

**APPLICATION BY TNW WIRELESS INC. AGAINST BELL
MOBILITY INC AND TELUS COMMUNICATIONS COMPANY
RELATING TO BELL MOBILITY INC'S AND TELUS
COMMUNICATIONS COMPANY'S REFUSALS TO PROVIDE
TNW WIRELESS INC. WITH MANDATORY WHOLESAL
ROAMING AGREEMENTS REQUIRED UNDER TELECOM
REGULATORY POLICY CRTC 2015-177 AND AS SPECIFIED
IN THEIR RESPECTIVE CARRIER ACCESS TARIFFS**

ANSWER

OF

BELL MOBILITY INC.

4 AUGUST 2017

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1.0 **INTRODUCTION AND EXECUTIVE SUMMARY**

ES-1 Bell Mobility files this Answer in response to an application by TNW Wireless Inc. (TNW) against ourselves and TELUS Communications Company (Telus), in which TNW seeks interim and final relief which, amongst other things, would order us to provide TNW with a Wholesale Roaming Agreement, on both an interim and final basis (the Application). In accordance with section 25 of the *Canadian Radio-television and Telecommunications Rules of Practice and Procedure* (the *Rules*) and the 4 August 2017 answer deadline date posted on the Commission's website¹, we hereby provide our Answer to the Application.

ES-2 We disagree with and oppose the entirety of the interim and final relief requested by TNW against Bell Mobility. This is on the basis of the following:

- (i) TNW's iPCS technology creates two connectivity scenarios: one in which their out-of-footprint subscribers obtain wireless network access through public Wi-Fi, and a second by which their out-of-footprint subscribers would obtain wireless network access through our host roaming network (and perhaps other carriers' host networks). Both these out-of-footprint access scenarios are contrary to the Commission's existing wholesale roaming rules and result in a net situation where, overall, both sets of subscribers obtain non-incidental access to our host roaming network in clear contravention of the Commission's rules.
- (ii) Connectivity obtained in the first scenario, via a public Wi-Fi network, clearly contradicts the Commission rules, which have consistently stated that public Wi-Fi access does not form part of a home network for the purpose of establishing what constitutes incidental use of access to an incumbent's network. TNW's new 'wrinkle', whereby it proposes to backhaul this public Wi-Fi-originated traffic back to its home network and onto its Radio Access Network (RAN) in Northern British Columbia and the Yukon, does nothing to alter the fact this is public Wi-Fi originated traffic, since the key element of the rule is the "access" portion of the transmission path, which remains dependent upon public Wi-Fi connections over which TNW exercises no control and thus has no quality of service or capacity guarantees.

¹ See: https://services.crtc.gc.ca/pub/instances-proceedings/Default-Default.aspx?S=O&PA=A&PT=A&PST=A&Lang=eng&_ga=2.43635360.425111980.1499868686-2008624736.1493803985.

- (iii) Connectivity obtained through the second scenario, via our host roaming network, provides virtually permanent connectivity by TNW's end-users to our network, which is anything but the "incidental" access, by which the Commission defined the limits to be made of wholesale Global System for Mobile (GSM) roaming services. This also results in resale, contrary to Industry Science and Economic Development Canada's (ISED's) clear conditions of licence (COLs) stating that mandated roaming service does not include resale.
- (iv) TNW's claim that by somehow dividing its scenario two traffic between our and other roaming carriers' networks this would skirt the Commission's clear "incidental" use limit, is a fiction. No matter how many other roaming partners' wholesale roaming host networks TNW attempts to divide its scenario two traffic amongst, TNW still provides zero access connectivity via its own home network. This will always be more than incidental roaming use by TNW's end-users, regardless of the number of host carriers TNW signs roaming agreements with.
- (v) TNW's iPCS technology thus results in a situation where TNW fails virtually each one of the Commission's indicia of non-incidental roaming as prescribed in Decision 2017-56². This only serves to reinforce the conclusion that TNW's proposed scheme violates the existing Commission and ISED roaming rules.
- (vi) Neither Privy Council Officer Order 2017-0557 (the Cabinet Reconsideration Order), requiring the Commission to reconsider Decision 2017-56, or TNC 2017-259³ change the above rules. Indeed, TNC 2017-259 only serves to reinforce that TNW's iPCS technology scheme is offside the current Commission rules.
- (vii) In addition, TNW's less than forthright conduct, its own delays, as well as its failure to satisfy the Commission's long-standing three-part test for interim relief⁴ disentitle it to the interim relief it applies for.

ES-3 Accordingly, we request that the Commission reject TNW's Application in its entirety.

² Telecom Decision CRTC 2017-56, *Wholesale mobile wireless roaming service tariffs – Final terms and conditions*, paragraph 78.

³ Telecom Notice of Consultation CRTC 2017-259, *Reconsideration of Telecom Decision 2017-56 regarding final terms and conditions for wholesale mobile wireless roaming service*.

⁴ See: *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311. The applicant for interim or injunctive relief of the type sought here by TNW must demonstrate the following: (i) its application raises a serious issue to be tried, (ii) there would be irreparable harm to it in the absence of a stay; and (iii) the balance of convenience favours granting the stay.

2.0 **FACTS**

2.1 **TNW's delays and less than transparent disclosures**

1. At the outset, it is helpful to correct the record regarding a number of inaccuracies set out in TNW's Application. TNW's claim⁵ that they first requested roaming from us by way of a 16 January 2017 letter from them addressed to us is incorrect and misleading in several respects. The validity of that letter was questionable, to say the least, since it was sent by a Mr. Panesar, claiming to be the President of a company called "RuralCom Corporation Inc.", but which nowhere made mention of the named licensee of cellular spectrum licences, namely RuralCom Corporation.⁶ TNW appears to have "jumped the gun" and prematurely issued a news release, dated 8 December, 2016, in which Investel Capital Corporation announced that its wholly owned subsidiary, TNW Networks Corp., had acquired "all of the issued and outstanding shares of RuralCom Corporation from RuralCom Capital Corporation"⁷.

