

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

Spectrum Management and Telecommunications – Industry Canada

**Comments of the Public Interest Advocacy Centre,
Consumers' Association of Canada and Council of
Senior Citizens' Organizations of British Columbia**

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1. Introduction

1. The Public Interest Advocacy Centre (PIAC), Consumers' Association of Canada (CAC) and Council of Senior Citizens' Organization of British Columbia (COSCO), together "PIAC/CAC/COSCO", are pleased to provide Spectrum Management and Telecommunications – Industry Canada with comments on the issues raised by "Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences" (March 2013).
2. This consultation represents a potential step forward for the management of the legal and business aspects of spectrum licence transfers and prudent spectrum management, to the ultimate benefit of Canadian wireless consumers.
3. In this consultation, Industry Canada proposes including licence conditions on all spectrum licences, both those already granted and those to be granted, that restrict the transfer of such licences in any manner or by any legal mechanism, without the approval of the Minister of Industry. PIAC/CAC/COSCO support this licence condition.

2. Proposed Condition on Transfer of Spectrum Licences

4. Specifically, the consultation posits imposing the following condition on all spectrum licenses (both existing and prospective):

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.¹

5. By this proposed licensing condition, Industry Canada is attempting to close a possible loophole in auction rules that may arguably allow such an agreement or option to be concluded prior to the conclusion of the prescribed period prohibiting transfer of licences in accordance with previous auction rules. In particular, it appears designed to address

¹ Spectrum Transfer Consultation, at p. 7.

the situation that has recently arisen where Shaw Media Global Inc. has agreed to an option transfer its “set-aside” spectrum (won as a “new entrant”) from the 2007 AWS auction to Rogers Communications Inc., as part of a larger deal including transfer of partnership interests in TVtropolis General Partnership.²

6. PIAC, CAC and COSCO among others have already complained publicly to the Minister of Industry that the Shaw-Rogers option deal for AWS spectrum violates the “letter and spirit” of the 2007 auction rules, which were designed specifically to remove the possibility for incumbent wireless providers to obtain “set-aside” spectrum from new entrants (at least during the “blackout” period of five years set out in the auction rules and, potentially, longer, depending on Industry Canada’s policy direction for spectrum).
7. PIAC/CAC/COSCO wish to express our support for the licensing condition sought to be imposed on all licences above. We are of the opinion that that condition affirms the previous policy contained in the relevant auction rules and is simply a second and clearer statement of that policy, which is consistent with Industry Canada’s stated policy to encourage a viable fourth- or more- national provider wireless industry in Canada.

3. Add Qualitative Competition Factor to Initial Threshold Test

8. In the consultation document, Industry Canada notes that not all spectrum licence transfers or deemed transfers would trigger a “detailed review” leading to possible denial of the transfer. PIAC/CAC/COSCO understand this position, however, we would add to the Department’s initial criteria for deciding if a transfer should be subject to the detailed review, based not simply on quantitative measures, but also on potential qualitative effect upon the wireless market and competition in that market. At present, the proposed “detailed review” criteria are simply thresholds considering “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.
9. PIAC/CAC/COSCO suggest that it could be possible for incumbent wireless providers to design spectrum transfer schemes that did not trip such mechanical quantitative thresholds but which were still designed to foreclose competitive entry by new entrant wireless service providers. A simple example would be two tacitly or explicitly

² See Shaw News Release: “SHAW ANNOUNCES AGREEMENT WITH ROGERS FOR PURCHASE AND SALE OF ASSETS” (January 14, 2013). Online: http://www.shaw.ca/uploadedFiles/Corporate/Media/Press_Releases/ShawRogersJan14.pdf

coordinated agreements to have a incumbent carrier one acquire spectrum in a region where their concentration was low in order to prevent acquisition of this spectrum by a new entrant, with a similar agreement by a incumbent carrier two in another part of the country to do the same in a region where that incumbent had low spectrum concentration. This strategy would reflect the high foreclosure value of spectrum for all incumbents, which is well-documented.

