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May 3, 2013

Sent via email: spectrum.operations@ic.gc.ca

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Re: Canada Gazette Notice No. DGSO-02-13 Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences

Pursuant to the procedures outlined in the above noted document, attached are Rogers Communications ("Rogers") Reply Comments.

The document is being sent in Adobe Acrobat X Pro Version 10. Operating System: Microsoft Windows 7.

Regards,

Kenneth G. Engelhart
DH:jt

Attach.

Reply Comments of

Rogers Communications

Consultation on considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences

(DGSO-002-13)

May 3, 2013

Executive Summary

E1. This consultation has important implications for the Canadian wireless market. In its Consultation Paper the Department has proposed major changes to the criteria used to assess applications for the transfer of spectrum licences or the acquisition of companies that hold spectrum licences. These proposals would replace the current policy of enhanced transferability for auctioned spectrum with a new level of regulatory oversight that would incorporate many of the same considerations as a review by the Commissioner of Competition under the *Competition Act*.

E2. If the Department decides to implement its proposals it will fundamentally change the current rights attaching to auctioned spectrum in Canada and seriously diminish the efficiencies inherent in an open secondary market.

E3. Over the past decade, Industry Canada has pursued policies designed to encourage the development of a competitive secondary market for spectrum licences. This policy is articulated in the Department's Spectrum Policy Framework for Canada ("the SPFC"), as well as in the current version of the Licensing Procedures for Spectrum Licences for Terrestrial Services ("CPC-2-1-23").

E4. These developments were supported by independent industry experts, including the Government of Canada's Telecommunications Policy Review Panel, which advocated the establishment of market-based exclusive spectrum rights, including the right to buy, lease or sell spectrum holdings.

E5. In furtherance of these policies Industry Canada included "enhanced transferability" rights in the conditions of licence for auctioned spectrum and identified this feature as a key distinction between ordinary radio authorizations and spectrum licences. Participants in previous auctions, including the AWS spectrum auction, purchased spectrum that included these rights. In the AWS auction, bidders paid a total of $4.2 billion to acquire spectrum licences that included these important rights.

E6. The Minister has stated that the change in policy addresses concerns about the on-going competitiveness of the wireless market and his desire to ensure that there are at least four competitors in each region.

E7. Given the significance of the proposed changes and the obvious reversal of the Department's current policy of relying on market forces in secondary markets, it is extremely important that the proposed new policy be based on a sound understanding of the existing state of competition in the Canadian wireless market.

E8. In the comments filed by interested parties in this consultation Industry Canada has been presented with two very different pictures of the current state of competition in the Canadian wireless market. One is based on fact and the other on rhetoric. This rhetoric originates largely with parties that have a vested interest in regulatory intervention.

E9. The facts point to a market that is highly competitive. The rhetoric argues that the market is a stagnant oligopoly that needs government regulation and assistance to prop up new entrants.

E10. Canadians have been subjected to this rhetoric for so long that many have come to believe it. This is very dangerous for sound public policy which ought to be based on facts. The current proposal to replace a relatively competitive secondary market with a highly regulated one provides a good example of a policy that could have very negative implications for the wireless industry if it is based on incorrect assumptions regarding the state of competition in the marketplace.

E11. The facts regarding competition in the Canadian market are as follows:

- Out of 21 developed countries, Canada is the fifth lowest for market share concentration as measured by the Herfindahl-Hirschman Index.[1]
- Smartphone plans are cheaper in Canada than in the U.S.[2]
- Canada ranks 2nd highest out of 21 developed countries for average minutes of use per user,[3] and 4th for mobile data usage per user.[4]
- Despite high usage and low demographics, Canadians spend the second lowest percentage of GDP in the G-8 and the third lowest percentage of GDP in the G-20, on wireless services.[5]
- Capex per subscriber in Canada is second only to Japan.[6]
- Canada has at least five wireless carriers in each region holding AWS spectrum licences.

E12. If the Department is going to reverse its policy of developing a competitive secondary market based on this evidence, it needs to reassess its decision. The

[1] Global Wireless Matrix 4Q12, Bank of America Merrill Lynch, January 3, 2013, p. 2.
[2] Canadian Wireless Myths & Facts, Scotia Capital, March 7, 2013, p. 2.
[3] Global Wireless Matrix 4Q12, Bank of America Merrill Lynch, January 3, 2013, p. 2.
[4] Bell Mobility Comments, April 3, 2013, at para. 13.
[5] Global Wireless Matrix 4Q12, Bank of America Merrill Lynch, January 3, 2013, p. 56.
[6] Bell Mobility Comments, April 3, 2013, at para. 10.

facts do not support this change in policy based on the state of competition in the Canadian wireless markets.

E13. The proposed changes would seriously undermine the credibility of the Department in future auctions and would devalue the spectrum acquired by new entrants in the AWS auction in a very prejudicial way. It would be bad public policy to change these conditions of licence retroactively and the state of competition in the Canadian wireless market does not require them to be change prospectively.

E14. The proposed new policy will also inhibit investment in new entrant carriers due to the increased risk of losing their capital if the business fails and they are unable to sell to their purchaser of choice. This point has been made by WIND and Mobilicity - two new entrants that the policy is ostensibly supposed to help.

E15. The fact that the two principal new entrants that are not associated with an ILEC or a cable company are opposed to the proposed measures is extremely significant. They say that proposed restrictions will not only fail to achieve the Minister's policy objectives - they will have the opposite effect of hampering access to capital by new entrants and increasing their cost of capital by significantly increasing investors' risk. This could negatively impact the possibility of maintaining at least 4 competitors in each region.

E16. The proposed new policy appears to be aimed at limiting Incumbent carriers like Rogers from gaining access to additional spectrum. This is not in the best interests of Canadians since it will reduce the ability of carriers to respond in an efficient and timely manner to growing demand from consumers and business users.

E17. As pointed out by Quebecor Media in its comments:

> In our view, a distinction must be made between a pro-competitive policy that seeks to equitably distribute new spectrum resources based on a comprehensive market assessment at the time of auction, and an ongoing spectrum transfer review policy that risks impeding the future reallocation of spectrum resources to their most efficient uses. The first policy has proven its worth. The second policy stands to do more harm than good.[7]

E18. The fact that the three largest incumbent carriers currently hold 85% of available spectrum in Canada should not be a cause of concern. They are using this spectrum to serve 90% of Canadian customers. There is therefore no imbalance

[7] QMI Comments, April 3, 2013, at paras. 20 and 21.

between the amount of spectrum they hold and the number of subscribers they serve.

E19. A number of parties have pointed out that the proposed new policy will result in unnecessary duplication of the role of the Commissioner of Competition and the Competition Bureau in monitoring and controlling market concentration and anti-competitive conduct.