2. There was considerable doubt about this transaction, including whether it had been completed at that time. TNW exacerbated this confusion by sending its 16 January 2017 letter under the signature of Mr. Panesar, who may not then have been qualified to assert he was president and identifying himself as acting for a company, RuralCom Corporation Inc., which is not an identified licensee of spectrum.

3. In any event, it is misleading for TNW to characterize its 16 January 2017 letter as a proper roaming request since it was non-compliant with several ISED Roaming COLs. It was not preceded by a request for a Preliminary Information Package (PIP) (as required by Roaming COL 3). As a result, it lacked specific technical details about TNW's request for roaming that we required (as required by Roaming COL 4(b)) for us to properly assess the technical feasibility of the proposal.

⁵ TNW Application, paragraph 8.

⁶ Based on information appearing on the ISED website, it appears that RuralCom Corporation holds two cellular licences: one, licence number 010288961-001, for tier 2 cellular spectrum covering the Inside Passage and Alaska Highway area of British Columbia. The second, 010288971-001, for tier 2 cellular spectrum covering the Alaska Highway area of Yukon Territory. Both licences show an effective date of 3 November 2017 and a 31 March 2021 expiry date.

⁷ See: <http://www.newswire.ca/news-releases/tnw-networks-corps-parent-company-investel-capital-corporation-acquires-wireless-operator-ruralcom-605406786.html>.

4. It turned out that TNW was not able to demonstrate its valid legal ownership of and control over RuralCom Corporation (and hence its standing as a carrier eligible to request roaming) and Mr. Panesar's authority to act on its behalf until 6 April 2017. This was as a result of a 6 April 2017 letter by Investel and a preliminary review of the RuralCom minute book. The 6 April 2017 letter also makes reference to: i) the information contained in the Corporation Canada public filing, and ii) the fact that ISED had acknowledged the transaction.

5. TNW's suggestion⁸ that we were required to respond to TNW's 16 January 2017 roaming request letter by providing it with a PIP two weeks from that date is also inaccurate. To the contrary, ISED Roaming COL 3 clearly obliges the requesting licensee (here, TNW or RuralCom Corporation) to request a PIP. Nowhere did Mr. Panesar's 16 January 2017 letter make such a request. We were thus under no duty to provide a PIP. TNW's own subsequent conduct belies its claim, since TNW expressly requested a PIP from us three months later, on 6 April 2017.⁹ We promptly responded to that TNW PIP request in half the required 14-day interval,¹⁰ emailing the PIP to TNW on 13 April 2017.

6. TNW's claim¹¹ that on 18 April 2017 they provided us with "a full proposal" for wholesale roaming is similarly inaccurate. Nowhere in their 18 April 2017 proposal did TNW share details with us about the iPCS technology that is clearly the central feature of its Application. They knew, or ought to have known by this time, in light of the Commission's rulings in Decision 2017-56 and Decision 57¹², both issued approximately six weeks earlier on 1 March 2017, that TNW's iPCS technology and the issue of whether this would generate incidental or non-incidental roaming would be a key issue associated with their roaming request. Instead, TNW relied on its verbal descriptions of that technology, provided in a face to face meeting that took place in the Toronto offices of Ernst and Young, the monitor in a CCSA proceeding involving TNW, on 7 April 2017. TNW instead left it to our Director of Roaming to pose a number of questions about their technology, which we set out in our 11 May 2017 letter.

7. TNW then waited more than a month, until 13 June 2017, to respond. TNW wrote to the Commission the following day, on 14 June 2017, and blamed us for the delays.

⁸ TNW Application, paragraph 8.

⁹ See: Investel Capital Corporation 6 April 2017 Letter to Francois Gagnon, page 3, section 2.2.

¹⁰ Roaming COL 3.

¹¹ TNW Application, paragraph 9.

¹² Telecom Decision CRTC 2017-57, *Ice Wireless Inc. – Application regarding roaming on Rogers Communications Canada Inc.'s network by customers of Ice Wireless Inc. and Sugar Mobile Inc.*

8. It may also be relevant to note there is some question as to TNW's compliance with ISED COLs attached to its cellular licences.

9. These required RuralCom to have provided ISED with a "detailed business plan" demonstrating how it intends to service local customers in its licensed areas (i.e., Northern British Columbia and the Yukon) no later than 13 January 2017. This same COL also required RuralCom, no later than 13 February 2017, to demonstrate to ISED that the cellular spectrum in respect of which it was granted licences "has been put into use by providing fully operational voice services to customers in the licence area." To ensure compliance with this condition, RuralCom was to have filed, by 13 February 2017 "a report indicating that the required services are being offered to customers and provided to a level of coverage at least 50% of these licensed areas." This licence condition requires that "RuralCom must maintain the minimum level of coverage noted above and continue to offer the required services throughout the term of the licenses." It is unclear whether RuralCom and TNW have any operational towers at this time. This raises concerns not only as to whether RuralCom is compliant with their roll-out and continuous service provision obligations under their cellular licence. Of equal concern, it's doubtful as to whether RuralCom is meeting its tower sharing obligations to the extent prospective co-locators on its towers have no basis to ascertain whether TNW has any operational towers or sites.

2.2 TNW's iPCS Technology

10. We understand from TNW's Application, and from their 13 June 2017 responses to our 11 May 2017 questions, that TNW envisions two types of its end-users who would utilize roaming services on the Bell home network: "Type A" subscribers would be "traditional subscribers", who are resident within TNW's home footprint, utilize traditional 3GPP GSM access to the TNW home network and receive telephone numbers from areas within TNW's licensed footprint.¹³ These Type A subscribers would gain access to roaming on the Bell host network solely when out of range of the TNW home network. Type B subscribers, in contrast, would be any of those end-user subscribers who are not Type A subscribers, who use iPCS technology data only Smartphone-over- Internet Protocol (IP) cloud based technology.

