TELUS COMMUNICATIONS COMPANY

Reply Comments for

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

DGSO-002-13
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Spectrum Management and Telecommunications

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Executive Summary

1. TELUS appreciates the opportunity to provide its reply comments in the Department's *Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences*, DGSO-002-13 (the "Consultation"). In these reply comments, TELUS responds to the positions noted by various parties in this proceeding.

2. Virtually every party in this Consultation has supported the need for a well-functioning secondary market for spectrum licences. Because spectrum is a scarce resource, transfers of spectrum licences are a vital part of ensuring that licensed spectrum is in the hands of parties that can use it most efficiently for the benefit of Canadians. The need for an expedient approval process for spectrum licence transfers was stated by incumbents, national new entrants and regional wireless service providers alike. The interest in this Consultation is high because creating an administratively burdensome review and approval process could severely affect the approval process for spectrum licence transfers, which, in turn, would deprive spectrum licences to parties that are best positioned to put them to use.

3. In its comments, TELUS supported the Department's efforts as part of this Consultation to propose a framework as to the approval process for spectrum licence transfers and to solicit views on its proposals. TELUS' support derived from its understanding that the purpose of the Consultation was for the Department to provide clear and objective rules as to how spectrum licence transfer requests are to be treated. A well-designed framework to review licence transfers based on a clear set of objective criteria would be of significant assistance to the transfer process.

4. In general, TELUS supports the proposed framework because it recognizes that while all transfers require Departmental approval, only some will require a detailed review. This allows for the rapid approval of transfers of spectrum licences that will have little, if any, anti-competitive effects, meaning the benefits of efficient and effective spectrum utilization can be brought to the marketplace more quickly.

5. Ministerial approval is necessary for any spectrum licence transfer, but it appears that many view the current approval process as automatic, especially for spectrum licences acquired by way of auction. However, as TELUS noted in its comments, the Minister's approval is discretionary, not automatic. The danger is it that this discretion could be used in a manner that is capricious or subjective, giving rise to potential transactions being denied for opaque or invalid reasons. On the other hand, objective criteria lead to discretionary decisions that are based on legitimate reasons. As a result, TELUS views this Consultation as a means to assist parties because criteria would indicate, at the outset, how a proposed transfer would be treated by the Department, and in particular, whether the transfer would be automatically subject to a detailed review.

6. Many parties have also voiced comments that this Consultation should serve as an avenue to restrict some parties from acquiring spectrum through commercial transfers. Notably, some parties repeat the Department's statement that Rogers, Bell and TELUS "hold licences for approximately 85% of all currently usable mobile spectrum in Canada."[1] Parties such as Eastlink [2] raise these spectrum statistics to imply that incumbent transactions should be subject to detailed reviews (or denied altogether) while their own transactions should be approved in cursory fashion.

7. TELUS stringently disagrees with positions that lump TELUS in with Bell and Rogers when it comes to spectrum holdings. Grouping TELUS along with Bell and Rogers ignores the spectrum allocation statistics that are public information and that TELUS has repeatedly brought up in past consultations with the Department. In fact, TELUS holds the least spectrum of the three national incumbents, by a wide margin[3].

8. As TELUS has suggested, the most relevant metric in assessing spectrum need, *subscribers per MHz-pop*, holds the most promise for guiding the Department in its determination of which proposed licence transfers should trigger a detailed review and ultimately, whether there are any grounds to deny a proposed transfer.

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[1] Consultation, para 10.
[2] Comments of Eastlink, para. 3 and 6.
[3] As highlighted in previous consultations, TELUS holds 15% to Bell's 29% and Rogers' 41% of the allocated commercial mobile spectrum in Canada (which adds up to 85% but ignores TELUS' 3:1 disadvantage to Rogers and TELUS' 2:1 disadvantage to Bell.) See: http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf09949.html#s4.2

9. In the remainder of these Reply Comments, TELUS goes through each of the questions raised by the Department in the Consultation and points out where parties have erred in their positions or have made cogent points worthy of further consideration.

TELUS' Reply to Specific Questions Posed by Industry Canada

6. Review of Spectrum Licence Transfer Requests

Industry Canada is seeking comments on: 6-1 The criteria and considerations set out above.

10. In section 6 of the Consultation, the Department has proposed a revision to CPC-2-1-23 that sets out the procedures related to requests involving the transfer, division or subordinate licensing of all spectrum licences. In the Consultation, the Department has proposed that upon receipt of any spectrum licence transfer request, it will first make a determination whether a "detailed review" is required.

