



PUBLIC INTEREST ADVOCACY CENTRE
LE CENTRE POUR LA DEFENSE DE L'INTERET PUBLIC

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May 16, 2011

Manager
Mobile Technology and Services
DGEPS
Industry Canada
Room 1612A
300 Slater Street
Ottawa, ON
K1A 0C8

Dear Sir:

**Re: Notice No. SMSE-005-11- Consultation on a Policy and Technical
Framework to License Spectrum in the Band 2500-2690 MHz**

We are writing to provide reply comments of the Public Interest Advocacy Centre with respect to the above noted consultation document. Thank you.

Yours truly,

Original Signed

Michael Janigan
Executive Director / General Counsel

Part I

Publication Date: February 12, 2011

**Title: Notice No. SMSE-005-11- Consultation on a Policy and
Technical Framework to License Spectrum in the Band
2500-2690 MHz**

**Comments of
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I. Introduction

1. The Public Interest Advocacy Centre, (PIAC), a non-profit organization with its head office in Ottawa, has for over thirty years been engaged in representing the interests of consumers and, in particular, vulnerable consumers concerning the delivery of important public services. This engagement has included both participating in proceedings of importance in the Canadian Radio-Television and Telecommunications Commission (CRTC), and research and advocacy on telecommunications and broadcasting issues.

II. Background

2. This reply is guided by our comments in the SMSE-018-10 (700 MHz band auction) consultation. In the 700 MHz Band consultation process, PIAC advocated for an auction structure that would allow all players to participate, particularly through a set aside for smaller players. Additionally, PIAC advocated for “use it or lose it,” “restraints on dealing,” and limited license term rules. Further, because certain needs of Canadians can only be met outside the commercial market, PIAC urged Industry Canada to structure a set aside of 25 MHz for public and priority uses.
3. PIAC has had the opportunity to review the comments filed in the initial round of comments concerning the licensing of spectrum in this band, and believes that there are additional concerns that should be reviewed that are directly relevant to the this current consultation. Accordingly, PIAC wished to raise these matters in reply.

III Process

4. PIAC notes that a number of statements have been made in the received comments attempting to link the goal of rigorous competition and the use of market forces with the auction process itself. Rogers Communications (“Rogers”) notes, for example, “
“The 2500 MHz auction policy should allow those who value the spectrum the most to put it to its most productive use.”
Bell Mobility Inc. (Bell) notes ominously:
“However, there is a worrisome trend of Industry Canada becoming more interventionist in the wireless sector,”
5. In PIAC’s view, the auction process should be more than an exercise to inflate the Consolidated Revenue Account of the Government of Canada. Obtaining the highest bids for wireless spectrum is one way for the public to benefit in an indirect fashion through having increased monies at the disposal of their elected government. There is competition, of course in the bidding process, but the end result might reflect strategic and resource concerns rather than the most efficient and competitive allocation of spectrum.
6. Industry Canada’s role is to achieve the public interest objectives that go beyond public revenue enhancement. Of course, incumbent players might be prepared to pay a higher price to maintain market hegemony. In that case, those that “value the spectrum the most” may not be using spectrum in the most efficient way possible by simply aligning the use with its own business strategy.

7. Put in another fashion, structuring the auction through the use of spectrum caps or set asides, is no more interventionist than the determination to structure the auction so that the highest bid wins. It is simply shifts the components of a winning hand to considerations like the state of the market and the welfare of consumers and away from the strongest suit of the incumbents, namely existing resources and spectrum. Bell’s own experts, Drs. Waverman and Dasgupta note:

“In short, the spectrum allocation process should give low weight to government revenue considerations and much higher weight to allocations that lead to timely deployment of wireless services and to efficient wireless competition”¹

IV .Reply Argument

A. Block sizes:

8. PIAC recognizes that block sizing directly effects competition or the ability to maintain effective competition. As such, PIAC urges the Department to provide the market the flexibility to accommodate all bidders – not merely those bidders capable of purchasing and concentrating the largest contiguous blocks. In other words, incumbency in the 2500 MHz spectrum should not simply be given the greatest weight because of the ability to immediately fashion blocks of a sufficient size to be sustainable.

¹ Waverman, Leonard, and Dasgupta, Kaylan, “Time to Set Aside Caps that Don’t Fit: The Limits of Spectrum Policy in Canada”, February 26, 2011, Para 36, (filed as Appendix 1 to Bell submissions April 19, 2011)

9. The incumbent carriers seek to walk between the raindrops by extolling the current state of wireless competition while maintaining that spectrum made available through spectrum caps and set asides to the new entrant drivers of existing competition would be risky and unsustainable. As well, the economic consequences of the incumbents being shut out by a cap from acquiring spectrum in this band are alluded to in their submissions. Bell states that that it is “quickly using up its available spectrum”². Rogers warns that while it will have access to the bare minimum amount of contiguous spectrum required to provide LTE data speeds in certain geographic areas, in other areas it won’t without more spectrum.
10. It is to be noted that the United Kingdom’s national telecom regulator, Ofcom, seems to be approaching the question of ensuring economic and sustainable competition in a different fashion than simply let “the big dogs eat”. In its assessment of mobile competition released March 22, 2011, Ofcom proposed that national competition would be threatened if it didn’t ensure that at least four competitors had enough spectrum of the right kind to be able to run a national network of their own. This is to be ensured by a system of “floors” and “caps”. Any auction outcome that doesn’t meet the minimum requirements of 4 competitors with enough spectrum to run a national network would be disregarded.³ There is some reason to believe the blandishments of the incumbents in this consultation urging laissez-faire would be given short shrift by Ofcom.