> ... However, the Department is not the only government agency with an interest in ensuring a viable competitive market in Canada. It must be recognized that this is primarily the responsibility of another government agency, the Commissioner of Competition and the Competition. The Department should be seeking ways to ensure that it does not unnecessarily duplicate the functions of the Competition Bureau. The Department's expertise is in spectrum management and not competition policy. Furthermore, the Department lacks the suite of remedies available under the *Competition Act* to correct anti-competitive conduct. [8]

E20. In summary, the proposed changes to spectrum transfer policy:

- ignore the strong public policy reasons in favour of a competitive secondary market;
- are based on incorrect assumptions regarding the competitiveness of the Canadian wireless market;
- will have significant adverse effects on investment in new entrants;
- will hinder the ability of incumbent carriers to meet customer demand;
- will unnecessarily duplicate the function of the Competition Bureau; and
- if applied to spectrum that has already been auctioned, will undermine all bidders' rights acquired in that auction and undermine future confidence in Industry Canada's spectrum auctions, thereby reducing the government of Canada's auction revenues.

E21. For these reasons, the proposed changes to CPC-2-1-23 should be abandoned. If the Department nonetheless decides to proceed with the proposed changes, they should only be applied to future auctions and should not be applied retroactively to previously auctioned spectrum that was purchased based on a different set of rules.

[8] Xplornet Comments, April 3, 2013, at para. 10.

E22. Rogers' comments on the details of the proposed changes are set forth in the main body of these reply comments.

Introduction

1. Rogers Communications Partnership ("Rogers") is pleased to provide the following reply comments in response to the comments filed by other parties in connection with Industry Canada's **Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences - DGSO-002-13** ("the Consultation Paper").

2. Rogers has reviewed the comments submitted in this proceeding by the following parties: Bell Mobility, Bragg Communications Inc. (EastLink), Canadian satellite and Space Industry Forum (CSSIF), Data & Audio-Visual Enterprises Wireless Inc. (Mobilicity), Globalive Wireless ("WIND"), MTS Inc. and Allstream Inc. ("MTS"), PIAC, CAC and COSCO ("PIAC"), Public Mobile Inc., Quebecor Media Inc. ("QMI"), SaskTel, Shaw Communications Inc. ("Shaw"), TELUS Communications Company ("TELUS"), TerreStar Solutions Inc. ("TerreStar"), Xplornet Communications Inc. and Xplornet Broadband Inc. ("Xplornet"), and Dr. Michael McNally, Brandy Mowatt and Lilian Pintos (U of A). While Rogers has responded to many of the arguments presented by other parties, it has not addressed every comment made. Failure to address any particular comment does not signify Rogers' agreement with it.

3. The Consultation Paper proposes major changes to the criteria used to assess applications for the transfer of spectrum licences or the acquisition of companies that hold spectrum licences. These proposals would replace the current policy of enhanced transferability for auctioned spectrum with a new level of increased oversight that would incorporate many of the same considerations as a review by the Commissioner of Competition under the *Competition Act*.

4. While there is some support for this initiative, interested parties have raised some very persuasive arguments why the Department should not proceed with its proposed policy. These may be summarized as follows:

    (i) There are strong public policy reasons in favour of maintaining a competitive secondary market for auctioned spectrum licences.

    (ii) The proposed changes to the spectrum transfer policy are based on incorrect assumptions regarding the current competitive environment.

(iii) The proposed changes will hurt new entrants more than they will help them, thereby diminishing their access to capital and their competitiveness.

(iv) The proposed changes will hinder the ability of Incumbent carriers to respond in a dynamic way to changing demand by consumers and business customers for increased bandwidth.

(v) The proposed changes will unnecessarily duplicate the function of the Commissioner of Competition (another Industry Canada agency) which already monitors competitive behaviour and has mandatory notification requirements for mergers and acquisitions.

(vi) If applied to spectrum that has already been auctioned, the proposed changes will undermine all bidders' rights acquired in that auction and undermine future confidence in Industry Canada's spectrum auctions, thereby reducing the government of Canada's auction revenues.

5. For all of these reasons, it is Rogers' respectful submission that it would be a mistake to proceed with the proposed policy changes.

The Public Interest in Favour of a Competitive Secondary Market

6. Interested parties that support Industry Canada's new review process appear to have totally ignored the policy benefits inherent in a secondary market for auctioned spectrum. EastLink, for example, appears to think that the new regime is necessary to prevent licensees from "circumventing the Department's aggregation limits."[9]

7. This concern does not justify elimination of the current rules respecting secondary markets. If spectrum aggregation limits were exceeded, the Department can already refuse to approve the transfer of spectrum under the existing version of CPC-2-1-23, which requires the transferee to satisfy all eligibility criteria. When the Department imposes spectrum aggregation limits as a condition of licence, the Minister also has the power under subsection 5(2)(b)(i) of the *Radiocommunication Act* to suspend or revoke the licence for breach of the condition. There is no need to eliminate the competitive secondary market for auctioned spectrum in order to enforce spectrum aggregation limits. This runs directly contrary to the Government of Canada's Direction to the CRTC on implementing the Canadian Telecommunications Policy objectives which states that:

[9] EastLink Comments, April 3, 2013, at para. 9.

(ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;

8. Over the past decade, Industry Canada has pursued policies designed to encourage the development of a competitive secondary market for spectrum licences. This policy is articulated in the Department's Spectrum Policy Framework for Canada ("the SPFC"), as well as in the current version of the Licensing Procedures for Spectrum Licences for Terrestrial Services ("CPC-2-1-23"). Participants in past auctions have acquired spectrum based in part on these licence attributes that include "enhanced transferability" rights. CPC-2-1-23 currently identifies "enhanced transferability" as a significant factor that distinguishes spectrum licences acquired in auctions from other radio authorizations.

9. As Bell Mobility has pointed out in its comments, Professor Martin Cave's report to Industry Canada, entitled *Study of Market-Based Exclusive Spectrum Rights*, also encouraged the Department to give greater favour to a competitive secondary market:

> Industry Canada should accelerate the pace of reform of spectrum management in Canada by specifically adopting policy directives which give greater force to the implementation of secondary markets namely by enabling spectrum trading along with defined, flexible user rights. Tradable licences where they apply should become fully transferable (primary users may replace each other); and sub-leasing/sub-division should be possible. Ministerial approval for every trade should not be required and should be replaced by a self-certification process. (Emphasis added)[10]

10. The policy in favour of enhanced transferability has been supported by industry experts that have reviewed Canada's spectrum policy. This includes the Telecommunications Policy Review Panel (TPRP) which made the following recommendations in its 2006 report:

> Recommendation 5-9
>
> Industry Canada should develop a new spectrum policy to provide clear direction… The new policy should take into account the work completed by Industry Canada as part of its on-going spectrum policy framework review, and should ensure that the following areas are addressed:

[10] Bell Mobility Comments, April 3, 2013 at para. 23.

(c) reliance on market-based approaches to spectrum management as much as possible,

(d) establishment of market-based exclusive spectrum rights (i.e. ability to buy, sell and lease spectrum holdings) and elimination of barriers to the development of secondary markets in spectrum,[11]

11. Given Industry Canada's efforts to create a market-based secondary market for spectrum, and the support for this policy it has received from Industry experts, the question arises why the Department is proposing to reverse its current policy and act in a manner that is inconsistent with the recommendations of those experts. Why is the Department proposing to increase regulation and place less emphasis on competitive market forces in secondary markets?

