

## **ISED Consultation SPB-003-22**

### **Consultation on a Non-Competitive Local Licensing Framework, Including Spectrum in the 3900-3980 MHz Band and Portions of the 26, 28 and 38 GHz Bands**

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#### **Reply Comments of the First Mile Connectivity Consortium**

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## Introduction

1. The First Mile Connectivity Consortium (FMCC) is an incorporated independent not-for-profit national association. Our members are First Nations Internet service providers known as “community/regional intermediary organizations.” Our associate members are university and private sector researchers and others interested in Indigenous and community communications and telecommunication services for the public good. Our work focuses on innovative solutions to digital infrastructure and services with and in rural and remote regions and communities across Canada. More details about our members and activities are available at: <http://firstmile.ca>
2. FMCC appreciates the comments and questions posed by ISED in regard to the broader systemic barriers that Indigenous service providers, businesses and communities experience accessing spectrum licenses, and its specific proposals for establishing a noncompetitive licensing framework (NCL). In this submission we provide some general comments on issues of radio spectrum ownership, and the Department’s policy development processes and steps it might consider taking to making them more accessible to Indigenous entities. We also provide specific comments in response to selected questions posed by ISED.
3. We would like to note that other government entities, including the CRTC, are currently examining similar issues related to processes and principles guiding telecommunications policy consultations with Indigenous peoples. For example, CRTC 2022-147 included questions regarding the Commission’s recognition of principles of substantial equality, equity, economic reconciliation, and harmonization with the United Nations Declaration on the Rights Indigenous Peoples (UNDRIP) and Canada’s recent adoption of the UNDRIP Act (S.C. 2021, c. 14). The CRTC is also specifically asking parties: “What action should CRTC take to ensure Indigenous rights, treaties, agreements and negotiations in Far North are addressed in evaluation of possible regulatory outcomes in this proceeding?” (Q4). We encourage ISED to closely monitor the discussions taking place in those related proceedings.
4. Please also see our submission to CRTC 2022-147 on these matters at:  
  
<https://applications.crtc.gc.ca/ListeInterventionList/Documents.aspx?ID=304788&en=2022-147&dt=i&lang=e&S=O&PA=t&PT=nc&PST=a>
5. FMCC agrees with ISED’s statement that: “In remote Indigenous communities, access to spectrum can have crucial benefits to accelerating broadband connectivity, establishing reliable cell service, improving access to life-saving emergency response services, building economic resiliency amongst Indigenous-led businesses and facilitating the participation and connectedness of remote Indigenous communities with the rest of Canada” (para 13).
6. We would like to bring ISED’s attention to the fact that Indigenous Peoples’ needs for electromagnetic spectrum are diverse and complex; they include self-determination, self-governance and digital sovereignty; community health, safety and well-being; emergency management and response; education; economic development; economic development; monitoring of resource extraction industries and climate change, and many more benefits.

7. We note that ISED defines universal access as “the principle that all Canadians will have an equal opportunity to participate in the digital world and have the necessary tools to do so, including access, connectivity, literacy and skills” (para 15).
8. FMCC calls on ISED and other Canadian government agencies and ministries to decolonize their respective telecommunications policy processes by addressing (1) the control and ownership of spectrum and (2) current policy processes.
9. We agree with TELUS and others on the need to reform the consultation process not only for ISED current NCL framework, but for Canadian telecommunications policy in general, taking into consideration UNDRIP and its adoption and implementation by the federal government and other levels of government. We stress that any decisions regarding these reforms must be ratified by Indigenous mandated organizations.
10. As stated in UNDRIP, as inherent right holders Indigenous Peoples have the right to own, control, access, influence, and steward digital technology; to influence and benefit from participation the technology sector and all sectors that are impacted by, or that rely on, digital technology; and to provide leadership in the reformation and/or development of laws, policies and regulations concerning digital technologies where they impact, or have the potential to impact, First Nations Title, Rights and/or Treaty Rights. (UNDRIP Articles 3, 5, 20(1), 21(1), 23, 34).
11. We question the authority of ISED to administer spectrum on behalf of Indigenous Nations. As Indigenous legal scholars have noted, spectrum is a natural resource that existed prior to the establishment of the Canadian state, and thus there is a lack of clear jurisdiction over spectrum covering Indigenous regions (Blackwater, 2020; Blackwater & Murtazashvili, 2022). Such a claim may suggest that First Nations and other Indigenous Peoples in Canada are entitled to ownership of this natural resource, and/or to receive a share in the proceeds of the Federal Government’s spectrum auctions.
12. FMCC feels that ISED should be engaged in discussion with Indigenous governments, service providers, and communities about how it plans to implement the principles of UNDRIP in its policies; policy proceedings; and approach to spectrum ownership and control. ISED needs to address the issue of ownership and who has the authority to sell license and renew permits for spectrum covering or used on Indigenous traditional territories.
13. Other countries are providing access to spectrum to Indigenous populations. As other parties in these proceedings have acknowledged, under the principles of the Treaty of Waitangi, the Māori have control over spectrum in the 3.5 GHz band; the Mexican regulator IFETEL set aside 2x5MHz of spectrum in the 800MHz band for communities served with populations less than 2,500 people (or a designated Indigenous region); and in the United States, the FCC offered a Rural Tribal Priority Window to eligible Indigenous entities to acquire 2.5 GHz spectrum covering their Tribal lands.
14. **Recommendation:** ISED acknowledge Indigenous rights to govern and manage the spectrum on and over their lands.

