

**Canada Gazette Notice No. DGSO-002-12**

***Consultation on a Licensing Framework for Mobile Broadband  
Services (MBS) – 700 MHz Band***

**Reply Comments of**

**Data & Audio-Visual Enterprises Wireless Inc., *dba* Mobilicity**



**25 July 2012**

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## I. INTRODUCTION

1. Data & Audio-Visual Enterprises Wireless Inc., doing business as Mobilicity (“Mobilicity”) provides herein its reply comments in the Department’s *Consultation on a Licensing Framework for Mobile Broadband Services (MBS) – 700 MHz Band*<sup>1</sup> (hereinafter the “700 MHz Licensing Consultation”).
2. While Mobilicity generally supports the Department’s Licensing Framework for the auction of 700 MHz spectrum, it has proposed a number of specific recommendations to (i) strengthen auction integrity and (ii) to promote increased competition in both urban and rural mobile wireless markets.
3. Having reviewed the initial comments of other parties, Mobilicity focuses on five discrete areas in these Reply Comments:
  - (a) Needed strengthening of the rules regarding the participation of Associated Entities, including clarification of the anti-collusion rules as applied to Affiliates and Associated Entities;
  - (b) Inclusion of the paired A and unpaired D and E blocks in the general two-block and large wireless carriers’ one-block caps;
  - (c) Limiting the supplementary round to bidding on unallocated licences (licences that were not won during the clock rounds);
  - (d) Permitting new entrants to pay winning bid amounts in instalments over a five-year period; and
  - (e) As an additional measure to promote competition, rural build-out, and efficient use of facilities, imposition of a licence condition requiring licensees with HSPA

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<sup>1</sup> Canada Gazette Notice No. DGSO-002-12 (April 2012).

footprints to provide mandated wholesale access to a requesting licensee with an HSPA footprint.

4. For convenience, a consolidation of Mobilicity's proposed amendments to the specific proposals in the Department's *700 MHz Licensing Framework* is set out at Appendix "A" hereto.

## II. SPECTRUM AGGREGATION LIMITS

5. The only pro-competitive measure adopted by the Minister in relation to the 700 MHz spectrum is the dual-cap of two paired blocks for all bidders (and licensees) and a single block of "prime" spectrum for large wireless providers:

**Decision B3-1:** A spectrum cap of two paired frequency blocks in the 700 MHz band (blocks A, B, C, C1 and C2) is applicable to all licensees;

**Decision B3-2:** A spectrum cap of one paired spectrum block within blocks B, C, C1 and C2 is applicable to all large wireless service providers. Large wireless service providers are defined as companies with 10% or more of the national wireless subscriber market share, or 20% or more of the wireless subscriber market share in the province of the relevant licence area.

**Decision B3-3:** The spectrum caps put in place for the 700 MHz auction will continue to be in place for five years following licence issuance. Therefore, no transfer of licences or issuance of new licences will be authorized if it allows a licensee to exceed the spectrum cap during this period.<sup>2</sup>

6. In other jurisdictions, regulatory authorities have instituted a number of pro-competitive measures. For example, in the United Kingdom, Ofcom instituted a range of interlocking measures to promote mobile competition, including:

- (a) Safeguard caps as follows:
  - (i) An overall spectrum cap of 2 x 105 MHz; and
  - (ii) A sub-1 GHz spectrum cap of 2 x 27.5 MHz;

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<sup>2</sup> *700 MHz and 2500 MHz Policy and Technical Framework*, Notice no. SMSE-002-12 (March 2012)(hereinafter *700 MHz Policy Framework*).

- (b) Set-aside or “reservation” for a fourth national wholesaler of at least one of four specific “Portfolios” of spectrum, ranging in size from 2 x 15 MHz to 2 x15 MHz plus 2 x 20 MHz;<sup>3</sup>
  - (c) Auction rules prohibiting any of the incumbent operators from bidding jointly;<sup>4</sup>
  - (d) Inclusion of a 98% by population geographic coverage obligation on only one of the 2 x 10 MHz 800 MHz licences; and
  - (e) A “wholesale access” obligation on all licensees, save for the holder of the aforementioned 2 x 10 MHz block of 800 MHz spectrum that has the 98 % coverage obligation.
7. Ofcom undertook these measures in order to ensure that there are **four** viable “wholesale competitors” in the United Kingdom. A key underpinning Ofcom’s analysis were the current spectrum positions of the incumbents (Everything Everywhere, Telefonica and Vodafone) on the one hand and Hutchinson 3G UK (H3G) on the other:

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<sup>3</sup> Ofcom, *Assessment of future mobile competition and award of 800 MHz and 2.6 GHz*, 24 July 2012, Figure 4.11 <online: <http://stakeholders.ofcom.org.uk/binaries/consultations/award-800mhz/statement/statement.pdf>> (hereinafter “Ofcom , 24 July 2012 Statement”).

