

Telecom Procedural letter addressed to Mr. Lawry Trevor- Deutsch (TNW Wireless Inc.)

Ottawa, 23 October 2017

Our reference: 8620-R63-201705675

Mr. Lawry Trevor-Deutsch
President, TNW Wireless Inc.
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regulatory@tnwcorp.com

Re: Part 1 application by TNW Wireless Inc. relating to wholesale roaming agreements required under Telecom Regulatory Policy 2015-177 – Request for interim relief

Dear Mr. Trevor-Deutsch:

With this letter, the Commission **denies** the request for interim relief made by TNW Wireless Inc. (TNW) in the above-noted application filed pursuant to Part 1 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, for the reasons set out below.

BACKGROUND

Under Telecom Regulatory Policy 2015-177 ¹ (TRP 2015-177), the national wireless carriers ² are required to provide roaming access on their respective networks to other wireless carriers. In Telecom Decision 2017-56, ³ the Commission provided guidance concerning the terms and conditions under which roaming service will be offered on a final basis. That decision confirms, among other things, that mandated wholesale roaming provides incidental, not permanent, access to the national wireless carriers' networks and that public Wi-Fi does not form part of a wireless carrier's home network for the purpose of establishing what constitutes incidental use of a visited network.

TNW, which currently holds licensed spectrum in the northwest region of British Columbia, parts of Yukon, and along the Alaskan highway, requested that both Bell Mobility Inc. (Bell) and TELUS Communications Company (TELUS) enter into wholesale roaming agreements with it as contemplated in TRP 2015-177. Bell and TELUS refused, indicating that it is unclear that TNW's business model, which includes Wi-Fi connectivity as the basis for its home network through its yet unlaunched iPCS technology, ⁴ would result in only incidental roaming on their networks.

On 3 July 2017, TNW filed an application requesting that the Commission compel Bell and TELUS to provide wholesale roaming for their wireless customers and rule on whether customers using iPCS technology outside of TNW's licensed areas would be considered to be roaming.

On 20 July 2017, the Commission launched Telecom Notice of Consultation 2017-259 (TNC 2017-259), ⁵ following the issuance of Order in Council (OIC) P.C. 2017-0557 by the Governor in Council. The OIC referred Telecom Decision 2017-56 back to the Commission for reconsideration by 31 March 2018. Specifically, the OIC directed the Commission to reconsider whether, for the purposes of the final terms and conditions for wholesale mobile wireless roaming service, the definition of "home network" should be

broadened to include other forms of connectivity besides licensed wireless spectrum provisioned through a radio access network, such as “Wi-Fi first” applications.

APPLICATION

In its application, TNW requested that the Commission:

- direct both Bell and TELUS to provide TNW with wholesale roaming agreements and to proceed with all necessary interconnection processes and guidelines no more than 30 days after the delivery of each agreement; and
- review TNW’s iPCS technology for compliance with Telecom Decision 2017-56 and determine that the use of iPCS while on Wi-Fi using Wi-Node cannot be deemed to be roaming.

TNW also requested interim relief to compel Bell and TELUS to provide wholesale roaming immediately, in order to allow it to begin offering services while the Commission assesses the merits of its application.

TEST FOR INTERIM RELIEF

To assess applications for interim relief, the Commission’s practice is to apply the criteria set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311. These criteria, known as the interim relief criteria, are the following: (i) there is a serious issue to be determined; (ii) the party seeking the interim relief will incur irreparable harm if the relief is not granted; and (iii) the balance of convenience, taking into account the public interest, favours granting the interim relief. The onus is on the applicant to establish that it meets all three criteria.

POSITIONS OF PARTIES

TNW submitted that both its traditional and iPCS technologies are fully compliant with Telecom Decision 2017-56, as they allow only for incidental roaming on visited networks. It added that to be commercially viable, it requires roaming agreements with Bell and TELUS, and that giving national wireless carriers the ability to deny roaming services based on the hypothetical actions of their competitors would in effect give them the ability to unilaterally decide which companies enter the Canadian wireless market.

The company submitted that its request meets the test for interim relief because (i) the ability of national wireless carriers to deny wholesale roaming agreements to smaller carriers, if no misuse has occurred, is a serious issue to be determined; (ii) it would suffer irreparable harm if it were not granted interim roaming access; and (iii) the balance of convenience favours it, as it has invested heavily in its business and will not be able to properly launch without having access to roaming service.

