November 1, 2001

BY E-MAIL and REGULAR MAIL

Mr. Jan Skora
Director General
Radiocommunications and Broadcasting Regulatory Branch

Mr. Michael Helm
Director General
Telecommunications Policy Branch

Mr. Robert McCaughern
Director General
Spectrum Engineering Branch

Industry Canada
300 Slater Street
Ottawa, ON  K1A 0C8

Re: Reply Comments - Canada Gazette Notice DGRB-006-01, "Consultation on the Auction of Spectrum Licences for Wireless Communication Services in the 2300 MHz Band and Fixed Wireless Access in the 3500 MHz Band"

Dear Messrs. Skora, Helm and McCaughern:

On behalf of Microcell Telecommunications Inc. and Inukshuk Internet Inc., we are pleased to submit the attached reply comments in connection with Canada Gazette Notice DGRB-006-01.

We greatly appreciate the opportunity to make our views known to the Department by participating fully in the public process initiated to discuss these important matters.

Yours very truly,

(SGD) Dean M. Proctor

Dean M. Proctor
Vice-President, Regulatory Affairs

/enc.
Microcell Telecommunications Inc. / Inukshuk Internet Inc.
Reply Comments – Canada Gazette Notice DGRB-006-01

Consultation on the Auction of Spectrum Licences for Wireless Communication Services in the 2300 MHz Band and Fixed Wireless Access in the 3500 MHz Band

1.0 Introduction and Summary

Microcell Telecommunications Inc. ("Microcell") and Inukshuk Internet Inc. ("Inukshuk") are pleased to have the opportunity to contribute these reply comments to Industry Canada (the “Department”) in connection with Canada Gazette Notice DBRB-006-01 (the “Notice”).

Having reviewed the comments of other interested parties in connection with the Notice, Microcell and Inukshuk remain convinced that this is not an appropriate time to conduct an auction for either Wireless Communication Services ("WCS") at 2300 MHz or Fixed Wireless Access ("FWA") at 3500 MHz. Regulatory policies must change – in particular the foreign ownership restriction must be lifted – and economic conditions must improve, before any auction can be held.

We note that no parties have provided convincing evidence of demand for this spectrum, particularly the FWA spectrum at 3500 MHz. Moreover, those parties which do strongly support the Department’s proposal to auction licences in these bands at this time would have the Department restrict participation in it by various means – thereby limiting its effectiveness at realizing the value of the spectrum distributed and guaranteeing that participation will be low.

We also note the comments of a number of parties that it is premature to auction significant amounts of the available spectrum in the 3500 MHz band until other allocation matters have been finalized. We agree. The Department should act quickly to confirm the allocation of the 2500 – 2690 MHz band to Multipoint Communication Services / Multipoint Distribution Services ("MCS" and "MDS", respectively) in light of the Federal Communications Commission’s ("FCC") recent decision to confirm similar allocations in the United States. And then, it is only when economic conditions are such that bidders for this spectrum can reasonably be expected to be able to finance deployment of systems in addition to their successful bids.

We moreover remain concerned that licensing 3500 MHz for use in urban areas, as proposed, will not contribute in any way to the achievement of the priorities identified by the National Broadband Task Force. The comments of incumbents using this spectrum to serve rural and high-cost areas show that they share our concern.

Finally, and very importantly, although Microcell and Inukshuk understand the concerns of several parties who argue in favour of set-asides and other artificial means to restrict the participation of strong incumbents in these proposed auctions, we are not convinced that set-asides will serve the public interest. On the contrary, what is needed is changes to policies that make necessary the consideration of set-asides. As noted in our initial comments, we believe that the imbalance in access to capital, and the resulting disparity
in the ability of large and smaller players to succeed in an auction, would be addressed by eliminating foreign ownership restrictions, and that no spectrum auctions should be held without those restrictions having been lifted.