<sup>4</sup> Ofcom, 24 July 2012 Statement, footnote 102.

**Licensing Position in the UK 900 MHz, 1800 MHz and 2.1 GHz Bands**

		<b>Everything Everywhere (T-Mobile and Orange)</b>	<b>Telefónica</b>	<b>Vodafone</b>	<b>H3G</b>
900 MHz Paired	-		2x17.4	2x17.4	-
1800 MHz Paired	2x60*		2x5.8	2x5.8	-
2.1 GHz Paired	2x20		2x10	2x15	2x15
2.1 GHz Unpaired	1x10		1x5	-	1x5
<b>Total</b>	<b>170</b>		<b>71.4</b>	<b>76.4</b>	<b>35</b>

8. Ofcom observed that

4.17 The present market is already highly concentrated according to standard classifications, and a consolidation from four national wholesalers to three would represent a significant increase in concentration. Further, there are high barriers to entry in national wholesale mobile services, including infrastructure costs and the limited availability of spectrum.

9. Having assessed the risk of not obtaining a fourth national wholesaler, due to either lower intrinsic value of 700 MHz spectrum to a new entrant or strategic investment value of 700 MHz spectrum to incumbents, Ofcom instituted the pro-competitive measures summarised above.

10. The only pro-competitive measure that the Department proposes to adopt in its Licensing Frameworks is the single block restriction imposed on “large wireless carriers”. And yet, in comparative terms, Canadian incumbent providers have at least the equivalent in spectrum holdings to the holdings observed in the U.K.:

**Licensing position in the Canadian 850 MHz, 1900 MHz and 2.5 GHz bands<sup>5</sup>**

	<b>Rogers</b>	<b>Bell</b>	<b>TELUS</b>	<b>Mobilicity</b>	<b>Total</b>
850 MHz	25	25	25	-	75
1900 MHz	40	20-30	20-30	-	90
2.5 GHz	40	40	-	-	80
AWS	20	20	20	10	70
Total	125	110	70	10	315

11. The spectrum holdings of the Canadian mobile wireless incumbents are comparable, and in certain respects are more advantageous than those of the UK incumbents. Rogers, the largest Canadian national wireless provider, unlike Everything Everywhere, already holds 25 MHz of sub 1 GHz spectrum; the second largest Canadian wireless provider (Bell) holds a nearly equivalent amount of spectrum; and the second and the third largest Canadian wireless providers (Bell and TELUS) have entered into successive forms of spectrum sharing/preferential facilities and roaming arrangements.
  
12. In the circumstances, as submitted in Mobilicity's Initial Comments and restated above, it remains critically important that the Department bolster its 700 MHz Licensing Framework by:
  - (a) Preventing large wireless carriers from circumventing the spectrum cap by bidding separately in the auction or otherwise coordinating their bidding activities in order to circumvent the single-block spectrum cap applicable to large wireless carriers;
  
  - (b) Including the paired "A" and unpaired "D" and "E" blocks in the large wireless providers' single-block cap; and

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<sup>5</sup> See also TELUS, Comments on SMSE-018-10, Appendix 1 – Key Canadian Spectrum Facts, Table 5 – Detailed Commercial Mobile Spectrum Holdings at 62, < [http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/smse-018-10-telus-submission.pdf/\\$FILE/smse-018-10-telus-submission.pdf](http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/smse-018-10-telus-submission.pdf/$FILE/smse-018-10-telus-submission.pdf) >

- (c) Further promoting competition at the national and regional levels and in both urban and rural areas, by requiring licensees with HSPA footprints to provide mandated wholesale access services to any other requesting licensee with an HSPA footprint.

**A. Participation Rules for Associated Entities**

13. In its Initial Comments, Mobilicity requested the following four modifications to the Department's proposed bidder participation framework:

- (a) strengthen and clarify the meaning of the term "Associated Entities;"
- (b) strengthen its current policies with respect to the participation of Associated Entities, such that Associated Entities may not participate in the auction separately and deem those that will not be **competing in the auction** (as opposed to entities that may "compete in the retail market") as Associated Entities;
- (c) require public disclosure of the disclosure packages to be filed by potential bidders and provide for a timely and meaningful public comment process to be held well before the deadline for filing their applications to participate in the auction. Transparency and a meaningful opportunity for the public to comment are particularly important, should the Department retain discretion to permit Associated Entities to participate separately in the auction;<sup>6</sup> and
- (d) Clarification of the anti-collusion rule with respect to its application to Affiliates or Associated Entities<sup>7</sup> and measures to promote their enforceability.

