INDUSTRY CANADA GAZETTE NOTICE DGSO-002-13

CONSULTATION ON CONSIDERATIONS RELATING TO TRANSFERS, DIVISIONS, AND SUBORDINATE LICENSING OF SPECTRUM LICENCES

REPLY COMMENTS OF SHAW COMMUNICATIONS INC.

MAY 3, 2013

A. Executive Summary

1. Canada's mobile wireless market has been the subject of heightened public attention of late. This has prompted a debate on whether Industry Canada's rules relating to spectrum licence transfers should be changed through proposals contained in the Department's *Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences,* DGSO-002-13 (the "Consultation Document"). In the view of Shaw and several other parties to this proceeding, adopting the proposals in the Consultation Document would be contrary to public policy and the interests of both Canadian consumers and the industry as a whole, both on a prospective and retrospective basis.

2. Industry Canada's power to make changes to the spectrum licence transfer rules is not unlimited. It is circumscribed by a combination of factors, including:

    i. The Government of Canada's policy objectives for Canadian telecommunications as expressed in section 7 of the *Telecommunications Act,* the Governor in Council's 2006 direction to the CRTC (the "Policy Direction") on implementing the policy objectives set out in the Act and Industry Canada's own policies, all of which outline such key principles as reliance on market forces to the maximum extent feasible, efficient, effective and minimally intrusive regulatory measures, minimal interference with competitive market forces, and the efficient functioning of markets through clear definitions of the obligations and privileges conveyed in spectrum authorizations;[1]

[1] See *Telecommunications Act,* S.C. 1993, c. 38, s.7; *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, SOR/2006-355 December 14, 2006; Industry *Canada's Decision to Rescind the Mobile Spectrum Cap Policy*, DGTP-010-04, August 28, 2004; and Industry Canada's *Spectrum Policy Framework for Canada*, June 2007.

ii. The existing rights of AWS licence holders who made significant investments to purchase spectrum licences based on a clear, published, and binding set of rules established by Industry Canada, and from whom the Government of Canada received more than $4 billion in revenues for the Treasury; and

iii. Industry Canada's duty to act fairly and in a manner consistent with its enabling legislation and its own established practices and procedures, including section 5.3 of its *Licensing Procedure for Spectrum Licences for Terrestrial Services*, CPC-2-1-23, September 2007 which states that the Minister's power to amend the terms and conditions of spectrum licences would only "be exercised on an exceptional basis".[2]

3. The foregoing must necessarily inform the decisions Industry Canada ultimately makes with respect to the proposals contained in the Consultation Document. Shaw submits that, properly informed, Industry Canada should not adopt the proposals prospectively and cannot adopt the proposals retrospectively. Adopting the proposals in the Consultation Document would create a high degree of regulatory and investor uncertainty. This would threaten competition, investment, innovation, and consumer choice, and would contradict several of Industry Canada's policies and rules. It would also be precipitous and unnecessary.

a) The Proposals Create Uncertainty and Threaten Competition

4. If the Department revises its rules for spectrum transfers, as proposed in the Consultation Document, this would undermine confidence in the stability of Canada's regulatory framework. In particular, applying changes on a retroactive basis to AWS licences would be unfair to all participants in the AWS auction, including Shaw. This instability and regulatory uncertainty would inhibit, rather than promote, competition, investment, service deployment, innovation and the efficient use of scarce spectrum resources for the benefit of consumers. New entrants would find it more difficult to

[2] CPC 2-1-23, page 3.

obtain financing and to change strategies in response to evolving consumer demands and the dynamism of the wireless marketplace.

b) The Proposals are Unnecessary, Opaque and Confusing

5. The apparent aim of the Consultation is to promote clarity in the licence transfer review process. However, as noted by many parties, the proposed review criteria and requirements are unnecessary and would likely cause more harm than good. There is already a well-established process for the review of spectrum licence transfers and the proposals in the Consultation Document would only add unnecessary layers of complexity and ambiguity.[3] This in turn would undermine the Government's express objectives of ensuring an open, efficient, and transparent regulatory framework that relies on market forces to the maximum extent feasible and only adopts regulatory measures that are efficient, effective, and minimally intrusive.

c) The Proposals are Inconsistent with Existing Policies and Undermine the Secondary Market

6. Shaw and other parties to this proceeding recognize the critical importance to competition of implementing light-handed regulatory measures to ensure access to spectrum resources. To date, Industry Canada's policy has been to establish limitations on spectrum holdings prior to the licensing of new spectrum and only after conducting extensive public consultations, as was the case for the AWS, 700 MHz and 2500 MHz bands. The proposals in the Consultation Document run the risk of re-opening policy debates that have already occurred, further to which decisions were made and published. In the case of AWS spectrum, Shaw and other competitors relied on those decisions in spending billions of dollars on spectrum and network deployment.

7. If the proposals set out in the Consultation Document are adopted, this would also fundamentally erode or remove the enhanced transferability and divisibility rights that

[3] See the Comments of Bell, paras. E2 and 4; Quebecor, para. 3; Shaw, para. 51; and Rogers, paras. E6 and 11.

currently attach to auctioned licences. This would place a chill on the secondary market for spectrum resources in Canada, to the disadvantage of Canadian carriers and consumers.

d) The Proposals Fundamentally Change the Existing Approval Processes

8. If applied to existing AWS licences, the proposals would fundamentally change the existing approval process by incorporating broad, far-ranging public policy considerations into a transaction between two commercial parties. The proposals would also add new terms and conditions regarding deemed transfers and prospective transfers.

9. Such a process would seriously erode, if not entirely remove, key attributes of the licences: enhanced transferability and divisibility rights. Those rights played a significant role in developing the valuations that bidders used to compete in the AWS spectrum auctions. AWS licence holders and their investors necessarily relied on, and, indeed, were required to be bound by, a framework of rules established by Industry Canada which Industry Canada now seeks to fundamentally and unilaterally change, midstream, having already taken the full economic benefit therefrom.

