

March 1, 2004

**BY E-MAIL: wireless@ic.gc.ca
and REGULAR MAIL**

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Re : **Canada Gazette, Part I, October 10, 2003, *Consultation on Spectrum for Advanced Wireless Services and Review of the Mobile Spectrum Cap Policy*, Notice DGTP-007-03**

To whom it may concern:

Microcell Telecommunications Inc. is pleased to submit the attached comments in response to Canada Gazette Notice DGTP-007-03.

We greatly appreciate the opportunity to make our views known to the Department on these important matters.

Yours very truly,

Microcell Telecommunications Inc.

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Vice President, Regulatory Affairs

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enc.

**Comments in Response to
Canada Gazette Notice DGTP-007-03**

**Consultation on
Spectrum for Advanced Wireless Services (AWS)
And
Review of the Mobile Spectrum Cap Policy**

Microcell Telecommunications Inc.

March 1, 2004

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Schedules A and B

1.0 Executive Summary

The issues of what to do with the mobile spectrum cap, and how to promote advanced mobile telephony services in rural Canada, are crucially important to the future of wireless competition in Canada.

Review of the Mobile Spectrum Cap Policy

The current Gazette Notice asks whether the spectrum cap remains relevant to ensuring a competitive wireless marketplace going forward. Microcell's response is a definitive yes.

The greatest threat to continued pro-consumer innovation in the Canadian wireless marketplace is the possibility of an industry consolidation from four to fewer national players. The policy action most likely to turn this threat into reality would be the removal of (or undue increase in) the existing mobile spectrum cap.

The incumbent cellular carriers have made no secret that they would prefer to operate in a three-player market. They have the motive and the financial means to effect such an anti-competitive consolidation. To remove (or unduly increase) the spectrum cap would provide them with the opportunity.

To alter the spectrum cap now would be particularly ill-advised given that the Government has yet to take any legislative action in response to the House of Commons Standing Committee on Industry, Science and Technology's recommendation to eliminate Canada's foreign ownership restrictions in telecommunications.

The optimum policy for Industry Canada to adopt with regard to the existing mobile spectrum cap – the policy that will best ensure continued four-player rivalry in the Canadian wireless market – is to leave the existing spectrum cap in place, at its current level, on the bands to which it currently applies. For greater certainty, the covered bands would include the 2 GHz PCS band, the 800 MHz cellular band, and the ESMR bands (with the existing proviso that spectrum from the ESMR bands count for no more than 10 MHz toward the spectrum cap). The covered bands would not include the 1710-1755 and 2110-2155 MHz AWS bands being considered for allocation in the current consultation.

In addition, to protect against a potential anti-competitive warehousing of spectrum in the proposed new AWS spectrum allocation, a second and separate spectrum cap should be set at 25 MHz for the combined AWS bands 1710-1755 MHz and 2110-2155 MHz.

Under the Microcell proposals just described, no carrier could reasonably argue that it would be impeded from acquiring whatever spectrum resources are necessary to satisfy the projected needs of its customers. The public interest would doubly benefit: new advanced wireless services would be made available, with no anti-competitive industry consolidation.

A properly designed spectrum cap regime is the most direct and effective tool that exists for advancing competition in Canadian wireless. A reliance on the *Competition Act* alone would be unwise in the current context, and would carry with it a risk of serious harm to the public interest via the elimination of competition.

Whatever decision is taken with regard to the mobile spectrum cap, it should become effective concurrent with the release of new AWS spectrum, no sooner.

Measures to Promote Advanced Mobile Telephony Services in Rural Canada

Microcell strongly disagrees with the Department's proposal to limit access to mandated digital roaming arrangements to carriers that operate solely in unserved or underserved areas and that do not compete in the same serving territories as the carriers on which they seek to roam. Such conditions would effectively preclude a carrier such as Microcell from benefiting from any mandated digital roaming arrangements in the 800 MHz cellular band.

The competitive advantage accruing to the incumbent cellular carriers is not the geographic scope of their spectrum holdings, but rather the propagation characteristics of the spectrum they control – 800 MHz cellular spectrum being much better suited for rural coverage than 2 GHz PCS spectrum.

The policy objective to be satisfied through mandated digital roaming arrangements is not solely to enable small regional carriers to offer wide-area roaming coverage to their customers (however laudable that objective may be), but more importantly to ensure that those carriers who possess scarce high-propagation 800 MHz spectrum do not unduly restrict access to this spectrum for unfair competitive advantage.

Microcell recommends that the 800 MHz cellular licensees be required to offer 800 MHz cellular resale and roaming, regardless of the transmission protocol employed, through commercial arrangements to PCS licensees who are not also cellular licensees in the territory in question.