14. Many other parties expressed similar concerns in their Initial Comments.<sup>8</sup> Mobilicity and other like-minded parties' concerns regarding the proposed power to exempt Associated

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<sup>6</sup> Mobilicity 25 June Comments, E.S., 3(h)(i) to (v).

<sup>7</sup> See Mobilicity, 25 June Comments, paragraph 67 to 69 with respect to the need to clarify the application of the anti-collusion rule to Affiliates and Associated Entities, particularly where the final rules adopted by the Department will permit Associated Entities to participate in the auction separately.

Entities from the rule that would prohibit them from participating separately in the auction include:

- (a) Exempting Associated Entities, and in particular large wireless providers that are associated, from the rule against separate participation in the auction, undermines the only pro-competitive measure adopted by the Department in its Licensing Framework for 700 MHz spectrum;<sup>9</sup>
- (b) Whether Associated Entities intend to compete in some measure, if any, in the market, does not negate the fact that in the auction, they will not be competing in a real sense;<sup>10</sup>
- (c) Exemptions from the strict rule discourage competition and discourage participation of smaller regional companies;<sup>11</sup>
- (d) Exemptions from the strict rule provides large wireless carriers with the mechanism to circumvent the single-block cap and to amass more spectrum to their already vast stockpiles of spectrum holdings;<sup>12</sup>
- (e) Permitting Associated Entities, and large wireless carriers such as TELUS and Bell, to participate separately and have access to up to 30 MHz of spectrum, would further limit new entrants' access to wireless spectrum;<sup>13</sup>
- (f) Bell and TELUS are clearly associated and on the face of the AWS auction results, there is troubling evidence of coordinated auction activity.<sup>14</sup> Bell and TELUS should not be permitted to participate separately in this auction;<sup>15</sup> and

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<sup>8</sup> BCBA; Cogeco; PIAC; Public Mobile; Rogers.

<sup>9</sup> Mobilicity, 25 June Comments, paragraph 50.

<sup>10</sup> Rogers, 25 June Initial Comments, paragraph 114.

<sup>11</sup> BCBA, 25 June Initial Comments, paragraph 11.

<sup>12</sup> Mobilicity, 25 June Comments, paragraphs 42-44.

<sup>13</sup> Cogeco, 25 June Initial Comments, paragraph 14. See also Rogers, 25 June Initial Comments, footnote 2.

<sup>14</sup> Mobilicity, 25 June Initial Comments, paragraphs 71-74.

<sup>15</sup> Eastlink, 25 June Initial comments, paragraph 40.

- (g) Exemptions from the strict rule would undermine the important policy rationale underlying the rule that Associated Entities must participate as a single entity, which is to preserve the integrity of the auction.<sup>16</sup>
15. As one party has stated, “Industry Canada further proposes to allow the auction cap to be applied separately if the associated entities demonstrate they will compete against one another in the retail market after the auction. That however does not negate the fact that during the auction the associated entities are not competing with one another.”<sup>17</sup>
16. If the Department were to treat Bell and TELUS as separate entities with respect to the application of the spectrum dual cap:
- (a) there will be no competition in the auction between Bell and TELUS; and
  - (b) as a result of the auction, Canadians will still be served via essentially two (2) national networks (the Bell/TELUS network and the Rogers network).
17. No party has offered a compelling reason for exemptions from the rule against separate participation of Associated Entities. If anything, parties such as Bell, WIND, and TELUS that support the Department’s proposed discretion to exempt Associated Entities also support the principle of auction transparency and integrity, the prohibition of signalling of bidding intentions or post-auction market structure and the anti-collusion rules. If the Department were to adopt its proposed power to exempt Associated Entities while also maintaining the anti-collusion rules, it would appear that the perverse result of this would be to prohibit coordinated bidding activity, except among **exempted** Associated Entities. This would obviously be unfair and lead to an unlevel playing field and greatly undermine the transparency and integrity of the auction process.

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<sup>16</sup> Mobilicity, 25 June Initial Comments, paragraph 39.

<sup>17</sup> Rogers, 25 June Initial Comments, paragraph 114.

18. Mobilicity notes, however, the comments of parties like SSi Micro and XploreNet, who have cited concerns regarding the choice of a Tier 2 licensed areas and the bias in favour of large, national wireless carriers over regional, rural providers.
19. Mobilicity is cautiously optimistic that there is sufficient flexibility in the subordinate licensing regime and Mobilicity's proposed wholesale access proposal, discussed below, to assure a role for regional providers dedicated to meeting the mobile wireless needs of rural subscribers. The principle that must be defended, however, is to preserve the integrity of the auction. This does not preclude parties, including regional and rural providers, from coordinating their bidding strategies and agreeing to a division of rights and responsibilities in the post-auction market, with an Associated Entity. However, Associated Entities must do so transparently such that the dual caps are respected and the integrity of the auction is preserved.

