



## Telecom Decision CRTC 2011-360

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Ottawa, 3 June 2011

### **Globalive Wireless Management Corp., operating as WIND Mobile – Part VII application regarding roaming on Rogers Communications Partnership’s wireless network**

File number: 8622-G44-201015438

*In this decision, the Commission dismisses the application filed by Globalive Wireless Management Corp., operating as WIND Mobile, regarding roaming arrangements with Rogers Communications Partnership.*

#### **Introduction**

1. The Commission received a Part VII application by Globalive Wireless Management Corp., operating as WIND Mobile (WIND), dated 12 October 2010, regarding its wireless service roaming arrangements with Rogers Communications Partnership (Rogers).
2. Specifically, WIND requested that the Commission:
  - pursuant to subsection 27(2) of the *Telecommunications Act* (the Act)
    - declare that Rogers has, in relation to the provision of telecommunications service, conferred an undue preference on itself and subjected WIND to an unreasonable disadvantage; and
  - pursuant to section 24 of the Act
    - direct that the public switched mobile voice services and wireless data services, including text service, that Rogers provides to WIND should enable WIND customers to receive the same seamless call transition,<sup>1</sup> when moving out of zone, that the customers of Chatr (Fido and Rogers) mobile services receive; and
    - direct Rogers not to confer an undue preference on itself or others in marketing its services to consumers.

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<sup>1</sup> Seamless call transition, also known as seamless handoff or seamless roaming, provides for the uninterrupted flow of a voice call that transitions from a home network to a host network. When a host network does not provide for seamless handoff to a home network, calls roaming from the home network to the host network are dropped in mid-call.

3. The Commission received submissions regarding WIND's application from Bell Canada; Data & Audio-Visual Enterprises Inc., operating as Mobilicity (Mobilicity); and TELUS Communications Company (TCC). The public record of this proceeding, which closed on 31 March 2011, is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings" or by using the file number provided above.

## **Background**

4. In February 2008, Industry Canada established the conditions of licence for advanced wireless services (AWS) in the 2 gigahertz (GHz) spectrum range. Among other things, the conditions of licence provide for mandatory roaming that does not require seamless call transition.
5. Globalive Wireless Management Corp. was awarded a number of AWS spectrum licences in July 2008 and, after entering into a mandatory roaming agreement with Rogers, launched its service, operating as WIND, in December 2009.

## **Issues**

6. The Commission has identified the following issues to be addressed in this decision:
  - I. Does the Commission have jurisdiction to consider WIND's application?
  - II. Is Rogers granting itself an undue preference?
  - III. Should the Commission mandate seamless roaming?

### **I. Does the Commission have jurisdiction to consider WIND's application?**

7. WIND noted that, while the Commission has forborne<sup>2</sup> from regulating most aspects of mobile services, it has retained the exercise of its powers to address unjust discrimination, undue preferences, and unreasonable disadvantages (under subsection 27(2) of the Act), as well as its powers to impose conditions on the offering or provision of any telecommunications service by a Canadian carrier (under section 24 of the Act).
8. Mobilicity noted that under section 47 of the Act, the Commission has jurisdiction to exercise its powers to ensure that Canadian carriers provide telecommunications services and charge rates in accordance with section 27 of the Act. Mobilicity submitted that Industry Canada's determinations in the conditions of licence do not encroach on the Commission's jurisdiction under sections 24 and 27 of the Act, and that the Commission may thus consider WIND's application.

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<sup>2</sup> Most notably in Telecom Decisions 96-14 and 2010-445

9. Rogers, Bell Canada, and TCC submitted that Industry Canada's jurisdiction under the *Radiocommunication Act* takes precedence over the Commission's jurisdiction such that the Commission cannot consider WIND's application.
10. Rogers submitted that the terms and conditions of mandatory roaming, including an express exclusion of seamless call transition capability from the definition of roaming, constituted an integral part of the AWS auction process held under the Minister of Industry's jurisdiction under the *Radiocommunication Act*, as well as part of the conditions of licence for successful bidders. Rogers argued that in these circumstances it would not be appropriate for the Commission to essentially reverse the determinations made by the Minister of Industry.
11. Bell Canada submitted that if the Commission approves WIND's application, it would effectively be amending the roaming requirements and the conditions of licence for cellular, personal communications services, and AWS licensees.
12. TCC stated that the courts have ruled that if a dispute, in its essential character, arises from the interpretation, application, administration, or violation of a regime over which a specialized tribunal has jurisdiction, the courts should decline to exercise their jurisdiction to entertain the dispute, and the jurisdiction of the tribunal should be treated as exclusive. TCC added that the Commission has recently ruled<sup>3</sup> that, where an arbitration provision applies to a dispute between parties, it will decline to intervene and will defer to the arbitral process.
13. TCC argued that, to determine the respective rights and obligations of the parties, the Commission must interpret the terms and conditions of the licences issued to Rogers and to WIND under the *Radiocommunication Act*, as well as their application. TCC submitted that this interpretation must include an evaluation, not only of the terms of the licences, but of the Minister of Industry's policy on mandatory roaming.