2.0 Introduction

On October 18, 2003, Industry Canada (the "Department") issued Canada Gazette Notice DGTP-007-03 entitled *Consultation on Spectrum for Advanced Wireless Services and Review of the Mobile Spectrum Cap Policy* (the "Gazette Notice"). The principal purpose of this consultation is to consider the allocation and designation of spectrum for Advanced Wireless Services (AWS), which include a wide range of services, such as third generation cellular, multimedia and broadband Internet. In particular, the Department is proposing to allocate 90 MHz of AWS spectrum in the 1710-1755 and 2110-2155 MHz bands through a competitive licensing process in the 2005/2006 timeframe.

In order for existing mobile spectrum licensees to access the new AWS bands in a future licensing activity, the Gazette Notice also initiates a review of the mobile spectrum cap policy. In addition, the Department invites comments on measures to promote advanced mobile telephony services in rural Canada.

The Department's proposals for the allocation and designation of spectrum for AWS, most notably in the 1710-1755 and 2110-2155 MHz bands, are likely to receive broad support from interested parties, as they are generally consistent with the positions taken by the Government of Canada in international spectrum allocation negotiations – positions which the Canadian industry has generally supported. Questions may be raised, however, about the necessity of releasing this spectrum as early as the 2005/2006 timeframe.

Greater controversy can be expected in regard to the last two issues - what to do with the mobile spectrum cap, and how to promote advanced mobile telephony services in rural Canada. Indeed, these issues are crucially important to the future of wireless competition in Canada. As a result, Microcell's comments herein will focus almost exclusively on these two issues. In each case, our comments are structured as responses to the specific questions posed by the Department in the pertinent sections of the Gazette Notice.

3.0 Review of the Mobile Spectrum Cap Policy

Would the retention of a mobile spectrum cap continue to play an important role in fostering competition and choice of services to Canadians?

The mobile spectrum cap was first introduced in 1995 as part of the policy framework and process to licence new spectrum in the 2 GHz Personal Communications Services (PCS) band. The cap was initially set at 40 MHz, applicable to spectrum holdings in the 2 GHz PCS band, the 800 MHz cellular band, and spectrum used for similar high-mobility telephony services such as Enhanced Specialized Mobile Radio (ESMR) systems.

Since its introduction, the spectrum cap has been modified on two occasions. First, in 1999, it was increased from 40 MHz to 55 MHz to give reasonable opportunities to all parties to acquire new spectrum in the then upcoming auction of 2 GHz PCS spectrum previously held in reserve. Second, in 2003, the Department changed the calculation of the aggregation of the frequencies used by ESMR systems – henceforth, a maximum of 10 MHz of aggregated ESMR spectrum would count toward the 55 MHz mobile spectrum cap limit.

As the Department states in the Gazette Notice, “By limiting spectrum concentration, the spectrum cap policy helped establish a level playing field among the licensees with the aim to foster competition and choice of service to consumers.”¹ Also, as the Department further states, “In general, the spectrum cap was viewed favourably, as having assisted new PCS entrants in financing new networks, stimulating competition and fostering the introduction of new services.”²

In other words, the spectrum cap has to date made an effective and necessary contribution to realizing the Department’s statutory obligation under the *Telecommunications Act* to “enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications”³.

The current Gazette Notice asks whether the spectrum cap remains relevant to ensuring a competitive wireless marketplace going forward.

Microcell’s response is a definitive yes. The existing spectrum cap, as applied to the existing PCS, cellular and ESMR bands, offers an essential protection against anti-competitive industry consolidation.

¹ Canada Gazette Notice DGTP-007-03, page 19.

² Canada Gazette Notice DGTP-007-03, page 19.

³ *Telecommunications Act*, section 7(c).

Since the introduction of four-player competition to the Canadian wireless market in 1996, enormous progress has been made in bringing innovative, high-quality mobile voice and data services to ever increasing numbers of Canadian consumers. By year-end 2003, wireless penetration had increased to approximately 40% of the Canadian population, per minute airtime prices have plummeted, and customers today benefit from an array of service plans, devices and enhanced functionalities scarcely imaginable eight years ago.

Microcell is proud of the central role we have played in driving innovative new trends in mobile services and bringing them to the mass market. But we feel the need to caution the Department against the complacent view that these trends will necessarily continue into the future without effective protection against anti-competitive industry consolidation.

The greatest threat to continued pro-consumer innovation in the Canadian wireless marketplace is the possibility of an industry consolidation from four to fewer national players. The policy action most likely to turn this threat into reality would be the removal of (or undue increase in) the mobile spectrum cap.

To understand the concrete nature of this threat, one need only look at the industry experience between mid-2002 and mid-2003 when Microcell, Canada's fourth-largest and only remaining new entrant wireless carrier, passed through a court-supervised financial restructuring. During this period, the combination of drastic cash conservation measures coupled with management's understandable pre-occupation with the restructuring process, resulted in Microcell effectively exiting the market from a marketing and service development standpoint.

