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April 3, 2013

BY E- MAIL

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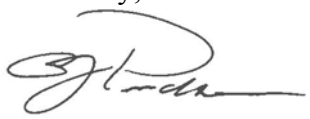
Dear Sir/Madam,

Canada Gazette Part 1, DGSO-003-13, March 2013
Consultation on Considerations Relating to Transfers,
Divisions and Subordinate Licensing of Spectrum Licences

Please find enclosed the reply comments of Xplornet Communications Inc. and Xplornet Broadband Inc. (collectively "Xplornet") in response to the submissions of other parties in connection with Canada Gazette Notice DGSO-002-13 Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences.

Yours truly,



CJP/
Enclosure

Christine J. Prudham

INDUSTRY CANADA CONSULTATION ON

CONSIDERATIONS RELATING TO TRANSFER, DIVISIONS AND SUBORDINATE LICENSING OF SPECTRUM LICENCES

CANADA GAZETTE DGSO-002-13

REPLY COMMENTS OF

XPLORNET COMMUNICATIONS INC.

AND

XPLORNET BROADBAND INC.

Filed: May 3, 2013

Introduction

1. These reply comments are submitted by Xplornet Communications Inc. and Xplornet Broadband Inc. (collectively "Xplornet") in response to the comments of other interested parties in accordance with the procedures set out in Canada Gazette Notice DGSO-002-13, Industry Canada Consultation on Considerations Relating to Transfer, Divisions and Subordinate Licensing of Spectrum Licences (the "Consultation Paper").

2. In these reply comments Xplornet has responded to a number of points raised by third parties. It has done so without restating all of the points made in its April 3, 2013 submission. Failure to rebut any intervenor comments that are inconsistent with Xplornet's stated position should not be taken as an indication of agreement with the intervenor.

Why this Consultation is Necessary

3. After reviewing all of the submissions from interested parties, it appears there is some confusion over why this consultation is necessary.[1] Xplornet would respectfully suggest that spectrum licence transfers need to be reviewed to insure that: (i) ongoing public policy goals are being respected, and (ii) adequate competition exists to provide the benefits of a competitive market to consumers and businesses.

4. The public policy goals of Industry Canada should include maximizing the use of spectrum for its intended purpose to benefit Canadians. Parliament has conferred on the Minister of Industry the power and responsibility to manage a scarce national resource - namely radio spectrum - in a manner that best serves Canadians. Since the resource in question is finite and not overly abundant, the Minister must carefully allocate available spectrum among all possible uses, considering both demand for the spectrum in question and its propagation characteristics. The Minister then apportions it among carriers or users through various licensing mechanisms. In carrying out this function, the Minister consults extensively with the wireless industry to examine demand for particular spectrum bands for particular purposes.

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[1] For example, in paragraph E2 of its comments, Bell Mobility states that it "is unsure why this Consultation is necessary."

5. As the caretaker of Canada's radio spectrum, Industry Canada has a statutory duty to ensure that the spectrum it licenses is used for the purposes for which it was licensed. In order to ensure the integrity of this licensing regime and in order to satisfy itself that spectrum is benefiting Canadians in the manner in which it was intended at the time of licensing, Industry Canada must continue to monitor use of the spectrum after it is licensed. If the spectrum is not being put to use for the intended purpose, the Minister must act to correct this situation. This includes denying the transfer of spectrum to parties that have no intention to use it for the designated purpose.

6. This should always be the first question the Department considers when an application to transfer spectrum is before it. This should precede any consideration of competition issues. If spectrum is not going to be used for the purpose for which it was licenced, the transfer is not in the public interest.

7. As discussed further below, this is a significant problem in Canada. Large amounts of spectrum currently lie fallow in the hands of licensees who have purchased it for a purpose that is different from what the Department originally designated. This problem is particularly accurate with respect to fixed wireless spectrum in the 2300 MHz and 3500 MHz bands which mobile operators are speculating will ultimately be re-designated for mobile broadband use. As long as the Minister is approving these spectrum transfers to companies with no intention of using it for its current designated purpose, the Minister is contributing to the spectrum shortage being experienced by Xplornet and other competitors. Simply put, the Minister must cease approving licence transfers or renewals in these circumstances.

8. The second lens through which a spectrum transfer should be reviewed if it passes the first hurdle, relates to the impact a proposed transfer is likely to have on the competitiveness of the Canadian wireless market. It is at this stage that spectrum concentration in the hands of a very few incumbent carriers comes into play. Is the spectrum in question required in order to expand the transferee's network to improve service to Canadians, or is it being purchased to block expansion by its competitors? Although it is just this latter question that the new policy proposals seem to focus on, Xplornet would respectfully submit that the new policy should focus on both ensuring

that the spectrum is being used for its intended purpose and that wireless markets remain competitive. However, it is only necessary to consider the latter issue of competition if there is evidence that the transferee intends to deploy the spectrum for its intended purpose within a reasonable timeframe.

9. While many of the parties to this consultation have expressed concerns relating to spectrum speculation and hoarding, the incumbent carriers have largely side-stepped this issue and have focussed on the current state of competition in the industry in support of their view that the new policy proposals are unnecessary.