### **Commission's analysis and determinations**

14. The Commission notes that its jurisdiction is distinct from that of Industry Canada. While the Commission has forborne from regulating mobile wireless services, it has retained its own distinct powers and duties under section 24 and subsections 27(2), (3), and (4) of the Act, which enable it to do the following, among other things:
  - impose conditions under section 24; and
  - make findings of undue preference or unjust discrimination under subsection 27(2).
15. In light of the above, the Commission determines that it may consider WIND's application.

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<sup>3</sup> See Telecom Decision 2010-184.

## II. Is Rogers granting itself an undue preference?

16. WIND submitted that its service relies on a distinction between WIND zones, which are areas inside its network footprint where its subscribers use its network and pay no roaming charges, and Away zones, which are areas outside its network footprint where its subscribers roam on Rogers' network and pay roaming charges. Further, WIND submitted that because Rogers does not offer it a seamless roaming service, when WIND subscribers roam from a WIND zone to an Away zone (i.e. roam from the WIND network to the Rogers network), any call underway is dropped.
17. WIND stated that Rogers launched a brand called Chatr in July 2010. WIND noted that Chatr relies on a distinction between Chatr zones, in which subscribers pay no roaming charges, and Out of Chatr zones, in which subscribers pay roaming charges. WIND also noted that Chatr subscribers are provided with seamless call transition when moving between these zones.
18. WIND and Mobilicity both submitted that Rogers, by offering seamless call transition to its Chatr subscribers but not to WIND or Mobilicity subscribers, is granting itself an undue preference. WIND submitted that it has been subjected to an undue and unreasonable disadvantage by Rogers, contrary to subsection 27(2) of the Act. Mobilicity submitted that Rogers has been subjecting all new entrants to an unreasonable disadvantage.
19. In addition, WIND referred to a complaint it had filed with the Competition Bureau regarding Rogers' advertising. WIND submitted that, after investigation, the Competition Bureau began legal proceedings against Rogers in November 2010, under the misleading advertising provisions of the *Competition Act*.
20. Rogers stated that Chatr is not a separate entity, does not have its own network, and does not own spectrum. Rogers also stated that there is a single Rogers network that it uses to deliver all its cellular services, including Chatr, and that customers who subscribe to Chatr service therefore do not roam onto the Rogers network from a Chatr network.
21. Rogers submitted that it has negotiated a roaming agreement with WIND that does not provide for the type of seamless call transition that WIND is seeking. Rogers further submitted that in this type of case, it would not be appropriate for the Commission to reopen the agreement nor to alter its terms.

### Commission's analysis and determinations

22. The Commission notes that WIND has a smaller network footprint than Rogers has and therefore relies on Rogers to provide extended coverage to its customers under the terms of the roaming agreement between the two companies. This agreement was mandated under Industry Canada's conditions of licence for AWS in the 2 GHz spectrum range.

23. The Commission also notes that, while Chatr customers do not experience dropped calls when they travel from a Chatr zone to an Out of Chatr zone on the Rogers network, WIND customers' in-progress calls are dropped when they transit from WIND's network to Rogers' network.
24. The Commission further notes that WIND was asked to identify the nature and evidence of the disadvantage it claimed it was subjected to by Rogers. In response, WIND stated that Rogers' multimedia campaign featuring the claim that Chatr offered "fewer dropped calls than new wireless carriers," based in part on "seamless call transition when moving out of zone," has affected it in two ways:
  - i. it has meant that prospective customers choosing between WIND and Chatr are more likely to choose Chatr; and
  - ii. it has inappropriately undermined consumer confidence in the quality of WIND's 3G+ network, both generally and in relation to Chatr's 2G network.
25. The Commission notes that WIND's claim was based on Rogers' multimedia campaign. Given this, and the fact that the terms and conditions of the roaming agreement negotiated between WIND and Rogers do not require seamless roaming, the Commission is not persuaded that WIND has demonstrated the existence of a preference in the circumstances of this case.
26. Since there is insufficient evidence that Rogers has granted itself a preference, the Commission concludes that it is not necessary to determine whether there is an undue preference under subsections 27(2) to (4) of the Act.

### **III. Should the Commission mandate seamless roaming?**

27. The Commission considers that, in view of the fact that there is insufficient evidence on the record to make a finding of preference under subsection 27(2) of the Act, it would be inappropriate to deal with the issue of mandating seamless roaming. The Commission notes, however, that the parties are free to negotiate any seamless roaming arrangement in good faith.

### **Conclusion**

28. Based on the above, the Commission **dismisses** WIND's application.

Secretary General

## Related documents

- *Modifications to forbearance framework for mobile wireless data services*, Telecom Decision CRTC 2010-445, 30 June 2010
- *On Call Internet Services Ltd. – Application for urgent and expedited relief from service suspension and disconnection by TELUS Communications Company*, Telecom Decision CRTC 2010-184, 25 March 2010
- *Regulation of mobile telecommunications services*, Telecom Decision CRTC 96-14, 23 December 1996