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Ken Engelhart
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April 3, 2013

[Sent via email: spectrum.operations@ic.gc.ca](mailto:spectrum.operations@ic.gc.ca)

Director, Spectrum Management Operations
Industry Canada
300 Slater Street
Ottawa, Ontario K1A 0C8

**Re: Canada Gazette Notice No. DGSO-02-13 Consultation on Considerations
Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences**

Pursuant to the procedures outlined in the above noted document, attached are Rogers Communications ("Rogers") Comments.

The document is being sent in Adobe Acrobat X Pro Version 10. Operating System:
Microsoft Windows 7.

Regards,

A handwritten signature in blue ink, appearing to read 'Ken Engelhart', written over a light blue horizontal line.

Kenneth G. Engelhart
DH:jt

Attach.



**Comments of
Rogers Communications**

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

(DGSO-002-13)

April 3, 2013

Executive Summary

- E1. The Canadian wireless market is highly competitive and is characterized by robust investment and innovation, declining consumer prices, high levels of usage and low levels of concentration.
- E2. More than 60% of the Canadian population have access to multiple LTE mobile broadband networks that are continually expanding, and more than 90% of the population have access to UMTS/HSPA networks.
- E3. Mobile spending as a percentage of gross domestic product (“GDP”) in Canada is the second lowest in the G8. Canada also ranks favourably compared to other developed countries for average minutes of use per capita.
- E4. Smartphone price plans are cheaper in Canada compared to the United States (“U.S.”) and Canadian rates for U.S. data roaming are the seventh lowest out of 34 developed countries.
- E5. Canada has the fifth lowest level of market share concentration out of 21 developed countries.
- E6. Given the competitiveness of the Canadian wireless market, there is no need for the competition assessment and spectrum concentration analysis that Industry Canada (“the Department”) has proposed in relation to the transfer, division and subordinate licensing of spectrum licences. Indeed, the Competition Bureau already performs a competition assessment when it responds to mandatory notifications regarding the proposed sale of spectrum licences.
- E7. In the event that the Department decides to implement its proposals, detailed assessments should only apply to mobile spectrum. The Department should only conduct a detailed review if the transaction exceeds the financial thresholds that are used by the Competition Bureau when assessing spectrum transfers.
- E8. Furthermore, under no circumstances should the proposed policies be applied during the current term of existing spectrum licences that contain enhanced transferability rights.
- E9. The definitions of “deemed transfers” and “prospective transfers” also need to be tightened up to avoid subjective elements in the definitions and to add clarity in their scope and application.

- E10. While limited notice of applications to transfer spectrum licences (including deemed transfers) may be appropriate if limited to the names of the parties and the spectrum licences involved, under no circumstances should notice of “prospective transfers” be provided to the public.
- E11. If the Department proceeds with its proposal to issue non-binding rulings with respect to “prospective transfers” of spectrum licences, such rulings should be optional at the request of the parties to the prospective transfer and the parties should be at liberty to execute such agreements provided that the prospective agreement provides for the ultimate licence transfer to be subject to prior Ministerial approval.

Introduction

1. Rogers Communications (“Rogers”) is pleased to provide the following comments in response to **Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences - DGSO-002-13** (“the Consultation Paper”).
2. The Canadian wireless market is highly competitive and is characterized by robust investment and innovation, declining consumer prices, high levels of usage and low levels of market share concentration.
3. Canada is a world leader in LTE deployment with the three largest operators each providing LTE coverage to at least 60% of the Canadian population at the end of 2012.¹ This coverage continues to expand each day. For its part, Rogers was the first operator to launch LTE in Canada, and one of the first operators worldwide to launch LTE. Peak download speeds of up to 150 Mbps are available on our LTE network and typical download speeds range from 12 Mbps to 25 Mbps. Faster LTE speeds will be possible if we are able to acquire additional spectrum with which to deploy wider channels for LTE.
4. Despite Canada’s significant land mass and low population density, Canadians living in rural areas also benefit from the fact that wireless services are available to 99% of the Canadian population.² Rogers’ GSM/EDGE network is available to about 97% of the population, while our UMTS/HSPA service is available to about 91%, offering download speeds of up to 42 Mbps.
5. Significantly, Canadian wireless carriers invested over \$2 billion in their networks and services in 2011 alone.³
6. Prices for mobile wireless services in Canada continue to decline each year, as evidenced by the ongoing decline of average revenue per user for voice services.⁴ In fact, Canada’s wireless rates compare very favourably to other developed countries. For example, mobile spending as a percentage of GDP in Canada is the second lowest in the G8 and third lowest in the G20.⁵
7. At the same time, the adoption and use of wireless services in Canada compares well with other countries. Canada ranks 10th highest out of 21 developed countries for average minutes of use per capita.⁶

