



2001-05-18

Director General,
Radiocommunication and Broadcasting Regulatory Branch,
Industry Canada,
300 Slater Street
Ottawa, Ontario,
K1A 0C8.

Dear Mr. Skora:

Re: Gazette Notice DGRB-002-01

In accordance with the procedure stipulated in Gazette Notice DGRB-002-01, please find attached the submission of the Canadian Wireless Telecommunications Association on the proposal to establish a procedure to determine compliance with licence conditions prior to further licensing.

Sincerely,

J. David Farnes
Vice President,
Industry & Regulatory Affairs

Attachment



CWTA Response to Gazette Notice DGRB-002-01, “Consultation on a Proposed Procedure to Determine Compliance with Licence Conditions Prior to Further Licensing”

Executive Summary

Industry Canada is proposing to add to its existing powers to enforce conditions of licence a new, and powerful, mechanism: prohibiting a licensee from participating in an auction, and thereby obtaining rights to use additional frequency resources, if it is not in compliance with existing conditions of licence. The Department emphasizes that the purpose of any new procedure adopted would be to assess the ability of existing licensees to efficiently use the spectrum already allotted to them.

In response, the Canadian Wireless Telecommunications Association (“CWTA”) notes that the Department has many tools, in addition to those listed in the Compliance Notice, with which to enforce compliance with licence conditions. Revocation or suspension of licence and prosecution under the *Radiocommunication Act* are both extreme measures, which the Department has been properly reluctant to deploy in the past, except in the face of flagrant and serious non-compliance. However, the consequences for a wireless telecommunications company of being foreclosed from even bidding for spectrum at auction are also extremely serious.

Therefore the CWTA urges the Department to consider whether its proposal, as outlined in the Compliance Notice, affords the degree of flexibility necessary to ensure that the response is *proportional* to the degree to which a licensee is non-compliant. We believe that other existing and potential tools can be applied so that the penalty best matches the circumstances and the consequences of non-compliance with licence conditions.

If the objective is to measure the prospective auction applicant’s likely ability to make good and responsible use of spectrum resources entrusted to it, the Department should be selective about the conditions of licence that can be enforced by prohibiting auction participation. The Department must retain the flexibility it has to determine which licence conditions are most relevant to its core objective *at the time an auction is announced*.

Regarding the proposal to prohibit a party from participating in an auction because of the non-compliance of an affiliate, CWTA considers that it meets neither the standard of flexibility nor of fairness that the CWTA urges the Department to adopt. The Department could more effectively address its concern about “shell” affiliates by reviewing the corporate information filed with a notice of intention to participate in an auction. If this review raises suspicion that the applicant of record is being set up to hide previous non-compliance, the Department could then investigate its suspicions and take appropriate action.

CWTA also urges the Department to take a close look at whether the proposed new enforcement mechanism respects the principles of procedural fairness, sufficient to ensure that the response to non-compliance is based on a fair and reasoned consideration of the facts, while respecting the confidentiality of licensee information in an operating environment that is often highly competitive. The essential requirement of fairness and natural justice is that the affected party be able to know and respond to the case against it. CWTA suggests some modifications to the proposed mechanism to improve its actual and perceived fairness.

In this submission, CWTA raises doubts as to whether the proposed mechanism will provide an adequate standard of flexibility and fairness, and urges the Department to focus instead on developing means of enforcing conditions of licence that are procedurally fair and flexible.

1.0 Introduction

In carrying out the Minister of Industry’s responsibilities pursuant to the *Radiocommunication Act*, Industry Canada (the “Department”) issues radio and spectrum licences which are often subject to conditions of licence. The licensee’s failure to comply with these conditions may result in suspension or revocation of a licence, or even in prosecution for an offence under the Act.

