

***Canada Gazette* Notice Reference No. DGSO-002-13**

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

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**Comments**

**of**

**Globalive Wireless Management Corp.**

**(“WIND”)**

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(A) INTRODUCTION

1. Globalive Wireless Management Corp. (“**WIND**”) is pleased to respond to *Canada Gazette*, Part 1, 16 March 2013, Notice Reference No. DGSO-002-13: *Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences* (the “**Consultation**”). WIND has elected to respond directly only to those items in the Consultation where WIND has a specific view. With respect to items referenced in the Consultation but not addressed in these comments, it may be assumed that WIND is neutral subject to reviewing the submissions of other participants in the Consultation. In all cases WIND will review all submissions received in response to the Consultation and will submit reply comments on 3 May 2013.

(B) MAIN CONSIDERATIONS

2. It is clear that the Government’s primary policy objective underlying this Consultation is to create, enhance, and sustain competition in the Canadian wireless telecommunications market. Competition stimulates innovation and investment, which leads to more choice for consumers and business users, together with lower prices and better services. Competition depends directly on creating an environment that attracts and facilitates capital investment. The Minister has recognized this recently, as reflected in the following quote:

“But also, when I get asked the question what the federal government can do, what I understand is capitalization is the life and death of this sector. The idea is to invest and then after that reach the break-even point and then after that more revenue and hopefully profits. And to get there, what people said is to “provide us with a good environment to make sure that investors are willing to invest here” and it goes to predictability and a good legal framework.”{emphasis added}

3. The lifeblood of a facilities-based wireless carrier is spectrum. When considering the issue of spectrum transfer processes, guidelines and rules, it is important to do so contextually. The Canadian wireless telecommunications market is structurally challenged and needs bold, committed and realistic governmental action to create and sustain the conditions in which a fourth carrier in each region (the oft-stated Government objective) becomes a viable proposition. These conditions simply do not yet exist.
4. With all respect and recognizing the good faith intentions of this Government, not enough has been done to date in this regard. As examples only:
  - a) the rules established for the upcoming 700 MHz auction will not provide carriers other than Rogers Communications Partnership (“**Rogers**”), Bell Canada (“**Bell**”) and TELUS Communications Company (“**TELUS**”) (collectively, referred to as the “**Incumbents**”) with the opportunity to obtain sufficient spectrum (at a rational economic price) to support a roadmap to LTE;

- b) the AWS licence conditions have permitted Shaw Communications to acquire but never use spectrum licences specifically set aside from the Incumbents for use in competition with the Incumbents, thus perverting the set-aside policy objectives. This has deprived WIND (and other new entrants that have taken up the challenge of providing competitive wireless services to Canadians) of a critical and scarce asset. Internationally-accepted principles of spectrum utilization and the spirit of the AWS spectrum set-aside policy suggests that the spectrum obtained by Shaw should have been revoked, sold, re-auctioned or otherwise made available to new entrants rather than continuing to remain unused. But nothing has been done;
  - c) there is an apparent unwillingness to deal directly with artificially high domestic roaming rates and terms using an active regulatory approach which would require the Incumbents to provide roaming at cost-oriented rates; and
  - d) rates and terms for tower collocation are similarly not appropriately regulated given that the Incumbents have no obligation or incentive to provide tower sharing and collocation at cost-oriented rates. It has been again decided to continue relying instead on an artifice of commercial negotiation that has been demonstrated not to work.
5. Tying it all back to the subject matter of this Consultation, in WIND's respectful submission if (for perfectly valid policy reasons) the Minister is proposing to deny a category or class of spectrum licence transfers, or to deny a specific proposed transfer, it is absolutely paramount that the regulatory conditions underlying this market be developed to permit sustained competition. Clearly more regulatory changes must happen. Until then, transfers should be permitted subject only to existing processes and law (e.g., the *Competition Act* and the *Investment Canada Act*) where appropriate, failing which these proposed restrictions will result in a further weakening of the viability of small players by diminishing the value of their licences.
6. With respect to the object of this Consultation, and taking into account the risk of creating an asymmetry against smaller players through the introduction of a set of inherently subjective and unpredictable transfer-blocking criteria, WIND proposes that the Minister develop a framework aligned with the actual market and regulatory environment in Canada. Today, transfers of existing spectrum owned by operators should not be restricted except for:
- a) first, checking the presence of a "fourth" competing operator (including MVNOs) in any relevant area; and
  - b) second, presuming satisfaction of the first criteria, requiring that the transferor of the spectrum must first give non-Incumbents a right to purchase such spectrum, provided such right of offer be limited in time and subject to evidence of credentials of the bidding transferee; and

- c) third, only upon the government implementing new and effective regulatory approaches that promote a sustainable and competitive market for non-Incumbent operators, would a revision of spectrum license transfer limits be appropriate.