10. For example, in support of its position, Bell points out there are already at least four wireless carriers in each provincial market, that mobile wireless prices are dropping and that capital expenditures are robust as reasons for opposing the proposed review process.[2]

11. These arguments might appear to have merit, but they miss the point. The important point they are missing is that the concentration of spectrum in the hands of the two largest incumbent carriers is foreclosing access to spectrum by their smaller competitors in both the mobile and fixed wireless markets. This problem is already apparent in the fixed wireless market and will begin to be felt in mobile markets as new entrants increase their customer base. If the current trend continues, new entrants in the mobile sector and competitors like Xplornet in the fixed wireless sector will not have the capacity to grow their businesses and competition will be diminished.

12. It is important to recognize that competitive markets only work to hold larger players in check if smaller players have the ability to increase production in response to higher prices imposed by larger players in an oligopolistic market structure. Since spectrum is clearly a scarce resource, lack of access to it will seriously impede smaller competitors serving this intended role. Given that all competitors have access to roughly the same technology, a competitor that cannot expand its network to meet demand is effectively neutralized as a competitive factor. So the fact that a given market might already have four competitors in it now, does not mean that it is or will remain competitive. If one or

[2] Ibid., paragraphs 4 to 12.

two of those competitors cannot expand capacity to meet demand, the market will quickly stagnate and competition will not be effective.

13. Public Mobile has also made this point in its comments:

> "The Government's policy goal should not be merely to ensure that there is a 4th carrier that survives in each market, but to ensure that the 4th carrier has access to the resources necessary to bring effective and sustainable competition to all Canadians. To achieve that goal, two critical ingredients are required: spectrum and capital. The former is entirely under the control of Government policy and decision-making. The latter is the purview of private sector investors. However, the two issues are linked. Without Government support to ensure that there is sufficient spectrum available to support the 4th carrier, risk capital will be extremely difficult, if not impossible, to attract. Without a clear path to sufficient spectrum for a sustainable 4th carrier, the necessary investments will not be forthcoming – to the detriment of Canadian consumers."[3]

14. Both Globalive and Mobilicity have suggested in their comments that the proposal to review spectrum transfers will damage their ability to attract investors since the policy has the potential to render the spectrum assets less liquid if an exit from the wireless market proves to be necessary.[4]

15. With respect, businesses are valued based on their prospects for success - more than their liquidation value. In Xplornet's view, Public Mobile has it right. It is the availability of additional spectrum required to grow a new entrant's business that will have the greatest impact on its success or failure and consequently on its ability to raise capital. Failing to implement the proposed review process will be far more damaging to investor confidence than abandoning it.

16. Bell Mobility argues for the benefits of a free market, including secondary spectrum markets in efficiently managing scarce resources.[5]

17. Xplornet agrees with Bell Mobility in principle, but believes that the secondary market has ceased to function as a competitive market given the incumbent carriers concerted efforts to buy up all of the available spectrum. Their considerable financial resources and their ability to "warehouse" unused spectrum has effectively precluded other carriers

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[3] Comments of Public Mobile, paragraph 8.

[4] Comments of Mobilicity, paragraph 7; and Comments of Globalive, paragraph 24.

[5] Comments of Bell Mobility, sections 3.2 to 3.4.

from the secondary market. Further, the failure to enforce use requirements contained in the spectrum licences creates speculation opportunities without financial consequence, whereby parties can buy spectrum intended for one purpose, hold it without spending capital to deploy and then profit when it is converted to another use.

18. In its comments, Quebecor Media argued that the time to set the policy for a given auction is at the time the auction policy is established in advance of the auction and that such policies should not be changed after the fact.[6]

19. With respect, Xplornet disagrees. The AWS auction rules and the 700 MHz and 2500 MHz auction rules all contain measures (set-asides and spectrum aggregation caps) designed to ensure that one or more new entrants would have access to spectrum in order to enter the mobile wireless market. They also preclude sale of set-aside spectrum to an incumbent for a period of five years (AWS), or sale to an incumbent that would result in it exceeding the prescribed spectrum aggregation limits for a period of five years (700 MHz and 2500 MHz). These measures were designed to overcome the barriers to entry posed by the better-financed incumbent carriers who Industry Canada presumed would otherwise purchase all of the available spectrum.

20. The new measures proposed by the Minister have a similar objective of ensuring that competitors have access to additional spectrum they need to expand their network capacity and remain competitive. The initial policy of encouraging new entry cannot ultimately succeed if the new entrants cannot gain access to additional spectrum to meet customer demand and network expansion plans.

21. This point was also made by EastLink:

> "EastLink submits that the Department's review of any transfer or deemed transfer arrangement should maintain the long-term integrity of set-aside and spectrum caps. Otherwise, the new wireless businesses made possible by the 2008 measures will not be sustainable, as they do not have access via other means to the spectrum required to provide competitive wireless services to new customers or to meet the future data needs of their existing customer bases. In the event that a lack of spectrum makes these new wireless businesses unsustainable, the operations would likely be aggregated under the national

[6] Comments of Quebecor Media, paragraphs 4 and 5.

