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April 3, 2013

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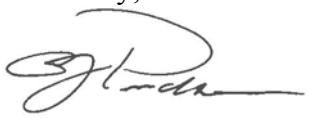
Dear Sir/Madam,

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 comments of Xplornet Communications Inc. and Xplornet Broadband Inc. (collectively "Xplornet") in response to 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

COMMENTS OF

XPLORNET COMMUNICATIONS INC.

AND

XPLORNET BROADBAND INC.

Filed: April 3, 2013

Introduction

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

Overview of Xplornet's position

2. Xplornet has not been shy in expressing its concern about the concentration of spectrum that is in the hands of very few carriers. This concentration is having a material adverse impact on competition in the wireless telecommunications markets in Canada. It is preventing growth in the services and the reduction in the prices available to Canadians. Xplornet welcomes this first step in addressing an issue that is impacting Canadian consumers across the country.

3. While wishing to encourage Industry Canada in following this course, Xplornet respectfully submits that a policy on the transfer of spectrum licences alone will not address the problems stemming from a high concentration of spectrum in the hands of a very few carriers. This transfer policy must be part of a more comprehensive spectrum policy that encourages competition, creates opportunities for entry and remediates anti-competitive behaviour. A single policy alone is easily circumvented and unlikely to have sufficient scope to deal with all the potential competitive issues relating to spectrum licences.

4. In considering how best to achieve a more competitive telecommunications market, it is important for the Department to acknowledge all elements and all participants – whether urban or rural, and whether fixed or mobile services.

5. While passing comments are made in the Consultation Paper with regards to the need to extend the benefits of competition to rural markets, the Minister has made clear his desire to have at least four mobile communications carriers in each region of the country.[1]

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[1] Consultation Paper, paragraph 8; and New measures to increase competition in the wireless sector, speaking points, The Honourable Christian Paradis, Minister of Industry, March 7, 2013

However, stating a fixed number such as “four” suggests that Industry Canada is trying to engineer a result or manage the market to what it perceives as the optimal outcome instead of allowing it to be truly competitive. Also, focusing on only urban needs to the exclusion of rural needs creates inefficient policies that block off opportunities for improved service in rural regions of the country.

6. Further, concentrating in a near-obsessive way solely on “mobile” ignores the fact that there are other services using spectrum for fixed wireless applications and forecloses the development of these services for the benefit of Canadian consumers. Such an approach discourages entry and investment by companies like Xplornet that see an opportunity to provide a service to Canadians that does not fit within the expectations of Industry Canada as a “fourth mobile provider.” Imagine if Research in Motion had been discouraged because its device did not originally do voice communication. What if someone had questioned whether the Blackberry should have been allowed to use spectrum because it was not a voice competitor? Xplornet wishes to encourage Industry Canada to take a more market-oriented approach that creates opportunities for competition and encourages new entry in each region, on a case by case basis, instead of a managed or regulated approach designed to achieve a pre-determined outcome. The limits should be our imagination and not the number of mobile telephone companies that are convenient to manage.

7. In considering reform of its licence transfer policy, the Department should distinguish its role as the manager of spectrum usage and licensing, and the formulator of spectrum policies, from a potential role as manager of competitive outcomes and post-licensing market behaviour.

8. Industry Canada has an important public policy mandate to insure that spectrum is being used for its intended purposes. Industry Canada, in reviewing a proposed licence transfer, must also consider the intended use of the spectrum by the proposed transferee to insure that such use is, in fact, consistent with the policies of Industry Canada and with the purpose for which the spectrum in question was made available for use. For example, it is arguably contrary to public policy to approve a transfer to an entity that has no other purpose for acquiring the spectrum than to stock pile it for future sale at an anticipated

higher price. Pure speculation for profit in a "public resource" is not in the best interests of Canadians and defeats the purpose of the Government of Canada making that resource available for use under the custodianship of Industry Canada. Similarly, purchasing spectrum for a purpose other than for which the spectrum was intended undermines the policies of Industry Canada who, presumably, made such spectrum available for a specific use because there was a need. Buying it for another purpose circumvents Industry Canada's ability to insure that public goods, like spectrum, are put to use as intended to meet the public policy objectives.

9. For these reasons, it is important that the designated use of spectrum and associated rollout requirements be made conditions of each spectrum licence and be enforced by the Minister through his licence revocation, licence renewal and licence transfer powers.