WIND proposes the introduction of a “grace period” during which spectrum transfers will not be limited by policy considerations until the regulatory environment evolves to ensure truly competitive conditions. This proposal is justified by several years of insufficient action by Industry Canada and other regulatory authorities. There have been numerous and reiterated requests to introduce relevant and effective measures to promote the creation of a pro-competitive market environment for smaller players. The failure to allow for a “grace period” for spectrum transfers would further undermine the already weakened position of new entrants.

**(C) CANADIAN WIRELESS MARKET STRUCTURE**

7. The Canadian market is a highly-concentrated oligopolistic market consisting primarily of the three Incumbents. In addition, Bell and TELUS maintain a partnership which effectively provides these two companies with a common cost structure, shared infrastructure and pooling of spectrum thus effectively leaving consumers with the equivalent of two national wireless carriers.
8. The Incumbents possess enormous market power. This is a function of the very high market share that they individually and collectively hold (i.e., they collectively serve approximately 91% of Canada’s wireless subscribers and account for 93% of total Canadian wireless sector revenues), coupled with the tremendous barriers to entry to the wireless market. As discussed below, the Incumbents not only control a tremendous share of the market, they report world-leading Average Revenue Per User (“ARPU”), they are among the most profitable carriers in the world, and Canadians pay some of the highest prices for wireless services in the world.
9. The Report also shows that in most Provinces, only one or two of the three Incumbents control more than 50% of the wireless market (the exceptions are Manitoba and Saskatchewan, which have regional wireline ILECs and in which the new entrants do not currently operate).
10. A key indicator of the lack of competitiveness of the Canadian wireless market is wireless carrier ARPU, which reflects a world-leading wireless spend per wireless customer. As recently noted by Professor Geist:

“By [the ARPU] standard, Canada is the most carrier-friendly market in the world as the carriers extract higher revenues from their users than any other country. ...On that front, Scotia Capital notes that ARPU for Bell, Rogers, and Telus has been largely unchanged since the entry of the new wireless competitors (Bell is up slightly, Rogers and TELUS down slightly). When compared to other countries, Canadian ARPU

stacks up as the highest in the world. The CRTC's Communications Monitoring Report 2012 shows Canadian ARPU as tied with Japan as the highest among eight leading economies (Canada, US, UK, France, Germany, Italy, Japan, and Australia) (Figure 6.1.9). In other words, despite new entrants designed to spur greater competition, the incumbent providers are still enjoying world-leading ARPU, which is indicative of a market sorely lacking in strong competition.”{emphasis added}

11. The 2012 Bank of America Merrill Lynch Global Wireless Matrix (the “**Matrix**”) also provides global statistics on carriers in countries across the globe which also clearly demonstrates that Canadian carriers having the highest global ARPU metrics. As noted by Peter Nowak when commenting on the ARPU statistics in the Matrix:

“The story here is clear. Canadian carriers lead the world in terms of monthly average revenue per user, at \$60.79. That’s 16 per cent higher than the United States (\$51.61), 32 per cent higher than the developed world average (\$43.79) and 76 per cent higher than Europe (\$27.02). Moreover, as the graph on the right shows, Canada is only one of four countries seeing ARPU growing.”

12. The Incumbents are also among the world’s most profitable carriers. This is clearly reflected in the Matrix. Peter Nowak notes in this regard that:

“With a margin of 45.9 per cent, Canadian carriers come in at the high end of the most profitable list. They’re seven per cent more profitable than their American and European counterparts and five per cent more than the developed world.

Even more interesting is the fact that Canadian carriers had the third-highest year-over-year growth in margins (Spain is comparatively crushing it). Combined with ARPU growth, it’s clear that business is good in Canada. Incumbent carriers may have experienced a temporary hiccup thanks to new entrants such as WIND and Mobilicity, but things are obviously getting back to normal.”

13. Canadians also pay among the highest prices in the world for wireless services. This can be seen in the Report, the U.S. Federal Communications Commission’s (the “**FCC**”) third annual International Broadband Data Report, and the 2011 OECD report on International Mobile Data Roaming.

