

Submission to the Competition Policy Review Panel

by

NextWave Wireless Inc.

Introduction and Summary

1. NextWave Wireless Inc. (“NextWave”) welcomes the opportunity to submit these comments in response to the invitation from the Competition Policy Review Panel (the “Panel”) in its October 30, 2007 Consultation Paper. We will focus on one important issue raised in the Consultation Paper: the foreign investment restrictions in the telecommunications sector.

2. NextWave supplies wireless service providers, consumer electronic product companies, and wireless handset and infrastructure manufacturers with the products, technologies, and network solutions they need to deliver next-generation wireless broadband products and services.¹ Our broad range of innovative products and technologies are organized into three lines of business:

- (a) **Multimedia Software:** Device-embedded multimedia software, media content management platforms, and content delivery services delivered through our PacketVideo (PV) subsidiary.
- (b) **Semiconductors:** WiMAX and LTE baseband chipsets and multi-band RFICs.
- (c) **Network Systems:** UMTS and WiMAX based wireless broadband and mobile broadcast systems, and carrier-grade mobile Wi-Fi systems.

3. NextWave also offers network operators a comprehensive suite of network deployment and management services along with complete back-office solutions. And for operators who need spectrum, we can provide access to our global portfolio of licensed radio frequencies to enable the rapid deployment of commercial network infrastructure. We have obtained spectrum assets in a variety of countries including Canada, the United States, Germany, Switzerland, Argentina, Austria and Croatia.

¹ For further information, see www.nextwave.com

4. NextWave plans to bring its suite of technology solutions to Canada. In support of this objective, we have established a presence in Calgary, and we are prepared to make additional investments in infrastructure and personnel. But, as a consequence of the foreign investment restrictions currently in place, our plans to use our Canadian spectrum have progressed slowly. As a result, Canadian consumers, both business and individual, will not be able to realize the full benefits of our innovations as quickly as will consumers in other countries.

5. In this submission, we urge the Panel to recommend the elimination of foreign investment restrictions in the telecommunications sector. If complete elimination is not realistic, we urge that the restrictions be eased to the greatest extent possible. We explain that the restrictions: (1) discourage investment in Canada and slow the diffusion of new technologies to Canadians, (2) lead to diminished competition and higher consumer prices, (3) increase the cost of capital to Canadian telecommunications businesses, (4) lead to lower productivity and reduced competitiveness, and (5) send the wrong message about Canada.

6. We hope that our comments will help the Panel to appreciate that the foreign investment restrictions do have negative consequences for the Canadian economy. Of equal importance, we trust that the Panel will recognize that a solution is available and can be readily implemented.

Whatever their Original Value, the Foreign Investment Restrictions have been Increasingly Criticized in Recent Years

7. Foreign investment restrictions in the telecommunications sector were first announced in the late 1980s as part of the negotiations of the Canada-US Free Trade Agreement. The restrictions were incorporated into the *Telecommunications Act* when it was became law in 1993. The same rules were later added to the Radiocommunication Regulations under the *Radiocommunication Act*.² The rules restrict the percentage of voting shares that non-Canadians can hold in facilities-based telecommunications carriers, restrict the percentage of non-Canadians that can sit on the board of directors, and require that Canadians exercise control in fact.

8. The original motivation for these investment restrictions was to adopt provisions comparable to those then in place in the United States. Other countries also imposed similar

² Consultation Paper, p. 42

restrictions at the time. Since the 1980s, however, virtually all countries have eased foreign investment restrictions in the telecommunications sector. Canada now stands out with one of the most restrictive regime in the OECD. As the Consultation Paper notes:³

Comparisons to other OECD countries show that Canada has a relatively restrictive foreign investment regime in the telecommunications sector (only Australia, China, South Africa are reported to have an equal or more restrictive regime).