10. Xplornet also submits that Industry Canada has a legitimate role in ensuring that an excessive amount of spectrum does not end up in the hands of very few carriers, thereby foreclosing market entry or network expansion by competitors. However, the Department is not the only government agency with an interest in ensuring a viable competitive market in Canada. It must be recognized that this is primarily the responsibility of another government agency, the Commissioner of Competition and the Competition Bureau. The Department should be seeking ways to ensure that it does not unnecessarily duplicate the functions of the Competition Bureau. The Department's expertise is in spectrum management and not competition policy. Furthermore, the Department lacks the suite of remedies available under the *Competition Act* to correct anti-competitive conduct.

11. In the interests of apply best practices, when assessing the concentration of spectrum in the context of spectrum transfer applications, the Department should consider adopting the practices of the Competition Bureau in assessing mergers and acquisitions.

12. Xplornet respectfully submits that, when evaluating potential transfers, divisions and subordinating licensing of spectrum licences, the Industry Canada should adopt the same analytical framework used by the Competition Bureau in matters under the *Competition*

Act. Specifically, the *Merger Enforcement Guidelines* (the "MEGs")[2] and the Competition Bureau's approach to evaluating the competitive effects of a merger could be used as guidance for the approach to be taken by Industry Canada in assessing transfers, divisions and subordinating licensing of spectrum licences. The competitive impact of a proposed spectrum transfer should be assessed to determine whether a transaction results in a substantial prevention or lessening of competition for not only spectrum but also other downstream services such as cellular telephone services, mobile data services or Internet services in the relevant geographic area.

13. However, Industry Canada's focus should be on spectrum concentration and spectrum policy issues, and not on other forms of anti-competitive behaviour. In regards to post-licensing control of market behaviour, another agency of Industry Canada, the Competition Bureau, already has jurisdiction to review abuse of dominance, conspiracy and mergers and acquisitions involving wireless carriers. Xplornet does not believe these functions should be replicated by the Minister or the Department. The Competition Bureau has the expertise resident in its staff to conduct the appropriate types of competitive analysis and it is what they do on a daily basis. This expertise is not currently resident in the Department and there appears to be no reason to duplicate it. As a result, Xplornet urges Industry Canada to leverage this expertise and leave detailed reviews of market behaviour to the Competition Bureau when the thresholds discussed below are reached.

14. Following such hand off, the Department should be an information source and remain involved, particularly in respect of spectrum policy use issues but should leave the market analysis to the Competition Bureau and the Commissioner of Competition.

15. Xplornet is concerned about the delays inherent in the proposed licence transfer process and the incompatibility with the timelines for review under other regulatory regimes. Xplornet's comments on the specific issues raised in the Consultation Paper are set forth in the following sections of these comments.

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[2] 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.

16. In summary, Xplornet applauds Industry Canada for addressing the issues created by spectrum licence transfers but encourages Industry Canada to continue to pursue other policies and to use the Competition Bureau's expertise to address the competitive issues in the Canadian marketplace.

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

17. 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.**

18. Although the criteria and considerations described in the Consultation Paper are generally similar to the criteria used by the Competition Bureau under the MEGs in assessing the competitive impact of acquisitions and mergers, they have a few flaws. The MEGs were

developed by the Competition Bureau with the assistance of public consultation over a number of years and were revised as recently as October 2011. As such, they benefit from extensive analysis and many practical tests in the real world. Xplornet suggests that Industry Canada use the MEGs to better develop an analytical framework for assessing transfers of spectrum licences.

19. As an example, paragraph 16(a) of the Consultation Paper makes reference to assessing the impact of the transfer on the efficiency and competitiveness of the Canadian telecommunications market. This starts half way through the analytical framework described in Part 3 and Part 4 of the MEGs. The first step is assessing the "market". What is the market from a product perspective and a geographic perspective? The criteria proposed by Industry Canada suggests the geographic market is all of Canada and the product market is all telecommunications services ("Canadian telecommunications market", emphasis added). The transfer of a single licence is unlikely to have an effect on the efficiency or competitiveness of the entire Canadian telecommunications market. However, a single licence being transferred could foreclose broadband services in a Tier 4 area of Canada or cellular services in an Atlantic province. Consequently, a proper market determination should be the first step in the analysis.

20. Similarly, the criteria in paragraph 16(b) need to be assessed within the context of a framework that defines the relevant market. Competition in one region of Canada does not imply competition in another region. Again, Xplornet would suggest that Part 4 of the MEGs do a better job of setting out the specific criteria to assess. While availability and quality of service are important and should be considered, affordability is a subjective term. A price may or may not be affordable but it should be the best price derived from a competitive market. For example, a price may be "unaffordable" because of the cost of reaching a specific location and not because of the absence of competition. Alternatively, a price may be entirely affordable in downtown Toronto, but it may still be too high because it is not competitive. The question should be whether there is adequate competition to insure a competitive price.