Bell and TELUS, as well as Bragg Communications Incorporated carrying on business as Eastlink, Quebecor Media Inc. on behalf of Videotron G.P., Rogers Communications Canada Inc., and Shaw Communications Inc., opposed the application. They argued that a service provider's use of public Wi-Fi facilities is not considered to be use of its home network, so TNW end-users using the iPCS technology would be permanently roaming, and TNW would effectively be operating as a mobile virtual network operator. As such, they submitted that the national wireless carriers are not mandated to provide TNW with the requested service, since TNW is seeking non-incidental access to those carriers' networks. They likened TNW's iPCS offer to the service offered by Sugar Mobile, which was denied access to mandatory roaming in Telecom Decision 2017-57. ⁶

These interveners also opposed granting TNW interim relief, submitting that TNW has not met the relevant test. They argued that (i) TNW has not demonstrated that it would suffer any harm, as it has not yet launched; (ii)

the balance of convenience favours maintaining the status quo; and (iii) TNW has not demonstrated how granting the relief would serve the public interest.

Ice Wireless Inc. requested that the Commission consider the nature of TNW's iPCS service, and whether it should fall within the definition of a "home network," as part of the TNC 2017-259 proceeding. The Commission could then determine whether TNW is eligible for mandated roaming following the determinations in that proceeding. To the extent that the Commission's wholesale roaming rules may change, Bell submitted that consideration of TNW's request should be deferred until the new rules, if any, are clarified.

The Public Interest Advocacy Centre (PIAC) supported TNW's application but also recommended that the Commission resolve it through the TNC 2017-259 proceeding. However, PIAC submitted that in the interim, roaming should be offered to customers primarily relying on TNW's licensed mobile network.

In its reply, TNW noted that none of the interveners commented on its request to be provided roaming using a more "traditional" model for customers residing in its licensed spectrum area and not using its iPCS technology. The company requested that the Commission compel Bell and TELUS to provide roaming in such instances. It also provided further information about its iPCS technology. It did not support the suggestion that its request be considered as part of the TNC 2017-259 proceeding, because its application pre-dates the issuance of that notice of consultation and because doing so would delay the issuance of the Commission's decision.

COMMISSION'S ANALYSIS AND DETERMINATIONS

Request for interim relief

If an application is not clearly frivolous, it will generally meet the first interim relief criterion: there is a serious issue to be determined. The applicant is not required to demonstrate that their argument is persuasive or strong, but only that there is a legitimate question being asked. In this case, the issue is whether the Commission should compel Bell and TELUS to enter into roaming agreements with TNW pursuant to the terms of the interim tariff currently in place for Bell and TELUS, which is a serious issue to be determined. Accordingly, the Commission determines that TNW has satisfied the first interim relief criterion.

The second criterion requires the party requesting interim relief to demonstrate that it will suffer irreparable harm if its request is not granted. “Irreparable” refers to the nature of the harm, rather than its magnitude. Harm is more likely to be irreparable where there is an unquantifiable loss or a loss that the applicant may not be able to recover. TNW submitted that it has invested heavily in the acquisition of a spectrum licence, payment of licence fees, network upgrades, and all necessary ancillary infrastructure for its wireless services. It argued that it cannot launch without a roaming agreement in place and it may not survive a protracted period of not being able to launch.

The public record contains no evidence that TNW has launched wireless services using either traditional or iPCS wireless technologies; therefore, there is no reason to believe that TNW would lose market share if its requested interim relief is not granted. While it may be true that it has incurred costs up to now, TNW has given very little detail about the nature or extent of its expenditures or its ability to recoup them in the event that its request for interim relief is granted. The onus of proving irreparable harm, on a balance of probabilities, is on TNW, but the information that has been provided is insufficient to do so.

In the circumstances, the Commission determines that TNW has not demonstrated that it would experience irreparable harm if Bell and TELUS are not directed to enter into wholesale roaming agreements with TNW

pending the final disposition of its application. With regard to the final criterion, TNW argued that the balance of convenience favours it because if it does not survive, Canadians will be deprived of a competitor. However, TNW appears not to have launched nor to have customers who could be negatively affected if interim relief is not granted while the Commission considers the request for final relief. Further, there is insufficient evidence on the record to establish the time frames within which TNW would be able to launch, even if its interim request were granted. Accordingly, the Commission considers that the granting of interim relief would not serve the public interest.