15. **Recommendation:** ISED immediately fully release unused spectrum on and over Indigenous traditional territories for the use by and benefit of Indigenous peoples at no cost.
16. Secondly, we commend ISED in its recognition of the limitations of ISED’s existing consultation process, as noted in para 113 of the consultation document, which states the requirement for “more inclusive engagement process to facilitate feedback from Indigenous groups”.
17. However, FMCC would like to address the tendency in consultations to approach Indigenous Peoples as one stakeholder among many – rather than as distinct rights-holders exercising a government-to-government relationship. When the Government of Canada officially adopted UNDRIP in May 2016, this endorsement came from Canada as a full supporter of the declaration – without qualification. The adoption and implementation of UNDRIP requires every level of the federal government to align Canadian laws with the standards set forth in the declaration. More than ever, Canada must now substantively cooperate and collaborate with Indigenous Peoples on any laws, policies, regulations or administrative measures that affect them.
18. In its deliberations in these and other consultations, ISED (as well as other federal government entities such as the CRTC) must recognize the First Nations government-to-government relationship supported by UNDRIP. This stresses that Indigenous peoples are rights holders not stakeholders. This means that First Nations and other Indigenous governments, and/or their mandated organizations, must guide and participate in policy/regulatory discussions and exercise their rights in a substantive way.
19. In B.C. the Declaration on the Rights of Indigenous Peoples Act (DRIPA)<sup>1</sup> provides a legislative framework that can be used to develop an Indigenous rights holder approach to telecommunications policy and regulation. In September 2020, the First Nations Technology Council developed a document making this argument: *Technology Underpins UNDRIP*. These and other resources may be helpful for ISED to consult.
20. We note that Indigenous entities, whether First Nations governments or regional technology organizations such as the FMCC not for profit member organizations, currently lack the internal technical and legal capacity required to address these important policy issues. Highly technical policy consultations, including on spectrum policy, are typically dominated by well-funded corporate entities with extensive internal resources to advance their perspectives.<sup>2</sup>
21. In assessing potential reforms to policy consultations, we urge ISED to consider examples of mandated Indigenous organizations in other sectors, such as health care and education, that include the depth of expertise required to participate substantially in policy consultations. For example, the First Nations Education Council in Quebec is governed by First Nations

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<sup>1</sup> See: [https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration\\_act\\_action\\_plan.pdf](https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf)

<sup>2</sup> McMahon, R. & Akcayir, M. (2022). Voices from Northern Canada: Integrating stakeholder expectations in telecommunications policy for rural, remote and Northern regions. *Telecommunications Policy*.

political leadership, and includes technical experts on various aspects of educational policy as it pertains to First Nations in Quebec.