12. Given the significance of the proposed changes and the obvious reversal of the Department's current policy of relying on market forces in secondary markets, it is extremely important that the proposed new policy be based on a sound understanding of the existing state of competition in the Canadian wireless market.

The State of Competition in the Wireless Market

13. In the comments filed by interested parties in this consultation Industry Canada has been presented with two very different pictures of the current state of competition in the Canadian wireless market. One is based on fact and the other on rhetoric. This rhetoric originates largely with parties that have a vested interest in regulatory intervention.

14. The facts point to a market that is highly competitive. The rhetoric argues that the market is a stagnant oligopoly that needs government regulation and assistance to prop up new entrants.

15. Canadians have been subjected to this rhetoric for so long that many have come to believe it. This is very dangerous for sound public policy which ought to be based on facts. The current proposal to replace a relatively competitive secondary market with a highly regulated one provides a good example of a policy that could have very negative implications for the wireless industry if it is based on incorrect assumptions regarding the state of competition in the marketplace.

16. It is time for a serious reality check, as the unsubstantiated statements made by parties supporting the Department's proposal's make clear.

[11] TPRP Report, 2006, at page 12-12.

Table 1

Rhetoric	Fact
"The Canadian market is a highly-concentrated oligopolistic market consisting primarily of three incumbents" (WIND, para. 7)	In fact, out of 21 developed countries, Canada is the fifth lowest for market share concentration as measured by the Herfindahl-Hirschman Index ("HHI"). Only the United Kingdom ("U.K."), U.S., Denmark and Germany have lower market share concentrations than Canada.[12]
"Canadians also pay among the highest prices in the world for wireless services." (WIND, para. 13)	Mobile spending as a percentage of GDP in Canada is the second lowest in the G8 and third lowest in the G20.[13] (despite high usage as measured by average minutes per capita.) Smartphone plans are cheaper in Canada than in the U.S., which is in many respects the most competitive wireless market in the world.[14]
A key indicator of the lack of competitiveness of the Canadian wireless market is wireless carrier ARPU, which reflects a world-leading wireless spend per wireless customer. (WIND, para. 10)	ARPU is not in fact an indicator of competitiveness. ARPU is a combination of usage and price. Canada ranks 2nd highest out of 21 developed countries for average minutes of use per user,[15] and 4th for mobile data usage per user.[16] In addition, the cost of providing wireless services in a country with one of the lowest population densities in the world is higher than all other G-8 and G-20 countries. Combining high usage with higher average costs produces higher ARPU. Despite high usage and low demographics, Canadians spend the second lowest % of GDP in the G-8 and the third lowest % of GDP in the G-20, on wireless services.
Canadian wireless incumbents possess market	As discussed further below, lower prices and high capital spending are inconsistent with the

[12] Global Wireless Matrix 4Q12, Bank of America Merrill Lynch, January 3, 2013, p. 2.
[13] Global Wireless Matrix 4Q12, Bank of America Merrill Lynch, January 3, 2013, p. 56.
[14] Canadian Wireless Myths & Facts, Scotia Capital, March 7, 2013, p. 2.
[15] Global Wireless Matrix, 4Q12, Bank of America Merrill Lynch, January 3, 2013, p. 2.
[16] Bell Mobility Comments, April 3, 2013, at para. 13.

power (WIND, para. 8)	concept of market power. There is no evidence of the Incumbents possessing market power.

17. If the Department is going to reverse its policy of developing a competitive secondary market based on this evidence, it needs to reassess its decision. The facts do not support this change in policy based on the state of competition in the Canadian wireless market.

18. Beginning as early as 1984, successive Ministers of Industry have implemented a number of licensing policies designed to reduce barriers to entry by new entrants. These policies are outlined in Chart 3 below:

Chart 3

Year	**Spectrum**	**Policy Implemented**
1984	800 MHz	- Decision to competitively licence one new entrant to compete with the serving ILEC (which did not have to compete for a licence). - "Head-start rule" prevented incumbent (ILEC) from offering service until it had granted interconnection to the PSTN to the new entrant.
1990	PCS	- Decision to licence 2 new entrants in addition to the ILEC and Rogers. - Decision to limit 2 incumbents to 10 MHz while granting new entrants 30MHz.
2008	AWS	- 40 MHz set-aside for new entrants. - restriction on sale to incumbents for 5 years. - mandatory in-territory and ex-territory roaming. - tower and site sharing - no exclusive roof-top sites - arbitration process for disputes.
2012	All spectrum	Removal of restrictions on foreign-controlled carriers entering the Canadian market as either "green field" or acquiring a carrier with less than 10% market share.
2013	700 MHz	- 10 MHz cap on "prime" spectrum for incumbents with greater than 10% market share regionally.

		- prohibition of sale of spectrum to an incumbent for 5 years if it would exceed the spectrum cap. -enhanced roaming and tower sharing rules. - permission to enter into joint network arrangements with other carriers in defined circumstances.
2013	2500 MHz	- spectrum cap of 40 MHz of spectrum in a given market tier.

19. All of these policies focussed on reducing barriers to entry into the Canadian wireless market. They did not dictate market outcomes or limit the ability of carriers to exit the markets by selling their business to either a new entrant or an incumbent carrier (except during an initial 5-year period in the case of AWS and 700 MHz spectrum), other than in measures that were clearly articulated prior to the spectrum auction or licensing process in question.

20. The proposed changes would seriously undermine the credibility of the Department in future auctions and would devalue the spectrum acquired by new entrants in the AWS auction in a very prejudicial way.

21. It would be bad public policy to change these conditions of licence retroactively and the state of competition in the Canadian wireless market does not require them to be change prospectively.

The Proposed Policy Will Hurt New Entrants

22. The proposed new policy will inhibit investment in new entrant carriers due to the increased risk of losing their capital if the business fails and they are unable to sell to their purchaser of choice.

23. This point was made very strongly by Mobilicity in its initial comments:

> 7. It is an audacious investor indeed who nonetheless assumes the inherently greater risks of investing in a new entrant. In making such decisions, investors will take into account various factors, chief among which are the accumulated or anticipated assets of the investment. Mobilicity would further suggest that the transferability of spectrum is primarily correlated to the value an investor places on that spectrum. Other factors, such as the “life time value” of the current subscribers and any other assets are of less value and importance. An asset is simply not valuable unless it has liquidity – i.e. can be bought and

> sold as easily as possible to the widest market possible. Investors need to know liquidity is possible, whether or not it is actually exercised.
>
> 8. Further, Mobilicity respectfully submits that the very announcement of this consultation with respect to license transferability a few weeks ago has already further impinged access to capital for new entrants. Ironically, this announcement has created a level of uncertainty and confusion in the minds of investors as to the liquidity of spectrum assets which in particular affects new entrants far more than incumbents and further hampers their ability to create a competitive marketplace – the very thing the Department has suggested it wants to enhance.[17] (Emphasis added)

24. WIND has made a similar point:

> Further limiting the ability to transfer spectrum to Incumbents beyond the above-noted proposal would establish further illogical asymmetry against smaller players. Eliminating a potential way to recoup investment would:
>
> a) cause less investment by new entrants as the return on further investment would be unclear and/or insufficient to justify the investment;
>
> b) lower the availability of funding for further expansion by new entrants due to the absence of clarity about return on investment by new entrants (and thus causing less investment as in first point); and
>
> c) cause higher costs of financing to obtain funding given the risk associated with the absence of clarity (thereby diminishing the returns available for new entrants, and probably causing less investment as in first point).[18]

25. The fact that the two principal new entrants that are not associated with an ILEC or a cable company are opposed to the proposed measures is extremely significant. The proposed restrictions will not only fail to achieve the Minister's policy objectives - they have the opposite effect of hampering access to capital by new entrants and increasing their cost of capital by significantly increasing investors' risk. This could negatively impact the possibility of maintaining at least 4 competitors in each provincial market.