9. In recent years, there have been repeated calls for the removal or easing of the restrictive Canadians rules. In 2006, the Telecommunications Policy Review Panel (“TPR Panel”) urged that the following changes be made:⁴

The Panel sees significant merit in removing Canada's current rigid and inflexible restrictions on foreign investment in telecommunications markets and replacing them with a more flexible regime that permits such investment where it benefits Canada and restricts investments that would not benefit Canada.

10. The OECD went even further. Most recently in 2007, but following a series of similar recommendations during the past decade, the OECD called on Canada to loosen its restrictions as a priority matter:⁵

Recommendations: Further reduce barriers by eliminating ownership restrictions in telecommunications ...

11. The Canadian industry is not opposed to ending these restrictions. This became abundantly apparent in the submissions that were made during the Telecommunications Policy Review process in 2005.⁶ The Competition Bureau, which supports ending the restrictions, succinctly summed up these submissions as follows:⁷

89. The Bureau notes that many of the other parties, including MTS Allstream, Rogers, Shaw, Aliant, CCTA, Telus, Bell, and the Coalition for Competitive Telecommunications shared the Bureau’s view. This suggests that there is an emerging consensus in the telecom sector in favour of removing the foreign investment restrictions.

³ Ibid, p. 43

⁴ Telecommunication Policy Review Panel, *Final Report 2006*, p. 11-24

⁵ OECD, *Economic Policy Reforms: Going For Growth 2007*, c. 2, p. 8

⁶ See http://www.telecomreview.ca/epic/site/tprp-gecrt.nsf/en/h_rx00025e.html

⁷ Second Round Comments of the Commissioner of Competition, September 15, 2005, p. 38

12. It is not surprising that so many parties want to see the end of Canada's foreign investment restrictions in the telecommunications sector. As discussed in the following paragraphs, the restrictions impose substantial costs on the Canadian economy and penalize Canadian consumers in a number of ways.

The Restrictions Discourage Investment in the Canadian Telecommunications Sector, and Slow the Diffusion of New Technologies

13. The restrictions contain disincentives for non-Canadians, whether strategic or portfolio investors, from investing in Canada. By limiting the number of voting shares that non-Canadians can hold, and by ensuring that non-Canadians cannot control Canadian telecommunications ventures, certain categories of investor are automatically deterred. Others that may be prepared to live with the Canadian restrictions can be deterred by the unpredictable length of time to obtain approval for their investments (which has stretched to several years in the case of some Industry Canada spectrum licences), and the uncertainty of whether approval will be given on acceptable terms. When faced with these realities, only a subset of potential investors will move forward. How many investment dollars are lost is difficult to quantify – there is little reason for companies to dwell on investments not made.

14. Discouraging investment from foreign strategic investors is particularly unfortunate, given their access to leading technology and management innovations. On one hand, strategic investors are the most likely potential investors in the Canadian telecommunications sector, and, on the other hand, they are the ones most likely to be deterred by the restrictions. Often these investors will want to own and control the business, which is explicitly prohibited by the restrictions. If they decide to go ahead despite these impediments, they are forced into half-measures where they may invest substantial amounts and provide valuable technology, but are unable to exercise control in a business in which they have extensive management experience and expertise.

15. Strategic investors have many calls on their investment dollars. Canada can be an attractive investment destination, but there are many other attractive destinations that seek investment. As NextWave and other companies well know, each investment project will have its

internal advocates and, because capital and talent is limited, not all projects can be pursued. The Canadian foreign investment restrictions can only diminish the likelihood that a Canadian project will be selected for funding among competing opportunities.

16. Strategic investors are often on the leading edge of technology. Where they decide to invest in a non-Canadian project, and pass on investing in a Canadian project, Canadian consumers forego the advantages of the timely introduction of new technology. Canada also loses indirectly because Canadian operators are not pressed to develop or adopt similar technologies in order to compete.