Microcell's three incumbent cellular competitors – Bell Mobility and its regional partners, Rogers Wireless and Telus Mobility – all took advantage of Microcell's weakened state to eliminate such consumer-friendly innovations as billing-by-the-second. Two of these competitors also launched targeted, discriminatory offers against Microcell's customers – offers which relied in part on myopic denigration campaigns rather than constructive efforts to grow the market.⁴

⁴ We note that the third competitor launched its own similar initiative in late 2003, accompanied by renewed initiatives on the part of the first two competitors, all in response to Microcell's October 2003 launch of our groundbreaking new City Fido wireless service (discussed in more detail later in these comments). On February 23, 2004, Microcell filed suit in Quebec Superior Court seeking injunctions against each of Bell Mobility, Rogers Wireless and Telus Mobility to prohibit them from engaging in certain marketing practices, including the unauthorized use of Microcell's trademarks and brand identity, diminishing the goodwill of the Fido brand, and the use of discriminatory offers targeted exclusively at Microcell customers.

All the while, senior executives of Microcell's competitors mused openly about Canada's alleged inability to support more than three national wireless carriers. The following quotes from the July 31, 2003 issue of *Report on Wireless* were typical:

Michael Neuman, Bell Mobility: *"[I]t's interesting that Microcell, which historically prides itself on being the youth brand, has in its post-receivership mode gone toe-to-toe for the same market as Rogers, Telus and Bell. My view is when you don't have the network, you don't have the capital and you don't have the cash flow, you have to pick a different strategy. I would urge anyone in that situation to read a book called The Art of War. It very clearly says that if you are disadvantaged in any very important factor in the battle, then you don't go toe-to-toe with a superior enemy. This is a big fundamental business mistake." [...]*

"I think as we go forward, it's very clear - and with the near demise of Microcell it became more brutally clear - it's now obvious to most industry watchers four facilities-based carriers is just a little too much for this marketplace inasmuch as the industry has not achieved any kind of return on investment yet. Even two out of the three major players, here I speak of Rogers and Telus, are not cash positive or profitable yet. After 18 years or so that suggests to me that there's oversupply. I just don't think that bodes well for four players. You're going to continue to see resale arrangements and lots of price competition even if there were three players, but I don't know if there's room for a fourth player long term."

Nadir Mohamed, Rogers Wireless: *" I have been on the record several occasions in the past as saying that three is better than four. All the metrics in the business show that three is better than four. And each of the three main players would say the same. The market conditions are such that a three-player market is better than four. Certainly, we have seen that Microcell has struggled."*

So how did Canadian wireless consumers fare during this year-long experiment in a quasi-three-player market? The evidence should give the Department some cause for concern. Beyond (or perhaps because of?) the cellular incumbents' U-turn on pro-consumer policies such as per-second-billing, and their choice to target promotional activities on denigration campaigns rather than market-expanding initiatives, wireless penetration growth in Canada stagnated. To be precise, total net additions to the Canadian wireless subscriber base, which had averaged 445,000 per quarter in the twelve quarters prior to Q3 2002, levelled off to an average of only 292,000 per quarter in the four quarters from Q3 2002 to Q2 2003.⁵

⁵ As if to confirm the thesis, it should be noted that subsequent to the reactivation of Microcell's marketing and service development activities in Q3 2003, the total net additions to the Canadian

That innovation should slow and competitive rivalry diminish when the three Canadian incumbent cellular carriers perceive themselves to be on the verge of eliminating their new entrant PCS competitor should come as no surprise to anyone who observes the competitive dynamics in the wireless industry. Industry reports and analysts have regularly cited the competitive importance of a four-player wireless market.

For example, Wall Communications Inc., in a November 2001 study commissioned by Industry Canada entitled “*A Competitive Assessment of the Canadian Mobile Wireless Industry*” (the “Wall Study”), commented with favour that:

“The industry has changed from two competing entities (up until the mid-1990’s) to the current number of four. The end result has been a related decrease in any firm’s given market share. The industry trend in market share and concentration is, therefore, moving in a preferable direction.”⁶ (emphasis added)

Nevertheless, the Wall Study went on to warn the Department, with some prescience, about the potential for anti-competitive abuses in the wireless industry and the need for continued oversight by the Department:

“There are now three roughly equal-sized firms and one smaller firm. While the relative concentration in the mobile wireless industry might be considered cause for concern in some circumstances, the licensing requirement really places the power of determining how many competitors exist in the hands of the government. There is no indication of market power abuse resulting from the high levels of industry concentration, although continued monitoring should be maintained.”

...

