



## Telecom Decision CRTC 2009-678

Route reference: Telecom Notice of Consultation 2009-429

Ottawa, 29 October 2009

### **Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime**

File number: 8657-C12-200910316

*In this decision, the Commission sets out its determination in the proceeding initiated by Telecom Notice of Consultation 2009-429, in which it undertook a review of Globalive's ownership and control. In its review, the Commission considered whether non-Canadians do not own or control Globalive as currently structured. The Commission determines that Globalive does not meet that test. The Commission therefore determines that Globalive has not met the requirements of the ownership and control regime and is therefore not currently eligible to operate as a Canadian telecommunications common carrier.*

#### **Introduction**

1. From 27 May to 21 July 2008, Industry Canada conducted an auction of spectrum licences for advanced wireless services (AWS) and other spectrum in the 2 GHz range. Globalive Wireless LP successfully bid \$442,099,000 for 30 AWS spectrum licences.
2. At that time, Globalive Wireless LP was owned by Globalive Wireless Management Corp. (Globalive). Globalive's beneficial owners were: Globalive Canada Holdings Corp. (GCHC), beneficially owned by Globalive Investment Holdings Corp. (GIHC); Globalive Communications Holdings Ontario Inc. or its subsidiaries, including Globalive Communications Corp. (GCC), controlled by Anthony Lacavera; Weather Investments S.p.A. or its subsidiaries, including Orascom Telecom Holding S.A.E., controlled by Naguib Sawiris; and Mojo Investments Corp. (Mojo), controlled by Michael O'Connor.
3. As part of the auction proceedings, successful bidders were to submit ownership and control documentation to Industry Canada for review within 10 business days of the cessation of bidding, in order to demonstrate compliance with the Canadian ownership and control provisions of the *Radiocommunication Act*. Globalive submitted its documentation to Industry Canada on 8 August 2008.
4. On 22 December 2008, Commission staff sent a letter to Globalive, as well as to all the other successful AWS bidders not already operating as common carriers. This letter indicated that the Commission was prepared to review Globalive's ownership prior to the commencement of its operations, in order to ensure that it met the Canadian ownership and control requirements of section 16 of the *Telecommunications Act* (the Act).

5. On 13 March 2009, Industry Canada issued spectrum licences to Globalive, having completed its ownership review and determined that Globalive was Canadian-owned and controlled within the meaning of the *Radiocommunication Act*.
6. On 3 April 2009, Globalive submitted its corporate documents to the Commission for the initiation of a review to determine whether it was eligible to operate as a telecommunications common carrier in accordance with subsection 16(1) of the Act.
7. On 20 April 2009, the Commission received a letter from TELUS Communications Company (TCC) requesting that the Commission initiate an open and transparent proceeding to review the ownership and control of Globalive. In a letter dated 22 April 2009, Shaw Communications Inc. (Shaw) supported TCC's request for a public proceeding.
8. By letter dated 5 May 2009, Globalive opposed TCC's request. In the alternative, Globalive requested that the Commission initiate a public process in order to seek comments from all interested parties on the best way to conduct any review proceeding.
9. In Telecom Notice of Consultation 2009-303, the Commission initiated a public process, inviting comment on whether it is appropriate in some instances to conduct Canadian ownership and control reviews under the Act on a public basis as opposed to a confidential basis. The Commission issued its determination in this matter in Telecom Regulatory Policy 2009-428, establishing a flexible, four-type review framework for ownership and control reviews under the Act. The Commission determined that in certain cases, including those where the review involves complex or novel governance structures or financing arrangements, the public interest may be served by conducting that review via a public, multi-party process with an oral hearing phase.

### **Proceeding**

10. Based on the review framework established in Telecom Regulatory Policy 2009-428, the Commission published Telecom Notice of Consultation 2009-429, initiating a public, multi-party review, including an oral hearing phase, of Globalive's ownership and control. The Commission considered such a review appropriate given the complex and novel nature of Globalive's ownership and governance structure and financing arrangements, the precedential value the review would hold for the industry and the public, and the fact that the participation and appearance of interested parties would allow the Commission to better complete and test the evidentiary record.
11. In Telecom Notice of Consultation 2009-429, it was indicated that all documentary evidence submitted to the Commission on 3 April 2009 (the pre-hearing documents or pre-hearing structure, as appropriate) would form part of the record of the proceeding. On 27 July 2009, Globalive filed a confidentiality claim for certain portions of the pre-hearing documents. Pursuant to a Commission staff confidentiality determination dated 3 August 2009, Globalive filed a redacted version of the pre-hearing documents for the public record on 6 August 2009.

12. On 4 August 2009, the Commission issued interrogatories to Globalive. Globalive filed responses, along with a confidentiality claim for certain portions thereof, on 14 August 2009. On 17 August 2009, Bell Canada, Rogers Communications Inc. (RCI), and TCC contested certain portions of Globalive's claim for confidentiality. Commission staff issued a determination on confidentiality with respect to Globalive's claim on 19 August 2009. Pursuant to that determination, Globalive filed additional redacted documents on 21 August 2009.
13. The Commission received written comments from Danoush Hoosseinzadeh on 10 August 2009, from the Canadian Cable Systems Alliance Inc. on 21 August 2009, and from Bell Canada, RCI, Shaw, and TCC on 24 August 2009. On 28 August 2009, Globalive filed reply comments.
14. Globalive is the principal party to the proceeding initiated by Telecom Notice of Consultation 2009-429. Bell Canada, RCI, and TCC (the appearing parties) were granted permission to participate in the oral phase of the public hearing, which was scheduled on 23-24 September 2009.
15. At the outset of, and at various points during, the oral phase of the public hearing, Globalive made numerous, significant amendments to its pre-hearing structure and pre-hearing documents. Revised documents were filed with the Commission and placed on the public record on 29 September and 2 October 2009 (the revised documents or revised structure, as appropriate).
16. Most of the public hearing session on 24 September 2009 was held *in camera* with the Commission and representatives of Globalive present. A redacted transcript of the *in camera* portion of the hearing was placed on the public record. In order to give the appearing parties the opportunity to frame their final statements in light of the revised structure and revised documents, the oral phase of the public hearing was adjourned and reconvened on 1 October 2009.
17. Following the conclusion of the oral phase of the public hearing, the Commission received final written comments from the appearing parties dated 5 October 2009 and a final reply from Globalive dated 7 October 2009.
18. The Commission has reviewed and considered the entire record of this proceeding, including the revised structure, the revised documents, and the written and oral submissions of all parties. The extensive public record of this proceeding, which closed 7 October 2009, is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings" or by using the file number provided above.

