This intervention into a competitive market is unique and unusual in that the government's stated policy favours a reliance on market forces to the greatest extent possible. Government policy has eschewed intrusive and interventionist measures in favour of a greater reliance on markets. Yet, in this instance, the government decided that investment in spectrum-based competition and the promises of more innovation outweighed the costs of its intervention. The costs of this intervention are significant. The spectrum set aside is estimated by some analysts to have the potential of saving new entrants hundreds of millions of dollars that would otherwise have flowed to taxpayers and contributed to a multibillion dollar collapse in the market capitalization of Canada's leading wireless carriers.

However, now that all perceived barriers to entry have been removed and prospective new entrants have been granted preferential access to this spectrum resource at discounted rents, along with roaming rights and access to towers and sites at commercial rates, their story has changed. Now, instead of planning to deploy NGNs as promised and as quickly as possible, they are using the Department's mandated roaming proposal to advocate a complete unbundling of existing and future networks, well beyond any regulatory regime that applies to the provision of monopoly or essential facilities in the wireline market. The promises of new and innovative services have faded giving way to a desire to leverage and arbitrage the services of the existing wireless carriers who have thus far expended billions of dollars in capital to develop and deploy those services.

Rather than compete through innovation and product differentiation, some prospective new entrants now want access to all the functionality incumbents provide, access to back office and billing systems, backhaul and international agreements with third party carriers, as well as discounts relative to retail

service rates and unrelated unbundling requirements that incumbents provide a roaming customer all the services and features an incumbent provides to its own customers. Not content with a full scale expropriation of whatever innovation and intellectual property incumbents have invested in, prospective new entrants also want access to all future investment that incumbents plan to make and all of this governed by arbitration rules that make monopoly-style regulation look benign by comparison.

Industry Canada must not be swayed by arguments that would undermine the very framework it has put in place to encourage the deployment of NGN radio access networks and to incent investment in innovation to benefit consumers. TELUS is worried that, before the ink is even dry on the Department's Decision, some prospective entrants seem to be engaged in an effort to add a new layer of regulation into the wireless business in order to promote resale and unbundling at regulated rates, all without any commitment to invest anything into NGNs. Clearly that was not the intent of the Minister's nor the Department's intervention. It is critical for the Department not to repeat the errors that were made in the past with respect to telecommunications policy in the monopoly wireline market. Resale, unbundling and forced sharing have proven to be counterproductive in terms of creating sustainable competition or innovation. Only through aggressive incentives to promote facilities-based competition will the stated objectives of the Department in embarking on this policy course be accomplished.

In TELUS's legal and regulatory opinion, what these prospective new entrants propose would amount to a rewrite of the Ministerial Decision, deemed to be final, as well as a betrayal of taxpayers, shareholders and incumbents who must bear the billions of dollars the set aside has and will cost. TELUS submits that, to change the commonly understood concept of roaming and adopt the level of unbundling and regulated rate setting now proposed by some parties in this consultation, would clearly amount to a failure of due process. The Minister and Department did not intend the present consultation (which has been clearly limited to conditions of licence on roaming and tower and site sharing under commercial terms) to become a vehicle to impose levels of regulation and expropriation that would only be applied, if at all, in rate of return regulated monopoly markets.

Resale

As TELUS noted in its earlier comments and as outlined by the Department, resale is not part of this consultation and is, accordingly, well outside the scope of this proceeding. Resale and roaming are two separate and well understood business arrangements the terms of which are arrived at and typically agreed to on a commercial basis. This is evidenced by the roaming and resale arrangements currently in existence among industry players. Some parties asked for resale during the consultation that led to last year's Decision. The Department chose only to mandate roaming in its final Decision and therefore subsequently limited this consultation to roaming.

