



Industry  
Canada

Industrie  
Canada

DGSO-003-13  
June 2013

Spectrum Management and Telecommunications

# **Framework Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences for Commercial Mobile Spectrum**

Aussi disponible en français

**Canada**

## Contents

<b>1.</b>	<b>Introduction.....</b>	<b>1</b>
1.1	Intent .....	1
1.2	Mandate.....	1
1.3	Policy Objectives .....	1
1.4	Background and Considerations .....	2
1.5	Interpretation.....	2
<b>2.</b>	<b>Industry Canada Review of Spectrum Licence Transfer Requests .....</b>	<b>4</b>
2.1	Scope of Application.....	4
2.2	Threshold .....	5
2.3	Considerations and Criteria.....	6
2.4	Deemed Transfers .....	9
2.5	Prospective Transfers.....	11
2.6	Public or Confidential Review .....	13
2.7	Timelines.....	15
2.8	Next Steps .....	16

## 1. Introduction

### 1.1 Intent

1. Through the release of this Framework, Industry Canada hereby announces the decisions resulting from the consultation process undertaken in *Canada Gazette* notice DGSO-002-13, *Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences*.
2. All comments and reply comments received in response to the consultation document are available on Industry Canada's website at: [http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/h\\_sf10568.html](http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/h_sf10568.html).
3. This paper sets out changes to existing conditions of spectrum licences in bands for commercial mobile spectrum and to Industry Canada's publication, *Licensing Procedure for Spectrum Licences for Terrestrial Services* (CPC-2-1-23), hereinafter referred to as the Spectrum Licence Procedures. This document sets out the procedures related to requests involving the transfer, division or subordinate licensing of these spectrum licences.
4. This Framework applies in addition to the existing provisions of the Spectrum Licence Procedures and will be integrated into them. All other provisions of the Spectrum Licence Procedures are unchanged and will continue to apply to spectrum licences issued both for commercial mobile spectrum and for all other services.

### 1.2 Mandate

5. The Minister of Industry, through the *Department of Industry Act*, the *Radiocommunication Act*, and the *Radiocommunication Regulations*, with due regard to the objectives of the Canadian telecommunications policy set out in Section 7 of the *Telecommunications Act*, is responsible for spectrum management in Canada. As such, the Minister is responsible for developing policies for spectrum utilization and ensuring effective management of the radio frequency spectrum resource. Pursuant to the *Radiocommunication Act*, the Minister has the authority to plan the allocation and use of spectrum, to issue licences, and to fix and amend the terms and conditions of licences.
6. In developing licensing frameworks and policies, Industry Canada is guided by the objectives stated in Section 7 of the *Telecommunications Act* and the policy objective stated in the *Spectrum Policy Framework for Canada* in order to maximize the economic and social benefits that Canadians derive from the use of the radio frequency spectrum.

### 1.3 Policy Objectives

7. Industry Canada has developed this Framework to support the Government's policy objective to maximize the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource, including the efficiency and competitiveness of the Canadian telecommunications industry, and the availability and quality of services to consumers.
8. The intent of the Framework is to provide guidance to licensees as to how transfers of spectrum licences will be reviewed, as well as to introduce additional conditions of licence regarding the transfer

of control of spectrum licences, all with an eye to managing the spectrum resource for the benefit of Canadians as per the policy objectives outlined above.

#### **1.4 Background and Considerations**

9. This Framework complements other measures taken by the Government of Canada to increase competition in the provision of wireless telecommunications services. It enhances Industry Canada's existing processes and guidance in its review of the transfer of spectrum licences. Reviewing spectrum licence transfers supports the Government of Canada's policy objectives in the wireless telecommunications sector. Access to sufficient spectrum is a precondition to the provision of wireless services. Undue concentration of spectrum among a small number of wireless service providers can be detrimental to competition.

10. Reviews conducted by Industry Canada, pursuant to the *Radiocommunication Act*, are separate from those conducted by the Competition Bureau pursuant to the *Competition Act*. Under the *Radiocommunication Act*, the Minister of Industry reviews spectrum licence transfers as part of the mandate to plan the allocation and use of spectrum. Under the *Competition Act*, mergers (which can include acquisitions of assets, including spectrum licences) may be reviewed by the Competition Bureau to determine whether they prevent or lessen, or are likely to prevent or lessen, competition substantially. As part of its assessment of mergers, the Bureau examines all relevant businesses of the parties, and considers a number of factors to determine the impact of the merger on competition in relevant markets. In addition, the Bureau may review agreements or arrangements involving radio spectrum between competitors or potential competitors under a civil provision of the *Competition Act* that prohibits agreements that prevent or lessen, or are likely to prevent or lessen, competition substantially. The approach for analyzing competitive effects under this civil provision is similar to the analytical approach applied for mergers. Under the criminal conspiracy provision in the *Competition Act*, subject to limited defences, conspiracies, agreements or arrangements between competitors or potential competitors to fix prices, to allocate markets or to restrict output are illegal. For the purposes of this Framework, the same types of agreements or arrangements may trigger transfer requests or requirements to notify, along with other obligations as outlined in this Framework, insofar as they lead to changes in Control of a Licence or the Control of a Licensee or Affiliate. In addition, such agreements or arrangements may be relevant to the review criteria and considerations, which are discussed in more detail below.