¹ Rogers 2012 Annual Report, p. 26; BCE 2012 Annual Report, p. 27; TELUS 2012 Annual Report, p. 65.

² *Communications Monitoring Report*, Canadian Radio-television and Telecommunications Commission, September 2012, p. 165.

³ *Ibid*, p. 168.

⁴ *Canadian Wireless Myths and Facts*, Scotia Capital, March 7, 2013, p. 3.

⁵ *Global Wireless Matrix 4Q12*, Bank of America Merrill Lynch, January 3, 2013, p. 56.

⁶ *Global Wireless Matrix*, p. 56.

8. The popularity of smartphone devices is rapidly growing globally. Smartphone plans are cheaper in Canada than in the U.S., which is in many respects the most competitive wireless market in the world.
9. The Canadian mobile wireless services market is also characterized by low levels of concentration. In fact, out of 21 developed countries, Canada is the fifth lowest for market share concentration as measured by the Herfindahl-Hirschman Index (“HHI”).⁷ Only the United Kingdom (“U.K.”), U.S., Denmark and Germany have lower market share concentration.
10. The expansion of LTE networks across Canada and rising popularity of smart phones and tablets are driving the dramatic growth in demand for mobile broadband services.
11. Given the competitiveness of the Canadian wireless market, in terms of investment, innovation, pricing, usage and concentration, Rogers submits that there is no need for the competitive assessment and spectrum concentration analysis that the Department has proposed. These assessments are not necessary in a highly competitive market.
12. Furthermore, the competitive assessment process could inhibit the efficient transfer of spectrum. Mobile operators including Rogers require additional spectrum in order to deploy faster data speeds and meet surging demand in a timely manner. While the Department conducted a spectrum auction in 2008 and intends to conduct auctions in 2013 and 2014 to respond to this demand, Rogers must also rely on the secondary market for acquiring much needed additional spectrum capacity to remain competitive.
13. In any event, the competition assessment that the Department has proposed is already completed by the Competition Bureau in the normal course of responding to mandatory notifications regarding the proposed sale of spectrum licences. The Department’s proposed duplication of the Competition Bureau’s assessment is therefore unnecessary.
14. In the event that the Department elects to implement its proposals regarding competition assessments, spectrum concentration and detailed assessments, Rogers recommends that the use of these instruments should be limited to mobile spectrum transfers and only applied to mobile spectrum that is licensed in the future.

⁷ *Global Wireless Matrix*, p. 2.

15. There is little to be gained by applying the Department's proposals to the proposed transfer of spectrum allocated for fixed services and used, for example, for point-to-point backhaul. This would only serve to unnecessarily delay less significant transactions.
16. Furthermore, it would be inappropriate to apply the Department's proposals during the current term of spectrum licences that were acquired in an auction, since existing licensees had no idea that the transferability of their licences would be subject to the proposed assessments when they initially acquired their spectrum licences. For example, successful bidders that paid hundreds of millions of dollars for their licences in the 2008 AWS spectrum auction made these substantial investments in the absence of the proposed new rules which may make it more difficult to obtain approval for spectrum transfers. For the reasons set out below, applying the Department's proposals to the transfer of these licences during their current term would be unfair and would fail to achieve the policy objectives espoused by the Department.