> incumbents via acquisitions. Such an aggregation would result in reduced competition and all the related negative side effects, including a return to higher prices for wireless services, and slower or non-existent deployment of advanced wireless services to rural areas. This result would be entirely inconsistent with the policy objectives for Canada's wireless spectrum and would be contrary to the interests of Canadian consumers."[7]

22. In fixed wireless markets the problems caused by consolidation and concentration of spectrum in the hands of the largest incumbent carriers are already being acutely felt. One by one, the secondary market has been used by the mobile wireless incumbents to purchase the 2.3 GHz and 3.5 GHz spectrum held by smaller players regardless of the fact that this spectrum is currently licensed for fixed applications. Notwithstanding this fact, as well as the fact that the spectrum in question is not being used for its intended purpose, Industry Canada has allowed these transfers to proceed.

23. Clearly this buying spree is being fueled by the purchase by AT&T of 2.3 GHz spectrum in the United States for LTE applications and speculation that 3.5 GHz spectrum will ultimately be made available for mobile service applications. This was apparent from Inukshuk's reply comments in connection with the Department's Consultation on Renewal Process for 2300 MHz and 3500 MHz Licences:

> "19. .... Moreover, Inukshuk is not "hoarding" spectrum. As we state in our comments, we have elected to not invest in an inefficient and waning technology such as WiMAX and we plan to implement mobile broadband services in our licensed 2.3 GHz and 3.5 GHz spectrum using LTE, which is a much more viable, long-term solution than WiMAX."

24. Given that both 2300 GHz and 3500 GHz licences are issued for fixed wireless applications, Inukshuk is holding these licences in the hope that their designated use will be changed, thereby thwarting Industry Canada's policy decision to make these bands available for fixed uses such as broadband services.

25. These speculative purchases and the warehousing of the fixed wireless spectrum purchased in these transactions has resulted in price escalations for carriers already operating in the fixed wireless space and has rendered the purchase of additional spectrum impossible. Over the past few years, this has had a negative impact on

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[7] Comments of EastLink, paragraph 8.

competition in the fixed wireless market due to foreclosure of access to additional spectrum. Internet service has been constrained or precluded entirely for Canadians in areas where 50% to 100% of the fixed wireless spectrum in the region is being warehoused.

26. This has resulted in anything but an efficient allocation of scarce spectrum resources in the fixed wireless market, since a very large part (i.e. 75% or greater) of this spectrum is not being used.

27. The Minister's proposed policy to monitor spectrum aggregation and to review in detail spectrum transfers that adversely affect competition are both necessary and desirable. This point was also made by Public Mobile:

> "The proposed framework to govern the transfer of spectrum licences is vital to the process of continuing to develop and enhance the competitive availability of spectrum. It ensures that there is a mechanism for the Department to review every proposal to transfer spectrum and to ensure – on an on-going basis – that spectrum is allocated in a manner that supports sustainable competition."[8]

28. Bell Mobility argues that the proposed measures are contrary to international trends and spectrum management best practices. It relies in this regard on the 2006 report of the Telecommunications Policy review Panel (TPRP).

29. Seven years have passed since the TPRP report was released and market conditions have changed in Canada and elsewhere. Canada is not alone in taking a second look at whether a laissez fair secondary spectrum market is producing the benefits ordinarily expected of a competitive market.

30. The U.S. Department of Justice (DOJ) recently filed a submission with the Federal Communications Commission (FCC) commenting on the FCC's *Policies Regulating Mobile Spectrum Holdings*. In its submission, the DOJ commented on the incentives carriers may have to acquire spectrum for purposes other than efficiently expanding their own capacity or services.

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[8] Comments of Public Mobile, paragraph 14.

> "The goal in assigning licenses to spectrum reallocated for commercial services should be to ensure that it generates the greatest ultimate benefit to the consumers of those services. However, due to the scarcity of spectrum, the Department is concerned that carriers may have incentives to acquire spectrum for purposes other than efficiently expanding their own capacity or services. Namely, the more concentrated a wireless market is, the more likely a carrier will find it profitable to acquire spectrum with the aim of raising competitors' costs. This could take the shape, for example, of pursuing spectrum in order to prevent its use by a competitor, independent of how efficiently the carrier uses the spectrum. Indeed, a carrier may even have incentives to acquire spectrum and not use it at all. The result is that spectrum may not be put to its most efficient use, which harms all consumers of wireless services and can have an exclusionary effect on the carrier's competitors."[9]

31. Public Mobile has also submitted that "the spectrum transfer policy should not permit acquisition of unused licences as a blocking strategy to limit the ability of a competitive player from expanding geographically using this spectrum."[10]

32. One key indicator of whether a carrier is purchasing spectrum for speculative purposes, or to foreclose the market to its competitors, is whether the purchaser is using the spectrum or just sitting on it. When a purchaser is buying fixed wireless spectrum and is not deploying it for its intended use, the Department should be making further inquiries. If upon investigation the prospective purchase has no business plan to use the spectrum for its intended use, or is found not to be using similar spectrum that it is currently licensed to use, the transfer requested should be denied.