With the introduction of spectrum auctions as a tool for the allocation of spectrum in cases where demand exceeds supply, the Department can add a new and powerful enforcement mechanism: prohibiting a licensee from participating in an auction, and thereby obtaining rights to use additional frequency resources, if it is not in compliance with existing conditions of licence. The Department first raised the possibility of using this mechanism in Gazette Notice DGRB-018-99, *Consultation on the Proposed Policy and Licensing Procedures for the Auction of Additional PCS Spectrum in the 2 GHz Frequency Range* (the “PCS Auction Notice”). Now the Department has initiated a separate consultation process on this subject, and has proposed a procedure by which compliance with existing licence conditions can be verified prior to further spectrum licensing (Gazette Notice No. DGRB-002-01, *Consultation on a Proposed Procedure for Determining Compliance with Licence Conditions Prior to Further Licensing*, referred to here as the “Compliance Notice”).

In the PCS Auction Notice the Department invited comments on how it should view the potential eligibility of any party not in compliance with its existing licence conditions. In the Compliance Notice, the Department emphasizes that the purpose of any new procedure adopted would be to assess the ability of existing licensees to efficiently use the spectrum already allotted to them. The Department has posited that this ability can be measured by requiring those would-be participants in auctions that already hold spectrum licences to prove their compliance with existing licence conditions.

In responding to the Compliance Notice, the Canadian Wireless Telecommunications Association (“CWTA”) notes that the Department has many tools, in addition to those listed in the Notice, with which to enforce compliance with licence conditions. Revocation or suspension of licence and prosecution under the Act are both extreme measures, which the Department has been properly reluctant to deploy in the past, except in the face of flagrant and serious non-compliance.

However, the consequences for a wireless telecommunications company of being foreclosed from even bidding for spectrum at auction are also extremely serious. As auctions come to be used more commonly to make spectrum allocation decisions, these consequences will become even more grave. If the Department elects to enforce compliance with conditions of licence as proposed in the Compliance Notice, licensees could find themselves unable to keep pace in a competitive market or even to attract the financing necessary to continue operations in market conditions where continued growth is perceived as an imperative.

Therefore the CWTA urges the Department to consider whether its proposal, as outlined in the Compliance Notice, affords the degree of flexibility necessary to ensure that the response is *proportional* to the degree to which a licensee is non-compliant. Are other tools available to enforce licence conditions that can be applied so that the penalty better matches the non-compliance?

CWTA also urges the Department to take a close look at whether the proposal respects the principles of procedural fairness, sufficient to ensure that the response to non-compliance is based on a fair and reasoned consideration of the facts, while respecting the confidentiality of licensee information in an operating environment that is often highly competitive.

Each of these issues – flexibility and fairness – is explored further below.

2.0 Flexibility: Ensuring a Proportionate Response

In view of the Minister of Industry’s mandate under the *Radiocommunication Act* to ensure the orderly development and efficient operation of radiocommunication in Canada, the conditions attached to licences issued to individual operators to make use of spectrum resources are clearly extremely important. There is no doubt that the Department takes seriously the challenge of designing conditions of licence that serve the broader public interest.

Licensees also take the conditions of their licences extremely seriously. In seeking authorization to use spectrum, by auction or by comparative process, applicants' assessments of the viability of their own proposals must centre on their ability to achieve the promises they make, which generally translate into conditions of licence. The conditions attached to radio station and spectrum licences also affect applicants' and licensees' ability to attract financing, an essential condition to most players' ability to deploy and operate radio networks.

So there is no debate that conditions, and adherence to conditions, are important. However, we believe there is room for debate on the question of whether all conditions are equally vital, and on the question of whether all conditions are equally useful as indicators of the ability of existing licensees to efficiently use the spectrum already allotted to them.

In the Compliance Notice, the Department categorizes the conditions it typically attaches to radio station and spectrum licences as follows:

- Category 1 conditions: technical conditions, including international agreements, technical standards, international and domestic coordination requirements and band plans;
- Category 2 conditions: regulatory conditions, including Canadian ownership and control requirements, spectrum and radio system policies, licence duration, licence fees and the approved area of operation; and
- Category 3 conditions: public interest conditions, including lawful interception capabilities, research and development investment, implementation of service and network deployment.

The Department believes it already has the tools needed to enforce Category 1 and 2 conditions. Therefore it seems that the Department is contemplating barring licensees from applying to participate in auctions solely on the basis of their non-compliance with Category 3 conditions.