10. Public policy and fairness, let alone the limits on Industry Canada's authority, preclude the adoption of such proposals. There is no exceptional basis which would support what would amount to a unilateral amendment to the licences. This would negatively impact the industry as a whole and prejudice and harm existing AWS licence holders.

B. Out-of-Scope Matters

11. Shaw notes that some parties raised issues and proposals in their comments that go beyond the scope of this Consultation. Shaw does not intend to address those submissions in these reply comments.[4] However, Shaw notes that many of these

[4] Any failure on the part of Shaw to address other issues or arguments raised by interested parties to this proceeding should not be construed as agreement with or acceptance of such issues or arguments, where to do so would be contrary to Shaw's interests.

comments are driven by concerns about the prospects of new entrants in the Canadian wireless market as well as other competitive concerns.[5] Shaw submits that these concerns cannot be addressed by changing the rules on licence transferability mid-stream. In fact, such retroactive measures would exacerbate these parties' concerns rather than resolve them.

12. As Shaw and others have explained in their comments,[6] the most appropriate and effective time for the Department to evaluate the spectrum needs of new entrants and establish rules to promote entry is prior to the auction of new spectrum. The Department should not seek to micro-manage the market to protect particular competitors. However, it can, and has, implemented light-handed measures to ensure competitive entry and sustainability, including the AWS spectrum set-aside and the related 5-year transfer restriction. Those rules must be maintained in order to ensure a stable regulatory environment that takes a consistent approach. This will ensure that the Canadian wireless market is attractive to current and prospective new entrants and their investors.

C. Shaw's Entry into the Wireless Market

13. Shaw notes that some parties included comments in their submissions on the current state of development of AWS spectrum. For its part, Shaw also provided a lengthy description of its efforts to deploy a conventional wireless network as well as its decision to shift its strategy to construct a carrier grade WiFi network. Although some parties may not have been aware of these efforts, it should be more than evident from Shaw's comments that it did not acquire its AWS licences for speculative purposes. Accordingly, any implicit or explicit assertions by other parties that Shaw's intention has been to merely "flip" its spectrum holdings for profit should be disregarded in light of the facts clearly set out in Shaw's comments. As previously noted, Shaw paid $190 million in the AWS auction for its spectrum licences and then spent a further

[5] See, in particular, the comments of Public Mobile and Wind.

[6] See the Comments of the following parties: Quebecor, paras. 4 and 33; Xplornet, para. 13; Shaw, paras. 39-45.; Mobilicity, paras. 18-19; Bell, paras. E4 and E9; and Rogers, para. 14 and 17.

approximately $190 million in planning and building a conventional wireless network. Although Shaw did not complete that network, Shaw determined that it could better serve the needs of its customers by developing a WiFi network. As a result, Shaw has launched the Shaw Go WiFi network, which is already the largest WiFi network in Canada. Shaw Go WiFi is uniquely positioned to respond to Canadian consumers' growing needs for cost-effective access to broadband services while on-the-go.

14. As the Department itself has acknowledged in its recent *Commercial Mobile Spectrum Outlook*,[7] WiFi is becoming more important around the world, and Shaw is the leading WiFi network provider in Canada. Part of the proceeds of Shaw's recently announced transactions with Rogers and Corus will be used to accelerate its WiFi investment and therefore significantly enhance wireless broadband services for consumers throughout Western Canada. Shaw Go WiFi provides a compelling alternative for wireless broadband that allows Shaw's customers to access a premium Internet service at hot-spots throughout Western Canada for no additional charge. Shaw has invested, and will continue to invest, many millions of dollars in Shaw Go WiFi and has engaged hundreds of employees to deploy and maintain the network and service.

15. The fact that Shaw ultimately chose to enter the market using different bands of spectrum and a different technology platform should not be discounted when considering its role in the wireless market. It should also be noted that Shaw is not alone in pursuing a wireless strategy that does not conform to the conventionally accepted mobile wireless model. Unfortunately, as noted by Xplornet, there appears to be "a near-obsessive" focus on mobile services and applications at the present time "which ignores the fact that there are other services using spectrum for fixed wireless applications".[8] According to Xplornet, this undue focus on mobile wireless services "discourages entry and investment by companies… that see an opportunity to provide a

[7] Industry Canada, *Commercial Mobile Spectrum Outlook,* March 2013.
[8] Comments of Xplornet, para. 6.

service to Canadians that does not fit within the expectations of Industry Canada" and "forecloses the development of these services for the benefit of Canadian consumers."[9]

16. Shaw agrees with Xplornet's concerns in this regard. The wireless market is dynamic, constantly evolving and not limited to conventional mobile services. Shaw's decision to move from a conventional wireless strategy to a carrier-grade WiFi network highlights the dynamism in the wireless market, which is also echoed in the following comment by Quebecor:

> *The mobile wireless industry is incredibly dynamic. New consumer devices and consumption trends emerge very quickly (think of the mobile tablet sector). New equipment types are developed to help operators manage the stresses on their networks (think of WiFi offloading and femtocells). And technologies that were once cutting edge quickly become out-of-date and even an encumbrance.*[10]

17. Given the dynamic nature of the industry, it is all the more important for the Department to ensure a stable regulatory environment. This will support the ability of competitors to adjust to changes in the market and respond to evolving consumer needs through innovation and investment. The regulatory environment should not penalize new entrants and their investors for finding novel ways to respond to market forces.