33. Finally, Bell Mobility points to the Competition Bureau's oversight of mergers and acquisitions as a reason why the proposed review process by the Department is not required.[11]

34. While it is true that the Commissioner of Competition has primary jurisdiction to review acquisitions and mergers in Canada, that jurisdiction is not exclusive. For example, it is part of the CRTC's jurisdiction to review mergers in the broadcasting sector and the Government of Canada saw fit to stipulate in section 11 of the *Radiocommunication*

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[9] WT Docket No. 12-269, *Policies Regarding Mobile Spectrum Holdings*, *Ex Parte* submission of the DOJ, April 11, 2013, pages 9-10. TerreStar also discusses use of a market concentration index by the DOJ and Federal Trade Commission in the United States and suggests a similar approach in Canada at paragraph 16 of its comments.

[10] Comments of Public Mobile, paragraph 13.

[11] Comments of Bell Mobilicity, paragraph E5.

Regulations that a radio licence may not be transferred or assigned without the authorization of the Minister. There is no suggestion that this should be done on a *pro forma* basis without a review. Furthermore, the Minister possesses industry-specific knowledge of the radiocommunications market, the concentration of spectrum licences and use made of those licences by the licensees. Consequently the Minister is in the best position to judge whether concentration of spectrum in the hands of a prospective licence transferee will foreclose access by others and diminish competition in the marketplace. While the same transaction may result in a review by the Commissioner of Competition, this should not divert the Minister from carrying out his statutory duties.

35. The same situation prevails in the United States where the DOJ and the FCC may exercise concurrent jurisdiction over a specific spectrum transaction. This does not preclude the FCC from considering the concentration of spectrum in assessing whether to approve a spectrum transfer.

36. For these reasons, Xplornet urges the Department to proceed with its plans to conduct reviews of spectrum transfers that raise issues of efficient use of spectrum, spectrum concentration and foreclosure of access to spectrum by other carriers. While Xplornet has comments on the details of the proposed review process, it wholeheartedly supports the policy thrust of the proposal.

37. Finally, it is unclear from the Consultation Policy whether the proposed regime is intended to apply to spectrum licences pertaining to satellite services. In its comments, the Canadian Satellite and Space Industry Forum (CSSIF) has requested clarification that the consultation is not applicable to satellite licences.[12]

38. Xplornet agrees that satellite spectrum should not be included in this transfer policy because it is reviewed in a different manner. The spectrum is licensed for use by a specific satellite and there are extensive frequency mapping requirements to insure there is no interference with adjacent satellites. Those requirements make it fundamentally different from terrestrial spectrum and extremely unlikely that the spectrum will be used

[12] Comments of CSSIF, March 28, 2013.

for an unauthorized purpose or left unused altogether. As a result, adding an additional layer of review for that type of spectrum seems unnecessary.

6-1 Industry Canada is seeking comments on the criteria and considerations set in the Consultation Paper.

39. In paragraphs 16 and 17 of its Consultation Paper, the Department sets out the following criteria and considerations that would apply to a detailed review of a transfer or division of a spectrum licence or a subordinate licence.

> **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.**

40. In its comments of April 3, 2013, Xplornet urged Industry Canada to use the Competition Bureau's Merger Enforcement Guidelines ("MEGs")[13] to better develop an analytical

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[13] Competition Bureau, *Merger Enforcement Guidelines* (Ottawa: Supply and Services Canada, October 2011), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/$FILE/cb-meg-2011-e.pdf.

framework for assessing transfers of spectrum licences. This included using the analytical framework in the MEGs to define the relevant geographic and product markets and applying a test of whether an acquisition or transfer is likely to result in a substantial lessening of competition in the relevant market.

41. PIAC has made similar points in its submission:

> "…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".
>
> 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." 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."[14]

42. Xplornet also suggested that paragraph 16(c) should be more focused on whether or not the transfer would result in the spectrum being put to the use intended by Industry Canada. In setting policy and deciding how to license spectrum and for what purpose, Industry Canada undertakes consultations and carefully considers all of the competing policy objectives. Once that policy is set and the licensing conditions established, Industry Canada should not have to revisit them for each licence transfer to determine if economic and social benefits are being derived from the use. Xplornet respectfully submits that Industry Canada should simply assess if the spectrum is being used for its intended licensed purpose. Non-use should be considered inconsistent with the purpose of deploying spectrum for the good of Canadians. Similarly, purchasing solely for a speculative purpose would be inconsistent with deploying spectrum to achieve Industry Canada's policy objectives.

43. Further, purchasing for a use not permitted by the licence would be inconsistent with Industry Canada's policy objectives. For example, buying spectrum designated by Industry Canada for fixed wireless access to achieve an intended purpose and holding it in the hopes its designation will change to mobile is inconsistent with Industry Canada's

[14] Comments of PIAC, paragraphs 10 and 11.

policies and frustrates Industry Canada's objectives of managing spectrum to achieve specific objectives to benefit Canadians.

44. SaskTel has made a similar point:

> "Unused spectrum licences should be returned to Industry Canada so that they can be assigned, presumably through an auction, to parties that are willing to deploy in these areas. This includes the sub-division of current spectrum licences into used and unused portions so that the unused sub-divided portions of the spectrum can be returned to Industry Canada;"[15]

45. As discussed in the section below, SaskTel has also suggested a threshold for non-usage that would automatically result in denial of a spectrum transfer application.