2.0 A Poor Time to Auction Spectrum

In our initial comments, Microcell and Inukshuk stated:

*Releasing additional spectrum for FWA services now would only make it more difficult for those working to build wireless networks and offer voice and broadband Internet access services to the general public. It would increase the competition they face at the first, most crucial stage of developing a competitive alternative in Canada, and that is the stage of raising financing required to extensively deploy their networks.*

*To be blunt, irrespective of the number of wireless and wireline networks authorized to compete in Canada, Canadians will not enjoy any of the benefits of competition if new networks cannot be economically and successfully financed, built and operated.* (p. 3)

Several other interested parties, from the smallest to the largest players, expressed similar views. Peter Hayward, The Wireless Guy Inc., Kevin P. Weeks of Weeks Law, and Grant Harding all state bluntly that current conditions mean that now is not a good time to auction spectrum in one or both of the bands under consideration in the Notice.

Bell Mobility, on behalf of the Bell Wireless Alliance, expresses its concern that releasing more spectrum at this time will undermine the overall health of the entire FWA industry. Bell Mobility also points out that it may be an oversimplification to say, as the Notice does, that the mere existence of technical advances in wireless technology means that the potential exists for a competitive market in the desired services.

None of those parties supporting a near-term auction of spectrum, particularly at 3500 MHz, offer convincing evidence that there is demand for fixed telephony or broadband Internet access service that can best be met by releasing this spectrum.

The most vociferous proponent of immediate auctions of spectrum in both bands is Me2 Connection Inc. ("Me2"). Me2’s argument for demand, however, boils down to a variation on “if you build it, they will come”:

*Inevitably, access to the greatest possible amount of spectrum immediately will lead to early development of these new networks and services. Anyone currently using the Internet would have no doubt of the serious need for improved communications infrastructure of the type these new networks are well capable of precipitating. If the total amount of spectrum made available represents an interesting business opportunity, the private sector will fund it, if not, then infrastructure development falls back to the responsibility of the Federal Government if they wish to achieve their goals. The total amount of*
Spectrum made available therefore will directly effect the acceleration of improved services (especially in rural and remote communities) as well as acting “the catalyst”, driving competitive pricing as a result of true and sustainable competition in this market segment. (p. 4)

The blithe assertion of the “inevitable” link between making a large amount of spectrum available and “early development of these new networks and services” is not based on evidence, common sense, economic principles, or any other logical foundation apparent to us. Nor is there any link between flooding the market with spectrum and the development of sustainable competition.

In fact, the only reasonable assertion in Me2’s statement is the observation that the federal government may be called upon to take up the slack in the event that the private sector is not willing to fund spectrum use that does not represent an interesting business opportunity. Surely releasing spectrum on the basis of arguments such as these cannot be considered responsible spectrum management.

The comments of other interested parties are not conclusive concerning the supply of suitable equipment for use at either 2300 MHz or 3500 MHz. Wi-LAN urges the Department to allocate the 3500 MHz band so as to accommodate both FDD and TDD technologies. Nokia also explains its equipment developed for use in this band, but notes that modifications are required to current rules to permit its Mesh-based technology to be used in Canada.

Parties currently operating in this band are somewhat less enthusiastic about the current supply of suitable equipment: Binary Solutions Ltd. ("Binary") states clearly that wireless equipment for the 3500 MHz band is not readily available today.

Even among those who believe that the Department should take the risk of conducting an auction for FWA spectrum at this time, most generally oppose a completely open auction process. Provisions to set aside certain blocks for the exclusive participation of new entrants, defined in various ways, were supported by Me2, Binary, TeraGo Networks Inc., Wicomm Ltd., High-Speed FX Communications Inc. ("High-Speed"), ABC Allen Business Communications ("ABC"), lime wireless inc. ("lime"), and Rogers Wireless Inc. ("Rogers")

In effect, these parties are asking the Department to make it easier for a category of small or new entrants – defined differently by each party, but always such that its own participation is favoured – to acquire spectrum. In Microcell’s view, many of these parties are signalling to the Department that if an auction which treated all parties alike were to be conducted now, they would not be able to participate successfully. Surely this, coupled with the lack of evidence of demand for this spectrum or the ready supply of suitable equipment, should indicate that the timing proposed by the Department is not likely to be conducive to an auction that meets the government’s goals of realizing economic value for scarce spectrum resources, while not threatening the viability of other wireless service providers.
3.0 Resolve Allocation Uncertainties Before Releasing this Spectrum

Several parties, in addition to Microcell and Inukshuk, urged the Department to resolve current uncertainties concerning the allocation of spectrum for MCS/MDS and 3G mobile uses before considering an auction of spectrum at 3500 MHz.