D. Regulatory Uncertainty and Unfairness

18. Without question, the most significant concern raised by parties to this Consultation is the regulatory and investment uncertainty that would be created by the rule changes that are being proposed by the Department, particularly if these changes are applied on a retroactive basis to spectrum licences that have already been auctioned. Licences obtained through a spectrum auction are different from other spectrum licences where, for example, fees are levied by the Department on an annual basis. In the case of auctioned licences, all fees associated with these licences are paid up-front before the

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9 *Ibid.*

10 Comments of Quebecor, para. 18.

licences are even issued. It is important, therefore, that the rules applicable to these licences are clearly delineated in advance of the auction and that prospective bidders have some certainty regarding the rules because it is these rules that form the basis of their decision to participate in the auction and the valuations that bidders use to prepare bids for the blocks of spectrum that are made available in the auction.

19. As Shaw and several other parties noted in their comments, the licensing rules that were developed for AWS spectrum were based on significant public input provided over three separate public consultation processes spanning a total of four years. Over the course of these proceedings, Industry Canada decided to eliminate an overall spectrum cap that had previously been in place for mobile wireless spectrum and adopted, instead, a spectrum set-aside for new entrant spectrum coupled with a 5-year restriction on transfers of set-aside spectrum.[11]

20. On the basis of these clear and transparent rules, several parties signed up to participate in the AWS auction and, in doing so, confirmed their understanding and acceptance of the rules. Indeed, as noted by Rogers, participants in the AWS auction were required to execute a binding Deed of Acknowledgement (the "Deed") in advance of the auction pursuant to which they agreed to be bound by all of the terms and conditions applicable to the licensing of AWS spectrum.[12] In fact, the Minister of Industry also explicitly indicated in the Deed his own acknowledgement of the receipt and "sufficiency" of the "considerations" that led to the auction applicant's agreement to be bound by the terms and conditions of the auction:

> *In consideration of the Minister of Industry ("Minister") holding a spectrum auction in accordance with the Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range, published December 2007, the Minister's approval of the Applicant's participation in this auction,*

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11 See *Consultation on Spectrum for Advanced Wireless Services and Review of the Mobile Spectrum Cap Policy*, DGTP-007-03, October 18, 2003*; Decision to Rescind the Mobile Spectrum Cap Policy*, *supra,* note 1; and *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, DGTP-007-07, December 8, 2007.

12 Comments of Rogers, para. 20.

> *and other good and valid considerations, the receipt and sufficiency of which are hereby acknowledged by the Applicant and the Minister…*[13]

21. On the basis of this understanding with the Minister, the parties that participated in the AWS auction, including Shaw, prepared valuations and competed vigorously in the auction, which raised over $4 billion for the Government. Given the process involved in developing the rules and the auction itself, as well as the financial significance of the auction proceeds, parties have a reasonable and legitimate expectation that the auction rules and licence conditions will be honoured by the Department. Fairness dictates that these rules be honoured, as do the Department's own policies and guidelines.

22. Several parties to this proceeding, including Wind, Mobilicity, Bell, Quebecor, Rogers, Xplornet and Shaw have noted that when the regulatory environment becomes unstable or uncertain through rule changes such as those proposed in the Consultation Document, this poses a number risks to competitors in the market and threatens to undermine the Government's policy objectives of encouraging competition, robust investment, innovation and deployment.[14] For example, Wind noted that "competition depends directly on creating an environment that attracts and facilitates capital investment."[15] However, this environment would be threatened by "policy-based restrictions on spectrum transfers."[16] In particular, these restrictions would "cause less investment by new entrants," "lower the availability of funding for further expansion by new entrants," and "cause higher costs of financing."[17]

23. A similar observation was made by Mobilicity in its comments. In fact, Mobilicity noted that the mere suggestion that the Department might change the rules that apply to transfers of spectrum licences can and, indeed, has created a climate of regulatory and

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13 *Application to participate in the Auction for Spectrum Licences for AWS and other Spectrum in the 2 GHz range*, Attachment A - Deed of Acknowledgement, emphasis added.

14 These objectives are described in the Consultation Document, at pages 1-2.

15 Comments of Wind, para 2.

16 *Ibid*, paras. 6 and 16.

17 *Ibid*, para 19.

investment uncertainty which threatens competition and is particularly harmful to new entrants:

> *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."*[18]

24. It was clear at the time of the AWS auction and remains clear today that licences for set-aside spectrum cannot be transferred to the incumbents until five years after they have been issued. However, beyond this requirement and the need to seek the Minister's prior approval to any transfer in accordance with the procedures set out in CPC 2-1-23, there are no limits on the transferability of AWS licences.

25. To make significant changes to the rules at this stage, including the new criteria and processes contemplated by the Consultation Document, would be fundamentally unfair to existing holders of spectrum licences and represent a radical alteration of the terms upon which bidders agreed to participate in the AWS auction. As noted above, the Department established clear rules relating to the transferability of AWS licences, it required bidders to accept and be bound by those rules prior to participating in the auction, and it has an established set of procedures that apply to any transfers of terrestrial spectrum licences (as set out in CPC 2-1-23). These rules not only state that licences obtained through a spectrum auction have enhanced transferability and divisibility privileges (thereby making them more easily transferrable than other licences), they also state that the Minister's power to amend the terms and conditions of spectrum licences would only "be exercised on an exceptional basis".[19]

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[18] Comments of Mobilicity, para 8.

[19] CPC 2-1-23, page 3.

26. This is consistent with the Department's *Spectrum Policy Framework for Canada*, which was published in advance of both the auction framework and licensing rules for AWS spectrum. In particular, section (h) of the "Enabling Guidelines" of the Spectrum Policy Framework states that "[S]pectrum policy and management should support the efficient functioning of markets by… *clearly defining the obligations and privileges conveyed in spectrum authorizations*."[20]

27. Given this backdrop, it is no wonder that so many parties to this proceeding have expressed concerns about the proposals contained in the Consultation Document, particularly if they are applied on a retroactive basis. These measures would be profoundly unfair. They would have a significant impact on actions and investments that have already been taken or made by bidders (and their investors and lenders) at the time of the last auction.