The existence of vertical integration, particularly between wireline and wireless partners, has the potential to undermine (to some extent) the competitiveness of the industry. It may also permit some firms to enjoy legitimate cost advantages. Ongoing monitoring should be maintained.”⁷ (emphasis added)

wireless subscriber base have increased back up to an average of 532,000 per quarter in Q3 and Q4 2003. This rebound in the aggregate subscriber growth rate is substantial, even after taking seasonal factors into account.

⁶ Wall Study, page 6.

⁷ Wall Study, page 7.

More recently, a May 2003 study by Lemay-Yates Associates Inc. entitled "*The case for four mobile telecom operators in Canada*" (the "Lemay-Yates Study") focused squarely on the advantages that accrue to Canadian consumers from the presence of four national wireless operators. Among the salient conclusions that emerge from the Lemay-Yates Study are the following:⁸

- There exists a positive correlation internationally between market growth and the number of competitors;
- The Canadian wireless industry continues to enjoy solid growth in terms of subscribers, revenues and usage;
- Competition stimulates wireless usage and average revenue per user (ARPU);
- Lower pricing does not hurt the industry in and of itself; and
- Microcell's individually-reported postpaid and prepaid ARPUs compare very favourably with those of other Canadian carriers.

The complete executive summary of the Lemay-Yates Study is included at Schedule A to these comments.

International authorities have also weighed in on the benefits to be derived from a four-player market structure. For example, in a May 2000 study entitled "*Cellular Mobile Pricing Structures and Trends*", the Organisation for Economic Cooperation and Development (OECD) reached the following conclusion:

"Analysis clearly shows a strong correlation between market growth and market openness. During the 1990s, those markets that had liberalized the most, and had four or more operators, have consistently outperformed markets with monopolies, duopolies or three operators."

It can be observed that OECD markets with four or more operators have, on average, exceeded the growth rates of those with three operators, duopolies or monopolies in every year since 1993 [...] This presents a strong message to policy makers to seize future opportunities to increase the number of market players in countries with less than four operators competing in the same markets." (emphasis added)

This quote from the OECD is included in a backgrounder Microcell prepared in January 2003 as part of our presentation to the House of Commons Standing Committee on Industry, Science and Technology (the "Industry Committee"), which at the time was studying the issue of whether to modify or remove Canada's foreign ownership restrictions in telecommunications. The entire backgrounder, entitled "*Can*

⁸ Lemay-Yates Study, Executive Summary.

the Canadian Market Support Four Wireless Competitors” is included at Schedule B to these comments, and remains as relevant today as it was one year ago.

Indeed, the essential role played by Microcell in raising the Canadian wireless industry to new, innovative and consumer-friendly plateaux has if anything become even more apparent since we emerged from our financial restructuring process in May of 2003. In the ten months that have elapsed since then, we have: successfully reclaimed our presence in the wireless marketing space; embarked on a sweeping expansion of our handset portfolio to include the latest data, multimedia and gaming devices; contributed to a popular wireless-wireline service bundle with Sprint Canada; and launched a series of innovative new service offerings including free calling between Fido subscribers.

But nothing better demonstrates the scope of Microcell's positive impact on the Canadian wireless industry than our October 2003 launch of City Fido service in Vancouver. City Fido is the first wireless service in Canada expressly designed for the wireline replacement market, fulfilling a policy objective Industry Canada itself put forward in its 1995 *Policy and Call for Applications for PCS in the 2 GHz Range*. Among other notable features, City Fido was the first wireless service plan in North America (and still the only one in Canada) to offer wireline subscribers the opportunity to port their wireline telephone number over to their new wireless service. One can rightly ask whether such an industry-expanding, competition-inducing innovation would have ever seen the light of day in a market inhabited solely by three incumbent cellular carriers each affiliated with an incumbent wireline telephone or cable operator.

Microcell remains by far the smallest national wireless carrier in Canada – with 1.3 million customers at the end of 2003, compared to 4.4 million for Bell Mobility (including its affiliate Aliant Mobility), 3.8 million for Rogers Wireless, and 3.4 million for Telus Mobility. But our ability to drive pro-consumer innovations in the Canadian wireless industry belies our small size.

The incumbent cellular carriers have made no secret that they would prefer to operate in a three-player market. They have the motive and the financial means to effect such an anti-competitive consolidation. To remove (or unduly increase) the spectrum cap would provide them with the opportunity.

To alter the spectrum cap now would be particularly ill-advised given that the Government has yet to take any legislative action in response to the Industry Committee's recommendation to eliminate Canada's foreign ownership restrictions in telecommunications. A small independent wireless player like Microcell does not have the same access to internal or external sources of capital as its much larger and well-affiliated competitors, and as such is disproportionately disadvantaged by Canada's existing foreign ownership restrictions. To remove (or unduly increase) the

spectrum cap under these circumstances would be tantamount to inviting an anti-competitive domestic consolidation under conditions artificially favourable to a domestic acquiror.