11. Under the *Radiocommunication Act*, any use of spectrum must be authorized by the Minister. Where any person acts in a manner that is contrary to the provisions outlined in this document such that they enter into agreements, arrangements or understandings to use spectrum without being authorized to do so by the Minister as outlined in the Spectrum Licence Procedures, they will be considered to be acting contrary to the *Radiocommunication Act* and will be subject to the enforcement provisions set out in that Act. Additionally, this Framework sets out amended conditions of licence that impose requirements on licensees related to transfers of spectrum licences. Licensees who do not act in accordance with these requirements will be considered to be acting in breach of their authorization, and therefore also acting contrary to the *Radiocommunication Act*.

#### **1.5 Interpretation**

12. A number of terms are used in this Framework, which are explained below:

**Affiliate:** An entity is an Affiliate of any other entity where it controls or is controlled by the other entity, or is controlled by any entity that also controls the first entity.

**Agreement:** Where the word “Agreement” is used in this document, it includes all forms of agreements, arrangements and understandings made in any manner or format.

**Applicants:** Applicants to a Transfer Request include the current licensee and the proposed transferee. In the case of a Deemed Transfer, the term Applicants will include, in addition to the licensee, the entity taking Control of the Licence or Control of the Licensee or Affiliate, and in the case of a Prospective Transfer, the term includes the entity to which the future Licence Transfer would be made.

**Control of a Licence:** A Licence is controlled by any party that has the power or ability, whether exercised or not, to determine or influence the use of all or part of the licensed spectrum or the disposition of all or part of the Licence. More than one entity at a time may exercise Control of a Licence.

**Control of a Licensee or Affiliate:** An entity has control of a licensee or Affiliate when it has the power or ability, whether exercised or not, to determine or decide the strategic decision-making activities of the licensee or Affiliate or to manage and run its day-to-day operations, including, but not limited to, Control of a Licence. Control may be demonstrated by legal ownership rights or through other means. Where an entity holds more than 20% of the voting shares — or if there are no voting shares but an entity holds a greater than 20% stake in the beneficial ownership of a licensee or Affiliate — that entity will be presumed (subject to rebuttal) to have control of that licensee. Control may be demonstrated by an examination of a number of factors, including ownership interests, relationships and Agreements between the relevant parties, and/or the ability to exercise influence. Industry Canada may also consider the degree of control exercised by entities acting in concert with each other.

**Deemed Transfer:** Any immediate change to the Control of a Licence or Control of a Licensee or Affiliate that can be effected without making a Transfer Request, including a change made through the granting of any full or partial right or interest in a Licence through an Agreement.

**Framework:** In this decision paper, “Framework” means the entire set of decisions, including decisions to update the Spectrum Licence Procedures and to amend certain conditions of licence, as well as the explanation of the decisions set out in this document.

**Industry Canada:** For the purposes of this Framework, functions of the Minister of Industry under the *Radiocommunication Act* may be exercised by Industry Canada.

**Licence:** The term “Licence” in this document includes spectrum licences and subordinate licences.

**Licence Transfer:** A transfer of any Licence, including a division of a Licence, the granting of a subordinate Licence, or a Deemed Transfer.

**Prospective Transfer:** A Licence Transfer (contemplated by an Agreement) that is to be or may be completed or that will take effect at a future date, whether or not the date is specified.

Spectrum Licence Procedures: The procedures relating to Transfer Requests, as outlined in Industry Canada's publication, *Licensing Procedure for Spectrum Licences for Terrestrial Services* (CPC-2-1-23).

Transfer Request: In this document, a Transfer Request includes any request to transfer a Licence, to grant a subordinate Licence, or to divide a Licence that will result in the issuance of a new Licence, if approved.