11. Some parties, such as Rogers,[4] Quebecor, Shaw,[5] Bell[6] and Mobilicity,[7] have all asserted that spectrum licences obtained by way of auction were obtained with conditions of licence that included enhanced transferability and divisibility rights. These parties claim that any revision of CPC-2-1-23 in the manner contemplated by the Consultation would violate these rights.

12. TELUS agrees with the basic premise that conditions of licence should not generally be disturbed during a licence term, but accepts that the Minister always holds the discretion to amend the conditions of licence at any time after a public consultation on the issue. More importantly, TELUS does not believe that setting out the criteria as to the process and manner in which the Department's approval for a proposed spectrum licence transfer would be granted is a detraction of any transferability rights.

13. Given that the Minister has ultimate responsibility and authority to approve or deny any transfer, setting out a clear framework as to the approval process is consistent with the transferability rights granted under the conditions of licence. In fact, provided that the criteria selected are realistic, meaningful and based on sound economic principles, such a

[4] Comments of Rogers, para. 16.
[5] Comments of Shaw, para. 8 and 11.
[6] Comments of Bell, para. 3-4.
[7] Comments of Mobilicity, para. 4.

framework is preferable to a process where parties have no concrete view as to how the Minister will apply its statutory discretion.

14. In the Consultation, the Department has proposed that when conducting a detailed review of a licence transfer, it will examine whether approval of the spectrum licence transfer would impact:

    a. the efficiency and competitiveness of Canadian telecommunications market;

    b. the availability, quality or affordability of services available to consumers; and/or

    c. the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource.

15. In its comments, TELUS agreed with the criteria listed above because they examine the competitive context effects that a proposed spectrum licence transfer could have. These considerations are consistent with the Canadian telecommunications policy objectives set out in the *Telecommunications Act*[8] and Minister's powers under the *Radiocommunication Act*.[9] Most notably, the Department's proposed considerations are directly aligned with these specific Canadian telecommunications policy objectives.

16. TELUS adds that these competitive context criteria must be assessed in a manner that is logical with the particular transaction at hand. Some transactions might seem immaterial on the surface but actually have deep ramifications. As stated by Xplornet, a transfer of a single licence is unlikely to have an effect on the efficiency or competitiveness of the entire Canadian market. However, a single licence being transferred could foreclose competitive broadband services in a Tier 4 area of Canada.[10]

[8] See the Canadian telecommunications policy objectives under section 7 of the Act.
[9] Section 5(1) of the *Radiocommunication Act* allows the Minister, prior to the issuance of any spectrum licence, to take into account all matters for the "orderly development and efficient operation of radiocommunication in Canada." In addition, section 5(1.1) of the Radiocommunication Act allows the Minister to have regard to the Canadian telecommunications policy objectives from section 7 of the *Telecommunications Act*.
[10] Comments of Xplornet, para. 19.

17. Some parties, such as Rogers[11] and PIAC, have proposed that the Department approve or deny a spectrum transaction based on the Competition Bureau's test of whether the acquisition would "prevent or lessen" competition substantially. It is important to note that the Competition Bureau's test derives from the abuse of dominance provisions from the *Competition Act*.[12] While there is no similar statutory basis for the Department to apply these same dominance criteria at the detailed review stage, factors such as "efficiency and competitiveness of the Canadian telecommunications market" and "affordability of services available to consumers" imply a similar type of market dominance consideration to be conducted by the Department.

18. While using a test that includes the exact language under the Competition Bureau's merger enforcement guidelines might not be necessary and most probably would be duplicative of the Bureau review in many instances, TELUS does agree that the impact on competition should be the fundamental consideration of any detailed review conducted by the Department. Of note, given that the wireless marketplace in Canada is not one where any individual wireless service provider holds market power, a transaction that would garner the transferee market power is one that should be examined closely, and potentially rejected.

19. Having said that, TELUS does not believe that a strict market power test would definitively answer the question as to whether a transaction should be approved. In its comments, Mobilicity noted that the Department should consider the effect upon the parties, as well as the wireless marketplace, should a transfer be denied, and what viable options still remain for the applicant.[13] Mobilicity's position underscores that approval of a transaction will always be based on the circumstances. This is consistent with TELUS' position that in order to prevent fettering of discretion, the Minister must still exercise discretion as to whether the transaction is approved or denied regardless of whether the transaction meets some prescribed standard.

[11] Comments of Rogers, para. 33.
[12] Section 79, *Competition Act*.
[13] Comments of Mobilicity, para. 27.