With due consideration to all of the above, Microcell submits that the optimum policy for Industry Canada to adopt with regard to the mobile spectrum cap – the policy that will best ensure continued four-player rivalry in the Canadian wireless market – is to leave the existing spectrum cap in place, at its current level, on the bands to which it currently applies. For greater certainty, the covered bands would include the 2 GHz PCS band, the 800 MHz cellular band, and the ESMR bands (with the existing proviso that spectrum from the ESMR bands count for no more than 10 MHz toward the spectrum cap). The covered bands would not include the 1710-1755 and 2110-2155 MHz AWS bands being considered for allocation in the current consultation.

In addition, to protect against a potential anti-competitive warehousing of spectrum in the proposed new AWS spectrum allocation, a second and separate spectrum cap should be set at 25 MHz for the combined AWS bands 1710-1755 MHz and 2110-2155 MHz.

Under the Microcell proposals just described, no carrier could reasonably argue that it would be impeded from acquiring whatever spectrum resources are necessary to satisfy the projected needs of its customers. The public interest would doubly benefit: new advanced wireless services would be made available, with no anti-competitive industry consolidation.

Would the removal of the mobile spectrum cap enable the wireless carriers to offer greater choice of services to consumers and foster competition? Provide the rationale for your position.

As can be seen in the proposals Microcell has just put forward, removal of the existing mobile spectrum cap is definitively not a pre-requisite for wireless carriers to offer greater choice of services to consumers. Moreover, such a move would be more likely to depress rather than foster competition.

As the Department states at page 22 of the Gazette Notice, the objective of the current consultation is to “permit wireless carriers to acquire new spectrum resources to expand their networks, and introduce new services until approximately the year 2010”, not to unwittingly open the door to an anti-competitive industry consolidation. Microcell’s proposals are entirely consistent with and faithful to the Department’s stated objective.

We note that the three incumbent cellular carriers each hold between 45 and 55 MHz of spectrum under the existing spectrum cap in most of Canada’s major markets.

Under Microcell's proposals as put forward herein, each of these carriers would be allowed to keep their existing capped spectrum, and would be eligible to acquire an additional 25 MHz of spectrum in the new AWS bands. This gives a total of 70 to 80 MHz per carrier, depending upon the outcome of the AWS allocation process.

To argue against the Microcell proposals on the basis that they would restrict the ability of the incumbent cellular carriers to serve customers is to argue, in effect, that these carriers cannot get by with only 70 to 80 MHz of spectrum each. Such an argument is untenable.

US and European carriers, who frequently number in excess of four per licence territory, routinely serve regions much more dense than those found in Canada with considerably less spectrum than Canadian carriers would be eligible to hold under Microcell's proposals. Indeed, the comments of the Canadian Wireless Telecommunications Association (CWTA), submitted on today's date, question the necessity of allocating the new AWS spectrum as early as the 2005/2006 timeframe, suggesting little pressing need for Canadian carriers to add to their existing 55 MHz-capped holdings, let alone push them in excess of 70 to 80 MHz.

Could concern regarding significant dominance in spectrum holdings be addressed through other mechanisms? Please specify what these mechanisms could be and indicate related conditions – for example limiting the amount of spectrum which could be acquired in the licensing process or relying solely on the provisions of the Competition Act.

A properly designed spectrum cap regime is the most direct and effective tool that exists for advancing competition in Canadian wireless.

That such a unique policy mechanism exists to prevent ant-competitive concentration in the wireless industry is a reflection of the unique circumstances under which this industry operates. Wireless carriers require spectrum to operate, yet this spectrum is a scarce resource allocated in finite units by a responsible government authority. Not only does this dependence on a government-allocated scarce input create an absolute barrier to entry into the industry, but it also provides a convenient mechanism for potential industry consolidation. All that is required is for one or more existing players to acquire more of the scarce resource.

Few industries offer would-be consolidators such a sure fire mechanism for achieving lasting dominance. No comparable government-allocated scarce input exists in the wireline telecommunications market, for example, let alone in most non-telecommunications industries.

In short, the wireless industry is not an industry like any other. Anti-competitive concentration is a real threat, and the accumulation of scarce spectrum resources provides the ready mechanism for effecting this concentration. It is entirely right and proper for the government authority that allocates the spectrum resource to use the unique powers at its disposal to prevent such an anti-competitive concentration from occurring.

With respect to the Department relying upon the *Competition Act*, Microcell does not believe that the legislation in its current form provides sufficient safeguards against anti-competitive industry concentration in the telecommunications Industry.