Moreover, the issues of whether a service provisioned with TNW's iPCS technology would result in permanent roaming on an incumbent carrier's network, and whether services provisioned using traditional technologies would be clearly separable from those using the iPCS technology, are still pending. It follows that granting interim relief could result in TNW launching and gaining customers for a service that is ultimately found to be ineligible for tariffed wholesale roaming. Such a result would clearly not serve the public interest. Accordingly, the Commission determines that the balance of convenience favours the status quo.

In light of the Commission's determinations with respect to irreparable harm and balance of convenience, TNW's application fails the test for interim relief. The Commission therefore **denies** TNW's application for interim relief.

Request for final relief

The majority of the record consists of discussions about whether TNW's iPCS technology is eligible for inclusion in the roaming tariff under which it would be offered, which is not yet finalized. To determine such eligibility, the Commission must assess this Wi-Fi technology against the determinations set out in Telecom Decision 2017-56 and TRP 2015-177. The Commission is currently reconsidering Telecom Decision 2017-56, and the use of Wi-Fi

in particular, as part of the TNC 2017-259 proceeding. Since it appears that the service has not been launched and there is currently regulatory uncertainty, the appropriate course of action would be to defer reviewing TNW's iPCS technology until after the Commission issues its determinations in the TNC 2017-259 proceeding.

As such, the Commission is hereby suspending consideration of TNW's Part 1 application until the completion of the TNC 2017-259 proceeding. To ensure that the record of the Part 1 proceeding is as complete as possible, the Commission may seek additional comments at a later date.

Procedural request

On 17 August 2017, TELUS filed a procedural request indicating that TNW, in its reply, had advanced a new, alternative form of relief not addressed in its initial application (regarding "traditional roaming") and had tendered new evidence that should have been filed with its application. TELUS requested that the Commission strike this information from the record. It argued that it was procedurally unfair for the applicant to amend its request for relief at this stage, without other parties having the opportunity to comment on the new information.

TNW submitted that the Commission should reject TELUS' request. It argued that its initial application must be understood to necessarily include the request related to traditional roaming. It added that it had to provide additional information about its iPCS technology to address inaccurate statements that had been made by parties.

PIAC also opposed TELUS' request.

The Commission considers that TNW's initial application could have been worded more clearly in its request for relief. However, it should have been evident to parties that the request with respect to traditional roaming was implicit in the application, given that roaming is a mandated service and TNW did specifically describe two types of customers in its application.

With regard to the additional technical information, since the consideration of the iPCS technology has been deferred, the information should not be struck from the record at this time. However, the Commission intends to give parties the opportunity to comment on the technology, in view of the determinations resulting from the TNC 2017-259 proceeding, when consideration of TNW's Part 1 application resumes.

In light of the above, the Commission **denies** TELUS' procedural request to strike parts of TNW's reply comments from the record of the proceeding.

Sincerely,

Original signed by

Scott Hutton

Acting Secretary General

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Footnotes

- Regulatory framework for wholesale mobile wireless service, Telecom Regulatory Policy CRTC 2015-177, 5 May 2015*

- 2 Bell Mobility Inc., Rogers Communications Canada Inc., and TELUS Communications Company

 - 3 *Wholesale mobile wireless roaming service tariffs – Final terms and conditions*, Telecom Decision CRTC 2017-56, 1 March 2017

 - 4 According to TNW, iPCS is an IP-only, cloud-based mobile technology that works seamlessly between Wi-Fi and 4G/LTE. TNW submitted that, on iPCS, data usage is tied to the active iPCS user profile and not the device or SIM card.

 - 5 *Reconsideration of Telecom Decision 2017-56 regarding final terms and conditions for wholesale mobile wireless roaming service*, Telecom Notice of Consultation CRTC 2017-259, 20 July 2017

 - 6 *Ice Wireless Inc. – Application regarding roaming on Rogers Communications Canada Inc.’s network by customers of Ice Wireless Inc. and Sugar Mobile Inc.*, Telecom Decision CRTC 2017-57, 1 March 2017
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Date modified:

2017-10-23