¹³ See TNW 13 June 2017 Letter to our Director of Roaming, pages 3 to 4.

11. TNW clearly intends Type B subscribers would be resident throughout Canada and have telephone numbers with area codes that are not necessarily local to TNW's home footprint and which instead are local to the areas where these subscribers reside. TNW's website confirms this where it states:

TNW Mobile will launch this year in an invitation only public beta in which you the consumer can help us test and design the service moving forward. A maximum of 5,000 invites will be sent out across North America with TNW Mobile SIMs.¹⁴

12. From TNW's Application¹⁵ it appears that Type B subscribers would fall into one of the two wireless network connectivity scenarios: Scenario One would be where they obtain their wireless access through Wi-Fi. Scenario Two would be where they obtain access via roaming on the Bell host network (or perhaps via roaming on other roaming service providers' networks, such as Telus or Rogers). The Type B subscribers' two connectivity situations can be illustrated by assuming a single TNW end-user, resident in downtown Toronto, outside TNW's British Columbia/Yukon home network territory.

13. In Scenario One, the end-user gains network access via a Toronto Wi-Fi network (i.e., while within a Starbucks). In Scenario One, using the iPCS technology loaded onto TNW's phone, the end-user's voice, data and/or Short Message Service (SMS) traffic is routed back (via backhaul) onto TNW's towers somewhere in its home footprint and onto TNW's licensed spectrum there. The transmission path thus runs from that user's device in Toronto, onto public Wi-Fi, back to the TNW home network, onto TNW's "iPCS Wi-Node gateway", onto TNW's operational towers, to the extent there are any, and then onto its backbone. In Scenario Two, access is obtained by roaming on our host network.

3.0 **ARGUMENT**

3.1 **iPCS technology results in non-incidental access to Bell's (and other) host roaming network contrary to the current Commission wholesale roaming rules and ISED's Roaming COLs – all of which disentitles the Final Relief Requested**

14. The backhaul of Wi-Fi traffic back onto TNW's Northern British Columbia/Yukon home network spectrum in the manner described, using its iPCS technology, which appears to have been designed solely to exploit what TNW perceived to be a loop hole in the Commission's

¹⁴ See: <http://wireless.tnwcop.com/sign-up/>.

¹⁵ TNW Application paragraphs 57 and 58.

roaming rules, does not negate the fact that Scenario One and Two create an outcome contrary to the Commission's currently applicable roaming rulings. TNW admits this fact by stating:

It is important to note that iPCS is not a technology that happens to be compliant with current telecommunications regulations. iPCS is a technology that was developed with the knowledge of regulations currently in place and designed to be compliant both with the letter and spirit of the regulations. ¹⁶

15. These Commission rulings define the nature of our wholesale GSM roaming services (and those of the other national carriers) as providing only incidental access to our and the other national wireless carriers' networks. Moreover, what is known of TNW's proposed scheme conflicts with most, if not all of the Commission's indicia of non-incidental roaming from Decision 2017-56.

3.1.1 Non-compliance of Scenario One connectivity with Commission Rulings

16. TNW's "iPCS technology" results in "non-incidental roaming" by TNW's end-users on our host network. TNW's use of the wholesale roaming services from Bell would directly contravene the Commission's rulings in: Decision 2017-56 and Decision 2017-57 as these were both recently reconfirmed in TNC 2017-259, all of which state that public Wi-Fi does not form part of a home network for the purpose of establishing what constitutes incidental use of an incumbent's network and that roaming provides "incidental" access to the roaming service provider's host network.

17. The iPCS technology is also offside 'ISED's COL for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements¹⁷ (the Roaming COLs) which state that a requesting operator's right to request roaming does not include resale.

18. This is all illustrated by assuming a hypothetical TNW end-user, resident in downtown Toronto, who lives outside TNW's British Columbia/Yukon home network territory. We can assume two connectivity scenarios by which this user obtains wireless network access. In "Scenario One", this end-user obtains wireless access via a public Wi-Fi network (i.e., within a Toronto Starbucks). In "Scenario Two", access is obtained by roaming on the Bell host network.

¹⁶ TNW Application, paragraph 47.

¹⁷ *Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements*, CPC-2-0-17, Issue 2, March 7, 2013.

Using TNW's apparently as yet untested iPCS technology¹⁸, in Scenario One, their voice, data and/or SMS traffic, it is said by TNW, is routed back (via backhaul) onto TNW's towers¹⁹ somewhere in its home footprint and onto TNW's licensed spectrum there. The Scenario One transmission path is thus: end-user's device (in Toronto Starbucks) onto public Wi-Fi; back to the TNW home network; onto TNW's iPCS technology "Wi-Node gateway"; onto TNW's operational towers (i.e., in Whitehorse); and onto its backbone.

19. The critical point is that the backhaul of Wi-Fi originated traffic back onto TNW's Northern British Columbia/Yukon home network spectrum and Radio Access Network (RAN), assuming it can be done, does not negate the fact that Scenarios One and Two create outcomes contrary to the Commission's currently applicable rulings, and cumulatively result in TNW's non-incidental use of the Bell roaming service by TNW's end-users.