10. To avoid this potential result, we recommend that Industry Canada consider including a qualitative market analysis inquiry akin to that found in s. 92 of the *Competition Act*, namely inquire into whether the proposed spectrum transfer: “prevents or lessens, or is likely to prevent or lessen competition in the wireless services market substantially”.
11. The Merger Enforcement Guidelines of the Competition Bureau detail several of the potential factors under such a test, in particular, where the merger can “foreclose rivals from accessing inputs to production.”³ We suggest that these Guidelines could be adapted to the task of reviewing spectrum transfers to determine if such foreclosure is an apparent goal of the transfer.⁴
12. To complaints that adding this qualitative factor to the above test for a detailed review would be inefficient for minor spectrum “re-arrangements” as posited in the consultation document, we contend that only by having a qualitative factor each time can the very real possibility of collusive or tacitly coordinated behaviour amongst incumbents to foreclose spectrum from new entrants be controlled.

3.1 Qualitative Factors in Detailed Review

13. Regarding the detailed review factors proposed by Industry Canada at para. 16 of the consultation document, PIAC/CAC/COSCO have some concerns. At present, these factors and the test they comprise are stated thus:

- (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.

14. PIAC/CAC/COSCO expect that the inquiry under factor (a) “the efficiency and competitiveness of Canadian telecommunications market” will concentrate upon

³ See Merger Enforcement Guidelines of the Competition Bureau (October 2011) at para. 2.9.

⁴ See in particular Merger Enforcement Guidelines at paras. 11.4 to 11.6.

competition and in particular will assess whether there are attempts by incumbents or others to foreclose or limit competition in a market. On this issue, we would expect the Department to be, as suggested above, considering factors such as those in the Competition Bureau's Merger Enforcement Guidelines, as adapted to spectrum transfers. We also would expect Industry Canada to be in contact with the Competition Bureau, which may well be considering action under the *Competition Act* in relation to such a potential transfer.

15. We trust that Industry Canada would have a healthy skepticism for arguments of market efficiency in this context, which is akin to a merger. Arguments of market efficiency can always be made, however, if the practical effect of the transfer is to foreclose entry or substantially lessen competition in the wireless services market then the "efficiencies defence" should be trumped by competitive concerns.
16. This factor would in part be a more in-depth analysis of the same qualitative factor suggest above in Industry Canada's threshold test; however, we see no harm in repeating the process, as the detailed review will lead to a decision on the transfer, not merely a decision on whether to review the transfer at all, as in the previous step.
17. Regarding factor (b) we are generally content and expect Industry Canada to evaluate this factor with a view to downstream retail competition and product offerings to consumers. We would welcome any summary of such research or release of any studies that were not competitively harmful. This would allow researchers and advocates some vital primary information upon which to assess the health of the wireless services market – which information is difficult to otherwise obtain.
18. However, regarding factor (c) we have two concerns. First, the use of the somewhat abominable "and/or" conjunction construction leaves open the possibility of treating this third factor as an alternative to the first two, which is neither appropriate nor implied by the inclusion of the first two factors. The conjunction should simply be "and".
19. Second, this third factor as presently stated is to some extent a double-edged sword for consumers. The argument could be made by the companies seeking to make the transfer that without transfer approval the spectrum would be inefficiently used or would lie fallow and therefore the transfer should be approved. PIAC/CAC/COSCO recommend a note to this factor that specifies that if a transferor made such a claim of present inefficient or fallow use that that statement could be used to open a different inquiry into hoarding of spectrum in the context of any "use it or lose it" spectrum auction rules. Therefore this third factor should be restated to require incremental economic or social benefits to consumers of the proposed transaction, which could be weighed against any potential anti-competitive effects identified under factors (a) or (b).

4. Conclusion

20. PIAC/CAC/COSCO support the inclusion of the specific licence condition in all existing and future spectrum licences suggested in the present consultation.⁵ Such a licence condition has proven necessary given recent market announcements, which PIAC/CAC/COSCO contend are likely intended to limit competitive entry or to lessen competition in the wireless services market.

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⁵ Namely:

“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.” See: Spectrum Licence Transfer Consultation, p. 7.