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MEMORANDUM

PRIVILEGED AND CONFIDENTIAL - SOLICITOR WORK PRODUCT

To: The Catalyst Capital Group Inc./Gabriel de Alba Date: May 19, 2014
 and Zachary Michaud

From: Fasken Martineau DuMoulin LLP/Steve Acker File/Matter No.: 267597.00007
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Re: **Project Turbine - Outline of Regulatory Issues and Process in Proposed Sharing of Globalive Spectrum**

1. Background

We understand that one or more investments funds managed by The Catalyst Capital Group Inc. (all such funds being herein collectively called “**Catalyst**”) are contemplating purchasing the shares of Globalive Wireless Management Corporation (“**Globalive**”), a new entrant licensee of AWS commercial mobile spectrum and wireless service provider. Catalyst is also contemplating that in due course there might be a merger between Globalive and Data & Audio-Visual Enterprises Wireless Inc. (“**Mobilicity**”), another new entrant wireless service provider, currently in receivership and the subject of protracted litigation. The latter proposed transaction would presumably happen only after the close and receipt of regulatory approval of any transaction for Catalyst to acquire Globalive.

Aside from the potential merger of the assets and spectrum holdings of Globalive and Mobilicity, Catalyst is contemplating that Globalive would take steps to obtain access to additional commercial mobile spectrum (AWS, 700 MHz, PCS, etc.) through a sharing arrangement which may include an actual or “deemed” transfer of spectrum licence that is held by one of the three incumbent wireless carriers (namely: Rogers, Bell, Telus) or other non-incumbent carriers (e.g.: Videotron/Quebecor).

The balance of this memo outlines the regulatory regime and issues implicated in the different scenarios for Globalive acquiring and/or obtaining access to commercial mobile spectrum owned by other licensees, and the process and timelines for approval of these transactions by Industry Canada. This memo does not discuss the proposed acquisition of Globalive by Catalyst, which is a transaction involving the change of control of a licensee and requiring prior Industry Canada approval.

It will be evident from the discussion below that there will be a significant approval process inherent in Globalive seeking to acquire and/or obtain access to spectrum owned by others. However it seems likely that the government would be supportive of Globalive’s and Catalyst’s efforts so long as Globalive is seeking to establish a viable fourth national cellular company.

That support would likely not extend to any comfort as to the government's willingness to ultimately approve a transfer of spectrum licences to Globalive in due course to any of Bell, Telus or Rogers. However, it may be possible for Catalyst to obtain comfort from the government that no option will necessarily be precluded in several years' time.

2. Regulatory Framework

Background

Section 5 of the *Radiocommunication Act* (RSC 1985 c R-2) grants Industry Canada broad authority to manage radio frequency spectrum by issuing licences. Pursuant to that authority, in June, 2013, Industry Canada adopted the new *Framework Relating to Transfers, Divisions and Subordinate Licensing of Spectrum for Commercial Mobile Spectrum* ("DGSO-003-13") which set out this Government's policy regarding transfers of commercial mobile spectrum licences.

The policy objective is "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."

In order to achieve this, DGSO-003-13 introduced the requirement to obtain prior Industry Canada approval for any transfer of spectrum licence, even transfers resulting from internal corporate reorganizations. Important for the purposes of Catalyst's proposal, DGSO-003-13 also established the requirement to seek approval for "Deemed Transfers" of spectrum licences. Deemed Transfers would include agreements for reselling or sharing of spectrum among licensees, for example.

"Commercial mobile services" was defined in DGSO-003-13 to include: Cellular, Personal Communication Services (PCS), Advanced Wireless Services (AWS), Broadband Radio Service (BRS), Wireless Communication Services (WCS) and Mobile Broadband Services (MBS) in the 700 MHz band.

The policies in DGSO-003-13 were incorporated into Client Procedures Circular-2-1-23 *Licensing Procedure for Spectrum Licences for Terrestrial Services* (CPC-2-1-23) as amended in August, 2013. CPC-2-1-23 is thus designed to trigger the requirement for prior approval from Industry Canada for most commercial dealings regarding use of commercial mobile spectrum by a party other than the original licensee.