22. Another example focused more directly on technology is the First Nations Technology Council (FNTC) in B.C. As the mandated sector council for technology and innovation working in service of the 204 First Nations in B.C., the Technology Council has a formal working relationship with the BC Assembly of First Nations, the Union of BC Indian Chiefs, and the First Nations through protocol entered into in 2012, as directed by the Chiefs. The Technology Council, as directed by the Chiefs in BC (UBCIC Resolution No. 2022-17, BCAFN Resolution No. 10/2022 and FNS Resolution No. 1021.07), is in the process of developing an Indigenous Digital Equity Strategy.
23. We recognize these larger issues are beyond the scope of the present consultations. FMCC recommends that ISED conduct an annual meaningful public consultation with Indigenous leaders and mandated organizations to discuss whether Indigenous needs for spectrum are being met by ISED. The Canadian government should work with the mandated Indigenous organizations in each traditional territory to find mutually beneficial paths forward.
24. We agree with Dr. Taylor and others that these issues should be consider in relation to other forthcoming consultations, such as for the Spectrum Outlook (2022-2026), as well as in relation to the public record related proceedings such as the CRTC's current review of Telecommunications in Northern Canada (CRTC 2022-147). We also agree with ECN's observation that the issue of Indigenous access to radio spectrum and the continued digital inequities in Indigenous communities across the country merit a separate policy proceeding in which ISED engages with these issues.

### **Non-Competitive Local (NCL) Licensing Framework**

25. In principle, we agree with the proposal to use “a non-competitive (i.e. not auctioned or otherwise competitively assessed) licensing framework for localized areas” (para 25). This approach may assist Indigenous providers in obtaining spectrum to serve their communities.
26. We agree with SSi Canada, which stated “We particularly support initiatives to facilitate access to spectrum by Indigenous peoples and communities, who can then use this resource to support the achievement of significant social, cultural, and economic development goals” (para 3).

**Q1** *ISED is seeking comments on its proposal to implement a FCFS spectrum licensing system for its non-competitive local licensing framework.*

27. We reiterate the issue of spectrum rights and ownership, and the unique status of First Nations as rights-holders as addressed above; these must be acknowledged before a spectrum licensing system over Indigenous land, territories and communities is implemented.

28. We disagree with the First Come, First Served (FCFS) spectrum licensing approach for NCL licensing (para 33). Incumbent providers might apply for spectrum before small and Indigenous providers are aware of the opportunity, or are able to prepare and submit an application. We note that all of the large incumbents favour the FCFS spectrum licensing approach.
29. Other intervenors such as Sogetel also expressed hesitation about the FCFS licensing framework, noting the current situation is one “the applicant that can assign the most resources to preparing and submitting its application the fastest gets the spectrum” (para 24) and that ISED should mitigate this through a merit-based evaluation. CanWISP preferred ACAS to FCFS.
30. We agree with ECN’s recommendation of an Indigenous Priority Access Window.

**Q3:** *ISED is seeking comments on whether the same spectrum licensing areas should be used in all areas (i.e. urban, metro and rural and remote Tier 5 service areas), or if different licensing areas should be used (e.g. radius-based licence areas in urban areas and custom vector-based licence areas in rural and remote areas). Alternatively, should site-licensing be used in rural and remote areas?*

31. We think that different licensing areas should be used in rural and remote areas (para 55). We have expressed this position in past submissions to ISED consultations going back to 2014.<sup>3</sup> We further recommend that site licensing be used in rural and remote areas, including Indigenous territories.
32. The process used to establish these licensing areas must reflect considerations of Aboriginal and treaty rights as well as UNDRIP.

**Q4** *ISED is seeking comments on maximum permissible power levels and whether higher maximum permissible power levels should be used in rural or remote areas. If so, what maximum permissible power levels should be adopted in rural and remote areas?*

33. We think that higher maximum permissible power levels should be permitted in rural and remote areas as long as there is no interference with existing lower power systems or other equipment (para 56).
34. We note that RABC, CanWISP, and others support maximum permissible power levels to improve coverage in NCL portions of specified bands, stating that higher power would benefit networks providing services in rural and remote areas.