17. The end result is an industry that is slow to provide technologically up-to-date services. Indeed, the TPR Panel made this very criticism of the Canadian wireless industry.⁸

There is evidence to suggest that emerging new telecommunications markets, particularly the fixed wireless broadband market, are developing and deploying new services faster in the U.S. and many other countries than they are in Canada. There has been rapid deployment of innovative new fixed wireless services in most OECD countries outside North America by service providers with regional and national licenses. For a number of reasons, Canada has not moved as quickly.

18. Companies such as NextWave which have developed leading edge wireless broadband services view this statement as an opportunity – but an opportunity that is tempered by the sober reality of investing in a market that discourages foreign investment in network operators. At the very best, any investment is delayed and likely reduced; at the worst, it does not occur at all. On both counts, Canada and Canadian consumers lose out.

The Restrictions Lead to Diminished Competition and Higher Consumer Prices

19. The discouragement of foreign investment means fewer Canadian operators and reduced competitive rivalry, leading to higher prices for consumers. The evolution of the Canadian mobile wireless industry bears out this statement.

20. Canada has three national mobile wireless operators. In 2001, when Canada auctioned additional PCS licences, no international operators joined Canadian-controlled consortia to bid

⁸ Telecommunication Policy Review Panel, *Final Report 2006*, p. 11-20

for them. This occurred despite the enormous interest, then and now, in mobile licences around the world. As a result, almost all of this valuable spectrum was purchased by Canadian incumbents, and primarily the three national operators.

21. Moreover, when Microcell, a small fourth mobile wireless operator, experienced financial difficulties in 2004, no foreign operator was prepared to invest. As a consequence, Microcell was acquired by its larger domestic rival, Rogers, leading to the demise of a pricing leader and a reduction in the number of industry rivals.

22. The TPR Panel provided a bleak assessment of the Canadian market for mobile wireless services, and cast blame at the foreign ownership restrictions as a key reason for the situation:

In addition, mobile wireless pricing is significantly higher in Canada than in the U.S. and other countries. The Seaboard Group reported in July 2005 that the average mobile wireless customers in Canada pay 60 percent more than they would have if they had used a U.S. plan, and 19 percent more than the rates charged by European carriers. These pricing differences may be explained by the relatively small number of mobile service providers in Canada.⁹

It seems likely that the quality, pricing and availability of wireless services — both mobile and fixed — would improve significantly if Canada's foreign ownership restrictions were liberalized. It has been pointed out to the Panel that Canadian telecommunications markets are not as competitive as those in the U.S. The number of cellular mobile service providers has shrunk to three, all of which are owned by wireline telephone or cable groups. Canada has been slow to adopt pro-competitive initiatives, as described in Chapter 1.¹⁰ (underlining added)

23. Canadian politicians have come to appreciate the diminished nature of the competitive environment. Recently, the Minister of Industry announced the process to auction AWS spectrum. As part of the auction framework, the Minister announced a sizeable spectrum set-aside for new entrants, mandated roaming and mandated tower sharing – all designed to spur new entry and increase competition. As Industry Canada's press release noted:

"We are looking for greater competition in the market and further innovation in the industry. At the end of the day, our goals are lower prices, better service and more choice for consumers and business," said Minister Prentice. "That is why we are setting aside a portion of radio spectrum exclusively for new entrants into the wireless market."

⁹ Ibid, p. 1-21

¹⁰ Ibid, p. 11-20

Recent studies comparing international pricing of wireless services show Canadian consumers and businesses pay more for many of these services than people in other countries. These services are key to strengthening the competitiveness of Canadian business.

24. Unfortunately, the Minister did not announce the easing of Canada's foreign investment restrictions – which, combined with the auction of AWS spectrum, would have been a powerful formula to help bring about the lower prices, better service and the increased choice that the Minister seeks (and, not insignificantly, greater auction revenues for the federal government) through the prospect of additional non-Canadian bidders.

25. The Minister's initiative to promote new entry and competition should be viewed as a reaction to an industry structure that is the logical consequence of Canada's foreign investment restrictions. By easing these restrictions, Canada can be expected to need fewer interventions of this sort in the future as the market will, on its own, tend towards more competitiveness and innovation.