The Radio Advisory Board of Canada, for instance, notes that the Department should refrain from making a final decision on the amount of spectrum to make available for FWA at 3500 MHz until two other regulatory allocation decisions have been finalized:

- The US decision concerning the use to be made in that country of spectrum from 3650 – 3700 MHz; and
- The determination in the US and in Canada as to the allocation of additional spectrum for 3G mobile use.

A similar position is expressed by MDS licensees Image Wireless Communications Inc. (“Image”) and Craig Wireless Systems Inc. (“Craig”), as well as by Bell Mobility, Rogers, and Telus Mobility.

Telus, however, misinterprets the recent decision by the US FCC, which confirmed the use of the 2500 – 2690 MHz band for MMDS and ITFS, and added an allocation for mobile to this band and designating it as a band suitable for flexible use. Contrary to Telus’ assertion, the implication of the FCC decision for Canada is not that MCS and MDS licensees should be moved to the 3500 MHz band. Rather, Microcell and Inukshuk urge the Department to follow the lead of the FCC and confirm MCS and MDS use in the 2500 MHz band, recognizing that the US will designate other bands for primary use in the provision of 3G mobile services.

Image and Craig also note that the frequencies in the 2300 MHz band that the Notice proposes to auction are suitable for use as return channels for MCS and MDS services. We urge the Department to give full consideration to the request of these licensees for such an allocation. We note that the NTIA press release of October 5, 2001 identified the 2110 – 2170 MHz band for study in connection with the allocation of spectrum to 3G mobile services in the US. This identification raises the possibility that existing MCS/MDS return path spectrum in the 2150 – 2160 MHz range could be reallocated to 3G. Microcell and Inukshuk believe it would be inappropriate and premature to license spectrum that could best be used for such purposes in advance of confirmation that MCS and MDS licensees have ongoing, protected access to return path spectrum.

Only two parties – Lime and Me2 – urge the Department to auction the 3500 MHz spectrum before finally resolving the question of what spectrum will be used in Canada for MCS and MDS. Lime states that the Department no longer needs to retain flexibility in the allocation of the 3500 MHz band because, in view of the recent developments in the US, “there would be little justification for forcing Canadian licensees to relocate” (p. 7).
While Microcell and Inukshuk agree that forced relocation of Canadian MCS or MDS licensees cannot be justified, particularly in light of the US developments, we do note that until the Department has formally clarified its policy and issued its decision concerning the second licence terms of the MCS licensees, the Department cannot in good conscience abandon the flexibility it currently has with respect to licensing in the 3500 MHz band. In other words, formal confirmation is still required before the Department can even consider an auction of the 3500 MHz band.

Me2’s argument in favour of immediate release of 200 MHz of spectrum in the 3500 MHz band is a combination of inappropriate and misguided attacks on the contribution of MCS and MDS licensees in offering competitive alternatives to Canadians, a request to minimize the spectrum available to MCS and MDS licensees, and allegations that current MCS (and possibly MDS) licensees could use their spectrum at 2500 MHz as assets in the event of bankruptcy.

Me2’s arguments are pejorative and unfair, and entirely without factual support. As an MCS licensee, Inukshuk has done a yeoman's effort in extremely adverse financial and regulatory environments to obtain and deploy suitable equipment that permits the company to offer useful and attractive services to Canadians on a competitive basis. In this regard, we note that Inukshuk has recently and very successfully completed North America's (and perhaps the world's) largest field trials of 2nd generation MCS/MMDS equipment. In addition, working with over 70 partners from Canada's learning community, several million dollars have already been committed by Inukshuk to develop on-line learning across the country. All this is hardly evidence supporting the Me2 allegations.

To suggest, as Me2 does, that Inukshuk (or SaskTel) is attempting to offset potential competition by blocking access to spectrum and inflating the value of the MCS spectrum as an asset for sale in a post auction environment demonstrates no understanding of the Department’s spectrum licensing process or policies, nor of Inukshuk's activities since being licensed – to say nothing of the completely inappropriate tone and content used.