[17] Mobilicity Comments, April 3, 2013 at paras. 7 and 8.
[18] WIND Comments, April 3, 2013, at para. 19.

26. In making these proposals, the Minister is also ignoring Cabinet's policies set forth in the *Direction to the CRTC on implementing the Canadian Telecommunications Policy Objectives* and in the Department's own *Spectrum Policy Framework for Canada*.

27. The Policy Direction provides as follows:

> (a) the Commission should
>
> (i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives, and
>
> (ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;

28. While the Direction was addressed to the CRTC, it pertains equally to the policy objectives cited by the Department in paragraph 4 of the Consultation Paper. It is therefore highly relevant to the proposed changes to the spectrum transfer policy and should be adhered to by the Department that helped formulate the Direction.

29. As noted by Bell Mobility in its submission, these policy objectives have also been incorporated in spectrum policy in the 2007 SPFC:

> (a) Market forces should be relied upon to the maximum extent feasible.
> . . .
> (d) Regulatory measures, where required, should be minimally intrusive, efficient and effective.
> . . .
>
> (f) Spectrum management practices, including licensing methods, should minimize administrative burden and be responsive to changing technology and market place demands.
> . . .
>
> (h) Spectrum policy and management should support the efficient functioning of markets by:
> . . .
> • facilitating secondary markets for spectrum authorizations;[19]

[19] Bell Mobility Comments, April 3, 2013, at para 28.

Impact on Incumbent Carriers

30. The proposed new policy appears to be aimed at limiting Incumbent carriers like Rogers from gaining access to additional spectrum. This is not in the best interests of Canadians.

31. As indicated above, Canadians already rank second out of 21 developed countries in wireless voice traffic usage per user - second only to the United States. According to Bell Mobility's initial comments, mobile data use in Canada is about to explode:

> …In this regard, Industry Canada's *Commercial Mobile Spectrum Outlook*, released on 6 March 2013, highlights this growth phenomena when it states that:
>
> …traffic over Canada's commercial mobile networks is expected to increase fifteen-fold between 2011 and 2017, from eight petabytes per month in 2011 to 122 petabytes per month in 2017 … To provide perspective, it is estimated that all of the information in every university research library in the United States would amount to just 2 petabytes of information. (Emphasis added) [20]

32. As also pointed out by Bell Mobility, Canada's capital expenditures per subscriber by the largest three Incumbents, was second only to Japan, and ahead of the U.S., France, Australia, U.K., Germany and Italy.[21]

33. With this level of network expenditures being made to support rapidly increasing demand, it is more important than ever for Canadian carriers to have ready access to the spectrum required to support their networks and their customers' needs. A policy designed to curtail that access will have a negative impact on the ability of Canadian wireless carriers to stay ahead of demand and support new technologies.

34. This point was made by QMI in its comments:

> Quebecor Media firmly believes that secondary market have a legitimate role to play in allocating spectrum resources and thereby enabling network operators to pursue their evolving business and technology strategies. Support for this position can be found in the Department's own *Spectrum Policy Framework for Canada*, which espouses both "the removal of barriers to secondary markets for spectrum authorizations" and "facilitating secondary markets for spectrum authorizations".

[20] Bell Mobility Comments, April 3, 2013, at para 7.
[21] Bell Mobility Comments, April 3, 2013, at para. 10.

> In our view, a distinction must be made between a pro-competitive policy that seeks to equitably distribute new spectrum resources based on a comprehensive market assessment at the time of auction, and an ongoing spectrum transfer review policy that risks impeding the future reallocation of spectrum resources to their most efficient uses. The first policy has proven its worth. The second policy stands to do more harm than good.[22]

35. Shaw has also pointed out that without regulatory certainty, secondary markets will not be able to respond in a timely fashion to the needs of a dynamic market:

> In order to thrive, a secondary market requires a high level of certainty with respect to the transferability rights represented by a spectrum licence and the underlying regulatory framework. The competitive marketplace continues to change rapidly as a result of many factors, including the availability of new spectrum, technological advancements, developments in the device ecosystem, and changes in consumer demand. It is critical for consumers that Canadian service providers have sufficient flexibility to respond to these changes in a timely fashion without being undermined in these efforts by an unstable regulatory environment where fundamental rules that are purported to be final and definitive are unpredictably changed, notwithstanding the fact that they were developed on the basis of an extensive public consultation process.[23]

36. The fact that the three largest incumbent carriers currently hold 85% of available spectrum in Canada should not be a cause of concern. They are using this spectrum to serve 90% of Canadian customers. There is no imbalance between the amount of spectrum they hold and the number of subscribers they serve.

Duplication of the Role of the Competition Bureau

37. A number of parties have pointed out that the proposed new policy will result in unnecessary duplication of the role of the Commissioner of Competition and the Competition Bureau in monitoring and controlling market concentration and anti-competitive conduct.

> ... However, the Department is not the only government agency with an interest in ensuring a viable competitive market in Canada. It must be recognized that this is primarily the responsibility of another government agency, the Commissioner of Competition and the Competition Bureau. The Department should be seeking ways to ensure that it does not unnecessarily duplicate the

[22] QMI Comments, April 3, 2013, at paras. 20 and 21.
[23] Shaw Comments, April 3, 2013, at para. 13.

functions of the Competition Bureau. The Department's expertise is in spectrum management and not competition policy. Furthermore, the Department lacks the suite of remedies available under the *Competition Act* to correct anti-competitive conduct. [24]

38. Bell Mobility has also argued that the Minister's existing powers of approval, coupled with the Competition Bureau's oversight of mergers and acquisitions, provides a sufficient safeguard in the absence of the new policy:

> Canada is a world leader in wireless with advanced, high-speed networks that rival those of any other nation including those with significantly larger populations. To ensure that Canada remains a leader in wireless it is critically important as reflected in Industry Canada's own SPFC, that facilitating secondary markets for spectrum is an integral part of Canada's spectrum policy program. Bell Mobility believes that the existing Ministerial approval required for spectrum transfers as well as the Competition Bureau's oversight of mergers and acquisitions provides Canada with more than sufficient powers to address any resulting concerns related to spectrum concentration and/or competition.[25]

39. In summary, the proposed changes to spectrum transfer policy:

- ignore the strong public policy reasons in favour of a competitive secondary market;
- are based on incorrect assumptions regarding the competitiveness of the Canadian wireless market;
- will have significant adverse effects on investment in new entrants;
- will hinder the ability of incumbent carriers to meet customer demand;
- will unnecessarily duplicate the function of the Competition Bureau; and
- if applied to spectrum that has already been auctioned, will undermine all bidders' rights acquired in that auction and undermine future confidence in Industry Canada's spectrum auctions, thereby reducing the Government of Canada's auction revenues.

