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Re: Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences

1. Public Mobile Inc. (Public Mobile) welcomes the opportunity to provide reply comments on the Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences issued by the Department on March 7th, 2013 (the "Consultation Document").
2. The Department raises important issues in the Consultation Document, and Public Mobile continues to believe that the wireless industry, and ultimately Canadian consumers, will benefit from increased clarity on issues respecting processes and policies related to transfers of spectrum licences.
3. Public Mobile's failure to comment on a particular issue that is or could be adverse to Public Mobile's comments viewed as a whole should not be taken by the Department as support of, or acquiescence to, such comments.
4. In the Consultation Document, the Department is essentially proposing two new policies:
 - **Spectrum transfer review process:** This defines a clear decision-making process and set of timelines for the ministerial review of licence transfers. This proposal does not change the existing Conditions of Licence and benefits all industry participants by bringing greater clarity to the criteria and processes through which licence transfer decisions will be made.
 - **Restriction on deemed transfers:** This proposal does change existing Conditions of Licence to ensure that the Minister's authority to review prospective licence transfers (and to enforce existing restrictions on licence transfers) cannot

be bypassed simply by structuring legal agreements in a manner that violates the spirit, if not the narrow legal letter, of the existing rules.

5. It is encouraging that the majority of respondents are in favour of both of these changes. With support from a mix of regional cablecos, new entrants and Incumbents, there is broad support from all different types of stakeholders. Not surprisingly, all consumer groups that participated in the Consultation are supportive of the Department's initiative.
6. Nothing in the other parties' comments submitted has convinced Public Mobile to change our original positions. The proposals we set out in our initial comments are a critical step in creating an environment that can support a fourth wireless competitor in every market. As stated previously, our key proposals are;
 - a. The Department should set out clear guidelines for the transfer of spectrum licences.
 - b. The most important criteria to be considered when conducting a detailed review should be the type and quantum of spectrum that is being transferred, the nature of the acquirer (i.e., dominant incumbent, new entrant competitor, etc.), and the impact of the acquisition on available spectrum and sustainable competition.
 - c. Any spectrum that is considered "set-aside," "capped," or otherwise restricted should be denied any kind of transfer during the restricted period – whether the proposal is for an actual transfer or a deemed transfer – that would be denied by the restriction. In this case, deemed or prospective transfers should not even be subject to review; they should be denied until such restrictions have been removed.
 - d. The treatment of deemed spectrum licence transfers as actual transfers, is essential to the policy objectives of the proposed rules.
 - e. It is a necessary clarification to the definition of "deemed spectrum licence transfer" to specifically include the words "including an option or similar agreement" after the word "transfer" in the first line of the definition. There should be no ambiguity that the transfer rules can be bypassed simply by exploiting a legal loophole.
 - f. Do not allow acquisitions of unused spectrum licences that can be used to block robust competitive deployments across Canada. Acquirers of spectrum blocks must be forced to assemble practically usable blocks (measured as 66% Canadian population coverage) when expanding into new spectrum blocks. A critical mass of spectrum is required to enable broadly national services and the Department should not permit piecemeal blocking acquisitions in specific regions.
7. Clarifying the rules around spectrum licence transfers is not just an academic exercise. Currently, there is a lack of transparency and certainty as to how transfers of spectrum licence will be treated, and there are issues currently before the Department that must be urgently dealt with in order to restore investor confidence to the Canadian wireless industry in advance of the 700 MHz auction.