In exercising her mandate under the *Radiocommunication Act*, the Minister of Industry is invited to have regard to the statement of Canada's telecommunications policy that is found at section 7 of the *Telecommunications Act*. This policy was developed in the specific context of the contribution that telecommunications can and should be expected to make to Canada's social and economic fabric. The policy statement carefully balances objectives that have been traditionally met by a highly concentrated industry structure with a clear injunction to place greater reliance on competition as a means of protecting the interests of Canadians.

In practice, this link to the objectives of the *Telecommunications Act* permits the Department to consider the actual state of competition in various sectors of the telecommunications industry before it determines what use is best made of the public resource that is the radio spectrum. One result of this consideration is the spectrum cap currently under consideration.

The alternative proposed, of relying on the *Competition Act* to ensure that Canadian consumers are not detrimentally affected by mergers or by the behaviour of dominant market players, has several defects compared to the existing process.

First, with her present powers, the Director of Competition can only act to prevent an abuse of dominant position while it is actually taking place or after it has taken place. Because of this constraint on timing, a great deal of damage can occur while the Director is conducting her investigation and seeking an order of the Competition Tribunal. It is preferable, in Microcell's view, to clarify what the applicable rules and policy are going to be, before companies plan their actions and cause such significant potential damage to their competitors.

Second, even in the case of a merger the result of which is likely to be the substantial lessening of competition, the Director's ability to act in a timely fashion is limited by the procedural and other safeguards contained in the *Competition Act*. Certainly these procedural safeguards are entirely appropriate in a statute that permits state intervention in the actual activities of specific companies and other economic actors. However, it limits the effectiveness of the *Competition Act* as a tool to prevent anti-

competitive mergers and conduct by dominant players in telecommunications markets.

In short, a reliance on the *Competition Act* alone would be unwise in the current context, and would carry with it a risk of serious harm to the public interest via the elimination of competition.

We note that at least one of the incumbent cellular carriers has expressed equivalent views to those of Microcell regarding the importance of the spectrum cap as a policy tool for preventing anti-competitive consolidation and the inappropriateness of relying upon the *Competition Act* for this purpose. Specifically, in its January 22, 1999 comments on Canada Gazette Notice DGTP-015-98 *Review of the Spectrum Cap Applied to Providers of Personal Communications Services* (Gazette Notice DGTP-015-98), Rogers Wireless (then Rogers Cantel) made the following persuasive points:

“Cantel submits that a carte blanche modification or removal of the existing Spectrum Cap Policy is not required and would not be in the public interest at this time. If the Spectrum Cap were removed or modified, a concentration of spectrum, perhaps resulting from mergers and acquisitions, could lead to market power and anti-competitive conduct.”⁹

“If one party acquired more spectrum, the Competition Bureau could only be involved once anti-competitive conduct resulted. The Department, on the other hand, is in a position to establish policy to proactively manage industry structure. The Spectrum Cap Policy will prevent anti-competitive markets from being established. ...”¹⁰

As for the suggestion that spectrum dominance could alternatively be controlled by removing the existing spectrum cap, then introducing a new spectrum cap applicable only to the new AWS licensing process, Microcell respectfully submits that this suggestion does not stand up to scrutiny. In fact, it would open the door to the precisely opposite result. Relieved of their existing spectrum cap constraints, the incumbent cellular carriers would find themselves in a position to effect an anti-competitive industry consolidation, then happily carve up the new AWS spectrum in an allocation process characterised by low rivalry. It would be difficult to conceive of a worse outcome for the public interest.

⁹ Rogers Wireless (then Rogers Cantel) comments on Gazette Notice DGTP-015-98, page 1.

¹⁰ Rogers Wireless (then Rogers Cantel) comments on Gazette Notice DGTP-015-98, page 4.

If the Department was to determine that the retention of a mobile spectrum cap is in the public interest, at what limit should it be set? Please provide a rationale for the limit you propose.

As discussed in detail above, Microcell strongly believes that to protect the public interest, the Department must undertake to ensure that the Canadian wireless market does not consolidate below four players. The best and most direct means to achieve this essential objective is to leave the existing mobile spectrum cap in place, at its current level, on the bands to which it currently applies (that is, PCS at 2 GHz, cellular at 800 MHz and ESMR).

In addition, to protect against a potential anti-competitive warehousing of spectrum in the proposed new AWS spectrum allocation, a second and separate spectrum cap should be set at 25 MHz per carrier (and affiliates) for the combined AWS bands 1710-1755 MHz and 2110-2155 MHz.

Microcell submits that none of the existing wireless carriers can reasonably claim that continuance of the existing 55 MHz spectrum cap on the bands to which it currently applies, coupled with eligibility to acquire up to 25 MHz each in the new AWS allocation process, would constrain their ability to provide advanced wireless services to their customers for the foreseeable future.