[24] Xplornet Comments, April 3, 2013, at para. 10.
[25] Bell Mobility Comments, April 3, 2013, at para. 33.

40. For these reasons, the proposed changes to CPC-2-1-23 should be abandoned. If the Department nonetheless decides to proceed with the proposed changes, they should only be applied to future auctions and should not be applied retroactively to previously auctioned spectrum that was purchased based on a different set of rules.

Responses to the Consultation Paper Questions

6. Review of Spectrum Licence Transfer Requests

Industry Canada is seeking comments on:

6-1 The criteria and considerations set out above.

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.

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

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.

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.

Criteria and Considerations

41. While there was general support for the criteria and considerations that would go into a detailed review of a spectrum transfer application, a number of parties expressed the view that there was lack of clarity in how the criteria would be applied.

42. PIAC urged the Department to add the test used by the Competition Bureau to determine when an acquisition or merger has a significant anti-competitive impact.[26] Xplornet also submitted that the criteria were too imprecise and open-ended.[27]

[26] PIAC Comments, April 3, 2013, at para 10.
[27] Xplornet Comments, April 3, 2013, at para. 27.

43. QMI[28] and Shaw both submitted that the review process and proposed criteria were unnecessary and "invite confusion."[29] Mobilicity opposed application of the proposed criteria to auctioned spectrum.[30]

44. Only Bragg, Public Mobile, TELUS and TerreStar supported the criteria in the form proposed by Industry Canada.

45. Most of the criteria and considerations identified by the Department come into play in a competitive analysis for a merger review conducted by the Competition Bureau. Rogers does not appreciate why the Department would wish to duplicate a review of factors that would be considered by the Competition Bureau when a merger or acquisition is subject to notification.

46. However, if the Department does see fit to establish its own review process, Rogers agrees with PIAC and Xplornet that it should include a competition impact test rather than simply referring to a number of factors that it will consider. The Competition Bureau's test of whether a merger or acquisition prevents or lessens or is likely to prevent or lessen competition substantially is a well-understood test that is familiar to the Industry and the courts. It is the impact on competition that the Department should be considering if it moves forward on its proposal and that assessment includes a consideration of the necessity of competitive responses to the actions of other players in the market, as well as the viability of any companies being purchased. It is not sufficient to simply list a number of factors that will be considered by the Department in reviewing an acquisition or merger involving spectrum licences. The Industry must know the test that will be applied to judge the transaction and the factors that mitigate the exercise of market power.

47. The Department should also consider whether competitors of an operator that is seeking to acquire additional spectrum through a transfer have combined their respective spectrum holdings in order to jointly operate a network that is capable of delivering faster mobile data speeds. Although the proposed transfer may result in the operator holding more spectrum than each of its individual competitors, the relevant comparison is with the total amount of spectrum that has been combined and is jointly shared by the operator's competitors. This is important because it is the total combined amount of spectrum that will determine its competitors' mobile data speeds. The Department's analysis must allow an operator to acquire additional spectrum in order to offer mobile data speeds that will enable it to effectively compete with competitors who have combined their spectrum.

[28] QMI Comments, April 3, 2013, para. 3.
[29] Shaw Comments, April 3, 2013, at para. 60.
[30] Mobilicity Comments, April 3, 2013, at para. 18.

48. A number of other parties have made submissions on additional criteria for review of spectrum transfers. EastLink has suggested that the Department's review of any transfer should maintain the "long-term integrity of set-aside and spectrum caps."

> EastLink submits that the Department's review of any transfer or deemed transfer arrangement should maintain the long-term integrity of set-aside and spectrum caps. Otherwise, the new wireless businesses made possible by the 2008 measures will not be sustainable, as they do not have access via other means to the spectrum required to provide competitive wireless services to new customers or to meet the future data needs of their existing customer bases.[31]

49. This implies that once spectrum is set-aside for new entrants in an auction, it can only be sold to other qualified new entrants - even after the expiration of the five year restriction on transfer to incumbents.

50. The policy that was established in advance of the AWS auction clearly indicated that incumbents would be prohibited from acquiring set-aside spectrum for a period of no more than 5 years from the time of licensing. The Department could have set the restriction at 10 years or forever - but chose not to do so. This timeframe was arrived at after a full public consultation and careful deliberation by Industry Canada. Nowhere in the AWS auction policy is it stated that this prohibition might continue for a period of more than 5 years. Therefore, contrary to EastLink's suggestion, the integrity of the AWS set-aside has not been violated in any way.

51. Mobilicity has made a similar point to EastLink in paragraph 10 of its comments:

> …Additionally, it should be clarified by the Department that only new entrants can qualify to acquire spectrum that was originally part of a set-aside, which is more in keeping with the spirit and the intention of the rules of the AWS auction as well as current government policy.[32]

52. This of course would be much more than a 'clarification". It would amount to a retroactive change to what were very clear rights acquired by successful bidders. As discussed further below, Rogers finds this view expressed by Mobilicity to be totally inconsistent with Mobilicity's view that it must be able to sell its business, including its spectrum, to whoever it wants.

[31] EastLink Comments, April 3, 2013, para. 8.
[32] Mobilicity Comments, April 3, 2013, at para. 10.

53. EastLink has also called for an extension of the restrictions on sale of set-aside spectrum from 5 to 10 years.[33]

54. Effectively, EastLink is asking Industry Canada to modify the policy and conditions of licence that it set before the AWS auction. As Rogers and some of the new entrants have explained in their comments, this would be unfair to AWS auction licensees, would make it more difficult for new entrants to secure additional capital and would generally discourage investment in new entrants. EastLink is in a different position from other new entrants as it can leverage its BDU business to compete with the incumbents. As mentioned above, Mobilicity has also argued in paragraph 34 that licences should only be transferable as part of a going concern.

55. There is no requirement in the AWS policy or conditions of licence for licensees to tie the transfer of their spectrum to the sale of their business as a going concern. Such a restriction would render spectrum transfer rights no different than the limited transfer rights that apply to spectrum that has been licensed through a comparative review or first come, first served (FCFS) process. Effectively, Mobilicity is asking Industry Canada to amend the policy and conditions of licence that it set before the AWS auction. This contradicts Mobilicity's own argument that Industry Canada should uphold the spectrum transfer rights granted for auctioned spectrum.

56. In addition, Mobilicity's proposal would effectively eliminate the concept of a secondary market for auctioned spectrum. It would revert to the old policy applicable to radio licences. Elimination of a secondary market for spectrum would be a very retrogressive step. It would impede the industry's ability to make economically efficient use of spectrum and to respond to increased demand by consumers. It would prevent carriers that are actually running a business from acquiring spectrum they might need to better serve a region. It is obvious that Mobilicity would like the ability to sell its business to third parties, while limiting the ability of other carriers to gain access to additional spectrum. This is extremely self-serving and is not based on any public policy principle, other than to enhance the value of Mobilicity's business to third parties.