### **Canadian ownership and control regime**

19. The Commission has the responsibility under the Act to regulate the telecommunications industry in Canada with a view to implementing the policy objectives enumerated in the Act, including the objective to promote the ownership and control of Canadian carriers by Canadians that is set out in paragraph 7(d). Further, specific ownership and control

requirements are set out in section 16 of the Act as well as in the *Canadian Telecommunications Common Carrier Ownership and Control Regulations* (the Regulations)<sup>1</sup> (collectively, the ownership and control regime).

20. Subsection 16(1) of the Act provides that "a Canadian carrier is eligible to operate as a telecommunications common carrier if it is a Canadian-owned and controlled corporation incorporated or continued under the laws of Canada or a province." Subsection 16(3) of the Act provides that a corporation is Canadian-owned and controlled if:
  - (a) not less than eighty per cent of the members of the board of directors of the corporation are individual Canadians;
  - (b) Canadians beneficially own, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than eighty per cent of the corporation's voting shares issued and outstanding; and
  - (c) the corporation is not otherwise controlled by persons that are not Canadians.
21. Subsection 2(1) of the Act defines "control" to mean "control in any manner that results in control in fact, whether directly through the ownership of securities or indirectly through a trust, agreement or arrangement, the ownership of any body corporate or otherwise."
22. Subsection 2(2) of the Regulations defines "Canadian," for the purpose of the Regulations and of section 16 of the Act, as, among others, a citizen who is ordinarily resident in Canada, a permanent resident in certain circumstances, and a qualified corporation.
23. A "qualified corporation" is defined in subsection 2(1) of the Regulations as follows:

...a corporation in which those of its shareholders who are Canadians beneficially own, and control, in the aggregate and otherwise than by way of security only, not less than 66 2/3 per cent of the issued and outstanding voting shares, and which is not otherwise controlled by non-Canadians.
24. Therefore, an inquiry under the ownership and control regime as to whether a Canadian carrier is Canadian-owned and controlled, and therefore eligible to operate as a telecommunications common carrier, involves a determination of both *de jure* control (legal control) and *de facto* control (control in fact).
25. The Act does not authorize the Commission to permit a Canadian carrier to operate as a telecommunications common carrier if it is not Canadian-owned and controlled. The Commission has no authority to issue a conditional approval on the basis that the carrier undertakes to bring itself into compliance in the future.
26. The Commission notes that Globalive must satisfy the requirements of the ownership and control regime at all times when it is operating as a telecommunications common carrier. The issue being addressed in this decision is whether Globalive has satisfied these requirements and is thus eligible to operate in this capacity.

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<sup>1</sup> SOR/94-667, 25 October 1994

## Legal control

27. As noted above, the test for legal control requires that
  - not less than eighty per cent of the members of the board of directors of the corporation are individual Canadians; and
  - Canadians beneficially own, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than eighty per cent of the corporation's voting shares issued and outstanding.
28. Globalive's board of directors under the pre-hearing structure consisted of seven individuals, six of whom were Canadians.
29. Based on its pre-hearing structure,<sup>2</sup> Globalive was wholly owned by GCHC, a corporation in turn owned by GIHC (66.67 percent voting interest) and Orascom Telecom Holding (Canada) Limited (Orascom) (33.33 percent voting interest). GIHC was owned by three shareholders: AAL Holdings Corporation (AAL) (66.68 percent voting interest), controlled by Mr. Lacavera; Orascom (32.02 percent voting interest), controlled by Mr. Sawiris; and Mojo (1.30 percent voting interest), controlled by Mr. O'Connor.
30. Orascom does not satisfy the definition of Canadian within the meaning of the Regulations. Therefore, for the purpose of the ownership and control regime, Orascom is non-Canadian.
31. In response to concerns expressed by the Commission during the oral phase of the public hearing, Globalive revised its corporate structure by eliminating its direct holding corporation, GCHC, which was wound up into GIHC. As a result, Globalive is wholly owned by GIHC. The overall equity positions of the shareholders remain unchanged. The board of directors of Globalive was expanded to eleven individuals, at least nine of whom must be Canadians.
32. All of Globalive's issued and outstanding voting shares are held by GIHC, a qualified corporation by virtue of the fact that 66.68 percent of its issued and outstanding voting shares are held by AAL, itself a qualified corporation. In addition, Globalive meets the requirement regarding the members of its board of directors.
33. Consequently, the Commission determines that Globalive has met the test for legal control.

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<sup>2</sup> For ease of reference, charts illustrating Globalive's pre-hearing and revised structures are presented in the Appendix to this decision.

## Control in fact

34. As noted in Broadcasting Decision 2007-429 (the CanWest<sup>3</sup> decision) and applied in Broadcasting Decision 2008-69 (the BCE<sup>4</sup> decision), the Commission considers that the appropriate test for assessing control in fact was set out in the Canadian Airlines decision<sup>5</sup> of the National Transportation Agency, now the Canadian Transportation Agency. In that decision, the National Transportation Agency found that:

...There is no one standard definition of control in fact but generally, it can be viewed as the ongoing power or ability, whether exercised or not, to determine or decide the strategic decision-making activities of an enterprise. It can also be viewed as the ability to manage and run the day-to-day operations of an enterprise. Minority shareholders and their designated directors normally have the ability to influence a company as do others such as bankers and employees. The influence, which can be exercised either positively or negatively by way of veto rights, needs to be dominant or determining, however, for it to translate into control in fact.