The Microcell proposals would doubly promote the public interest: new advanced wireless services would be made available, with no anti-competitive industry consolidation.

When should the decision on the spectrum cap become effective?

Whatever decision is taken with regard to the mobile spectrum cap, it should become effective concurrent with the release of new AWS spectrum, no sooner.

No motivation exists for altering the spectrum cap prior to the actual release of new spectrum, other than to facilitate an anti-competitive consolidation of the Canadian wireless industry.

What other information could assist the Department in determining the public interest in considering changes to the mobile spectrum cap?

The preceding discussion contains references to several reports detailing the central role that Microcell, the only remaining new entrant in the Canadian wireless industry, has played in bringing wireless innovation and competitiveness to Canadians.

We respectfully submit that the Department must attach the highest importance to the impact its spectrum cap decisions may have on the wireless industry structure in Canada, and on the consequent ability of this industry to continue satisfying our nation's telecommunications policy objectives.

Any change in the spectrum cap policy that increases the likelihood of a wireless industry consolidation to below four national players risks dramatically undermining the competitiveness of this sector, to the disadvantage of all Canadians.

4.0 Measures to Promote Advanced Mobile Telephony Services in Rural Canada

The Department invites comments on:

- 1. *The proposal to afford preferential commercial roaming arrangements to small rural carriers with national and regional cellular and PCS carriers where the rural carriers***
 - a. do not compete in the same serving territories having network facilities, and***
 - b. operate solely in an unserved or underserved area.***

- 2. *The mechanisms that may best implement this proposal.***

The issue of mandated roaming between mobile wireless carriers is of considerable interest to Microcell, and considerable importance to the safeguarding of fair wireless competition in Canada.

In 1996, when the Department chose to issue 10 MHz PCS licences to the incumbent cellular carriers (Rogers Wireless and the members of the then Mobility Canada consortium), it attached to these licences a requirement that the incumbent cellular carriers make analog cellular resale and roaming in the 800 MHz band available to the two new 30 MHz PCS licensees (Microcell and the then Clearnet). The Department also mandated that all PCS licensees make PCS resale and roaming available to all other PCS licensees.

In 1997, Microcell signed an analog cellular roaming agreement with one of the incumbent cellular licensees, which agreement continues in effect.

Analog cellular services, however, are gradually being phased out in Canada. And the existing roaming requirement on cellular carriers does not extend to digital services offered in the 800 MHz cellular band.

The 800 MHz cellular band, whether employed using analog or digital protocols, is particularly well suited for rural deployment as electromagnetic waves propagate farther at that frequency than at the 2 GHz PCS frequency. As a result, the same rural area can be deployed with considerably less network infrastructure at 800 MHz cellular frequencies than at 2 GHz PCS frequencies. There are areas in Canada that may never be covered by PCS systems, but are already covered by digital cellular systems.

To confirm the rural coverage advantages of 800 MHz spectrum relative to 1900 MHz spectrum, the actions and words of industry participants and analysts are highly illustrative.

For example, in a February 14, 2003 news release, announcing financial and operating results for the fourth quarter and year ended December 31, 2002, Rogers Wireless explained why they are investing in and deploying GSM/GPRS infrastructure at 800 MHz, despite already having deployed some 1900 MHz GSM/GPRS equipment:

“The Company believes the investment in its 850 MHz GSM/GPRS network infrastructure will provide superior in-building and rural coverage.”

Telus has confirmed similar benefits for 800 MHz network deployment over 1900 MHz. In its Prospectus Supplement to a Short Form Base Shelf Prospectus dated May 25, 2001, Telus stated (pages 5-8):

“The Mike network utilizes frequencies in the 800 MHz range which have propagation advantages over higher frequencies such as those used in digital PCS networks, resulting in more cost effective geographic coverage.”

Consider also the following statement by Bill Cliff, the Chief Technology Officer for Cingular, one of the largest wireless operators in the United States:

“The down banding of GSM to 850 MHz gives Cingular significant advantages, especially in rural and dispersed areas, because there is better propagation in lower spectrum positions. That means fewer radio towers.” (November 2001)

Nokia, a major wireless infrastructure manufacturer, made the following observation:

“A major benefit of GSM 800 is that it enables existing TDMA operators as well as new GSM entrants to benefit from the global success of GSM. In addition, current GSM 1800 and 1900 operators can reduce their network expenditures by reduced coverage and capacity costs on the 800 MHz band.” (NOKIA Press Release, “Nokia expands GSM success with GSM 800 to secure solid evolution to 3G”, February 6, 2001.)

Other players, such as Bell Mobility, confirm the benefits of 800 MHz spectrum in their choice of bands for deployment. Given that they are licensed for both 800 and 1900 MHz, they do have a choice:

“Effective this July, Bell Mobility’s 800 MHz Digital PCS network is expanding to serve residents and vacationers in Bracebridge, Gravenhurst, Huntsville, Midland, Orillia, Parry Sound and communities in between.” (CNW Canada NewsWire, “Bell Mobility Expands Digital PCS Coverage to Cottage Country”, Toronto, June 29, 2000.)