Any contravention of CPC-2-1-23 is a contravention of the conditions of licence, contrary to the *Radiocommunication Act*, and will be subject to enforcement provisions in that Act.

Transfers requiring prior Industry Canada approval

All transfers of commercial mobile spectrum licences require prior Industry Canada approval, which will be determined on a case-by-case basis. The types of licence transfers subject to CPC-2-1-23 are:

i) Licence Transfers

A “Licence Transfer” includes any transfer of any Licence, division of a Licence, granting of a Subordinate Licence, and a Deemed Transfer.

A “**Subordinate licence**” is a licence that is related to a primary licence and in which the primary licensee is responsible for meeting all regulatory requirements, including the terms and conditions of the licence. For example, depending on the terms of such an agreement, a lease of spectrum to another licensee would appear to be a type of Subordinate Licence.

A “**Deemed Transfer**” is defined as: “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 [request to transfer a Licence, grant a Subordinate Licence or divide a Licence], including a change made through the granting of any full or partial right or interest in a Licence through an Agreement. Arrangements for strategic alliances, joint ventures and similar understandings may result in a change in the Control of a Licence.”

In other words, it is an agreement effecting any immediate change to the “Control of a Licence” or “Control of a Licensee or Affiliate” where the end result is not the issuance of a new licence. So the key inquiry into whether an agreement represents a Deemed Transfer is the nature and extent of the change in control of the licence or licensee. For their part, control of a licence and control of a licensee are defined in CPC-2-1-23 as follows:

“**Control of a Licence**”: “A Licence is controlled by any party that, directly or indirectly, 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. Industry Canada will consider, among other matters, the degree of control exercised by entities acting in concert with each other in assessing the Control of a 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, directly or indirectly, 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 ownership interests or through other means. Where an entity beneficially owns

more than 20% of the voting shares — or if there are no voting shares but an entity beneficially owns a greater than 20% stake in the ownership interests of a licensee or Affiliate — that entity will be presumed (subject to rebuttal) to have Control of a Licensee or Affiliate. 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 will also consider the degree of control exercised by entities acting in concert with each other. More than one entity at a time may exercise Control of a Licensee or Affiliate.”

ii) Prospective Transfers

Prospective Transfers are defined as a “Licence Transfer (contemplated by an Agreement with another commercial mobile band licence holder, including any Affiliate, agent or representative of the other licence holder), that is to be or may be completed or that will take effect at a future date, whether or not the date is specified.” So, a Prospective Transfer includes agreements relating to future transfers, divisions, subordinate licences and deemed transfers.

Requirements for Licence Transfers and Prospective Transfers

To give effect to any agreement involving a Licence Transfer and Prospective Transfer of commercial mobile spectrum, applicants must seek prior approval of Industry Canada and demonstrate that they meet the requirements of CPC-2-1-23, in particular Sections 5.6.2, 5.6.3 (only Subordinate Licences) and 5.6.4. In addition to these requirements, Industry Canada may also take into consideration any other relevant matters, at its discretion, in disposing of applications.

i) Section 5.6.2 - General provisions

This section establishes the general conditions and guidelines for all Licence Transfers and Prospective Transfers applications for all spectrum licences (i.e.: not only commercial mobile spectrum).

For example, the Transferee must meet the applicable eligibility criteria set out in the *Radiocommunication Regulations*. Further, for all Licence Transfers, applicants must include a declaration of compliance with section 5.6.2. Industry Canada may request further documents and information regarding the Applicants’ current deployment levels, the planned use of the spectrum, and/or existing or anticipated capacity constraints.

ii) Section 5.6.3: Subordinate Licences

This section establishes the conditions of licence and guidelines regarding the application for a Subordinate Licence.