20. The Commission in Decision 2017-56 clearly concluded that when a wireless service provider, like TNW here, purports to provide network access to its end-users via public Wi-Fi, that Wi-Fi access is not part of the roaming carrier's home network because Wi-Fi facilities are not owned or operated by that service provider, nor are there any contractual or other arrangements between the service provider and the Wi-Fi operators to assure end-users of the availability, quality or reliability of such facilities in any meaningful or sustainable way.²⁰ The Commission just reconfirmed this principle through the issuance of TNC 2017-259, in which it restated the principle as follows:

... public Wi-Fi does not form part of a home network for the purpose of establishing what constitutes incidental use of an incumbent's network under the wholesale roaming tariffs. ... Wi-Fi is provided over facilities that are not owned or operated by wireless service providers, and that there are not necessarily any contractual or other arrangements between the owners and operators of Wi-Fi networks and the service providers that use them to deliver telecommunications services to retail end-users. Accordingly, the Commission considered that the availability, quality, and reliability of such facilities could not be assured in any meaningful way. Further, including public Wi-Fi in the definition of "home network" would undermine the policy objectives of mandated wholesale roaming,

¹⁸ See TNW's "sign up" page at: <http://wireless.tnwcop.com/sign-up/> wherein TNW states as follows: "TNW Mobile will launch this year in an invitation only public beta in which you the consumer can help us test and design the service moving forward. A maximum of 5,000 invites will be sent out across North America with TNW Mobile SIMs. Sign Up below for news and information about the public beta and the TNW Mobile launch and be one of the first to receive a free TNW Mobile SIM." (Emphasis added)

¹⁹ As of 27 July 2017 our search of a popular Canadian tower and site website, https://www.ertyu.org/steven_nikkel/cancellsites.html shows that that neither TNW, or its predecessor, RuralCom Corp., has any operational towers and sites at this time.

²⁰ See Decision 2017-56, paragraph 28.

since it would discourage wholesale roaming customers from investing in their facilities.²¹

21. Nothing in TNW's Application, notwithstanding the added wrinkle of backhauling its Wi-Fi originated traffic onto its British Columbia/Yukon RAN, makes these findings any less applicable to it. Nowhere does TNW provide evidence of any contractual or other arrangements that make the quality, availability or capacity of its public Wi-Fi originated traffic more secure than would generally be the case.

22. In Decision 2017-56 the Commission ruled that access provided to a carrier's end-users via public Wi-Fi is not the same as access via private Wi-Fi. Accordingly, Public Wi-Fi access does not count as connectivity to the carrier's home network for purposes of determining whether roaming access is incidental or not. The Commission just restated this finding again in TNC 2017-259 as follows:

The Commission noted that public Wi-Fi is provided over facilities that are not owned or operated by wireless service providers, and that there are not necessarily any contractual or other arrangements between the owners and operators of Wi-Fi networks and the service providers that use them to deliver telecommunications services to retail end-users. Accordingly, the Commission considered that the availability, quality, and reliability of such facilities could not be assured in any meaningful way. Further, including public Wi-Fi in the definition of "home network" would undermine the policy objectives of mandated wholesale roaming, since it would discourage wholesale roaming customers from investing in their facilities.

23. This rule alone is a sufficient basis to dismiss this Application. TNW nevertheless claims²² that it can assure "its end-users full availability, quality and reliability of services" - presumably based on their connectivity with its home network RAN in British Columbia and Yukon, but has provided no evidence regarding such reliability, availability and quality of Wi-Fi access. Accordingly, TNW's claim that its iPCS technology provides "coverage" in the Scenario One connectivity situation is false. It does not provide "coverage". It relies on public Wi-Fi for access. Backhauling this traffic back onto its native RAN does not change this fact.

24. Accordingly, under the current Commission roaming rules, all of the traffic of TNW's Type B end-users' public Wi-Fi connectivity does not count as access connectivity to TNW's home network. It follows that all of the roaming engaged in by TNW's Type B end-users will be

²¹ TNC 2017-259, paragraph 4.

²² TNW Application, paragraph 54.

"non-incidenta" because these end-users will almost never obtain their network access via TNW's home network and will instead be 100% reliant on our roaming network for access connectivity.

3.1.2 Non-Compliance of Scenario Two Connectivity with Commission Rulings

25. TNW's Scenario Two traffic transmissions are equally problematic. This scenario is identical to that of Sugar Mobile's end-users considered and rejected by the Commission in Decision 2017-57. In Decision 2017-57, the Commission ruled that Sugar Mobile's end-user subscribers who were resident outside the Northern Canadian home footprint of Sugar Mobile's affiliate, Ice Wireless, would obtain non-incidenta access when roaming on Rogers host network.

26. The Commission cited the fact that Sugar Mobile's end-users might never access the home facilities of their own carrier (Ice Wireless):

Including public Wi-Fi in the definition of a wireless carrier's home network would fundamentally redefine the concept of roaming itself, since end-users accessing a visited network would not necessarily need to use any of the facilities owned or operated by the wholesale roaming customer to gain access to the visited network. The wholesale roaming customer could sell a mobile wireless service to end-users, the cellular portion of which would be provided exclusively through an incumbent's network, without ever needing to provide access through a home network.²³

27. This reasoning applies equally here. Non-native TNW end-users who seldom, if ever, visit Wi-Fi hot spots and otherwise make little or no use of Wi-Fi would never use any of TNW's so-called facilities. They would instead be solely reliant upon the network (or networks) of TNW's wholesale roaming service providers.

28. TNW argues that not more than 50% of its end-users' traffic volumes would be carried on our network.²⁴ It claims that it will shift its end-users' Scenario Two roaming traffic between us and other host roaming networks²⁵ and in so doing ensure that volumes of its traffic transmitted over our network will always be smaller volumes transmitted over its own RAN.²⁶ Even if TNW could do this, the result would be non-incidenta roaming. There are at least four

²³ Decision 2017-57, paragraph 26.

²⁴ See, for example, TNW 13 June 2017 letter to Bell Director of Roaming, page 5, paragraph 1.1.3.

²⁵ TNW Application, paragraph 53.

²⁶ TNW Application, paragraph 53.

reasons why TNW's plan to divide its Scenario Two traffic between us and other carriers' host roaming network cannot solve its greater than incidental access problem.