**1. Test for Association**

20. Mobilicity identified the types of agreements that would be susceptible to disclosure as part of the public comment and review process for bidder participation.<sup>18</sup>
21. Eastlink submitted that the test for association should not simply be restricted to the degree to which the associated entities compete in the retail market, but rather, include consideration of whether the entities give each other a "significant preference",<sup>19</sup> presumably in terms of wholesale access. Mobilicity supports Eastlink's additional criterion.

**2. No Advance Rulings**

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<sup>18</sup> Mobilicity, 25 June comments, paragraph 29.

<sup>19</sup> Eastlink, 25 June Comments, paragraph 39.

22. WIND<sup>20</sup> and Rogers<sup>21</sup> and others have suggested that the Department permit parties to seek “advance rulings” in advance of filing their disclosure and bid application packages.
23. Mobilicity opposes these proposals. Given that the Department may ultimately be asked to rule on whether a given relationship constitutes an Association, it would violate the rules of procedural fairness for the Department to sit in judgment of a matter on which it may already have given an advance ruling, on a hypothetical basis or otherwise. Mobilicity favours transparency and public comment over secret consultations.
- B. A and D&E Blocks Should Be Included in the Large Providers’ Single-Block Cap**
24. Parties generally agree that the A and D & E blocks are not fully substitutable for the prime blocks of 700 MHz spectrum. Several parties specifically commented on the treatment of the paired A block and the unpaired D & E block. Bell, for example, suggested that due to the alleged impairments of these blocks, the paired A block licences should have the same number of eligibility points as the unpaired D & E block licenses.
25. Mobilicity disagrees with Bell’s suggestion. The value of an A block licence to a bidder is clearly greater than the value of a D or E block license. The A block comprises a 5x5 MHz pair, whereas the D and E blocks are unpaired 5 MHz bands. When the A block suffers impairment, that impairment only impacts one of the 5 MHz pairs, since channel 51 is adjacent to the A block uplink and the A block downlink is available for use in all markets. In the many geographic markets without a channel 51 problem, the paired A block will also be as fully usable as the paired B and C blocks.
26. Furthermore, while the current shortfalls (including handset ecosystem support) of the A and D & E blocks is not disputed, with technological maturation, the A and D & E blocks may not be as impaired as they appear today.

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<sup>20</sup> WIND, 25 June Comments, paragraph 25(a).

<sup>21</sup> Rogers, 25 June Comments, paragraph 116(b).

27. 700 MHz spectrum, which is the first sub-1 GHz spectrum that has been made available in over two decades, is unique and valuable spectrum. Coverage assumptions being equal, a mobile wireless network deployment using 700 MHz requires far fewer sites than deployments made using 1800 MHz or 2.6 GHz spectrum.<sup>22</sup> Given these qualities, 700 MHz is intrinsically valuable to spectrum-starved new entrants. For example, the A block can be used by a new entrant to add capacity in markets where it is not impaired as well as for downlink capacity in markets where it is. The D & E blocks can be used asymmetrically to provide additional downlink capacity.
28. For the large, spectrum-rich, wireless carriers, the A, D & E blocks would certainly not represent their first choice in terms of spectrum deployment or utilization. However, in relative terms, they have more means than new entrant wireless carriers to acquire these blocks and they would have the incentive to acquire these blocks, if only to foreclose competition, absent a regulatory rule to guard against this incumbent incentive. As pointed out by Eastlink, the U.S. experience is instructive. In the U.S. 700 MHz auction, Verizon, the cellular incumbent, won 49% of the 700 MHz spectrum, even though it already held roughly one-half (about 25 MHz) of cellular 800 MHz spectrum.
29. The 700 MHz spectrum may be the only sub-1,000 MHz spectrum available for auction in the foreseeable three to five years. Particularly for new entrant carriers that are spectrum-constrained and will likely be outbid in the forthcoming auction for the prime blocks, the A and D&E blocks may represent the **only** viable alternative for expansion. And yet, leaving these blocks out of the large wireless carriers' single-block cap makes them more vulnerable to being hoarded by the large wireless service providers.
30. In light of the fact that incumbents have a strategic interest in foreclosing competition by acquiring all available 700 MHz spectrum and given that spectrum utilization figures