As noted above, there are good and compelling reasons, given past experience, not to mandate resale. Resale and other similar practices are intended to create forms of arbitrage as a second best substitute for facilities-based competition. This Decision is intended to promote the deployment of more spectrum-based radio access networks in order to increase competition and innovation. Resale actually creates disincentives to invest in NGNs because a resale regime encourages arbitrage rather than true competition based on facilities. Resale generally contributes to ongoing regulation not innovation as parties become mired in ongoing regulatory disputes about the scope of forced sharing and the level of price discounts that should be applied to those resold services through regulation. Clearly this was not the competitive environment contemplated by the Department when the Decision to set aside spectrum was taken. Neither the market facts nor the economic reality of the last decade support those parties who argue for resale over an explicit presumption in favour of a facilities-based approach.

Moreover, if the Department were to reopen a decision that has already cost the industry billions of dollars in a fashion that resulted in even more harm, TELUS anticipates that the whole auction process could be derailed and delayed by inevitable legal challenges. The Decision has been made. It is time for prospective new entrants to build the networks they promised in return for a set aside and roaming and to deliver the services that they claim Canadians demand.

Roaming

(a) Roaming does not include unbundling of services and features

Roaming is intended to supplement, not substitute for investment in Next Generation Networks, by providing another carrier's customers reasonable functionality when outside the signal coverage footprint of a home radio access network. Roaming has been mandated for 10 years out-of-territory and for only 5 years in-territory to provide incentives to build out NGNs and to ensure home carriers have adequate coverage during the build out phase. The fact the Minister has set aside spectrum and identified his expectations for a reasonable build out, clearly signify that roaming was not intended to be an alternative to spectrum-based competition.

It is disingenuous for new entrants to claim they now need access to the very networks and features they once derided in order to convince the government of the need for a set aside. Innovation and true competition depend on the ability to product differentiate and on the understanding that the enabling investments made by industry participants will not be expropriated by others seeking to avoid the necessary capital and operational costs associated with owning and operating a world class coast-to-coast wireless network.

Roaming has never been used in the past to undermine the benefits of product differentiation nor was it ever intended to do so. Rather, the purpose of roaming is to support voice and IP connectivity sufficiently to allow roamers to send and receive calls and access the home carrier's services. It is not to ensure that, whatever service and feature TELUS provides to its customers, must also be resold or unbundled.

In the United States, there is no regime for roaming even remotely approaching what prospective new entrants seek to attain through regulation in Canada. Moreover, what is requested involves a level of network and back office complexity never before required in Canada and certainly not part of a rational roaming regime.

Fundamentally, what parties are requesting to be unbundled and resold under the roaming umbrella have never been considered essential by the Canadian Radio-television and Telecommunications Commission (CRTC). In fact, requests for resale and unbundling of wireless facilities and services have already been considered and rejected by the Commission on previous occasions.

(b) In order to incent all carriers to invest, access to AWS and other NGNs should not be subject to mandatory roaming rules

Roaming is intended to overcome coverage advantages incumbents have when new entrants first launch services. TELUS submits that insofar as the construction of new next generation facilities like AWS or 3G overbuilds are concerned, all carriers are on an equal footing. TELUS has indicated it will begin to overbuild its CDMA network in the next couple of years. This will require a major investment in infrastructure. In addition to paying a higher bid price for AWS spectrum than would be the case but for government intervention, TELUS must actually invest more than new entrants.

TELUS submits that in order to encourage the construction of NGNs, no carrier, including new entrants, should be required to share any new facilities or investment in infrastructure, including AWS. To require such sharing reduces the incentive to build NGNs. Since CDMA roaming will be available nationally, there is no reason to discourage investment by rules that mandate sharing of new investment.

Moreover, prices for access to new facilities cannot be established simply by examining agreements that were premised on incremental costs of existing facilities. TELUS does not consider that any arbitrator can determine a fair price for investments that have not made any return on capital. In fact, the only way a carrier can be assured a reasonable return on capital in such a situation is to require that a new entrant actually share in the capital costs on a fully allocated or shared basis. That is not roaming.