20. Globalive suggests that approval of a spectrum licence transaction that would result in a three-player only market in one or more areas be subject to a "deeper analysis" prior to obtaining approval. This deeper analysis would entail whether the selling company would be in a position to continue to operate under reasonable profitable terms; and whether the buying party is willing to provide an MVNO to guarantee competition.[14]

21. Globalive's position should be dismissed. The Minister's desire for four wireless operators in every region should not, in and of itself, be used as an approval screen for spectrum licence transfers. The Department's analysis should be based on the market circumstances, the competitive context criteria that it has listed above, and in particular, whether the licence transfer could cause a market power position for the transferee. The actual number of market participants is less important than the issue of whether there would be market power.

22. In addition, Globalive's criteria for its deeper analysis are irrelevant. Setting aside the many problems of trying to determine "reasonable profitable terms" for the selling party, such a criterion would impose a requirement that a party maintain its spectrum position regardless of whether it wanted to exit the wireless business or shed some of its spectrum holdings. The Department is not empowered to impose a requirement that a party stay in business when it has no desire to continue. In addition, there is no requirement for mandatory resale of wireless services in Canada. The Department should not impose one on a party simply wishing to acquire spectrum via a secondary market transfer. For these and other reasons, Globalive's position is without merit.

23. Rather than examining the merits of the Department's proposed criteria listed above, some parties have made blanket statements about the need to restrict licence transfers that were initially part of the set-aside for wireless new entrants in the AWS spectrum auction. As an example, Eastlink argues that "any spectrum set-aside or capped for use remain available for new entrants."[15] Public Mobile argues that any transfer of spectrum that is set-aside "should be automatically denied."[16] Globalive argues that while there should be

[14] Comments of Globalive, para. 24.
[15] Comments of Eastlink, para. 6
[16] Comments of Public Mobile, para. 25.

no general restrictions on transfers of spectrum licences, the Department should grant non-incumbents a right to purchase spectrum" that is subject to a prospective transfer.[17]

24. As a result, these parties ignore the significant level of competition in the wireless marketplace among incumbents, national wireless new entrants and regional players and demand a mechanism wherein transfers of set-aside spectrum are restricted. Their positions are not tenable because they limit the spectrum available by way of transfer, causing an impairment on a functioning secondary market for spectrum and limit the opportunities for efficient and effective use of mobile spectrum. In contrast, TELUS points to the view of Quebecor, another new entrant in the AWS spectrum auction, who states that "secondary markets must be allowed to function" so that spectrum resources can be matched with their best available use.[18]

25. SaskTel asks that a spectrum licensee not be allowed to acquire additional spectrum in any given band where they are actively using less than 50% of their existing spectrum licence holdings in that band.[19] TELUS is in strong agreement that spectrum deployment conditions should be both firm and enforced strictly by the Department. However, SaskTel's proposal would impose a new deployment requirement and enforcement measure by way of limitation on spectrum acquisition. In TELUS' view, deployment requirements are best left to specific deployment conditions of licence and enforcement of those licences in particular. There is no basis to create new deployment requirements in the spectrum transfer rules, or to use potential acquired spectrum as a means to enforce deployment of other spectrum licences.

26. In addition, as TELUS noted in its comments, any rule that simply prohibits spectrum transfers outright must be dismissed. This goes back to the discretionary powers of the Minister, and that this discretion must be exercised in each and every case, rather than blind application of hard and fast rules. TELUS supports a review mechanism whereby objective criteria can be used to determine whether a detailed review is required, but in the

[17] Comments of Globalive, para. 6.
[18] Comments of Quebecor, para. 6.
[19] Comments of SaskTel, para. 18.

course of the detailed review itself, the assessment of every potential spectrum transfer must be based on the circumstances rather than solely applying prescribed criteria.

27. TELUS notes the position raised by Rogers about how spectrum holdings should be examined by the Department when determining whether a transfer should be approved. Rogers asks that the Department consider whether competitors have combined spectrum holdings in order to jointly operate a network". Rogers suggests that the Department "must allow an operator to acquire spectrum to compete with competitors who have combined their spectrum."[20]