## **2. Industry Canada Review of Spectrum Licence Transfer Requests**

### **2.1 Scope of Application**

13. In the consultation, Industry Canada proposed to apply the criteria and considerations set out therein to all Licences to which the Spectrum Licence Procedures apply. However, different spectrum bands are conducive to providing different services and Industry Canada recognizes that there are significant differences in the supply and demand conditions and in the competitive markets for these services. For example, the competitive environment for commercial mobile spectrum differs from that of the various fixed services. The licensing regime for commercial mobile spectrum reflects this difference, as the initial release of Licences is always through a competitive process — generally an auction — whereas fixed spectrum is licensed through a mixture of annual and long-term licences, which are issued through various competitive and non-competitive processes. Similarly, in today's market, the supply and demand conditions for spectrum for the provision of satellite services differ greatly from those of the terrestrial services.

14. Accordingly, this Framework will be applied to Licences for commercial mobile spectrum, which currently are those issued in the Cellular, Personal Communications Services (PCS), Advanced Wireless Services (AWS), Broadband Radio Service (BRS) and Wireless Communication Services (WCS) bands. As new spectrum is allocated for the purposes of providing commercial mobile services, these provisions will apply to those bands. As well, this Framework will apply to Licences issued pursuant to the upcoming auctions in the 700 MHz and 2500 MHz bands.

15. This Framework will apply to existing commercial mobile spectrum Licences. The provisions outlined in this Framework will be applied to Licence Transfers and Prospective Transfers, on or after the date of publication of this Framework.

16. The Minister of Industry may, in the future, impose the terms of this Framework or specific conditions of licence regarding Licence Transfers and Prospective Transfers to Licences in frequency bands or services not discussed within this Framework.

17. Additionally, Industry Canada notes that parties using spectrum that is licensed to another party (by virtue of spectrum sharing or other similar agreements) are required to seek a subordinate Licence from Industry Canada, under the terms set out in Industry Canada's Spectrum Licence Procedures. Accordingly, applications for subordinate Licences in commercial mobile spectrum bands will be reviewed by Industry Canada pursuant to this Framework. Similarly, arrangements for strategic alliances, joint ventures, and similar understandings may result in a change of Control of a Licence, which is subject to review under this Framework as a Deemed Transfer.

18. This Framework and any resulting changes to Industry Canada's Spectrum Licence Procedures and the relevant conditions of licence will apply to all Licence Transfers and Prospective Transfers in commercial mobile spectrum bands.

## **2.2 Threshold**

19. In the consultation, Industry Canada asked whether a threshold (i.e. a measure of MHz-pop) or another type of screen or cap should apply when deciding whether to conduct a detailed review.

### **Summary of Comments**

20. Many respondents provided a variety of suggestions as to potential thresholds for use by Industry Canada in determining whether or not to conduct a detailed review. Such proposals included the following suggestions: MHz-pop measurements, subscriber per MHz-pop, percentages of mobile spectrum held by the transferee or between the three licensees with the highest level of holdings, or some combination of these thresholds.

21. Some respondents expressed concerns that a threshold or another measure would capture transfers that would have an insignificant impact on spectrum concentration, or that such thresholds may be subject to "gaming" in cases where a series of small transactions could be completed to avoid review.

22. Other respondents submitted that it would be too difficult and too complex to determine an appropriate measure or formula applicable to most situations. They noted that many transfers are unique, and should therefore be reviewed on their own individual merits.

### **Discussion**

23. Industry Canada explored a number of quantitative and other types of thresholds that could be employed to screen or to limit the number of spectrum licence transfer requests that would be subjected to a detailed review. As noted above, the focus of this Framework has been narrowed to concentrate on commercial mobile spectrum. However, Industry Canada has determined that there is no single measure that can address the complexity of the commercial mobile spectrum environment in the assessment of a Licence Transfer.

24. Commercial mobile spectrum is an important resource to be managed for the economic and social benefit of Canadians. As such, it is appropriate to subject all Licence Transfers and Prospective Transfers in these bands to a similar type of review. This will ensure that all transfers of licence for commercial mobile spectrum are reviewed against the criteria outlined in Section 2.3 of this decision paper.

## **Decision**

25. Based on the above, Industry Canada will review Licence Transfers and Prospective Transfers of commercial mobile spectrum based on the considerations and criteria described below, which will be added to the current provisions in the Spectrum Licence Procedures.

### **2.3 Considerations and Criteria**

26. In the consultation, Industry Canada sought comments from stakeholders on the considerations and criteria concerning the review of requests for the transfer or division of licences, as well as the subordinate licensing of spectrum licences.

### **Summary of Comments**

27. The proposed criteria and considerations were generally supported by TELUS, MTS Allstream, Public Mobile, Eastlink and Xplornet. They were not supported by Bell Mobility, Rogers, Quebecor or Mobilicity.

