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Guideline

Guidelines for Compliance with the Conditions of Licence Relating to Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements

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1. Background

In February 2008, Industry Canada published *Canada Gazette* Notice DGRB-002-08 - *Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements*. These conditions of licence were announced, but were not in force until the publication of *Canada Gazette* Notice No. DGRB-005-08 – *Release of Industry Canada’s Arbitration Rules and Procedures for Mandatory Roaming and Antenna Tower and Site Sharing*, in November 2008. At the same time, CPC-2-0-17, *Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements*, was released which mirrored the decision announced in the *Canada Gazette* Notice in February.

Although the conditions of licence set out the requirements of the Department, they did not establish firm and specific time frames and requirements for every step. The Department’s initial position was to set time frames for certain steps only and rely upon the entities involved to establish reasonable practices for other steps depending on the specifics of the circumstances.

Since the implementation of the conditions of licence, the Department has received complaints from different licensees regarding a failure to adhere to licence conditions such as “negotiating in good faith” and responding “in a timely manner.” In dealing with the complaints, the Department heard divergent views and has seen the need for increased clarity in certain areas. On February 17, 2009, Industry Canada issued a consultation letter to address several issues related to the preliminary phase of the antenna tower and site sharing process. These guidelines flow from that consultation and will assist in providing all licensees with a clearer sense of the Department’s expectations with respect to the issues set out below.

2. Intent

By this process, Industry Canada is not reviewing or changing the conditions of licence, but is establishing guidelines that may be used by the Department when assessing complaints of non-compliance to the licence conditions. These guidelines will also assist in consistent interpretation and decision making and may be used by the Department on a going forward basis.

3. Consultation Comments Review and Decisions

Industry Canada has reviewed the comments and concerns expressed by the respondents (available online at www.ic.gc.ca/antenna) and, accordingly, is providing the following guidelines regarding requirements and time frames that licensees are expected to follow.

3.1 Content of Requests for Preliminary Technical Information

The consultation letter suggested that the request for preliminary technical information package contain the following: “The request should include at a minimum the licensee’s site reference number (if available), site address and/or geographical coordinates and Requesting Operator’s reference number.”

Discussion: Respondents generally agreed that the inclusion of the Licensee’s site reference number was the most important information to include with a request. For PCS and cellular sites or sites authorized under a radio licence, this information may be available from Industry Canada’s Spectrum Direct database. For other sites, the information may be obtained from the Licensee. The inclusion of a minimum of two references will safeguard against errors that would waste valuable time and resources.

Decision: A preliminary request for technical information will be considered complete if it contains, at a minimum, two of the following: (1) the licensee’s site reference number (2) the site address (3) geographical coordinates. For many PCS and cellular towers, this information can be obtained from Industry Canada’s website at https://sd.ic.gc.ca/pls/engdoc_anon/web_search_geographical_input. If the request is incomplete, it must be returned to the Requesting Operator. Requests should also include the site reference number assigned by the Requesting Operator.

3.2 Response to Preliminary Technical Information Requests

The conditions of licence provide that: “In order to satisfy the condition of Site sharing in accordance with this licence, the Licensee must respond, **in a timely manner**, to an initial request for information by a Requesting Operator as follows: ... the Licensee shall provide to the Requesting Operator any preliminary technical information for each Site, such as drawings, surveys, technical data, engineering information, future requirements, lease provisions and other information relating to the site relevant to formulating a Proposal to Share **that it has in its possession or control ...**” [emphasis added]

3.2.1 Response Time

The consultation letter suggested the following and requested comments: “Within a week of receiving a complete request for preliminary technical information containing the information described above, the Licensee is expected to produce a response ...”

Discussion: In determining the guidelines for a reasonable time frame to apply to the term “in a timely manner,” the Department first considered the other time frames contained within the same document, namely 30 days for the provision of the response to the proposal to share and 90 days for completion of the negotiation process, which includes the 30-day period noted above. As the step being considered is that of preliminary information, it should be reasonably expected that “in a timely manner” would not exceed the other time frames set out in the document.