29. First, the "50% over three successive months" roaming threshold relied upon by TNW is outdated and no longer applies in our roaming tariff.²⁷ Second, it ignores the plain and ordinary meaning of the Commission's "incidental" definition. Webster's²⁸ defines "incidental" as "being likely to ensue as a chance or minor consequence; minor consequence; or occurring by chance or without intention or calculation. Cambridge²⁹ echoes these and adds a further definition: "of little or less importance". TNW's iPCS technology scheme results in roaming traffic volumes far in excess of this threshold. Third, TNW cannot predict or ensure that its non-resident end-users' use of our host network will be minor or chance, unintended or of little importance. Many of these non-resident end-users may never obtain network access through Wi-Fi. This would be the case even if TNW could artfully divide its traffic dependent on roaming access between two or more roaming providers. Fourth, TNW has taken no measures that would limit its end-users' use of our roaming network to incidental levels. To the contrary, based on information on TNW's website, there are no planned restrictions on end-users' use of roaming networks. TNW claims iPCS technology would be sold with a contract limitation binding the subscriber to "Canadian regulations regarding incidental roaming"³⁰, yet nowhere does it say what these would be. More tellingly, nowhere is there anything describing its wireless plans³¹ indicating there are any limits on roaming. To the contrary, TNW's website proclaims there are no contracts. Available choices include "unlimited North American talk and text." TNW sells data in 500 MB increments. None of this marketing language contains limits on end-user connectivity to our network. As a result, use of our network in this manner would mean TNW would be "reselling" our network to TNW end-users resident outside of its Northern British Columbia/Yukon footprint.

²⁷ See Decision 2017-56, paragraphs 73 to 75.

²⁸ See: https://www.merriam-webster.com/dictionary/incidental?utm_campaign=sd&utm_medium=serp&utm_source=jsonld.

²⁹ See: <http://dictionary.cambridge.org/dictionary/english/incidental>.

³⁰ TNW Application, paragraph 61.

³¹ See; <http://wireless.tnwcop.com/plans/>.

3.1.3 TNW's use of our host network would run afoul of virtually all Commission indicia of non-incidentual use

30. Based on the foregoing, there would be no need for the Commission to refer to its list of indicia of permanent roaming from Decision 2017-56³² because when not on public Wi-Fi, TNW's end-users would be exclusively reliant on roaming access from us (or other carriers). This would be the case regardless of the number of roaming networks in addition to us that TNW divides its traffic amongst.

31. Nevertheless, if further evidence were required that TNW's iPCS technology results in non-incidentual roaming, it comes through the application of the following indicators of greater than incidentual roaming identified by the Commission in Decision 2017-56 at paragraph 78:

The Commission may use some or all of the following indicators to help it determine whether the wholesale roaming customer has misused or allowed its MVNO to misuse the service, depending on the particular facts of the case:

- it has deliberately issued phone numbers from exchanges outside its home network footprint to its end-users;
- it has sold or marketed its services outside its home network footprint;
- it has sold or marketed its services in a manner that would result in its end-users gaining permanent access to the incumbent's network;
- it has provided its end-users with a device that has for its sole or predominant purpose permitting them to gain permanent access to the incumbent's network; and
- it has otherwise failed to take commercially reasonable steps to limit roaming on the incumbent's network by its end-users to incidentual levels that are within the scope of the service. In considering this factor, the Commission may take into account evidence of broad traffic patterns and network use trends concerning a significant proportion of wholesale roaming customer or MVNO end-users.

32. Based on the record it appears TNW end-users obtaining Type B access would fall off side each of these indicators. TNW's own website is brazen about the company's plans to launch a North American wide service. Indeed, it has already begun marketing this initiative. By marketing "unlimited" plans, TNW similarly appears intent on selling and marketing its service in a manner where its end-users obtain permanent access to the Bell network.

33. End-user use of our network in this manner would mean TNW would be "reselling" our network to TNW end-users resident outside of its Northern British Columbia/Yukon footprint. This would result in mandated resale, directly contrary to ISED's Roaming COL number two,

³² Decision 2017-56, paragraph 78.

bullet two, which clearly states: "Roaming as provided for in this condition does not include resale."

34. For all of these reasons, there is simply no regulatory basis to grant any of TNW's requests for final relief. We therefore request that they be dismissed and, to avoid any further doubt, that the Commission issue a declaration stating that TNW's iPCS technology would provide its users with inappropriate non-incidental use to Bell's roaming service to which they are not entitled under our roaming tariff.

3.1.4 Cabinet's re-consideration Order and TNC 2017-56 have not created new roaming rules

35. TNW's reliance on Privy Council Office Order 2017-0557, dated 1 June 2017 (the Cabinet Reconsideration Order), is irrelevant to and thus of no assistance to this Application. The Cabinet Reconsideration Order refers Decision 2017-56 back to the Commission for re-consideration. But it does not, of itself, change any of the aforementioned Commission or ISED wholesale roaming rules, let alone create new rules. The Commission initiated a public consultation to reconsider Decision 2017-56 through TNC 2017-259. TNC 2017-259 reconfirms that TNW's iPCS technology scheme is offside the current roaming rules because public Wi-Fi originated traffic does not count as TNW's home network traffic in the assessment of what constitutes "incidental use" of roaming service by its end-users. Nowhere does TNC 2017-259 create new or interim wholesale roaming rules. Indeed, the Cabinet Reconsideration Order and the Commission's pending reconsideration of the issues provides an additional reason for denying TNW's application. To the extent the Commission's wholesale roaming rules may change, TNW's request should be deferred until the new rules, if any, are clarified. This avoids the cost, uncertainty and disruption associated with implementing rules for approximately eight months, and potentially having to change them to the extent new rules emerge from TNC 2017-259 in March 2018.