28. Those who did not support the proposed criteria and considerations generally indicated that it was not necessary to introduce these, stating that the current review process, together with the Competition Bureau's review, is sufficient. Bell Mobility submitted that the existing Ministerial approval required for spectrum licence transfers and for the Competition Bureau oversight of mergers and acquisitions provides sufficient power to address any concerns about the impact of spectrum concentration on competition. Rogers questioned why Industry Canada would duplicate the review of factors considered by the Competition Bureau.

29. Other respondents suggested refinements to the proposal. These suggestions focused on two main areas of concern: (1) the way Industry Canada will account for spectrum licence holdings and spectrum concentration, and (2) the need for Industry Canada to consider regional variation. Eastlink, for example, suggested that a transferee's entire licence holdings should be taken into account, whereas SaskTel indicated that Industry Canada should take into account the number of facilities-based providers in a given region and that spectrum should be differentiated above and below 1 GHz. WIND also stated that Industry Canada should base its review on the number of operators in a region, but that this number should include Mobile Virtual Network Operators (MVNOs). A number of respondents indicated that Industry Canada should account for spectrum sharing agreements in its assessment. SaskTel noted that Industry Canada should take into account regional characteristics and consider rural areas differently than urban ones.

30. Additional comments were received related to the timing of Industry Canada's review of the spectrum licence transfer request, vis-à-vis the parties' finalization of their agreement. Xplornet indicated that a requirement to approach Industry Canada prior to the finalization of an agreement would be problematic, and suggested that Industry Canada allow parties to enter into binding agreements prior to seeking Industry Canada's approval of the transfer.

31. Most parties, whether they supported the proposal or not, submitted that if criteria were adopted, these should be objective and transparent.

## Discussion

32. As noted in the introduction to this paper, reviews that may be conducted by Industry Canada under this Framework are separate from those conducted by the Competition Bureau, pursuant to the *Competition Act*, and therefore would not affect the Commissioner of Competition's review of mergers, agreements, or arrangements involving radio spectrum. Industry Canada's direct concerns are with respect to the impact of the proposed Licence Transfer or Prospective Transfer on the concentration of spectrum in a region, whereas the Bureau's concerns relate to its statutory mandate, as discussed above.

33. Spectrum concentration should be considered on a number of different levels. Overall spectrum concentration across commercial mobile spectrum bands is key to assessing the availability of spectrum for competitors. In-band concentration should also be considered, as each band can possess unique characteristics that are not or cannot be replicated in other bands. Thus, spectrum concentration within the band may influence competitors' ability to offer comparable services.

34. Assessment of spectrum concentration should take into account the access to spectrum through subordinate licensing and spectrum sharing agreements, as the secondary licensee is benefiting from additional spectrum to deploy.

35. The impact of a given level of spectrum concentration may differ from region to region, due to factors that impact spectrum scarcity (e.g. population density). Additionally, spectrum holdings among operators vary widely between regions. As such, an assessment of the impact of a Licence Transfer and the resulting spectrum concentration may vary across different regions.

36. All Licence Transfers require the approval of Industry Canada in order to be effected. As such, Industry Canada encourages potential Applicants to seek informal, non-binding advice prior to requesting a transfer of a spectrum licence. Information submitted in the course of obtaining this advice would be treated as confidential, subject to the provisions of the *Access to Information Act*.

37. Industry Canada recognizes that the cost savings and efficiency gains that can be realized through the use of spectrum sharing can enable more rapid deployment of next generation services to Canadians, including those in rural areas, and can also support investment and service innovation since next generation technologies require large amounts of spectrum. When sharing spectrum, Industry Canada expects that both parties to the Agreement would continue to have access to and make use of the spectrum. Accordingly, the nature of a sharing Agreement, including the planned use of the spectrum, is pertinent to a review of a request for a subordinate licence that is made pursuant to such an Agreement.

## Decision

38. Industry Canada will examine the Licence holdings of the Applicants, both within the licensed spectrum band and across commercial mobile spectrum bands, in the relevant Licence area(s). All Licences held by the Applicants and their Affiliates will be considered in the analysis. Additionally, Industry Canada will consider other access to spectrum through any Agreements, including Licences held pursuant to a Deemed Transfer, as well as any pending transfers (which includes Licence Transfers that are currently under consideration or that may result from a Prospective Transfer).

