BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

TNW Wireless Inc. Part 1 Application for Mandated Wholesale Wireless Roaming, CRTC File No. 8620-R63-201705675

ANSWER OF TELUS COMMUNICATIONS COMPANY ("TELUS")

AUGUST 4, 2017

ABRIDGED

TABLE OF CONTENTS

ABRIDGED

ABRIDGED

I. Executive Summary

1. TNW Wireless Inc. (the "Applicants") are seeking an order mandating TELUS and Bell Mobility to provide them with a service that the Commission has already, repeatedly, decided not to mandate. The regulatory framework governing wholesale mobile wireless services does not mandate mobile virtual network operator ("MVNO") access. Since MVNO access is not mandated, the requirement to provide tariffed GSM-roaming service extends only to incidental access to TELUS' network. A service provider's use of public Wi-Fi facilities is not considered to be part of its home network, and is not relevant to the determination of whether access to TELUS' network is incidental.

2. The Applicants propose a national (indeed, international) mobile wireless service in areas where they hold no spectrum licences and have deployed no wireless network infrastructure. Instead, they propose to operate as an MVNO, with their subscribers connecting via public Wi-Fi facilities when available. While they claim that their service offering will only involve incidental access due to this intended use of public Wi-Fi facilities, the Commission has already considered this very issue and determined that their proposed use of TELUS' facilities would not be incidental within the meaning of the existing regulatory framework. Accordingly, the Commission has already determined that the Applicants' claimed use would not be eligible for TELUS' tariffed GSM-roaming service. The technical arguments, which the Applicants claim distinguish their service from previous services considered by the Commission, do nothing to change the analysis or conclusion.

3. The Applicants concede that they are seeking a change to the regulatory framework, such that it would no longer promote investment in facilities by all carriers. This position is inconsistent with their claims that they qualify for mandated services under the current regime.

ABRIDGED

4. The Applicants make the absurd contention that TELUS is required to provide access for clearly ineligible uses, and then subsequently apply to the Commission for a determination on the eligibility of the use. This is not a sound reading of the existing rules. Moreover, taking such an approach would harm end-customers, cause market confusion, waste Commission and industry resources, and take away the force of tariffed terms and conditions. The Commission should reject the interpretation put forth by the Applicants.

5. While the Commission is now reconsidering the wholesale mobile wireless framework as it relates to public Wi-Fi use, there is no certainty that the rules will change, and there is no certainty *how* they will change if they do. There is no basis to change the rules for the Applicants in advance of completing the larger policy review.

6. The service the Applicants seek is forborne. As such, TELUS must use its business judgment to assess the commercial proposal. The Applicants are part of a group of companies operating as a single undertaking which owes significant debt to TELUS and have repeatedly breached contractual obligations to TELUS. Accordingly, they do not present an acceptable credit risk to enter into such an arrangement. Even if the Applicants qualified for the mandated roaming service, TELUS is empowered under its tariff to refuse service in these circumstances.

7. Additionally, there is reason to doubt that the Applicants have a solid legal foundation to their business. There are serious questions about their rights to the spectrum licences they claim to hold, as Innovation, Science and Economic Development Canada ("ISED") has not yet approved the spectrum licence transfers. Additionally, the technology which appears to form a key component of their service offering is based on intellectual property against which third parties assert there are strong ownership claims.

8. The request for expedited relief should be dismissed, as the applicable criteria have not been met, particularly since the dispute is not bilateral and the

ABRIDGED

Applicants are requesting a policy change that would displace and sweep away existing regulatory rules – something that cannot be done lightly. Moreover, the request for interim relief must be dismissed as a) the Applicants are seeking a mandatory injunction, changing the status quo, carrying with it a high threshold that has not been met, b) the Applicants do not meet the other requirements for interim relief, and c) they ask for equitable relief without clean hands, and are therefore not entitled to it.

ABRIDGED

II. Introduction

9. The Applicants bring a Part 1 application (the "Application") requesting various orders from the Commission regarding access to the wholesale tariffed roaming services of TELUS and Bell Mobility. Among other things, they essentially request that the Commission order that these services be provided, request an assessment of their technology for "compliance", and request interim and expedited relief.

10. The Application should be dismissed in its entirety. The Applicants are seeking a tariffed service for which they do not qualify. They are seeking to provide a national (indeed, international) mobile wireless service in areas where they do not hold licensed spectrum and have not deployed any wireless network infrastructure. In connection with this offering, they are seeking to provide their customers access to TELUS' and Bell's mobile wireless networks through roaming on those networks.

11. The Applicants purport that such use will constitute "incidental roaming," arguing that the primary means of access for their end-users will be Wi-Fi. However, this assertion of incidental roaming is false. Such use will be an impermissible form of resale, not the type of roaming covered by the wholesale roaming tariff. This issue has already been adjudicated by the Commission, in two decisions released in March 2017.[1] There is no basis to depart from these determinations, only months after they were decided.

12. In this Answer, TELUS first addresses the Applicants' meritless claims that their technology, as compared to that used by Sugar Mobile, creates a distinction with regulatory meaning. Second, TELUS addresses the assertion that the Governor in Council, through an Order in Council, has changed Commission policy, which it

[1] Telecom Decision CRTC 2017-56, *Wholesale mobile wireless roaming service – Final terms and conditions* ("TD 2017-56") and 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.* ("TD 2017-57").

has not. Third, TELUS explains that the Applicants' request is really a request for a forborne service, which is subject to commercial negotiation and the business judgment of the parties. Fourth, TELUS addresses the identity of the Applicants, who are substantially indebted to TELUS, and are thereby disentitled from TELUS' tariffed services. Fifth, TELUS notes that there are significant questions about the rights of the Applicants to the assets in question. TELUS then notes that the requests for interim and expedited relief are not justified and should be dismissed. Finally, TELUS demonstrates that making the requested changes would be inconsistent with the Telecommunications Policy Objectives and Policy Direction.

III. Applicants' Proposed Use Is Not Permitted Under Mandated Wireless Roaming Requirements

13. The arrangement the Applicants desire is one that is not mandated under the CRTC's mandatory roaming regime. It runs directly counter to the Commission's decision not to mandate MVNO access and the decisions on how to treat public Wi-Fi use. While the Applicants argue that their over-the-top technology makes them eligible for mandated roaming under TELUS' roaming tariff,[2] they are incorrect, as discussed below.

14. What remains, once the technical sophistry is set aside, is the reality that the Applicants are seeking to impermissibly resell access to TELUS' mobile wireless network. As is clear from the Application, as well as other public statements of the Applicants, the Applicants' proposed business would involve marketing and selling mobile wireless services throughout Canada, and indeed internationally, despite the fact that they have not deployed, and do not intend to deploy, wireless network infrastructure in those areas. This proposed use of TELUS' network is not a form of incidental access within the meaning of the wholesale wireless

[2] TELUS Communications Company, Carrier Access Tariff CRTC 21462, Item 233.

ABRIDGED

roaming framework, and would be directly contrary to specific determinations the Commission has already made.

a) Wholesale Wireless Roaming Framework

15. A wireless carrier provides connectivity to its customers based on radio access network infrastructure that it has built. This network is the "home" network. When outside of the wireless carrier's network area, its customers might still obtain connectivity if the wireless carrier has roaming rights with another wireless carrier that has network in that geographic area. As such, a wireless carrier has the ability to obtain coverage for its customers in areas where it has gaps in its home network by way of wholesale roaming rights with other wireless carriers.

16. In Telecom Regulatory Policy CRTC 2015-177, *Regulatory framework for wholesale mobile wireless services*, ("TRP 2015-177"), the Commission decided that it would no longer be appropriate to refrain from regulating GSM-based wholesale roaming services provided by TELUS, Bell and RCP.[3] The Commission required these three carriers to file tariffs for such services.[4] However, the Commission did not mandate wholesale MVNO[5] access.[6] Mandating MVNO access would undermine wireless carriers' significant current and planned investments in wireless network infrastructure,[7] and would discourage continued investment "because [wireless service providers] could rely on this access rather than investing in their own mobile wireless infrastructure".[8] Accordingly, tariffed wholesale wireless roaming services do not include mandated MVNO access.

[3] TRP 2015-177, para 128.
[4] TRP 2015-177, para 129.
[5] TRP 2015-177, fn 16, an MVNO "relies on the spectrum and [radio access network] of a wireless carrier and, in some cases, other facilities and/or services to provide mobile wireless services to consumers"
[6] TRP 2015-177, para 125.
[7] TRP 2015-177, para 121.
[8] TRP 2015-177, para 122.