3.1.5 TNW's non-Compliance with existing Commission and ISED policies

36. Far from facilitating existing policies, as TNW claims, the iPCS technology would undermine ISED's and the Commission's wholesale roaming policy objectives. ISED's policy seeks to encourage network investment.³³ Granting this Application would incent TNW to

³³ See, for example, ISED Revised Frameworks for Mandatory Roaming and Tower and Site Sharing, DGSO-001-13, 7 March 2013, paragraph 3.

construct as few towers as possible and to needlessly backhaul all of its traffic back onto its RAN. Likewise the Commission expressly intends to promote facilities based competition and maintain incentives for all carriers to continue to invest in and grow their home networks.³⁴ Again, far from inciting investment, permitting TNW to resell our network to Non-Resident TNW end-users using its iPCS technology would encourage TNW to avoid having to expand its home network beyond its current level. TNW would instead be incented to build as few towers as possible and artificially (and needlessly) backhaul all of its Wi-Fi traffic back to those few towers and associated licensed spectrum. This, solely to perpetuate the illusion that voice, data and SMS traffic somehow touches TNW's home network. This is the antithesis of facilities based competition.

3.2 Concerns about whether TNW is meeting its 9-1-1 service obligations

37. Our main concern related to 9-1-1 is that TNW has not explained how it would provision 9-1-1 service to its end-users when they obtain network access via a public Wi-Fi network. The Commission will need to satisfy itself that end-users in each of the connectivity scenarios envisioned by TNW (i.e., all Type A subscribers; and all Type B subscribers, including all end-users under connectivity Scenario One and Scenario Two).

38. TNW's choice of terminology makes it difficult to ascertain whether its iPCS technology solution meets 9-1-1 regulatory obligations. In some instances, there is insufficient information, there was more than one meaning, or the description was just too ambiguous to know how TNW intends to provide 9-1-1. We therefore provide our Answer based on a straightforward interpretation of TNW's description, but we have attempted to point out all instances where we believe there could be compliance issues with TNW's 9-1-1 implementation and thus recommend further Commission investigation.

3.2.1 Type A end-users on the TNW Home Network

39. In this scenario, a 9-1-1 call is initiated by a caller located within TNW's licensed territory. As TNW operates as a wireless service provider (WSP) in this scenario, it is required to offer the same level of 9-1-1 as the incumbent local exchange carrier (ILEC) operating in the area. For example, when the ILEC provides Enhanced 9-1-1 (i.e., E9-1-1), then the WSP must support Wireless E9-1-1 Phase II.

³⁴ See Decision 2017-57, paragraph 25.

40. TNW defines its 9-1-1 service as an "Enhanced 9-1-1 system". However, the solution TNW describes is not compliant with Commission-approved Wireless E9-1-1 Phase II rules as follows:

- Call centre: TNW indicates that all 9-1-1 calls are directed to an Emergency Response Center to verify the caller's physical location information and then transferred to the appropriate public safety answering point (PSAP). The fact that 9-1-1 calls go through a call centre before being transferred to the appropriate PSAP is not an E9-1-1 compliant service. With E9-1-1, all 9-1-1 calls are sent automatically to the designated PSAP without going through an intermediary third party call centre.
- ALI database information: TNW indicates that it retrieves location information from TNW's real-time Automatic Location Information (ALI) database. While an ALI is used in the provision of E9-1-1 service, it is not used in the manner TNW describes. To provide E9-1-1 service, the WSP makes use of the ILEC's E9-1-1 network access service as an underlying service. Cell site location information is entered in the ILEC's 9-1-1 Database Management System which provisions the ALI database and the Selective Routing Database enabling the selective routing process that allows the 9-1-1 Service Provider (i.e., the ILEC) to route the 9-1-1 call directly to the designated PSAP.
- Verification of location information: TNW indicates that after retrieving location information from its "ALI database" and once the physical location has been verified, the call is transferred to the appropriate PSAP. As explained above, the location information for Wireless E9-1-1 calls does not need to be "verified" as the coordinates (longitude and latitude) of the caller are sent directly to the designated PSAP. Therefore, the fact that the location information is verified in order to route the call to the PSAP indicates that this is not a compliant Wireless E9-1-1 solution.
- Reverse geocoding: TNW discusses how it uses the estimated geolocation position of the handset to determine the 9-1-1 caller's location and converts this location into an address for the operator to query. In our experience, reverse geocoding is prone to errors. Notwithstanding potential unreliability issues, using

a reverse geocoding approach is inconsistent with Wireless E9-1-1 rules which state that the latitude and longitude coordinates of the caller are sent to the PSAP, not a pre-converted latitude and longitude location coordinates into an approximated address.

- Other issues: TNW makes no mention of providing cell site information or the 10-digit call back number to the PSAP or enabling an in-call location update function for the PSAP. These are all required under the wireless E9-1-1 regulatory regime.

3.2.2 Type B end-users – Scenario One access via a public Wi-Fi Connection

41. In this scenario, a 9-1-1 call is initiated when the TNW end-user obtains access via a public Wi-Fi connection. In this case, TNW is operating as an over-the-top voice over Internet Protocol (VoIP) Service Provider, as it is not using the cell network to handle the call and is not processing the call as a Wireless E9-1-1 Phase II call. Accordingly, the Commission's Nomadic VoIP 9-1-1 rules apply. One of the first requirements is for TNW to be registered with the Commission as a reseller. As of 20 July 2017 when we reviewed the Commission's registration list, TNW was not registered as a reseller and therefore not authorized to offer VoIP service over Wi-Fi.

42. The current requirements for VoIP Service Providers when it comes to 9-1-1 are set out in various Commission decisions but can be categorized as follows:

- Express Consent: TNW must capture customer's express consent to 9-1-1 limitations in a verifiable manner. Since TNW does not mention this in its application, there is no ability to validate whether it is compliant.
- Send all calls to a third party call centre: Calls must be sent to a third party call centre so that the 9-1-1 caller can verbally provide his/her location and the call can be routed to the designated PSAP using an ILEC routing service. In its description, TNW mentioned sending all calls to an emergency response centre when the 9-1-1 caller is on its network. Since there is no indication in the TNW's Application as to whether this is also the case for 9-1-1 calls initiated over Wi-Fi connections, we have no ability to determine if TNW is compliant.