Retroactive Application to Existing Spectrum Licences

17. In Rogers' respectful submission, the proposed new conditions of licence should only be applied to future auctions or to renewal of existing licences. To apply the new regime to spectrum licences that have already been issued is unfair and inconsistent with the principles underlying spectrum auctions.
18. Historically the Department has treated auctioned spectrum in a contractual manner. It has made the terms of that contract clear prior to the bidding process by publishing consultation papers, receiving comments and reply comments, and publishing the final auction framework, including conditions of licence. It has then conducted a question and answer process to ensure that the final framework is fully understood by the parties.
19. The Application to Participate in the Auction that bidders have to sign includes a certification that the bidder has read the licensing policy for the auction in question and understands the policies and rules specified therein.⁸
20. The Deed of Acknowledgement that bidders have to sign includes the following agreement:

To: Her Majesty the Queen in right of Canada

⁸ Application to participate in the Auction for Spectrum Licences for AWS and other Spectrum in the 2 GHz range.

In consideration of the Minister of Industry (“Minister”) holding a spectrum auction in accordance with the *Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, published December 2007, the Minister’s approval of the Applicant’s participation in this auction, and other good and valid considerations, the receipt and sufficiency of which are hereby acknowledged by the Applicant and the Minister, the Applicant covenants and agrees:

1. to accept and to be bound by all of the terms and conditions of the auction as set out in *Canada Gazette* notice DGRB-011-07 and the *Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*; and⁹
21. This is a contractual obligation that is binding on the bidder.
22. Through this process, the Department ensures that bidders are fully aware of their rights and obligations as set forth in the policy documents and conditions of licence.
23. From the bidder’s perspective, certainty of terms is essential to the process of valuing the spectrum and considering how much to bid in a particular market.
24. One of the most important rights associated with auctioned spectrum is the right to sell it in the aftermarket. This is a key distinguishing feature of spectrum licences that differentiates them from radio licences with annual fees.
25. In the AWS auction, for example, the *Licensing Framework*¹⁰ specified that, subject to a five year moratorium on transferring new entrant set-aside spectrum to incumbent carriers, the AWS licences were transferable subject to Ministerial approval. In section 4.2 of that policy, the only requirement specified is notification to meet eligibility and technical criteria and conditions of the licences:

Departmental approval is required for each proposed transfer of a licence, whether the transfer is in whole or in part. The licensee must apply to the Department in writing. The transferee(s) must also provide an attestation and other supporting documentation demonstrating that it meets the eligibility criteria and all other conditions, technical or otherwise, of the licence.¹¹

⁹ Ibid, Attachment A - Deed of Acknowledgement.

¹⁰ Industry Canada, *Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services in the 2 GHz Range*, December 2007.

¹¹ Ibid, section 4.2.

26. In section 2 of the AWS Conditions of Licence, bidders are referred to CPC-2-1-23 for more information on the transfer policy. That document includes the following statement:

For more information, refer to Industry Canada's Client Procedures Circular CPC-2-1-23, *Licensing Procedure for Spectrum Licences for Terrestrial Services*, as amended from time to time.

27. CPC-2-1-23 explains an important policy distinction between the transfer of spectrum licences acquired through an auction and radio licences - namely "enhanced transferability":

Spectrum licences are a subset of radio authorizations which may be issued at the discretion of the Minister of Industry through various licensing processes. To meet the policy goals of the Department, the spectrum licences assigned under the different licensing processes may not have the same privileges. One such privilege is that of enhanced transferability and divisibility rights accorded to spectrum licences assigned through an auction. These spectrum licences may be transferred in whole or in part (either in geographic area or in bandwidth) to a third party subject to the conditions stated on the licence and other applicable regulatory requirements.¹²

28. It was in part on the basis of these rights that bidders in the AWS auction (as well as other spectrum auctions) valued the spectrum and formulated their bidding strategy. This provision contributed to the \$4.2 billion raised in the AWS auction.

29. Changing this key attribute of AWS spectrum involves changing the rights of bidders in that auction after the fact - a change that flies in the face of the principles of contractual certainty that the Department strives to attain in its spectrum auctions.

30. This change in the conditions of licence only four to five years into a ten year term can be expected to have the following ramifications:

- i) Devaluation of AWS spectrum - particularly that held by new entrants who would now have increased risk of not being able to sell to a competitor after 5 years, as they were told they could do when they entered the auction and agreed to the terms;

¹² CPC-2-1-23, *Licensing Procedure for Spectrum Licences for Terrestrial Services*, at page 4.