28. Rogers is presumably making a reference to the reciprocal network access agreement that Bell and TELUS have executed for their HSPA networks. These arrangements have been examined by the Department in the past, and there has been a recognition that each of Bell and TELUS is building its own network using its own spectrum, and that they compete actively against each other across all regions. The arrangements between Bell and TELUS actually develop and enhance viable wireless competition. TELUS agrees that the Department when reviewing a transfer request should consider, among all the facts it has before it, "combined spectrum holdings"; that is, the spectrum licensed by each individual operator and any subordinate licensing in place. The issue of how much spectrum an operator should be able to acquire is best addressed by considering *Subscribers per MHz-pop*. The adequacy of an operator's spectrum position is always a function of the number of customers that the spectrum needs to serve. Reciprocal network access arrangements between operators aimed at achieving cost efficiencies do not create new spectrum to better serve the partners' customer bases. Theoretical maximum network speeds enabled by the amount of combined spectrum in a region are meaningless once the shared wireless access channel is employed to serve hundreds or thousands of customers per cell site. Ultimately, *Subscribers per MHz-pop* is the primary driver of what actual speeds can consistently be delivered to customers.

Industry Canada is seeking comments on:

[20] Comments of Rogers, para. 35.

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.

29. In its comments, TELUS noted its agreement with the Department's view that some transfers do not have a material impact, and should not be subject to a detailed review. Therefore, TELUS agreed with the threshold approach as suggested by the Department. There should be some transactions that do not warrant a detailed review because they do not have material impacts in terms of the telecommunications policy objectives. The Department has noted some examples of such transactions, including transfers made as part of an internal reorganization, transfers that will serve to fill gaps in network coverage for the proposed licensee or subordinate licensee that does not already hold licences for similar spectrum in the region, or transfers involving only small amounts of spectrum.

30. TELUS also noted that the goal of a threshold is to set a minimum level such that detailed reviews are only undertaken in the clearest of cases. If a threshold is set too low, then non-controversial deals would be subject to detailed reviews, delaying the transaction needlessly and imposing unnecessary administrative work on both the Department and the parties to the transaction.

31. TELUS pointed out that any thresholds set in advance must be re-examined to ensure their relevancy. Thresholds are moving targets that will need to be revisited to ensure that they remain relevant and effective in imposing detailed reviews only where warranted. Shaw also emphasized this problem, saying that any spectrum concentration screen would need to be reviewed and updated.[21] Revision on a regular basis is an important component so that the thresholds are regarded as meaningful. Thresholds based on spectrum holdings industry percentage or position, or stated in ratio form, are more robust, but still need to be reviewed routinely as well.

32. TELUS also asked that the Department take into account any differences in specific marketplaces when applying such thresholds. As an example, a transaction that exceeds prescribed thresholds might indicate that the agreement would result in a high level of

[21] Comments of Shaw, para. 65.

spectrum concentration in a particular area. However, that transaction should also be judged against whether the geography is urban or rural, as an example. A measure of high concentration might be a greater concern in a large urban area, where more competitors would be expected, as opposed to a smaller community or a rural area.

33. SaskTel also noted that in rural areas, it can be expected that there will be fewer wireless operators than in urban areas.[22] Xplornet also commented that assuming the same concentration in urban and rural areas could create "inefficient policies that block off opportunities for improved service in rural areas."[23] Application of thresholds must also be accompanied by sound judgement so that the Department can always be assured that the detailed review process is used whenever appropriate, but not otherwise.

34. In its comments, TELUS proposed that *subscribers per MHz-pop* would be more valuable than MHz (or MHz-pops) as a screen for determining the need for a detailed review, because it assesses the relative spectrum need of parties requesting licence transfers.[24] The simplest way to think of this metric is a ratio of a licensee's subscriber market share to its spectrum share[25]. All else equal, the higher the *Subscribers per MHz-pop* ratio, the harder the spectrum is working and the higher the need for more spectrum to support growth to satisfy customer demand. *Subscribers per MHz-pop* is the most valid way to compare the relative spectrum needs of operators of all sizes in any geography.[26]

35. TELUS also proposed simpler measures that could be employed. For example, the Department could examine the rank-order of licensees in terms of spectrum depth in the subject area where the licences are being transferred. The Department could then simply compare the rank-order of the various licensees in the licensed area before and after the proposed transaction. Using this rank-order method, the Department could impose a

[22] Comments of SaskTel, para. 11.
[23] Comments of Xplornet, para. 5.
[24] TELUS notes that before implementing a screen such as this, it must be first determined whether licensees are able to report subscribers to the various spectrum tier levels. Subscriber counts for tier 3 or tier 4 areas might be difficult to provide.
[25] Strictly speaking the metric is the ratio of not market share to spectrum share but the ratio of subscribers per population count in the region to spectrum share.
[26] TELUS notes that differences in serving urban versus suburban populations should also be taken into account. Spectrum can be made to yield the highest efficiency when the subscribers are, relatively speaking, more evenly spaced about the service area as opposed to packed into dense urban pockets.

threshold that, for example, states for any transaction that results in the acquiring party to become first in spectrum depth in the licensed area, a detailed review is required. MTS Allstream proposed a similar type of screen that would trigger a detailed review of any transfer if any one carrier holds more than 50% of usable mobile spectrum in any one licence area.[27] The value in using a rank-order method is that it is less subject to change over time.

