



TELUS

Comments of TELUS Communications Company to
Industry Canada

Guidelines for Compliance with Mandated Site Sharing Rules

6 March 2009

1 Introduction

TELUS submits the following comments in response to the Department's request for comments on the processes framing the interaction between licensees and Requesting Operators for the purpose of concluding a Site Sharing Agreement in a timely manner through good faith negotiations. TELUS notes the direction given by the Department that the consultation is not conducted with a view to reviewing the Conditions of Licence set out in CPC-2-0-17.

TELUS appreciates the opportunity to comment on the processes with respect to site sharing. The established wireless carriers have engaged in site sharing on a commercial basis for many years, and have developed processes to address the practical issues that arise when tower space is shared. This experience should inform the examination of similar processes under the Conditions of Licence. In particular, TELUS maintains that processes aligned closely with long-standing commercial practice are *prima facie* applied in good faith to the new context of mandated site sharing with new entrants.

TELUS relies on two fundamental observations:

- Government policy, as expressed in the Conditions of Licence, is to rely on market forces. The best representation of market forces is how the relevant markets have actually operated over time. It is not only rental price that is at issue. Market forces drive prudent behaviour in ensuring that tower loading remains structurally sound, RF interference is minimized, etc. Regulation to elevate one value over all others typically risks unwanted consequences.
- Mandatory site sharing affects property rights, which should not be interfered with except by due process of law. The AWS spectrum auction in 2008 proceeded on the basis that the substantive rules set forth in the Conditions of Licence would apply at least over the licence period. In addition to the direct cost of acquisition of the spectrum, significant capital investments are planned for the roll-out of next generation wireless networks. These investments rely on the stability of property rights, which should not be jeopardized by any substantive alteration of the Conditions of Licence under the guise of process development.

In submitting the comments that follow, TELUS explicitly reserves its rights and, notwithstanding any opinion that may be expressed on an issue raised herein, does not waive or compromise any legal remedy that may arise, whether against the Minister or any other person, from the unlawful amendment of the Conditions of Licence.

2 Timelines for Site Sharing

2.1 The timeliness standard

The standard established by the Conditions of Licence for the provision of preliminary technical information is timeliness. TELUS submits that this standard is inconsistent with the imposition of any arbitrary period of time. A concentrated volume of transactions will necessarily have an impact on the ability of a licensee to respond to all requests for information within a fixed period of time however devised. In this regard, requests from a single Requesting Operator cannot be considered in isolation, if the requests from multiple operators are all handled by the same internal resources of the licensee.

TELUS submits that the proper principles to apply to evaluate the timeliness of a response to a request for preliminary technical information are as follows:

- a) Requests should be prioritized by the Requesting Operator acting in consultation with the licensee. Consultation is required because the strict processing order a Requesting Operator might prefer could lead to undue and avoidable delay, if the preliminary technical information for a high priority site were particularly difficult to assemble. In this regard, TELUS notes that responses to requests for preliminary information requests are not a clerical task, limited to copying the contents of a file. To provide accurate information that may be relied on by the Requesting Operator, review by skilled engineering resources is required:
 - As built plans on file may be outdated and need refreshing through a site visit.
 - Network reconfiguration or deployment may be contemplated that would impact the tower profile, so that in every case vetting by network planning resources is required.

- Other colocation requests may be pending, so that in every case vetting by site acquisition resources is required.

The time taken to assemble proper documentation in a preliminary information package (commonly known as a “PIP”) will directly impact the ability of the licensee, upon receiving a subsequent request for conditional approval, to provide reasonable assurances to the Requesting Operator that an elevation shown as available on the tower profile is in fact not in use or reserved.

- b) Requests should be handled equitably as between multiple Requesting Operators competing for the same internal processing resources of the licensee, to ensure a constant flow of PIPs to each. No Requesting Operator should be permitted to monopolize the resources of the licensee in responding to information requests. In combination with the prioritization discussed above, a steady flow of PIPs will allow the Requesting Operator to advance its network planning. It is particularly important to note in this context that a PIP is merely the starting point for a significant amount of preparatory work that must be accomplished by the Requesting Operator, including the basic preliminary analysis required to determine whether to make a request to reserve space.