- ii) Discount the value of spectrum in future auctions since bidders will know that the terms are uncertain;
- iii) Dampen new entry by increasing the risks associated with selling their business to the highest bidder if they fail to establish a viable wireless business;
- iv) Possibly result in law suits by aggrieved new entrants whose rights to sell to incumbents after five years will have been seriously diminished.

31. For these reasons, the application of the proposed policy to existing spectrum licenses will have precisely the opposite impact on new entry compared to the Department's stated policy objectives and will undermine all future auctions. The Department should therefore make it clear that the new policy will not apply to existing spectrum licences that are subject to enhanced transferability rights until their current term expires.

Responses to the Consultation Paper Questions

6. Review of Spectrum Licence Transfer Requests

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.

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

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.

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.

Criteria and Considerations

32. Rogers submits that most of these factors come into play in a competitive analysis for a merger review conducted by the Competition Bureau. However, the Competition Bureau uses a more precise test of whether the merger or acquisition "prevents or lessens, or is likely to prevent or lessen, competition substantially." Rogers does not appreciate why the Department would wish to duplicate a review of factors that would be considered by the Competition Bureau when the merger or acquisition is subject to notification, and to use a less precise test.

33. Furthermore, if the Department does see fit to establish its own review process, it should consider including a competition impact test rather than simply referring to a number of factors that it will consider. The Competition Bureau's test of whether a merger or acquisition prevents or lessens or is likely to prevent or lessen competition substantially is a well-understood test that is familiar to the Industry and the courts. It is the impact on competition that the Department should be considering if it moves forward on its proposal and that assessment includes a consideration of the

necessity of competitive responses to the actions of other players in the market, as well as the viability of any companies being purchased. It is not sufficient to simply list a number of factors that will be considered by the Department in reviewing an acquisition or merger involving spectrum licences. The Industry must know the test that will be applied to judge the transaction. In Rogers' respectful submission, that test should be the same test used by the Competition Bureau.

34. In the context, however, of a detailed assessment conducted as suggested by the Department, and without prejudice to its primary submission that the Department should not conduct such a detailed assessment, Rogers has the following comments on the proposed criteria.
35. First, Rogers submits that the Department should consider whether competitors of an operator that is seeking to acquire additional spectrum through a transfer have combined their respective spectrum holdings in order to jointly operate a network that is capable of delivering faster mobile data speeds. Although the proposed transfer may result in the operator holding more spectrum than each of its individual competitors, the relevant comparison is with the total amount of spectrum that has been combined and is jointly shared by the operator's competitors. This is important because it is the total combined amount of spectrum that will determine its competitors' mobile data speeds. The Department's analysis must allow an operator to acquire additional spectrum in order to offer mobile data speeds that will enable it to effectively compete with competitors who have combined their spectrum.

Threshold, Screen or Cap that Should be Used

36. Rogers recommends that the Department consider the use of a threshold to determine whether a detailed review is required. As noted above, Rogers also recommends that detailed reviews should only apply to transfers and transactions involving mobile spectrum licences issued in the future and not, for example, to the transfer of spectrum licences during their current term, or to fixed service spectrum licences.
37. We note that the *Competition Act* defines a threshold whereby parties must notify the Competition Bureau of any proposed transactions that involve the sale of assets with a book value that exceeds \$80 million.¹³ This is the threshold that currently applies, among other things, to the proposed sale of spectrum licences. Upon receiving any such mandatory notification, the Competition Bureau undertakes a detailed assessment of the proposed transaction.

¹³ *Competition Act*, part IX, subsection 100(7).

38. Consistent with the threshold that has been set for the Competition Bureau by the Parliament of Canada, the Department could adopt the same thresholds for determining when to undertake a detailed assessment of a proposed spectrum transfer. It makes no sense for the Department to review small transactions that fall below this threshold. It would result in unnecessary administrative burden and would impede the Industry from responding in a timely manner to network requirements.