For instance, the subordinate licensee may not exceed the authority granted to the “Primary Licensee” under the licence, and implementation of services by the subordinate licensee will count toward meeting the primary licensee’s regulatory responsibilities. In addition to other considerations, in applications for a Subordinate Licence, Industry Canada will also consider the nature of the Agreement and the planned use of the spectrum by each of the Applicants.

iii) Section 5.6.4: Transfers of commercial mobile spectrum licences

This section sets out the following criteria and considerations for assessing applications for Prospective Transfers and Licence Transfers of commercial mobile spectrum licences:

- (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 1 GHz) 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 objective outlined in Section 5.6.4 that may arise from the Licence Transfer or the Prospective Transfer.

Additionally, and most importantly, Industry Canada will analyze the post-transfer change in spectrum concentration levels in a licence area. Industry Canada will not approve of applications

that would result in an “undue concentration”, in its estimation, of commercial mobile spectrum in a service provider in a licence area.

Industry Canada will also examine the ability of the Applicants and other existing and future competitors to provide services in light of the post-transfer concentration of commercial mobile spectrum.

3. Scenarios for Greater Spectrum Access

Globalive presented to Catalyst a number of scenarios through which Globalive might gain access to additional commercial spectrum and be able to roll out LTE throughout its service areas. Roll out of LTE is necessary for any wireless service provider to remain competitive in today’s market for services. The scenarios include: an arrangement to share AWS spectrum with Rogers in southern Ontario (the Globalive and Rogers blocks are contiguous); buying Shaw’s unused AWS spectrum and sharing it with Rogers; a spectrum swap with Telus (Globalive AWS spectrum in certain markets for Telus 850 MHz spectrum); sharing Videotron’s unused AWS spectrum in Toronto and newly-acquired 700 MHz spectrum in Ontario, Alberta and B.C.

There may be other scenarios as well but all the arrangements can be reduced to two broad categories, for the purpose of assessing likelihood of obtaining Industry Canada approval:

1. Agreements involving a transfer or Deemed Transfer with an incumbent wireless service provider; and
2. Agreements involving a transfer or Deemed Transfer with a non-incumbent service provider.

Option 1: Sharing with incumbent

Though there are few precedents to date, a spectrum “sharing agreement” or resale agreement in which both licensees operate and manage their networks would appear to qualify as a Deemed Transfer because control of the licence would effectively change.

As well, a Subordinate Licence would include a lease agreement in which the primary licensee leases a portion or all of its licensed spectrum to a third party, and wherein the third party provides services to end users under its own brand-name, but where the regulatory obligations to and responsibility for the back office operations of the network remain with the primary licensee. To the extent that a lease involves such a change in Control, without being an outright acquisition of the licence, the agreement would be a Deemed Transfer.

It is important to note that as the transfer framework and government policy introduced in DGSO-003-13 is recent and relatively untested, it is difficult to predict how it will be applied or even what the Government intends by “undue concentration.” However, the current Government has made it clear that any proposed transfer of commercial mobile spectrum to an incumbent will be subject to very close scrutiny and, in the current climate, most unlikely to succeed. Indeed, since the introduction of CPC-2-1-23, the Government has only approved of transfers arising out of internal corporate reorganizations where no change in spectrum concentration occurs.

One precedent exists which gives insight into the Government’s interpretation of “undue concentration” - the October, 2013, application of Inukshuk (a partnership between Bell and Rogers) to acquire 30 MHz worth of WCS spectrum licences from NextWave. Industry Canada denied the request. It found that Rogers and Bell stood to more than double their combined WCS spectrum to 77%, meaning that including Telus, 95% of WCS spectrum would be effectively held by all three incumbents post-transfer. Therefore, the concentration of spectrum would be undue and impermissible.

Two conclusions can be drawn from this. First, Industry Canada’s determination as to whether the concentration of spectrum is “undue” will take into account the spectrum owned by all incumbents in an area, regardless of whether they are party to the proposed transfer. Second, whether spectrum concentration is “undue” is not necessarily determined with reference to the proportion of wireless services subscribers the applicants have in the market. In other words, Industry Canada found that incumbents owning 95% of WCS spectrum would be undue even though the incumbents serve roughly the same proportion of all wireless service subscribers.