**(D) BARRIERS TO ENTRY**

14. The barriers to entry and expansion for facilities-based mobile wireless operators in Canada are extremely high. In the absence of a proactive approach to breaking down these barriers (including measures WIND has long promoted, including spectrum set-asides for LTE, tighter scrutiny of anticompetitive customer-retention practices (e.g., high termination fees, 3-year contracts and bundling), a more fluid portability regime, less discriminatory and more

binding national roaming rules, and tower sharing mandates), these barriers will continue to cripple competition.

15. WIND has already invested substantial time and effort, to say nothing of tremendous financial resources, to bring Canadian consumers a true competitive alternative to the Incumbents despite strong (and largely unchecked) anticompetitive opposition and regulatory gamesmanship. However, much more capital is needed to support a continued challenge to the Incumbents.
16. In view of the Canadian market reality, it is WIND's submission that in order to have a long-term competitive alternative to the Incumbents, much more is needed by way of substantive and effective measures than have been implemented to date. Foremost among such measures is access to sufficient amounts of appropriate spectrum so that non-Incumbents can pursue a competitive strategy. Without reasonable access to spectrum that provides a roadmap to LTE, together with a positive regulatory environment which can constrain the considerable market power of the Incumbents, further capital simply will not be available to the new entrants. And absent such conditions, policy-based restrictions on spectrum transfer (as opposed to existing reviews per, for example, the *Competition Act*) are not appropriate.
17. Not addressing the core impediments to competition in the Canadian market, but concomitantly imposing blanket limits on spectrum transfer, not only will not increase competition in this country, but will have the opposite effect, by reducing the value of the spectrum held by non-Incumbents, and thereby hampering access to, and increasing the cost of, capital that is needed to invest in these operations. This will reinforce the dominance of the Incumbents to the detriment of the Canadian consumer.
18. Accordingly, WIND's proposal for license transfer framework is focused on giving new entrants a chance to obtain spectrum on reasonable terms absent Incumbent incentives to obtain spectrum based on the value of market foreclosure. This spectrum transfer proposal is set out below, but must also be reinforced by other regulatory non-spectrum-transfer measures to promote competition:
  - a) First, limiting spectrum license transfer evaluation to confirming presence of a "fourth" competing operator in the relevant area including MVNOs; and
  - b) Second, upon confirmation of the presence of a fourth operator in the relevant market, requiring that the transferor of the spectrum must first give non-Incumbents a right of first offer to purchase such spectrum, provided such right of offer be limited in time and subject to evidence of *bone fide* credentials of the bidding transferee.

19. Further limiting the ability to transfer spectrum to Incumbents beyond the above-noted proposal would establish further illogical asymmetry against smaller players. Eliminating a potential way to recoup investment would:
- a) cause less investment by new entrants as the return on further investment would be unclear and/or insufficient to justify the investment;
  - b) lower the availability of funding for further expansion by new entrants due to the absence of clarity about return on investment by new entrants (and thus causing less investment as in first point); and
  - c) cause higher costs of financing to obtain funding given the risk associated with the absence of clarity (thereby diminishing the returns available for new entrants, and probably causing less investment as in first point).
20. Other regulatory measures that should be immediately introduced in order to rebalance the playing field include:
- a) measures to avoid speculative acquisition of spectrum (e.g. enforcing a “use it or lose it” principle);
  - b) measures to ensure that in future mobile spectrum auctions, there is an opportunity for non-Incumbents to obtain spectrum at a rational commercial price (i.e., based on an economic value that does not include the value that Incumbents will assign to foreclosure of competition). At least 2X10 MHz of spectrum (or all of the spectrum where there is 2X10 MHz or less of spectrum available) should be set aside or otherwise placed off-limits to the Incumbents in all future mobile spectrum auctions
  - c) adoption of a pro-competitive regulatory regime which constrains anti-competitive marketing activities of the Incumbents such as long term contracts;
  - d) tower sharing provided on regulated terms and at regulated prices (cost orientation) by the Incumbents; and
  - e) national roaming provided on regulated terms and at regulated prices (cost orientation) by the Incumbents.
21. Below are WIND’s comments to the specific questions set out in the Consultation.

**(E) SPECTRUM LICENCE TRANSFER REQUESTS**

6-1 The criteria and considerations set out in paragraphs 15, 16 and 17. Criteria and considerations set out below.