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<sup>3</sup> See for example FMCC’s comments submitted to ISED’s *Consultation on Policy Changes in the 3500 MHz Band (3475-3650 MHz) and a New Licensing Process in Rural Areas. Reference number (DGSO-003-14): Canada Gazette, Part I, August 2014.*

**Q8.** *ISED is seeking comments on its proposed licence term, including:*

- A. Should ISED adopt a one-year licence term for licences issued through the NCL licensing framework?*
- B. Should longer licence terms, such as two or three years, be considered in rural and remote areas?*
- C. Should operators be allowed to acquire licences for less than one year? If yes, what should be the minimum licence term?*
- D. Should ISED determine appropriate licence terms based on an assessment of each identified band?*

35. Terms longer than one year such as three years should be considered for rural, remote, and Indigenous areas. As we have noted in several submissions to the CRTC, there may be many setbacks in establishing networks in remote communities because of delays in obtaining funding, limited periods for shipping equipment due to weather and lack of roads, delays in getting access to existing facilities from other providers, and in arranging access to rights-of-way.<sup>4</sup>

36. In particular, longer licence terms should be made available to Indigenous organizations and/or projects that involve Indigenous partners. This can provide an incentive for mobile service providers to partner with and/or support Indigenous organizations in the spirit of economic reconciliation.

37. We note that CanWISP recommends that ISED make 3900 MHz NCL licences available for 20-year licence terms to correspond to the licence terms in place and proposed across the 3 GHz band, and that mmWave NCL licences be made available for 10-year licence terms if 10-year terms are ultimately adopted for the mmWave commercial bands, so that the mmWave NCL licence terms also correspond with those in the adjacent commercial bands. Their reasoning is that organizations providing broadband services in rural and remote regions must make significant financial investments in equipment, and to do so, they need to know they will have access to the spectrum frequency band needed for their endeavour and investment.

**Q12** *ISED is seeking comments on when deployment must be active and cover the licence area:*

- a. If licences are for one year terms, should some deployment requirements only need to be met in subsequent terms, if the licence is renewed?*
- b. Should there be a minimum site requirement to ensure that requests for licence areas remain targeted? If so, what would be an appropriate number of sites per unit of area?*
- c. In rural and remote areas, should deployment requirements be phased (e.g. two or three years after the licence is issued)?*

38. Deployment terms in rural areas should be phased over at least three years. See our response to Q8 above.

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<sup>4</sup> For example, see the record of FMCC's submissions to: *CRTC 2019-406: Call for comments regarding potential barriers to the deployment of broadband-capable networks in underserved areas in Canada.*

**Q13** *ISED is seeking comments on its proposal to not allow the divisibility, transfer or subordination of licences issued through the NCL licensing framework.*

39. We disagree with ISED's proposal (para 76). Indigenous providers and others should have the right to divisibility, transfer and/or subordination of licences. They should also have the right to receive access to spectrum from other providers that have these rights.

**Q22** *ISED is seeking comments on its proposal to implement a fee regime for NCL licences using low and mid-band spectrum. Specifically:*

- *the proposed annual fee base rate of \$35.93 per MHz per km<sup>2</sup> for calculating annual licence fees for spectrum licensed in metro/urban areas and a minimum total licence fee of \$48.00 annually or \$4.00 monthly*
- *the proposed 75% reduced annual base rate (\$8.98 per MHz per km<sup>2</sup>) for calculating annual licence fees for spectrum licensed in rural areas and a minimum total licence fee of \$48.00 annually or \$4.00 monthly*
- *the proposed 95% reduced annual base rate (\$1.80 per MHz per km<sup>2</sup>) for calculating annual licence fees for spectrum licensed in remote areas and a minimum total licence fee of \$48.00 annually or \$4.00 monthly*

40. As noted above, spectrum rights and ownership must be considered with recognition of the unique status of First Nations as rights-holders that reflects the UNDRIP. Therefore, no fees should be levied for the use of the spectrum resource in Indigenous territories or by Indigenous entities. As well, waiving fees for Indigenous providers and coverage of Indigenous land supports the principles of economic reconciliation.

41. We agree with intervenors such as CanWISP and Techsavvy on this matter. Techsavvy submitted that:

“173. There should be no licence fees associated with licences which are used primarily to provide broadband services to First Nations communities, whether these licences are issued to Indigenous service providers or other providers working in partnership with First Nations communities or corporations.”

**Q23:** *ISED is seeking comments on its proposal to consider applying this fee structure to all NCL spectrum licences below 10 GHz.*

42. As noted in our response to Q22, we believe that fees for all spectrum used by Indigenous providers and for coverage of Indigenous land should be waived.