ABRIDGED

17. Subsequently, the Commission had occasion to consider service providers who offer services based on their customers connecting primarily via public Wi-Fi facilities and whether such providers should be eligible for mandated roaming service. The Commission clarified the rules in this regard in Telecom Decision CRTC 2017-56, *Wholesale mobile wireless roaming service tariffs – Final terms and conditions* ("TD 2017-56") and 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.* ("TD 2017-57"), both released on March 1, 2017. The Commission ruled that "mandated wholesale roaming provides incidental, and not permanent, access to the incumbents' networks" and "clarifies that public Wi-Fi does not form part of a wireless carriers' home network for the purpose of establishing what constitutes incidental use of the visited network pursuant to the relevant wholesale roaming tariff".[9] The Commission found that it would be inappropriate to include public Wi-Fi in the definition of "home network" because it would mean that a home network would be anywhere Wi-Fi was available. In the words of the Commission,

> there would be no way to distinguish between a company's home network and every piece of network equipment in use by anyone in Canada. Moreover, 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.[10]

b) Applicants' Proposed Business Will Rely on Public Wi-Fi and Does Not Qualify for Mandatory Roaming

18. The Applicants' proposed service is in all relevant respects identical to that already considered by the Commission in TD 2017-56 and TD 2017-57. They are seeking to sell a mobile wireless service, with connectivity purportedly primarily

[9] TD 2017-56, para 31.
[10] TD 2017-56, para 29.

ABRIDGED

through public Wi-Fi facilities, and demand mandated wholesale arrangements allowing their customers to also access the mobile wireless networks of carriers such as TELUS. The Commission has already addressed this issue: use of public Wi-Fi is not considered part of a carrier's network for purposes of determining incidental roaming. They are, therefore, ineligible for TELUS' tariffed roaming service.

19. It is clear from their statements as to the nature of their proposed service offering that the Applicants are not entitled to mandatory roaming services. While they claim to hold spectrum licenses (discussed further below) and a functional wireless network covering a limited territory along the Alaska Highway, the Applicants are clear that they do not intend to restrict their offering to customers based in that territory. Instead, they want to provide an offering relying on public Wi-Fi facilities and resold access to the networks of other carriers. By press release dated December 9, 2016, a copy of which is attached to this Answer as "Appendix A", Sandeep Panesar states that "Our goal is to make iPCS widely available in Canada and soon around the world". They further state, in the same press release, that they will expand their "existing home network service area in the northern regions in British Columbia and the Yukon and will extend its service reach locally, nationally, and internationally through its patent-pending Wi-Node technology and through various roaming networks". Furthermore, in their initial roaming proposal to TELUS, the applicants stated #

.#

ABRIDGED

20. Based on these comments, what the Applicants are seeking to do is serve customers who reside outside if its wireless network footprint, with their connectivity via Wi-Fi and roaming on other carriers' networks. Given that the customers would reside in other carriers network footprints, and not within the footprint of the Applicants, the Applicants seek to resell the network footprint of other carriers.

21. The Applicants are certainly open to market and sell Wi-Fi based wireless services throughout Canada. These are "over the top" services and they do not need the relief requested in the Application to do so. However, they are not entitled to demand mandatory roaming to get access to the other carriers' networks and then use that roaming to resell access to such networks part of that offering. The Commission has not mandated wholesale MVNO access.[11] TELUS' tariff for mandated wholesale wireless roaming services does not cover business arrangements such as the one proposed by the Applicants, as was confirmed in TRP 2015-177 and further explained in TD 2017-56 and TD 2017-57. Instead, the Applicants must negotiate such an arrangement, with one or more of the multiple facilities-based wireless carriers operating in Canada, on commercial terms. The mandated roaming tariffs do not provide an avenue for the Applicants to demand the roaming access they seek.

c) Technical Arguments are Misdirection

22. A considerable portion of the Application is devoted to an attempt to differentiate iPCS technology from the technology used with the Sugar Mobile service offering considered in TD 2017-57. These arguments are without merit and demonstrate a fundamental misunderstanding of the regulatory wholesale wireless framework, particularly as it relates to the use of public Wi-Fi. The Applicants' contentions in this regard amount to two primary assertions: 1) iPCS technology de-registers the devices from the visited public mobile network ("VPMN") whenever the device is

[11] TRP 2015-177, para 125.

ABRIDGED

connected to Wi-Fi, and 2) their subscribers' devices will connect to the "home network", including virtual use of the home spectrum, whenever connected via Wi-Fi. Neither assertion has any bearing on the analysis of whether TNW Wireless Inc. is eligible for mandatory roaming. Each will be addressed in turn, below.

23. Additionally, the Applicants make a vague assertion regarding the difference between "carrier Wi-Fi" and "public Wi-Fi". When attempting to differentiate its technology from that used by Sugar Mobile, the Applicants note that the "Commission left open the door for further defining 'carrier Wi-Fi' as part of a network".[12] It is true that the Commission has not yet considered whether carrier Wi-Fi can be considered part of a wireless carrier's home network,[13] however that issue is not relevant to this proceeding.

24. In TD 2017-56, the Commission drew a clear distinction between carrier Wi-Fi and public Wi-Fi, stating: "[u]nlike carrier Wi-Fi, public Wi-Fi facilities are not owned or operated by wireless service providers, nor are there necessarily any contractual or other arrangements between the Wi-Fi operators and the service providers that use them". [14] The Applicants have led no evidence demonstrating that they own or operate any of the Wi-Fi facilities they plan to use to provide their service, nor have they led evidence as to any contractual arrangements between them and the Wi-Fi operators. Accordingly, there is no doubt that the Wi-Fi they intend to use is public Wi-Fi within the meaning of the wholesale wireless roaming framework.

i) De-Registration From VPMN Not Relevant to Roaming Analysis

25. The Applicants' argument regarding de-registration from the VPMN is based on the incorrect notion that determining incidental access requires a consideration of

[12] Application, para 73.
[13] TD 2017-56, para 28.
[14] TD 2017-56, para 28.

ABRIDGED

the quantity of a device's consumption over the VPMN versus over public Wi-Fi. This is not a relevant consideration under the wholesale wireless framework, as clarified in TD 2017-56 and TD 2017-57.

26. The Commission has already determined that a subscriber's use of public Wi-Fi facilities is not relevant to an assessment of whether the access sought is "incidental". For the purpose of this analysis, it makes no difference whether the device is registered to the VPMN. The Commission's policies in this regard are not premised on an understanding that all of a device's consumption occurs through (or simply while registered to) the VPMN. Rather, they are based on the view that mandating the provision of roaming to Wi-Fi based service providers would be inconsistent with facilities-based competition.[15]

27. Through its mischaracterization of incidental access, TNW is effectively looking for a redefinition of the home network, and for it to be applied immediately. The Commission has previously stated,

> [i]ncluding 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. [emphasis added][16]

28. In its notice of consultation in reconsideration of TD 2017-56, the Commission has indicated that it will consider whether the definition of home network should be expanded to include other forms of connectivity, such as public Wi-Fi.[17] It has

[15] See TD 2017-57 para 25. "Further, it would be contrary to the wholesale wireless framework's stated objective of promoting facilities-based competition because it would eliminate incentives for a wireless carrier to invest in its own network". See also TD 2017-56, para 29.
[16] TD 2017-57, para 26.
[17] *Reconsideration of Telecom Decision 2017-56 regarding final terms and conditions for wholesale mobile wireless roaming service*, Telecom Notice of Consultation CRTC 2017-259.

ABRIDGED

not, however, rescinded the current definition based on its previous findings or otherwise reversed course.

ii) Connection to Home Network Not Relevant to Roaming Analysis

29. The Applicants also claim that their service will be different from that considered in TD 2017-57 because their subscribers' devices will remotely connect to the home network, including the licensed spectrum, while connected via public Wi-Fi [18]. This artifice is nothing more than a weak attempt at regulatory gaming, an effort to find a loophole in the rules whereby a carrier could exploit a small licensed network footprint for mandated network access to sell a mobile wireless service on a national basis. However, there is no such loophole and the wholesale wireless framework does not, in fact, mandate access in these circumstances. In any event, such a reading would be totally inconsistent with the stated policy goal of facilities-based competition that underpins that framework.