35. The National Transportation Agency went on to say that the determination of control in fact turns on the consideration of individual factors which, taken together, may result in a minority shareholder exerting control:

In all previous Canadian ownership reviews and enquiries, the Agency has not only looked at individual arrangements between the shareholders and the air carrier to determine where control in fact lies but has also examined all arrangements taken together to make the determination. Individual arrangements between the minority shareholder and the airline can each result in the minority shareholder exerting a degree of influence over the company. **Such influence, considered on an individual arrangement basis, may not be determining and may not result in the minority shareholder being able to exert control over the airline. All such influence taken together, however, may result in the minority shareholder being able to exert a degree of influence which translates into control.** [emphasis added]

36. A determination of control in fact necessarily involves careful consideration of the facts in a particular case. Accordingly, past Commission decisions with respect to ownership and control are not binding or determinative. However, they are useful in providing guidance for the interpretation and application of the test for control in fact.

37. Based on an analysis of all the information submitted in the course of this proceeding, the Commission considers that the following matters raise concerns relating to control in fact:

- corporate governance;

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<sup>3</sup> CanWest MediaWorks Inc.

<sup>4</sup> BCE Inc.

<sup>5</sup> National Transportation Agency Decision No. 297-A-1993, 27 May 1993

- shareholder rights;
- commercial arrangements between Globalive and non-Canadians; and
- economic participation of Globalive and non-Canadians.

### **Corporate governance**

38. As noted in the BCE and CanWest decisions, specific corporate governance arrangements may have substantial implications for control in fact. In the present case, the relevant arrangements include those with respect to the composition of the boards of directors, quorum provisions, and the appointment of officers.

#### *A. Composition of the boards of directors*

39. Under the pre-hearing structure, Globalive's board was composed of seven directors, including six Canadians. All directors were appointed by the board of GCHC. GCHC's board was composed of seven directors: four nominated by GIHC and three by Orascom. Finally, GIHC's board was composed of five directors: two nominated by AAL, two nominated by Orascom, and one Independent Director, as defined in the Shareholders' Agreements and corporate documents. The Independent Director was nominated by a selection committee composed of one director nominated by AAL, one nominated by Orascom, and Globalive's chief executive officer (CEO).
40. During the oral phase of the public hearing, the Commission and the appearing parties raised a number of concerns regarding board composition. With respect to GIHC, the Commission expressed concern that Orascom and AAL had an equal number of directors on the board, despite the fact that AAL held the majority of the voting shares. Bell Canada and RCI argued that Orascom had more influence than AAL in selecting the members of the GIHC board. In particular, they contended that Orascom could effectively select the fifth board member, as Mr. Campbell, who held the swing vote on the committee, had previous business relationships with Orascom. In addition, Bell Canada and RCI submitted that Orascom had even more influence at the GCHC level, because in addition to its three nominees on the GCHC board, Orascom had input into the selection of GIHC's nominees to the board.
41. As noted above, GCHC was wound up into GIHC. Under the revised structure, changes were made to the composition of the boards of directors of both GIHC and Globalive. The GIHC board is now composed of eleven directors: four directors nominated by AAL, four by Orascom, and three Independent Directors. The first Independent Director is selected by AAL with subsequent Independent Directors chosen by a selection committee composed of three members: the longest-serving Independent Director, one director nominated by AAL, and one director nominated by Orascom. The Globalive board is in essence identical to that of GIHC, with the additional requirement that two of Orascom's nominees be Resident Canadians, as defined in the Shareholders' Agreement and corporate documents.

42. During the oral phase of the public hearing, the Commission noted that in the BCE decision, it considered that not only must there be a majority of Canadians on the board, but the nominees of the Canadian shareholder must be sufficient in number to offset the substantial influence of non-Canadian investors on the board.
43. The appearing parties contended that the majority Canadian shareholder should be able to appoint a majority of the members of the boards of directors. TCC argued that the appointments to the boards are not commensurate with the voting positions of the shareholders. RCI contended that AAL does not have the countervailing power through the board to offset Orascom's overwhelming financial interest and its many levers of control. Bell Canada remained concerned that under the revised structure, AAL still has only one voice out of three on the Independent Director selection committee.
44. Globalive submitted that its revised structure is consistent with the structure approved in the Unitel decision<sup>6</sup> and prevents Orascom from controlling the board. Globalive further argued that, since the relative economic participation of the shareholders is vastly different here than in the transaction examined in the BCE decision, that decision does not support greater AAL representation on the boards. With regard to the selection committee, Globalive submitted that the relevant provisions are such that both shareholders are required to accept the Independent Directors chosen by the committee.

*Commission's analysis and determination*

45. In the present case, the Commission considers that the revised board structure, including the role and composition of the selection committee, does not ensure that the nominees of the Canadian shareholder are sufficient in number to offset the influence of Orascom, a non-Canadian shareholder. In order to address this point, Globalive would have to amend its Shareholders' Agreement and corporate documents such that on each of the two boards, AAL nominates five directors, Orascom nominates four directors, and AAL and Orascom each nominate one Independent Director. There would be no further need for a selection committee.

***B. Quorum provisions***

46. Under the pre-hearing structure, GIHC board quorum required either three directors, consisting of an Independent Director and at least one nominee each of AAL and Orascom, or any four directors. In addition, a majority of the directors present had to be Independent Canadians, as defined in the Shareholders' Agreements. GCHC quorum required the presence of a majority of Independent Canadians and at least five directors, including at least two nominees each of Orascom and GIHC. Quorum for the Globalive board required a majority of Independent Canadians, including the attendance of at least five directors.
47. Under the revised Shareholders' Agreement, quorum requires the attendance of nine directors, including at least two nominees each of AAL and Orascom. A majority of the directors present must be Independent Canadians. In the event that quorum is not reached, the directors present at a reconvened meeting shall constitute a quorum, provided that a majority of the directors present are Independent Canadians.

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<sup>6</sup> *In the Matter of Unitel's Eligibility to Operate in Canada as a Telecommunications Common Carrier Pursuant to Section 16 of the Telecommunications Act*, CRTC Letter Decision, 16 October 1996 (the Unitel decision)



48. Bell Canada argued that under the revised quorum rules for the Globalive board, Orascom could have twice as many nominees present as AAL and would thus have control over voting matters.

*Commission's analysis and determination*

49. Provided that the boards are reconstituted according to paragraph 45 above, the Commission considers that the revised quorum provisions ensure that the number of nominees of the Canadian shareholder is sufficient to offset the influence of Orascom.