These public interest conditions of licence are at once the most variable and the most subjective conditions attached to licences. Take lawful interception capabilities for example.

The current conditions of PCS licences states:

6.1 You shall, from the inception of service, provide for and maintain lawful interception capabilities as authorized by law.

(a) The requirements for lawful interception capabilities are provided in the "Solicitor General's Enforcement Standards for Lawful Interception of Telecommunications" (Rev. Nov. 95). These standards may be amended from time to time following consultation with the Solicitor General of Canada and the licensees.

(b) You may request the Minister to forbear from enforcing certain assistance capability requirements for a limited period. The Minister following consultation with the Solicitor General of Canada, may exercise his power to forbear from enforcing a requirement or requirements where in the opinion of the Minister, the requirement(s) is (are) not reasonably achievable. Forbearance requests must include specific details and dates when compliance to requirement(s) can be expected.

In establishing this condition in April, 1996, the Department provided licensees with guidance, in the form of a reference to the then-current standards to be met, and assistance, in the form of the forbearance procedure set out in paragraph (b).

However, if a licensee is consulting with the Solicitor General with respect to an amendment of the standard or is subject to an order of forbearance at the time that it must make its application for additional spectrum, will the Department bar it from participation in an auction?

More important, is prohibiting one licensee (or, if the affiliate rule is implemented, a group of licensees) from participating in an auction the best way for the Department to enforce this obligation?

The CWTA is not convinced that this is the best way. Failure of a licensee to comply with lawful interception requirements will be met by other penalties, possibly including legal penalties for contempt of the court order that authorized the interception in question. Prohibiting participation in an auction is a particularly blunt instrument with which to enforce this condition, and one with significant consequences for the licensee.

As another example, consider PCS licensees' network deployment obligations:

1.1 In order to realize the Government's objective of full national coverage, you must implement your system substantially in accordance with the full five year plan contained in your detailed submissions to the Department notwithstanding any stated conditions therein. In addition, you and any entities with which you have submitted an application for 2 GHz PCS, must offer a reasonable level of service in all regions of Canada within two years of the date of this authorization.

This condition is stated in a way that is both subjective (it refers to the licensee's detailed submission) and flexible (implementation must be "substantially in accordance" with plans, and offer a "reasonable" level of service). In the not only appropriate: it is necessary. Deployment of a radio network, especially a new nation-wide network built to compete with incumbent systems, is a difficult task and one that is subject to many variables, including the availability of equipment, access to antenna sites, access to affordable financing, and the ability of the market in each location to support the number of licensees required to offer service in that location.

When an applicant seeks authorization to use radio spectrum, and when the Department issues licence conditions, both parties are well aware of the many variables – most of them beyond the control of the licensee – that can affect performance over the period of the licence, and thereby affect compliance with conditions of licence. Conditions are, therefore, wisely expressed so that the Department need not revoke or suspend a licence for non-compliance.

We believe that the Department should retain this flexibility, even while looking for new and effective means of enforcing licence conditions. If the objective is to measure the prospective auction applicant's likely ability to make good and responsible use of spectrum resources entrusted to it, the Department should be selective about the conditions of licence that can be enforced by prohibiting auction participation. The Department must retain the flexibility it has to determine which licence conditions are most relevant to its core objective *at the time an auction is announced*.

The enforcement mechanism proposed in the Compliance Notice has extremely serious consequences. The CWTA urges the Department to ensure that it retains the flexibility to deploy the mechanism only when the non-compliance is similarly serious, and clearly relates to the licensee's ability to make efficient use of spectrum.

3.0 Fairness: Ensuring a Legitimate Process

Because the consequences to an operator of a spectrum-based communications system of being foreclosed from participating in the auction of additional spectrum can be so grave, it is extremely important that the process used by the Department to apply this enforcement mechanism both be, and be seen to be, fair.

The essential requirement of fairness and natural justice is that the affected party be able to know and respond to the case against it.