Replies to Comments of Other Parties

8. As noted above, most of the Comments from other industry participants supported the proposed policies. From regional incumbent cablecos like Bragg, incumbent telcos like MTS and Sasktel, alternative providers like Terrestar and Xplornet, and wireless carriers TELUS and Public Mobile, support for clarity regarding spectrum transfers is widespread throughout the Canadian telecommunications industry. It is also no surprise that both consumer groups that participated in the Consultation supported the Department's initiative.
9. Two large incumbents did, however, oppose the proposed new policies. Bell Canada argued that the new policy was not needed, once again arguing – as it has on every consultation that discusses encouraging competition – that the Canadian market is fine and there is no need for government action of any kind. Given the decisions on the set aside during the 2008 auction, the regulations (and revisions) to the rules on mandatory roaming and tower sharing, the decisions regarding the 700 Mhz and 2500 MHz auctions, and the recent public comments of the Minister, we believe Bell is alone in holding this position and there is no need to debate the facts again.
10. Rogers Communications has advanced a different argument, asserting that a clarification of the rules would somehow violate the Department's "contractual" obligations in relation to the issuance of spectrum licences. Rogers' argument however distorts the language of the existing Conditions of Licence and the authority, and responsibility, of the Minister.¹
11. The Minister has (and has always had) the authority to approve (or disapprove) spectrum licence transfers. This is clearly stated in the Conditions of Licence of AWS spectrum, "Departmental approval is required for each proposed transfer of a licence, whether the transfers is in whole or in part."² It is also a Ministerial power, under s.5 of the Radiocommunications Act, "to amend the terms and conditions of any licence, certificate or authorization issued under paragraph (a)".³ These two documents clearly set out that a) the Minister has the power to approve/deny transfers and b) the Minister may amend the terms of a licence.
12. The additional constraint imposed on licences issued as part of the set aside during the 2008 AWS spectrum auction limits the Minister's authority because it does not permit an application for a transfer to be approved during the 5-year restricted period. Nothing in the licence, stated or implied, says the Minister loses his authority to approve or disapprove transfers after that period. On the contrary, the Minister's obligation is to continue to focus on the public interest that is rooted in the licencing of a public resource.
13. Rogers cites CPC 2-1-23 (the "Circular") to make the argument that a "contract" exists which would be violated should the Minister deny a transfer other than for strictly technical grounds (where the acquirer will not or cannot abide by the COLs). Ignoring the strictly legal issue that

¹ "Changing this key attribute of AWS spectrum involves changing the rights of bidders in that auction after the fact - a change that flies in the face of the principles of contractual certainty that the Department strives to attain in its spectrum auctions." Rogers Comments, *Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences, DGSO-002-13*, para 29.

² Example taken from Shaw Telecom Inc. Spectrum Licence 5139213 for Block B AWS spectrum, Appendices s.2 Licence Transferability and Divisibility, available on the Industry Canada website through the "Spectrum Direct" utility. Accessed 3 May 2013.

³ Radiocommunications Act, R.S.C., 1985, c.R-2, s.5.

the Circular has “no status in law”⁴ and that the Minister’s authority under the licence is general, Rogers offers a misleading interpretation on pure policy grounds.

14. The Circular makes clear that how a licence was issued is a valid consideration in the Minister’s determination whether to approve or disapprove a licence transfer. It says that licences assigned through an auction have “enhanced transferability”. This is distinguished from licences issued under a comparative review or ‘first-come, first-serve’ process (not auctioned). While the Circular is somewhat vague on the policy, it implies that spectrum licences that were not auctioned cannot be transferred on their own, but that the Minister will consider an application to transfer the licence as long as it is being utilized as part of a going concern. The “enhanced transferability” that applies to auctioned spectrum is the option to request a transfer of the licence itself (something not allowed with non-auctioned spectrum). It can be inferred, but is not stated, that transfers of openly auctioned spectrum will generally be allowed as long as they continue to support the broader public policy goals. Nowhere does it (explicitly or implicitly) purport to remove or limit the Ministers authority to judge each transfer as it is requested.
15. In addition, the Circular does not address the question of transfers that involve spectrum issued through a restricted auction, especially the case where such spectrum could not otherwise be transferred to an entity that was not permitted to participate in that auction.
16. At present, CPC-2-1-23 does not set out any criteria that will be used by the Minister to make a decision or the decision making process to be used. If nothing else, the proposed new rules governing the process for the Minister’s decision making on proposed transfers will bring beneficial clarity to all parties.
17. However, Rogers does make a good point that the Minister’s decision on a spectrum licence transfer should take into account how that spectrum was licenced in the first place;
 - **Comparative Review/ First Come, First Serve spectrum:** In these cases spectrum was granted to specific companies for specific reasons, and no transfer of licences (as licences) should be allowed. Consistent with the current policy, the transfer of a going concern may be allowed, but is subject to the approval process and the Minister should apply all the relevant criteria (including being assured that the transfer involves a real going concern and isn’t just a pure licence transfer in disguise).
 - **Set Aside/Capped spectrum:** During the restricted period, transfers would generally be permitted, subject to reasonable review, to others who could have acquired the spectrum in the relevant auction. After the restricted period, any proposed transfers to an entity that was not eligible to acquire the spectrum at auction would be subject to detailed review to ensure such a transfer will not harm the public interest.
 - **Open auction spectrum:** As above, the presumption is that it can be transferred to anyone who could have acquired the spectrum in the relevant auction.
18. Deemed transfers, especially derivative transactions like options, must be reviewed as actual transfers. The substance of a transaction is what matters most, and the Minister needs to have the authority to prevent creative legal manoeuvring to get around the intention of the rules. As