Once conditional approval of an elevation has been granted (assuming there have been no changes to the tower profile between the delivery of the PIP and the request by the Requesting Operator for conditional approval of an elevation), a tower design to accommodate the new antennas must be developed. In many cases construction plans are required. Ancillary services such as power may need additional provisioning from the electrical utility company. As a result, a large backlog of completed PIPs will not be of any use to the Requesting Operator, if the resources required internally by the Requesting Operator to complete the preparatory work are scarce, or if third party approvals and action are required. Experience shows it is not the PIP stage that principally drives the timeline for site sharing, but the preparatory work that is incumbent on the Requesting Operator. The Conditions of Licence explicitly acknowledge that this preparatory work must be done by the Requesting Operator at its own cost.

2.2 The quality of information

In light of the significant investment in resources required of the Requesting Operator in order to complete the preparatory work that begins upon receipt of a PIP, it is important for all concerned that the PIP process, and the conditional approvals that are built upon it, be conceived to deliver reliable results that may be used as a basis for subsequent activity.

Most fundamentally, the addition of antennas creates loads that must be analysed by qualified engineers to ensure continued structural integrity of the tower. The engineering analysis will depend on the elevation chosen. Unless the elevation can be reliably reserved, the Requesting Operator will undertake this costly and time-consuming work at risk. The licensee is only able to provide assurances that the requested elevation may be reserved if the PIP is properly done and then validated again after the request for conditional approval is received. While it is possible to provide unvalidated tower profile information very quickly, such a process would not allow any elevations to be confidently reserved. The Requesting Operator would then have the choice of proceeding at the risk that all the work done and expense engaged to develop a site sharing proposal may be lost.

An arbitrarily hurried PIP process creates fertile ground for subsequent dispute, as Requesting Operators are faced with the prospect of having wasted substantial time and resources on engineering studies and other work that cannot be used. The contest will then be between forfeiting the licensee of property rights that become apparent on more careful study of tower loading, and compensating the Requesting Operator that has proceeded on the basis of process guidelines advanced by the Department. This result should be avoided.

2.3 Site access

Site access is not exclusively within the control of the licensee. Typically, the landlord's property must be used to approach the site. The licensee's leasing arrangement with the landlord may only grant access rights to the licensee's employees and contractors for the specific purposes authorized in the contract. In both cases, the landlord's consent is required and cannot be compelled by the licensee. The landlord may require escorted access, or impose other conditions on the Requesting Operator's access.

Landlords may also simply refuse access because they do not contemplate or wish to permit further occupancy at the site. Contractual covenants stipulated for the landlord's benefit may limit the number of antennas, especially for rooftop sites, or may restrict use of the site in other severely constraining ways (for instance, by requiring that a tower be made to look like a flag

pole). The prohibition in the Conditions of Licence against exclusivity clauses cannot forfeit landlords of rights they have acquired for their own benefit. Landlords are not licensees. Only exclusivity stipulated for the benefit of licensees can be prohibited by the Minister acting under the authority of the *Radiocommunication Act*.

Antennas are generally mounted in places that require skilled workers to access safely. In the standard commercial process, the Requesting Operator, in its written response to a PIP requesting conditional approval of an elevation, accepts liability for the contractors the Requesting Operator will send to the site and agrees to indemnify the licensee for damages, injury or death caused by the presence of the Requesting Operator on the site.

Third party consents and the Requesting Operator's own actions should not be used to determine a timeline that is directed to the licensee. If any fixed timeline is established as guidance for granting access for a site visit, it should specify that only the time attributable to actions exclusively within the licensee's control are counted.

3 Reservations for Future Use

TELUS submits that the introduction of the idea of "imminent future use" to the processes of mandatory site sharing would constitute a substantive amendment to the Conditions of Licence. The concept necessarily operates to expropriate rights that were relied upon by licensees in bidding for spectrum in the 2008 AWS spectrum auction. The notion that future requirements in wireless network planning are framed by a one-year time horizon is both economically unrealistic and unsupported by legal principle.

It is fundamental to the organisation of our legal system that property rights should not be interfered with except by due process of law:

Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or of any interest therein, save by due process of law.¹

Any act which deprives an owner of a valuable asset, tangible or intangible, is a taking of property.² The Supreme Court of Canada has recently reaffirmed the principle that express legislative power is needed to deprive an interested party of its assets:

79. It is well established that potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their

¹ *Harrison v. Carswell* [1976] 2 S.C.R. 200 at p. 291

² *Manitoba Fisheries Limited v. Her Majesty the Queen* [1979] 1 S.C.R. 10

rights without the clear intention of the legislation [citations omitted]. Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that a broadly drawn power can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. This would go against the above principles of interpretation.³

Applying these principles to the context of mandated site sharing under the Conditions of Licence, TELUS submits that it is not necessary to deprive the licensee of the right to use its towers for future requirements in order to accomplish the objectives expressed in the *Radiocommunication Act* under the authority of which the Minister acts. The statute has been amended to allow a competitive bidding process to allocate spectrum and embrace the principles of reliance on market forces. This purpose is defeated if the Minister nullifies one of the principal drivers behind investment decisions in new spectrum, namely reliance by the licensee on having the network infrastructure capabilities to provide services under the new licences into the future.