21. Xplornet suggests 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. Presumably, non-use would be 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.

22. 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 policies and frustrates Industry Canada's objectives of managing spectrum to achieve specific objectives to benefit Canadians. One could only imagine the consequences of an entity buying spectrum designated for public safety and emergency communications and holding it in the hopes that someday it would be designed mobile for cellular telephone use. That would entirely frustrate a valid public policy objective and make a mockery of Industry Canada's ability to achieve those policy objectives. As a result, Industry Canada is urged to assess the transfer not in the context of general economic and social benefits but rather in the context of achieving the policy objective for which the spectrum was originally licensed.

23. Xplornet supports use of the criteria in paragraph 17 but within the analytical framework of the MEGs. For example, once the geographic scope of the market is determined in accordance with the framework in the MEGs, that "market" would be the relevant region in which the current holdings of the proposed licensee would be assessed. Similarly, once competitive services are determined, it is easier to assess the alternative spectrum that could be used to provide those services. Further, in looking at alternative spectrum,

Industry Canada should consider the availability and cost of equipment and whether such cost would render the user at a competitive disadvantage in the relevant market.

24. In paragraph 19 of the Consultation Paper, the Department states that "it is proposed that licensees will be required to notify Industry Canada prior to finalizing a deemed spectrum licence transfer." This provision is problematic.

25. In the normal course, commercial practice is for parties to a spectrum transfer agreement to execute a definitive agreement that is a binding contract between them. One of the terms of that agreement is that approval of the Minister of Industry for the transfer of the spectrum licences is required prior to closing. The agreement is finalized prior to applying for approval of the transfer but there is no transfer of the spectrum licence prior to Industry Canada approval. As such, property in the licence does not transfer until the Minister has given approval, even though the purchase and sale agreement is binding.

26. In Xplornet's view, it would be more consistent with commercial practice for the Department to simply state, as is currently the case, that no transfer of a spectrum licence (which would include by definition a deemed spectrum transfer) is effective without prior approval of the Minister of Industry. The Minister would not, of course, grant such approval until the required review had been completed and the competitive assessment favourably determined. Xplornet suggests that Industry Canada permit agreements to be finalized for commercial and legal reasons but that the transfer not be allowed to be completed until the Minister's approval is obtained.

27. One omission of the proposed criteria is the lack of a proper test for when an acquisition of a spectrum licence or a licensee should be denied. The MEGs use a test of substantial lessening of competition within a market. As mentioned above, the relevant geographic and product or service markets are key determinations that must be made before assessing the competitive impact or likely competitive impact of a transaction or merger. The criteria and considerations proposed by the Department in the Consultation Paper are vague and lack the rigour of the MEGs. The lack of a proper test for when a transfer should be denied makes the proposed rules imprecise and open-ended. It is not sufficient to say that the Department will examine whether a transfer will "impact" the identified

criteria. This provides little or no guidance to the industry and hence no predictability. As with the process under the MEGs, spectrum transfers should only be denied when they are likely to result in a substantial lessening of competition in the relevant market.

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.

28. Yes and yes. Industry Canada should establish thresholds for a detailed review and for when it may challenge a transaction. It is typical for governments undertaking competition reviews to issue guidelines or regulations setting out the size of a transaction that will be reviewed in detailed and what level of market concentration following a transaction will cause the transaction to be reviewed in detail. If any one of the thresholds is triggered, a detailed review is undertaken. This allows potential parties to know in advance if their transaction is certain to be reviewed and plan accordingly. However, such governmental authorities still reserve the right to review any transaction, regardless of size or concentration, if there is a potential competition issue.

29. 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. However, in respect of a single transaction or a series of related transaction, Xplornet would suggest the appropriate threshold for a detailed review would be 75 million MHz-POP or more. This permits smaller licence transactions or large single licence transactions that are unlikely to have competitive implications to proceed without undue review and delay.

30. In respect of a measure for concentration, Xplornet would suggest taking guidance from the *Competition Act* and the MEGs, which contain criteria similar to that used for merger reviews in other countries. If the proposed transferee would have less than 35% of the spectrum band in the relevant market, a detailed review should not be required. This is

consistent with encouraging at least three participants in any given market and the goal of promoting competition post-transfer.