36. In contrast, Public Mobile proposes a simple threshold where any entity that is acquiring spectrum in a region where it already holds more than 25% of the currently available spectrum should be automatically subject to a detailed review.[28] In TELUS' view, 25% is too low a threshold to be using as a screen for a detailed review. It could subject prospective transfers to automatic detailed reviews for transferees who might remain, after the proposed transfer, the third largest holder of spectrum in a particular region. While a 25% threshold could be appropriate in certain cases, it would not typically be the case and therefore should be dismissed by the Department.

37. Rogers has proposed that the Department adopt a threshold of any proposed transaction that exceeds $80M in assets.[29] TELUS understands that that this is the same asset value threshold that the Competition Bureau uses to determine whether it will undertake a review of a transaction.

38. First, this appears to provide little new as most spectrum transfer requests would already be caught by the Competition Bureau test as many if not most transfers would be part of an M&A transaction. Also, the problem with monetary thresholds such as these is that if they are based on the stated value of the deal, parties must choose to construct a deal (or multiple deals) that are just below the stated thresholds. PIAC has pointed this out as a potential concern.[30] As a result, TELUS does not agree with using a simple monetary value threshold.

[27] Comments of MTS Allstream, para. 9
[28] Comments of Public Mobile, para. 27%.
[29] Comments of Rogers, para. 37.
[30] Comments of PIAC, para. 9.

39. SaskTel has proposed that no detailed review be necessary where the spectrum transfer is for an affected region with a population less than 500,000.[31] TELUS disagrees with this. A rule based on population might not take into account difference in tier region sizes.

40. Mobilicity also proposed a simple screen, suggesting that if there were four viable competitors in the region once the transaction were completed, then the transaction should be approved without a detailed review.[32] TELUS notes that this simple test would not take into account differences in urban versus rural geographies. In addition, it does not examine the specific market position of the acquiring party. If the acquiring party is the spectrum depth leader in the region, a detailed review might be necessary, irrespective of the number of carriers, because of possible market power implications. As a result, Mobilicity's approach, though simple and easy to understand, could lead to detailed reviews being foregone when in fact they are necessary.

41. PIAC suggests that the threshold as to whether to undertake a detailed review should be the Competition Bureau's test of whether competition in the wireless market will be lessened substantially.[33] As noted in the section above, Rogers has asserted that this test could be applied during a detailed review as the screen whether a proposed transfer is denied or approved in totality, to which TELUS in paragraph 18 above noted that it expects that this analysis would be part of that determination.

42. To try to use the Competition Bureau's test as a threshold as to whether the Department should conduct a detailed review would essentially mean that all transfers would be subject to a detailed review. TELUS is not supportive because this is defeats the purpose of determining whether a detailed review is necessary. Market power analysis requires an extensive review and if it is found that market power will result from a transaction, this will normally give rise to a reason to deny a transaction or have it substantially amended. Market power should not be used as the threshold itself.

[31] Comments of SaskTel, para. 4.
[32] Comments of Mobilicity, para. 28.
[33] Comments of PIAC, para. 10.

43. Rogers takes a position that the Department allow it to acquire spectrum given that it is trying to compete with companies (Bell and TELUS) that have combined spectrum.[34] As TELUS has previously stated in these reply comments, arrangements between operators aimed at achieving cost efficiencies do not create new spectrum to better serve the partners' customer bases. Theoretical maximum network speeds enabled by the amount of combined spectrum in a region are not relevant. What is relevant is the delivered speed under customer loading, i.e., once the shared wireless access channel is employed to serve hundreds or thousands of customers per cell site. Ultimately, *Subscribers per MHz-pop* is the primary driver of what *actual* speeds can consistently be delivered to customers and so again in this context, proves what an informative metric it is.

Industry Canada is seeking comments on: 6-3 The treatment of deemed spectrum licence transfers as actual transfers, divisions or subordinate licensing arrangements.

44. In the Consultation, the Department has defined a "deemed spectrum licence transfer" as the following:

> **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**

45. The Department is proposing to treat deemed spectrum licence transfers as actual transfers, divisions or subordinate licensing arrangements, meaning that they would be subject to the same approval process. In addition, the Department has proposed that a licensee would be in breach of its conditions of licence if it finalizes the agreement for a deemed licence transfer after the Department has indicated it would refuse approval.