⁴ Licensing Procedure for Spectrum Licences for Terrestrial Services, CPC-2-1-23, Issue 2, September 2001, Preface.

discussed above, there should be a clear ban on any deemed transfer during the restricted period in which the actual transfer would not be permitted. Because spectrum subject to an option agreement is effectively frozen as neither party is in a position to deploy it, to allow deemed transfers would make the Department complicit in encouraging the systemic hoarding of spectrum.

19. While the Department's proposals clarify and improve the spectrum transfer process, and are a critical step in ensuring sustainable competition, they are only one step. In general, we would support Wind Mobile's view that there are other steps to enable a long-term competitive market. While Public Mobile and Wind Mobile's frameworks are different, both new entrants have approached this consultation with an eye towards competition and the benefits it brings to Canadian consumers.

Conclusion

20. We are at a critical juncture in the development of sustainable wireless competition in the Canadian wireless marketplace. Minister Paradis has made it clear over the past few months that a key public policy goal is to ensure there is a sustainable environment in which there are at least four viable wireless competitors in every market. As he stated on April 15, "The intent of the policy was not to have this set-aside spectrum to end (up) in the hands of incumbents."⁵
21. If Government policy were to allow the reconsolidation of Canada's wireless market back into the three dominant incumbents, the recent benefits of new entrant competition would be lost to Canadian consumers and businesses. The Minister, in his statement at the time the Consultation Document was released, acknowledged that the lifeblood of wireless carriers is access to sufficient spectrum and to sufficient affordable capital.
22. The Government's policy goal should be to ensure that the fourth carrier in each market has access to the resources necessary to bring effective and sustainable competition to all Canadians. To achieve that goal, two critical ingredients are required: spectrum and capital. The former is entirely under the control of Government policy and decision-making, however, the two issues are linked. Without Government support to ensure that there is sufficient spectrum available to support the fourth carrier, risk capital will be extremely difficult, if not impossible, to attract. Without a clear path to sufficient spectrum for a sustainable fourth carrier, the necessary investments will not be forthcoming – to the detriment of Canadian consumers.
23. As mentioned in our replies to competitors above, there are three elements which Public Mobile would like to underscore and that the Department should keep in the forefront when reaching a determination on this consultation:
 - a. The Minister has the authority to approve (or disapprove) transfers, this is enshrined in the Radiocommunications Act and is an unambiguous Condition of Licence. This consultation is about providing greater certainty and clarity to the processes related to these decisions.

⁵ The Globe and Mail, Canada signals unhappiness with Shaw over spectrum sale plan, Published on 15 April 2013. <<http://www.theglobeandmail.com/feeds/thomson-reuters/canada-signals-unhappiness-with-shaw-over-spectrum-sale-plan/article11216072/#dashboard/follows/>>

- b. The decision making process that reviews spectrum licence transfers should take into account how the spectrum was originally issued. While all transfers need to be considered in the context of evolving market conditions, the review should generally favour transfers between entities that were both eligible to bid at auction, while looking very closely at transfers that transfer spectrum to an entity that (through set asides or spectrum caps) was not eligible at the time of the auction.
- c. Deemed transfers, especially derivative transactions like options, should be reviewed and treated as would a formal transfer. The substance is what matters, and the Minister needs to have the authority to prevent legal tricks to get around the rules.

24. Public Mobile submits that the proposed framework to govern the transfer of spectrum licences is a vital cog in the process of continuing to develop and enhance the competitive and fair availability of spectrum throughout Canada.

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