² Comments of Bell Mobility, Canada Gazette Notice No. SMSE-005-11, p. 18

³ “Assessment of future mobile competition and proposals for the award of 800 and 2.6 GHz spectrum and related issues”, Ofcom, March 22, 2011, p. 3

11. Ofcom has also sponsored research concerning the effect on spectrum efficiency and resultant capacity of improvements in 4G technologies. The research results show that forecast capacity improvements have been significantly underestimated previous studies.⁴

12. In releasing the research report described in paragraph 12, herein, Ofcom's Director of Research stated:

“The research that we commissioned indicates that early 4G mobile networks with standard configurations will be 3.3 times (230%) more spectrally efficient than today's standard 3G networks. To put this in context, a user on an early 4G network will be able to download a video in around a third of the time it takes today on a 3G network. It is anticipated that this efficiency will increase to approximately 5.5 times (450%) by 2020.”⁵

13. At a minimum, Ofcom's new research counsels caution in relation to the acceptance of predictions of dire economic and efficiency consequences if the incumbents are capped at current levels of spectrum in this band.

14. PIAC echoes Public Mobile's statement that “[t]he creation of block sizes that encourage and foster sustainable competition is critical for the evolution of a dynamic wireless services market in the face of dominant incumbent carriers

⁴ “Report for Ofcom 4G Capacity Gains, Real Wireless27, January 2011

⁵ “4G set to deliver capacity gains of more than 200% over 3G”, News Release, Ofcom, May 12, 2011 <http://media.ofcom.org.uk/2011/05/12/4g-set-to-deliver-capacity-gains-of-more-than-200-over-3g/>

with vast spectrum reserves.”⁶ Sustainable competition requires the entrance of newer, smaller competitors at the critical junctures of the 700 and 2500 MHz band auctions. In the 2500 MHz band auction in particular, sustained competition for the future is best accomplished by auctioning smaller blocks and allowing aggregation of blocks post-auction.

15. PIAC also supports the post-auction measure proposed by Telus and others, whereby parties can aggregate smaller blocks.⁷ PIAC also supports a post-auction mechanism for assigning or organizing blocks contiguously for those players who acquire multiple blocks.⁸ This way, auctioning smaller blocks would accommodate both smaller and larger players. The need for a process for coherent assemblage of spectrum should not automatically cede an advantage to the existing incumbents.

B. Tier Sizes:

16. PIAC stresses the importance of adopting tier sizes that allow the greatest competition in all markets. Regional differences must be accounted for, such that tier sizes do not preclude competitors from entering the market or maintaining a competitive presence in any region. This is best accomplished through a mixture of tier sizes.

C. Competitive Measures:

17. PIAC’s underlying concerns about competition were put forth in the 700 MHz consultation. To reiterate, competition is not achieved by merely holding an auction for bidders to “compete” for resources; true competition requires that all

⁶ Public Mobile at page 4.

⁷ Telus at para. 39.

⁸ Proposed by Research in Motion at para. 13.

parties have the opportunity to participate in the auction. Measures to promote real competition include ensuring block sizes and tier preferences do not eliminate, but rather encourage the participation of, smaller competitors. In addition to block sizes and tier preferences, caps and set asides provide opportunities to increase competitive presence in the 2500 MHz band currently dominated by Bell, Rogers and their jointly owned affiliate, Inukshuk .

18. Bell and Rogers vigorously assert in their comments of April 19, 2011 that the market is currently working competitively to the benefit of Canadians. Their credibility is not enhanced by the fact that similar claims were advanced by them when the framework spectrum auction consultation was initiated in 2007 by Canada Gazette Notice DGTP-001-07.

19. Bell's experts make heroic efforts to try to show there is no need for competition concerns with this important industry that is producing EBITDA levels of 45% and 43% in 2008 and 2009 respectively, and is dominated by three large players.⁹ PIAC disagrees, and suggests that we cannot return to the wireless market complacency that was altered by Industry Canada's efforts in the last spectrum auction to build the groundwork for a competitive market.