30. The possibility that the iPCS technology may, if taken at face value, create a private network connecting the device to the TNW network does not change the conclusion that the Applicants are seeking non-incidental access under the existing regulatory framework. Outside of their licensed area, all access by the Applicants' end-users will be provided over facilities that are owned or operated by someone other than the Applicants. The Commission considered this same issue in the TD 2017-57 and found that a remote connection to a home network does not amount to use of the home network. It ruled that:

> even if there is some minimal connection between the end-user and Ice Wireless's network backbone, the use of public Wi-Fi by a Sugar Mobile end-user outside Ice Wireless's territory would still be subject to the concerns set out above and would not amount to the use of a home network for the purpose of roaming. [emphasis added][19]

[18] Application, paras 51-52, 56.
[19] TD 2017-57, para 29.

ABRIDGED

31. Moreover, a logical and principled consideration of the proposed remote connection lays bare why it is irrelevant to the wholesale wireless framework. Facilities-based policy, which underpins the framework, promotes investment in the wireless network infrastructure which is necessary to provide mobile wireless services. Of note, it requires that wireless network facilities be built in the areas where the network coverage is being provided. Of course, the Applicants' purported remote use of their spectrum accomplishes none of these goals. Having a functional mobile wireless network along the Alaska highway is facilities-based competition in that region, but does nothing to further facilities-based competition via mobile wireless access to Canadians based in Vancouver, Calgary, Edmonton, Toronto, or anywhere else for that matter. For subscribers in those areas, wireless access will be provided through the use of facilities owned and operated by parties other than TNW Wireless Inc. Claiming that usage connects subscribers to network services that also include wireless network in a different territory is nothing more than a contrived and false method to assert eligibility for mandatory roaming.

32. Mandating access in these circumstances would not promote investment in wireless networks. It would have precisely the opposite effect. It would signal that providers could provide national mobile wireless offering on an MVNO basis, relying on mandated resale, so long as they deployed *any* network infrastructure using licensed spectrum in Canada, no matter how small a footprint and no matter how many customers served over that infrastructure. There is no rational policy reason to allow for such providers to have regulated access to roaming.

d) Applicants Are Seeking a Change to the Existing Framework

33. It is helpful to consider the Applicants' view of the current wholesale wireless regulatory framework. They disagree with the pursuit of facilities-based policy, and ask the Commission to change it to enable their business plans. Yet, at the

same time they contest (wrongly) that they qualify for the existing roaming services which support facilities-based policy. They cannot have it both ways.

34. The Applicants candidly state "it is our opinion that for the foreseeable future, there will be only 3 national wireless networks and that the Canadian population and geography will not support any additional national networks."[20] The Applicants concede, therefore, that they have no intention of building a national wireless network, despite their desire to offer wireless services on a national basis.

35. They later state that they "do not believe that granting the relief sought in this Application would in any way slow investment as *the incumbents* will still have to compete amongst themselves and maintain state-of-the-art networks" (emphasis added).[21] This a clear signal that the Applicants are asking the Commission to abandon facilities-based policies. Their argument appears to be that the Commission should no longer pursue policies that encourage <u>all</u> carriers to invest in deployment of wireless network infrastructure, since the Applicants assert that a subset of carriers (the "incumbents") will continue to invest anyways. In addition to being entirely unsupported by any evidence or persuasive argument, this position asks the Commission to reverse the policies it has pursued over many years and thorough policy reviews. Specifically, the Commission has concluded that mandating wholesale MVNO access would undermine the investments made by new entrants in spectrum and new wireless networks,[22] and that "permanent network access would likely discourage investment by wireless carriers",[23] including incumbents and new entrants.

36. At the same time, the Applicants also claim that their proposed service would be in compliance with the current wholesale regulatory framework, which the above analysis shows to be without merit. The Applicants have already taken the

[20] Application, para 67.
[21] Application, para 71.
[22] TRP 2015-177, para 121.
[23] TRP 2015-177, para 122.

position that they do not agree that facilities-based policies, which the existing framework is designed to support, are worthwhile. Moreover, they have demonstrated no intention of deploying substantial (or indeed, any) additional wireless network infrastructure. It is very difficult to understand how a service provider that does not intend to invest can be in compliance with regulatory policies that specifically seek to encourage investment.

e) TELUS Not Required to Provide Access First Then Challenge Later

37. The Applicants allege that TD 2017-56 changed the rules such that any determination of whether a use constitutes incidental roaming can only be determined on an *ex post* basis by the Commission.[24] They claim that a carrier has no ability to deny ineligible access, but must instead allow it to happen and then apply to the Commission for a determination on eligibility. This contention completely mischaracterizes the Commission's determinations in TD 2017-56 and would lead to absurd, dangerous results. TELUS is fully within its rights to deny the roaming request as it has.

38. In TD 2017-56, the Commission decided that certain prohibitions on permanent roaming, contained in interim tariffs, be removed from the final tariff terms and conditions. Those prohibitions had included provisions defining what amount of use could lead to non-incidental access. The Commission decided to remove these from the final tariffs because it was concerned that approving *thresholds* on an *ex ante* basis could be "counterproductive".[25] However, the Commission was clear that the continued limitation to *incidental* access was sufficient to prohibit clearly ineligible resale.[26] Indeed, in completing its analysis, the Commission considered several examples that had been tendered by Eastlink. The first such example addressed the type of access the Applicants seek: the deliberate misuse or abuse of wholesale roaming to resell the incumbents' service outside of the Applicants

[24] Application, paras 38-40.
[25] TD 2017-56, para 74.
[26] TD 2017-56, para 74.

ABRIDGED

home network footprint.[27] The Commission was clear in its reasoning that this type of access was addressed by tariff provisions that limit the mandated service to incidental access.[28] It was the other two scenarios that the Commission did not want to address *ex ante* through a specific tariff item defining thresholds.

39. The Applicants are requesting access that is not incidental within the meaning of the tariff. They are, therefore, ineligible for the service. This is not a question of thresholds, but rather a more basic question of whether they are seeking roaming or resale. Since this form of resale is not covered by the tariff, TELUS is entitled to deny the service and there is no need for the Commission to review *ex post.*

40. Moreover, the interpretation advanced by the Applicant is an absurdity and would set a dangerous precedent. If accepted, it would require carriers to allow clearly ineligible use of regulated services and only subsequently challenge such use through an application. It is patently unreasonable to force a tariffed service provider to make the service available to a wholesale customer when it will be used in a manner that contravenes the tariff and Commission policy. It is also unreasonable and inequitable for the Applicants to have access to a service that they will use in a non-compliant manner when there are other wholesale customers that obtain the service for justified purposes and in compliance with the tariff.

41. Additionally, terms and conditions of tariffs frequently include provisions proscribing eligibility or limiting allowed uses of services. Incumbents must often play a gate-keeping or enforcement role, for example through implementing reseller registration requirements or imposing 9-1-1 obligations. Where it is clear that an applicant would violate these tariff requirements, TELUS is entitled to refuse service. There is no principled basis for departing from this in the present circumstances.

[27] TD 2017-56, para 59.
[28] TD 2017-56, para 68.

ABRIDGED

42. Finally, it would be wasteful of resources, both Commission and industry, to require the individual litigation of every real world application of a policy determination. To the extent that there is any ambiguity on the face of TD 2017-56 regarding the Commission's *ex post* review of roaming thresholds, which TELUS denies, it ought to be resolved to avoid absurdity.

43. In any event, the proposed use is clearly offside the tariff conditions when considered against factors the Commission has established for *ex post* reviews.[29] In particular, the Applicants intend to sell and market services beyond their home network and they will sell or market their services in a manner that would result in its end-users gaining permanent access to TELUS' network.

44. It would no doubt suit the Applicants to have mandated ineligible access to TELUS' services, as it would afford them the windfall benefits of services to which they are not entitled and the opportunity to use the regulatory and legal systems to frustrate TELUS' subsequent efforts to disconnect them. The Commission should not abet such behaviour.

IV. The Order in Council Requiring a Review of Definition of "Home Network" Does Not Alter the Rules

45. The Applicants refer to a recent order by the Federal Cabinet requiring the Commission to reconsider part of its wholesale wireless framework. This order has no bearing on the Application or the requested relief.

46. On June 1, 2017 by Order in Council PC 2017-0557 (the "Order in Council"), the Governor-in-Council referred back to the Commission TD 2017-56 for reconsideration, using the powers provided under subsection 12(1) of the *Telecommunications Act*. Pursuant to the Order in Council, the Commission is required to complete the reconsideration by no later than March 31, 2018. The

[29] TD 2017-56, para 78.