28. Such measures would also affect actions and investments that are being considered and made today in preparation for the upcoming auctions of spectrum in the 700 MHz and 2500 MHz bands. Prospective participants in those auctions and their investors and financiers need certainty that the fundamental rules established in advance of those auctions will be maintained throughout the terms of their licences. If the rules governing the transfer restrictions in the conditions of licence can be changed mid-stream, this would discourage prospective domestic and foreign bidders from participating in these and future auctions, thereby reducing spectrum auction revenues for the Government and undermining the effectiveness of future auctions in allocating spectrum as efficiently as possible for the benefit of consumers.

29. This was a consistent and recurring theme in the submissions of new entrants and incumbents in this proceeding and it underscores Shaw's view that competition would be threatened, not enhanced, if the Department were to impose any further restrictions on the transferability of AWS licences. As Rogers notes, imposing further restrictions in the conditions of AWS licences could result in the devaluation of AWS spectrum and any

[20] Industry Canada, *Spectrum Policy Framework for Canada*, June 2007, page 9, emphasis added.

spectrum auctioned in the future and could "dampen new entry" by increasing the risks "if [new entrants] fail to establish a viable wireless business."[21]

30. The submissions of other parties attest to the fact that the proposals contained in the Consultation Document are already having a direct negative impact on financing prospects. Even though the Government has taken measures to liberalize the rules regarding Canadian ownership and control for certain telecommunications carriers, those measures will have no positive impact on access to financing if the regulatory environment is uncertain. As the Department knows, some of the new entrants have already obtained equity and other financing from several non-Canadian sources. Creating an unstable and opaque regulatory environment for those investors, and future investors, is highly prejudicial and will only make it more difficult for new entrants to attract financing in the future.

31. For these reasons, Shaw submits that if the Department decides to change the rules for spectrum licence transfers, it should only do so on a prospective basis in relation to spectrum licences that have yet to be auctioned. Even so, the Department can only make changes on a basis that retains clear rules which are fair, consistent with the Government's policy objectives, and define licence obligations and privileges in advance.

E. The Proposed Changes Are Unnecessary

32. Shaw also agrees with the arguments of several other parties that the new criteria and requirements proposed in the Consultation Document are unnecessary and would likely cause more harm than good.[22] A well-established process is already in place for the review of spectrum licence transfers and any new criteria would only add unnecessary layers of complexity and ambiguity.

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[21] Comments of Rogers, para. 30.

[22] See the Comments of the following parties: Mobilicity, paras. 13-19; Bell, paras. E2 and 4; Quebecor, para. 3; and Rogers, paras. E5 and 11.

33. The current process that is applied to the transfer of terrestrial spectrum licences is set out in CPC 2-1-23. This document explains that the transfer of a spectrum licence is subject to several conditions and guidelines, including compliance with eligibility criteria and other conditions of licence.[23] CPC 2-1-23 further specifies that "[W]ritten notification to the Department is required for all proposed licence transfers, including a declaration from all interested parties that the points above (i.e. compliance with the eligibility criteria and other conditions of licence) have been satisfactorily addressed."[24]

34. Unfortunately, the Consultation Document gives the erroneous impression that the review criteria set out in CPC 2-1-23 are lacking in substance or clarity. However, CPC 2-1-23 expressly states that transfers must comply with the conditions of each licence which, in the case of auctioned licences, would include the auction and licensing rules that have been established by the Department for those licences. In practical terms, this means that the Department can conduct reviews of spectrum licence transfer requests that take into account all of the detailed rules that apply to a specific band of spectrum. This approach is more relevant and, therefore, more effective[25] than the approach contemplated by the Consultation Document.

35. In fact, as noted by each of Shaw, Quebecor and Telus, the approach contemplated in the Consultation Document (which appears to involve the adoption of static spectrum thresholds) is problematic because spectrum availability and use is constantly changing. This is highlighted by the fact that the Department will be undertaking two spectrum auctions in the coming months and has committed to further increasing the overall amount of commercial mobile spectrum available in its recently released *Commercial Mobile Spectrum Outlook*. As noted by Telus:

> *…objective thresholds based on spectrum holdings statistics are, by definition, static measures. However, spectrum statistics are dynamic. Notably, total spectrum allocated in the marketplace is scheduled by*

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23 CPC 2-1-23, page 4.

24 *Ibid*, page 5.

25 Comments of Bell, para 5.

> *the Department to grow significantly for the next ten years, at least, as a result of band re-farming to meet the growing demand for mobile broadband. As a result, thresholds are a moving target that will need to be revisited so that the thresholds are regarded as meaningful.*[26]

36. As Shaw argued in its comments, the use of a "moving target" for purposes of spectrum transfer reviews will, by definition, be accompanied by regulatory uncertainty and instability. In addition, it would be an extremely complex process to define a suitable threshold even for the limited purpose of determining whether a detailed review is appropriate for a particular transaction. This would require the Department to obtain detailed evidence on multiple issues, including: the relevant product market, which is constantly evolving; the relevant geographic market; the types of spectrum that should be included in a possible threshold; and the appropriate method for determining the value of different spectrum bands.[27] None of these issues were addressed in any detailed manner in the Consultation Document, nor have parties to the Consultation provided detailed submissions on these points.

37. In Shaw's view, the existing process for spectrum licence transfers is effective, efficient and functions well. There is no need to introduce new measures or processes. The proposals in the Consultation Document would contradict, rather than promote, the aim of this Consultation, which is to enhance the clarity of the spectrum transfer process.

F. The Proposals are Inconsistent with Existing Policies and Rules

38. One reason why so many parties have expressed concerns in relation to the proposals set out in the Consultation Document is because, in many respects, they run directly contrary to the Government's own policies and rules.

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[26] Comments of Telus, para. 21. Quebecor also noted at para. 32 of its Comments that, in the context of "substantial ongoing spectrum releases, we have serious doubts as to whether it is at all relevant for the Department to perform a detailed case-by-case analysis of existing spectrum holdings whenever two parties wish to engage in a secondary market spectrum transaction."