The condition of licence relates to information “...that it has in its possession or control...,” reflecting that the Department did not anticipate delays resulting from research or other considerations at this point in the process. The Department also recognizes that, for some requests, verification and update might be undertaken in order to provide more reliable and accurate information. However, the Department does not expect the Licensees to delay their response by investing significant time and resources to review in detail all the preliminary information to be provided.

Industry Canada also recognizes that many Requesting Operators are planning to launch services in the near term. This has resulted in a significant number of requests being submitted, all of which require resources to process. As set out in CPC-2-0-17, licensees may not recover costs from the Requesting Operator during this phase of the process. As a result, the Department considers that a longer response

time is reasonable during, and limited to, the initial post-auction phase when a high volume of requests is expected.

During this initial period and at times when a large number of requests are submitted to a Licensee, the Requesting Operator may indicate the relevant priority of its requests.

Decision: Within two weeks of receiving a complete request for preliminary technical information, the Licensee is expected to produce a response, including, as a minimum, the information listed in section 3.2.2.

In view of the high volume of requests submitted by AWS new entrants in preparation for the deployment of their systems, Industry Canada considers that until October 1, 2009, a response time of up to four weeks will be acceptable. For requests submitted after October 1, 2009, Licensees will be expected to respond to requests within two weeks of their reception.

3.2.2 Content

The Preliminary Information and Analysis description under paragraph 1.2 of CPC-2-0-17 states that: “When asked, the Responding Licensee must provide its **available technical data** on the site in a timely manner and must allow the Requesting Operator to access the site in a timely manner.”[emphasis added]

Furthermore, the consultation letter suggested what content was required to fulfil this condition: “... the Licensee is expected to produce a response including as a minimum: tower loading profile including imminent future use and contracted third party lease arrangements, compound layout, tower foundations design, Transport Canada and/or NAV Canada form, site lease summary as well as site access information, such as contact, procedure and any specific restriction relating to a site visit.”

Discussion: The issue of future use is dealt with in detail in section 3.3 and 3.4. The respondents generally accepted the rest of the proposed required content; however, it is noted that where the required information is not available or up to date, the Licensee may choose to assign resources to updating the information required to respond to the request.

Concerns were raised about the need to provide third party and site lease information at this stage, as there may not be a lease summary available. Consistent with the other information to be submitted, the requirement for a summary of the existing lease arrangements only applies if the information is available.

Decision: When responding to a preliminary technical information request, the following information must be included where it is available to the Licensee: tower loading profile, including imminent future use and the summary of existing leases (see sections 3.3 and 3.4 below), contracted third party lease arrangement contacts, compound layout, tower foundations design, Transport Canada and/or NAV Canada form(s), as well as site access information, such as contact, procedure and any specific restriction related to a site visit (see section 3.5 below).

3.3 Reservation for Licensees' Future Requirements

The Department's *Responses to Questions for Clarification on the AWS Policy and Licensing Frameworks* provided that: "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." [emphasis added]

The consultation letter proposed that "only **imminent future use** should be considered in the context of the preliminary information package and that 'imminent' would include plans which are clearly and specifically identified in the Licensee's annual capital plan."

Discussion: The Department recognizes that future use is an important factor when determining tower access. As stated in the conditions of licence, the clarification questions and the consultation letter, companies are recognized as having imminent, near term and longer term plans.

The condition of licence specifies that information on future requirements shall be provided as part of the response to the preliminary information request. The Department subsequently clarified that future needs may be considered where they are well documented, reasonable and near term. However, the Department has not provided a specific guideline for circumstances where a licensee's future plans can be considered a reason not to share at a particular site. There was and is no intent to disrupt the imminent plans of responding Licensees, hence the introduction in the consultation letter of the term "imminent use" in the context of the preliminary information requests.

Because Industry Canada has discussed both near term and longer term future needs in earlier clarifications, that terminology was also discussed in some of the responses. Some respondents indicated that there is an industry standard for planning, which is generally between three and five years. The Department does not intend to identify a specific differentiation between near and longer term, but accepts the industry norm and reiterates that near term must be reasonable and well documented.