***C. Appointment of officers***

50. Under the pre-hearing structure, GCHC's board appointed two co-chairmen, one nominated by AAL and one by Orascom. The chairmen of GIHC and Globalive were to be Bruno Ducharme and Dr. W.K. Michael, respectively.
51. In their initial written representations, TCC and RCI expressed concern that the presence of two co-chairmen, one a nominee of the non-Canadian shareholder, could have implications for control in fact. Specifically, TCC noted that there were no detailed procedures for decision-making between the two co-chairmen.
52. At the outset of the oral phase of the public hearing, Globalive presented revisions regarding its designated officers. The revised documents provide that Mr. Lacavera shall be the initial chair of GIHC and Globalive, and that subsequent chairmen shall be selected by the respective boards and shall be either an Independent Director or Mr. Lacavera. Additionally, the CEOs of Globalive and GIHC shall be Independent Canadians and shall be appointed by and report to their respective boards.

*Commission's analysis and determination*

53. The Commission has no concern with regard to the appointment of officers under the revised structure.

**Shareholder rights**

***A. Liquidity rights***

54. The pre-hearing GIHC Shareholders' Agreement contained a number of mechanisms to allow the parties to dispose of or transfer their shares in the venture, including AAL withdrawal rights, Orascom drag-along rights, Orascom call rights, and AAL put rights. In sum, these liquidity rights granted significant privileges to Orascom, specifically the power to require AAL to exit the venture or to compel AAL to sell in the event that Orascom decided to dispose of its holdings.

55. The Commission expressed concerns regarding the influence that the liquidity rights granted to Orascom as minority voting shareholder; in particular, the drag-along rights were inconsistent with the position of AAL as the majority voting shareholder. The appearing parties expressed similar concerns. TCC contended that the drag-along rights allowed Orascom to unilaterally sell the venture to a buyer of its choosing. RCI and Bell Canada noted that the right to require a sale is a power normally accorded to a controlling shareholder, accompanied by a “tag-along” for the minority partner.
56. In the revised documents, Globalive has removed the rights listed above and substituted a mutual liquidity right, which allows either AAL or Orascom to elect to sell its holdings in the venture, subject to a right of first refusal by the other party. In AAL's case, the Shareholders' Agreement provides a guaranteed floor price for its shares should it elect to sell within a certain period. This provision also provides that, in those same circumstances, should AAL sell its holdings for greater than fair market value, as defined therein, it will pay that difference to Orascom.
57. The Commission expressed concern during the oral phase of the public hearing that the revised liquidity rights include a provision for AAL to exit the venture with a guaranteed floor price. Specifically, the Commission noted that it is traditionally the minority voting shareholder which is granted an exit provision at a guaranteed price, not the controlling shareholder. The appearing parties expressed concern that the revised liquidity rights remain indicia of control. RCI argued that the guaranteed exit price insulates AAL from any risk and that this situation is indicative of where control lies.
58. Globalive responded that the liquidity rights are customary commercial terms negotiated among shareholders and built into agreements in order to deal with certain eventualities, such as shareholder deadlock. Globalive contended that these rights have absolutely no impact on operations or strategic decision-making. Globalive added that the guaranteed floor price established in the liquidity rights does not represent an attempt to eliminate the risk of the venture for AAL, but rather reflects the inclusion of an established and successful business as equity in a high-risk, capital-intensive start-up. Globalive argued that the appearing parties have not made any clear connection between the revised mutual liquidity rights and the control of day-to-day operations of the wireless business.

*Commission's analysis and determination*

59. The Commission considers that the liquidity rights in the revised documents are an improvement on the array of rights originally granted to Orascom as minority voting shareholder. Nevertheless, the liquidity rights, even in their revised form, provide an indication of Orascom's influence over the venture. The specification of a floor price and the imposition of a cap on the proceeds generated in the event that AAL sells its shares are inconsistent with the relative voting interests of the shareholders.

### ***B. Eligible Purchasers***

60. Both the pre-hearing and the revised Shareholders' Agreements provide that shareholders may only sell their shares pursuant to a written offer from an Eligible Purchaser, as defined therein. To meet this definition, the purchaser cannot be a Strategic Competitor, defined as a person which operates or provides telecommunications business services, whether fixed line or wireless.
61. TCC argued that the definition of an Eligible Purchaser contained in the Shareholders' Agreement shrinks the pool of potential purchasers. Bell Canada argued that the majority controlling shareholder should have the right to sell the business and that the Strategic Competitor exclusion should be removed. At the Commission's request, Bell Canada submitted that the definition of a Strategic Competitor should be amended to include only companies that operate or provide wireless telecommunications services in Canada and that derive at least 20 percent of their revenues from the provision of such services.
62. Globalive responded that the restriction on Eligible Purchasers protects the remaining shareholders from being forced into a relationship with a competitor and that shareholders have the discretion to waive this restriction. In addition, all sale provisions are subject to extensive rights of first refusal in favour of the non-selling shareholder.

#### *Commission's analysis and determination*

63. The Commission considers that a significant issue with regard to liquidity is the ability of the exiting investor to find a suitable purchaser. The Commission is concerned that the Eligible Purchaser definition limits the pool of potential purchasers to financial investors and restricts the ability of the majority voting shareholder to sell all or some of its shares. The Commission considers that Bell Canada's proposal is unduly restrictive, as it would capture other successful AWS bidders that are new entrants. In addition, the Commission notes that Industry Canada's AWS policy framework provided that only entities with less than a 10 percent share of the national wireless market were eligible to bid on the set-aside spectrum of that auction.
64. Accordingly, the Commission considers that Globalive should amend the definition of Strategic Competitor to include only entities which, taken together with their affiliates, hold more than a 10 percent share of the Canadian wireless market on a per-subscriber basis.

### ***C. Veto rights***

65. Schedule A to the pre-hearing Shareholders' Agreements outlined special matters requiring shareholder consent. Provisions in Part I of Schedule A required 75 percent shareholder approval, while provisions in Part II specifically required Orascom's approval. Based on the pre-hearing and revised corporate structures, wherein Orascom held 33.33 percent of the voting shares in GCHC and holds 32.02 percent of the voting shares in GIHC, Orascom has an effective veto over all items contained in Parts I and II of Schedule A.
66. During the oral phase of the public hearing, the Commission expressed concern with many of these vetoes. In regard to the financial thresholds attached to certain vetoes, the Commission noted that the dollar thresholds fell below the threshold established in the CanWest and BCE decisions (five percent of the enterprise value of the corporation).