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<sup>22</sup> Ofcom, 24 July 2012 Statement, paragraph 3.7. See also Eastlink, Initial Comments filed 25 June 2012, paragraph 5, citing Professor Peter Cramton, in a declaration prepared for T-Mobile, USA: "With 800 MHz, 98 % coverage is achieved with only 2,000 sites. With 1800 MHz, more than 10,000 sites are required to achieve 98 % coverage. With 2.6 GHz, even 20,000 sites are not enough to achieve 98% coverage. The low-frequency spectrum allows a high level of coverage with a small fraction of the number of sites, and hence much less capital expense."

among Department's primary objectives, Mobilicity recommends that the non-prime A and D&E blocks also be included in the large wireless carriers' single-block cap. In this way, large wireless carriers, whether alone or through association or affiliation, would not be permitted to obtain more than 12 MHz of paired or unpaired spectrum in the 700 MHz spectrum band.

### **III. AUCTION RULES – SUPPLEMENTARY ROUND**

31. As noted in many comments submitted in this consultation, the current supplementary round rules coupled with the second price rule creates avenues for vexatious bidding and risks inefficient or unfair auction outcomes. Mobilicity therefore asks that the supplementary round be eliminated, except for purposes of assigning unallocated licences left over from the clock rounds.

#### **A. The Supplementary Round Should be Eliminated**

32. The supplementary round is intended to provide an opportunity for bidders to express levels of preference (*i.e.*, bids) for packages of licenses that they could not express during the clock rounds. Doing so creates the potential for the auction to be more efficient than if the final allocation was fixed at the conclusion of the clock rounds.
33. However, this potential for added efficiency comes at a cost—one that is too high—of introducing the ability and incentive for strategic bidding. This added cost of introducing a strategic element should only be paid if it is outweighed by the benefits of increased efficiency.
34. As noted by several commenters, there are several vital concerns in relation to the supplementary round and the second price rule. One main concern is that bidders have an ability and incentive in the supplementary round to place bids that are not sincere in an attempt to raise other bidders' "second price". There is also the possibility that the final

allocation will be significantly different than the final clock allocation.<sup>23</sup> The proposed supplementary round bidding rules are sufficiently complex that one commenter suggested, after noting the potential of trillions of combinations of bids, that the maximum number of bids allowed in the supplementary round by a bidder should be raised from 500 to 2,000.<sup>24</sup>

35. This complexity must be weighed against any potential lost efficiency from ending the auction at the conclusion of the clock rounds. Past SMR auctions have not demonstrated significant inefficiencies (such as missed synergies from intricate agglomerations of licenses) that would be worth the added complexity and expanded scope for strategic behaviour that come from the supplementary round.
36. Thus, like Eastlink and Quebecor Media Inc., Mobilicity requests that the Department limit the supplementary round to bids on licences that were not allocated at the conclusion of the clock rounds. This would increase efficiency by minimizing the number of licenses not assigned, without introducing the scope for significantly more strategic behaviour from a supplementary round.

**B. Alternatively, Minimise Negative Aspects by Predefining Bids that Would Guarantee Continued Winnings from the Clock Round**

37. If the Department chooses to keep a more expansive supplementary round, the Department may take several steps to reduce the scope for strategic and disruptive behaviours.
38. Were the Department to limit bidding in the supplementary round to packages that include a bidder's final clock package, this would reduce the scope for mischief.<sup>25</sup> To motivate honest and meaningful bidding during the clock rounds, it is essential that the

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<sup>23</sup> This could happen if a bidder uses its eligibility or the revealed preference rule to bid on and win a set of licenses significantly different from its final clock allocation. (Note that if this could not happen, the supplementary round would not be fulfilling its promise of potentially significantly increasing the efficiency of the auction.)

<sup>24</sup> See Rogers, 25 June Comments, paragraph 65.

<sup>25</sup> Sasktel, 25 June Comments, paragraph 33.

Department set clear rules and guidelines that guarantee that a bidder will win its final clock round package in the supplementary round without exorbitant increases in the price paid.

39. For example, the Department may set a predetermined bid increment from the closing bid in the final clock round, and if the winner of the clock round bids as much as the increment in the supplementary round, the Department would warrant that the winner wins at least the same package as it won in the clock round.
40. However, Mobilicity continues to believe that limiting the scope of the supplementary round to only unallocated licenses is the better solution. On the one hand, bidders would not be left dissatisfied because they lost their clock round winnings in the supplementary round. On the other hand, if the supplementary round were changed, this would likely leave some otherwise supplementary round bidders disheartened because their bids were higher than that of the ultimate winner.