57. Mobilicity has also argued that where there has been no material roll-out of spectrum, transfers should not be permitted.

    The foregoing is consistent with the Department's licensing policies for mobile wireless spectrum. For example, while the Department's AWS Policy Framework did not specify specific roll-out obligations except in relation to roaming provisions for national new entrants (subsequently extended for all new entrants

[33] EastLink Comments, April 3, 2013, at para. 16.

> in DGSA-001-13), the Department did stipulate that failure to deploy or insufficient deployment over the licensed area would constitute a reason for non or partial renewal. Thus, even though the AWS Licensing Framework states that "deployment status would not form part of an evaluation of licence transfer if the date for the deployment requirement (rollout) has not yet arrived," where there has been no rollout whatsoever, or substantial non-use of the bulk of the transferor's holdings and no accompanying network build, such that the spectrum licence is in essence being "flipped," then the request for approval of a transfer should not be approved and the spectrum should be returned to the Department.[34]

58. The policy that was established in advance of the AWS auction clearly indicated that Industry Canada would "take into account" the rollout targets in the following limited circumstances: i) in considering the eventual renewal of AWS licences; and ii) in considering any application from a national new entrant for extension of in-territory roaming beyond the initial 5 years. There is no requirement in the AWS policy or conditions of licence for licensees to satisfy the rollout targets before transferring their spectrum.

59. In essence, Mobilicity is asking Industry Canada to amend the policy and conditions of licence that it set before the AWS auction. This again contradicts Mobilicity's argument that Industry Canada should uphold the spectrum transfer rights granted for auctioned spectrum. Further, Mobilicity itself points out (see paragraph 23 above) new restrictions on the liquidity of an investment in spectrum would deter investment in new entrants in the first place, thereby raising barriers to entry. It would be much harder for a new entrant to raise capital if, for example, it were prohibited from selling its excess spectrum or from receiving any proceeds for its spectrum if its venture did not proceed because it became uneconomic due to changes in market conditions.

60. WIND and Xplornet have made similar points arguing that when an applicant has not deployed spectrum, it should not be permitted to transfer it.

> b) the AWS licence conditions have permitted Shaw Communications to acquire but never use spectrum licences specifically set aside from the Incumbents for use in competition with the Incumbents, thus perverting the set-aside policy objectives. This has deprived WIND (and other new entrants that have taken up the challenge of providing competitive wireless services to Canadians) of a critical and scarce asset. Internationally-accepted principles of spectrum

[34] Mobilicity Comments, April 3, 2013, at para 35.

utilization and the spirit of the AWS spectrum set-aside policy suggests that the spectrum obtained by Shaw should have been revoked, sold, re-auctioned or otherwise made available to new entrants rather than continuing to remain unused. But nothing has been done;[35]

61. There is no basis for these actions in the AWS policy or conditions of licence that were set after the conclusion of a full public proceeding prior to the 2008 AWS spectrum auction. In Rogers' view, any attempt to change the rights acquired by successful bidders in the AWS auction retroactively prior to the renewal date of such licences could result in litigation and can be expected to devalue new entrant spectrum in both the secondary market and in subsequent auctions since there will be no faith in the Department's description of the rights being acquired for the initial ten year licence.

62. In any event, WIND has provided no evidence that it or any other new entrant has insufficient spectrum for its current purposes, that it needs Shaw's AWS spectrum in particular, or that any spectrum needs it has cannot be met by acquiring spectrum in the upcoming auctions.

Threshold, Screen or Cap that Should be Used

63. In its initial submission Rogers recommended that the Department consider the use of a threshold to determine whether a detailed review of a licence transfer is required.

64. Rogers noted that the *Competition Act* defines a threshold whereby parties must notify the Competition Bureau of any proposed transactions that involve the sale of assets with a book value that exceeds $80 million or revenues derived from those assets that exceed $80 million.[36] This is the threshold that currently applies, among other things, to the proposed sale of spectrum licences. Upon receiving any such mandatory notification, the Competition Bureau undertakes an assessment of the proposed transaction.

65. Rogers recommended that the Department adopt the same threshold for determining when to undertake a detailed assessment of a proposed spectrum transfer. It makes no sense for the Department to review small transactions that fall below this threshold. It would result in unnecessary administrative burden and

[35] WIND Comments, April 3, 2013, at para. 4(b); see also Xplornet Comments, April 3, 2013, at para. 21.
[36] *Competition Act*, part IX, subsection 110(2).

would impede the Industry from responding in a timely manner to network requirements.

66. There were a wide variety of views expressed by other interested parties respecting the need for a threshold to trigger a detailed review of spectrum transfers.

67. Mobilicity argued that the only threshold should be whether there are four competitors in a region. If there are, there should not be a detailed review.[37] Bragg, MTS, Public Mobile, SaskTel, TELUS, TerreStar and Xplornet supported the imposition of a threshold for a detailed review - but they all proposed different criteria with no two parties in agreement on what the threshold should be. One focused on a percentage of "available spectrum", one on "total spectrum holdings", one on the percentage of "usable spectrum", one on the three largest incumbent's share of spectrum, one on population served, one on percentage share of MHz or subs/MHz etc.

68. The trouble with all of these proposals is that they have very little to do with whether the proposed transfer of spectrum will significantly affect competition in a given local market - which is the purpose of the proposed review. In addition, most of the thresholds proposed focus on the three national incumbent carriers - ignoring the very large market shares held by SaskTel and MTS in their home provinces or the very small market share of Rogers in some provinces like Newfoundland, Prince Edward Island and Saskatchewan.[38] Lastly, none of the parties have made a sufficiently detailed spectrum threshold proposal that would allow the Department to develop a properly informed test.

69. In Rogers' respectful submission, it would be more sensible to utilize the tests established under the *Competition Act* which are well understood by the Industry.

70. Several parties, including Bell, Shaw and QMI oppose the imposition of any threshold for a detailed review of a proposed transaction. Some of these parties oppose any review by the Department of spectrum transfers arguing that such reviews are unnecessary given the jurisdiction of the Commissioner of Competition to review transactions that significantly affect competition in a market.

[37] Mobilicity Comments, April 3, 2013, at para. 28.
[38] CRTC Communications Monitoring Report, September 2012, p. 170.

71. These parties favour measures such as set-asides or spectrum aggregation caps that are imposed prior to the auctioning of spectrum - not after the fact in the manner purposed by the Department.[39]

72. Rogers agrees with these parties that it is inappropriate for Industry Canada to influence market outcomes at the level of the secondary market. The time for manipulating the market is at the time of the auction, if it is necessary at all. Rogers' comments on the threshold issue are therefore without prejudice to its general position that the proposed review process is entirely unnecessary and is bad public policy.