67. The appearing parties and Shaw all argued that the veto rights were indicative of control and provided Orascom with an unreasonable degree of influence over the operations of a Canadian common carrier. Bell Canada argued that the vetoes covered every fundamental operational expenditure and allowed Orascom to dictate all major operational decisions. TCC argued that the veto rights transferred an unacceptable degree of influence to Orascom.
68. The GIHC Shareholders' Agreement was amended to include an "ordinary course of business" exception to some of the vetoes provided to Orascom under Part II of Schedule A. Globalive also included an exemption to the veto covering the issuance of new shares in order to allow for an employee stock option plan. Globalive increased the veto thresholds to \$22.1 million, or five percent of the value of the spectrum granted pursuant to the AWS auction. Globalive contended that, as it is not yet in operation and its enterprise value is difficult to determine, five percent of the value of the spectrum is a logical benchmark for these veto thresholds.
69. The Commission expressed concern that the revised veto thresholds are inadequate. RCI argued that Orascom's veto rights under Parts I and II still allow it pervasive negative control over the majority Canadian shareholder. RCI remained concerned that the monetary thresholds attached to these vetoes are too low. TCC argued that the revisions to the monetary thresholds do not diminish the influence granted to Orascom.
70. Globalive contended that minority shareholder veto rights are consistent with past Commission decisions and are in place to provide protection for the minority investor. According to Globalive, the increased thresholds are sufficiently high to ensure that Orascom cannot control the wireless business. In sum, Globalive submitted that the veto rights are consistent with Commission precedent and do not confer control in fact over the operation of Globalive.

*Commission's analysis and determination*

71. The Commission notes that the modifications made to the veto rights are substantial. The addition of an ordinary course of business exception is an important step in allaying concerns that the veto rights grant Orascom influence over the operation of the wireless business. However, the Commission considers that the value of the spectrum is not an appropriate foundation on which to base the five percent veto threshold. The Commission considers that Globalive's enterprise value is a more appropriate measure.
72. Accordingly, the monetary threshold for vetoes should be set at five percent of Globalive's enterprise value as determined by its board every two years, based on a third-party valuation.

**Commercial arrangements between Globalive and non-Canadians**

73. Orascom and Globalive entered into a Technical Services Agreement dated 17 February 2009 (the TSA). In addition, Globalive entered into two other consulting services agreements: a Management and Strategic Consulting Agreement with AAL and an Amended Telecommunications Consulting Services Agreement with Mojo. Finally, Globalive and WIND Telecomunicazioni SpA (WIND), an Orascom affiliate, entered into a Trademark Agreement dated 10 August 2009.

### *A. Technical Services Agreement*

74. The Commission has reviewed all three consulting agreements and finds that only the TSA raises concerns with respect to control in fact as a result of the strategic nature of the services provided and the fact that they are provided by the major non-Canadian shareholder and primary lender to Globalive.
75. The services to be provided to Globalive by Orascom pursuant to the TSA include the following, among others:
- the design of Globalive's network architecture and its network capability;
  - the implementation of the network;
  - vendor selection and the purchasing of network equipment;
  - the negotiation of purchase agreements with international and local vendors;
  - regulatory compliance; and
  - the introduction of new products and services.
76. In their written comments submitted prior to the oral phase of the public hearing, the appearing parties and Shaw all expressed the concern that the TSA allowed Orascom to exercise control over Globalive. They cited the significant role that Orascom played in the design, implementation, and vendor selection of all key aspects of one of the most strategic components of Globalive's business, its network.
77. TCC pointed out that Orascom's investment in Globalive was conditional upon the other investors agreeing that Globalive would execute the TSA. TCC submitted that, since the fees were on a flat-rate basis instead of a fee-for-service basis and had to be paid whether or not the services were used, Globalive would be forced to draw upon Orascom's technical expertise or end up paying twice if the technical expertise were provided by another party.
78. During the oral phase of the public hearing, the appearing parties submitted that because AAL only had experience in the wireline business in Canada, Globalive would have to turn to its non-Canadian investor for advice and technical support, thereby becoming subject to ongoing influence. They argued that Orascom's wireless industry-specific experience in 14 countries, when combined with its size<sup>7</sup> and success, would make it difficult for Globalive to ignore Orascom's recommendations.
79. Throughout the proceeding, Globalive disputed the assertion that the TSA provided Orascom with control over key strategic technical decisions, citing various examples of Globalive's reliance on the telecommunications expertise of its more than 200 Canadian employees. Globalive indicated that the single most important feature of the TSA was that it allowed

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<sup>7</sup> The wireless revenues of Orascom and its affiliates were \$5.3 billion in 2008. Globalive's 2008 telecommunications revenues were just over \$120 million.

Globalive the economic advantage of purchasing various network elements (up to and including handsets) at the same price as Orascom would pay, which was far lower than the price that Globalive would otherwise have had to pay.

80. During the oral phase of the public hearing, Globalive indicated that all three of the consulting agreements served a dual purpose, allowing Globalive to receive consulting services from the shareholder corporations on a cost-effective basis while providing a pro rata economic return to the shareholders for their investments.
81. Globalive submitted a revised TSA that gives it the unilateral right to terminate the TSA at any time and for any reason. In the event of such termination, Globalive and Orascom would enter into a subsequent agreement to provide to Orascom the same financial benefits as those provided under the TSA. Globalive acknowledged that there may be a perception that it is locked into a long-term arrangement regarding its network deployment, but submitted that by negotiating the right to terminate the TSA, it has allayed any such concerns.