ABRIDGED

Order in Council specifies that it is material to this reconsideration to consider whether:

> a) broadening the definition of "home network" to consider if other forms of connectivity, such as Wi-Fi, would have a positive impact on the affordability of retail mobile wireless to consumers in Canada;
>
> b) the evidence demonstrates in a sufficiently clear and significant manner that the potential negative impact on investment in wireless infrastructure from the inclusion of Wi-Fi connectivity in the definition of "home network" outweighs the potential positive impact on the affordability of retail mobile wireless services to consumers from that inclusion, and
>
> c) impact on investment could be mitigated by imposing conditions on mandated wholesale roaming services, such as ensuring that roaming by customers of providers who offer service primarily over Wi-Fi would be incidental rather than permanent by, for example, limiting roaming in amount, subjecting such roaming services to a different tariffed wholesale rate, or both.[30]

47. Importantly, the Order in Council does *not* alter the wholesale wireless framework as it exists today. Section 12 of the *Telecommunications Act* empowers the Governor in Council to vary or rescind a Commission decision, or refer it back to the Commission for reconsideration of all or part of the decision.[31] The Governor-in-Council chose to refer back to the Commission for reconsideration TD 2017-56, meaning that it did not vary or rescind any Commission determination. The Commission may choose to confirm, vary or rescind that decision, but the decision as pronounced remains fully in force until completion of the proceeding to reconsider.[32]

48. Taken together, it is clear that, for the purposes of the current Application, the Commission must apply the rules as they exist today. The Governor in Council

[30] Order in Council.
[31] *Telecommunication Act,* s 12(1).
[32] *Telecommunications Act,* s 12(6).

ABRIDGED

did not vary TD 2017-56, despite its powers to do so. Instead, it required the Commission to reconsider certain matters addressed in TD 2017-56. It directed the Commission, when conducting that assessment, to assess the evidence regarding the impacts on investment and affordability, and to consider whether negative impacts can be addressed through alternative regulatory mechanisms. The Commission may, having completed this exercise, choose to confirm the original decision. It may also choose to vary it. Now that the Commission has commenced TNC 2017-259, it is conducting the reconsideration of TD 2017-56.

49. It would be premature to change the rules now, without having done that analysis, on a one-off basis in response to a Part 1 application that covers essentially the same territory as the proceeding leading up to TD 2017-57. In short, the Commission should apply the rules that are in force today, not those that may or may not be in force at some later date.

V. Proposed Resale Arrangement is Forborne

50. When the Applicants requested mandated roaming from TELUS, it was immediately apparent that it was not seeking roaming, but access to wholesale services for resale. Since the requested resale arrangement is forborne, there is no basis for the Commission to order TELUS to provide such services. Access to forborne services is set by commercial negotiation. The terms and conditions of such an arrangement, and indeed the threshold decision to provide or not to provide those services at all, is subject to the business judgment of the parties. In this regard, a brief review of the context in which the Applicants make their demand is instructive.

a) The Applicants Are Part of a Group of Companies Operated as a Single Undertaking

51. The request for tariffed wholesale wireless services is notionally by a company called TNW Wireless Inc. This company is, by shareholders, management,

operation, financial administration, and branding part of a series of highly integrated companies. This group includes, among others, the company formerly known as Teliphone-Navigata Westel Inc. ("TNW", now known as 8640025 Canada Inc., ("864")), Teliphone Data Centres Inc., Teliphone Corp., TNW Networks Corp, and numerous others. Investel Capital Corporation ("Investel") is the controlling (or sole) shareholder of 864, Teliphone Corp., TNW Networks Corp, and Teliphone Data Centres Inc., is in turn owned by 864.[33] The shares of Investel are owned by Fiducie Residence JAAM, whose beneficiaries are the family of Benoit Laliberté.[34]

52. This group of companies are operated by the same management team.[35] Benoit Laliberté is, or at least was until recently, Managing Director of Investel,[36] a consultant to and former CEO of TNW, and considered to be the directing mind behind the management and operation of the TNW group.

53. In addition to the obvious overlap of control and management, it is apparent that the companies have been run as a single enterprise, without distinction between the corporate entities. The comments of the Monitor in the current ongoing *Companies' Creditors Arrangement Act* proceeding involving companies within the TNW Group (the "CCAA Proceeding") are worth noting in this regard:

> The Monitor is of the view that the assets of the Business are highly integrated in nature and there is no meaningful way to segregate the assets and customer relationship of the Business to various legal entities without a major examination, which would be extremely costly and would likely conclude that all of the assets, at minimum, as subject to

[33] See 8th Report of the Monitor, dated July 7, 2017, Appendix B, *In the Matter of the Companies' Creditors Arrangement Act, RSC 1985 c C-36, as Amended, and In the Matter of the Canada Business Corporations Act RSC 1985 c C-44, and In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc. and Teliphone Data Centers Inc.* (the "CCAA Proceeding"). CCAA Proceeding materials referred to herein available online at:
http://documentcentre.eycan.com/Pages/Main.aspx?SID=1393
[34] 8th Report of the Monitor in the CCAA Proceeding, paras 18-20.
[35] In 8th Report of the Monitor in the CCAA Proceeding, para 20, the Monitor identifies key management as Benoit Laliberté, Sandeep Panesar, Glen Gregory, Owen Gilbert, and Lawry Trevor-Deutsch.
[36] *8640025 Canada Inc. v. TELUS Communications Company,* 2016 BCSC 2211, para 2.

ABRIDGED

> the security interests of the Secured Creditors. The Monitor further notes that:
>
> a) the Business is managed by the same personnel;
> b) customer billings are deposited to the same bank account; and
> c) cash disbursements are made from the same bank account and financed using the same sources of funds including customer billings and loans advanced by the DIP Lender, both prior to and after the commencement of these insolvency proceedings'; and
> d) the transactions of the Business are all accounted for using the same general ledger.
>
> The complex organizational structure of the Petitioners and the use of different entities makes it extremely difficult to trace the ownership of assets. The Monitor is of the view that the complexity of the organizational structure is entirely unnecessary given the relative simplicity of the Business of the operating model of the Business.[37]

54. Similarly, the evidence of Lawry Trevor-Deutsch in the CCAA Proceeding demonstrates that the many related companies have been operated as a single undertaking without regard to corporate distinctions.[38]

55. TNW Wireless Inc., which was named RuralCom Corp ("RuralCom") until its name was changed on February 15, 2017,[39] was acquired by Investel in December 2017. Subsequently, by press release dated June 28, 2017, a copy of which is attached hereto as "Appendix B", a company called United American Corp announced that it had acquired TNW Wireless Inc., as part of a series of transactions that also saw Investel become largest single shareholder of UAC. Benoit Laliberté is identified as the president of United American Corp. Much, or

[37] 7th Report of the Monitor in the CCAA Proceeding, paras 119-120.
[38] Affidavit of Lawry Trevor-Deutsch, dated June 24, 2017, after having itemized a number of purported transactions, at para 22: "[t]he business and customers resulting from these transactions were serviced, together, without maintaining corporate distinctions, utilizing the assets acquired in those transactions, again, without maintaining corporate distinctions by [Teliphone Corp] and its wholly owned subsidiary Teliphone Canada Corp until January 1, 2016 when TNW Networks Corp took over management. [Para 23] On the first day of January, 2016, all the various customers of all the related companies, including those of the Petitioners, and [Teliphone Corp], were assigned to TNW Networks Corp, by way of the Assignment Letter dated January 1, 2016…"
[39] According to public information on the Corporations Canada registry.

ABRIDGED

all, of the management of TNW Wireless Inc. is common to other companies in the TNW group.[40] It is readily apparent that the shareholders and management includes TNW Wireless Inc. in its overall plans for the TNW group.[41]

56. TNW Wireless Inc. is, by all relevant measures, one and the same as other companies in this group. Even in their Application, the Applicants' shorthand reference to "TNW Wireless Inc." is simply "TNW". Accordingly, the relationship between TELUS and all members of the TNW group are directly relevant to the request by the Applicants.

b) Recent History Between TELUS And TNW Group Demonstrates a Fractured Relationship

57. In June 2016, following years of missed payments and breached agreements, TELUS issued a notice of disconnection to TNW, as a result of the significant debt it had incurred to TELUS. TNW then commenced a Part 1 application seeking an extended period before which the disconnection could be made. In a letter decision dated September 22, 2016, the Commission, noting that TELUS' right to disconnect had not been challenged, ruled that disconnection could not occur before November 21, 2016. TNW was ordered to forthwith notify its customers of the pending disconnection, and file with the Commission confirmation that such notification had been made, as well as a list of affected customers. Subsequently, TNW brought an application to review and vary the September 22, 2016 disconnection decision. The Commission, by letter decision dated November 1, 2016, denied that request, and again ordered TNW to notify its customers of the pending disconnection and file confirmation of such notice having been given, along with a list of customers.