39. In making its determination as to the impact of a Licence Transfer on the policy objectives of this Framework, Industry Canada will analyze, among other factors, the change in spectrum concentration levels (i.e. the amount of spectrum controlled by the Applicants in comparison to that held by all licensees) that would result from the Licence Transfer. In each case, Industry Canada will examine the ability of the Applicants and other existing and future competitors to provide services, given the post-transfer concentration of commercial mobile spectrum in the affected Licence area(s).
40. As part of the determination described above, Industry Canada will normally take into account the following factors:
- (a) the current licence holdings of the Applicants and their Affiliates in the licensed area;
  - (b) the overall distribution of licence holdings in the licensed spectrum band and commercial mobile spectrum bands in the licensed area;
  - (c) the current and/or prospective services to be provided and the technologies available using the licensed spectrum band;
  - (d) the availability of alternative spectrum that has similar properties to the licensed spectrum band;
  - (e) the relative utility (e.g. above and below 1GHz) and substitutability of the licensed spectrum and other commercial mobile spectrum bands in the licensed area;
  - (f) the degree to which the Applicants and their Affiliates have deployed networks and the capacity of those networks;
  - (g) the characteristics of the region, including urban/rural status, population levels and density, or other factors that impact spectrum capacity or congestion; and
  - (h) any other factors relevant to the policy objectives outlined in this Framework that may arise from the Licence Transfer.
41. In cases of requests for subordinate Licences, pursuant to Agreements such as spectrum sharing Agreements, Industry Canada will also consider the nature of the Agreement and the planned use of the spectrum by each of the Applicants.
42. While Industry Canada will examine all Licence Transfers, those generally considered as having negligible or no impact — such as Licence Transfers made solely to effect an internal reorganization — will normally be approved.
43. Where a Licence Transfer or Prospective Transfer involves more than one Licence, Industry Canada may approve the transfer of only some of the licences requested and deny others.
44. Industry Canada's Spectrum Licence Procedures will be updated to include procedures related to the above review with respect to Licences for commercial mobile spectrum, in addition to the consideration of all of the other factors outlined in the Spectrum Licence Procedures, such as any applicable eligibility requirements and conditions of licence specific to the band in question.
45. Applicants will be required to provide any relevant documentation based on the above considerations and will be invited to make submissions along with the transfer application in order to permit Industry Canada to review Licence Transfers and Prospective Transfers in a timely fashion. Industry Canada may request further documents or information at any time prior to completing its review. The application and supporting materials will be treated confidentially, subject to the provisions of the *Access to Information Act*.

## 2.4 Deemed Transfers

46. Deemed Transfers have the effect of changing the control of a spectrum licence, either through a change in the ownership or the control of a licensee or through other means that would cause a person other than the licensee to control the spectrum licence.

47. In the consultation paper, Industry Canada proposed to treat any deemed spectrum licence transfer in the same fashion as other licence transfers. Given that the current conditions of licence require that Industry Canada approve all spectrum licence transfers, it was proposed that licensees would be required to notify Industry Canada prior to finalizing a deemed spectrum licence transfer. Such notifications would be treated as a spectrum licence transfer request to be reviewed by Industry Canada, as set out elsewhere in the consultation.

### Summary of Comments

48. Of the 16 respondents to the consultation, nine supported Industry Canada's proposal relating to deemed spectrum licence transfers; Public Mobile suggested changes to the proposed definition; five had no comment; and Bell Mobility maintained its opposition to the overall proposal, including this element.

49. Some respondents supporting the proposal noted that it represents an important aspect of Industry Canada's overall approach to reviewing spectrum licence transfer requests.

50. Some respondents suggested clarifications to Industry Canada's proposal, relating to the following aspects: the definition of deemed spectrum licence transfers; the treatment of financial agreements as deemed spectrum licence transfers (in particular, certain respondents expressed their concerns about encountering delays when entering into standard financial agreements that might be reviewed); the form of Industry Canada's response to these transfers; and the relationship between prospective transfers and deemed spectrum licence transfers.

51. Rogers suggested changes to the wording of the definition of the deemed spectrum licence transfer, namely to remove the words "intent" and "effect" from the proposed wording, as these are difficult to establish in terms of the control of a licence.

52. Rogers also suggested that Industry Canada should clearly state whether it would approve or deny a deemed transfer, rather than using the hypothetical wording as set out in the consultation paper, and noted that the term "finalizing a deemed licence transfer" was imprecise.

53. Consistent with its overall opposition to the proposal, Bell Mobility submitted that Industry Canada should not do anything beyond the reviews performed by the Competition Bureau with respect to deemed transfers.

## Discussion

54. The treatment of Deemed Transfers as Licence Transfers is important in order to ensure that all changes to the control of spectrum licences are reviewed in a consistent manner.