*Commission's analysis and determination*

82. The Commission accepts that the TSA is a dual-purpose agreement in that it allows Globalive access to Orascom's considerable wireless operating expertise, including access to its global, preferred purchasing power, and it provides Orascom with certain financial benefits. The Commission notes that under the revised TSA, Globalive must pay a fixed fee to Orascom irrespective of whether services are rendered, and if it terminates the agreement, it must pay Orascom either an amount to be negotiated or \$100 million less fees already paid, depending on the circumstances.
83. Moreover, the Commission notes that the TSA provides Globalive with benefits that operate as key determinants of its success. It is this reliance by Globalive on Orascom that defines their relationship and allows Orascom the opportunity to influence a wide range of operating and strategic decisions.
84. Given the significant benefits Globalive derives from the TSA, the Commission is of the view that Globalive will maintain the TSA for the foreseeable future. Consequently, the Commission considers that Orascom will continue to have influence over operating and strategic decisions related to Globalive's network.

***B. Trademark Agreement***

85. Under the Trademark Agreement, Globalive is provided with a licence to use the trademark WIND in association with its services in Canada. The WIND trademark is used by Orascom affiliates in Greece and Italy. WIND is controlled by Weather Investments S.p.A., Orascom's controlling shareholder.
86. The appearing parties raised concern that if the term of the agreement were short, or if WIND could terminate the agreement on short notice, Globalive would be left in a position where it might have to abandon the trademark by which its services are known in the market and substitute a new, unknown trademark.

87. Globalive submitted that the branding agreement simply provides it with a cost-effective means to leverage a well-established, internationally recognized wireless brand.

*Commission's analysis and determination*

88. Based on information that Globalive filed in confidence with the Commission and discussions held during the *in camera* oral phase of the public hearing, the term of the agreement and the termination rights are not of concern to the Commission.
89. However, the Commission finds that Globalive's adoption and use of a trademark belonging to an Orascom affiliate do provide Orascom (or its controlling shareholder) with influence over Globalive because Orascom has the power to limit how the brand can be used.

**Economic participation of Globalive and non-Canadians**

***A. Equity participation***

90. The overall equity positions of the shareholders are the same under both the pre-hearing and the revised structures. The combination of Orascom's voting and non-voting shares in GIHC translates into 65.1 percent of Globalive's total equity.
91. TCC submitted that the very size of Orascom's equity stake in Globalive is a factor that is highly relevant to the issue of control in fact. RCI took issue with the fact that the only equity injected by AAL was in the form of its wireline business and that virtually no fresh capital was contributed by any party other than Orascom.
92. Globalive submitted that Orascom's equity holdings are mostly non-voting and are consistent with past broadcasting decisions and telecommunications precedents.

*Commission's analysis and determination*

93. Equity participation is central to the Commission's analysis in determinations of control in fact. As noted by the National Transportation Agency in the Canadian Airlines decision, "The greater the economic interest, the greater the likelihood that the owner of that economic interest will be able to exercise control in fact. This matter becomes of major importance as the economic interest reaches and exceeds 50 per cent."<sup>8</sup>
94. Orascom's equity participation is 65.1 percent, which is consistent with levels of non-Canadian investment previously approved by the Commission.<sup>9</sup> The Commission is of the view that, while in the circumstances of this case the level of equity participation provides an avenue for influence, it is not sufficient on its own to convert that influence into control.

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<sup>8</sup> Canadian Airlines decision, page 18

<sup>9</sup> In the CanWest decision, GS Capital Partners (the non-Canadian shareholder) held 65 percent of the total equity of CW Investments Co. In Broadcasting Decision 2004-284, HMTF General Partnership contributed 65 percent of the equity to finance the acquisition of Persona Communications Inc. Finally, in Letter of Authority A98-0061, the Commission approved a corporate reorganization of Fundy Communications Inc. (FCI), with non-Canadians Harvard Private Capital Holdings Inc. and Alta holding 62.3 percent of the issued common shares of FCI.

## ***B. Financing arrangements***

95. Orascom is the source of the vast majority of Globalive's debt, having advanced \$442.4 million by way of a Spectrum Loan Agreement dated 31 July 2008 and committed a further \$66 million under an Operating Loan Agreement dated 23 March 2008, for a total commitment of \$508.4 million (collectively, the Orascom loan agreements). In addition to the Orascom loans, GCC, a wholly-owned subsidiary of GIHC, committed \$400,000 to Globalive by way of a Loan Agreement dated 14 April 2008.
96. According to the pre-hearing loan documents, the loans were to be due in full in August 2011, including an initial term and extensions. Interest was set at a rate of LIBOR<sup>10</sup> plus 12 percent for the initial term, LIBOR plus 15 percent for the first extension, and LIBOR plus 18 percent for the subsequent extension.
97. The pre-hearing loan documents contained a number of sections relevant to control in fact. In particular, section 7.2 allowed Orascom to appropriate Globalive funds at any time following an event of default and section 8 provided a general indemnity to Orascom. Section 5.2 included a number of negative covenants, notably the following:
- 5.2(a), which prohibited Globalive from incurring debt in excess of \$20 million, other than indebtedness to reduce or retire amounts owing under the loans themselves;
  - 5.2(d), which prohibited Globalive from making corporate distributions other than for wages paid in the ordinary course of business;
  - 5.2(g), which prohibited Globalive from making any capital expenditures in excess of \$10 million without the consent of Orascom; and
  - 5.2(j), which prohibited Globalive from permitting or suffering to exist a change in control.
98. In their pre-hearing written comments, the appearing parties expressed concern with respect to the size, terms, and rates of the Orascom loans. They also expressed concern regarding the covenants of the loans, which they suggested could operate as levers of control in the hands of the non-Canadian shareholder.
99. On 29 September 2009, subsequent to the first two days of the oral phase of the public hearing, Globalive filed amending agreements to the Orascom loan agreements. While the interest rates remain unchanged, the amending agreements provide that, at the option of the borrower, the terms of the loans can be extended for a further 36 months from the August 2011 call date. Moreover, sections 5.2, 7.2, and 8 of the original Orascom loan agreements have been deleted in their entirety.<sup>11</sup>

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<sup>10</sup> London Interbank Offered Rate

<sup>11</sup> Section 5.1, which contained a number of positive covenants, was also deleted.