(c) Reciprocity

Some parties are suggesting that arbitrators should not take into account the concept of reciprocity in determining an appropriate commercial rate. TELUS strongly disagrees. In arriving at similar commercial rates under similar circumstances for roaming, reciprocity must be a determinative factor. For example, Bell and TELUS have agreements based on reciprocity for roaming. Rates were developed and reflect what each carrier brings to the table in terms of requirements to build in comparable urban locations, number of corridors served and other factors. Each party offers the other hundreds of millions of minutes of traffic based on mutual commitments to spend hundreds of millions of dollars to construct facilities that can be shared. It would be unjust to establish a principle that parties that contribute no equity to a commercial arrangement should receive the same arrangement as parties that contribute hundreds of millions of dollars simply because the requesting party would find that arrangement more convenient and less costly. We respectfully request that the Department ensure that the principle of reciprocity is incorporated in any final conditions of licence relating to roaming.

Tower and site sharing

(a) Future use

Some parties have expressed concern that incumbents might reserve too much capacity on towers for future use, leaving too little space available for others to lease. TELUS notes that reservations for future use are not speculative. It is obvious to any follower of the wireless industry that incumbents will face real and substantive demands for future capacity. TELUS has an interest in AWS, spectrum at 2.5 and 2.6 GHz for fixed and mobile applications, 700 MHz as well as more capacity to overbuild the CDMA network. Further, TELUS presently makes extensive use and plans to continue to deploy microwave to facilitate backhaul throughout our networks requiring space to be available on our towers. None of these interests are merely speculative. The Department has already signaled an auction for AWS and imminent consultations on the other bands cited above.

Prospective new entrants must also not lose sight of the extent of intervention contemplated in this consultation. First, this is a proceeding to enable commercial negotiations. Unfortunately, what is being proposed is a prescription for detailed regulation. Second, the Minister has no power to expropriate the property right we hold in towers and sites. Any carrier that owns a tower or site has the right to use that tower or site for its own purposes and requirements before considering any request from third parties. This fundamental property right cannot be expropriated by licence conditions.

(b) Managing unreasonable demands

Shaw and other parties suggest that tower access is somehow a pro-forma exercise. As noted by the Canadian Association of Broadcasters and other incumbent tower owners, that is far from the case. TELUS has no electronic repository of information where a site request can be quickly analyzed and disposed of. As any carrier can assert, the actual process behind an engineering tower assessment is complex and resource intensive. TELUS understands that in the US where independent tower companies are prevalent, that a typical co-locate application request normally can be acknowledged within one month of receipt. However, the timeframe for securing final approval for a site from, can range anywhere from 3 months (where there may be minor issues in terms of paperwork or lease issues) to 6 months (in the event of major issues having to be negotiated and discussed between a tower owner and co-location applicant). Given the above information, it is suggested that Industry Canada take into consideration the US experience in choosing a realistic timeframe before a request goes to arbitration.

Simplistic ideas that an assessment can be done in 10 days or less ignores reality, particularly in situations where there may be hundreds of requests on the table. TELUS does not consider this to be an exaggeration. In fact, within days of the Decision, TELUS already had one request for scores of sites. TELUS is concerned that the Department's Decision may have created a "gold rush" mentality, whereby carriers and potential carriers will try to bank as many sites, as quickly as possible under the first come, first served regime they propose. That type of scenario will quickly bog down any chance of a reasonable response time by current estimates. To prevent this process from becoming unmanageable, TELUS submits the best remedy is: first, to demand an adequate deposit before any assessment is made; second, to consider best-offer bids in lieu of first-come first-served bids if demand exceeds supply; and, third, to require all payment on an up front basis.

(c) Disclosure of information

Some parties argue that TELUS should be required to provide very detailed technical information about individual cell site readiness in as little as 10 days after a request. This is wholly unrealistic. Unless and until a prospective carrier provides a detailed proposal in writing, there is nothing to which to respond. More troubling is a complete lack of understanding of the time and resources to do a site assessment and the problems of handling multiple requests for site/tower access.