Me2 suggests that MCS licensees should be accommodated in the 3500 MHz band with less than half their current bandwidth in a part of the spectrum (3400 – 3450 MHz) currently licensed to a number of smaller operators in primarily rural areas. Not only would this suggestion require MCS licensees to completely revisit their business plans and locate equipment for use to provide services to Canadians, if such equipment is available at all; it would also result in conflicts between relocated MCS licensees and incumbent FWA licensees. To say such results are inappropriate and unfair to MCS licensees – and FWA incumbents – is understatement.

In short, Me2’s argument is misplaced, it is not credible, and it should be dismissed by the Department.
4.0 Licensing Urban FWA Will Not Contribute to Improved Internet Access in Rural Areas

Pointing to the recommendations of the National Broadband Task Force to focus available resources on improving broadband Internet access in rural and aboriginal communities, Microcell and Inukshuk expressed doubt as to whether licensing use of the 3500 MHz band in urban areas will contribute to this goal.

We note that several interested parties who responded to the Notice are currently FWA licensees in primarily rural and remote areas. Many of these parties, notably ABC, express reservations about the Department’s proposal to license Tier 4 blocks, suggesting that smaller incumbents will have difficulty bidding to complete their licence areas by participating in the proposed auction.

Image and Craig, both MDS licensees, point out their accomplishments in offering MDS services throughout their largely rural service areas, including broadband Internet access service. These parties argue for the allocation of the WCS spectrum at 2300 MHz to use as return paths by MDS licensees, saying that access to this bandwidth is necessary for them to offer effective competition in the Internet access market.

Lime, a strong proponent of licensing at this time, notes that existing FWA systems “have a high likelihood” of causing interference with the systems eventually implemented by auction winners, and should therefore be subject to displacement in accordance with the proposed transition policy. In effect, Lime asks the Department to give priority to those who win rights to use 3500 MHz spectrum through the proposed auction over those who obtained licences through the existing first-come, first-served process – even though there is no obligation on the auction winners to provide service in rural areas.

We urge the Department to review its proposal for further licensing in the 3500 MHz band so as to ensure that existing FWA systems in the band, as well as other licensed systems such as MCS and MDS, are not hindered in their efforts to provide services including broadband Internet access in rural parts of their licensed territory.

5.0 Proposals to Set Aside Spectrum for New Entrants

We note that of the parties making comments in response to the Notice, only Telus and Bell Mobility agree with Microcell and Inukshuk that proposals to set aside spectrum for new entrants – however defined – are not in the public interest.

Despite this, however, we remain convinced that spectrum set-asides are not the best means available to the Department to improve the ability of participants other than incumbent telephone and cable companies, and their affiliates, to offer competition in Canadian telecommunications markets. Rather, as we explained at length in our initial comments, Microcell and Inukshuk urge the Department to relax foreign ownership restrictions so as to improve the ability of smaller players to obtain access to capital.

The wide variety of suggestions received in response to the Notice’s call for comments on set-asides demonstrates the difficulty of defining “incumbent” and “new entrant” in a
way that will achieve the Department’s goals. Thresholds suggested by various interested parties range from restricting access only by ILECs (Rogers) to permitting participation only by small working wireless ISPs currently operating in rural areas (High-Speed).

Me2 points to supposed “set-asides” used in the initial licensing of PCS in Canada as an instance of the successful application of this policy. Microcell would note that establishing a spectrum cap on all potential licensees in a comparative selection process is a different matter from forbidding certain classes of enterprises from bidding in an auction process. We agree with Me2 that new entry can, and in the case of the 1996 PCS licensees demonstrably has, stimulate significant price competition and other benefits of competitive entry. However, we do not agree that restricting bidding to small or new entrants for some or all of the available spectrum is the best way to promote competitive entry.

As we noted in the comments, if the Department determines that this spectrum should be licensed for use, and if the auction mechanism is selected as the best means of realizing the value of spectrum and allocating it to those who value it most highly and are therefore presumed to put it to its best use, then the auction should be permitted to function freely. It would be more effective to ensure that all would-be participants have improved access to necessary financing by relaxing Canadian ownership and control provisions.

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