---

[40]. The connection of Benoit Laliberté is clear from above. We note as well that Lawry Trevor-Deutsch is the sole director of TNW Wireless Inc.

41 8th Report of the Monitor in the CCAA Proceeding, para 77 "[t]he go-forward business plan prepared by the Shareholder Representatives relies heavily on the IP described above [including iPCS] as well as the mobile spectrum that the Group acquired from RuralCom Corporation .."

ABRIDGED

58. During this same period, the parties commenced several civil suits relating to TNW's debts to TELUS. On March 2, 2016, TELUS filed a Notice of Civil Claim against 864 in respect of certain debts. Part of these claims were addressed in a consent judgement against 864, dated August 24, 2016 in the amount of $241,095, which amount has yet to be paid.[42] On November 3, TNW commenced a proceeding in the Supreme Court of British Columbia, the purpose of which was to request an injunction preventing TELUS from disconnecting services. The hearing occurring on November 14, 16, and 18, 2016. The Court denied the injunction application in a decision dated November 25, 2016.[43] In that context, the Court found that 864

> has not disputed at least some of the indebtedness. This is evidenced at the very least by the consent judgment obtained on August 24, 2016, but there is evidence from which a clear inference that a more substantial portion of Telus' claim for over $9 million is undisputed.[44] (emphasis added)

59. Further, the Court found that

> [a]lthough 864 did make substantial payments, it continued to be in a shortfall position, and there is no dispute about this in the evidence. 45

60. Subsequently, 864 filed a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act* ("BIA"). This BIA proceeding was later continued under the CCAA, applying to 864 along with Teliphone Data Centers Inc., and by order dated April 6, 2017 Teliphone Canada Corp. (the "Petitioners"), pursuant to the amended and restated initial order dated November 30, 2016 (the "ARIO").[46] At the time when 864 filed under the BIA, it owed TELUS in excess of $10

[42] See *8640025 Canada Inc. v. TELUS Communications Company*, 2016 BCSC 2211, para 17.
[43] *8640025 Canada Inc. v. TELUS Communications Company*, 2016 BCSC 2211.
[44] *8640025 Canada Inc. v. TELUS Communications Company*, 2016 BCSC 2211, para 47.
[45] *8640025 Canada Inc. v. TELUS Communications Company*, 2016 BCSC 2211, para 68.
[46] Although not technically a Petitioner, the shares and assets of TNW Networks Corp were irrevocably assigned to the Monitor pursuant to an order of the Court in the CCAA Proceeding dated February 8, 2017, para 10.

ABRIDGED

million. It has represented to the Court in the CCAA that its purpose in commencing insolvency proceedings was to avoid TELUS disconnecting services.

61. The terms of the ARIO include, among other things, an order for the continued supply of services. The terms of the order for continued supply were later modified, by order dated December 21, 2016, to require the prepayment for the supply of services by TELUS and Bell Canada. Consequently, TELUS has been required to continue providing services to the Petitioners, provided that the Petitioners make payments for these continued services, pursuant to certain terms stated in the order.

62. During the course of the CCAA Proceeding, the secured creditors and Monitor lost faith in the management of 864 and made an application to have a receiver appointed over the company. On April 6, 2017, following an application by the secured creditors, the Court provided the Monitor with enhanced powers and placed it in control of 864's property and operations.

63. More recently, 864 has had considerable cash flow problems and it missed a payment due to TELUS in June 2017, which it failed to cure as required. As it is entitled to do under the terms of a December 21, 2016 order, TELUS has issued a disconnection notice to 864 advising that TELUS will be terminating all services on August 14, 2017. On August 1, 2017, 864 filed another Part 1 application seeking to prevent the August 14disconnection. In a letter to the parties dated August 3, 2017, the Commission rightly returned the application to 864 on the basis that the issue at the heart of the application dealt with a matter related to a court order and raised no issue under the *Telecommunications Act* or Commission decision.[47]

[47] Letter from Chris Seidl (Executive Director, Telecommunications Sector, CRTC) to Benoit Laliberte, Joseph Cote and Lawry Trevor-Deutsch, dated August 3, 2017.

ABRIDGED

64. It was during the CCAA Proceeding that Investel announced the acquisition of RuralCom.

c) Doing Business with TNW Group of Companies Presents Serious Risk to TELUS

65. This history is recited in this Answer to provide the crucial context in which the Applicants' demand for service is being made. Since the services requested are forborne, TELUS must use its business judgment when assessing any proposed business arrangement. In this case, the request came from a business which owed significant debts to TELUS and had a long history of being unable or unwilling to pay their bills. Somehow, they had shielded assets so as to enable the acquisition, during the CCAA Proceeding, of a company holding spectrum licences, and then sought to purchase even more services from TELUS.

66. In addition to failing to pay its invoices, TNW also has a history of breaching its agreements with TELUS. As noted above, the primary individual behind the TNW Group is Benoit Laliberte. In another decision involving 864 under its prior name, a Justice of the BC Supreme Court described Mr. Laliberte as follows:

> I do not accept that breaches of the agreements – which appear to be the basis upon which Mr. Laliberte prefers to do business – are the basis upon which to establish the *status quo*.[48]

67. TNW presented (and continues to present) an obvious and serious credit risk, given the history and the past challenges TELUS has faced in extricating itself from a business relationship under which it was essentially providing services for free. Though not required to provide a justification to deny provision of a forborne service, there is no disputing the wisdom of the business judgment in denying a request for a forborne resale arrangement with this company.

VI. TELUS Entitled to Refuse Tariffed Services Due to Applicants' Debt to TELUS

[48] *Cascade Divide Enterprises, Inc. v Laliberte*, 2013 BCSC 263 at para 98.

ABRIDGED

68. If the Commission disagrees, and determines that the Applicants are eligible for the mandatory roaming service, they are nonetheless disentitled to such services due to the debts owed. Under TELUS General Tariff Terms of Service, CRTC 21461, Item 103.1, TELUS

> must provide service to all customers who apply, except when: a) the customer applying for services owes money to the Company, other than as a guarantor, and refuses to pay the amount owed or refuses to make payment arrangements acceptable to the Company.

69. As set out above, the Applicants are part of an integrated group of companies that owe substantial sums to TELUS. As at November 18, 2016, when 864 filed under the BIA, it owed TELUS CAD $9,777,668.86 and USD $530,297.33. Accordingly, TELUS is not obliged to provide services to the customer.

70. It would appear that the Applicants seek to acquire wholesale roaming services through a different corporate entity than those that have previously acquired services from TELUS. On this basis, they may argue that they are not in fact the same customer, within the meaning of TELUS' General Tariff. The Commission can, and should disregard this artifice.

71. Unquestionably, Canadian law empowers courts to "pierce the corporate veil", as an exception to the doctrine of corporate separateness articulated in *Salomon v. Salomon & Co.* [1897] AC 22 (HL). However, regulatory agencies have even greater powers, and indeed duties, to do so.

72. The Supreme Court of Canada has established the basic principle that private parties cannot, through agreements, bypass regulatory obligations imposed on them in the public interest.[49] The Federal Court of Appeal has ruled that it is permissible for an agency to "enquire into the relationship of an applicant with a third party for the purpose of determining whether the application in the circumstances constituted an attempt to circumvent the regulations", "[w]hether

[49] *British Columbia Telephone Co v Shaw Cablesystems (BC) Ltd.,* [1995] SCR 739, para 60.

ABRIDGED

we characterize it as a case of non-application of, or exception to, the doctrine of corporate veil".[50] Indeed, failure to consider the relationship between entities can constitute a reversible error.[51]

73. The Commission adopted just this approach in Broadcasting Decision CRTC 2002-299 *Mandatory order issued pursuant to subsection 12(2) of the Broadcasting Act against Videotron Ltee and its subsidiaries* ("BD 2002-299"). The Commission correctly found that in appropriate circumstances, it must consider "the actual relationship between the parties and examine whether or not devices have been created in order to circumvent regulation".[52]

74. This is an appropriate case for the Commission to consider the actual relationship between the parties. As is amply demonstrated above, TNW Wireless Inc. is practically indistinguishable from the other members of the TNW group. The ultimate control of the shareholders, management, branding, and financial administration of the business make no distinction between the various corporate entities. They operate, and should be treated by the Commission in this proceeding, as a single undertaking.