46. From a policy perspective, Industry Canada's first obligation should be to insure that spectrum is being put to use for its designated purpose to fulfill Industry Canada's policy objectives. If a party has no means of using it and does not have a business plan to use it for that purpose, then why permit the transfer and grant them a licence? This should be the primary consideration before competition issues are even considered.

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.

47. In its April 3, 2013 comments, Xplornet agreed that Industry Canada should establish thresholds for a detailed review and for when it may challenge a transaction.

48. Given different spectrum bands have different quantities of spectrum, are licensed in different block sizes and are licensed in different size tiers with different populations, it is difficult to find an appropriate threshold in MHz-POP that would work for all bands as many parties indicated in their submissions. In light of the points raised in all the submissions, Xplornet has modified its view and would suggest that Industry Canada not implement a MHz-POP measure. Instead, Xplornet believes that Industry Canada should be looking at measures of concentration.

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[15] Comments of SaskTel, paragraph 4.

49. One such measure should be related to the overall spectrum holdings of the transferee across all auctioned spectrum in the relevant geographic tier and another measure should focus on holdings within a single band - Canada wide. If a transferee will end up with more than 25% of all spectrum in a geographic region (looking at the Tier 4 level), then the transaction should be reviewed in detail. Similarly, if the transferee will end up with more than 50% of all spectrum in a band, then the transaction should be reviewed in detail.

50. As mentioned above, SaskTel has proposed a threshold measure for non-use of spectrum that it proposes be used to act as a safeguard against spectrum hoarding:

> "There are also many cases where spectrum has been allowed to remain fallow, even in urban areas. SaskTel recommends to the Department that a criteria be established where a spectrum licensee is not allowed to acquire additional spectrum in any given band where they are actively using less than 50% of their existing spectrum licence holdings in that same band. This will avoid service operators warehousing or hoarding spectrum."[16]

51. While this would clearly be a step in the right direction, Xplornet does not consider it goes far enough given the scarcity of available spectrum. A carrier should not be permitted to sit on half of its spectrum holdings without deploying it. Xplornet believes that whenever a licensee has 25% or more of its existing spectrum holdings (all bands) unused in a geographic area, it should not be permitted to acquire additional spectrum in that geographic area.

52. As indicated above, Xplornet believes that an examination of whether spectrum has been used for its intended purpose and whether it will be used for that purpose in a timely manner by a transferee should precede any competitive analysis. With spectrum as scarce as it is, no transfers should be entertained when there are reasonable grounds for believing that it will not be put to Industry Canada's intended purpose within a reasonable time.

53. In its April 3, 2013 comments, Xplornet also pointed out that the MEGs suggest that a market is concentrated if the four largest firms have more than 65% market share.[17]

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[16] Comments of SaskTel, paragraph 18.

[17] MEGs, paragraph 5.9.

Xplornet suggested that a transaction should be reviewed in detail if, post-transaction, the three largest spectrum holders in the market would have 65% or more of all available spectrum in that market.

54. Other parties have agreed that the focus should be on all available spectrum - not just one particular spectrum band in considering whether the prospective transferee has accumulated too much spectrum. EastLink has stressed the need to assess both the current spectrum holdings of a perspective transferee and compliance with the intended use of spectrum before permitting any transfer.

> "Specifically, Eastlink submits a proposed licensee's entire spectrum holdings – not just its holdings in the subject spectrum band – must be considered because it would be an inefficient use of spectrum to allow a licensee with large caches of spectrum in other bands to add to its stockpile when other carriers with far less spectrum may also require and be interested in purchasing the subject spectrum. As the Department noted in the Consultation, the minimum amount of spectrum each carrier requires is increasing as wireless data usage grows. Therefore, a licensee's total spectrum holdings, including spectrum the licensee has access to via an agreement but may not own directly, is a relevant factor to consider when reviewing a transfer request.
>
> Most importantly, the Department must consider original restrictions on the subject spectrum in its review of a transfer request. Set-asides and spectrum caps have been put in place to ensure sustainable competition and deployment of advanced wireless service to urban and rural areas. Any transfer or deemed transfer that would violate these rules would inherently put those policy objectives at risk. As a result, it is critical that the Department adopt, as a criterion for review a consideration of any original set-aside, spectrum cap or other restriction on the spectrum under the licensing framework. Simply put, spectrum must retain identical conditions of licence and restrictions both before and after a transfer."[18]

55. Public Mobile has also submitted that the focus of Industry Canada's attention should be in the total spectrum holdings of a transferee:

> "In terms of a more quantitative review threshold, the longer-term objective (both through this review process and through the licencing of future spectrum) should be to bring competitive parity to the spectrum holdings of at least four competitors. Therefore, any entity that is acquiring spectrum in a region where it already holds more than 25% of currently available spectrum licences should be automatically subject to a detailed review. We believe that if the Department's intention is to encourage a fourth wireless player in every region, Government policies should encourage the fair distribution of spectrum among four entities, at a minimum. Any entity that holds more than a quarter of

[18] Comments of EastLink, paragraphs 11 and 12.

the spectrum in any specific region should not be able to acquire additional spectrum via a transfer without a detailed review of that transfer in order to prevent wireless market reconsolidation and encourage sustainable competition."[19]

56. Xplornet also submits that the spectrum review process is only one of the checkpoints where the Department has the ability to ensure compliance with its spectrum usage policies and its pro-competitive policies. As discussed above, the Department has already used its auction policies relating to spectrum caps and set-asides to pursue these objectives. However, the Department needs to review compliance with its policies not only at the time of the auction but at each subsequence issuance of a new licence resulting from a transfer in order to ensure ongoing compliance with its policies.

