

Canada Gazette Notice No. DGSO-002-13

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

Written Submissions of

Data & Audio-Visual Enterprises Wireless Inc.,

dba Mobilicity



3 April 2013

I. INTRODUCTION

1. Pursuant to Canada Gazette Notice No. DGSO-002-13, *Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licenses*, dated 16 March 2013, Data & Audio-Visual Enterprises Wireless Inc., carrying on business as Mobilicity, provides herein its comments on DGSO-002-13.
2. The *Spectrum Policy Framework for Canada*¹ states that the policy objective of the Department's Spectrum Policy Framework for Canada is to maximize the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource.
3. The Enabling Guidelines that accompany the foregoing policy objective stipulate among other factors, that market forces should be relied upon to the maximum extent feasible, that regulatory measures, where required should be minimally intrusive, efficient and effective, and that regulation should be open, transparent and reasoned, and developed through public consultation, where appropriate.² The Enabling Guidelines further provide that spectrum policy and management should facilitate secondary markets for spectrum authorizations and clearly define the obligations and privileges conveyed in spectrum authorizations.³
4. The Department is proposing to review of the procedures set out at Section 5.6 of CPC-2-1-23, concerning "Transfer and Divisibility of Spectrum Licences." Mobilicity submits that with the exception of instances of non-use of spectrum acquired by way of auction, the provisions of Section 5.6 pertaining to spectrum licences acquired through auction processes should not be disturbed. Spectrum licences acquired through auction processes provide the holder of such authorization with the privilege of enhanced transferability and divisibility rights. These spectrum licences may be transferred in whole or in part (either

¹ DGTP-001-07 (June 2007) at 8.

² *Ibid.* at 9, (a), (d) and (e).

³ *Ibid.* at 9, (h)

geographic area or in bandwidth) to a third party subject to the conditions stated on the licence and other applicable regulatory requirements.

5. It is important at this outset of this discussion to recognize three ineluctable facts in relation to the wireless industry: (a) the wireless business is a costly one and as a result, new entrants' ability to compete are more or less entirely dictated by their access to capital; (b) that the new entrants have been and will continue to be challenged (relative to incumbents) in accessing that capital; and (c) that spectrum is the core and most valuable asset in a wireless business.
6. Mobilicity submits that these three points are objective fact indeed even Minister Paradis stated that for the smaller players "capitalization is a life and death matter"⁴.
7. It is an audacious investor indeed who nonetheless assumes the inherently greater risks of investing in a new entrant. In making such decisions, investors will take into account various factors, chief among which are the accumulated or anticipated assets of the investment. Mobilicity would further suggest that the transferability of spectrum is primarily correlated to the value an investor places on that spectrum. Other factors, such as the "life time value" of the current subscribers and any other assets are of less value and importance. An asset is simply not valuable unless it has liquidity – ie can be bought and sold as easily as possible to the widest market possible. Investors need to know liquidity is possible, whether or not it is actually exercised.
8. Further, Mobilicity respectfully submits that the very announcement of this consultation with respect to license transferability a few weeks ago has already further impinged access to capital for new entrants. Ironically, this announcement has created a level of uncertainty and confusion in the minds of investors as to the liquidity of spectrum assets which in particular affects new entrants far more than incumbents and further hampers their ability to create a competitive marketplace – the very thing the Department has suggested it wants to enhance.

⁴ Bloomberg Businessweek March 27, 2013 <http://www.businessweek.com/news/2013-03-27/paradis-says-canada-wireless-sector-needs-foreign-capital>

9. While incumbent telecommunications service providers, with all of their historical advantages, are among the most reliably profitable undertakings, the new entrants have yet to achieve break-even cash flow, let alone turn a profit. As such investors look to “hard assets” such as spectrum with which they can secure their investment. A transfer process whereby spectrum cannot be transferred to certain entities replete with non-specific somewhat subjective criteria will undoubtedly make the hill currently being climbed by new entrants all the more steeper.
10. With respect to spectrum that has been subject to a set aside, where there has been no use of the spectrum, no material build-out of the bulk of their holdings and no accompanying business assets, such that the spectrum licence is in essence being “flipped,” the request for approval of a transfer should not be approved and the spectrum should be returned to the Department. Would-be transferors that have not used their licenced spectrum should not be entitled to recover their bid amounts and should certainly not profit from transactions relating to their unused spectrum. Additionally, it should be clarified by the Department that only new entrants can qualify to acquire spectrum that was originally part of a set-aside, which is more in keeping with the spirit and the intention of the rules of the AWS auction as well as current government policy.
11. If the Department intends to “rewrite the rules” and further constrict and complicate the license transfer process, but remain dedicated to creating sustainable competition in the Canadian wireless telecom marketplace, then Mobilicity respectfully requests that the Department consider measures to negate the foreseeable challenges to raising capital for new entrants. Mobilicity submits that one such measure is for the Department to change the payment schedule for newly acquired spectrum and for already acquired AWS spectrum:
 - (a) In the case of newly acquired spectrum, the Department should allow new entrants to repay the auction proceeds by installment payments over the length of the license term; and