[27] For further detail on this point, please see the Comments of Shaw, paras. 62-63.

39. First, the proposals contradict the Department's long-standing practice of establishing spectrum caps, transfer restrictions and other spectrum-related rules in advance of the auction of a particular band of spectrum. This practice was confirmed in the Department's policy decision to establish limitations on spectrum holdings "at the time of licensing new spectrum."[28] As Quebecor notes:

> *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 allocation 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*.[29]

40. In addition, the proposals run directly counter to several key principles in the Enabling Guidelines to the *Spectrum Policy Framework for Canada*, including the following:

- *Market forces should be relied upon to the maximum extent feasible;*
- *Regulatory measures, where required, should be minimally intrusive, efficient and effective;*
- *Regulation should be open, transparent and reasoned, and developed through public consultation, where appropriate;*
- *Spectrum management practices, including licensing methods, should minimize administrative burden and be responsive to changing technology and market place demands; and*
- *Spectrum policy and management should support the efficient functioning of markets by… clearly defining the obligations and privileges conveyed in spectrum authorizations.*[30]

41. As discussed in this section and throughout these reply comments, adopting the proposals in the Consultation Document would undermine market forces, as well as efficient, effective, minimally intrusive and transparent regulation. The proposals include unnecessary and opaque processes and requirements and, if they were applied

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28 *Decision to Rescind the Mobile Spectrum Cap Policy, supra*, note 1.

29 Comments of Quebecor, para. 21. Bell also echoed this point at para. E9 of its Comments when it noted that "the time to implement measures to promote access to spectrum is at the time of licensing and auctioning new spectrum".

30 *Spectrum Policy Framework for Canada, supra,* note 1.

retroactively, the proposals would re-define established rules that have already been "conveyed in spectrum authorizations" that have already been auctioned. The proposals would also increase the administrative burden for the industry and make it more difficult for competitors to respond to changing consumer needs and marketplace demands, including changes in technology. The uncertainty and unfairness created by changing the rules mid-stream and the ambiguity of the proposed requirements would also undermine the prospects for new entrants, thereby hindering competition.

42. In all of these respects, the proposals also contradict the telecommunications policy objectives set out in section 7 of the *Telecommunications Act* which include, among others, the objective to "enhance the efficiency and competitiveness of Canadian telecommunications" and the objective "to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation where required is efficient and effective."[31] They are also inconsistent with the Governor in Council's 2006 Policy Direction to the CRTC, which emphasized that, in implementing the Canadian telecommunications policy objectives set out in section 7 of that Act, the CRTC should:

> *(i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives, and*
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> *(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.*[32]

43. Finally, the proposals set out in the Consultation Document directly conflict with the findings of international experts, the recommendations of the Telecom Policy Review Panel ("TPRP") and the Department's own decisions regarding the importance of a properly functioning secondary market to the efficient use of spectrum.

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[31] *Telecommunications Act*, *supra,* note 1, sections 7(c) and (f).

[32] Policy Direction, *supra*, note 1.

44. A number of parties to this proceeding, including Shaw, Quebecor, Rogers and Bell noted that the secondary market plays a key role in allocating spectrum resources. The Department itself has recognized this fact and has included a specific Enabling Guideline in its *Spectrum Policy Framework*, which provides that spectrum policy and management should support the efficient functioning of markets "by facilitating secondary markets for spectrum authorizations".[33]

45. Likewise, both the TPRP and the Department's own externally retained experts have recommended that greater reliance be placed on market-based approaches to spectrum management and that barriers to the development of secondary markets in spectrum be eliminated.[34]

46. If the proposals set out in the Consultation Document are adopted, this would erode, if not entirely remove, the enhanced transferability and divisibility rights that currently attach to auctioned licences. As noted by Quebecor, these proposals would "put a chill on the secondary market for spectrum resources in Canada, to the disadvantage of Canadian carriers and consumers."[35] They would undermine the function of a secondary market in spectrum licences and, as a consequence, the role of market forces in ensuring an efficient allocation of spectrum for the benefit of consumers.

47. As a final comment on the subject of consistency, Shaw notes that even though Mobilicity expressed support in its comments for the enhanced transferability rights that attach to auctioned spectrum and the importance of a secondary market for spectrum, it also suggested that a licence should not be transferable "unless it is accompanied by other business assets and is being used as part of a going concern."[36] This proposal should be disregarded as it is flatly contradicted by the current rules applicable to spectrum licence transfers which clearly permit transfers of licences on either a standalone basis or as part of a going concern. Mobilicity's proposal is also

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33 *Spectrum Policy Framework for Canada*, *supra*, note 1, page 9.
34 Comments of Bell, paras 20-25
35 Comments of Quebecor, para 7.
36 Comments of Mobilicity, para. 34.

inconsistent with its overall position in this proceeding that the proposals contained in the Consultation Document are unnecessary and potentially harmful. More importantly, if adopted, Mobilicity's proposal would undermine the fundamental purpose of spectrum management and policy, which is to ensure the most efficient allocation of spectrum resources for the benefit of consumers. Mobilicity's proposal would effectively ensure that unused spectrum is kept longer in the hands of parties that do not plan to use it, even when that may be the result of legitimate changes to strategies or business plans that are needed to better respond to the needs of consumers. Also, as suggested by Quebecor, a transfer of spectrum that has not been deployed has less potential competitive impact than a transfer of spectrum as part of a going concern.[37] There is simply no reasonable basis for imposing this arbitrary rule proposed by Mobilicity.

48. Nor is there any basis for paying regard to Wind's assertion that "the spectrum obtained by Shaw should have been revoked, sold, reauctioned or otherwise made available to new entrants."[38] This submission, as well as Wind's undefined proposal of a "right of first offer" for "non-incumbents"[39] would constitute an unjustified, highly prejudicial revision to the AWS conditions of licence. These suggestions are clearly inconsistent with current rules and policies and would unjustifiably punish Shaw for shifting its strategy in response to changing consumer and marketplace demands after Shaw has spent $190 million on spectrum and another roughly $190 million on a conventional wireless network.