#### **IV. BID PAYMENTS – INSTALMENT PAYMENT**

41. In its Initial Comments, Mobilicity noted that the Department has, in the past, cited the benefits of allowing winning bidders to pay for their winning bids via instalment payments.
42. Mobilicity believes that permitting instalment payments for new entrants (i) promotes auction participation by small players, (ii) removes a significant burden for bidders aiming to invest in infrastructure, and (iii) acknowledges the effects of scarce liquidity in the banking system and economy.
43. Each of the forgoing considerations gained favour in the April 2012 Telecom Regulatory Authority of India (Trai) recommendation for the allowance of instalment payments in the country's upcoming 2G spectrum auction. If Trai's recommendations continue to be

followed,<sup>26</sup> India will join multiple nations who have recently permitted instalment payments. For example, in 2011, winners of Italy's 4G spectrum auction were permitted to pay €682 million within 30 days from auction completion, and €438 million in five annual instalments,<sup>27</sup> and Spain spectrum auction winners were able to pay in two instalments for 800 MHz spectrum.<sup>28</sup>

44. Mobilicity believes that the benefits of permitting instalment payments far outweigh the potential drawbacks, which are often argued as default risk, delayed roll-out to customers and speculative bidding. In particular, permitting instalment bid payments does not promote speculative bidding in any way. There is ample incentive for full payment of the winning bid, since non-payment entails forfeiture of the deposits accompanying application packages and forfeiture of the valuable spectrum acquired through the auction.
45. As a result, Mobilicity reiterates its request that the Department permit only new entrants to make bid payments through instalment payments, payable in six instalments over a period of five years.

## **V. WHOLESALE ACCESS OBLIGATIONS**

46. Sub 1 GHz spectrum is scarce; particularly for spectrum-starved new entrants, access to a minimum of 10 MHz of paired 700 MHz spectrum will be critical to the new entrants' ability to compete credibly and viably against the already spectrum-rich incumbents.
47. Mobilicity has previously urged the Department to adopt measures similar to the sub-1 GHz spectrum cap and specific reservation of at least one prime paired block of 700 MHz spectrum in the Department's Policy Framework. Mobilicity believes that such measures

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<sup>26</sup> Upon submission of this reply, Trai's recommendations had been accepted by India's empowered group of ministers (EGom), and placed before the country's cabinet for ratification.

<sup>27</sup> Italy's 4G spectrum awarded", *LTE World* (1 October 2011) online: *LTE World* < <http://lteworld.org/blog/italys-4g-spectrum-awarded>>.

<sup>28</sup> "Telefónica Launches LTE in Madrid and Barcelona", *Converge Network Digest*, online: *Converge Network Digest* <<http://www.convergedigest.com/Mergers/financialarticle.asp?ID=34122>>.

- are required in order for the Department to achieve its stated goal of reaching at least **four** credible competitive alternatives in every geographic market in Canada (as opposed to the current two national network competition).
48. Ofcom had stated that “UK consumers will be likely to benefit from better services at lower prices in future if following the Auction there continue to be at least **four** credible national wholesalers of mobile services.”<sup>29</sup>
49. Contrast this with the current **two** national networks in Canada. Indeed, even at a retail level, Canada arguably only has **three** national level carriers competing.<sup>30</sup>
50. The last time sub 1 GHz spectrum was made available to wireless carriers in Canada was decades ago. We do not know when sub 1 GHz spectrum will be made available again in Canada, after the 700 MHz spectrum auction. The coming 700 MHz spectrum auction is thus arguably the last opportunity for the Department to bring competition to the rural areas or to introduce competition on a national level.
51. Mobilicity, therefore, submits that the Department should consider one additional measure to promote competition and in particular, to ensure that consumers everywhere (including rural areas) will have access to multiple providers. In particular, Mobilicity submits that as an additional condition of licence for the 700 MHz prime blocks spectrum, licensees should be mandated to provide wholesale access to all licensees with an HSPA network.
52. In the absence of an additional measure, the objective of making at least **four** arms-length mobile wireless carriers available in each geographic area will likely not materialise. As a result, Mobilicity urges the Department to mandate wholesale access as a condition of licence applicable to all mobile wireless licensees that have deployed an HSPA network.

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<sup>29</sup> Ofcom, 800 MHz and 2.6 GHz Statement at 2.

<sup>30</sup> There is reservation to the use of the word “competing” as one notes the comfy oligopoly the Big 3 enjoyed prior to the AWS auction.