- (b) For AWS spectrum that new entrants had already acquired, the Department should return the entire auction proceeds to new entrants. This would be repaid back to the Department subject to a nominal rate of interest, over the remaining length of the license term. The Department should also consider economic incentives or subsidies to promote network investment, and rebate investment already made by new entrants.
12. Adoption of the latter measure will immediately alleviate the chilling effect that the Department's DGSO-002-13 proposal will and have already had on new entrant licensees' access to much-needed capital or other funding. In the longer term, this may signal to investors that Canada is committed to promoting competition and to constructing an environment that attracts investments from all over the world.

II. REVIEW OF SPECTRUM LICENCE TRANSFER REQUESTS

A. Criteria and Considerations Leading to Detailed Review, including Use of Threshold, Screen or Cap

Industry Canada is seeking comments on:

- 6-1 The criteria and considerations set out above.
- 6-2 Whether there is a threshold in the form of concentration or a measure of MHz-pop that Industry Canada should apply in deciding whether to conduct a detailed review, or some other type of threshold, screen, or cap that should be used to decide if a detailed review is required

13. Section 5.6 of CPC-2-1-23 currently provides that spectrum licences assigned through auction benefit from the privilege of enhanced transferability and divisibility rules. In contrast, it provides that spectrum licences issued under comparative review or "first-come, first-served" processes typically do not have enhanced transferability and divisibility rights. Section 5.6 of CPC-2-1-23 then goes on to describe the general conditions and guidelines applicable to spectrum transfers, namely eligibility criteria, the expectation that the term of the licence received by the transferee will generally be

- limited to the end of the original term (subject to renewal rights), compliance with existing policies and divisibility and disaggregation considerations.
14. In DGSO-002-13, Industry Canada proposes to revise CPC-2-1-23 to set out the factors that it will take into consideration in determining whether a detailed review of a request for approval of a spectrum transfer *without distinguishing between auctioned spectrum licences and licences acquired under comparative review or “first-come, first-serve” processes*.
 15. Mobilicity is concerned that the proposal entails a rewriting of the enhanced transferability and divisibility conditions of licence and framework decisions that apply to auctioned spectrum by making detailed review of requests for spectrum transfers the rule rather than the exception even in the case of auctioned spectrum.
 16. Spectrum licences acquired through auction processes are subject to binding conditions of licence, and detailed licensing framework and policy framework decisions. In particular, the governing authorization and framework documents provide the holder of such authorization with the privilege of enhanced transferability and divisibility rights. These spectrum licences may be transferred in whole or in part (either geographic area or in bandwidth) to a third party subject to the conditions stated on the licence and other applicable regulatory requirements.
 17. Recognising that capital has been raised, resources expended to participate and acquire spectrum in an auction process and further investments made to build out networks and enter markets, the enhanced transferability and divisibility conditions and obligations set out in the governing authorization and framework documents for auctioned spectrum licences should govern, absent extraordinary or extenuating circumstances.
 18. Mobilicity submits that the threshold criteria and considerations for approval of requests for spectrum licence transfer⁵ should apply only to licences acquired through comparative

⁵ DGSO-002-13, at 4.

selection or first-come, first-served processes. In the case of auctioned spectrum, assuming that the request for licence transfer is in compliance with the original conditions of licence (*e.g.* the five-year moratorium on transfer of new entrant spectrum to parties other than new entrants) and absent extenuating circumstances, these criteria and considerations should not apply.