Industry observers and analysts have also identified the value of 800 MHz spectrum over 1900 MHz spectrum:

“Since a signal travels further at 800-MHz than at 1900-MHz, more cell sites are required to service a given number of subscribers for PCS, particularly in rural areas.” (TM Capital Corp, “Frequency Electronics, Inc.”, February 5, 2001.)

“Consequently, 1900 MHz (PCS) operators must build considerably more cell sites than 800 MHz (cellular or SMR) operators for equal coverage. With the low population densities in rural markets, the capital investment required to construct an adequate network is less likely to generate sufficient returns.” (Duff & Phelp Credit Rating Co., “Special Report: Telecommunications – Wireless Credit Fundamentals: On Track and Gaining Momentum”, October 1999.)

The competitive advantage that accrues to the incumbent holders of 800 MHz spectrum, therefore, is not their narrow ability to deploy a specific technology standard (namely analog cellular or AMPS), but rather their general ability to deploy whatever technology they may choose in a spectrum band that has superior propagation characteristics to those of at least some of their competitors.

A technology-independent roaming and resale obligation applied to the holders of cellular spectrum would focus more directly and more fully on the issue of coverage potential, which is the true and lasting competitive advantage that cellular licensees hold over “pure play” PCS licensees.

Microcell’s experience over the last few years has only served to highlight the unfortunate fact that positive market incentives alone will not suffice to encourage Canada’s industry players to enter into reasonable and pro-competitive digital roaming arrangements.

In a context where players’ motives are truly pro-competitive in nature, we would expect to see a significant number of such arrangements between players of all sizes in a wide variety of geographic regions, with each player bringing its own resources and demand characteristics to the table. However, when players’ motives are anti-competitive in nature, as appears to be the case in Canada today, what we observe is on the one hand an inter-incumbent sharing of spectral advantages (witness the

digital roaming deal between Bell Mobility and Telus Mobility) and on the other hand a desire to avoid doing business with smaller players in the hope (perhaps) that they might disappear.

In a truly competitive market, carriers would welcome opportunities to amortize their network infrastructure expenditures over a greater number of users via resale and roaming arrangements, especially in rural areas where the absolute number of potential users is limited. Carrier profitability, and rural Canadians, would be the big winners.

Unfortunately, Canada's wireless market does not function this way today. Wielding competitive advantage as a weapon is more important than improving one's rural coverage cost structure.

In light of these facts, Microcell strongly disagrees with the Department's proposal to limit access to mandated digital roaming arrangements to carriers that operate solely in unserved or underserved areas and that do not compete in the same serving territories as the carriers on which they seek to roam. Such conditions would effectively preclude a carrier such as Microcell from benefiting from any mandated digital roaming arrangements in the 800 MHz cellular band.

We emphasize once again that the competitive advantage accruing to the incumbent cellular carriers is not the geographic scope of their spectrum holdings, but rather the propagation characteristics of the spectrum they control – 800 MHz cellular spectrum being much better suited for rural coverage than 2 GHz PCS spectrum.

The policy objective to be satisfied through mandated digital roaming arrangements is not solely to enable small regional carriers to offer wide-area roaming coverage to their customers (however laudable that objective may be), but more importantly to ensure that those carriers who possess scarce high-propagation 800 MHz spectrum do not unduly restrict access to this spectrum for unfair competitive advantage.

Microcell recommends that the 800 MHz cellular licensees be required to offer 800 MHz cellular resale and roaming, regardless of the transmission protocol employed, through commercial arrangements to PCS licensees who are not also cellular licensees in the territory in question.

5.0 Other Issues – The Allocation and Designation of AWS Spectrum Bands

Comments on Gazette Notice DGTP-007-03 were submitted on today's date by the Canadian Wireless Telecommunications Association (CWTA). Microcell participated in the elaboration of the CWTA's comments, and we support these comments in so far as the allocation and designation of AWS spectrum bands is concerned.

However, we do not agree with the incumbent cellular carriers, who form the majority in the CWTA, on what to do with the mobile spectrum cap or on how to promote advanced mobile telephony services in rural Canada. On these latter two subjects, Microcell views are as recorded herein and not as recorded in the CWTA's comments.

All of which is respectfully submitted.

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SCHEDULE A

Lemay-Yates Associates Inc.

“The case for four mobile telecom operators in Canada”

Executive Summary

SCHEDULE B

Microcell Telecom

Foreign Investment Policy Backgrounder

“Can the Canadian Wireless Market Support Four Wireless Competitors?”