Treatment of Deemed Spectrum Licence Transfers

73. The proposed definition of deemed spectrum licence transfers provides as follows:

> "deemed spectrum licence transfer" means any agreement or transfer that has the effect of transferring, dividing or creating an interest in a spectrum licence in that it provides for the acquisition or control of a licence through a change in ownership and control of a licensee; or otherwise has the intent to determine who controls use of the spectrum other than the original licensee.[40]

74. In its initial comments, Rogers stated that it has no objection to transfers of control being treated as spectrum transfers when the company being acquired holds spectrum licences.

75. However, Rogers expressed concern about use of the words "intent" and "effect" in the proposed definition. They are unnecessary and make the definition subjective and vague. Either an agreement transfers, divides or creates an interest in a licence in that it provides for the acquisition or control of a licence through a change in the ownership and control of a licensee - or it does not. The intent of the parties is irrelevant.

76. In light of these concerns, Rogers proposed that the definition of deemed transfer be amended as follows:

> "deemed spectrum licence transfer" means any agreement that results in the ownership or control of a spectrum licence through a change in ownership and

[39] Bell Mobility Comments, April 3, 2013, at para. E9; see also Shaw Comments, April 3, 2013, at para. 35; and QMI Comments, April 3, 2013, at para. 4.
[40] Consultation Paper, p. 3.

control of a licensee; or otherwise results in a person other than the licensee controlling use of the spectrum.

77. Rogers also noted that the wording of the definition also appears to be broad enough to catch security agreements whereby a company pledges its assets, including spectrum licences, or possibly shares, to a lender. It would cause an enormous administrative burden for the Department and for Licensees if it were necessary to apply to the Department for approval every time a pledge of assets was made to support a loan. In Rogers' respectful submission, security agreements should be excluded from the definition of deemed spectrum licence transfers.

78. Another concern with the apparent breadth of this definition relates to its potential overlap with the definition of "prospective transfer" in paragraph 25 of the Consultation Paper. An option to purchase either a spectrum licence or a company that holds a spectrum licence might reasonably be interpreted to involve "creating an interest in a spectrum licence in that it provides for the acquisition or control of a licence through a change in ownership and control of a licensee; or otherwise has the intent to determine who controls use of the spectrum other than the original licensee". The concept of "an interest" is much broader than the concept of a transfer or division of a licence - terms that have precise legal meanings. For these reasons, Rogers respectfully submitted that deemed spectrum licence transfers should be defined to exclude any transactions falling within the definition of a prospective transfer. In order to accomplish this, the definition of "prospective transfer" should be included in the definition section of the policy and should be expressly excluded from the definition of deemed transfer.

79. Paragraph 19 of the Consultation Paper also indicates that licensees will be required to notify Industry Canada in advance of "finalizing a deemed licence transfer" and that a licensee that finalizes a deemed licence transfer in the face of an indication by the Department that it would refuse the approval, would be in breach of its licence conditions. Rogers questions why any unique rules would be required for the treatment of deemed transfers since the Department is proposing to treat them as actual transfers. Once it is determined to treat them as actual transfers, the Department needs only to have a set of rules for treatment of actual transfers.

80. In addition, the words "finalizing a deemed licence transfer" or "finalizing" an actual transfer are imprecise and too broad for a rule the breach of which could result in a breach of the terms of a licence possibly giving rise to revocation of licence under the *Radiocommunication Act*. Rather than create new rules that are imprecise, the Department should continue to rely on a standard condition of licence that prohibits spectrum licence transfers without the prior approval of the Minister. This can be

expanded by a provision that includes deemed spectrum licence transfers in the definition of spectrum licence transfers. This approach would be consistent with commercial reality and result in a more precise and understandable regime.

81. Most of the parties agreed with the proposal regarding "deemed transfers". Xplornet took the same position as Rogers that financing arrangements should be excluded from the definition of deemed transfers.[41] Other parties did not comment on the other issues raised by Rogers. Rogers urges the Department to seriously consider these other points which are designed to clarify the distinction between "deemed transfers" and "proposed transfers" by making them mutually exclusive.

Publication of Spectrum Licence Transfer Requests

82. In its initial submission, Rogers noted that spectrum transfer arrangements are competitively sensitive. It would be highly prejudicial to the parties associated with the proposed agreement if all information associated with a given transaction was publicized.

83. Rogers supported the notion that spectrum licence transfer requests will be publicized only under the following conditions. The Department should maintain the confidentiality of financial information and other sensitive details associated with actual or deemed transfers and should disclose only key information, such as the fact that an application for approval of a transfer of spectrum licence has been filed with the Department, the parties involved, and the spectrum licences associated with the proposed transaction.

84. In addition, to the extent that interested parties will be invited to provide the Department with their comments regarding the proposed transaction, Rogers recommended that the parties to the proposed transaction should be provided with the right to reply to any such comments. This will ensure that the claims made by other parties regarding the proposed transaction will be adequately scrutinized and tested.

85. Under no circumstances should notice of a "prospective transfer" of a spectrum licence be provided to the public.

86. Once again, a wide variety of opinions were expressed on this issue, ranging from complete confidentiality (Mobilicity, SaskTel, TELUS, WIND) to an open and public process (MTS, Public Mobile, TerreStar and University of Alberta). Xplornet's position was closer to Rogers'. It advocated disclosing the parties, the licences

[41] Xplornet Comments, April 3, 2013, at para. 35.

being transferred and whether a detailed review will be conducted. It opposed publication if the parties are not permitted to enter into binding agreements in advance of approval.[42]

87. Rogers thinks that this approach strikes the right balance. *Pro forma* disclosure of the parties and the spectrum involved in the case of executed agreements ought not to prejudice the parties. On the other hand disclosure of the terms of an agreement should be held confidential. If there is a right for third parties to comment, there should be a right of reply and reasons for a decision should be published.

Other Suggested Changes

88. A number of parties proposed other changes which, for the most part have nothing to do with the licence transfer policy under consideration.

89. EastLink has alleged that Incumbents have subjected new entrants to unreasonable roaming rates and tower sharing delays.[43]

90. The mandatory roaming and tower sharing policy established by Industry Canada provided that roaming and tower sharing must be provided at commercial rates and terms. All disputes on rates and terms are subject to binding arbitration. If EastLink believes that roaming and tower rates are "unreasonable", then it should have availed itself of arbitration.

91. WIND has also made this point and has suggested that negotiations for rates and terms "has been demonstrated not to work".[44]

92. Industry Canada has already considered and rejected alternatives to commercial negotiations for roaming and tower sharing. Further, since WIND and several other new entrants have successfully negotiated roaming and tower sharing arrangements with incumbents such as Rogers, it is clear that the use of commercial negotiations has been a success in terms of allowing new entrants to enter and compete in the Canadian wireless market.

93. WIND has also suggested that tower sharing rates should be cost-based.[45]

94. Industry Canada has already considered and rejected the use of cost-based rates for mandatory roaming and tower sharing. As recently as March 2013, Industry

[42] Xplornet Comments, April 3, 2013, at paras. 39-42.
[43] EastLink Comments, April 3, 2013, at para. 14.
[44] WIND Comments, April 3, 2013, at para. 4(d).
[45] WIND Comments, April 3, 2013, at para 4(c) and (d).

Canada upheld its previous decision to use commercial rates. This followed a full public consultation in 2012 in which certain parties argued that cost-based rates should be used.