G. Deemed Transfers

49. As indicated above, a number of parties to this Consultation have argued that there is no need to change any of the existing rules that apply to transfers of spectrum licences,

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37 Quebecor para 35.
38 Wind, para 4.
39 Wind, para. 18.

including the rules that would apply to deemed transfers of spectrum licences, because the existing rules adequately address these matters.[40]

50. Other parties have noted that if the Department's intention is to require that the transfer of a radio spectrum licence includes both a transfer of the licence itself as well as a transfer of control of the licence holder (through the sale of shares or otherwise), there is no need to introduce a standalone definition of a deemed spectrum transfer to address this issue.[41] The Department could simply make this requirement clear in its rules.

51. In Shaw's view, the definition for deemed transfers proposed in the Consultation Document (reproduced immediately below) is confusing, vague, and could have a number of unintended negative consequences.

> *"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."*

52. For example, Xplornet notes that the Department's proposed definition of a deemed spectrum transfer would capture standard financing arrangements (e.g., vendor financing from radiocom equipment manufacturers) in which the holder of a radio spectrum licence has granted a security interest in its property.[42] If competitors must seek approval from the Department every time they enter into financing arrangements involving a security interest in their assets, this could significantly restrict competitor access to financing and, ultimately, restrict competition.

53. One solution to this problem, as proposed by Xplornet and others, is to exclude such arrangements from the definition of deemed spectrum transfers, so that entities can

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40 See, for example, the Comments of Bell Mobility at para. 37 and Quebecor at para. 40.

41 See the Comments of Xplornet, para. 37 and Rogers, para. 42.

42 Comments of Xplornet, para. 35.

"raise capital in typical secured financing transactions without triggering the spectrum transfer rules."[43]

54. If the Department wishes to encourage competition in the market, it should not impose any further limitations on the ability of competitors to gain access to critical sources of financing by introducing complicated and unnecessary approval processes for security agreements. As Public Mobile notes in its comments, "[T]he Government should be largely indifferent to the origins of capital..."[44] If a creditor wishes to realize on any security interests that may have been granted to it pursuant to a security agreement, the current process would require the creditor to obtain the prior approval of the Department before the licences could be transferred into its own name.

55. A further problem with the proposed definition of a deemed spectrum transfer is that it makes use of vague and highly subjective terms such as "effect" and the "intent to determine control". As noted by Rogers, an agreement either "provides for the acquisition or control of a licence through a change in the ownership and control of a licensee – or it does not."[45] If the purpose of creating a definition for deemed spectrum transfers is to capture instances where licences are transferred through a change of control, then there is far more straightforward language that can be used to achieve this result.

56. Likewise, there is no need to introduce a new procedural rule which would require parties to notify the Department of a "deemed licence transfer" (as proposed at paragraph 19 of the Consultation Document) because deemed licence transfers would be treated as actual licence transfers under the Department's proposal, which means that the parties to these arrangements must obtain the prior approval of the Department before giving effect to their arrangement.

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43 *Ibid,* para. 35. See also the Comments of Rogers, para. 44.
44 Comments of Public Mobile, para. 9.
45 Comments of Rogers, para. 42.

57. With respect to Public Mobile's suggestion that the definition of a deemed spectrum transfer should include an "option or similar agreement" and also be kept "broad enough to capture other types of transactions that may not yet have been contemplated, but would have the same effect,"[46] Shaw submits that this proposal fails to recognize the legal distinction that was made by the Department in the Consultation Document between deemed spectrum transfers, on the one hand, which essentially involve the *de facto* transfer of a spectrum licence, and option arrangements, on the other hand, where an option to transfer a spectrum licence is granted, but there is no transfer of the licence until the option is actually exercised and all requisite regulatory approvals have been obtained.

58. In Shaw's view, the purpose of the Department's "deemed spectrum transfer" proposal is to change the transfer rules so as to capture instances where a spectrum licence is being transferred from one party to another through a change in control of the licensee. It is not intended to capture instances where there is no actual transfer of the licence.

59. Public Mobile's proposals would broaden the definition of a deemed spectrum transfer to the point where it would have no legal meaning, and the process for spectrum licence transfers would be opaque and impossible to interpret or apply.

60. Once again, assuming the scope of the Department's intention is limited to capturing indirect transfers of spectrum licences through a change in control of the licensee, Shaw would support the adoption of a much more clear and straightforward definition, such as the following version proposed by Rogers:

> *"deemed spectrum licence transfer" means any agreement that results in the ownership or control of a spectrum licence through a change in the ownership and control of a licensee; or otherwise results in a person other than the licensee controlling use of the spectrum.*[47]

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[46] Comments of Public Mobile, para. 31.

[47] Comments of Rogers, para. 43.

H. Prospective Licence Transfers

61. A number of parties to this proceeding, including Shaw, have pointed to several flaws with the Department's proposal to introduce a condition of licence which would require notification of a prospective licence transfer prior to entering into a binding agreement.

62. For example, both Xplornet and Rogers noted that the typical spectrum transfer agreement does not provide for the immediate transfer of a spectrum licence upon execution of the contract.[48] Instead, it is normal commercial practice to specify in the contract that the spectrum licence will transfer at a later date, once the Department's approval for the transfer has been obtained. In other words, even though the parties to the transaction have entered into a binding agreement which evidences their intention to transfer a spectrum licence, there is no transfer of legal title in the spectrum licence itself – nor could there be – because this step can only be completed after the Department approves the transfer.