15. *Industry Canada proposes, upon receipt of a spectrum licence transfer request, to determine whether a detailed review is required. It is noted that some transfers do not have material impacts in terms of telecommunications policy objectives. For example, a detailed review would not generally be required of 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. Accordingly, in assessing whether a detailed review is required, thresholds will be examined, taking into account the following factors:*

- a) the amount of spectrum involved in the transfer; and/or*
- b) changes in levels of spectrum concentration and distribution among licensees in the region that would result from the transfer.*

*In all cases, Industry Canada will assess the application forms based on the material provided and its own licensing information as against any band specific criteria or eligibility criteria. In the cases noted above, Industry Canada will not typically require further information to complete its review and can approve the application in a summary fashion. Where a detailed review is required, Industry Canada proposes to advise the licensee and will likely require further information to complete the review.*

16. *Where required, a detailed review will determine whether approval of the spectrum licence transfer request will 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.*

17. *In making this determination, Industry Canada may examine the following factors:*

- a) current licence holdings of the proposed licensee or subordinate licensee in the subject spectrum band and region;*
- b) overall distribution of licences in the subject spectrum band and/or related bands in the region;*
- c) the current and/or prospective services provided using the subject spectrum; and/or*
- d) the existence and availability of alternative spectrum with similar properties as that subject to the transaction.*

22. WIND supports the criteria set out in paragraph 15 to be used to determine if a detailed review is required. A detailed review would not generally be required of 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.
23. Where a detailed review is appropriate, WIND recommends, consistent with its introductory comments, that the criteria in section 16 above be simplified as WIND proposes above.
24. In case a proposed transfer creates a three-player-only market in one or more areas, a deeper analysis should be run in order to assess:
  - a) Whether, absent the proposed transfer, the selling company would be in a position to continue operating under reasonable profitable terms.
  - b) Whether the buying party is willing to provide as a condition precedent for obtaining spectrum transfer approval MVNO access at technical and economic conditions capable of guaranteeing a sufficient level of competition in that area.
25. The criteria for a transfer recommended by WIND is objective thus creating rules that investors can understand with certainty which is a pre-requisite to investment. More significantly, these rules will promote competition by improving access by new entrants to spectrum to the extent that new entrants believe that the overall regulatory regime is sufficiently supportive of competition.

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.

26. WIND submits that it does not make sense to apply spectrum caps on spectrum license transfers and not to overall spectrum holdings already in the hands of mobile operators. Since no overall spectrum cap limits apply, there should not be any such limits on spectrum transfers.

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

27. WIND agrees with the Industry Canada proposal.

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.

28. Spectrum license transfer requests should remain confidential.

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.

29. WIND has no additional comments.

(F) **TIMELINES**

7-1 Industry Canada is seeking comments regarding the proposed timelines. Proposed timelines set out below.

*a) under normal circumstances, within four (4) weeks of receipt of a spectrum licence transfer request, Industry Canada will:*

- approve the issuance of a new licence or subordinate licence, as applicable, based on the information supplied, provided that the request meets the applicable requirements set out in CPC-2-1-23; or*
- advise the parties to the spectrum licence transfer request that a detailed review will be required.*

*b) Based on the information provided, the Department will review the transaction as set out above, and within sixteen (16) weeks of receipt of all required information, will:*

- approve the issuance of a new licence or subordinate licence, as applicable, provided that the request meets the applicable requirements set out in CPC-2-1-23; or*
- communicate the factors leading to a refusal to approve the spectrum licence transfer request, and the reasons for same.*

30. WIND considers the proposed timelines to be excessive and proposes to reduce the timelines to:

- a) Four weeks for the upfront summary approval;
- b) Four weeks for the detailed review of the transaction.

(G) **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.

31. Industry Canada proposes to introduce a notification requirement related to agreements that provide for the future transfer or division of a spectrum licence, or a subordinate licensing arrangement. This requirement would be incorporated into a condition of licence to be applied to all existing and subsequently issued spectrum licences. Upon receipt of such notice, Industry Canada proposes to review the information provided by the parties with the intent of providing a “preliminary” assessment of the transaction which will not bind Industry Canada in respect of the approval or denial of any eventual spectrum licence transfer request at the time that the request is made.
32. WIND submits that there needs to be regulatory clarity whenever a transaction is made subject to Industry Canada’s review. “Preliminary” reviews and approvals are unhelpful and do not provide the requisite certainty.