

## Gazette Notice DGRB-010-07

### *Consultation on Proposed Conditions of Licence to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements*

#### **Submission by TeraGo Networks Inc.**

##### ***A. Introduction***

1. TeraGo Networks Inc. (“TeraGo”) welcomes the opportunity to make this submission in response to Industry Canada’s invitation in Gazette Notice DGRB-010-07 (the “Notice”). Capitalized terms used herein but not otherwise defined shall have the meanings ascribed thereto in the Notice.
2. TeraGo supports the initiative to establish conditions of licence that mandate sharing of Sites among Licensees. However, we recommend that certain changes be made to more carefully define the scope and utility of the Site-sharing requirement. We explain our position in the following paragraphs and have attached as Schedule A proposed wording for revised conditions that incorporate our recommendations, plus some minor wording changes to improve clarity.

##### ***B. Technical Feasibility***

3. Sections 2 and 3 of the proposed licence conditions for mandatory Site-sharing make it clear that Site-sharing will only apply where “technically feasible”. The phrase “technically feasible” is not defined in the Notice nor in the Client Procedures Circular (CPC-2-0-03) *Radiocommunication and Broadcasting Antenna Systems*. This lack of definition may become an area of controversy among Operators and Licensees. Accordingly, we submit that there should be mechanisms to help guide parties on relevant factors for determining technical feasibility and how to resolve any disputes in interpreting this phrase.
4. We recommend that the licence conditions state that Site-sharing will be considered to be not technically feasible where, despite reasonable safeguarding measures, including efforts by the requesting Operator to rectify any of the following at its own cost, the sharing:

- (a) interferes with, impairs or creates an unreasonable risk of interference with or impairment of, the operation of the other party's network or infrastructure or communication services;
  - (b) causes damage, or an unreasonable risk of damage, to the other party's network or infrastructure;
  - (c) creates a hazard to the health or safety of any person; or
  - (d) poses a risk to the integrity of the structure on which the Site is located.
5. The licence conditions should set out a clear mechanism for resolving disputes regarding technical feasibility. It is unclear from the proposed wording if these disputes will be resolved by Industry Canada, as is contemplated for some disputes in CPC-2-0-03, or by an arbitrator as contemplated in Section 4 of the proposed licence conditions. We believe that either mechanism can work. If, as we suspect, Industry Canada intends that the arbitration process apply, this should be articulated in Section 4. We have included such language in our proposed revised conditions attached hereto.

***C. Improving the Incentive to Negotiate in Good Faith***

6. Incumbent Licensees may resist Site-sharing. Resistance can be undertaken in a number of ways, including delaying the arbitration process as long as possible, whether by lack of cooperation or appeals of dubious merit.
7. If Licensees have too much scope in delaying Site-sharing and increasing the costs incurred by applicants, it will diminish the incentive for Licensees to negotiate in good faith. As such, the objectives of the Site-sharing policy will be undermined, and the benefits from Site-sharing may be lost altogether.
8. Accordingly, the conditions should include measures that negate the incentive to engage in obstructionist conduct and, by the same token, to improve the incentive to negotiate in good faith. We, therefore, submit that the negotiation period before a dispute can be submitted to arbitration should be reduced from 90 to 60 days. A 60-day period is ample time for negotiations to take place and the issues in dispute to be identified.

**D. *Affiliate Relations***

9. The proposed licence conditions apply to a Licensee. As such, the proposed conditions leave open the possibility that a Licensee might transfer Site-related assets to an affiliated entity, and thereby escape the obligations of the licence conditions. To remedy this situation, the licence conditions should require a Licensee to cause its affiliates to comply with the same obligations that are imposed on the Licensee.
10. Both Industry Canada and the CRTC have imposed affiliate rules in the past. The motivation is to ensure full compliance with regulatory obligations. Imposing such a requirement in respect of Site-sharing does not break any new ground.

**E. *Conclusion***

11. Industry Canada has for many years urged Licensees to share their Sites. Despite this, some Licensees have engaged in conduct, such as exclusive Site usage deals, that restricts Site-sharing. With this Notice, together with Gazette Notice DGTP-007-07 – *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, Industry Canada has moved to a position of mandating Site-sharing. As such, Industry Canada should ensure that the rules are as effective and as clear as possible. It is with this objective in mind that TeraGo proposes a number of amendments to the proposed Site-sharing licence conditions.

*January 22, 2008*

## SCHEDULE A

### *Revised Site-Sharing Licence Conditions (with revisions underlined)*

1. Licensees must facilitate sharing of antenna sites, including rooftops and supporting structures ("Site(s)"), and not cause or contribute to the exclusion of other radiocommunication antenna operators ("Operator(s)") from gaining access to Sites. Without limiting the generality of the foregoing, where a Licensee is party to an agreement that includes a provision excluding any other Operators from the use of a Site and/or the right to maintain communication equipment on the premises, then, in order to facilitate the sharing of Sites, the Licensee must consent to waiving that portion of the agreement to facilitate a request to share. Further, Licensees must not enter into or renew agreements that exclude other Operators from using a Site.
  
2. Licensees must share their Sites except where not technically feasible, where national security concerns exist or the Site is used solely for personal enjoyment. Sharing will be considered to be not technically feasible where, despite reasonable safeguarding measures, including efforts by the requesting Operator to rectify any of the following at its own cost, the sharing:
  - (a) interferes with, impairs or creates an unreasonable risk of interference with or impairment of, the operation of the Licensee's network or infrastructure or communication services;
  - (b) causes damage, or an unreasonable risk of damage, to the Licensee's network or infrastructure;
  - (c) creates a hazard to the health or safety of any person; or
  - (d) poses a risk to the integrity of the Site.
  
3. In order to fulfill the condition of sharing in accordance with this licence, the Licensee must respond to a request to share by any other Operator within 30 days as follows:
  - (a) In the event that the request to share is technically feasible, the Licensee must provide the requesting Operator with a response and an offer to enter into a sharing agreement. The department expects that Site-sharing arrangements would be offered

at commercial rates that are reasonably comparable to rates currently charged to others for similar access.

- (b) In the event that the request to share is not technically feasible, the Licensee must provide the requesting Operator with a response detailing the reasons why it is not feasible (accompanied by any applicable technical information) in accordance with CPC-2-0-03.
4. Site-sharing arrangements will be negotiated expeditiously and in good faith. If after 60 days from the initial request, the Licensee and the Operator requesting a Site-sharing arrangement cannot agree to the terms of the arrangement, the Licensee must agree to submit the matter to an arbitrator as agreed upon by the parties in accordance with the provisions of the provincial arbitration legislation applicable to the greatest number of Sites involved in the arbitration. The Licensee agrees that the arbitrator shall have all necessary powers to determine all of the questions in dispute (including those relating to technical feasibility and to determining the appropriate terms of the Site-sharing arrangement and those relating to procedural matters under the arbitration) and that any arbitration under this section shall be legally binding. The Licensee must participate fully in such an arbitration and follow all directions of the arbitrator in accordance with any arbitration agreement or with the applicable legislation. At any time, the Licensee and the Operator requesting antenna tower and Site-sharing may agree to specific terms with regard to submitting their dispute to an arbitrator and may withdraw their arbitration, on agreed terms, so long as they agree to a Site-sharing arrangement.
5. The Licensee shall cause its Affiliates to comply with these conditions in like manner as the Licensee. The term "Affiliate" shall have the same meaning as that set out in section 5.3.1 of Gazette Notice DGRB-011-07 – *Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range* dated December 22, 2007.