Nevertheless, certain situations are conceivable that may militate in favour of Industry Canada approval. For example, in light of the Government’s main test regarding the “undue concentration of spectrum,” a scenario in which overall spectrum concentration, post-transfer, remains the same or in which each party’s spectrum concentration is increased proportionately.

Thus, a sharing scenario whereby an incumbent like Rogers and Globalive share each other’s AWS spectrum in a given licence area raises a possible “win-win” situation that might possibly overcome the Government’s objection to adding to incumbents’ spectrum holdings. Apart from having similarities with the existing Bell-Telus sharing arrangements (which pre-date the transfer policy), such an arrangement arguably would be intended to make new entrant Globalive much more competitive, thus serving the Government’s policy objective. Nonetheless, such an arrangement would have to be vigorously sold to the Minister of Industry taking into account the factors in CPC-2-1-23 s. 5.6.4, and there is no guarantee it would be approved, despite the arguments in favour.

In short, in the category of deals entered into with incumbents, whether for outright transfers or for sharing arrangements which are Deemed Transfers, the risk of non-approval is high.

Option 2: Sharing with non-incumbent

On the other hand, sharing arrangements entered into with non-incumbents such as Shaw or Quebecor (or outright transfers of spectrum to such an operator) would also face some scrutiny under the above-referenced assessment criteria and pre-approvals process, but would have a much higher chance of success.

This is because such arrangements would presumably strengthen both parties (either through additional access to spectrum or cash), making both more competitive as against the three incumbents. Approvals would not be as quick as in the case of an intra-corporate transaction but would almost certainly be forthcoming.

4. Process and Timelines

Under CPC-2-1-23, applicants are encouraged to consult informally with Industry Canada after completion of due diligence and before entering into sharing or transfer agreements. Such consultations are not mandatory but are highly desirable. Options for achieving the results sought can be explored with Industry Canada staff to see if they have any concerns. There are no timelines set out for Industry Canada's determinations regarding proposals presented in such consultations.

In the case of a Deemed Transfer, such as a sharing arrangement, the parties to the arrangement must apply for approval before the agreement to share spectrum takes effect. Industry Canada sets 12 weeks as the normal time for it to issue a decision. This time is only a service standard, and can be extended if the issues are complicated, more information is requested by Industry Canada, or the parties need more time to file the information.

It is unlikely a decision will be issued in less than 12 weeks unless the arrangement is simple and straightforward. Where an incumbent is involved, as indicated above, the complexity increases and one can probably add a month or more to the 12 week standard.

In the case of an agreement for Licence Transfer which is not a Deemed Transfer, CPC-2-1-23 appears to contemplate two phases of Industry Canada prior approvals. The first is an application within 15 days of entering into a Prospective Transfer agreement. Industry Canada will normally take 12 weeks to issue a decision as to whether the Prospective Transfer meets the policy objectives. Assuming approval, a separate application is then required when the actual transfer is to take place. Presumably such a transfer request will be handled expeditiously as the policy issues will have been dealt with in the first phase assessment of the prospective transfer application.

5. Application Strategy

As indicated above, the acquisition by Catalyst of the shares of Globalive will itself constitute a Deemed Transfer as the licences will continue to be in the name of Globalive but control of those licences will pass to a new shareholder. This will trigger the application process and review outlined above. It may well make sense, depending on commercial requirements and contingencies, to approach Industry Canada at the informal consultation stage to lay out the terms of that acquisition together with any scenario(s) of Deemed Transfer and /or actual Licence Transfer that would follow the acquisition of Globalive's shares. That way, Industry Canada could review the entire package together, thereby shortening the time for Industry Canada review. It is assumed that before the acquisition of Globalive is finalized, subject to regulatory approvals, Catalyst and its counterpart will have tentative agreement on the sharing and/or transfer arrangements which are designed to make Globalive more competitive.