Applied to the proposal made in the Compliance Notice, fairness requires the following elements:

- *Timely notice:* If the Department believes that a licensee is not in compliance, it should advise the licensee promptly and completely. The right to respond is empty if the licensee does not have adequate time before it must apply to participate in an auction to either explain the circumstances to demonstrate that it is, in fact, compliant, or to seek a waiver of the specific condition if the condition is not central to the efficient use of spectrum.
- *Full disclosure of the case against a licensee:* If the Department's belief is based on allegations made by a third party, the licensee should receive a copy of the allegation as soon as possible. The Department should also send the allegation to the licensee in as complete a form as possible. Only by knowing both the allegation and the evidence and reasoning of the party alleging non-compliance can the licensee adequately respond to the case against it. In most cases, the identity of the party making the allegation will also be relevant to the response.

Similarly, if the allegation of non-compliance comes from the Department itself, the grounds should be disclosed in enough detail that the licensee has a genuine opportunity to respond and explain.

- *Protecting confidentiality:* If the alleged non-compliance relates to a condition of licence whose specifics are based on material held in confidence when the licensee filed its detailed proposal, the Department should be careful that any information it makes public respects this confidentiality.
- *Adequate time to respond:* The licensee must be afforded an adequate period of time to make its response and get the matter resolved before its participation in the auction has to be finalized.

4.0 Response to Specific Calls for Comment

4.1 Selective Application of the Procedure

Noting that it has effective tools to resolve instances of non-compliance with Category 1 (technical) and Category 2 (regulatory) conditions of licence, the Department seeks comment on its proposal to limit the application of the new enforcement mechanism (precluding a party from participating in an auction of additional spectrum) to parties holding radio station or spectrum licences that are subject to Category 3 (public interest) conditions.

There is no consensus among CWTA members concerning this proposal.

4.2 Application to Affiliates

The Department also seeks comment on its proposal to require prospective auction participants to attest to the compliance of their affiliates with all licence conditions that apply to all of their existing radio and spectrum licences.

Again, the CWTA is very concerned with the implications of this proposal.

The Department cites as the reason to make this proposal:

The Department is aware that, as with all similar eligibility criteria, noncompliant applicants may attempt to circumvent the requirement by arranging for an affiliated, compliant entity to be the applicant of record.

While this is certainly something with which the Department is legitimately concerned, CWTA believes that the proposal concerning affiliates is much broader than it needs to be to address the Department's concern.

The Department's proposal would not only prevent "shell" affiliates of non-compliant licensees from participating in auctions: it would also punish a licensee for the non-compliance of an affiliated licensee over which it has no control, operating a completely

different service in a different spectrum band. In fact, the would-be applicant could be barred from participating in an auction because a distinct business in a completely different product and geographic market is being negatively affected by factors beyond its affiliate's control. As noted, compliance with roll-out conditions can be affected by equipment, site-sharing, financing and market circumstances. These circumstances can equally affect compliance with R&D financing conditions and others.

If the proposal is implemented, the Department would, in fairness, have to give the affiliated licensee a reasonable and fair opportunity to respond to the perceived or alleged non-compliance, as discussed above. Not only would this add to the time required to prepare for an auction; it could also involve the Department in reviewing the activities of licensees active in parts of the spectrum and authorized uses that are far removed from the subject of the auction. This would add to the administrative burden of the procedure, and would also undermine the public's perception that the procedure is fair.

The Department could more effectively address its concern by reviewing the corporate information filed with a notice of intention to participate in an auction. If this review raises suspicion that the applicant of record is being set up to hide previous non-compliance, the Department could then investigate its suspicions and take appropriate action.

4.3 Proposal Concerning Publicity for Non-compliance Reports

The Department invites comment on its proposal to post "written substantiated reports from third parties alleging that certain applicants are not in compliance with their licences" on a publicly available Web site, together with the applicant's response.

The CWTA recognizes that the legitimacy of administrative processes depends to some extent on their transparency. To this end, enabling public review of and, potentially, comment on the record of an examination of a licensee's compliance with licence conditions has certain advantages. The Department could build a public record of its application of this procedure, thereby enabling licensees, applicants and other members of the public to better predict how the Department might rule in future concerning specific instances of non-compliance.

However, if the Department pursues this path it must be vigilant to ensure that it is acting, and seen to be acting, fairly. Specifically, it must set standards that have to met for a report to be considered "written" and, especially, "substantiated".