55. In response to comments provided by consultation respondents, the following clarifications are provided with respect to the treatment of Deemed Transfers:

- (a) It is not Industry Canada's intention to hinder licensees from entering into financial arrangements made on normal commercial terms in the ordinary course of business. As such, Industry Canada will not generally require reviews relating to Deemed Transfers arising from entering into financial arrangements with parties whose business is primarily financing or lending. Industry Canada will instead focus its review on Deemed Transfers to any other licensees covered under this Framework, or to their Affiliates or to any of their respective agents or representatives.
- (b) The form of approval of a Deemed Transfer will differ from that of a Transfer Request, where the prior Licence is revoked with consent and then reissued to the transferee by Industry Canada. In cases where the name of the licensee does not change, Industry Canada can provide the licensee either with written confirmation that the Licence remains valid (where the Deemed Transfer is approved) or with written notice that the Deemed Transfer is not approved and that the licensee will be in breach of their conditions of licence if the Deemed Transfer is implemented.

56. The inclusion of Deemed Transfers in the definition of a Licence Transfer is meant to capture a variety of situations where there is a change in the Control of a Licence or Control of a Licensee or Affiliate, such as:

- (a) a transfer of shares of the Licensee or its Affiliates, including the purchase of shares, or effecting the conversion of shares;
- (b) strategic alliances and joint ventures;
- (c) an Agreement providing for exclusive use or excluding others from using licensed spectrum; or
- (d) any Agreement that provides for "negative control," i.e. an Agreement preventing a licensee from entering into an Agreement with a competitor to transfer a Licence.

57. Industry Canada considers that certain types of influence can lead to a person having Control of a Licensee or Affiliate or Control of a Licence. These can include, among others, influence over the board of directors and/or operations of the Licensee and influence based on economic dependence of the Licensee.

## Decision

58. Industry Canada will therefore adopt the following definition:

Deemed Transfer: Any immediate change to the Control of a Licence or Control of a Licensee or Affiliate that can be effected without making a Transfer Request, including a change made through the granting of any full or partial right or interest in a Licence through an Agreement.

59. Industry Canada's Spectrum Licence Procedures will be revised to incorporate the definition of a Deemed Transfer and to describe the form of approval or denial of such a transfer. Licensees will be required to apply for a review of a Deemed Transfer, and the application will be treated in accordance with the revised Spectrum Licence Procedures, using the criteria and considerations set out in this Framework. The application will be treated confidentially, subject to the provisions of the *Access to Information Act*.

60. In addition, the transfer and division condition of licence of existing and future spectrum licences subject to this Framework will now include a requirement to apply to Industry Canada for approval of a Deemed Transfer before any Agreement implementing the Deemed Transfer takes effect. The condition of licence will also state that it would be a breach of the licensee's conditions of licence to implement a Deemed Transfer that has not been approved by Industry Canada.

61. The condition of licence will also require the licensee to provide any documentation that Industry Canada requests related to this provision.

## **2.5 Prospective Transfers**

62. In the consultation paper, Industry Canada proposed to introduce a notification requirement related to agreements that provide for the future transfer or division of either a spectrum licence or a subordinate licence, referred to as "prospective transfers." This requirement would be incorporated into a condition of licence, to be applied to all existing and subsequently issued spectrum licences.

63. Upon receipt of such notice, Industry Canada proposed to review the information provided by the parties with the intent of providing a non-binding preliminary assessment of the prospective transfer.

### **Summary of Comments**

64. Of the 16 respondents to the consultation paper, six supported the addition of this condition of licence, seven opposed it, and three had no comments.

65. Among the respondents that supported the addition of this condition of licence, SaskTel stated that it should apply only to future, rather than existing, spectrum licences. Public Mobile suggested that Industry Canada explicitly indicate that where a licensee is or appears to be in breach of its condition of licence, a preliminary assessment of the transfer would be negative. Xplornet suggested that prospective transfers as set out in the consultation paper should be treated as deemed transfers.

66. Among those respondents opposing the addition of the proposed condition of licence, some indicated that it was not necessary, given that Industry Canada already has sufficient tools to regulate transfers and future transfers of spectrum licences. Additionally, some respondents reiterated their opposition to the addition of conditions of licence on existing licences before the expiry of their terms.

67. Further concerns were expressed as to the effects of Industry Canada's non-binding preliminary assessment of a prospective transfer, and some parties noted that deals may change substantially between the time the initial agreement is made and when it is completed. Rogers made the suggestion that the preliminary assessment should be at the option of the parties, rather than a mandatory requirement.