- Notifications: Texts used to communicate 9-1-1 limitations to customers must be filed with the Commission prior to their use. The texts are then used in all marketing services (website, TV, radio, etc.) and reminders sent at least once a year. The Commission keeps a website of all the notification texts it receives from VoIP Service Providers which it reviews and determines acceptable for use. Since neither TNW (nor RuralCom) is not listed on this website, it is unclear whether they meet this requirement. TNW's website makes no mention of any 9-1-1 limitations. In fact, the only reference to 9-1-1 is a note that "911 service is provided by the underlying carrier or roaming partner."³⁵ This clearly falls short of the Commission requirements.
- Portal: an online portal must be provided for end-users to input their most up to date location and be able to update it as need be. Again, since TNW does not mention this in its application, there is no ability to validate whether it is compliant.

43. We note that the Emergency Services Working Group (ESWG), with participation of key stakeholders involved in the delivery of 9-1-1 services in Canada, such as PSAPs, WSPs and Commission Staff, agreed on a solution on how to treat 9-1-1 calls initiated by WSP end-users on Wi-Fi connections. Normally, all calls are treated as Nomadic VoIP calls as described above since the WSP operates as a VoIP Service Provider when using a Wi-Fi access to offer voice service. However, the ESWG filed a consensus report with the Commission last January³⁶ proposing that all 9-1-1 calls must default to a cell network when one is available to the WSP in order to be treated as standard Wireless E9-1-1 Phase II calls. This is irrespective of whether the WSP has a roaming agreement or not. Even if a WSP had no roaming agreement with the licensed cell provider in an area, the WSP will be required to send all 9-1-1 calls over cell if a cell network is available.

44. Although the Commission has not ruled on this ESWG report yet, we have every reason to believe that it will accept the ESWG's recommendations to default calls to cell as the preferred 9-1-1 call treatment and only use Wi-Fi as a last resort. If this is the case, then the solution described by TNW, which assures roaming partners that the use of roaming is only incidental as actually "disables the user's smartphone device 3GPP radio(s) and stops emitting

³⁵ TNW's website last visited on 20 July 2017 : <http://wireless.tnwcop.com/plans/>.

³⁶ Evaluate the Impacts of Wireless Service Providers Wi-Fi 9-1-1 Calling Report, ESTF0076b (TIF 76b), dated 11 January 2017.

any electromagnetic frequency on any licensed spectrum" may not even be aware of the presence of a cell network to be able to default 9-1-1 calls to that network as opposed to sending every call on the Wi-Fi connection. It is unclear how TNW would be able to meet this requirement.

3.2.3 Type B end-users – Scenario Two access via a roaming partner

45. This appears to be the only scenario that does not raise any 9-1-1 concerns because 9-1-1 is handled entirely by the incumbent (in our case, Bell Mobility) network in full compliance with E9-1-1 rules.

46. For all these reasons, there is serious doubt as to whether TNW's iPCS technology solution is compliant with applicable 9-1-1 service obligations. We encourage the Commission to verify that TNW will be able to meet all of its 9-1-1 obligations.

3.3 TNW is disentitled to and has not met the test for interim relief

3.3.1 A party seeking interim relief lacking clean hands is disentitled to such relief

47. It is well-established that a party seeking an equitable remedy, including in the form of the interim injunctive relief sought here by TNW, must do so with "clean hands". Examples of "unclean hands" include misstatements and overstatements of evidence. In *City of Toronto v. Polai*³⁷ the Ontario Court of Appeal ruled that the misconduct alleged against the plaintiff or applicant must relate directly to the transaction or matter at issue. These principles are directly applicable here and serve to disqualify TNW from the interim relief it seeks. Among the grounds which TNW asserts justify its claim for an urgent order within 30 days, are allegations of delay on our part in responding to our roaming request. These claims are false and misleading.

48. As noted above, TNW's 8 December 2016 news release announcing its purported acquisition of RuralCom was premature.

49. Its 16 January 2017 'roaming request' was not only deficient from the perspective of the Roaming COLs, it further complicated the already muddy corporate situation regarding the lack of certainty about the ownership and control of RuralCom's cellular licences by mis-labelling the companies and the individual who were requesting roaming in that letter.

³⁷ [1970] 1 O.R. 483 (Ont. C.A.), paragraph 46.

50. Even in April 2017, once TNW began to follow more closely the procedures and protocols of making a roaming request as prescribed in the ISED Roaming COLs, it was less than forthcoming and declined to fully describe its iPCS technology in its 18 April 2017 roaming proposal when it could have and should have done so given that the issue of greater than incidental access by its end-users was by that time a live issue since the issuance of Decision 2017-56 and Decision 2017-57 weeks earlier.

51. By waiting for us to pose technical questions about iPCS technology (on 11 May 2017) and waiting until 13 June 2017 to provide its answers, TNW un-necessarily caused delay. For all of these reasons, TNW is disentitled to the interim relief it seeks.

3.3.2 TNW has failed to satisfy the well-established test for interim relief

52. Alternatively, even if TNW's was not disqualified by the "clean hands principle," its request for interim relief fails on the basis that it fails to meet any of the three branches of the *RJR-MacDonald Inc.* test. That test requires the applicant for interim or injunctive relief of the type sought here by TNW to show the following:

- (i) its application raises a serious issue to be tried,
- (ii) there would be irreparable harm to it in the absence of a stay; and
- (iii) the balance of convenience favours granting the stay.

53. In this case, TNW fails to satisfy each of these three tests.

3.3.2.1 No serious issue raised

54. In practical terms, TNW's application raises no issue, let alone a serious issue, for consideration. TNW would have the Commission believe that its iPCS technology means that TNW's out of territory end-users obtaining access via public Wi-Fi instead obtain access via TNW's own home British Columbia/Yukon RAN. It does not.