57. Another opportunity arises at licence renewal time when the Minister has the opportunity to deny renewal of licences to parties who have failed to use the spectrum in the manner required under their licences. The Minister also has the power to suspend or revoke licences when licensees have failed to comply with licence rollout or usage requirements in their conditions of licence. Finally, the Department has the power to establish broader spectrum caps that include all spectrum holdings of licensees. This is increasingly important as advances in technology increasingly expand the utility of spectrum for mobile applications bringing spectrum that was originally licensed for fixed wireless applications into the scopes of mobile wireless carriers.

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

"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.

58. Most interested parties appear to agree with Industry Canada's proposal to treat a change of control of a spectrum licensee in the same way as a transfer of spectrum licences. This makes sense to Xplornet.

[19] Comments of Public Mobile, paragraph 27.

59. Like Xplornet, Rogers proposes that financing arrangements in which an entity grants a security interest in its property should be excluded from the definition of a "deemed spectrum licence transfer" prior to the creditor attempting to exercise on its security.

> "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."[20]

60. This makes good sense from Xplornet's perspective and is consistent with the manner in which Xplornet understands the current rules to apply.

61. Rogers also suggested amendments to Industry Canada's proposed rules prohibiting finalization of a deemed or actual licence transfer agreement in advance of approval by the Minister. Rogers argues for a distinction to be drawn between finalizing an agreement that makes a licence transfer subject to Industry Canada approval and finalizing the transfer of a licence without approval:

> "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

[20] Comments of Rogers, paragraph 44.

would be consistent with commercial reality and result in a more precise and understandable regime."[21]

Xplornet agrees with Rogers on this point.

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.

62. In its April 3, 2013 comments, Xplornet favoured transparency in the review process and therefore supported Industry Canada's proposal.

63. In publicising the transfer, Industry Canada should provide the same sort of minimal public disclosure as it does for *Investment Canada Act* reviews. Adapting for spectrum licences, this would mean disclosure of the parties, the spectrum licences to be transferred and whether or not a detailed review is being undertaken. Industry Canada could then benefit from any input provided by other carriers or interested parties.

64. Rogers supported this approach in its comments:

"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."[22]

65. Other parties supporting public disclosure include MTS, Public Mobile, TerreStar and the University of Alberta commentators. Bell, Mobilicity, SaskTel, Shaw, TELUS and Globalive favour confidentiality.

66. Xplornet believes that transparency is important in order to give guidance to the industry on the factors and analysis applied by the Department to spectrum transfers and also to solicit information from the industry on relevant facts required to properly assess the transaction and its possible impact on spectrum availability.

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[21] Comments of Rogers, paragraph 47.

[22] Comments of Rogers, paragraph 50.

67. With the limited disclosure proposed by Rogers and Xplornet, applicants ought not to be prejudiced by this minimal level of public disclosure. However, such disclosure should be contingent on the parties being permitted to finalize and execute their agreement of purchase and sale contingent on Ministerial approval of the spectrum transfer.

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.

68. In its April 3, 2013 comments, Xplornet suggested that Industry Canada address situations where one party enters into an agreement with an option to purchase spectrum licences from another party. From a practical commercial perspective, such agreements allow parties time to do due diligence and negotiate reasonable commercial terms for a purchase and sale agreement. However, such agreements can also be used for anti-competitive purposes to essentially block out spectrum from the marketplace, thereby preventing use and competition. Xplornet would suggest that an option agreement with a term requiring the option to be exercised and the purchase to be completed within 90 days (subject only to Ministerial approval and any other required regulatory review thereafter) should not be subject to review. However, if the option term is for a longer period of time or there are provisions for extension or renewal of the option period beyond 90 days, such a transaction has the effect of removing spectrum from the marketplace and has the potential to be anti-competitive. As such, Xplornet would suggest that any agreement providing for an option to purchase spectrum that does not expire within 90 days represents an "interest" in spectrum and should be deemed to be a transfer of spectrum to which the policy regarding review of spectrum transfers applies.

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

21. It is proposed that, 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.

22. In the latter case, the Department may seek additional information and documentation from the parties.

23. 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.

24. In some circumstances, timelines for decisions may vary from those proposed in this paper. For example, these timelines may be impacted by:

– requests from the Department for further information from the parties; or

– time required by the parties to respond to specific concerns raised by the Department in its review.