46. In its comments, TELUS noted its agreement with the proposal. A deemed spectrum licence transfer should be treated in the same manner as an actual transfer, division or subordinate licensing arrangement, as the case may be. TELUS' comments were based on its understanding that a deemed spectrum transfer occurs when there is a change in share ownership of the entity holding the spectrum licence, meaning that the name of the

[34] Comments of Rogers, para.35.

licensee might not change but the ownership of the licensee has. In this case, it makes logical sense that a spectrum transfer be deemed and subject to Department review. Otherwise the person controlling the spectrum licence and its use could change by way of a share transaction, but that transaction would not cause a spectrum licence transfer review.

47. TELUS notes that the proposed definition of a deemed spectrum licence transfer extends beyond the change of ownership situation to any transfer that "creates an interest in a spectrum licence." TELUS agrees with other parties that this language extends a deemed spectrum transfer too far in that it would impose a Department review requirement on transactions such as an option agreement or a pledging of spectrum assets[35] as security in a financial arrangement.

48. In TELUS' view, an interest that arises from an option agreement is not equivalent to a deemed spectrum transfer because the party that holds an option does not possess the spectrum licence or control its use. Only on the exercise of an option would a spectrum licence transfer take place, and then a spectrum licence review can take place as in the normal course. The situation is the same in a pledging of assets in that the financial institution would have an interest in the spectrum licences, but not a legal ownership interest.

49. Therefore, while TELUS agrees that a deemed spectrum licence transfer should be treated as a spectrum licence transfer and subject to review, the definition of a deemed spectrum transfer as proposed is too broad. As a result, TELUS requests that the definition be amended such that it be limited to only those instances where the ownership interest in the spectrum licences will be transferred.

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

[35] Comments of Rogers, para.44.

50. In its comments, TELUS asked that the current confidential review model be retained because proposed spectrum transfers are commercially-sensitive matters between parties. TELUS noted that the Department has been doing confidential spectrum transfer reviews for many years without any issue.

51. In addition, TELUS contrasted a potential public review conducted by the Department with the confidential processes of the Competition Bureau. In cases where a spectrum transfer would be part of a larger merger or acquisition transaction, the processes would conflict, meaning that the spectrum licence transfer review process would expose a proposed transaction that would otherwise be fully confidential under Competition Bureau review processes. These conflicting processes would be problematic.

52. In the comments, almost all of the other parties asked that the Department retain its confidential spectrum licence transfer review process. In fact, only four parties were supportive of model where the review process was not confidential and allow for public input, with the rest of the parties all in firm opposition to any changes to the current confidential process.

53. MTS Allstream[36] and Terrestar[37] both stated that they support a public consultation model and that public input on spectrum transfers should be obtained. However, neither provide a reason as to why they believe the current confidential model is insufficient for the Department to conduct its reviews or what sort of additional information third parties could bring to the process.

54. Xplornet[38] and Rogers[39] both provide limited and qualified support of a public process for spectrum transfers. Rogers prefaces its comments by stating that "spectrum transfer arrangements are completely sensitive." It then proposes minimal public disclosure of the transfer application information such as the identity of the parties and licences subject to the application, with the public entitled to comment on the application.

[36] Comments of MTS Allstream, para 12.
[37] Comments of Terrestar, para 20.
[38] Comments of Xplornet, para 40.
[39] Comments of Rogers, para .50.

55. Xplornet similarly only supports minimal disclosure of the parties and the spectrum licences. It also states that public disclosure and input should only be permitted if a binding agreement is in place between the transacting parties, meaning that it does not support a public process for "prospective" transfers.

56. Rogers and Xplornet's proposals should be rejected. Not only would they constitute a dramatic break from the confidential procedures that spectrum licence transfers currently have, they would create serious problems when the spectrum licence transfer is part a merger or acquisition transaction, as is commonly the case.

57. As TELUS stated in its comments, reviews of such transactions are conducted by the Competition Bureau, whose processes are confidential.[40] As a result, it would be contradictory for the Department to have spectrum licence transfer review process that was not confidential because it would expose a proposed transaction that would otherwise be fully confidential under Competition Bureau review processes. As such, the Department spectrum review processes must be confidential or else it would conflict with the Competition Bureau's confidential review processes for mergers and acquisitions.

