

**Canada Gazette Notice No. DGSO-002-13**

***Consultation on Considerations Relating to Transfers, Divisions and  
Subordinate Licensing of Spectrum Licenses***

**Reply Comments of**

**Data & Audio-Visual Enterprises Wireless Inc.,**

***dba Mobilicity***



**3 May 2013**

## I. Capitalization is Life and Death

1. Five years on from the Department's bold policy initiatives to promote choice in providers, diversity in plans and services, and lower prices in Canada's mobile wireless telecommunications market, Data & Audio-Visual Enterprises Wireless Inc., dba Mobilicity, fully appreciates the Minister's growing concern for the state of wireless competition. The new entrants have barely managed to wrest 6 percent of the market<sup>1</sup> from the incumbents and the street is rife with apprehension and "for sale" signs.
2. Bold action is again called for, if the Department is truly committed to supporting competition. Many respondents sympathetic to the consumer cause resuscitated requests for making more sub-1000 MHz spectrum available to new entrants. While Mobilicity supports this call and indeed, was at the forefront of such calls in the past,<sup>2</sup> recent developments suggest that even if such action were taken in the near-term, it would largely be meaningless without (a) transferability freedom of auctioned spectrum and (b) direct or indirect assistance in raising capital.
3. In the capital-intensive telecommunications sector, and particularly for new entrant enterprises seeking a foothold in the sector, capitalization is *indeed* a life and death matter.<sup>3</sup>
4. In this regard, reiterated below is Mobilicity's proposal for concrete measures to be taken prior to the deadline for posting of deposits to participate in the 700 MHz auction that will provide new entrants much-needed flexibility and enhance their access to capital:

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<sup>1</sup> It is estimated that the new entrants' market share of total Canadian wireless service subscribers currently stands at approximately 6 percent. See Rita Trichur, "Wireless price rise predicted," The Globe and Mail, September 25, 2012 <online: <http://www.theglobeandmail.com/technology/mobile/wireless-price-rise-predicted/article4564864/>>

<sup>2</sup> Data & Audio-Visual Enterprises Wireless Inc. dba Mobilicity, Consultation on a Licensing Framework for Mobile Broadband Services (MBS) – 700 MHz Band, Comments on Canada Gazette Notice No. DGSO-002-12, 25 June 2012, paragraphs 23-24, 40-44, and 90-93.

<sup>3</sup> Bloomberg Businessweek March 27, 2013 <http://www.businessweek.com/news/2013-03-27/paradis-says-canada-wireless-sector-needs-foreign-capital>

- (a) **In the case of new spectrum (for example, the 700 MHz spectrum), the Department should allow new entrants to pay the auction proceeds by installment payments over the length of the licence term; and**
  - (b) **For AWS spectrum that new entrants have already acquired, the Department should return the entire auction proceeds to new entrants. This would be repaid back to the Department subject to a nominal rate of interest, over the remaining length of the licence term.**
5. The foregoing measures are at once practical and fair. Over the course of the first twenty (20) years of the history of mobile wireless deployment in Canada, the Department handed out up to 65 MHz of “free” spectrum to each of the large incumbents<sup>4</sup> in a bold effort to promote wireless services in Canada:
- (a) Rogers was granted 25 MHz of nationwide 800 MHz spectrum in 1983/1989;
  - (b) Rogers was granted a further 40 MHz of nationwide PCS 1 (1900 MHz) spectrum in 1995, for a total of 65 MHz throughout its licenced areas by the mid-1990s;
  - (c) Bell was granted 25 MHz of 800 MHz spectrum in 1983/1989 in selected regions, including Newfoundland, Labrador, Nova Scotia, P.E.I., New Brunswick, Fort Nelson Area, Whitehorse, NWT & Nunavut, Ontario (South, North, East), Quebec (South and East);
  - (d) Bell was granted a further 10 MHz of PCS 1 (1900 MHz) spectrum in 1995 in selected regions, including Ontario, Quebec, P.E.I., Nova Scotia, New Brunswick, Newfoundland, for a total of approximately 35 MHz spectrum throughout its licenced areas;

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<sup>4</sup> These were handed out either as a result of comparative review selection processes or on a first-come, first-served basis where Industry Canada was awarding unassigned spectrum. Apart from annual licence fees, the spectrum itself was handed out for “free”.