69. In its comments of April 3, 2013, Xplornet expressed the view that four weeks for a decision on an ordinary spectrum licence transfer is reasonable when a detailed review is not required. There appears to be general consensus that this is reasonable.

70. However, Xplornet did express concern about the timelines for transfers involving a detailed review. It urged Industry Canada to be mindful that transactions of a significant scale may also be subject to review by other authorities, including the Competition Bureau, the CRTC and Investment Canada. It therefore urged Industry Canada to align its review timetable with one of the more established timetables to facilitate complex transactions.

71. Shaw has urged Industry Canada to shorten its proposed timeline for detailed reviews down to the shorter timeframe adopted by the Competition Bureau:

"In order to encourage certainty and timeliness for buyers and sellers in the secondary market, any timelines adopted by the Department in relation to licence transfer reviews

should be streamlined as much as possible. In Shaw's view, the four-month review period should be shorter, and in any event no longer than the Competition Bureau's timelines. In addition, any revisions to CPC 2-1-23 should include commitments by the Department to complete its reviews as quickly as reasonably possible following receipt of a spectrum license transfer request.[23]

The Competition Bureau's service standards for merger reviews are as follows:

For non-complex mergers, the service standard is 14 calendar days, commencing the day a complete notification or ARC request is received by the Commissioner, assuming sufficient information is provided to assign complexity.

For complex mergers, the service standard is 45 calendar days, commencing the day a complete notification or ARC request is received by the Commissioner, assuming sufficient information is provided to assign complexity. However, where a Supplementary Information Request (SIR) is issued, the service standard is 30 calendar days and commences the day on which the Commissioner has received a complete response to the SIR from all SIR recipients."[24]

72. The consensus among other parties also appears to be that the proposed timelines for detailed reviews are too long. Xplornet believes that Shaw's proposal makes sense. TELUS also shares this view[25].

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.

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

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.

27. Upon receipt of such notice, Industry Canada proposes to review the information provided by the parties with the intent of providing a preliminary

[23] Shaw Comments, paragraph 79.

[24] Ibid., paragraph 78.

[25] TELUS Comments, paragraph 38.

assessment of the transaction. A preliminary assessment in this case represents the Department's opinion of the transaction at the time of writing, but does 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.

In preparing its preliminary assessment, Industry Canada will apply the criteria set out in Section 6 above, within the timelines indicated in Section 7 above.

73. Only four interveners supported this proposal.[26]

74. Most of the remaining interested parties that commented on this part of the proposal were of the view that since this review process is not binding on the Minister or the parties to the option agreement, it should either be at the option of the parties to the agreement to request an advance ruling, similar to an application for an Advance Ruling Certificate (ARC) under the *Competition Act*, or it should be eliminated since it serves no useful purpose.[27]

75. TELUS summed up this position as follows:

> "TELUS views these proposals as unnecessary. Based on the *Radiocommunication Act*, the Minister has complete ministerial discretion when issuing a spectrum licence to a prospective licensee. Therefore, every spectrum transfer is subject to Department approval. If the intent of this condition of licence is to ensure that Departmental approval of a spectrum transfer is obtained, then this condition of licence is not required because the relevant statutes already require such approval. Besides, the Department's formal review procedures of the final agreement between parties would supersede any preliminary assessment in any event.
>
> In addition, the proposed condition of licence and the preliminary assessment process are impractical for a number of reasons. First, it is not clear at what point discussions between two parties would lead to a situation where notification to the Department is required, even though no binding agreement exists for the transfer of spectrum. Even where parties that have signed a letter of intent regarding possible transfer of spectrum, meaning that discussions have progressed a substantial degree, these cases often fail to reach a binding agreement between the parties. As a result, if the proposed condition of licence were to be imposed on licensees, the Department might find itself conducting preliminary assessments of possible deals that never materialize. This would waste valuable Department resources and potentially divert and frustrate Department efforts from reviewing actual deals.

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[26] PIAC, Public Mobile, SaskTel and Terrestar. Mobilicity supported the provision - but only in respect of FCFS spectrum and unused auctioned spectrum.

[27] Bell Mobility, Quebecor Media, Rogers, Shaw, TELUS, Globility and Xplornet opposed the provision.

> Moreover, the utility of the preliminary assessment for the parties is marginal. Notably, if the preliminary assessment is based on a framework of a possible deal, rather than the final agreement itself, the preliminary assessment could be meaningless. It is easy to envision a situation where parties decide to renegotiate and agree upon different terms, such as the volume of spectrum being transferred. This means that a preliminary assessment could be based on a deal structure that did not reflect the actual deal. Furthermore, a positive preliminary assessment would give the parties no comfort because the Department has stated that it would not be binding. This means that the procedural review components that have been proposed under section 6 of the Consultation, such as the threshold review and a possible detailed review, would still have to be conducted."[28]

76. Xplornet agrees with TELUS' analysis.

77. However, as indicated above in response to question 6.5, prospective transfers, such as option agreements can have the same market foreclosure impact as actual transfers since they can prevent third parties from acquiring spectrum that they need to expand their networks and services. For this reason, Xplornet has proposed that they be deemed to be transfers or included within the definition of "transfer" if the option is exercisable more than 90 days after the execution of the option agreement (excluding regulatory approvals).