Look Communications has recommended that all carriers provide detailed site plans on a public Industry Canada web site that can be accessed by carriers. TELUS submits that the costs and resources of inputting to and managing such a site would be material, requiring thousands of preliminary assessments for sites, including a significant number that may never be subject to a request to share. TELUS also

notes that this type of disclosure raises competitively sensitive information and serious concerns about network security. Posting detailed site descriptions and locations gives away too much competitively sensitive information for no justifiable reason.

TELUS submits that the concept behind tower and site sharing is to remove barriers to entry where they arise. Site sharing policies were not intended to require owners to put all their wares on display like some bazaar for competitors to browse through. Rather, where barriers to network builds occur, carriers can seek specific assistance from tower/site owners to remedy those challenges. The onus remains on the party seeking access to do so as the need arises as commonly occurs in the market today.

(d) Priority for new entrants

It has been suggested that new entrants should have priority over incumbents when it comes to tower and site sharing. Some go so far as to suggest blocking incumbents from these arrangements. TELUS disagrees for several reasons. First, for the foreseeable future, incumbents will continue to have greater demand for towers and sites than entrants simply because they serve a much larger geographic area and number of subscribers, who depend on the incumbents for continued expansion of capacity. Second, some incumbents are also considered new entrants for the purposes of AWS. Third, the tower sharing policy was designed with all radio carriers in mind, including broadcasters, public safety and electric utilities, not one type of commercial radio common carrier.

Arbitration

Some parties propose a regulated “quasi-tariff” system of arbitration contrary to the government’s policy of maximum reliance on market forces. Further, these parties have set unrealistic rules and time limits for arbitration, which will undercut commercial negotiations. Ultimately, these proposals will result in an unworkable process, uncertainty and protracted delays.

TELUS will reply on the key points of who should be the arbitrator, interim access rules, and the rules for arbitration. TELUS will not address the more radical measures, such as the imposition of a most favoured nations clause to bypass negotiations, a moratorium on ongoing commercial agreements in the industry by incumbents and an explicit “me first” policy favouring entrants. These measures are obviously beyond the scope of the Consultation and fly in the face of the principles adopted in the final terms of the Decision.

(a) Who should be the arbitrator?

Instead of a private arbitrator, several parties propose that the CRTC should be the arbitrator for roaming and tower access disputes. Look Communications would nominate the CRTC as arbitrator and says the CRTC should establish and administer tariff rates applicable to roaming and tower access.¹ Primus likewise argues that the arbitrator should be the CRTC and rates should "be governed by a tariff approved by the CRTC."² Primus hopes that the CRTC would use its Phase II costing method. Shaw proposes the CRTC as arbitrator, since it is willing to so act. However, most parties, including MTS Allstream, QMI and all of the 800/PCS licensees prefer private arbitration.

TELUS did not understand this Consultation to be focused on re-regulation of rates, such that the forbearance orders issued by the CRTC would be rolled back and a heavy-handed model of tariff regulation imposed on the wireless industry. Nowhere in the Decision or the Consultation is it suggested that the forbearance orders issued by the CRTC could be overturned. Indeed, the arbitration process was intended to be consistent with the settlement of commercial disputes, not regulated disputes, according to the Decision.³

The CRTC says that it is familiar with the wireless industry and would be able to arbitrate, pursuant to conditions of licence, without the need for the same learning curve that another arbitrator would face.⁴ However, as other parties have noted, commercial arbitrators can be chosen based on experience, and even a roster of experienced arbitrators is possible. Further, the CRTC's experience with regard to the wireless industry is not particularly up to date since it has not actively regulated wireless carriers for more than a decade, as a result of a series of forbearance orders culminating in *Regulation of Mobile Wireless Services*, Telecom Decision 96-14, December 23, 1996, and has never regulated access to wireless facilities." In fact, the CRTC's institutional bias is to regulate wireline carriers under tariffs set at notional costs, not commercial rates.