Treatment of Deemed Spectrum Licence Transfers

39. Rogers has a number of concerns related to the treatment of “deemed spectrum licence transfers”.

40. The proposed definition of deemed spectrum licence transfers provides as follows:

“deemed spectrum licence transfer” means any agreement or transfer that has the effect of transferring, dividing or creating an interest in a spectrum licence in that it provides for the acquisition or control of a licence through a change in ownership and control of a licensee; or otherwise has the intent to determine who controls use of the spectrum other than the original licensee.¹⁴

41. It appears that the intent of the definition is to catch the purchase of companies that hold spectrum licences (i.e. a share transaction). Rogers has no objection to transfers of control being treated as spectrum transfers when the company being acquired holds spectrum licences. Rogers itself has always sought Industry Canada approval in such circumstances. However, the definition goes beyond this type of transaction to catch any agreement “that has the effect of transferring, dividing or creating an interest in a spectrum licence... or otherwise has the intent to determine who controls use of the spectrum other than the original licensee.”

42. Rogers is concerned about use of the words “intent” and “effect” in the proposed definition. They are unnecessary and make the definition subjective and vague. Either an agreement transfers, divides or creates an interest in a licence in that it provides for the acquisition or control of a licence through a change in the ownership and control of a licensee - or it does not. The intent of the parties is irrelevant. The factors used by the Department to determine control in fact are well understood.

43. In light of these concerns, Rogers proposes that the definition of deemed transfer be amended as follows:

¹⁴ Consultation Paper, p. 3.

“deemed spectrum licence transfer” means any agreement that results in the ownership or control of a spectrum licence through a change in ownership and control of a licensee; or otherwise results in a person other than the licensee controlling use of the spectrum.

44. The wording of the definition also appears to be broad enough to catch security agreements whereby a company pledges its assets, including spectrum licences, or possibly shares, to a lender. Such a charge results in the bank or lenders having a legal interest in those assets. It would cause an enormous administrative burden for the Department and for Licensees if it were necessary to apply to the Department for approval every time a pledge of assets was made to support a loan. This is not currently required as long as the agreement makes an actual appointment of a receiver or any seizure of the licences subject to prior approval by the Minister. In Rogers’ respectful submission, security agreements should be excluded from the definition of deemed spectrum licence transfers.
45. Another concern with the apparent breadth of this definition relates to its potential overlap with the definition of “prospective transfer” in paragraph 25 of the Consultation Paper. An option to purchase either a spectrum licence or a company that holds a spectrum licence might reasonably be interpreted to involve “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”. The concept of “an interest” is much broader than the concept of a transfer or division of a licence - terms that have precise legal meanings. For these reasons, Rogers respectfully submits that deemed spectrum licence transfers should be defined to exclude any transactions falling within the definition of a prospective transfer. In order to accomplish this, the definition of “prospective transfer” should be included in the definition section of the policy and should be expressly excluded from the definition of deemed transfer.
46. Paragraph 19 of the Consultation Paper also indicates that licensees will be required to notify Industry Canada in advance of “finalizing a deemed licence transfer” and that a licensee that finalizes a deemed licence transfer in the face of an indication by the Department that it would refuse the approval, would be in breach of its licence conditions. Rogers questions why any unique rules would be required for the treatment of deemed transfers since the Department is proposing to treat them as actual transfers. Once it is determined to treat them as actual transfers, the Department needs only to have a set of rules for treatment of actual transfers.

47. In addition, the words “finalizing a deemed licence transfer” or “finalizing” an actual transfer are imprecise and too broad for a rule the breach of which could result in a breach of the terms of a licence possibly giving rise to revocation of licence under the *Radiocommunication Act*. The conditions of licence currently require advance notice of a transfer of a licence and prohibit such a transfer without approval of the Minister. This has never prevented the parties to such an agreement from finalizing their agreement and executing it, provided that it is an express condition of the agreement of purchase and sale that the licences (or shares of a company that holds a licence) cannot be transferred without prior Ministerial approval. Such an agreement might be “finalized” but it does not infringe the requirement to obtain prior Ministerial approval to transfer the licence. Rather than create new rules that are imprecise, the Department can continue to rely on a standard condition of licence that prohibits spectrum licence transfers without the prior approval of the Minister. This can be expanded by a provision that includes deemed spectrum licence transfers in the definition of spectrum licence transfers. This approach would be consistent with commercial reality and result in a more precise and understandable regime.