Conclusion

78. Xplornet welcomes this consultation on Industry Canada's spectrum transfer policy as an important first step in addressing an issue that is negatively impacting Canadian consumers across the country.

79. Xplornet would respectfully submit that spectrum licence transfers need to be reviewed to insure that: (i) ongoing public policy goals are being respected, and (ii) adequate competition exists to provide the benefits of a competitive market to consumers and businesses.

80. As the guardian of Canada's radio spectrum, Industry Canada has a statutory duty to ensure that the spectrum it licenses is used for the purposes for which it was licensed. In order to ensure the integrity of this licensing regime and in order to satisfy itself that

[28] Comments of TELUS, paragraphs 42-44.

spectrum is benefiting Canadians in the manner that was intended at the time of licensing, Industry Canada must continue to monitor use of the spectrum after it is licensed. If the spectrum is not being put to use for the intended purpose, the Minister must act to correct this situation. This includes denying the transfer of spectrum to parties that have no intention to use it for the designated purpose. If Industry Canada does not adopt this approach, it risks having its public policy objectives at best ignored and at worst willfully thwarted.

81. Large amounts of spectrum currently lie fallow in the hands of licensees who have purchased it for a purpose that is different from what the Department originally designated. This problem is particularly acute with respect to fixed wireless spectrum in the 2300 MHz and 3500 MHz bands which mobile operators are speculating will ultimately be re-designated for mobile broadband use. As long as the Minister continues to approve these spectrum transfers to companies that have no intention of using the spectrum for its current designated purpose, the Minister is contributing to the spectrum shortage being experienced by Xplornet and other competitors. Simply put, the Minister must cease approving licence transfers or renewals for spectrum that will not be used or will not be used for its intended purpose.

82. This should always be the first question the Department considers when an application to transfer spectrum is before it.

83. If a transfer application passes this first hurdle, the second lens through which a spectrum transfer should be reviewed relates to the impact a proposed transfer is likely to have on the competitiveness of the Canadian wireless market. It is at this stage that spectrum concentration in the hands of a very few incumbent carriers comes into play. Is the spectrum in question required in order to expand the transferee's network to improve service to Canadians, or is it being purchased to block expansion by its competitors? As a guide to determining the competitive effects, four tests are proposed:

    (i) Pre-transfer, is 25% or more of the transferee's current spectrum (all bands) in the geographic region in which it is acquiring the new spectrum undeployed?

(ii) Post-transfer, will the transferee hold greater than 25% of all spectrum in the geographic region (assessed at the Tier 4 level)?

(iii) Post-transfer, will the transferee hold greater than 50% of the spectrum in the band subject to the transfer request?

(iv) Post-transfer, will the three largest spectrum holders in the relevant geographic area have 65% or more of all available spectrum?

84. The first question goes to a question of need. If the transferee has spectrum for future growth, it is reasonable to infer, unless the contrary can be demonstrated, that additional spectrum would not be put to immediate use and therefore is being acquired to keep it out of the hands of parties who would put it to more immediate use to benefit consumers.

85. The second, third and fourth questions go to concentration to ensure that there is adequate spectrum available to support entry and growth of at least four healthy competitors in any geographic region, which would be consistent with the Minister's stated goal.

86. However, Xplornet would suggest that it is only necessary to consider these competition issues after Industry Canada has considered the spectrum use issue and concluded there is evidence that the transferee intends to deploy the spectrum for its intended purpose within a reasonable timeframe.

87. While many of the parties to this consultation have expressed concerns relating to spectrum speculation and hoarding, the incumbent carriers have largely side-stepped this issue and have focussed on the current state of competition in the industry in support of their view that the new policy proposals are unnecessary.

88. As demonstrated in the comments of interested parties in this consultation process, there is no question that the concentration of spectrum licences in the hands of very few carriers is foreclosing the expansion of services to Canadians by other carriers in all segments of the wireless market, but particularly in rural areas.

89. While encouraging Industry Canada to pursue its plans to reform the spectrum transfer rules in a way that will include a competitive impact analysis, the new licence transfer policy must be part of a more comprehensive policy that encourages use of spectrum for its intended purpose and encourages competition by creating opportunities for entry and

remediating anti-competitive behaviour. This should include licensing policies that insure spectrum is used for its designated purpose and preclude the acquisition of spectrum by carriers that are speculating on a change in use. These policies should be backed up by the Minister's powers to establish spectrum caps to curtail further concentration of spectrum, to revoke licences or refuse renewal of licences for non-use, and to more carefully monitor spectrum transfers.

90. It is not sufficient to rely, as some parties have suggested, on auction rules that set aside spectrum for new entrants or impose spectrum caps on incumbents. Industry Canada has an on-going responsibility to ensure that spectrum continues to be deployed in a manner that satisfies the public interest. This includes ensuring that spectrum is used efficiently in furtherance of the purposes established for its use and ensuring that it is made available in a manner that fosters the development of a competitive market ensuring public benefit to Canadian consumers and businesses.

91. Xplornet thanks Industry Canada for the opportunity to comment on its proposed policy changes.