The CRTC invokes the recommendations of the Telecommunications Policy Review Panel.⁵ However, Recommendation 9-21 of the Telecom Panel states that the *Telecommunications Act* should be amended to ensure that the CRTC has the power to mandate alternative dispute resolution both by the CRTC itself and on an outsourced basis in appropriate cases.⁶ In the absence of legislative amendments, it is questionable whether the CRTC's offer to take on arbitration duties for Industry Canada is even lawful.

¹ Look Comments, page 8 and 15.

² Primus Comments, paragraphs 2 and 23.

³ Decision, page 8.

⁴ CRTC Comments, paragraph 5.

⁵ CRTC Comments, paragraph 8.

⁶ Telecommunications Policy Review Panel Final Report 2006, page 9-43.

It is true, as the CRTC observes, that the Telecom Panel recommended that the CRTC be asked to assume management and regulatory functions relating to spectrum.⁷ However, the transfer of spectrum management and regulatory functions to the CRTC requires amendments to the *Radiocommunication Act*, and likely other legislation as well.⁸ Creating a “half-way house”, where the CRTC performs an arbitration function also creates a scenario where the wireless industry is regulated by two bodies. This is contrary to the delineation of authority over spectrum under Canada’s laws. Further, it is not efficient to introduce two levels of bureaucracy having powers over wireless carriers.

Further, the CRTC’s opinion that it would not use any of its statutory powers under the *Telecommunications Act* is open to serious challenge.⁹ The CRTC’s constating statute, the *Canadian Radio-television and Telecommunications Commission Act* expressly states in section 12(2) that the members of the Commission *shall* exercise the powers and duties invested in the Commission by the *Telecommunications Act*. There does not appear to be any scope for the CRTC to turn its back on its statutory mandate under the *Telecommunications Act* and assume the role of a private arbitrator at the behest of Industry Canada.

In fact, in supporting the CRTC as arbitrator, Look and Primus clearly expect the CRTC to exercise this mandate using all of its rate-setting powers under the Act, including the ability to compel parties to assemble and disclose detailed costing information.

The CRTC’s eagerness to “step up to the plate” and undertake additional duties outside its statutory sphere is not of assistance in facilitating a commercial process. Use of a statutory entity to act as a surrogate for commercial dispute resolution is flawed. The CRTC has a mandatory duty to exercise its powers and perform its duties with a view to implementing the Canadian telecommunications policy objectives and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with Section 27 of the Act.¹⁰ The CRTC’s multiple objectives and the formality of its processes¹¹ run contrary to efficient regulation and the timely resolution of commercial disputes.

(b) Interim access

ADR Canada has proposed that the Department should give “serious consideration to separating the issue of how much compensation to be paid from the issue of the actual construction and implementation of the sharing.”¹² ADR Canada proposes that sharing should be allowed at interim rates, whether or not

⁷ Telecommunications Policy Review Panel Final Report 2006, page 5-26, Recommendation 5-10.

⁸ *Ibid*, page 5-27.

⁹ CRTC Comments, paragraph 10.

¹⁰ *Telecommunications Act*, Section 47.

¹¹ Telecommunications Policy Review Panel Final Report 2006, page 9-42.

¹² ADR Canada Submission, page 2.

the compensation is agreed to as long as either party has the right to commence the arbitration process. While TELUS has serious concern with an organization involved in dispute resolution trying to determine matters *ex-ante*, we have submitted comments on the substance of this matter irrespective of this concern.

In principle, TELUS does not object to allowing access on the terms similar to those proposed by ADR Canada, so long as the access does not give rise to legitimate issues of technical feasibility and TELUS is not exposed to stranded costs.¹³ TELUS would support the assistance of Industry Canada in resolving matters of technical feasibility, failing which the matter would be determined by arbitration *before* access is mandated. Assuming reasonable conduct, it is anticipated that most disputes would center on commercial terms and conditions and could be accommodated in accordance with ADR Canada's proposal to allow interim access on interim rates, with a final rate to be determined by arbitration. Any such interim arrangement would need to be based on a reasonable interim rate and normal commercial terms, which protect the Licensee from liability for claims, other than gross negligence or wilful misconduct, and access being provided on a reasonable efforts basis. Further, the party seeking interim access must pay up-front and in full all engineering, procurement and construction costs caused by the request in the form of a deposit. If interim access is permitted, it should not be open to the party getting access to walk away from costs it has caused.