The Department expects both near and longer term requirements to be the subject of good faith negotiations and, if agreement is not reached within the established time frames, either party may initiate the independent binding arbitration process set in the conditions of licence.

Decision: Equipment installations specifically identified in the responding Licensee's plans and to be installed within the 18 months immediately following the submission of a request for preliminary technical information, may be identified as "imminent future use" on the tower profile portion of the preliminary information package. The plans for use of this space are not expected to be disrupted for the purposes of this condition of licence unless both parties agree to negotiate access to the space. As imminent use forms a portion of near term future needs, plans for imminent future use must be reasonable and well documented consistent with the aforementioned clarification.

Where an assessment of non-compliance is being made with respect to this requirement, the licensee may be required to provide evidence to the Department demonstrating that the space will be put into service within 18 months, such as installation agreements, appropriate authorizations or other relevant documentation.

Where the tower owner is reserving space because there is a plan to install equipment on the tower beyond the next 18 months, that space may be identified as “future use” in the preliminary technical information package and dealt with during the negotiation process.

The imposition of this condition of licence does not displace the Licensee’s needs in favour of the Requesting Operator’s, but requires that each be open to negotiating fair commercial terms for access; neither does the licence condition force the responding licensee to replace or rebuild a tower at its own expense. The licence condition requires that the responding licensee negotiate in good faith towards an agreement on a sharing arrangement on commercial terms when in receipt of a proposal from a Requesting Operator. Reasonable and well documented near term needs beyond 18 months are legitimate considerations in the negotiation process.

3.4 Reservation for Third Party

The conditions of licence provide that: “In order to satisfy the condition of Site sharing in accordance with this licence, the Licensee must respond, in a timely manner, to an initial request for information by a Requesting Operator as follows: ... the Licensee shall provide to the Requesting Operator any preliminary technical information for each Site, such as drawings, surveys, technical data, engineering information, future requirements, **lease provisions** and other information relating to the site relevant to formulating a Proposal to Share ...”[emphasis added]

The consultation letter suggested the following and requested comments: “... any **space reserved on a tower for future use by a third party** where a contract is in place and **fees are being paid**, should be identified as part of the preliminary information package.”[emphasis added]

Discussion: The Department recognizes that Licensees may have entered into antenna tower or site lease contracts with third parties, and the option of reviewing such arrangements and coming to a negotiated agreement between all parties must be considered.

The main concern expressed by the respondents was that the Licensee might be excluded from discussions between the Requesting Operator and the third party who has a previous lease agreement in place. The revised wording is more specific and addresses this concern.

Additionally, the question was raised regarding arrangements that may not involve a financial transaction or a specific location on a site. The Department will not include the mention of fees paid for third party arrangements, noting that only a reservation for a specific location on a tower or site is to be considered.

Decision: Any space reserved on a tower for identified future use by a third party, where a contract is in place for a specific location on a tower, should be identified as part of the preliminary information package. In this situation, as is the case with the Licensee’s future plans (see section 3.3), a third party’s imminent installation is expected not to be disrupted, unless all the parties reach an agreement. All other third party future plans (near term and longer term) should be open to three-way negotiations.

3.5 Site Access

Discussion: Although respondents agreed on the principle of a site visit, some questioned the need at the preliminary phase of the process. As the conditions of licence stipulate that “the Licensee shall facilitate access to the Site so that a formal Proposal to Share can be formulated,” Licensees must facilitate access for a site visit during the preliminary phase of the process when requested.

The Department considers that, in the great majority of cases, a visit can be arranged within a week. Some exceptional circumstances can justify a short delay.

Decision: The Licensee is to coordinate and grant access to the site on request, as set out in the condition of licence. Generally speaking, this access should be granted within one week of the request. Extenuating circumstances, such as access to a remote location or adverse weather conditions, could justify a short delay. Should the site be leased, the Licensee must provide the Requesting Operator with the landlord’s contact information as part of its reply to the Preliminary Technical Information Request. Where an exclusivity clause is in place, the licensee must provide immediate notification to the landlord demonstrating that it is prepared to waive the exclusivity clause in its agreement.