75. Failure to look past corporate separateness in these circumstances would allow a company to circumvent regulatory obligations and harm the public interest. Item 103.1 of TELUS' tariff is a Commission-approved measure to implement Commission policies, in this case, the obligation to serve and crucial exceptions to it. It is a key part of the regulatory bargain: a company with a regulatory obligation to provide a service (and therefore unable to exercise business judgment regarding with whom it does business) requires regulatory protection against the abuse that could flow as a consequence of the duty. The regulatory bargain serves the public interest in this instance by ensuring that TELUS is not required to provide services to a customer who has refused to pay for services,

[50] *Villetard's Eggs Ltd v Canada (Egg Marketing Agency),* [1995] FCR 581 (FCA).
[51] Ibid.
[52] BD 2002-299, para 166.

ABRIDGED

thereby damaging TELUS' ability to recover costs and ultimately leading to higher rates for paying customers. Allowing the Applicants to receive additional services, when they have failed to pay for services already received, contravenes this regulatory measure and offends the regulatory bargain.

VII. Legal Basis of Applicants' Business Is In Question

76. In considering this matter, the Commission should also be aware that aside from the change to regulatory policy requested by the Applicants, several other necessary components of their proposed service offering are in doubt. Even if the Commission reversed course and required TELUS to supply resale access by which the Applicants could offer a national service, the legal instability of that offering could have negative impact on Canadian consumers.

77. To begin with, tariffed wholesale GSM-based roaming service is only available to mobile wireless carriers, other than Bell Mobility and Rogers Communications Partnership, that hold one or more Canadian mobile wireless spectrum licenses.[53] Accordingly, any company seeking mandatory roaming must be a licensee under the ISED spectrum licensing regime. The Applicants have not confirmed to TELUS that they are, in fact, a spectrum licensee.

78. The acquisition of RuralCom by Investel constituted a deemed transfer of RuralCom's spectrum licences.[54] It is a condition of the RuralCom spectrum licences that transfers are subject to ISED approval prior to transfer. Requests for approval are assessed under Client Procedures Circular CPC-2-1-23, *Licensing Procedure for Spectrum Licences for Terrestrial Services,* as amended from time to time ("CPC-2-1-23").[55] The Condition is clear that licensees must apply in writing prior to implementing a "Deemed Transfer", which occurs in the case of a

[53] CRTC 21462 Item 233.1.
[54] The conditions of licence to RuralCom's two licences are located online: <http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11018.html.
[55] Online: < http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf01875.html>

change of control of a licensee.[56] Implementing prior to obtaining approval is considered to be a breach of the conditions, and is subject to enforcement actions under the *Radiocommunication Act*.[57]

79. There is no evidence that the transfer or deemed Transfer of RuralCom's two spectrum licences has been approved by ISED.[58] Normally, ISED aims to issue a decision within 12 weeks of the request.[59] Although the timeline may vary, the transaction was announced in early December 2016,[60] and the normal 12 week review period has long since expired. Accordingly, the request for mandatory roaming is being made by a party, TNW Wireless Inc., which might not hold a spectrum licence. TNW should be required to provide evidence that it is a mobile wireless spectrum licensee before any Commission order is issued that TNW must be provided mandatory roaming.

80. Similarly, by the Applicants' description, their proposed service offering would rely on iPCS technology. However, the Applicants' rights to use such technology are in doubt. According the 8th Report of the Monitor in the CCAA Proceeding, there are strong claims that the IP on which iPCS technology is based in fact belongs to the Petitioners.[61]

81. The relief requested in the Application should not be granted, for all of the reasons described herein. However, should the Commission consider changing its policies to accommodate the request, it should decline to make such changes due to the contentions and questionable nature of the Applicants' legal standing to obtain roaming from TELUS and also its right to implement iPCS technology.

---

[56] For definition, see CPC-2-1-23, s 5.6.1.
[57] CPC-2-1-23, s 5.6, and 5.6.4.3.
[58] ISED maintains a database of current licence holders. It also normally publishes a summary of its decision on transfer applications. See CPC-2-1-23, s 5.6.2.9 and 10.
[59] CPC-2-1-23, s 5.6.4.5.
[60] "TNW Networks Corp's Parent Company, Investel Capital Corporation Acquires Wireless Operator RuralCom", 8 December 2016, online: Yahoo Sports https://sports.yahoo.com/news/tnw-networks-corps-parent-company-110000619.html.
[61] 8th Report of the Monitor in the CCAA Proceeding, para 79.

ABRIDGED

Allowing them to operate in the proposed manner would create a very real chance that legal problems would ensue, with their suppliers and other third parties.

VIII. Interim and Expedited Relief Not Appropriate

a) Expedited Relief Not Appropriate Since Applicants Seek a Policy Change

82. The Applicants are seeking "interim relief on an expedited basis".[62] Although they have not requested an expedited hearing, the Commission's criteria in Broadcasting and Telecom Information Bulletin CRTC 2013-637, *Practices and procedures for staff-assisted mediation, final offer arbitration and expedited hearings*, are relevant and should be applied to determine what method of dispute resolution should be used in these circumstances.

83. Expedited hearings should be used when the following four criteria are met, provided that the nature of the dispute is not exclusively monetary: (i) the dispute is bilateral or affects only a small number of parties; (ii) the parties have been unable to resolve the dispute by alternative methods; (iii) the dispute is relevant to the regulation and supervision of either the Canadian broadcasting or telecommunications system, primarily to matters of interpretation or application of an existing Commission decision, policy, or regulation; and (iv) resolution of the dispute does not require a new policy or change to an existing policy.[63]

84. The first and fourth criteria are clearly not met. The Applicants have sought relief against both TELUS and Bell Mobility, which means this is not a bi-lateral dispute. The disputes and the Commission's ultimate decision to grant relief may also have a broader, indirect impact on MVNOs and other Wi-Fi-based service providers who may be inclined to seek the same relief from TELUS and Bell until the Commission can render its decision following its reconsideration of Decision

[62] Application at paras 2, 4, ES-18, 20, 80.
[63] Broadcasting and Telecom Information Bulletin CRTC 2013-637, *Practices and procedures for staff-assisted mediation, final offer arbitration and expedited hearings*, 28 November 2013, online: CRTC http://www.crtc.gc.ca/eng/archive/2013/2013-637.htm n at 4, 27.

2017-56. The relief requested would require a policy change (discussed below), which would necessarily have an impact far beyond just the immediate parties.

85. More importantly, the relief the Applicants are seeking requires a new policy or a change to an existing policy, the policy being the Commission's wholesale wireless roaming framework. The Applicants admit that they seek a change to regulation when they state that "the regulations in place do in fact interfere with the operation of a competitive market by indirectly giving power to the incumbents to decide which companies enter the wireless marketplace"[64] and suggest that "a fundamental change to the Canadian competitive landscape" is necessary.[65] They are seeking a policy change, and such proceedings should not occur through an expedited process.