55. In any event, the Commission's rules currently in force concerning the treatment of such public Wi-Fi originated traffic are crystal clear on this point: "public Wi-Fi does not form part of a home network for the purpose of establishing what constitutes incidental use of an incumbent's network under the wholesale roaming tariffs."³⁸

56. TNW similarly relies on an outdated 50% traffic volume threshold when it attempts to argue that "incidental" use of our network requires it to demonstrate that the volume of its end-users' traffic gaining network access via our network must merely be smaller than any other forms of access. The problem with TNW's 50% theory is that this argument is irrelevant since the 50% traffic volume threshold is no longer part of our wholesale GSM roaming tariff.

57. The plain and ordinary meaning of the term "incidental" also undermines TNW's claims. Webster's³⁹ defines "incidental" as "being likely to ensue as a chance or minor consequence; minor consequence; or occurring by chance or without intention or calculation." Cambridge⁴⁰ echoes these and adds a further relevant definition: "of little or less importance". TNW's end-user's traffic volumes obtaining network access via its roaming service providers' networks, which comprise close to 100% of their access connections, cannot be "by chance" or "of little importance." Even if 100% of Scenario Two end-users' traffic were to be dynamically divided between Bell Mobility, Telus and Rogers, as TNW hopes, the resultant 33% volumes on each of the national wireless carriers' networks would still dwarf the zero percent of TNW end-user traffic volumes gaining access via TNW's own home network.

58. Finally, if there was any lingering doubt that TNW's proposal runs afoul of the "incidental" rule (which there is not), it is dispelled by the fact that every single indicator identified by the Commission in Decision 2017-56 as a means of assessing whether a carrier is making greater than incidental use of roaming service validates the conclusion that TNW's end-users will make far more than incidental use of our roaming network. For all of these reasons, there is no serious issue raised by TNW's Application.

³⁸ TNC 2017-259, paragraph 4.

³⁹ See: www.merriam-webster.com/dictionary/incidental?utm_campaign=sd&utm_medium=serp&utm_source=jsonld.

⁴⁰ See: <http://dictionary.cambridge.org/dictionary/english/incidental>.

3.3.2.2 No irreparable harm

59. Furthermore, TNW has also failed to show that it would suffer irreparable harm absent interim relief. TNW has no customers.

60. To the extent TNW is incurring harm, it is self-inflicted and arises not from the absence of a roaming agreement with us, but rather from TNW's pursuit of what it has admitted is its own risky and unviable business model. TNW makes the following surprising admission against interest in the Application:

Small wireless carriers cannot properly compete in the marketplace without Wholesale Roaming agreements which is why the Commission has developed its regulatory framework for wholesale mobile services. Without Wholesale Roaming Agreements, spectrum licenses in limited geographical areas have little value.⁴¹ [Emphasis added]

61. We read this statement to mean that even if TNW's relatively modest number of in footprint end-users were to qualify for roaming, TNW would still not be financially viable. It cannot succeed financially unless by regulatory fiat it is able to serve out-of-footprint end-users. Accordingly, it is TNW's faulty business model, not the on-going negotiation of roaming service, that is causing it harm. Put another way, TNW knows full well that its end-users, or most of them, must make greater than incidental use of our host roaming network. Otherwise TNW cannot succeed.

3.3.2.3 The Balance of Convenience favours refusal of TNW's request

62. The final branch of the *RJR MacDonald* test requires the Commission to make a determination as to which party will suffer the greater harm from the granting or refusal of a stay pending a final decision on the merits. As well as the private interests of the parties, the interests of the third parties indirectly affected and the public interest more generally are relevant. All of these factors weigh strongly in dismissing TNW's request for interim relief.

63. TNW has no customers. Refusing its request for interim relief thus leaves it no worse off than it would be without the interim order. In sharp contrast, we would be required to engineer connectivity, arrange interconnections, make roaming clearinghouse arrangements and all of these arrangements would have been made in vain in the event TNW's Application were

⁴¹ TNW Application, paragraph ES 12.

dismissed. Given TNW's current situation under creditor protection, it is uncertain whether we could ever recover the costs associated with provisioning such interim roaming. Worse still, any customers that signed on for TNW service during this interim period would ultimately lose their service and be forced to migrate to competing service providers. All of this disruption, similar to that experienced by Sugar Mobile subscribers in the aftermath of Decision 2017-57, is avoidable by not issuing the interim order sought by TNW.

64. Lastly, public policy, in the form of the *Telecommunications Act* (the *Act*) policy objectives and the *Order Issuing a Direction to the Commission on Implementing the Canadian Telecommunications Policy Objectives* (Telecom Policy Direction)⁴² all strongly militate against granting the interim relief requested by TNW.

65. Section 7(a) of the *Act* seeks to foster the "orderly" development of the telecommunications system. Yet to facilitate immediate roaming only to conceivably have it discontinued in eight months is the very antithesis of orderly development. Section 7(b) of the *Act* embodies the principle of fostering high quality and reliable services for Canadians. TNW's network and technology are not yet up and running and have yet to be tested. In addition, there are serious questions as to whether it can meet its obligations in terms of providing 9-1-1 service. This is an additional policy basis for denying its application. Section 7(f) of the *Act* seeks to foster reliance on market forces. However, by its own admission, TNW has pursued an economically non-viable business model, flawed by the relatively small amounts of spectrum it has obtained spectrum licences for and the relatively sparse population of potential customers within its footprint.

66. Finally, the Telecom Policy Direction compels the Commission to rely on market forces and adopt the least intrusive form of regulation. In this case, the least intrusive form of regulation would be to, at a minimum, wait for the outcome of the TNC 2017-259 rulings. This obviates the disruption and upheaval of adopting an interim measure, only to have it change in eight months' time.

67. For all of the foregoing reasons, TNW's request fails each of the RJR MacDonald tests and should be rejected.

⁴² SOR/2006-355, 14 December 2006. See online at: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2006-355/page-1.html>

4.0 CONCLUSION

68. For all of the foregoing reasons, Bell requests that the Commission reject this application and dismiss it in its entirety.

69. All of which is respectfully submitted.

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