3.6 Requirement for Confidentiality

Discussion: The Department was made aware by some of the parties engaged in the early phase of this process that they were experiencing delays due to the request that they sign a non-disclosure agreement (NDA) prior to any information being provided.

In response to the February 17, 2009 consultation, there is a general consensus that NDAs may be required, but only at the later stages of negotiations, and that NDAs should remain generic in nature. Furthermore, a clause forcing exclusive negotiation between the parties would not be appropriate, as it would keep the Requesting Operators from negotiating access to other sites in various parts of the country and cause great delays to the deployment of their systems.

Since most of the information included in the response to a preliminary information request is in the public domain, and only basic technical information is being shared, the Department does not believe that a non-disclosure agreement is required prior to the release of preliminary information.

Decision: Industry Canada recognizes the competitiveness of the market and understands the need for confidentiality and non-disclosure agreements between the parties. However, the Department is of the view that non-disclosure agreements should be appropriate and generic in nature, should not include provisions that are unique to a single operator or group, and should not prohibit negotiation with other parties or prohibit communication with Industry Canada.

Furthermore, the Department does not consider the release of imminent future plans and basic technical information as proprietary or strategic information. Accordingly, the Department does not consider the signature of an NDA as a valid reason to delay providing a Preliminary Information Package as described above.

4. Non-Compliance with Licence Conditions

In accordance with their conditions of licence, Licensees are required to, among other things, provide Requesting Operators with technical information under their control in a timely manner, and facilitate Requesting Operators' access to the site upon reasonable notice. Within 30 days of receiving a request to share, Licensees must offer to enter into a site sharing agreement with Requesting Operators or inform the Requesting Operator that sharing is not technically possible. After 90 days of receiving the request to share, either party may then invoke independent binding arbitration.

The Department will refer to the guidelines set out in this decision when making a determination regarding compliance with the conditions of licence discussed herein.

The conditions of licence outlined in CPC-2-0-17 were established in order to facilitate competition in the market while relying on market forces to negotiate arrangements on commercial terms. Should these conditions of licence prove to be insufficient in facilitating those goals, the Minister of Industry, in accordance with section 5(1)(b) of the *Radiocommunication Act*, may consider amending the terms and conditions of the licences or seeking other policy and/or procedural solutions.

The Minister of Industry has the authority under section 5(2) of the *Radiocommunication Act* to suspend or revoke a radio authorization where the licensee has contravened the terms or conditions of that authorization. Where a licensee is found to be in non-compliance with the conditions of licence for antenna tower and site sharing, the Department may consider the suspension or revocation, in whole or in part, of the Licensee's radio and/or spectrum licences associated with the site where the breach of licence occurred.

Many spectrum licences have been issued with a high expectation of renewal; however, that expectation only applies where the licence conditions are being met. As a result, a renewal may be denied or a licence not fully renewed where there is a breach of any of the conditions of licence. This has been clearly articulated in various policy and licensing documents¹ and has remained a consistent criteria for the renewal of all long-term licences. In particular, the current consultation on the renewal of PCS and cellular licences includes the provision that renewal is contemplated for licensees who are in compliance with all terms and conditions of licence. Compliance will be verified prior to the issuance of new licences.

Furthermore, to the extent that non-compliance impairs or frustrates the policy objectives for which these licence conditions were established, consideration may be given in future licensing processes to more prescriptive and/or restrictive policy measures. Such policy changes could affect the Department's future plans for spectrum use, licensing and renewal.

¹ *Framework for Spectrum Auctions in Canada*, Issue 2, published in October 2001; *CPC-2-1-23- Licensing Procedure for Spectrum Licences for Terrestrial Services*, Issue 2, published in September 2007; *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, issued in November 2007; *Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, issued in December 2007; and *Responses to Questions for Clarification on the AWS Policy and Licensing Frameworks*, published on February 27, 2008.