20. PIAC stresses the importance of the Department's role in structuring competitive measures into the auction process. PIAC challenges Rogers' assertion that mechanisms such as set-asides and caps "distort auctions and

⁹ CRTC Communications Monitoring Report 2010

handcuff carriers.”¹⁰ Rogers’ assertion is erroneously based on the underlying premise that an “open” auction is free from structural biases. An open auction is not value-neutral; it will favour the participation of only the highest bidders. PIAC points out that the advantage the Big Three have going into the auctions holding 85% of the total available spectrum “does not promote a healthy competitive market and will only lead to further industry consolidation.”¹¹ PIAC agrees that “maintaining or worse increasing the disparity of spectrum assets” would destroy sustainable competition.¹² Set-asides and caps are critical structural measures to promote sustainable competition. While they might come with a cost of reduced government revenue, in PIAC’s view, this does not constitute a subsidy but rather establishing the appropriate conditions for the operation of market forces.

i. Set-asides:

21. PIAC is concerned that “the combined population-weighted percentage of Bell and Rogers’ holdings of licensed spectrum in the 2500 MHz band is...98 percent.”¹³ PIAC is also aware that Telus holds has access to a significant amount of spectrum via network sharing agreements with Bell, and that Telus may have “more spectrum than all new entrants combined.”¹⁴ Therefore, PIAC asserts that because spectrum is already excessively concentrated by the Big Three, all available BRS spectrum should be set aside for smaller entrants only.¹⁵

¹⁰ Rogers at para. 38.

¹¹ Niagra Networks at para.7.

¹² *Ibid.*

¹³ MTS Allstream at para. 15

¹⁴ Niagra Networks at para. 7.

¹⁵ Niagra Networks at para. 11.0.

21. Failing that, PIAC supports set-asides of a sufficient amount of spectrum to allow new entrants into each of Regions A, B, and C. This could mean set-asides for participants holding less than 10% of the national wireless market, as this threshold was successful at promoting competition in the 2008 AWS auction.
22. PIAC supports the guideline proposed by Public Mobile, that an entity with more than 20 MHz of fallow PCS, Cellular, or AWS spectrum should be precluded from bidding in the 2500 MHz band auction.¹⁶ This measure will prevent entities from buying up spectrum without plans to use it efficiently and promptly.
23. PIAC stresses the importance of restrictions on transferring set-aside spectrum to non-new entrants, or to entities with more than 20 MHz fallow spectrum, for period of 5 years.

ii. Spectrum Cap:

24. Just as a cap was useful in the 2001 PSC auction to allow smaller licensees to acquire spectrum, a cap is an important tool to promote competition in the 2500 MHz band, where the market is already dominated by three main entities.
25. Bell Mobility states that intervention in the auction process, such as through set asides or spectrum caps, significantly conflicts with the intent and spirit of the Policy Framework.¹⁷ However, PIAC submits that promoting competition and

¹⁶ Public mobile at page 11.

¹⁷ Bell Mobility at para. 71.

promoting the ability of smaller entities to participate in the market is a key to the objectives of the industry and the overall Canadian economy.¹⁸ The 2500 MHz auction is a critical juncture at which the Department can promote competition by preventing excessive future concentration of spectrum by the largest three service providers.

26. PIAC is concerned that no cap, or a cap set too high, would fail to prevent spectrum concentration. PIAC is not concerned that a spectrum cap could be set too low, thereby preventing the largest of the companies from acquiring sufficient spectrum to satisfy business needs. This apprehension must be viewed in the context that the Big Three already dominate spectrum holdings, and have more spectrum than they are using.¹⁹

27. PIAC submits that it is appropriate to cap the amount of spectrum each player can acquire in the 2500 MHz auction, relative to the amount of spectrum each has already acquired in that band. In other words, post-auction, no entity should hold over 50 MHz within the 2500 MHz band. PIAC considers a cap per entity of 50 MHz within the 2500 MHz band to be a critically important measure to ensure future and sustained competition in the market.

28. PIAC submits that the cap should be in place for a minimum of five years to allow sufficient time for newer, smaller entrants to become better established in the market.

¹⁸ *Competition Act*, R.S. 1985, c. C-34, s. 1.1; See also *Telecommunications Act*, S.C. 1993, c. 38 which states that Canadian telecommunications policy has as one of its objectives to enhance the efficiency and competitiveness of Canadian telecommunications and to use regulation where required.

¹⁹ As per MTS Allstream at para. 15 "the combined population-weighted percentage of Bell and Rogers' holdings of licensed spectrum in the 2500 MHz band is actually 98 percent". As per Eastlink at para. 9, Bell and Rogers through Inukshuk own 33% of available 2500 MHz spectrum in Region A and 67% of spectrum in Region B.

Changes to Foreign Investment Restrictions:

29.Changes to foreign investment restrictions would not affect PIAC's responses.

V. Conclusion:

30.For the reasons given above, Industry Canada should:

1. Set aside all available BRS spectrum for newer, smaller players; and failing that
2. Restrict participation in the set aside to players with less than 10% of the wireless market, or in the alternative, less than 20 MHz of fallow PCS, Cellular or AWS spectrum;
3. Prohibit the transfer of set-aside spectrum to the Big Three for a period of five years;
4. Cap the amount of spectrum each entity can hold to 50 MHz within the 2500 MHz band, for a period of five years.

31.PIAC urges to the Department to institute only those measures that promote equitable access to spectrum for new entrants and smaller players, to support the goal of increased competition in the market.

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