68. Some respondents also pointed out that the consultation paper does not clearly indicate at what point the parties to a prospective transfer would need to approach Industry Canada, given the proposed requirement to do so before a binding agreement has been reached. Further, Rogers pointed out that the parties contemplating a prospective transfer would, according to the proposal in the consultation paper, still be able to remain in a prospective transfer agreement, even where Industry Canada has provided a negative preliminary assessment.

## **Discussion**

69. Although Agreements that provide for future Licence Transfers (e.g. option agreements, rights of first refusal or first offer, security agreements) do not immediately change the Control of a Licence or Control of a Licensee or Affiliate, Industry Canada is of the view that such Agreements can nevertheless impact both the competitive market for wireless services and the policy objectives set out in this Framework. Accordingly, Industry Canada is of the view that the Licence Transfers envisioned by these types of Agreements should be subject to Industry Canada review at the time that the Licensee enters into the Agreement.

70. Industry Canada also takes the position that, where it denies a Prospective Transfer, the policy objectives of this Framework do not support the licensee remaining in the Agreement that provides for such a transfer. However, Industry Canada also recognizes that parties may require a reasonable amount of time to either exit or reformulate an Agreement that is able to better meet this Framework.

71. Industry Canada considered the possibility of treating Prospective Transfers as Deemed Transfers. However, because Deemed Transfers and Prospective Transfers differ in terms of the timing of any change in the Control of a Licence or Control of a Licensee or Affiliate, Industry Canada is of the view that Prospective Transfers (which only have a future effect) should be treated separately from Deemed Transfers (which have an immediate effect). Similarly, Industry Canada's review of a Prospective Transfer should be considered as distinct from a review of a Licence Transfer, based on the factors set out in Section 2.3 above, and will be conducted at the relevant time.

72. Industry Canada will focus its review on Prospective Transfers, as provided for in Agreements between the licensee and any other licensees covered under this Framework and/or one of their Affiliates or any of their respective agents or representatives. Although various Agreements may result in a change to the Control of a Licence or Control of a Licensee or Affiliate at a future date, it is not Industry Canada's intention to capture Agreements made in the ordinary course of business with parties other than licensees that are subject to this Framework, e.g., security agreements incidental to standard financial arrangements with parties whose business is primarily financing or lending.

73. Industry Canada is of the view that information submitted as part of a review of a Prospective Transfer should be treated as confidential until such time as either the information has been made public by the Applicants or Industry Canada has reached a decision. However, this information is subject to the provisions of the *Access to Information Act*.

## Decision

74. Industry Canada will adopt the following definition:

Prospective Transfer: A Licence Transfer (contemplated by an Agreement) that is to be or may be completed or that will take effect at a future date, whether or not the date is specified.

Licence Transfers include Deemed Transfers.

75. The transfer and division condition of licence for existing Licences subject to this Framework will be amended to require licensees to apply to Industry Canada for a review of a Prospective Transfer within 15 days of entering into any Agreement involving a Prospective Transfer to another licensee covered under this Framework or to one of its Affiliates or to any of their respective agents or representatives.

76. Industry Canada's Spectrum Licence Procedures will be revised to provide for reviews of Prospective Transfers, based on the criteria and considerations set out in this Framework. For the purposes of the review, the Prospective Transfer will be evaluated as though the future Licence Transfer arising from the relevant Agreement has been made. The resulting Licence Transfer will be considered in accordance with the revised Spectrum Licence Procedures, using the criteria and considerations set out in this Framework, and will be treated confidentially, subject to the provisions of the *Access to Information Act*.

77. Subject to paragraph 79 below, upon completing its review, Industry Canada will provide the licensee with a decision indicating that either the Prospective Transfer provided for in the Agreement meets the policy objectives set out in this Framework or that the Prospective Transfer does not meet these objectives. Further, the transfer and division condition of licence for existing Licences subject to this Framework will be amended to provide that in cases where Industry Canada has issued a decision indicating that the Prospective Transfer does not meet the policy objectives, it will be a breach of the condition of licence for a licensee to remain in the Agreement that provides for the Prospective Transfer for a period of more than 90 days from the date of the decision.

78. The condition of licence will also require the licensee to provide any documentation that Industry Canada requests related to this provision.

79. Any Licence Transfer resulting from an Agreement reviewed under this section will require a separate application to Industry Canada at the time that the parties wish to make the transfer. The Licence Transfer will be reviewed, as set out in this Framework, at that time.

## 2.6 Public or Confidential Review

80. In the consultation, Industry Canada asked whether its current process to review spectrum licence transfer requests should be modified to allow for public notification/consultation before a transfer has been approved.