(c) Rules and timelines

ADR Canada notes that:

"An arbitration process, poorly designed, can result in protracted proceedings including court challenges."¹⁴

TELUS further notes that a poorly designed arbitration process – one which encourages a rush to the arbitrator – will harm the policy objective of reliance on market forces and doom commercial negotiations to failure. Rather than imposing a prescriptive and poorly designed arbitration process with unrealistic timelines, a more reasonable approach is to put licensees on notice that the Department expects interim access to be provided where technically feasible such that the commercial issues can be dealt with through negotiations, and if absolutely necessary, through a reasonable arbitration process.

TELUS notes that MTS Allstream has chosen to draft detailed arbitration rules, which feature unrealistic timelines and provisions which favour moving quickly to arbitration for tactical advantage. The

¹³ Costs and practicality, contracts with third parties, duties and obligations owed to other stakeholders and local governments and reasonable reservations of capacity to meet the licensee's anticipate future service requirements.

¹⁴ ADR Canada Comments, page 1.

Consultation did not seek to establish detailed arbitration rules. MTS Allstream's rules should be rejected. Hastily drawn up rules, which encourage arbitration instead of negotiations and impose unrealistic timelines on that arbitration will not assist anybody. To use the words of ADR Canada, this kind of poorly designed arbitration process will result in "protracted proceedings including court challenges."

TELUS further wishes to respond to particular modifications proposed by parties, as detailed below.

- Final Offer Arbitration – MTS Allstream and others appear to support Final Offer Arbitration ("FOA") in order to encourage parties to be reasonable in their negotiations. However, MTS Allstream has been unable to resist the temptation to seek tactical advantage. MTS Allstream gives the claimant the right to deliver a final offer, with only 10 days given to the respondent to respond and then allowing the claimant the opportunity to reply.¹⁵ This form of FOA does not encourage commercial negotiations. It is of tremendous tactical advantage to be the "first mover" in filing a complaint to the arbitrator. The time period to respond (10 days) is not workable, especially when coupled with the requirement for a list of relevant documents. This "trial by ambush" approach is particularly unsettling given the prospect that TELUS could face multiple requests by different parties simultaneously and the potential complexity of arbitrations involving roaming relationships. TELUS is open to FOA as a last alternative to negotiations on certain matters, but would never support FOA under the terms MTS and others suggest.
- In light of the multifaceted issues like reciprocity and volume discounts that could arise in connection with roaming arrangements, and the likelihood that simple binary choices may not give the arbitrators sufficient means to reach a determination that is based on commercial realities, TELUS would accept FOA being limited to tower access as the default option. In the case of roaming, the matters in dispute would be determined by the arbitrators based on the Terms of Reference discussed below and FOA would only be used if directed by the arbitrators on the grounds that the remaining issues not agreed upon would permit the final offer process.
- TELUS continues to support, as set out in its proposed conditions of licence, longer timeframes that are both realistic and encourage real negotiations such that arbitration would be the exception rather than the rule. If arbitration is needed as a last resort, arbitration would be limited to all remaining matters at issue between the parties (i.e., price, terms and conditions and any other issues that were not agreed to in negotiations).

¹⁵ MTS Allstream Submission, Schedule "A", Item 24 "Term Sheets".