31. Xplornet has suggested in prior spectrum consultations that Industry Canada should establish spectrum caps incorporating all spectrum bands capable of being used for data communication to prevent undue concentration. The MEGs suggest that a market is concentrated if the four largest firms have more than 65% market share.[3] Given that two entities, who frequently act in a coordinated way through a single entity, hold over 65% of all currently available spectrum in Canada, virtually every acquisition by that entity would be caught by this criteria. It is an indication that by typical anti-trust standards, inadequate competition review has occurred to date and the market is already unduly concentrated. Despite the current situation, Xplornet would suggest 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. This criterion could be waived if the entities involved in the transaction are not one of the three entities holding the 65% or greater share of spectrum. Again, this approach would reduce concentration by encouraging at least three potential participants in any market and create opportunities to purchase spectrum for the fourth entrant that the Minister of Industry wishes to encourage.

32. In assessing concentration, Industry Canada should consider coordinated actions, whether undertaken through formal partnerships or joint ventures, or through agreements. If an entity is acting with or has an agreement with another party regarding the use of or interest in spectrum, the spectrum of both parties should be considered for the purpose of assessing the percentage of spectrum held.

33. Given the parallels with the Competition Bureau's thresholds, adopting this approach may make it easier for Industry Canada and the Competition Bureau to handle situations where they have concurrent jurisdiction, such as mergers involving telecommunications carriers, where both have jurisdiction to review the transaction. It would also allow Industry Canada and the Competition Bureau to work together to improve the efficiency

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[3] MEGs, paragraph 5.9.

of the review process. Such an approach would result in far less duplication and administrative expense and would result in the organization with the most expertise conducting competitive impact assessments applying its expertise to the transaction in question. This would also be more consistent with the Government of Canada's principles of "smart regulation".

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.

34. The Department's intent appears to be to treat a change of control of a spectrum licensee in the same manner as a transfer of licences. This makes sense to Xplornet and is generally the way that Xplornet understands the current licence transfer framework to apply.

35. However, Xplornet proposes that financing arrangements pursuant to 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. This would allow entities to raise capital in typical secured financing transactions without triggering the spectrum transfer rules. However, if a licensee borrower defaults, the creditor will be subject to review before it exercises on its security (i.e. takes control of the spectrum licences). Although this may be perceived to create potential complications for financing arrangements, it is essentially no different than the current situation where a creditor would have to obtain the Minister's approval to realize on licences and sell them or take over the operation of the borrower as a receiver or trustee. Further, it prevents parties from structuring a "financing" arrangement and realization as a means of transfer to circumvent the proposed rules.

36. In addition, Xplornet suggests clarifying that change in control includes both direct and indirect changes of control. If the spectrum licences are owned by a corporation created

solely to hold the licences and the shares of the corporation are then sold, there is a change in control of the corporation but not a "change in control" of the licences because the same legal entity continues to own them. To insure such a situation is captured, the rules should refer to an indirect change in control of the licences.

37. To make things easier, Industry Canada might consider deeming a transaction that results in an indirect change in control of a spectrum licensee or a spectrum licence to constitute a spectrum transfer. Once a transaction is deemed to constitute a licence transfer, there is no need for any other provisions dealing with "deemed licence transfers". The regular transfer provisions would apply.

38. As discussed further in response to question 8.1 below, Xplornet also proposes that prospective spectrum transfers, such as options to acquire spectrum or spectrum licensees, be deemed to be a transfer of the spectrum. A long term option agreement can have the same market foreclosure impact as an actual transfer since it precludes third parties from acquiring the spectrum during the time that the option remains in effect.

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.

39. Xplornet favours transparency in the review process and therefore supports this proposal.

40. 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.

41. In a merger review, the parties are typically required to provide a list of the largest suppliers and customers to the Competition Bureau. This permits the Bureau staff to call the customers and suppliers to determine if the transaction would have any potential impact on the marketplace. This approach may be too burdensome for Industry Canada in every potential licence transfer. However, by making the potential transfer public, it

gives any party that might be impacted, including the Canadian consumers, the opportunity to provide relevant information to Industry Canada.

42. It should be noted that if Industry Canada does not accept Xplornet's suggestion that parties be permitted to enter into a binding agreement (as set out in paragraphs 24 to 26 above), publication of information may be highly prejudicial and problematic. Making the information public and not permitting a binding agreement means third parties could attempt to sabotage the transaction. For example, company A agrees to sell a spectrum licence to company B but they cannot enter into a binding agreement because of the proposed rules. The proposed transaction is made public. Company C reads about the proposed transaction and immediately offers company A twice the purchase price to willfully sabotage company B (for what could be competitive or anti-competitive reasons). Company A has no legal obligation to company B and the original transaction falls apart. Company B now has potential losses from transaction costs for a deal that was not completed. Further, a potential lender to company B would be very hesitant to loan money in the future knowing that the transaction might not close because of third party actions, as opposed to only being conditional upon the Minister's review and assessment. Finally, Industry Canada has invested time in reviewing the transaction between company A and company B, yet there is no such transaction anymore. For these reasons, it is important a legally binding agreement be permitted.