86. Accordingly, TNW has not satisfied the criteria for an expedited hearing, and should not be entitled to interim relief on an expedited basis.

b) Applicants Fail to Meet Test For Interim Relief

87. The Commission assesses applications for interim relief using criteria set out by the Supreme Court of Canada in *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd.*[66] ("*Met Stores*"), as modified in *RJR-MacDonald Inc. v Canada (Attorney General)*[67] (the "*RJR-MacDonald* Criteria").[68] The *RJR-MacDonald* Criteria are that (1) there is a serious issue to be determined, (2) the party seeking the interim relief will incur irreparable harm if the relief is not granted, and (3) the balance of convenience, taking into account the public

[64] TNW Application at 104.
[65] TNW Application at 295
[66] [1987] 1 SCR 110.
[67] [1994] 1 SCR 311, 1994 CarswellQue 120 (*RJR-MacDonald*).
[68] Practice Note, 28 February 1997, online: CRTC http://www.crtc.gc.ca/eng/telecom/p970228.htm.

interest, favours granting the interim relief. To be successful, an applicant must establish that it meets all three criteria.[69]

88. The three-stage test that forms the *RJR-MacDonald* Criteria is applied by Courts and tribunals when considering an application for either a stay or an interlocutory injunction.[70] The same principles apply to both interlocutory (pending disposition of an appeal) and interim (for a specified period of time) relief.[71]

i) Changing the Status Quo in Interim Order a Very High Burden

89. When applying the *RJR-MacDonald* Criteria, Courts will typically assess the nature of the interlocutory relief sought by an applicant; that is, whether it is mandatory, in that the relief would require the defendant or respondent to act positively by taking a specific action, or prohibitory, in that the relief would require the defendant or respondent to refrain from taking action.[72]

90. Where the interlocutory interim relief being sought is mandatory in nature, there is a higher threshold at the first stage of the *RJR-MacDonald* Criteria: the test is whether there is a strong prima facie case to be tried, rather than a serious issue to be tried.[73]

91. The relief sought by the Applicants is clearly mandatory in nature because if it was granted, TELUS would be required to take positive steps to enter into a roaming agreement and commercial relationship with TNW Wireless Inc. Such an agreement and relationship do not exist today, and accordingly the relief

---

[69] Telecom Commission Letter Addressed to Ice Wireless and Rogers Communications Inc., 7 July 2016, online: CRTC http://www.crtc.gc.ca/eng/archive/2016/lt160707.htm?_ga=1.262313743.2035647210.1458830628 (Ice Letter Decision).
[70] *RJR-MacDonald* at 48.
[71] *RJR-MacDonald* at 47.
[72] *Teliphone Corp. v Comwave Wholesale Inc.*, 2015 ONSC 5142 (*Comwave*); see also *8640025 Canada Inc. v TELUS Communications Company*, 2016 BCSC 2211 (*864*).
[73] *Barton-Reid Canada Ltd. v Alfresh Beverages Canada Corp.*, [2002] OJ No 4116 (SC) (*Barton-Reid*) at 9, as cited in *Comwave* at 19.

sought requires TELUS to take actions that go beyond merely preserving the *status quo*.

92. Thus, the onus resting on the Applicants is higher than if the relief being sought required the respondents to refrain from taking action.[74] The Applicants must show that they have a strong *prima facie* case that they are entitled to mandatory roaming from TELUS and Bell Mobility and that its claim is "almost certain to succeed".[75]

ii) No Strong *Prima Facie* Case to be Determined

93. The usual standard for the first stage of the test, i.e. a serious issue to be determined, is very low if an application is not frivolous.[76] However, given that the relief being sought in this case is in the nature of a mandatory order, the Applicants must meet a higher threshold than the usual standard. The first stage requires a preliminary assessment of the strength of TNW Wireless' case.[77]

94. For the plethora of reasons raised by TELUS in this Answer, the Applicants have not demonstrated that they are eligible for mandatory roaming under the Commission's *existing* framework. The issues raised in the Application surrounding Wi-Fi usage and permanent roaming require a decision on the merits, which will be issued following due regulatory process. The Applicants have raised questions about whether Wi-Fi-based service providers should have access to mandated roaming services, and has framed its request as being consistent with the Minister of Innovation, Science and Economic Development's recent announcement, but has not established a strong *prima facie* case justifying a mandatory order for roaming under the current regime. Accordingly, TNW has not met the first stage of the test for mandatory interlocutory relief.

[74] *864* at 31.
[75] *Comwave* at 19.
[76] Ice Letter Decision.
[77] *Comwave* at 18.

ABRIDGED

iii) Applicants Will Not Suffer Irreparable Harm

95. The Applicants have not demonstrated that they would suffer any harm at all, much less irreparable harm. They are seeking to run a business relying on services to which they are not entitled. The inability to run such a business without successfully negotiating wholesale access is simply the implication of validly created regulation. This is not a "harm" that can be recognized by law.

96. To justify interim relief, there not only must be harm (which there is not on the facts of this case), but it must be irreparable. As the Commission and Courts have stated, 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.[78] In addition, "irreparable" refers to the nature of the harm suffered rather than its magnitude. The Commission has held that "the test of irreparable harm relates only to the harm suffered by the applicant and does not relate to the public interest".[79]

97. The Applicants allege that they will suffer irreparable harm if relief is not granted, and lists their costs of investing in the wireless market, including spectrum licence acquisition, licence fees, network upgrades and ancillary infrastructure.[80] These costs are investments, not losses, and in any event they are fully quantifiable. Moreover, TELUS' refusal to provide roaming in no way prevents TNW from using any of its spectrum licences or network infrastructure.

98. Further, the Applicants' subscribers (if any currently exist) will not lose service or be adversely affected if relief were to be withheld, which is distinguishable from the facts underlying the Rogers/Ice Wireless dispute.[81] In its decision to grant interim relief to Ice Wireless, the Commission found that "Ice Wireless and Sugar Mobile would very likely incur irreparable harm if interim relief were not

[78] Ice Letter Decision. See also *RJR-MacDonald* at 64.
[79] Telecom Decision CRTC 2008-39, *Canadian Association of Internet Providers' request for interim relief regarding Bell Canada's practice of "throttling" its wholesale ADSL access services*" at para 13, 14 May 2008, online: *CRTC* < http://www.crtc.gc.ca/eng/archive/2008/dt2008-39.htm>.
[80] TNW Application at 85-86.
[81] Ice Letter Decision.

granted" given that Ice Wireless' end-customers already had wireless service and were roaming on Rogers' network, and any termination by Rogers would have resulted in a loss of service.[82] The circumstances that were present in the Rogers/Ice Wireless dispute are not present here, given that TNW Wireless has not launched, and subscribers are not using, its iPCS service.

99. The Applicants' assertion that it will "not be able to properly launch its wireless service"[83] absent relief is premature and falsely premised on a number of unproven claims and assumptions, including (i) their proposed service offering is qualified for mandatory roaming under Commission's wholesale wireless framework, (ii) the assumption that TELUS and Bell are the only network providers that can provide roaming on a nation-wide basis, and (iii) the assumption that their Wi-Fi based service cannot be launched without resold access to a carrier's network. In addition, TNW Wireless Inc. is free to negotiate commercial roaming agreements with other Canadian carriers.

100. Moreover, the Applicants have provided no evidence to support their claim that they will suffer irreparable harm. In previous Commission decisions on interim relief applications, relief has not been granted where the applicant does not provide sufficient evidence in support of its claim.[84]

iv) Balance of Convenience Favours TELUS

101. The assessment of the balance of convenience requires the "determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory decision, pending a decision on the merits".[85]

---

[82] Ice Letter Decision.
[83] TNW Application at 86.
[84] Telecom Decision CRTC 2008-39, *Canadian Association of Internet Providers' request for interim relief regarding Bell Canada's practice of "throttling" its wholesale ADSL access services* at 13, 14 May 2008, online: CRTC < http://www.crtc.gc.ca/eng/archive/2008/dt2008-39.htm> (Throttling Decision).
[85] *Met Stores*, cited in *RJR-MacDonald* at 67.

ABRIDGED

102. The Applicants have not demonstrated that they will suffer irreparable harm absent interim relief. However, even if the Commission were to find that not granting interim relief would cause irreparable harm to TNW, there are circumstances that rebut the presumption that the balance of convenience favours the granting of interim relief.

103. TELUS stands to suffer considerable harm if it is compelled to provide roaming to a service provider that has openly communicated its intent to resell TELUS' network, in contravention of the existing regulatory framework. The Applicants' contention that there would be no harm caused to Bell and/or TELUS[86] is wrong for a number of reasons.

104. First, the roaming fees in TELUS' GSM-based roaming tariff do not account for MVNO access, which was expressly not mandated by the Commission, or other non-compliant uses of roaming. The cost studies submitted to the Commission in respect of GSM-based roaming service were not prepared with the possibility of permanent roaming in mind. The increased traffic on TELUS' network that would result from permanent roaming will significantly impact TELUS' operations, and TELUS would not be adequately compensated through fees in the current tariff.

105. Second, there is strong reason to expect that fees will not be paid by the Applicants in a timely manner or at all. As noted above, and as detailed in the Company's submissions in response to TNW's 2016 Part 1 Application seeking interim relief with respect to the timing of disconnection of services by TELUS, the Commission is aware of the chronic history of non-payment by the TNW group. It is reasonably foreseeable that the Applicants will continue this pattern of conduct if it were to benefit from an order by the Commission compelling TELUS to provide roaming. Even if measures were put in place to mitigate the risk of non-payment (for example, if TNW were required to pay for roaming

[86] Application at 93.