58. TELUS hopes that the Department recognizes that there is near consensus that public disclosure of spectrum licence transfer applications and reviews is extremely problematic and could cause a chilling effect on spectrum transfers. Parties who are fiercely opposed to public disclosure include incumbents, national new entrants and regional wireless providers. Moreover, of the four parties who supported public disclosure, two did so without providing any supporting rationale for their position, and the other two only gave qualified support of extremely limited disclosure, and all did so without recognizing the conflict the process would have with the Competition Bureau's review. As a result, TELUS asks that no public disclosure of a spectrum licence transfer be made by the Department during the review and approval process.

[40] See section 29 of the *Competition Act*.

7. Timelines

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

59. In its comments, TELUS supported the Department stipulating clear timelines for a spectrum transfer review process. Because the current review process does not have defined timelines, there is considerable uncertainty for the parties to a proposed licence transfer request, where time is very much of the essence.

60. TELUS also stated that four weeks for the first stage of a review appears reasonable, but that sixteen weeks for completion of a detailed review after the receipt of requested information seems lengthy. TELUS pointed to the second statutory waiting period under the Competition Bureau's processes for mergers that could result in substantial lessening of competition, meaning that a more complex review and approval period is necessary. This second waiting period is allotted 30 days and commences after parties have provided complete responses to supplementary information requests. TELUS stated that if the Competition Bureau is given 30 days for this process, it is uncertain why the Department would require 16 weeks to complete a detailed review following the receipt of information requested from the parties. TELUS urged the Department to set a timeframe of four weeks within which a detailed review is to be conducted after receipt of the required information.

61. Many other parties are concerned with the Department's proposed length of the detailed review. Rogers notes that one of the drawbacks of the Department's proposals was the potential for delaying transactions and urged the Department for reduced timelines.[41] Shaw,[42] Globalive,[43] Mobilicity[44] and Xplornet[45] all stated that up to four weeks should be the standard for the detailed review period, consistent with the Competition Bureau's process. Therefore, many parties have raised issues with the proposed timelines, and TELUS asks that the Department take note of the position that the second procedural

[41] Comments of Rogers, para. 54-55.
[42] Comments of Shaw, para. 79.
[43] Comments of Globalive, para. 30.
[44] Comments of Mobilicity, para, 42.
[45] Comments of Xplornet, para, 50.

stage, the detailed review process, should require no more than 4 weeks after receipt of the required information.

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.

62. The proposed condition of licence concerning prospective transfers is set out below.

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

63. The Department also proposes that upon receipt of a notification of a prospective transfer, it will conduct a preliminary assessment of the transaction, which would represent the Department's opinion of the transaction at that time. This preliminary assessment would not be a binding statement of approval or denial of an eventual licence transfer request.

64. In its comments, TELUS noted that because the Minister has complete ministerial discretion when issuing a spectrum licence to a prospective licensee, every spectrum transfer is subject to Department approval. In addition, this condition of licence is unnecessary because every spectrum licence transaction is prospective until the Minister's approval is granted.

65. TELUS noted a number of practical problems with this proposed condition of licence. First, it is not clear at what point discussions between two parties would lead to a situation where notification to the Department is required, even though no binding agreement exists for the transfer of spectrum. As a result, if the proposed condition of licence were to be imposed on licensees, the Department might find itself conducting preliminary assessments of possible deals that never materialize. This would waste valuable Department resources and potentially divert and frustrate Department efforts from reviewing actual deals.

66. Moreover, TELUS stated that utility of the preliminary assessment for the parties is marginal. Notably, if the preliminary assessment is based on a framework of a possible deal, rather than the final agreement itself, the preliminary assessment could be meaningless. Furthermore, a positive preliminary assessment would give the parties no comfort because the Department has stated that it would not be binding. This means that the procedural review components that have been proposed under section 6 of the Consultation, such as the threshold review and a possible detailed review, would still have to be conducted.

67. The preliminary assessment also creates procedural concerns for the parties. If the procedures noted in the Consultation under section 6 are put in place, parties have potentially a 20-week period[46] to wait until final Department approval of a spectrum transfer is officially granted, more if additional information is required at the review stages. It would be counterproductive to force parties, even before a binding agreement is in place, to wait for a preliminary assessment from the Department that is both non-binding and potentially immaterial, if the final deal happens to vary from the deal submitted for preliminary assessment. In addition, unlike the proposed procedures for the formal review process, there is no timeframe prescribed for this preliminary assessment to be conducted.