## Summary of Comments

81. MTS Allstream, Public Mobile, Terrestar, Xplornet, and Dr. Michael McNally, et al. indicated that Industry Canada should introduce a public announcement of spectrum licence transfer requests awaiting Industry Canada's approval in order to increase the transparency of the approval process. Some respondents indicated that publication of only basic data related to the transfer may be appropriate.

82. However, many other respondents noted that the details of spectrum licence transfers are commercially sensitive and that significant harm could result from the publication of spectrum licence transfer requests before these have been approved by Industry Canada.

## Discussion

83. After assessing the submissions received, Industry Canada recognizes that parties may regard information submitted with respect to Licence Transfers or Prospective Transfers as confidential. As such, Industry Canada is of the view that requests for a review submitted by Applicants under this Framework should be treated confidentially until such time as the information has been made public by the Applicants or Industry Canada has reached a decision.

84. Industry Canada currently maintains a database of spectrum licences on its website, which is updated once a spectrum licence has been transferred or divided or once a subordinate licence has been issued. In addition to this information, stakeholders may benefit from the publication of Industry Canada's rationale for any approval or denial of a Licence Transfer or Prospective Transfer. Industry Canada's decisions do not create binding precedent as to future decisions. However, publication of this information may provide guidance as to the treatment of future applications for Licence Transfers and Prospective Transfers.

85. Additionally, Industry Canada notes that potential Applicants may benefit from receiving informal advice regarding a Licence Transfer, Prospective Transfer, or other matters under this Framework prior to finalizing any Agreement or to making a Transfer Request.

## Decision

86. Material submitted by Applicants under this Framework will be treated as confidential, subject to the requirements of the *Access to Information Act*, until such time as the Applicants release the information publicly or Industry Canada publishes a decision.

87. Industry Canada will normally publish a summary of its decisions with respect to Licence Transfers and Prospective Transfers. Although they do not create binding precedents, these summaries of decisions may provide guidance as to the treatment of future Licence Transfers and Prospective Transfers.

88. Industry Canada encourages parties that are contemplating entering into Agreements related to transfers of spectrum licences to seek informal, non-binding advice prior to doing so. Information submitted in the course of obtaining this advice will be treated as confidential, subject to the provisions of the *Access to Information Act*, and no information relating to these requests will be published.

## **2.7 Timelines**

89. In the consultation, Industry Canada proposed to provide either approval of a spectrum licence transfer request or advice that the request would be subject to a detailed review, as set out in the consultation paper, within four weeks of receipt of an application. Additionally, Industry Canada indicated that a detailed review would be completed within 16 weeks of receipt of all required information for a total time of 20 weeks. These timelines were subject to variation in certain instances — for example, if Industry Canada requested further information or if further time was required in order to respond to specific concerns.

### **Summary of Comments**

90. While three respondents indicated that the timelines proposed were reasonable, and Terrestar suggested extending the timelines to allow for a public consultation process, the majority of respondents providing comments on this issue indicated that the proposed timelines should be shortened to between three and four weeks. In particular, a number of respondents indicated that the timeline for a review of a request for a transfer should be harmonized with the timelines established by the Competition Bureau for its reviews of mergers.

### **Discussion**

91. Industry Canada recognizes the importance of timely regulatory decisions in the quickly changing telecommunications environment. As such, after considering the comments provided by respondents in the consultation and given that the initial review proposed in the consultation paper will not be required, Industry Canada believes that the timeline for a review and approval or denial of a Licence Transfer or a Prospective Transfer should be shortened to 12 weeks from the date that a request and all required information has been received.

92. A 12-week timeline for review is consistent with those time frames established in various international jurisdictions, which range from 30 days to six months.

93. Industry Canada notes that certain circumstances could arise that would lengthen the time required to review a Licence Transfer or a Prospective Transfer. For example, further information might be required from the Applicants, or the Applicants could require additional time to respond to specific concerns raised. Where the issues that are raised in a review of a Licence Transfer or a Prospective Transfer are complex, Industry Canada may require additional time to consider these.

### **Decision**

94. Industry Canada's Spectrum Licence Procedures will be revised to reflect that reviews of Transfer Requests, Deemed Transfers, and Prospective Transfers will normally be completed within 12 weeks from the time of receipt of all required information. This timeline may vary due to requests for further information, where the Applicants require additional time to respond to specific concerns raised, or where the complexity of the issues raised in the course of a review demands a longer period of time in order to consider the effects of the Licence Transfer or the Prospective Transfer.

## **2.8 Next Steps**

95. Industry Canada will publish notice of amendments to the Spectrum Licence Procedures and of amendments to conditions of licence for Licences subject to this Framework. After that date, Industry Canada may provide guidelines on the interpretation of matters under the Spectrum Licence Procedures, as questions arise.