## **Indigenous Connectivity**

**Q27.** *ISED is seeking comments on approaches that would make the NCL licensing accessible for Indigenous service providers, businesses and communities seeking access to spectrum that covers areas they want to service.*

43. We refer ISED to the principle of economic reconciliation regarding this question. There is a long history of recommendations from Indigenous organizations and governments regarding economic reconciliation. From the earliest days of the Internet – and even before that, in contexts related to telephone and broadcasting – Indigenous peoples have advocated for their right to share in the ownership and control of these resources and the economic benefits derived from their development and use. These recommendations extend from initial planning and construction to ongoing management, operations and maintenance.

44. We further refer to the Calls to Action issued by the Truth and Reconciliation Commission of Canada for guidance on economic reconciliation, and highlight in particular #92, on “Business and Reconciliation”:

“92. We call upon the corporate sector in Canada to adopt the United Nations Declaration on the Rights of Indigenous Peoples as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following:

i. Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.

ii. Ensure that Aboriginal [Indigenous] peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects (Emphasis added).<sup>5</sup>

45. We urge the telecommunications industry to join ISED in acting on these recommendations, in the spirit of corporate social responsibility and reconciliation. The call to action provides a framework these companies can use to partner with Indigenous governments, organizations and communities to develop and operate telecommunications systems that enable them to achieve their economic and community development goals.

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<sup>5</sup> See: [http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls\\_to\\_Action\\_English2.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf), p.9.

## **Collaboration and Partnerships:**

46. We point to the submission by Rogers, which provides evidence of existing partnerships with Indigenous mobile services providers, as one clear example of economic reconciliation through the mutually-beneficial deployment of subordinate licenses in Indigenous contexts:

“84. ... Rogers has entered into multiple agreements subordinating our spectrum to small regional carriers serving rural and remote areas over the years, including those owned and operated by Indigenous service providers. These agreements have resulted in the provision of public and private wireless services using Rogers' licensed spectrum in multiple, remote First Nations communities and Indigenous-owned businesses, served by local, community-based carriers. We remain open to entering into similar arrangements with our spectrum licences to extend coverage further...

85. In regard to approaches that would make the NCL licensing accessible to First Nations seeking access to spectrum that covers areas they want to service, Indigenous service providers, businesses, and communities are best positioned to provide guidance.”

47. We also note the cooperation between TBayTel and KNet to provide mobile services in remote Northern Ontario and between Ssi Canada and ECN to provide mobile services in Eeyou Istchee in Northern Quebec.

## **Training and Outreach**

48. Indigenous organizations and providers need training in how to acquire licences and in more general issues of spectrum allocation. One approach that could be very helpful would be outreach by ISED staff, for example in their regional offices, to provide or organize such training.
49. We point to the example of the FCC's Office of Native Affairs and Policy (ONAP) which has conducted field visits and workshops for Indigenous groups in the U.S.

## **Policy Recommendations**

50. We fully endorse the 2021 Indigenous Connectivity Summit (ICS) Policy Recommendations. FMCC member organizations are involved in the annual ICS and contributed to the formation of these recommendations.

**Q27a.** *ISED is also seeking comments on how it should define a licence applicant as Indigenous when developing policies to increase accessibility to spectrum for Indigenous service providers, businesses and communities.*

51. We believe it is inappropriate to define Indigenous applicants without wider consultation with other Indigenous organizations and representatives.

**Q28** *ISED is seeking comments from Indigenous service providers, businesses and communities, about the challenges (e.g. administrative, regulatory, technical etc.) Indigenous peoples face when accessing spectrum, and suggestions on how ISED can remove these barriers. In providing comments, respondents are asked to include supporting rationale and arguments.*

52. We note that Eeyou Communication Network (ECN) states that “not one Indigenous entity holds a radio frequency spectrum license for the provision of broadband services. This should concern ISED” (para 55). We agree.

53. We also agree with ECN that auctions are not a viable means for Indigenous providers to obtain spectrum, and that an Indigenous Priority Window (as introduced by the FCC in the U.S. for some spectrum) could provide a workable mechanism for Indigenous providers to obtain spectrum.

**Conclusion:**

54. We appreciate the opportunity to participate in this consultation.

55. We reserve the right to respond to other questions from ISED and to comments by other intervenors in later stages of this consultation.

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