68. Based on the above, TELUS requests that the Department not impose the proposed condition of licence regarding notification of prospective transfers. Of course, parties would be free to provide notification to the Department of a proposed spectrum transaction, even in advance of a completed agreement, should they wish, both as a courtesy and because of an interest in a preliminary assessment by the Department. This notification would be voluntary, but not required.

69. TELUS notes that prescribing thresholds for detailed reviews would be a strong signal to parties to send a pre-notification to the Department of a potential spectrum licence transfer. If parties are contemplating an arrangement that exceeds the stated thresholds, they would see potential benefit in pre-notification to the Department because they would

[46] TELUS has requested that the detailed review stage be completed in 4 weeks, rather than the 16 weeks proposed by the Department.

recognize that a detailed review was likely forthcoming and that the Department would appreciate knowledge ahead of time to plan for resource requirements.

70. Many other parties took issue with the proposed condition of licence for the same reasons noted by TELUS. Quebecor stated that there was no need for this proposed condition of licence.[47] Shaw called the proposal "unusual" and that it was "unaware of any other circumstances" where parties are required to notify a regulator of a proposed transaction prior to a binding agreement.[48]

71. Xplornet noted that given that the preliminary assessment is non-binding on the parties and the Minister, it was "not sure what this provision was meant to accomplish."[49] Globalive called the non-binding preliminary assessment "unhelpful" in that it would not provide the parties any certainty.[50] These positions all mirror points that TELUS made in its comments.

72. Parties that supported the proposed condition of licence presented no sound rationale for their position. SaskTel merely stated that it agrees[51] with the preliminary assessment process, but pointed to no reasons as to how the process has merit or benefits the parties.

73. Mobilicity concurred with the proposed pre-notification requirement based on the incorrect statement that it would minimize delay should the Department undertake a detailed review.[52] However, as noted by TELUS in its comments, the proposal creates, as opposed to minimizes, delay because there is no stipulated timeframe as to how long the preliminary assessment is to take. In addition, given that the parameters of an agreement might change from the pre-notification to the formal notification stages, any detailed review would still have to be conducted, with little use of any preliminary assessment. Finally, the prescribed timelines for the detailed review would remain the same, because there is no shorter timeframe prescribed if an agreement has a preliminary assessment already completed.

[47] Comments of Quebecor, para. 40.
[48] Comments of Shaw, para. 81.
[49] Comments of Xplornet, para. 51.
[50] Comments of Globalive, para 40.
[51] Comments of SaskTel, para. 31-32.
[52] Comments of Mobilicity, para. 45.

74. Public Mobile's comments on the proposed condition of licence were confounding. It stated that it fully supports[53] the proposed condition of licence, but similar to SaskTel, provided no basis for its support. Then, it added the bizarre position that if a proposed transaction were "*prima facie* off-side, in breach of, or has the appearance of being in contravention of any telecommunications policy or telecommunications policy objective in place at the relevant time," there would be a presumption that the Department's preliminary assessment will be to deny the transfer or deemed transfer. TELUS is mystified by this position, in that any agreement that is contrary to a telecommunications policy objective should not be approved by the Department at all. There is no need for a preliminary assessment process to deal with matters such as consistency with telecommunications policy objectives, because they can be examined as part of any transaction review.

75. Based on the above, TELUS requests that the Department not impose the proposed condition of licence regarding notification of prospective transfers. Of course, parties would be free to provide notification to the Department of a proposed spectrum transaction, even in advance of a completed agreement, as a courtesy should they wish. This notification would be voluntary, but not required. Xplornet[54] and Shaw,[55] among others, supported the use of a voluntary preliminary assessment regime.

76. In its comments, TELUS indicated that a voluntary preliminary notification system would have merit based on the proposed framework of reviews as noted in the Consultation. Notably, prescribing thresholds for detailed reviews would be a strong signal to parties to send a pre-notification to the Department of a potential spectrum licence transfer. If parties are contemplating an arrangement that exceeds the stated thresholds, they would see potential benefit in pre-notification to the Department because they would recognize that a detailed review was likely forthcoming and that the Department would appreciate knowledge ahead of time to plan for resource requirements.

[53] Comments of Public Mobile, para. 39.
[54] Comments of Xplornet, para. 51.
[55] Comments of Shaw, para. 82.

77. TELUS also agreed with the Department's proposal that licensees be entitled to informally approach the Department on a confidential basis to find out how criteria and considerations might be applied to a particular request. This proposal encourages parties to engage with the Department at earlier stages of possible transactions. This engagement would be useful because it could reduce the time necessary to complete the threshold review process and the detailed review process, if such a detailed review were to be required.

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