48. It is also not clear why the Department is referring to “an indication that it would refuse approval” regardless of whether it is dealing with an actual application for transfer or a deemed transfer. If deemed transfers are being treated as actual requests for a transfer, then the Minister would either be approving or denying the transfer in an actual decision. If such approval is required as a condition of licence, the *Radiocommunication Act* already specifies in section 5(2)(i) that the Minister has the power to revoke a licence for breaching the conditions of licence and there is no need for new provisions dealing with the ramifications of a breach.

Publication of Spectrum Licence Transfer Requests

49. Spectrum transfer arrangements are competitively sensitive. It would be highly prejudicial to the parties associated with the proposed agreement if all information associated with a given transaction was publicized.

50. Rogers supports the notion that spectrum licence transfer requests will be publicized only under the following conditions. The Department should maintain the confidentiality of financial information and other sensitive details associated with actual or deemed transfers and should disclose only key information, such as the fact that an application for approval of a transfer of spectrum licence has been filed with the Department, the parties involved, and the spectrum licences associated with the proposed transaction.

51. In addition, to the extent that interested parties will be invited to provide the Department with their comments regarding the proposed transaction, Rogers recommends that the parties to the proposed transaction should be provided with the right to reply to any such comments. This will ensure that the claims made by other parties regarding the proposed transaction will be adequately scrutinized and tested.
52. As discussed further below, under no circumstances should notice of a “prospective transfer” of a spectrum licence be provided to the public.

Other Suggested Changes

53. Rogers does not have any other suggested changes for 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.

7. Timelines

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

54. Detailed reviews should be completed as expeditiously as possible so that operators will have access to additional spectrum to deploy new services, provide faster data speeds and satisfy growing demand for more capacity. One of the drawbacks of the proposed new regime is the potential for delaying transactions between carriers that are trying to make new investments in infrastructure to respond to consumer demand or the need to upgrade networks to accommodate new technology. Prolonged regulatory processes such as the one proposed have to impede the ability of carriers to respond dynamically to market conditions and to meet customer expectations.
55. For these reasons, Rogers urges the Department to reduce the timelines proposed in the Consultation Paper.
56. Certainly, longer timeframes than those that have been proposed will unnecessarily delay spectrum transfers and will therefore inhibit innovation in the Canadian wireless market, limit competition and threaten the quality of wireless services provided to Canadians.

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.

57. The Department has proposed the following provision to deal with “prospective transfers”:

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.

58. Rogers is concerned with the lack of specificity in this proposed new notification and review process. Clearly the intention is to catch transactions that involve spectrum transfers or divisions at a later date - but on its face the proposed provision could catch many types of agreements that the parties would wish to close as soon as possible were it not for regulatory approval requirements. For example, at the present time, spectrum purchase agreements make the closing of spectrum transfers subject to the Department’s approval and, in some cases, *Competition Act* approval. Such approvals are usually conditions precedent to closing. Due to the timelines involved in obtaining such approval, it is possible for closing to be delayed for a considerable period of time. Under the Department’s proposal, the timeline on a detailed review could be longer than 16 weeks and in the case of the Competition Bureau, it could be longer still. In Rogers’ respectful submission, these types of agreements that call for closing within a short period of time after receiving all applicable regulatory approvals should not be considered “prospective transfers”. Such transactions are in fact the norm and should be treated as current applications to transfer.

59. The vagueness of the term “prospective” also needs to be refined if the new rules are to be readily understood and provide proper guidance to the Industry. Given the types of delays that are common in regulatory reviews under the *Competition Act*, as well as by the Department, Rogers considers that an agreement of purchase and sale for the transfer of spectrum, or for the acquisition of a company that holds spectrum licences, should only be considered to be prospective if closing of the

transaction is stated in the agreement to be either more than one year after execution of the agreement, or more than two months after receipt of all regulatory approvals that are stated to be conditions precedent to the closing of the licence transfer or merger.