63. Given this commercial backdrop, the Department's proposal for prior notification of "prospective" licence transfers raises a number of practical concerns. First, because notification to the Department must be made *before* the parties have entered into a binding agreement, Telus points out that "it is not clear at what point discussions between two parties would lead to a situation where notification to the Department is required."[49] Indeed, because many commercial negotiations never reach the stage where they are actually binding, the Department might find itself "conducting preliminary assessments of possible deals that never materialize."[50]

64. Second, the Department could find itself repeatedly in situations where it has carried out preliminary assessments of licence transfer arrangements that bear no resemblance to the arrangements that are ultimately entered into by the parties. Once again, this is because the parties would have to notify the Department of a prospective licence

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48 See the Comments of Xplornet, para. 25 and Rogers, para. 58.

49 Comments of Telus, para. 43.

50 *Ibid*, para. 43.

transfer before they have entered into a binding agreement and because nothing is binding at that stage, the terms of the arrangement can easily change. As noted by Rogers, "one often doesn't know a binding agreement has been reached until the agreement is actually executed and delivered."[51]

65. The Department's proposal to conduct preliminary reviews of non-binding arrangements is highly unusual and, indeed, inconsistent with how commercial transactions involving regulated assets are normally structured. It is instructive to note in this regard that the *Competition Act* does not require parties to a proposed merger to submit a notification of a proposed transaction to the Competition Bureau in advance of the completion of an agreement.

66. A further problem with the Department's proposal to conduct preliminary assessments is that it raises serious confidentiality concerns. As noted by Shaw, the facts surrounding proposed spectrum licence transactions (especially those which are not yet binding on the parties) constitute highly sensitive commercial information which could materially impact the negotiations between the parties if even the existence of the transaction is disclosed on the public record.[52] In fact, as Xplornet points out, the disclosure of such information on the public record "means third parties could attempt to sabotage the transaction."[53] Clearly, any form of public disclosure by the Department of non-binding arrangements would be highly prejudicial to the parties involved and could deter pro-competitive transactions.

67. Another concern that was raised by interested parties with respect to the Department's proposal to conduct mandatory preliminary reviews of "prospective licence transfers" is that these reviews could add significant and unnecessary delays to the overall review process. As noted by Telus:

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51 Comments of Rogers, para. 61.
52 Comments of Shaw, para. 86.
53 Comments of Xplornet, para. 42.

> *As the Department is well aware, time is normally of the essence to parties when transferring spectrum. If the procedures noted in the Consultation under section 6 are put in place, parties have potentially a 20-week period to wait until final Department approval of a spectrum transfer is officially granted, more if additional information is required at the review stages.*[54]

68. Given that the Department is not proposing to make its preliminary assessment of prospective licence transfers binding, it is not at all clear what additional benefit would be gained by making such reviews mandatory. As noted by Wind, "'Preliminary' reviews and approvals are unhelpful and do not provide the requisite certainty."[55] In fact, Telus points out that if "the intent of this condition of licence is to ensure that Departmental approval of a spectrum transfer is obtained, then this condition of licence is not required because the relevant statutes already require such approval."[56]

69. Shaw agrees with these submissions. There is no need to introduce a condition of licence that applies to "prospective licence transfers" because both the *Radiocommunication Act* and the existing conditions of licence require the Department's prior approval for any transfer of a spectrum licence.

70. Given these considerations, not to mention the impracticality of conducting preliminary assessments of non-binding arrangements, Shaw requests that the Department not impose the proposed condition of licence regarding mandatory reviews of prospective licence transfers.

I. Confidentiality

71. Several parties to this proceeding, including Mobilicity, Wind, Quebecor, SaskTel, Rogers, Bell and Telus noted that because spectrum licence transactions take place in

[54] Comments of Telus, para. 45.
[55] Comments of Wind, para. 32.
[56] Comments of Telus, para. 42.

the secondary market, they are highly commercially sensitive in nature and, therefore, should be reviewed on a confidential basis by the Department.[57]

72. Shaw agrees. Public disclosure of the details of these transactions would provide competitors with extremely sensitive commercial information and therefore cause significant financial and business harm, not only to the parties to the transaction itself, but also to other parties that are potentially affected by the transaction, such as investors, creditors and suppliers.

73. Moreover, as noted by Mobilicity, the disclosure would undermine confidence in the regulatory process and place particular hardship on new entrants; it would represent

> *(a) a fundamental change to the licensing process not contemplated when investments in new entrants were originally made (b) it would serve to further the impression that the transfer process is open to uncertainty and thus further constrain the ability of new entrants to raise capital and (c) it would undoubtedly elongate the process of a transfer, which for reasons elaborated upon below could be catastrophic to a new entrant.*

74. In its comments, Shaw noted that because of the commercially sensitive nature of the information involved in spectrum licence transfer transactions, the Department should maintain all such information in confidence during the review process. In addition, while Shaw does not object to the disclosure of certain non-confidential information once the review process has been completed, any such disclosure of information by the Department should be consistent with the approach of the Competition Bureau.

75. This recommendation is consistent with the submissions of several other parties who have urged the Department to align certain procedural rules for licence transfer reviews with those of the Competition Bureau. Indeed, as noted by Telus, "the Department

[57] See the April 3, 2013 Comments of the following parties: Mobilicity, para. 32; Wind, para. 28; Quebecor, para. 29; Bell, paras. E10 and 38, SaskTel, para. 25; Rogers, para. 49; and Telus, para. 32.

spectrum review processes must be confidential or else it would conflict with the Competition Bureau's confidential review processes for mergers and acquisitions." [58]

J. Timelines

76. A number of parties agreed with the Department's proposal to adopt a one-month review period for routine spectrum licence transfers, but argued that a four-month period for detailed reviews was too long.[59]

77. For example, Wind characterized the proposed timelines as "excessive",[60] while Mobilicity noted that "sixteen weeks is far too long a timeframe to such detailed review and would have a fundamental negative impact upon a new entrant."[61] Mobilicity also noted that "for the (currently) unprofitable new entrants, sixteen weeks can lead to untold millions of dollars of losses, while waiting for a decision on a licence transfer that can significantly change their fortunes hopefully for the better."[62]

78. Other parties, such as Telus and Xplornet, have asserted that a four month review process is not consistent with the review timelines that have been adopted by other regulatory and administrative authorities and that, at a minimum, the Department should bring its review timeframes into alignment with the best practices of these other agencies.[63] For example, Xplornet points out that:

> *Industry Canada needs to be mindful that transactions of a significant scale may also be subject to review by other authorities, including the Competition Bureau, the CRTC and Investment Canada. There may also be other required timelines to be followed, such as the rules of a stock exchange in a public take-over, or the timelines of international competition or regulatory authorities if a multinational is involved. Xplornet strongly urges Industry Canada to align its*

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58 Comments of Telus, para. 33.