- (e) TELUS was granted 25 MHz of 800 MHz spectrum in 1983/1989 in selected regions, including Alberta, Sept-Îles and Gaspésie, Beauce, Saint-Georges, Sainte-Clotilde-de-Beauce, Southern B.C., Dawson Creek Area, Saint Victor; and
  - (f) TELUS was granted a further 30 MHz of nationwide PCS 1 (1900 MHz) spectrum in 1995, for total of 55 MHz throughout its licenced areas.
6. Each of the large incumbents has received up to 65 MHz of wireless spectrum in its licenced areas absolutely free; each holds 25 MHz of prime, sub-1000 MHz spectrum received for free.
7. Today, Mobilicity is not requesting that the Department return the same favour to the new entrants in furtherance of the Department's ongoing mission to bolster competition in the wireless sector. All it asks is that the Department allow new entrants to pay the proceeds of the AWS spectrum auction and in the upcoming 700 MHz spectrum auction in installments. Not only is this more than fair, it will immediately alleviate the pressure currently felt by the new entrants and will advance the Department's objective of ingraining sustainable competition in the mobile wireless sector.

## **II. Restrictions on Transfer Are Part of the Problem, Not the Solution**

8. Imposing further restrictions on the transfer of spectrum assets is not the solution and will inevitably harm competition in at least two ways. First, it will dampen new entrants' ability to raise further capital.<sup>5</sup> Second, it clearly sends a negative message to current and potential investors.<sup>6</sup> As a result, in a self-contradictory manner, it undermines any

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<sup>5</sup> Greg O'Brien, COMMENTARY: There's no "fix" available to the feds on the wireless file, Cartt.ca, <online: <http://www.cartt.ca/news/FullStory.cfm?NewsNo=15425&CFID=5197768&CFTOKEN=9e52ff26a1e63535-235D72CA-B787-7083-80E9F963CD1AAC57> >

<sup>6</sup> "Instead, its dubious idea now is to try to belatedly slap new restrictions on who spectrum licenses can be transferred to, which if pushed through, will dramatically decrease the value of Wind and Mobilicity. That would then cause any foreign investors thinking of spending money in wireless in Canada to flee and – as sure as the sky is blue – cause a host of lawsuits from the various industry players, almost all of whom object." See Greg O'Brien, COMMENTARY: There's no "fix" available to the feds on the wireless file, Cartt.ca, <<http://www.cartt.ca/news/FullStory.cfm?NewsNo=15425&CFID=5197768&CFTOKEN=9e52ff26a1e63535-235D72CA-B787-7083-80E9F963CD1AAC57> >

initiatives that the Department has or will undertake to encourage further foreign investment in the sector.

9. Mobilicity appreciates that the Department is concerned about the future of competition and its stated objective of sustaining at least four wireless carriers per region<sup>7</sup>. However, the imposition of additional vague, open-ended restrictions on the transferability of spectrum will do nothing to assist neither the new entrants nor the Department in achieving its ends, since it will serve to impede new entrants' access to the lifeblood of this sector, namely the ongoing ability to access new sources of capital. Rather, Mobilicity submits that implementing the measures proposed above in relation to installment payments represents the best assurance of achieving the Department's stated objective of sustaining four (and preferably more) carriers in every region.
10. If the Department feels that it is necessary to introduce new rules to restrict the transferability of spectrum, then the only relevant criteria that should be added are:
  - (a) whether or not there will be four viable carriers in the relevant licenced areas after the transfer; and
  - (b) where there has been no use or material non-use of spectrum, the Department should establish a clear policy of not permitting the "flipping" of spectrum. Where new entrant or set-aside spectrum that has not been deployed to any material degree is sought to be "flipped", the Department should ensure that the spectrum not fall into the hands of large incumbent carriers.

### **III. Proposals Regarding Spectrum Licence Transfer Requests**

11. As stated above, Mobilicity harbours grave concerns regarding the additional doubt and uncertainty that the DGSO-002-13 Consultation has cast on the transferability of its spectrum licences. Its instalment payment proposal represents a proactive policy measure

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<sup>7</sup> Industry Canada, Backgrounder: Reviewing the Policy on Spectrum License Transfer Requests, March 2013, <  
<http://www.ic.gc.ca/eic/site/064.nsf/eng/07293.html> >

that the Minister may undertake to immediately address the troubling fundamental market conditions that lie at the root of the problem.