60. Rogers also has concerns about confidentiality of any prospective transfers if they have to be notified to the Department in advance of execution. In such circumstances, without an executed agreement, all documentation must be kept strictly confidential including the fact that there is a potential deal. Failure to do so would result in extreme prejudice to the parties.
61. As a practical matter, Rogers notes that it may be very difficult for parties to know when they have reached a “binding agreement” that they should notify to the Department. Negotiations for the acquisition or disposition of spectrum licences are often conducted in a highly competitive environment. Rogers’ experience is that one often does not know a binding agreement has been reached until the agreement is actually executed and delivered. In such circumstances, in order to comply with the Department’s requirement, the parties may have to enter into an agreement confirming their agreement to enter into the “binding agreement” once the Department’s preliminary assessment concludes that the transaction would likely be approved.
62. Rogers notes that the Department is not proposing to make its preliminary assessment binding. This is presumably because of a concern that market conditions might change prior to the date of the actual transfer or the date on which the option is exercised. For the same reasons, Rogers assumes that the Department is not proposing to restrict the parties’ ability to execute a prospective transfer agreement in the event that the Department issues a negative assessment, provided that such agreement provides for the ultimate transfer of the spectrum licence to be subject to prior Departmental approval. This should be made explicit in the policy.
63. The Department has indicated that the same timelines would apply to a prospective transfer as a final transfer. This means up to four weeks for a simple review and sixteen weeks or more for a detailed review. Given that a prospective transfer will still have to be reviewed at a later date, possibly with a second sixteen week plus timeline, this process will result in considerable delay and administrative burden twice. This will make commercial dealing much more difficult.
64. Rogers wonders what the purpose of the preliminary assessment is if it is non-binding and if it is recognized that market conditions may result in a different

outcome at the time the transfer actually takes place. It would make more sense to make the preliminary assessment process available at the option of the parties to the agreement, rather than to make it mandatory as the Department has proposed.

Conclusion

65. The Canadian wireless market is highly competitive and is characterized by robust investment and innovation, declining consumer prices, high levels of usage and low levels of concentration.
66. More than 60% of the Canadian population have access to multiple LTE mobile broadband networks that are continually expanding, and more than 90% of the population have access to UMTS/HSPA networks.
67. Mobile spending as a percentage of GDP in Canada is the second lowest in the G8. Canada also ranks favourably compared to other developed countries for average minutes of use per capita.
68. Smartphone price plans are cheaper in Canada compared to the U.S. and Canadian rates for U.S. data roaming are the seventh lowest out of 34 developed countries.
69. Canada has the fifth lowest level of market share concentration out of 21 developed countries.
70. Given the competitiveness of the Canadian wireless market, there is no need for the competition assessment and spectrum concentration analysis that the Department has proposed in relation to the transfer, division and subordinate licensing of spectrum licences. Indeed, the Competition Bureau already performs a competition assessment when it responds to mandatory notifications regarding the proposed sale of spectrum licences.
71. In the event that the Department decides to implement its proposals, detailed assessments should only apply to mobile spectrum. In this case, the Department should use the same thresholds that are used by the Competition Bureau when determining whether to make a detailed assessment of a spectrum transfer.
72. Furthermore, under no circumstances should the proposed policies be applied during the current term of existing spectrum licences that contain enhanced transferability rights.

73. The definitions of “deemed transfers” and “prospective transfers” also need to be tightened up to avoid subjective elements in the definitions and to add clarity in their scope and application.
74. While limited notice of applications to transfer spectrum licences (including deemed transfers) may be appropriate if limited to the names of the parties and the spectrum licences involved, under no circumstances should notice of “prospective transfers” be provided to the public.
75. If the Department proceeds with its proposal to issue non-binding rulings with respect to “prospective transfers” of spectrum licences, such rulings should be optional at the request of the parties to the prospective transfer and the parties should be at liberty to execute such agreements provided that the prospective agreement provides for the ultimate licence transfer to be subject to prior Ministerial approval.
76. Rogers appreciates the opportunity to share its views with the Department regarding these important matters.