19. To do otherwise or to “rewrite the rules” risks jeopardising the rules of engagement and thereby violating the requirement for clear and defined obligations and privileges as articulated by the Department itself.
20. Therefore, Mobilicity proposes that CPC-2-1-23 be revised to include the following:
 - A detailed review would also not generally be required of transfers of spectrum licences assigned through an auction.
21. In the alternative or in addition, as previously stated Mobilicity proposes that the Department introduce measures to negate any current or future capital raising challenges by amending the payment schedules for new 700 MHz spectrum and already acquired AWS spectrum:
 - (a) In the case of newly acquired spectrum, the Department should allow new entrants to repay the auction proceeds by installment payments over the length of the license term; and
 - (b) For AWS spectrum that new entrants had already acquired, the Department should return the entire auction proceeds to new entrants. This would be repaid back to the Department subject to a nominal rate of interest, over the remaining length of the license term. The Department should also consider economic incentives or subsidies to promote network investment, and rebate investment already made by new entrants
22. Mobilicity is confident that the suggested measures will further prompt competition as investors’ confidences are boosted through the Department’s perseverance to construct an attractive and stable investment environment with rules that will be enforced.

23. Moreover, Mobilicity notes that use of instalment payments is gaining increasing favour amongst regulators worldwide. In April 2012, the Telecom Regulatory Authority of India (Trai) recommended allowing instalment payments in the country's upcoming 2G spectrum auction. On November 8, 2012, India's Cabinet approved Trai's recommendation and held that licensees will be allowed to pay in equated annual instalments for the balance number of years of license (such that the last instalment is payable not later than 12 calendar months prior to the expiry of the license).⁶
24. In Finland's current 800 MHz spectrum auction, winners must pay a license fee corresponding to the winning bid in five equal annual instalments.⁷
25. In 2011, winners of Italy's 4G spectrum auction were permitted to pay €682 million within 30 days from auction completion, and €438 million in five annual instalments,⁸ and Spain spectrum auction winners were able to pay in two instalments for 800 MHz spectrum.⁹
26. Similarly, winning bidders in Ireland's recently concluded multi-band spectrum auction will pay approximately €854.64 million for the spectrum rights, comprising of €481.7 million in upfront fees and €372.95 in annual spectrum usage fees,¹⁰ which will be paid in instalments until July 2030.¹¹

⁶ Cabinet, *TRAI's recommendations on "Spectrum Management and Licensing Framework" – Specific recommendation of EGoM on pricing of spectrum furnished as desired by the Cabinet*, (8 November, 2012) online: <<http://pib.nic.in/newsite/erelease.aspx?relid=88919>>

⁷ Finnish Communications Regulatory Authority, "Explanatory notes to Regulation 64" *Regulation on auction in the 791 – 821 MHz and 832 – 862 MHz bands*, (19 November 2012) at 17 online: <http://www.ficora.fi/attachments/6CJbaUJkK/M64_MPS_englanti.pdf>

⁸ Italy's 4G spectrum awarded", *LTE World* (1 October 2011) online: *LTE World* <<http://lteworld.org/blog/italys-4g-spectrum-awarded>>.

⁹ "Telefónica Launches LTE in Madrid and Barcelona", *Converge Network Digest*, online: *Converge Network Digest* <<http://www.convergedigest.com/Mergers/financialarticle.asp?ID=34122>>.

¹⁰ Commission for Communications Regulation, *ComReg Announces Results of its Multi-Band Spectrum Auction* (15 November 2012) online: <http://www.comreg.ie/_fileupload/publications/PR15112012.pdf>

¹¹ In ComReg's opinion, it is appropriate to provide an option for bidders to defer some of the auction payment, especially in the early stages of any new license, in part because the high levels of capital expenditure necessary to secure licenses may be too burdensome for new entrants. Commission for Communications Regulation, *Liberalising the Future Use of the 900 MHz and 1800 MHz Spectrum Bands* (21 December 2009) at 169 online: <http://www.comreg.ie/_fileupload/publications/ComReg0999.pdf>

27. However should the Department conclude that some criteria should be applied to already auctioned spectrum, then Mobilicity suggests that the Department consider the impact of the denial of such a transfer as well the approval. In other words, what will be the impact upon the applicant, the transferee and its associated stakeholder as well as the Canadian telecommunications market should a transfer be denied? Do viable options remain for the applicant in question?
28. With respect to question 6-2, if applied against auctioned spectrum, then Mobilicity suggests the Department should consider a holistic view of concentration, building upon the comments made in the backgrounder to the March 7 announcement of this process: “The Government of Canada is taking steps to promote at least four wireless competitors in each region and is facilitating access to spectrum for these providers.” Specifically, Mobilicity suggests that instead of a complicated numeric formula the test for concentration should be a simple one: in the region in question, are there at least four *viable* wireless competitors capable of vigorous competition? If the answer is yes, then Mobilicity submits that the market is not yet overly concentrated to preclude the transfer request.