- Terms of reference – A climate of efficient commercial negotiations can only co-exist with a clear statement that the arbitrators will base their decision on commercial terms for similar arrangements negotiated at arms length in the Canadian market. The arbitrators also must have regard for the fundamental principle of maximum reliance on market forces. Otherwise, there will be a disconnect between the ruling of particular arbitrators and the results of normal commercial negotiations. This will impair the ability of parties to negotiate reasonable agreements because there will be a discount between the market and what an arbitrator might award. MTS Allstream provides terms of reference to achieve a “just, speedy and cost effective determination of the terms of Roaming of Site-hearing Agreement.”¹⁶ This purpose is at odds with the Department’s objective to encourage a commercial resolution of these arrangements. There is no reference to commercial terms for similar arrangements in the Canadian market, no consideration of whether the parties could use other feasible arrangements and no consideration for reasonable reservations of capacity. The focus on “just, speedy and cost effective determination” invites a regime of rough justice, where costs are lowered to benefit entrants without regard for true commercial arrangements. TELUS requests that the Department reject these proposals in order to ensure a more reasonable period to negotiate. Otherwise, all requests will automatically default to arbitration and that process will break down.
- Timelines – The timelines proposed by some of the parties, most notably MTS Allstream and Shaw, are individually extremely aggressive and entirely unworkable in aggregate. For example, Shaw proposes the oral hearing be convened less than 30 days after the start date with as little as 5 days notice of an oral hearing and a decision written within two weeks of the close of the arbitration.¹⁷ TELUS suggests that Industry Canada need only track the record of timing with respect to the provisioning of Shaw’s Third Party Internet Access Service to understand how complex this type of process can be and how self-serving and unrealistic its proposals are. MTS Allstream’s timelines are also extremely tight, with as little as four days written notice for hearing dates, 10 days to agree to an arbitrator and a short 30 day window for disclosure of documents.¹⁸ MTS Allstream requires an accelerated timetable for the completion of preliminary matters (not to exceed 60 days) and forces the tribunal to deliver the award and reasons within 10 days of completion of the hearing.¹⁹ TELUS would ask the Department to step back and ask itself whether it is feasible for a cadre of arbitrators, experts and lawyers to stand ready, all across Canada, to drop everything else they are doing and meet even one arbitration’s timeline. Moreover, since it takes 12 to 18 months to actually get a network launched and since roaming and tower/site sharing are mandatory, TELUS does not understand the need for haste. On the

¹⁶ MTS Allstream Submission, Schedule “A”, Item 1, “Application and Purpose”.

¹⁷ Shaw Submission, Appendix “B” “Arbitration Rules”.

¹⁸ MTS Allstream Submission, Schedule “A”, Items 27, 11, 24.

¹⁹ MTS Allstream Submission, Schedule “A”, Item 40.

other hand, the risk of failure to meet these timelines is magnified by the prospect of a multiplicity of proceedings, a prospect made more likely if the arbitration rules discourage commercial negotiations. The inevitable results of failure to meet unrealistic deadlines are judicial proceedings. Aggressive rules create a serious risk that the entire arbitration proceeding could be a nullity. This risk can be avoided by allowing more reasonable timelines for real negotiations, as proposed in TELUS' initial submission and supplemented by interim access if necessary.

