

Communications Law Bulletin

November 2007

Fasken Martineau DuMoulin LLP

Industry Canada Releases Auction Policy Framework for Advanced Wireless Services Spectrum

On November 28, 2007 the Honourable Jim Prentice, Minister of Industry, announced that the federal government is making 105 megahertz (MHz) of radio spectrum available by way of auction. The details on how the auction for Advanced Wireless Services (AWS) spectrum, expected to be held beginning May 27, 2008, will be conducted are contained in a paper entitled *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range* (the "Auction Policy Framework").¹

This highly anticipated announcement follows a lengthy public consultation on how best to license and conduct an auction process for AWS spectrum, launched by the federal government on February 16, 2007. Following the release of a consultation paper entitled *Consultation on a Framework to Auction Spectrum in the 2 GHz range including Advanced Wireless Services*, interested parties were invited to submit comments on a number of spectrum utilization issues such as competition-related issues in the provision of high-mobility services and

other technical and operational considerations for the use of the spectrum, including proposed conditions of licences, the size of spectrum blocks and geographic areas, licence terms, and conditions for licence renewal. The November 28th release of the Auction Policy Framework represents an attempt by the federal government to increase access to mobile spectrum for advanced services, and to foster greater competition in the wireless market.

As part of an ongoing effort to bring you up-to-date developments as they relate to the communications industry, the Communications Law Group at Fasken Martineau has prepared the following high level overview of the key aspects of the Auction Policy Framework and related publications.

Spectrum Set-aside

Of the 105 MHz of radio spectrum being made available to wireless service providers through the auction process, 40 MHz of AWS spectrum will be set aside *exclusively* for new entrants. This was a hotly contested issue in the preceding consultation. The set-aside is designed to ensure that one or more new entrants gain access to spectrum and to foreclose the possibility of the incumbent players acquiring all of it. The remaining

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¹ The Auction Policy Framework is available on Industry Canada's website and can be accessed at <http://strategis.ic.gc.ca/epic/site/smt-gst.nsf/en/sf08833e.html>.

65 MHz will be made available to any and all interested bidders.

For the purposes of the Auction Policy Framework, a *new entrant* is defined as “[a]n entity, including affiliates and associated entities, which holds less than 10 percent of the national wireless market based on revenue”. The *new entrant* designation will remain valid throughout the term of an entity’s spectrum licence even if the entity’s market share eventually exceeds this 10 percent threshold. In addition, spectrum licences obtained through the set-aside auction process may not be transferred to any party that does not meet the criteria of a *new entrant* for a period of 5 years from the date of issuance.

The spectrum auction will make available a total of 236 licences in regional service areas and a total of 28 licences in provincial and large regional service areas. Of the total number of available licences, 59 regional service area licences and all of the provincial and large regional service area licences will be reserved for new entrant bids in accordance with the spectrum set-aside. As a result, incumbents earning more than 10 percent of Canadian wireless revenue nationally will be excluded from bidding on any new provincial and large regional service area licences. The opening bids for each service area (for both the set-aside spectrum and non-set-aside spectrum blocks) are provided in the tables found in Annex 1 to the Auction Policy Framework.

The set-aside virtually guarantees that the wireless market will have more players following completion of the auction. Large communications companies such as Quebecor Media and Shaw Communications are likely to bid for spectrum in order to add wireless to their existing suite of communications services.

Mandated Roaming

In addition to setting aside spectrum for new entrants, the federal government has also chosen to mandate roaming in an attempt to promote

competition, albeit at commercially negotiated rates. In general terms, “out-of-territory” roaming enables end users to obtain services from a wireless provider other than the subscriber’s primary network operator when travelling from one geographic area to another, and “in-territory” roaming refers to mandated roaming within a new entrant’s licensed service territory. Under the terms of the Auction Policy Framework, Industry Canada will require licencees to offer automatic digital roaming as follows:

- to all cellular, personal communications services (PCS) and AWS licencees outside of their licensed area, for *a minimum period of 10 years*;
- to all new entrants within their licensed areas for *a period of 5 years* from the date of issuance of their licence; and
- to national new entrants² having substantially met (as determined by Industry Canada) the 5-year roll-out requirements outlined in Annex 2 to the Auction Policy Framework for an *additional 5-year period*.

In the event carriers are unable to reach acceptable roaming arrangements within an established time frame (to be determined in a subsequent consultation process), the parties will be required to undertake binding arbitration to resolve the matter, the rules of which will also be determined in the consultation.

Mandated roaming means new entrants can offer services nationally using competitors’ facilities

² For the purposes of the Auction Policy Framework, a *national new entrant* is defined as “a new entrant that has acquired licences for all Tier 2 or Tier 3 service areas, or a combination of Tier 2 and Tier 3 service areas, covering all of Canada in the AWS or PCS bands” and “includes a group of new entrants collectively holding all Tier 2 or Tier 3 service areas, or a combination of Tier 2 and Tier 3 service areas, covering all of Canada in the AWS or PCS bands and cooperating to provide a national service”.

while they build out their networks on either a regional or national basis. Incumbents will be able to roam on a mandated basis (as opposed to by agreement) on the networks of other incumbents only in areas where they themselves are not licensed. As the only national GSM carrier, Rogers Wireless is likely to bear the initial brunt of the obligation to provide mandated roaming.

Antenna Tower and Site Sharing

In an attempt to alleviate concerns associated with the building of new antenna towers (*e.g.*, environmental) and to address certain strategic and competition-related issues, Industry Canada has chosen to mandate antenna tower and site sharing and to prohibit exclusive site arrangements for all licencees, including those with broadcasting towers. Once again, if parties are unable to reach mutually agreeable sharing arrangements within prescribed time frames, they will be directed to binding arbitration.

The strategic and real estate value of towers vary significantly and, as additional investment is often required to strengthen towers to support more radio equipment, these negotiations are likely to be contentious.

Next Steps in the Auction Process

Industry Canada has set the following milestones in connection with the AWS spectrum auction:

- the auction framework document setting out the auction application procedures, licensing parameters, technical considerations and

anticipated targets with respect to timing is expected to be published in December 2007;

- a supplementary public consultation on specific changes to the conditions of licence for existing licence holders to implement the policy measures announced in the Auction Policy Framework (specifically mandatory antenna tower/site sharing and mandated roaming) is scheduled to close on January 11, 2008;
- following this supplementary public consultation, a final decision on the operation and wording of the conditions of licence is expected to be made public in February 2008;
- the deadline for AWS spectrum auction applications is expected to occur in March 2008;
- a mock auction intended to familiarize potential bidders with the auction process is expected to take place in May 2008; and
- the auction for AWS spectrum is set to begin on May 27, 2008 and is expected to last between two and three weeks.

If you require further information with respect to the AWS spectrum auction, or if you wish to submit comments in the supplementary consultation, please feel free to contact a member of our Communications Law Group. Fasken Martineau advises on a wide range of regulatory and business issues in the communications industry. For further information on these services, please refer to our website (<http://www.fasken.com/communications>) or contact one of our Communications lawyers listed on the following page.

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