The Conditions of Licence for mandated tower access cannot be construed as conferring upon the Minister or, *a fortiori*, a delegate of the Minister, a general power to order the use of tower space that a licensee needs in the future to provide its services. The proposed amendment of section 8.0, condition 3 of the Conditions of Licence, to limit a licensee's "future requirements" to only "imminent future use", confiscates property without statutory authorization.

3.1 Future requirements in the Conditions of Licence

Industry Canada, in its "Responses to Questions for Clarification on the AWS Policy and Licensing Frameworks" dated February 27, 2008, provided the following clarification on the meaning to be ascribed to a licensee's future requirements:

A licensee's own future needs for tower or antenna space may be considered if they are well documented, reasonable and near term but these needs are not considered a matter of technical feasibility. Longer term future needs alone will not to [sic] be considered a reason not to share.

(*op cit*, answer 3.4, page 17)

Bidders in the 2008 AWS spectrum auction were justified in relying on these statements in calculating the economic value of the spectrum offered for licence. Indeed, such reliance was explicitly contemplated by Industry Canada.⁴ Investment decisions in the hundreds of millions of dollars were predicated on the security of property rights represented by the AWS Policy and Licensing Frameworks so described.

³ *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140

⁴ *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range* (Industry Canada) dated November 2007, at page 9: "The final decision on the operation and wording of the licence conditions regarding sharing will be taken before the auction starts."

The relevant test for future requirements is not imminence, but what is “well documented, reasonable and near term”. These words must be given a purposive and contextual interpretation. Facilitating the deployment of advanced network facilities for the benefit of the Canadian population is the purpose underlying the AWS Policy and Licensing Frameworks. Only large scale investment can achieve this purpose and no such investment is possible without securing property rights over a time frame that can provide reasonable assurances of return on investment. The design of network architecture, procurement on a large scale of network equipment and build-out of network facilities over hundreds of sites, are the means by which this investment objective is achieved. On no reasonable standard can these activities be measured in mere months. The economic value of a wireless network deployment is not realised by facilities that can be built in a single year with the resources available to a licensee in the Canadian economic environment. The near term is not an arbitrary standard, but one that is informed by the economic realities that sustain large scale investment decisions.

Furthermore, Industry Canada confirmed to potential bidders in the 2008 AWS spectrum auction that longer term future needs, if combined with other factors, could justify the reservation of tower placements for a licensee’s use. There is no limitation on the range of such other relevant factors, which must therefore be examined on a case by case basis. Eliminating this possibility through the introduction of a uniform test of imminent future use unlawfully curtails the rights of licensees.

3.2 Network planning and deployment

Experience with wireless network deployments demonstrates that much longer timelines are required than the one-year proposed by the Department. Launch of the current generation of wireless networks occurred in late 2005 and the build-out has only recently reached between 75% and 90% of the Canadian population, depending on the network operator. Planning for these deployments took place well in advance of launch. .

The level of investment required for wireless network deployment is a principal driver of the time line. Spectrum acquired in the 2008 AWS spectrum auction was specifically intended for future requirements, in the form of new facilities deployment. Substantial infrastructure expenses must be incurred to build those new network facilities. Investment on this scale, in the Canadian economic context, requires multi-year planning and execution. Network design choices are strongly impacted by conclusions drawn from the economic modeling of fundamental service demand drivers as they are projected to evolve over time. Concurrently, the licensee will work with major equipment suppliers to ensure that sound technology strategy is maintained, and eventually to source and secure critical infrastructure. As network planning advances, new sites

must be acquired where necessary to complement existing network infrastructure capabilities. Then construction is rolled out on a national scale, for which skilled resources are needed. The entire process relies on security of property rights as planning is transformed into execution. TELUS submits that process design for mandatory site sharing cannot be used to frustrate such major contributions to the development of Canadian communications infrastructure

3.3 Legal principles with respect to network support structures

The CRTC has on several occasions examined the issue of spare capacity on support structures (meaning poles and conduits) for wireline network deployments. The legal principles examined provide useful analogies to the present circumstances. CRTC Order 2000-13 summarizes:

The Commission notes that in Decision 95-13, and in Order 96-1484, the companies' right to priority access is recognized to include reserving capacity for anticipated future requirements. The Commission notes, however, the CCTA's and the CTA's points particularly with respect to changed competitive circumstances since 1995. The Commission's finding in favour of minimizing the number of support structures is also crucial. Furthermore, the Commission notes that there have been competitive disputes concerning support structures access, and the legitimacy of claims of lack of spare capacity. Where disputes arise over whether spare capacity is available, therefore, the Commission may place the onus on the companies to justify their current and anticipated requirements, where they state they have no spare capacity on any particular support structures.