ABRIDGED

service in advance or provide a deposit or deposit alternative), payment will never be guaranteed, and TELUS expects it could find itself in the position it was in in 2016, that is, issuing a notice of disconnection and facing a number of legal and regulatory hurdles before being permitted to disconnect. TELUS has had to already expend considerable resources on the process relating to disconnection of services to 864 and the resulting CCAA Proceeding. As noted in the Monitor's reports, the TNW Group has done its utmost to put up every hurdle it can in the CCAA Proceeding.

106. The Applicants suggest that if the requested relief is not granted, they "may not survive a protracted period of not being able to launch a full range of mobile services".[87] Given the financial situation affecting its management group and family of companies, as detailed in the CCAA Proceeding, the Applicants' long term survival is already in question. There is no basis for granting, on an interim basis, an order that radically alters an existing regulatory regime simply in response to the financial difficulties the Applicants have found themselves in. In the circumstances, and as a result of their own business conduct, the Applicants are "to a large degree, the author[s] of [their] own misfortune".[88]

107. The balance of convenience analysis also requires that the Commission take into account the public interest. The public interest will not be protected by granting the interim relief, and it is possible that it will in fact be negatively impacted. If the Commission were to order TELUS to provide roaming to a company helmed by a management group that has sought creditor protection and has not demonstrated good faith through that process, the impact on future wireless subscribers is reasonably foreseeable. In the likely event that history repeats itself, TELUS could find itself in the unfortunate position of being owed significant amounts of fees for services rendered and forced to terminate the

[87] TNW Application at 89.
[88] *Platinex Inc. v Kitchenuhmaykoosib*, 2006 CanLII 26171 (ONSC) at paras 68-76.

ABRIDGED

roaming agreements to mitigate losses. This would create a scenario similar to the dispute between Rogers and Ice Wireless where a significant number of innocent end-customers were potentially impacted. Moreover, the confusing signals to the market, as described above, are contrary to the public interest.

108. There is also a presumption that regulatory schemes and other frameworks enacted to protect the public should not be set aside. The Applicants are effectively asking the Commission to suspend its roaming framework, declare a new rule that permits MVNO access and permanent roaming and immediately apply it to TNW. Granting the requested relief would displace existing rules and sweep away the existing regulatory framework, which cannot be done lightly.

109. In *Met Stores*, Justice Beetz stated:

> While respect for the Constitution must remain paramount, the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and is given the weight it deserves.[89]

110. The Applicants have not made the case in their Application for the Commission to reverse its previous decisions[90] in which it decided not to mandate MVNO access following a consideration of multiple stakeholder interests, and it remains to be seen whether the Commission will do so when it issues a decision following its reconsideration of Decision 2017-56. The balance of convenience favours maintaining in place the existing Commission framework in relation to wholesale wireless roaming.

111. When all of the factors listed above are weighed, including the consideration of the public interest, the balance of convenience tips heavily in the Company's favour, and the application for relief should be denied.

[89] *Met Stores* at 57.
[90] Telecom Regulatory Policy CRTC 2015-177 and Telecom Decision CRTC 2017-56.

ABRIDGED

v) No Interim Relief For Applicants With Dirty Hands

112. Requests for interlocutory relief are considered to be "extraordinary equitable remedies".[91] A party's right to seek equitable relief is subject to the equitable maxim that "he who comes into equity must come with clean hands".[92]

113. As set out above, the Applicants have failed to meet the *RJR-MacDonald* Criteria. Even if they had succeeded, the interim relief sought in the Application would not be available, as the Applicants do not have "clean hands"; in other words, their actions are not beyond reproach.

114. The requested relief is for an order to provide more services to a party that owes TELUS in excess of $10 million. The failure to pay those debts, which include a consent judgment in the B.C. Supreme Court, is an indicator that their hands are not clean. In a recent case involving the TNW group, the Ontario Superior Court refused an injunction in part on the basis that their refusal to pay amounts owing was indicator of unclean hands.[93] While some of the TNW Group companies have been in creditor protection for some of the time, they appear to have sufficient funds to acquire RuralCom during the same period.

115. Moreover, in the context of the CCAA Proceeding, TNW's management unsuccessfully sought a Court-ordered stay of proceedings under the CCAA and, throughout the process the Court-appointed Monitor has observed in its regular reports to the Court that the Petitioners "have not complied fully with the court orders issued in these proceedings"[94] and "have not been sufficiently cooperative with the Monitor in many respects".[95] They now seek an order from the Commission compelling TELUS to provide an additional tariffed service despite a total lack of propriety in a related proceeding where they have argued that TNW

[91] *864* at 92.
[92] *Canson Enterprises Ltd v Boughton & Co.*, [1991] SCR 534 at 82.
[93] *Teliphone Corp v Comwave Wholesale Inc,* 2015 ONSC 5142, paras 42 and 44.
[94] Fifth Report of the Monitor, 9 March 2017, at para 123a.
[95] Fifth Monitor's Report at 123c).

ABRIDGED

Wireless is a part of their overall restructuring plans with 864 and the related companies.

116. Further, a recent report details the Monitor's observations regarding the unauthorized removal of servers from a data centre, as authorized by Mr. Laliberté, and has sought a Court order directing the return of the servers.[96]

117. Finally, this pattern of behaviour long pre-dates the struggles of the past year. Indeed, as noted above, in a 2013 decision of the Supreme Court of British Columbia, the court opined that contractual breaches "appear to be the basis upon which Mr. Laliberté prefers to do business".[97]

118. Ultimately, for the reasons articulated previously in this Answer, the "hands" controlling TNW are the same as the "hands" controlling the petitioners in the CCAA Proceeding, and they are not clean. The law of equity requires that TNW's request for an extraordinary, equitable remedy be dismissed.

IX. Granting Relief Not Consistent with Telecommunications Policy Objectives or Policy Direction

119. In its Application, TNW suggests that granting the relief will promote telecommunications policy objectives from section 7 of the *Telecommunications Act* (without referencing a specific objective) and is consistent with the Policy Direction.[98]

120. It is apparent that TNW is advocating for a change to the mandatory roaming framework that marks a shift away from facilities-based competition, and is seeking to initiate that change via an application for interim relief. It also cites the Minister's June 5, 2017 announcement[99] to imply that policy objectives like

[96] Eighth Report of the Monitor, 7 July 2017, at para 81-97.
[97] *Cascade Divide Enterprises v Laliberte*, 2013 BCSC 263, at para 98.
[98] TNW Application at 94-105. *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355.
[99] TNW Application at 98-99.

ABRIDGED

affordability will be advanced, but provides no evidence to support a relationship between granting the requested relief and lower costs to Canadians.

121. When the Commission issued the two key decisions that form the existing regulatory framework, it made determinations that were consistent with the Policy Direction and advanced policy objectives set out in paragraphs 7(a), (b), (c), (f), (g) and (h) of the *Act*, and provided supporting reasons for its findings.[100] A reconsideration of those decisions has been ordered by the Governor in Council, and the Commission will need to once again consider the telecommunications policy objectives, but the rules have not been revoked or varied. Accordingly, the determinations of consistency with the Policy direction and policy objectives continue to be valid.

122. Granting the requested relief would be entirely inconsistent with the Policy Direction, given that such a mandatory order would constitute significant interference with the operation of competitive market forces – arguably more so than if the order were prohibitory in nature. The roaming arrangement that TNW is seeking is not one that is mandated, and TELUS has made a commercial decision to not enter into it. For the Commission to order otherwise, without the full consideration of the broader issues it has been ordered to reconsider, would be inconsistent with the Policy Direction as well as concepts of procedural fairness. In addition, changing the rules prior to conducting the broader assessment required by the Order in Council would be inconsistent with paragraph 7(f) of the *Telecommunications Act*, as it would be an inefficient form of regulation. Changing the rules would be inefficient as it would contravene facilities-based competition and create regulation that the Commission has already found to be unnecessary and that is now under review, and changing the rules in an order for TNW would be premature.

[100] Decision 2017-56 at 259-266. See also TRP 2015-177 at 195-201.

ABRIDGED

X. Conclusion

123. The Commission should reject the Application in its totality. The Applicants are seeking a form of mandated access that the Commission has already, repeatedly, decided not to mandate. The Applicants have failed to distinguish their service in a way that has regulatory meaning from the services the Commission has considered previously.

124. Respectfully submitted this 4th day of August 2017.

* * * End of document * * *