100. On 2 October 2009, following the completion of the oral phase of the public hearing, Globalive filed further amending agreements to delete section 7.1(f) of the Orascom loan agreements. That section created an event of default upon the occurrence of an event that, in the reasonable opinion of Orascom, has or could reasonably be expected to have a material adverse effect.
101. The appearing parties were of the view that the revised Orascom loan agreements continue to operate as levers of control in the hands of Orascom. In their view, it is unlikely that Globalive will be able to repay the Orascom debt in the foreseeable future or to secure other sources of funding, with the result that Orascom will use this dependence as a means of exercising control over Globalive. Moreover, RCI noted that covenants similar to those forfeited by Orascom in the Orascom loan agreements remain in the Shareholders' Agreement, so that Orascom has essentially retained its position of control.
102. Globalive submitted that its financial arrangements provide Orascom with no power to determine or decide the corporate strategy or operations of its venture. With respect to the Orascom debt, Globalive submitted that no law prohibits Orascom from holding a significant portion of Globalive's debt, and noted that it has already obtained financing commitments from third-party vendors in excess of US\$100 million, commitments which rank ahead of its obligations to Orascom.
103. Globalive argued that the notion of debt per se as a lever of control is not substantiated, and that a lever is not a lever unless it permits the person wielding it to achieve a certain result upon the application of force. It submitted that a lender can exert control through debt in one of three principal ways: (i) by including positive or negative covenants that limit certain conduct and that, if breached, could lead to the loan being called; (ii) by including equity conversion rights; and (iii) by using the loan, if it is material in amount, as a sword of Damocles hanging over the board of directors. Globalive dismissed the first two examples as inapplicable in the present case. With respect to the final potential control lever, Globalive submitted that it too is no longer a concern, as Orascom cannot call the loans and Globalive has the option to extend the maturity date of the Orascom loan agreements to August 2014.

*Commission's analysis and determination*

104. The Commission recognizes that there are no statutory restrictions on the amount of debt that a non-Canadian can provide to a telecommunications common carrier. However, debt levels and debt financing arrangements can be important indicia of where influence lies. As stated in the CanWest decision, the concentration of debt and equity in the hands of a single foreign entity can create an opportunity for undue influence over the venture by that non-Canadian entity:

The Commission was concerned that if a Goldman, Sachs & Co. entity was the lead syndicator with respect to the debt, or if it were the major debt holder under any of the lending agreements, this together with GSCP's equity interest could result in undue influence over the venture by a non-Canadian.<sup>12</sup>

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<sup>12</sup> CanWest decision at paragraph 52. GSCP was an affiliate of Goldman, Sachs & Co.

105. In the case of the CanWest decision, the non-Canadian shareholder holding 65 percent of the equity was also providing a significant amount of the debt. Prior to the oral phase of that proceeding, the Commission expressed concern regarding the proposed level of debt, and during the oral phase, CanWest confirmed that the percentage of the debt held by the non-Canadian investor had been reduced to less than 20 percent and that Goldman, Sachs & Co. would not be lead syndicator.
106. In the present case, Orascom, the significant non-Canadian equity holder, has provided approximately 99 percent of Globalive's current debt, excluding some third-party vendor financing, which represents the vast majority of Globalive's total financing.
107. The concentration of debt and equity in the hands of a single entity can create an opportunity for influence. In circumstances such as the present, where a company is heavily debt financed, this opportunity can translate into significant influence over the venture by the debt holder.
108. The magnitude of the debt provided by Orascom, the relative debt to equity financing, and the fact that the debt is concentrated in the hands of a single entity cause the Commission concern with the loans as a source of Orascom influence. The modifications to the covenants and terms of the loans do little to reduce this concern. Furthermore, the Commission notes that covenants similar to those deleted from the Orascom loan agreements are still contained in Schedule A to the Shareholders' Agreement.
109. In addition to the above-noted concerns, the Commission considers that a company's inability to obtain financing from third-party sources may also be relevant to the issue of control in fact. As noted in the Unitel decision, "In certain circumstances it may be possible to conclude that a non-Canadian shareholder or lender may have a considerable amount of leverage, and even control, over a cash-strapped telecommunications common carrier."<sup>13</sup>
110. During the oral phase of the public hearing, Globalive noted that Orascom and AAL had planned to rely heavily on external financing to capitalize Globalive. However, following completion of the AWS auction, Globalive's efforts to obtain external financing to replace Orascom's loans coincided with a major downturn in the credit markets. Orascom indicated that it is not interested in remaining Globalive's major lender and is committed to transferring its loans to an outside party. However, at this time, Orascom remains the major source of financing for Globalive in the near term.
111. Globalive stated during the oral phase of the public hearing that the capital investment required for a national wireless start-up is well over \$1 billion. Having raised approximately \$600 million, Globalive will require significant further capital in order to complete its network rollout. The Commission considers that Globalive's dependence upon Orascom for financing may well increase in the near term, given its inability to date to attract substantial third-party financing.

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<sup>13</sup> Unitel decision at page 29

112. It is the Commission's view that such a significant concentration of debt in the hands of Orascom, representing the vast majority of Globalive's enterprise value, serves to provide Orascom with leverage over Globalive. Given Orascom's equity interest in Globalive, such a high level of debt in the hands of a non-Canadian is unacceptable.

### **Conclusion**

113. The Commission considers that each of the factors addressed above provides Orascom, a non-Canadian, with an avenue for influence over Globalive. While disparate points of influence may not individually result in control, when combined they can translate into the ability to control in fact.
114. As noted above, control in fact is only established where influence is dominant or determining. In particular, the issue is whether or not there is an ongoing power or ability, whether exercised or not, to determine the strategic decision-making activities of a corporation or to dominate the ability to manage and run its day-to-day operations.
115. Globalive has made numerous significant changes to its corporate structure and documents in order to address many of the Commission's concerns. In this decision, the Commission has identified additional changes that are necessary to address certain remaining concerns with respect to Orascom's influence over Globalive. These changes relate to the composition of the boards of directors, liquidity rights, and the threshold for veto rights.
116. Notwithstanding these additional changes, significant concerns remain with respect to the control in fact of Globalive by Orascom. In the present case, the record shows that Orascom, a non-Canadian
- holds two-thirds of Globalive's equity;
  - is the principal source of technical expertise; and
  - provides Globalive with access to an established wireless trademark.
117. Given the changes that were made during the public hearing and presuming that the additional changes that have been identified in this decision are made, these elements taken together, while significant, would not cause the Commission, in the circumstances of this case, to reach a decision that Orascom is in a position of influence that is both dominant and determining.
118. However, when these levers are considered in concert with Orascom's provision of the vast majority of Globalive's debt financing, the Commission finds that it cannot conclude that Globalive is not controlled in fact by a non-Canadian, to wit Orascom. In other words, the Commission finds that Orascom has the ongoing ability to determine Globalive's strategic decision-making activities.