B. Deemed Spectrum Licence Transfers

Industry Canada is seeking comments on:

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

29. Industry Canada proposes to require licensees to notify it prior to finalizing a deemed spectrum licence transfer. “Deemed spectrum licence transfer” is defined as “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.”
30. Mobilicity supports this proposal.

C. Confidentiality of Reviews

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.

31. Industry Canada notes that currently, requests for approval of spectrum transfers are conducted entirely in confidence. It seeks comments on whether Industry Canada should publicize the fact of a spectrum licence transfer requests and accordingly an opportunity for third party input.

32. Mobilicity is not in favour of publicizing licence transfer requests and providing opportunity for third party input for three reasons: (a) It is 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.

D. Provisions relating to Transferability and Divisibility

Industry Canada is seeking comments on:

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

33. As stated above, Mobilicity proposes that the Department include in its proposed review of CPC-2-13 language that clarifies that detailed reviews would generally not be applied to spectrum licences assigned through auction.

34. This is not to say that the Minister would be stripped of his discretion where extraordinary or extenuating circumstances exist. While it is difficult to conceive of or

predict of every such case, Mobilicity submits that the Minister would of course retain a discretion to reject a request to transfer (or subordinate) a licence where the transferor is in non-compliance with the original licence or policy and licensing framework. In particular, licences acquired via auction, like licences issued under a comparative review or “first-come, first-served” process, should not be capable of being sold outright, unless it is accompanied by other business assets and is being used as part of a going concern.

35. The foregoing is consistent with the Department’s licensing policies for mobile wireless spectrum. For example, while the Department’s AWS Policy Framework did not specify specific roll-out obligations except in relation to roaming provisions for national new entrants (subsequently extended for all new entrants in DGSA-001-13), the Department did stipulate that failure to deploy or insufficient deployment over the licensed area would constitute a reason for non or partial renewal.¹² Thus, even though the AWS Licensing Framework states that “deployment status would not form part of an evaluation of licence transfer if the date for the deployment requirement (rollout) has not yet arrived,”¹³ where there has been no rollout whatsoever, or substantial non-use of the bulk of the transferor’s holdings and no accompanying network build, such that the spectrum licence is in essence being “flipped,” then the request for approval of a transfer should not be approved and the spectrum should be returned to the Department.
36. Additionally, in the specific case of set-aside spectrum where the spectrum licence is essentially being flipped with no meaningful build-out or attempted build-out of network assets using the auctioned spectrum, large wireless providers as defined by the Department should be precluded from acquiring the set-aside spectrum.

¹² *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range* (November 2007) at 10. See also *Responses to Questions for Clarification on the AWS Policy and Licensing Frameworks* (February 27, 2008), Question 1.9 at 7 and AWS Conditions of Licence, Condition 12 <online: **insert**>

¹³ *Licensing Framework for Mobile Broadband Services (MBS) – 700 MHz Band*, DGSA-001-13 (March 2013), para. 261 at 41.

III. PROPOSED TIMELINES FOR DEPARTMENTAL REVIEW

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

37. Industry Canada proposes to treat requests for approval of spectrum licence transfers within four weeks by either approving or advising parties of the Department's decision to conduct a detailed review. In the latter case, the Department proposes to approve or reject said request within sixteen (16) weeks of its receipt of additional information and documentation necessary for its detailed review.
38. In the context of spectrum licences acquired under a comparative review or "first-come, first-served" process, the proposed timelines are reasonable.
39. In the context of spectrum licences acquired through a competitive auction process, as submitted above, Mobilicity expects that absent cases of non-compliance of the transferor with the original conditions of licence or policy or licensing frameworks, or extraordinary circumstances, such as total non-use of the auctioned spectrum, it expects that the enhanced transferability and divisibility conditions that attach to auctioned spectrum licences would govern.
40. In the alternative, if the Department determines as a result of this consultation that detailed reviews of requests to transfer auctioned spectrum will be the rule rather than the exception, sixteen weeks is far too long a timeframe to such detailed review and would have a fundamental negative impact upon a new entrant.
41. Specifically, in a fast-paced technology focused business like wireless, sixteen weeks is an eternity. Wholesale changes, massive technology decisions and major competitive decisions are made in far shorter timeframes. Most importantly, for the profitable incumbents, a sixteen week review period may not pose a challenge from an economic perspective. However 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.