The Restrictions Increase the Cost of Capital to the Canadian Industry

26. When the Industry, Science and Technology Committee of the House of Commons looked at the foreign investment restrictions in 2003, it concluded that the restrictions increased the cost of capital in the telecommunications sector. In forming this view, the Committee referred to a 2003 study that calculated the extent of the higher cost of capital for Canadian telephone and cable television companies as compared to their US counterparts: 164 basis points higher for the former and 277 basis points for the latter.¹¹ This translated into an increase in the cost of capital of at least \$1.06 per month per subscriber for an incumbent telephone company and at least \$2.61 per month per subscriber for Canadian cable companies.¹²

27. Although the big operators face higher costs of capital, smaller operators face much greater problems. In many cases investment capital is simply not available from Canadian sources – as Microcell learned in 2004. Where investors are available, they can often demand a greater expected return for their investment than in a market with a large number of interested

¹¹ See Network Research Inc., *The Implications of Foreign Ownership Restrictions Upon the Canadian Cable Television Industry*, February 12, 2003, a study commissioned by the Canadian Cable Television Association

¹² Further, the TPR Panel noted that the restrictions cause companies to rely more on debt than they might otherwise, and to rely on Canadian sources of capital, thereby skewing their capital structures. See Final Report, 2006, p. 11-17

investors. This, in turn, translates into a higher cost of capital, riskier business plans and higher prices to consumers.

28. Policy makers should want service suppliers to have access to abundant pools of capital, and priced at the lowest possible level. Unfortunately, the foreign investment restrictions create barriers to such access.

The Restrictions Lead to Lower Productivity and Reduced Competitiveness

29. The Consultation Paper highlights Canada's modest standing in productivity and competitiveness rankings as compared to other developed countries. In both cases, the Panel notes that a key contributing factor is the relatively low rate of adoption of new technologies.¹³ Although the Panel does not point to the telecommunications industry in particular, an earlier government report on innovation singled out that industry as a contributor to low productivity as compared to the United States.¹⁴

30. The Conference Board in a recent study also points to Canada's low adoption of information and communications technology as a reason for Canada's poor productivity standing:¹⁵

Why are we falling behind in productivity? One reason could be our low investment in physical capital. Investment in machinery and equipment (M&E) – particularly information and communications technology – is associated with the adoption and diffusion of the latest state-of-the-art technologies, which, in turn, lead to growth in labour productivity. Our investment in M&E as a percentage of GDP is among the lowest of the countries against which we benchmark ourselves. (underlining added)

31. Telecommunications is an input to every other business activity. Because significant telecommunications services in Canada are characterized by high prices, slow adoption of new technologies and/or low levels of take-up, the enterprises that rely on these services will suffer. Their productivity will be impaired because their rivals internationally will pay less for their telecommunications services and get more services and more advanced services for what they

¹³ Consultation Paper, pgs. 7-8

¹⁴ Government of Canada, *Achieving Excellence, Investing in People, Knowledge and Opportunity*, February 2002, p. 15 available at <http://www.innovation.gc.ca/gol/innovation/site.nsf/en/in04135.html>

¹⁵ Conference Board of Canada, *How Canada Performs: A Report Card on Canada*, June 2007, pgs. 42-43

pay. Lower productivity and the inability to access the most up-to-date services will lead to reduced competitiveness.

32. To remedy the situation, the Conference Board recommended measures to increase foreign investment, which it sees as a key driver of economic growth:¹⁶

These indicators point to the need to reduce barriers to foreign ownership—barriers that are mainly in key services industries, such as the telecommunications and airline industries.

33. In the OECD's recent report, noted earlier, that organization echoes the Panel's concern about low productivity levels in Canada. It then makes three recommendations for improvement, one of which is to reduce barriers to foreign investment in the telecommunications and air transport industries.