- Number of Arbitrators and Qualifications – TELUS continues to believe that three arbitrators will afford a better decision-making process and does not support Industry Canada determining who arbitrates *ex ante*. The submission by ADR Canada, on an interim process, demonstrates that even the best intentioned of arbitrators may bring an unintentional bias to the table. Having a panel of three gives comfort to all parties to a dispute. It would also help if one of the three had legal training. However, it is not necessary that all three be lawyers or former judges, and arbitrations could benefit from other perspectives as well. TELUS believes that a single arbitrator might not be positioned to resolve issues in a manner that conforms to parties' expectations; however scope could be given to the use of a single arbitrator if agreed to by the parties to a particular dispute. MTS Allstream sets out a code for arbitrators' qualifications in two, potentially contradictory, parts of its rules.²⁰ TELUS notes that impartiality is a requirement under Provincial legislation and need not be stipulated in a confusing and contradictory manner. In respect of the proposal of some parties, including QMI, that a roster of arbitrators qualified for disputes be prepared by ADR Canada²¹. TELUS agrees that a non-exhaustive roster could be of assistance to the parties. However, TELUS believes it would not be appropriate for ADR Canada or Industry Canada to unilaterally prepare a roster of arbitrators. Industry Canada has no particular expertise in arbitration. Selection of arbitrators could quickly cross the line into a form of direct regulation, contrary to the legislative framework. ADR Canada has no ability to evaluate technical expertise and, by entering the fray in this consultation, appears to have signalled its predisposition on certain matters, such that an apprehension of bias has been created. Any roster should be developed by consensus of affected parties. In the meantime, each party may select an arbitrator and the two arbitrators will select a third.
- Confidentiality and Information – Most parties accept the need for confidentiality of the arbitration process, with only those few parties (the same parties who favour the CRTC acting as arbitrator and imposing tariffs) seeking to eliminate confidentiality. QMI expressly endorses the need for confidentiality of "highly sensitive and confidential" roaming rates in the market and notes that there should be (confidential) disclosure of the roaming rates that the particular Licensee charges

²⁰ MTS Allstream Submission, Schedule "A", Items 12 and 14.

²¹ QMI Submission, page 14.

for others for similar services for the purposes of arbitrations.²² TELUS does not object to providing its own commercial information under strict conditions of confidentiality for the purposes of arbitration, provided that the disclosure obligation is reciprocal. TELUS does not agree with MTS Allstream's proposal that the arbitrator could compel the production of third party agreements.²³ The confidentiality of private arrangements of carriers should not be placed at risk by broad disclosure orders. Only the agreements entered into by the actual parties could be compelled at the arbitration.

- Appeals – QMI suggests that the normal right of appeal should be excluded in the interest of speed efficiency and finality.²⁴ MTS Allstream makes a similar proposal.²⁵ Arbitration statutes generally do not truncate the right to appeal to the courts on questions of law. The courts perform a valuable supervisory role over commercial arbitrations on questions of law. There does not appear to be any compelling reason to exclude the right of either party to seek access to the courts to correct errors of law. Again, the ability to allow interim access in cases where there is no dispute over technical feasibility would afford a normal commercial arbitration process, including the usual rights of appeal on questions of law.

Conclusion

TELUS submits that the Department should not be swayed by arguments intended to impose unwarranted and inefficient regulation on an industry deemed competitive by all sectors of government that have jurisdiction over its undertakings. In order to truly reflect the plain meaning of the Minister's decision:

- Roaming on advanced services should not be mandated in order to allow carriers to invest in innovation and to differentiate services to the benefit of consumers.
- The distinction between resale and roaming must not be blurred.
- Resale and unbundling must remain outside the scope of this proceeding.
- Regulation should not replace negotiations under "commercial terms."

²² QMI Submission, page 15.

²³ MTS Allstream Submission, Schedule "A", Item 26(b).

²⁴ QMI Submission, page 14.

²⁵ MTS Allstream Submission, Schedule "A", Item 38.

- There must be sufficient time to ensure that commercial negotiations are the end game and not merely a fast track to binding arbitration.
- Rates should be based on similar arrangements under similar circumstances to reflect value provided through reciprocal contributions or other normal pricing arrangements like volume discounts.
- Unless agreed upon by parties, there should be a panel of three to arbitrate to avoid potential biases.
- Parties seeking tower access, site sharing or roaming must be prepared to pay the initial costs up front and the full costs on an ongoing basis.

Finally and most importantly, new entrants must be incented to construct radio access networks as the *quid pro quo* for set asides. Incumbents have suffered significant damage in the market by this decision. The rationale for this intervention was to increase competition and its associated benefits by encouraging the construction of innovative new facilities. The set aside and mandatory access requirements were imposed to give new entrants the opportunity to deliver on what they promised they would do. It's now time for them to live up to their promises. TELUS and other incumbents have already paid in full.