## VI. CONCLUSION

53. The 700 MHz auction represents a potential turning point for the Canadian wireless industry. For the first time in Canadian history, sub 1 GHz spectrum is being made available in a competitive selection process, rather than on a comparative selection or sole-source basis.
54. As such, the 700 MHz auction represents an important opportunity for the Government – to promote competition in the market for wireless voice, text and data communications for all Canadians. However, if poorly managed and designed, it could simply reinforce the dominance of the large wireless providers, who each have had the opportunity to exploit, largely unmolested, 25 MHz of sub 1 GHz spectrum for over two decades and could defeat the current competition that the Department fought so hard for.
55. While Mobilicity is concerned at the potential circumvention of the only pro-competitive measures in the Department's *700 MHz Policy Framework* and *700 MHz Licensing Framework*, through small changes to its proposed Licensing Framework, the Department may take measurable steps towards the establishment of a vibrantly competitive wireless marketplace.

## APPENDIX “A” – SUMMARY OF MOBILICITY RECOMMENDATIONS

### 4. Auction Format and Rules

#### 4.25 Summary

*Industry Canada is seeking comments on its proposal to use the CCA format, as well as the general attributes outlined above, including:*

- *the categories of generic licences;*
- *the guarantee of contiguity across blocks A and B in the lower 700 MHz band in a specific service area;*
- *the combined eligibility point and revealed preference activity rule in the clock rounds, and the revealed preference limit in the supplementary round;*
- *the use of a second-price rule; and*
- *the information to be disclosed during, and post-auction.*

- (a) The Supplementary Round should be limited to licences that are unallocated at the end of the clock round.

### 5. Bidder Participation – Affiliated and Associated Entities

*Any entities that enter into any partnerships, joint ventures, agreements to merge, consortia or any arrangements, agreements or understandings of any kind, either explicit or implicit, relating to the acquisition or use of any spectrum in the 700 MHz band will be treated as Associated Entities. Typical roaming and tower sharing agreements would not cause entities to be deemed associated.<sup>31</sup>*

*[...]*

*Industry Canada is seeking comments on its proposed changes to the definition and rules related to associated entities. Specifically, comments are sought on:*

- *the types of agreements that should be captured under the definition of associated entities;*
- *[...]*

<sup>31</sup> 700 MHz Licensing Consultation, paragraph 64.

- *the provision that typical roaming and tower sharing be specifically excluded from the revised definition of associated entities and whether other types of agreements such as the purchase of backhaul capacity should be deemed excluded;*<sup>32</sup>

### **Definition of Associated Entities**

- (b) Without limiting the generality of the definition of Associated Entities, agreements *etc.* relating to use of the 700 MHz spectrum include those that
- A. relate to the acquisition or options to acquire an ownership interest in any bidder in the auction of spectrum in the 700 MHz band or any licensee of spectrum in the 700 MHz band, whether via the auction itself or post-auction;
  - B. relate to the sharing, acquisition of or options to share or acquire rights in the spectrum in the 700 MHz band, whether via the auction itself or post-auction;
  - C. relate to the amounts to be bid, bidding strategies or the particular licence(s) on which the parties to the agreement will or will not bid;
  - D. relate to access to or sharing or options to access or share a party's network in relation to the 700 MHz spectrum, whether pre- or post-auction; or
  - E. relate to the branding and marketing of services using any spectrum in the 700 MHz band.

... *Specifically, comments are sought on:*

- *the proposal that entities that are deemed associated entities may apply to be treated as separate entities for participation in the auction;*

<sup>32</sup> 700 MHz Licensing Consultation, text box at paragraph 75.

- *the proposal that associated entities may request to have spectrum caps apply to them separately based on an analysis of their association and of whether they intend to compete in the same licence service area;*

- (c) Associated Entities and Affiliates are prohibited from participating in the auction separately.
- (d) If the rules for the 700 MHz spectrum auction provide for discretion on the part of the Department to permit separate participation and separate application of the spectrum aggregation limits,
  - (i) large wireless service providers and their Affiliates are prohibited from participating in the auction separately and from seeking separate application of the spectrum aggregation limits;

*... the criteria to be considered in determining whether entities are competing;*

- (e) The test for association should include whether entities give each other a significant preference in terms of wholesale access.

*... Specifically, comments are sought on:*

- *the level of information to be disclosed to the public*

- (f) **At least four months prior to the deadline for application to participate in the auction**, prospective applicants must
  - (i) file any and all agreements etc. that relate to the acquisition or use of 700 MHz spectrum, including any roaming and resale arrangements;
  - (ii) in addition to the information required at paragraphs 66-68, 70 and 73 of the 700 MHz Licensing Consultation, prospective applicants must submit to a public comment process.