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.

43. Xplornet would like to suggest that Industry Canada give consideration to a few other factors in formulating the spectrum transfer policy.

44. In addition to the criteria suggested in paragraphs 16 to 19 of the Consultation Paper, Industry Canada should consider if the acquisition may have been undertaken to foreclose entry. Again, competition law experience can be helpful to provide guidance in this area. There are examples of patent pooling being undertaken to prevent entry into certain

markets.[4] Like a spectrum licence, a patent is a government grant of a monopoly to do something. By pooling or cross-licensing these patents, which may not actually be put into use, the owners prevented entry into their market. Industry Canada should assess the possibility that the spectrum licences are being purchased with the intent of preventing entry into a market.

45. Similar consideration should be given to 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 60 to 90 days (subject only to Ministerial approval and any other required regulatory review thereafter) should not be subject to review. However, it 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.

46. Industry Canada must be cognizant that this policy comes after the horse has left the barn. There is, by any measure known to competition policy, an undue concentration of spectrum in the hands of two parties that are acting jointly as one entity. It is conceivable that such entity may argue that an incremental purchase of spectrum will not unduly lessen competition because there is no material competition today, particularly if the seller has not deployed the spectrum in question. In such circumstances, Industry Canada is urged to consider how such a transaction forecloses the possibility of entry and future

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[4] For a more detailed discussion, please see Competition Bureau, *Intellectual Property Enforcement Guidelines* (Ottawa: Supply and Services Canada, September 2000), available at http://strategis.ic.gc.ca/pics/ct/ipege.pdf., 22-23.

competition and should continue to pursue other policies beyond this transfer policy to address the issue.

47. Finally, the Consultation Paper does not address available remedies to the Minister. It is not clear what, if any, sanctions are available to the Minister for failure to follow the rules and notify Industry Canada of transactions. It is within the control of the Minister not to transfer licences. However, what if the interest in the spectrum is essential conveyed by one party holding the licence in trust for another party and allowing that party to use the spectrum, without the Minister's approval? In these circumstances, the Minister may need alternative remedies, such as the power to terminate the licence in question and reallocate the spectrum to a new person, or the power to investigate alleged violations of the rules, in order to give effect to the spectrum transfer policy.

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.

48. In Xplornet's view, four weeks for a decision on a spectrum licence transfer is reasonable.

49. Xplornet has concerns about the timelines for transfers involving a detailed review. Industry Canada needs 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. There may also be other required timelines to be followed, such as the rules of a stock exchange in a public take-over, or the timelines of international competition or regulatory authorities if a multinational is involved. Xplornet strongly urges Industry Canada to align its review timetable with one of the more established timetables to facilitate complex transactions.

50. While other organizations have similar requirements that their timetable for review does not start until after information requests have been satisfied, there are guidelines on when the additional requests for information can be issued to prevent undue delay in the process. Xplornet again encourages adopting best practices from other review processes and using the timetable of the Competition Bureau or another comparable agency.

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 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.

28. 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.

51. Given that this review process in not binding on the Minister or the parties to the option agreement, Xplornet is not sure what this provision is intended to accomplish. If it is intended to give the parties an indication of what the Department's view of the prospective transaction is under current market conditions, it should 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*. If it is intended to prevent an option type arrangement being signed, it does not in fact do this.

52. As indicated above in response to questions 6.3 and 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 is proposing 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).

53. As in the case of transfer applications, prospective transfers that constitute deemed transfers should be reviewed using the same criteria proposed by Xplornet in response to question 6.2 above.

54. As in the case of actual transfers, parties to prospective transfer agreements should be permitted to execute the agreement provided that the actual transfer of spectrum is made subject to Industry Canada's approval.

Conclusion

55. 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.

56. 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.

57. While wishing to encourage Industry Canada in pursuing 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 competition, creates opportunities for entry and remediates 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.

58. While Xplornet encourages Industry Canada to pursue its plans to reform its spectrum transfer policy, it should be careful not to duplicate the functions of the Commissioner of Competition who is more generally charged with the responsibility for monitoring competition in Canadian industry and who has the statutory mandate to police anti-competitive behaviour. Industry Canada should exercise its powers with a view to enforcing spectrum policy and work with the Competition Bureau to address other forms of anti-competitive behaviour. Where competitive analysis is required in the context of spectrum concentration, the Department should have regard to the type of competitive analysis set forth in the Competition Bureau's *Merger Enforcement Guidelines*. This methodology is well established and is understood by Canadian industry.

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