Spare capacity on support structures is examined more closely in CRTC Decision 2004-29, at paragraph 22:

The Commission notes that, pursuant to Tariff item 404.1, spare capacity is the difference between unused capacity of the support structure and the capacity required by TCI to meet its anticipated future service requirements. Unused capacity is the difference between the capacity of the support structures based on design limitations and the capacity used by TCI and that TCI previously allocated to licensees. The Commission also notes that, pursuant to Tariff item 404.2.2, TCI is only required to provide spare capacity where spare capacity is available. TCI is not required to provide spare capacity where doing so will unduly interfere with the rights of any joint-user or other licensees.

The CRTC did not specifically define "future service requirements" in this Decision but directed TELUS to provide forecasts over a 3 and 5 year planning horizon. These directions have been used to guide subsequent responses to requests for access to wireline support structures. The CRTC has not been called upon since that time to arbitrate any dispute with respect to future service requirements on wireline support structures, indicating general acceptance of the principles advanced in CRTC Decision 2004-29. Subsequent events have demonstrated that the regime put into place by the CRTC for shared access to wireline support structures has not

impeded competing service providers from rapidly deploying cable TV, Internet service, IP telephony and other services to the vast majority of the Canadian population.

The planning horizon for wireless network deployment is if anything longer than for the poles and conduits that form the subject matter for the CRTC's rulings on wireline support structures. The level of investment is higher, and as a practical matter wireless licensees cannot rely on statutorily mandated assistance for their network deployment, such as wireline carriers are routinely able to do to acquire rights of way for their installation of support structures. Site acquisition is a major activity for wireless network deployment, and may be denied at the pure discretion of landlords. This uncertainty operates to lengthen the planning horizon for wireless network deployments, and to reinforce the importance of sites and elevations once they are acquired. Replacements are not readily available.

TELUS submits that the proper near term planning horizon for wireless network deployment, based on experience and legal principle, is five years.

4 Requirements for Confidentiality

Confidentiality covenants are the basis for commercial dealings whenever information that may confer a competitive advantage is exchanged. Standard non-disclosure agreements will stipulate that confidential information i) may only be used for the purpose for which it is disclosed, ii) may only be circulated to persons who need to know the information to carry out that purpose, and iii) may not be disclosed to any third party except under compulsion of law. The threshold issue is whether any particular information is confidential.

TELUS submits that a necessary consequence of the forced disclosure of information to a Requesting Operator without the benefit of confidentiality covenants, is that the information not be confidential. On the contrary, if the information is confidential, the proprietary value of that information is expropriated for the benefit of a private party, contrary to both common law and statute. The exercise of the general powers of the Minister to impose Conditions of Licence should not be construed to deprive a licensee of proprietary rights⁵. While the Conditions of Licence do establish a regime of expropriation with respect to the sharing of sites, and establish compensation at commercial rates as the standard, they do not authorize the expropriation of confidential information that the Requesting Operator may receive without any obligation to proceed to site sharing and to pay the compensation site sharing entails.

⁵ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)* [2006] 1 S.C.R. 140, para. 69 and 79

Much of the information disclosed in PIPs exchanged between licensees operating under commercial site sharing arrangements, is in the public domain. The compulsory disclosure regime of the Conditions of License can be interpreted to provide a convenient mechanism to Requesting Operators for the discovery of such basic technical information, if no confidentiality agreement is required. TELUS submits that this principle properly circumscribes the operation of what is essentially compelled public disclosure.

5 Conclusion

The process design for the development of a site sharing proposal under the Condition of Licence should be aligned in principle with the processes used in commercial site sharing arrangements, which have been developed over time in response to practical issues. The innovation of the Conditions of Licence is at the ultimate stage of the site sharing process, in imposing a requirement of agreement at commercial rates. The preparatory steps in the development of a site sharing proposal are driven primarily by design and construction issues. Existing commercial practice is an appropriate model for these processes.