95. WIND has also suggested that Industry Canada should constrain the incumbents' use of long-term contracts.[46]

96. This issue is already the subject of an on-going CRTC proceeding that is intended to develop a wireless code of conduct. In any event, long term contracts are very popular with Canadians since they provide customers with the option of spreading the considerable up-front cost of their wireless device over a longer timeframe. Canadians should continue to have the option of signing long-term contracts.

97. WIND states that Industry Canada should set aside a minimum of 2x10 MHz of spectrum for new entrants.[47]

98. Industry Canada has already set-aside one block of 2x10 MHz and two blocks of 2x5 MHz of AWS spectrum for new entrants. This has allowed new entrants to enter and compete in the wireless market.

99. It has also effectively done this again in the pending 700 MHz auction by capping incumbents' accumulation of prime spectrum blocks.

100. WIND also argues that Incumbents must be restricted from acquiring more spectrum since they will obtain spectrum based on the value of "market foreclosure".[48]

101. Wind's concern regarding market foreclosure is a red herring since Wind and several other new entrants have already acquired spectrum and entered the Canadian wireless market. Wind and other new entrants successfully bid for set-aside AWS spectrum and Public Mobile successfully bid for non-set-aside PCS "G" block spectrum. Incumbent carriers cannot foreclose the wireless market to these competitors by acquiring additional spectrum through auctions or spectrum transfers.

102. Finally, WIND has suggested that where a transfer will result in a three-player market, buyers should be required to provide MVNO access in order to have a spectrum transfer approved.[49]

[46] WIND Comments, April 3, 2013, at para. 20(c).
[47] WIND Comments, April 3, 2013, at para. 20 (b).
[48] WIND Comments, April 3, 2013, at para. 18, 20(b).
[49] WIND Comments, April 3, 2013, at para. 24(b).

103. Once again, the Department has considered and rejected mandatory resale arrangements. It has opted instead for facilities-based competition ensuring access to spectrum to new entrants and mandatory roaming and tower sharing. If a fourth carrier is not in the market, it is not for lack of spectrum. It is because investors do not think the market can sustain a fourth carrier.

7. Timelines

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

104. In its initial submission Rogers submitted that detailed reviews should be completed as expeditiously as possible so that operators will have access to additional spectrum to deploy new services, provide faster data speeds and satisfy growing demand for more capacity. One of the drawbacks of the proposed new regime is the potential for delaying transactions between carriers that are trying to make new investments in infrastructure to respond to consumer demand or the need to upgrade networks to accommodate new technology. Prolonged regulatory processes such as the one proposed have to impede the ability of carriers to respond dynamically to market conditions and to meet customer expectations.

105. For these reasons, Rogers urged the Department to reduce the timelines proposed in the Consultation Paper for detailed reviews.

106. Bell, Public Mobile, SaskTel and TerreStar all supported the proposed timelines, although TerreStar proposed adding time to the proposed 16 week period for a detailed review in order to conduct a public process.[50]

107. Most other parties supported the four week period for normal transfers - but considered the 16+ week period for detailed reviews to be too long. Mobilicity, for example, submitted that an extra three weeks on top of the four week process for a normal transfer would be sufficient for a detailed review.[51] WIND advocated for a maximum of 8 weeks for a detailed review.[52] Shaw argued for harmonization with the Competition Bureau timelines[53] as did Xplornet and TELUS.[54]

[50] TerreStar Comments, April 3, 2013, at para 22.
[51] Mobilicity Comments, April 3, 2013, at para. 42.
[52] WIND Comments, April 3, 2013, at para. 30.
[53] Shaw Comments, April 3, 2013, at para. 79.
[54] Xplornet Comments, April 3, 2013, at para. 50; see also TELUS Comments, April 3, 2013, at para. 39.

108. The consensus of the parties who submitted comments on this issue is that the timelines for normal transactions is about right, while the timelines for detailed reviews is too long. Rogers agrees with the consensus and urges the Department to reduce the timelines for detailed reviews or to at least harmonize them with the Bureau's timelines.

8. Prospective Transfers

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.

109. In its initial comments Rogers questioned the purpose of the preliminary assessment if it is non-binding. It would make more sense to make the preliminary assessment process available at the option of the parties to the prospective transaction, rather than to make it mandatory as the Department has proposed.

110. Shaw agreed with making the preliminary assessment optional and confidential,[55] as did Xplornet.[56]

111. Bell, QMI, WIND and TELUS were all of the view that the preliminary review process serves no useful purpose.[57]

112. Only PIAC, Public Mobile, SaskTel and TerreStar supported the proposal.

113. Given these comments, there appears to be a strong consensus that the preliminary review process is not necessary and should either be dropped or made optional at the request of the parties to the transaction.

114. The fact that the preliminary determination is non-binding renders this process of limited value. The fact that the parties are not permitted to sign a prospective transfer agreement means that there may in fact be no real agreement to review and the fact that the agreement is prospective means that complete confidentiality must be maintained making any determination by Industry Canada of very little value for the guidance of third parties.

[55] Shaw Comments, April 3, 2013, at para. 82.
[56] Xplornet Comments, April 3, 2013, at para. 51.
[57] Bell Comments, April 3, 2013, at paras. 42 and 45; see also QMI Comments, April 3, 2013, at para. 40; WIND Comments, April, 3, 2013, at para. 32; and TELUS Comments, April 3, 2013, at para. 42.

115. In short, the review of prospective agreements (except at the option of the parties to the agreement) will serve no useful purpose.

116. If, notwithstanding these defects, the Department decides to proceed, Rogers is concerned with the lack of specificity in the proposed new notification and review process. Clearly the intention is to catch transactions that involve spectrum transfers or divisions at a later date - but on its face the proposed provision could catch many types of agreements that the parties would wish to close as soon as possible were it not for regulatory approval requirements. For example, at the present time, spectrum purchase agreements make the closing of spectrum transfers subject to the Department's approval and, in some cases, *Competition Act* approval. Such approvals are usually conditions precedent to closing. Due to the timelines involved in obtaining such approval, it is possible for closing to be delayed for a considerable period of time. These types of agreements that call for closing within a short period of time after receiving all applicable regulatory approvals should not be considered "prospective transfers". Such transactions are in fact the norm and should be treated as current applications to transfer.

117. The vagueness of the term "prospective" also needs to be refined if the new rules are to be readily understood and provide proper guidance to the Industry. Given the types of delays that are common in regulatory reviews under the *Competition Act*, as well as by the Department, Rogers considers that an agreement of purchase and sale for the transfer of spectrum, or for the acquisition of a company that holds spectrum licences, should only be considered to be prospective if closing of the transaction is stated in the agreement to be either more than one year after execution of the agreement, or more than two months after receipt of all regulatory approvals that are stated to be conditions precedent to the closing of the licence transfer or merger.

118. Rogers also has concerns about confidentiality of any prospective transfers if they have to be notified to the Department in advance of execution. In such circumstances, without an executed agreement, all documentation must be kept strictly confidential including the fact that there is a potential deal. Failure to do so would result in extreme prejudice to the parties.