34. The link between foreign investment and increased productivity and competitiveness, which both the Conference Board and the OECD recognize, is not surprising. What is notable, however, is the emphasis these organizations place on implementing remedies in the telecommunications sector in order to improve the situation. The clear message is that eliminating Canada's foreign investment restrictions in the telecommunications sector will aid in increasing Canada's productivity and competitiveness.

The Restrictions Send the Wrong Message About Canada

35. Canada appreciates the importance of foreign investment. As the Panel notes in the Consultation Paper:¹⁷

It has long been recognized that foreign direct investment (FDI) brings benefits to Canada through new sources of capital, ideas and know-how. As well, direct investment by Canadian firms in foreign markets enables them to be more productive and competitive and, ultimately, to create more and better jobs in Canada.

36. This welcoming attitude is reflected in the federal government's website, which trumpets the advantages of Canada as a destination for investment.¹⁸ Companies like NextWave are

¹⁶ Ibid, p. 50

¹⁷ Consultation Paper, p. 2

¹⁸ See http://investincanada.gc.ca/en/1/Invest_in_Canada.html

attracted to Canada as a place to do business. But, there are many other destinations that are also attractive, and they too have welcoming websites.

37. Canada does itself a disservice by detracting from the positive image it seeks to convey. Yet the studies, articles and complaints that suggest that Canada is a less than hospitable destination for foreign investment generally, and in the telecommunications sector in particular, cannot be helpful to achieving Canada's goals.

38. The Panel has an opportunity to move Canada towards correcting negative impressions concerning foreign investment. As the foregoing discussion has shown, foreign investment restrictions in the telecommunications sector loom particularly large in the minds of knowledgeable observers, both domestic and foreign. Changes to the rules will have a correspondingly large impact on improving Canada's reputation as an advantageous destination for foreign investment.

Our Recommendations

39. For the reasons we have discussed, NextWave recommends that Canada simply eliminate the foreign investment restrictions in the telecommunications sector. This would be accomplished by appropriate changes to the *Telecommunications Act* and regulations, and to the Radiocommunication Regulations under the *Radiocommunication Act*.

40. We do not express any view on the general investment review process under the *Investment Canada Act*, or on possible changes that have been announced to address investment by state owned entities or investment that raises national security concerns. To the extent that these general investment screening rules are considered desirable, we have no issue with them applying equally, and in a non-discriminatory manner, to the telecommunications sector.

41. If complete elimination of the foreign investment restrictions in the telecommunications sector is not feasible, we recommend that the restrictions be eased to the greatest extent possible. The TPR Panel expressed particular concern that the takeover of large incumbent players might lead to losses in head offices, jobs, research and development activity in Canada and national

security concerns.¹⁹ If these detrimental effects are considered a serious risk, then specific measures should be implemented to counter these particular concerns should they arise when foreign takeovers are proposed for this class of operator. The objective of a screening formula should be to isolate the real areas of concern and fashion remedies that address them directly, and not to generally and broadly restrict foreign investment in the telecommunications sector as is the current case. We note in this regard, under recent changes to the *Canada Transportation Act*, the federal cabinet has the power to screen large takeovers in the transportation sector (both domestic and foreign) and to block or modify those that fail to meet a public interest test.²⁰ While we have concerns that a “public interest” test may be too broad and uncertain, and can thereby unnecessarily discourage foreign investment on those grounds, it is still instructive to note that, in another key sector of the economy, measures have been developed that can address the very detrimental takeover consequences that the TPR Panel identified. We are confident that an appropriate and targeted formula could be developed in the telecommunications sector, should that be necessary. That said, there is no need to spend time and effort designing such an investment screening formula if our recommendation to eliminate the foreign ownership restrictions altogether is adopted.

January 11, 2008

¹⁹ Telecommunication Policy Review Panel, *Final Report 2006*, Afterword

²⁰ See *Canada Transportation Act*, ss. 53.1-53.6