The aspect of a written report that is most important in this context is that it be clearly attributable to the party making it. It could be highly relevant to the Department's determination of whether a licensee is, in fact, compliant that the complaints of non-compliance come from the licensee's competitors. Anonymous reports should not be considered credible.

More difficult, particularly with respect to Category 3 licence conditions, is the qualification that posted reports must be substantiated – yet it is even more important.

What process will the Department pursue to substantiate allegations of non-compliance? Will it have to determine that the report is correct before it can be posted, or will it be sufficient merely for the Department to conclude that it raises a reasonable inference of legitimacy?

The potential damage to a licensee's reputation from posting an incorrect or even malicious report is great. It is imperative that the licensee's response be posted prominently, with at least the same emphasis as the report of non-compliance. We also suggest that the Department should establish a high standard for what it considers to be a "substantiated" report before posting allegations of non-compliance with licence conditions for public information.

4.4 Proposal Concerning Opportunity to Return to Compliance

The Department properly recognizes that applicants for additional spectrum must be given a reasonable and realistic opportunity to correct the alleged non-compliance. If the Department can overcome the flexibility and fairness challenges associated with its proposed enforcement mechanism, and proceeds to introduce it, CWTA would support the proposal to allow applicants to return to compliance.

The proposal includes the following steps, all of which CWTA believes to be necessary:

- Once the Department becomes convinced that there is, indeed, a situation of non-compliance, the applicant is given an opportunity to correct the situation immediately, thereby rendering itself compliant with licence conditions.
- If the applicant is unable to correct the non-compliant situation in a timely fashion, it may be considered compliant if they can demonstrate that its non-compliance is beyond its control by making a written submission to the Department.
- The Department would temporarily or permanently suspend the licence condition that has rendered the licensee non-compliant if the licensee can demonstrate that it is acting in good faith.

4.5 Proposals Concerning Protection of Confidentiality

CWTA notes that the Department recognizes that applicants' submissions, or parts of their submissions, may include confidential information. As noted with respect to fairness, above, protection of the confidentiality of information filed in confidence, and of information relating to matters that have previously been treated as confidential, is extremely important. CWTA agrees with the Department's proposal to permit applicants to file submissions either wholly or in part in confidence.

This is particularly important with respect to the conditions of licence relating to commitments made in the applicant's detailed submissions in a comparative selection context. To the extent that the applicant sought, and received, assurances of

confidentiality for its submissions, the Department should respect the confidentiality of the material considered in the context of this enforcement mechanism.

In this regard, the CWTA notes that the Compliance Notice gives the following explanation of the standard condition of licence requiring substantial compliance with all commitments made in the licensee's detailed submission:

When the Department proposes to award a licence via a comparative process, the associated policy paper outlines a number of commitments to which each applicant must agree. When awarded, the licences then carry a condition that binds the licensees to those commitments.

We ask the Department to confirm that the only "commitments" made in licence applications that are the subject of conditions of licence are those that respond specifically to requirements outlined in the associated policy paper. If so, the confidentiality concerns may be less difficult to manage than if the "substantial compliance" condition relates to the complete text of the licensee's detailed submission.

Conclusions and Recommendations

The CWTA commends the Department for conducting a public consultation on the proposed new enforcement mechanism, and appreciates this opportunity to participate in the development of the Department's licensing and enforcement policy.

The CWTA recognizes that the Department needs effective tools to enforce the licence conditions it imposes. Licence conditions are not lightly imposed, nor lightly undertaken by spectrum holders.

However, we are concerned that the mechanism proposed in the Compliance Notice – prohibiting a party from participating in an auction of additional spectrum because of its, or its affiliate's, non-compliance with a licence condition – does not meet the needs either of the Department or of the industry.

The penalty associated with this mechanism is potentially extremely serious for a licensee; yet there is no assurance that it will be used only when this penalty would be proportional to the breach of condition of licence in question. The CWTA also believes that the proposed mechanism requires significant modification to meet the basic test of natural justice, that is, that a party potentially subject to a penalty of this magnitude be given a full and fair opportunity to know and respond to the case against it.