12. Subject to its position set out above, for sake of completeness, Mobilicity addresses by way of reply the Department's specific proposals in the DGSO-002-13 Consultation.

Industry Canada is seeking comments on:

6-1 The criteria and considerations set out above.

13. Mobilicity opposes the addition of the detailed review framework proposed by the Department at paragraphs 15-16 of DGSO-002-13. The adoption of these proposals would only serve to harm competition. Rather, it proposes that the Department adopt the instalment payment relief set out above in Part I of this Reply and reiterates its proposal that CPC-2-1-23 be revised to state as follows:

A detailed review would also not generally be required of transfers of spectrum licences assigned through an auction.

14. In the alternative, if the Department feels that it is necessary to introduce new rules to restrict the transferability of spectrum, then the only relevant criteria that should be added are:

- (a) whether or not there will be four viable carriers in the relevant licenced areas after the transfer; and
- (b) where there has been no use or material non-use of spectrum, the Department should establish a clear policy of not permitting the "flipping" of spectrum. Where new entrant or set-aside spectrum that has not been deployed to any material degree is sought to be "flipped", the Department should ensure that the spectrum not fall into the hands of large incumbent carriers.

Industry Canada is seeking comments on:

6-2 Whether there is a threshold in the form of concentration or a measure of MHz-pop that Industry Canada should apply in deciding whether to conduct a detailed review, or some other type of threshold, screen, or cap that should be used to decide if a detailed review is required.

15. The predominant preoccupation of those parties that supported the Department's proposed use of detailed reviews and advocated for use of thresholds to determine when detailed reviews should be undertaken is the potential for over-concentration of spectrum resources in Canadian mobile wireless markets. While Mobilicity is sympathetic to the concern and agrees that the market in Canada remains highly concentrated, as stated above, the solution to this problem is not to further restrict or limit transfers of new entrant spectrum. Indeed, such restrictions would only serve to further constrain the options available to new entrants to raise new capital, which is essential for the continued survival of new entrant enterprises.

Industry Canada is seeking comments on:

6-3 The treatment of deemed spectrum licence transfers as actual transfers, divisions or subordinate licensing arrangements.

16. Subject to its overarching objection to the imposition of additional limitations on the transfer of auctioned spectrum, Mobilicity concurs with the vast majority of parties who supported the Department's proposal to treat deemed transfers in the same manner as actual transfers.

Industry Canada is seeking comments on:

6-4 The current review model, which is confidential, and whether it should be modified such that Industry Canada would publicize a spectrum licence transfer request and provide an opportunity for third party input.

17. With very few exceptions,<sup>8</sup> all parties submitted that the Department's current practice of undertaking reviews of spectrum transfer requests on a confidential basis be maintained.

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<sup>8</sup> The exceptions were MTS Allstream, paragraph 13; Public Mobile, paragraph 34; and TerreStar, paragraph 20.

18. In keeping with its initial comments, Mobilicity concurs in this view.

Industry Canada is seeking comments on:

6-5 In addition, Industry Canada welcomes comments on any other suggested changes to the applicable conditions of licence related to licence transfers, and to section 5.6 of CPC 2-1-23 and to the relevant application forms or other requirements.

19. N/A

7-1 Industry Canada is seeking comments regarding the proposed timelines.

20. Mobilicity notes that most parties' comments are in line with Mobilicity's initial submission that detailed reviews should be undertaken for no more than three (3) weeks beyond the initial review period.<sup>9</sup> Mobilicity reiterates that lengthy reviews can be potentially life-threatening for new entrants that have yet to achieve positive cash flow.

26. Industry Canada proposes to add the following as a condition of licence to all spectrum licences for terrestrial services, as part of the existing conditions of licence related to transfer:

*Prior to entering into any binding agreement, including an option or similar agreement, which provides for a transfer or division of a spectrum licence or a subordinate licensing arrangement to be made at a later date, licensees will notify Industry Canada in writing and provide the relevant details of the agreement. Licensees must also notify Industry Canada in writing of any such agreement already in place as of the effective date of this condition of licence.*

8-1 Industry Canada is seeking comments on the proposed Condition of Licence concerning prospective transfers, including the criteria, considerations and timelines set out above.

21. Mobilicity has considered the parties' comments in response to the Department's Question 8-1 and concurs with WIND that there needs to be clarity whenever a transaction is made subject to Industry Canada's review.

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<sup>9</sup> Mobilicity, paragraphs 40-42.