- (g) If the rules for the 700 MHz spectrum auction provide for discretion on the part of the Department to permit separate participation and separate application of the spectrum aggregation limits,
  - (i) prospective applications must, in conjunction with their disclosure filings, file:
    - A. any applications for separate participation and separate application of spectrum aggregation limits;
    - B. such applications are to be accompanied by an Affidavit provided by an officer of the company stating that (i) there are no other express, implied or tacit agreements *etc.* with respect to the use of the spectrum to be auctioned, within the meaning of the Department's decision on the 700 MHz Licensing Framework that results from this *700 Licensing Consultation* and (ii) the applicant will not cooperate, collaborate, discuss, negotiate or enter into agreements, arrangements or understandings with any parties other than its declared Affiliates and Associated Entities regarding the licences being auctioned, bids or bidding strategies in the auction, or the post-auction market structure, or signalling its bidding intentions, either publicly or privately, until the end of the bidding process;
  - (ii) an opportunity for public comment on applications by Associated Entities for separate participation will be provided; and
  - (iii) the Department's determination of applications by Associated Entities must precede the deadline for making the pre-auction financial deposits **by at least three months** or in the alternative, the financial deposits should be refundable upon publication of the Department's decision on

Associated Entities that may participate separately and have the spectrum aggregation limits applied separately.

## 5.1 Prohibition of Collusion

### *Prohibition of Collusion*

*From the date of application until the deadline for the final payment on winning bids, each applicant is prohibited from cooperating, collaborating, discussing, negotiating or entering into agreements, arrangements or understandings with any competitors regarding the licences being auctioned, bids or bidding strategies in the auction, or the post-auction market structure. Each applicant is also prohibited from signaling its bidding intentions, either publicly or privately, from the application deadline until the end of the bidding process.*

*The application form to participate in the auction will include a declaration that the applicant will be required to sign certifying that the applicant has not entered into any agreements, arrangements or understandings of any kind with any competitor, other than those disclosed to Industry Canada, regarding the spectrum licences being auctioned or the post-auction market structure. The applicant must also certify that it will not discuss during the auction, any agreements, arrangements or understandings of any kind with any competitor, including its disclosed associated entities, regarding the spectrum licences being auctioned or the post-auction market structure. For the purposes of this certification, “competitor” means any entity, other than the applicant and/or its affiliates, which could potentially be a bidder in this auction based on its qualifications, abilities or experience.*

*Should a bidder fail to comply with this prohibition, it may be subject to disqualification from the auction and/or forfeiture penalties.<sup>33</sup> ]*

- (h) For purposes of the 700 MHz and the anti-collusion rule proposed by the Department, “competitor” includes an Associated Entity, regardless of whether or not the Department may have granted the Associated Entity permission to participate separately in the auction or not.
- (i) Apart from the bidder participation and anti-collusion rules,

<sup>33</sup> 700 MHz Licensing Consultation, paragraph 79.

- (i) breach of the anti-collusion rule is punishable by disqualification of applicants during the auction, stripping Licensees of licences won or monetary penalties; and
- (ii) a Licensee's ability to enter into any agreements *etc.* with respect to the acquisition or use of 700 MHz spectrum within five (5) years of the conclusion of the auction is subject to Departmental approval. In deciding such applications, the Department should give due consideration to the time elapsed between the close of the auction and conclusion of the agreement or arrangement pertaining to use of the 700 MHz spectrum, and the reasons, as applicable, justifying non-disclosure of the agreement or arrangement prior to the auction.

## **6. Conditions of Licence for Spectrum in the 700 MHz Band**

### **6.2 Aggregation Limits**

*Industry Canada is seeking comments on the proposed wording of the condition of licence related to the spectrum aggregation limits.*

- (iii) The paired 700 MHz A block should be included under both the general two-block limit and the large wireless service providers' one-block limit, and
- (iv) The unpaired 700 MHz D and E blocks should also be included under both the general two-block limit and the large wireless service providers' one-block limit.

### **6.3 Transferability and Divisibility**

*Industry Canada is seeking comments on the proposed wording of the condition of licence related to transferability and divisibility.*

- (j) Any new rules pertaining to transfer or divisibility of the 700 MHz spectrum not impede the ability of the AWS new entrants to transfer or divide any 700 MHz spectrum at the same time that they are permitted to apply to transfer or divide their AWS spectrum.

**6.12 Rural Deployment Requirements**

- (k) Service providers that have failed to meet their deployment commitments or conditions of licence in relation to a given geographical area be barred from bidding on any 700 MHz spectrum in such area.

**7.5 Bid Payments and Forfeiture Penalties**

- (l) Winning new entrant bidders shall be permitted to make their winning bid payments six instalments over a period of five years.

**Wholesale Access Obligation**

- (m) All licensees with an HSPA network must, upon request, provide wholesale access to any requesting licensee with an HSPA network.

\*\*\* END OF DOCUMENT \*\*\*