59 See, for example, the Comments of the following parties: Shaw, para. 84; Bell, para. 44; Telus, para. 45; and Rogers, para. 63.

60 Comments of Wind, para. 30.

61 Comments of Mobilicity, para. 40.

62 *Ibid*, para. 41.

63 See the Comments of Telus, paras. 38-39 and Xplornet, paras. 48-50.

review timetable with one of the more established timetables to facilitate complex transactions.[64]

79. Shaw agrees with these parties. The four-month review period proposed by the Department in the Consultation Document for detailed reviews should be shorter, and in any event no longer than the Competition Bureau's timelines. In addition, any revisions that are made by the Department to CPC 2-1-23 should include commitments by the Department to complete its reviews as quickly as possible following receipt of a spectrum licence transfer request.

K. Fundamental Change to Existing Licences

80. In addition to the negative and deleterious effect that retrospective application of the proposals would have on consumers and the industry in the future, the proposals contained in the Consultation Document would fundamentally change rights which have already accrued to existing holders of AWS licences. As indicated above, the existing rules state that licences obtained through a spectrum auction have enhanced transferability and divisibility privileges.

81. While the AWS licences contain a provision through which the Minister retains discretion to amend their terms and conditions, the Minister cannot do so if it would unilaterally and fundamentally change existing rights and contravene principles of fairness, natural justice, and the policy objectives, rules and procedures established when those rights were acquired.

82. In section 5.3 of CPC 2-1-23, licensees are informed that the terms and conditions of spectrum licences will only be changed "on an exceptional basis and only after consultation."[65] No such exceptional basis exists or has been demonstrated by the Department or by any other party to this proceeding. In addition, there has not been the type of consultation that would be required to properly consider this issue. With

[64] Comments of Xplornet, para. 49.
[65] CPC 2-1-23, page 3.

that being said, there is no degree of consultation that could change the Minister's inability to change the fundamental rights that have accrued to AWS licence holders.

83. In most contexts, retrospective application is unacceptable, for the very reason that it affects, and indeed violates, rights that have already accrued and actions already taken. Changing the consequences at a later stage creates uncertainty and undermines confidence in any market as parties are at a loss as to how to structure their affairs or measure their actions.

84. The fact that the proposals are contrary to the Government's existing policies and rules[66] is particularly germane to consideration of any retrospective application. The Department must act fairly and in a manner that is consistent with both its enabling legislation and its own established policies, practices and procedures.

85. The Government of Canada has received a substantial economic benefit from the AWS spectrum auction and cannot now unilaterally remove a fundamental attribute of what was bought and paid for by parties acting in good faith on the representations of the Department. Industry Canada asked AWS auction participants to follow a prescribed set of rules, to expressly agree to be bound by those rules, and to make significant investment and business decisions on the basis of those rules. Auction participants did what they were asked. It would be fundamentally unfair and prejudicial to alter radically what they acquired as a result. Bidders in the auction had a reasonable and legitimate expectation that they would receive the benefits obtained under the terms and conditions of their licences, the "receipt and sufficiency of which" were acknowledged by the Minister. This expectation is underscored by fairness and the Government's own policies, procedures, and past practices. The spectrum auction rules were proposed by the Department, a lengthy and in-depth public consultation ensued, and then the rules were finalized. They cannot now be re-written.

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[66] See, for example, the list of policies and rules set out in *supra* note 1.

L. Conclusion

86. For all of the foregoing reasons, Shaw submits that the proposals contained in the Consultation Document are wholly unnecessary and, indeed, inconsistent with current policies, rules and procedures. In addition, the proposals will not advance the Consultation's aim to increase the clarity of the spectrum transfer review process. Instead, the proposals would create:

i. A high degree of regulatory and investment uncertainty, which will undermine the prospects for new entrants in Canada and the Government's policy objectives of promoting competition, innovation, investment, service deployment and consumer choice;

ii. A loss of confidence in the stability, transparency, efficiency and effectiveness of Canada's regulatory regime and the reliability of the Department's rule making authority, which will hinder the effectiveness of spectrum auctions going forward; and

iii. A chill on transactions in the secondary market for wireless spectrum, thereby undermining the efficient allocation of spectrum for the benefit of consumers through market forces and the ability of competitors to respond to technological and marketplace developments and evolving consumer needs.

87. Shaw does not support the proposals contained in the Consultation Document. However, if the Department determines that proposals should be implemented, the Department must only do so on a prospective basis in relation to spectrum licences that have yet to be auctioned. No exceptional circumstances have been demonstrated by the Department or any parties to this Consultation that would support the application of the proposed modifications to the AWS conditions of licence. In fact, no such exceptional circumstances exist.

88. Simply put, the Department cannot unilaterally change these rules mid-stream. To do so would fundamentally alter rights which have accrued to the AWS licence-holders who relied on them in deciding to participate in the AWS spectrum auction and in developing valuations for the bids which resulted in billions of dollars in revenues to the Government. Such changes would prejudice and harm AWS licence-holders and would not fall within the scope of the Minister's authority to modify the terms of the AWS spectrum licences. This Consultation does not alter that fact.