42. Mobilicity submits that a detailed review should be no more than an additional three (3) weeks in length beyond the initial review period. To add considerable time to such a review would again put the new entrants in a potentially unrecoverable disadvantage to the incumbents.

IV. PROPOSED CONDITION OF LICENCE REQUIRING PRIOR WRITTEN NOTICE TO DEPARTMENT

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.
-----	--

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

New Condition of Licence

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.

44. Mobilicity concurs with the proposed requirement for prior written notice to the Department of any transactions that provide for a transfer or division of a spectrum licence or a subordinate licensing arrangement.
45. As submitted above, Mobilicity believes that the enhanced transferability and divisibility rights associated with auctioned spectrum licences should only be overridden in extraordinary circumstances (such as total non-use of the spectrum), the proposed condition of licence appears to be in the public interest. It will minimise delay should the Department undertake a detailed review of the transaction.

V. CONCLUSION

46. In the AWS spectrum auction, the Department exercised policy leadership by creating a new entrant set aside and mandatory roaming and antenna tower and site sharing. By virtue of these bold policy measures, Canadians have experienced unprecedented choice and competition.
47. That being said, the harsh reality is that wireless competition is on life support and requires a fresh infusion of policy leadership. There are many reasons for which the promise of the Department's bold policy initiatives in the AWS spectrum auction have failed generate sustainable competition. In Mobilicity's view, chief among these are (a) failure to regulate site sharing and roaming rates; (b) failure to mandate soft handoff requirements; (c) weak and delayed oversight and enforcement of the mandatory roaming and site sharing regime such as it was; (d) delay and uncertainty in lifting the foreign ownership and control restrictions on new entrant carriers; (e) lack of oversight over the retail contracting practices of wireless carriers; and (f) the illusion of competition orchestrated by incumbents using flanker brands as "fighter" brands to undermine lawful competition brought about by new entrants.
48. Mobilicity understands and recognizes that some of these factors were not ultimately within the Department's control and that the Department has announced measures to improve the mandatory roaming and site sharing regime. Be that as it may, within the exception of the lifting of the restrictions on foreign ownership and control of new entrant carriers, the impediments to the success of the Department's 2007 policy initiatives ***remain present and will remain present for the foreseeable future.***
49. The current context reads far from a level playing field for new entrants and their investors. In light of this reality, Mobilicity respectfully requests that the Department carefully consider Mobilicity's concerns and that it ensure above all, a clear and efficient licence transfer regime. In particular, Mobilicity requests that the Department incorporate the following key tenets in the decision resulting from the DGSO-002-13 consultation:

- (a) Access to capital is the key to success of new entrants.
- (b) Practically speaking, the decisions resulting from the DGSO-002-13 Consultation will disproportionately affect new entrant (and in the case of AWS spectrum, set-aside) spectrum.
- (c) For spectrum that has been built-out and used to a significant degree, there should be no moratoriums and no restrictions on transferability and divisibility. To do otherwise risks dealing a decisive blow to new entrants' ability to raise funds in the capital or financial markets.
- (d) In exceptional circumstances, such as where there has been no use or material non-use of spectrum, the Department should establish a clear policy of not permitting the "flipping" of spectrum.
- (e) Where new entrant or set-aside spectrum that has not been deployed to any material degree is sought to be "flipped", the Department should ensure that the spectrum not fall into the hands of large wireless carriers. Large wireless carriers are already "spectrum rich" by any measure, relative to the new entrants, and they should not be permitted to acquire unused new entrant or set-aside spectrum (which has already been paid for in the case of auctioned spectrum) if only to prevent another new entrant from accessing the resource.
- (f) In the alternative or in addition, Mobilicity proposes that the Department introduce measures to negate any current or future capital raising challenges by amending the payment schedules for new 700 MHz spectrum and already acquired AWS spectrum:
 - (i) In the case of newly acquired spectrum, the Department should allow new entrants to repay the auction proceeds by installment payments over the length of the license term; and

- (ii) For AWS spectrum that new entrants had already acquired, the Department should return the entire auction proceeds to new entrants. This would be repaid back to the Department subject to a nominal rate of interest, over the remaining length of the license term. The Department should also consider economic incentives or subsidies to promote network investment, and rebate investment already made by new entrants.

*** END OF DOCUMENT ***