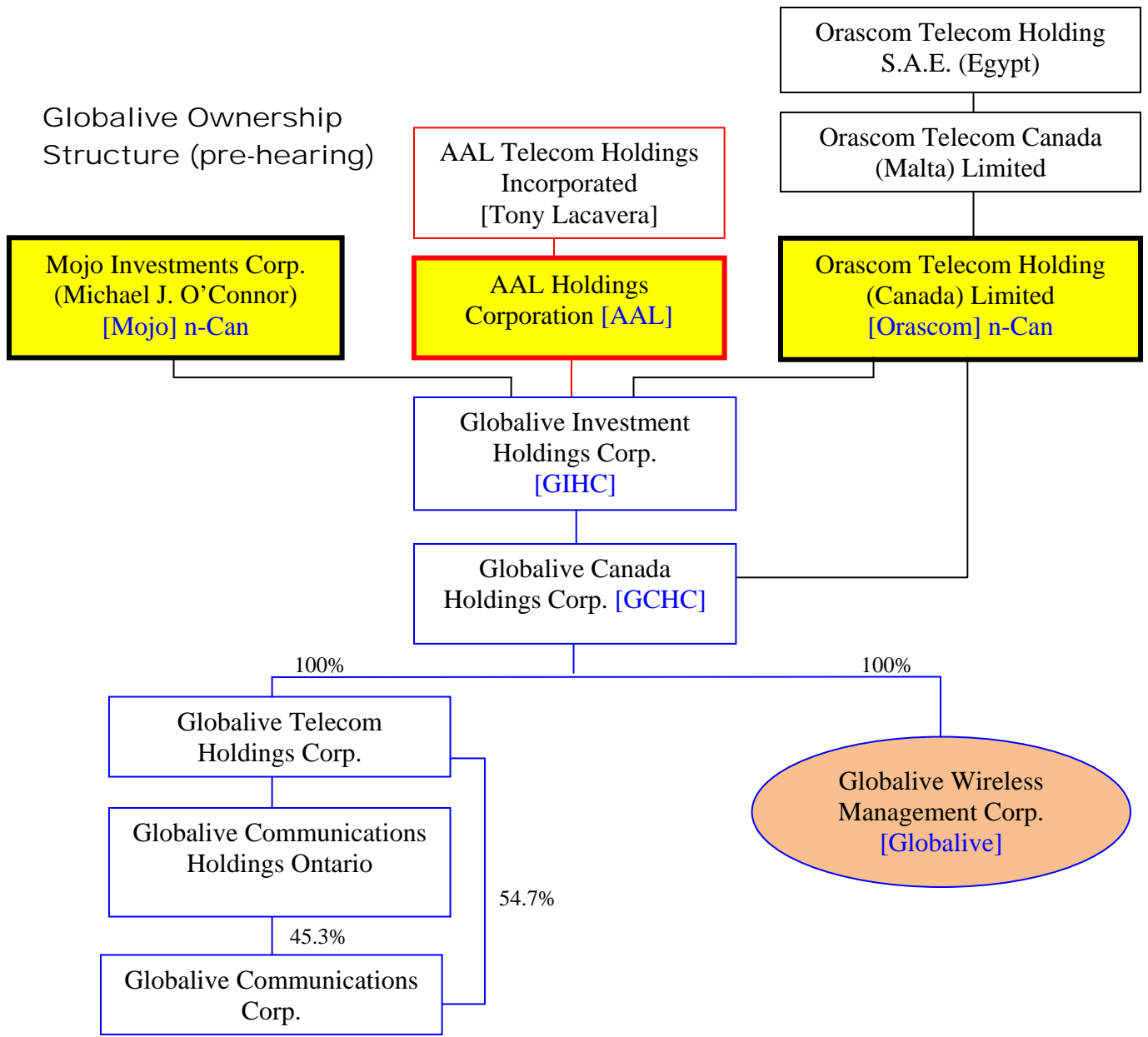
119. In light of all the above, the Commission finds that Globalive is controlled in fact by Orascom, a non-Canadian. Therefore, the Commission concludes that Globalive does not meet the requirements set out in section 16 of the Act and is not currently eligible to operate as a telecommunications common carrier.

Secretary General

### **Related documents**

- *Proceeding to consider the compliance of Globalive with the ownership and control regime*, Telecom Notice of Consultation CRTC 2009-429, 20 July 2009, as amended by Telecom Notice of Consultation CRTC 2009-429-1, 21 July 2009
- *Canadian ownership and control review policy*, Telecom Regulatory Policy CRTC 2009-428, 20 July 2009
- *Call for comments – Canadian ownership and control review procedure under section 16 of the Telecommunications Act*, Telecom Notice of Consultation CRTC 2009-303, 22 May 2009
- *Transfer of effective control of BCE Inc. to a corporation to be incorporated and a consequential change in ownership of CTVglobemedia Inc.*, Broadcasting Decision CRTC 2008-69, 27 March 2008
- *Transfer of effective control of Alliance Atlantis Broadcasting Inc.'s broadcasting companies to CanWest MediaWorks Inc.*, Broadcasting Decision CRTC 2007-429, 20 December 2007
- *Change in effective control*, Broadcasting Decision CRTC 2004-284, 21 July 2004, as amended by Broadcasting Decision CRTC 2004-284-1, 26 July 2004

*This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>*



### GIHC Shares and Equity

Voting Shares: 1.30% Mojo; 66.68% AAL;  
32.02% Orascom

Non-voting Shares: 0% Mojo; 0% AAL;  
100% Orascom

Total Equity: 1.00% Mojo; 51.40% AAL;  
47.60% Orascom

### GIHC Board of Directors (5)

(2) AAL  
(2) Orascom  
(1) Independent Director

### GCHC Board of Directors (7)

(4) GIHC  
(3) Orascom

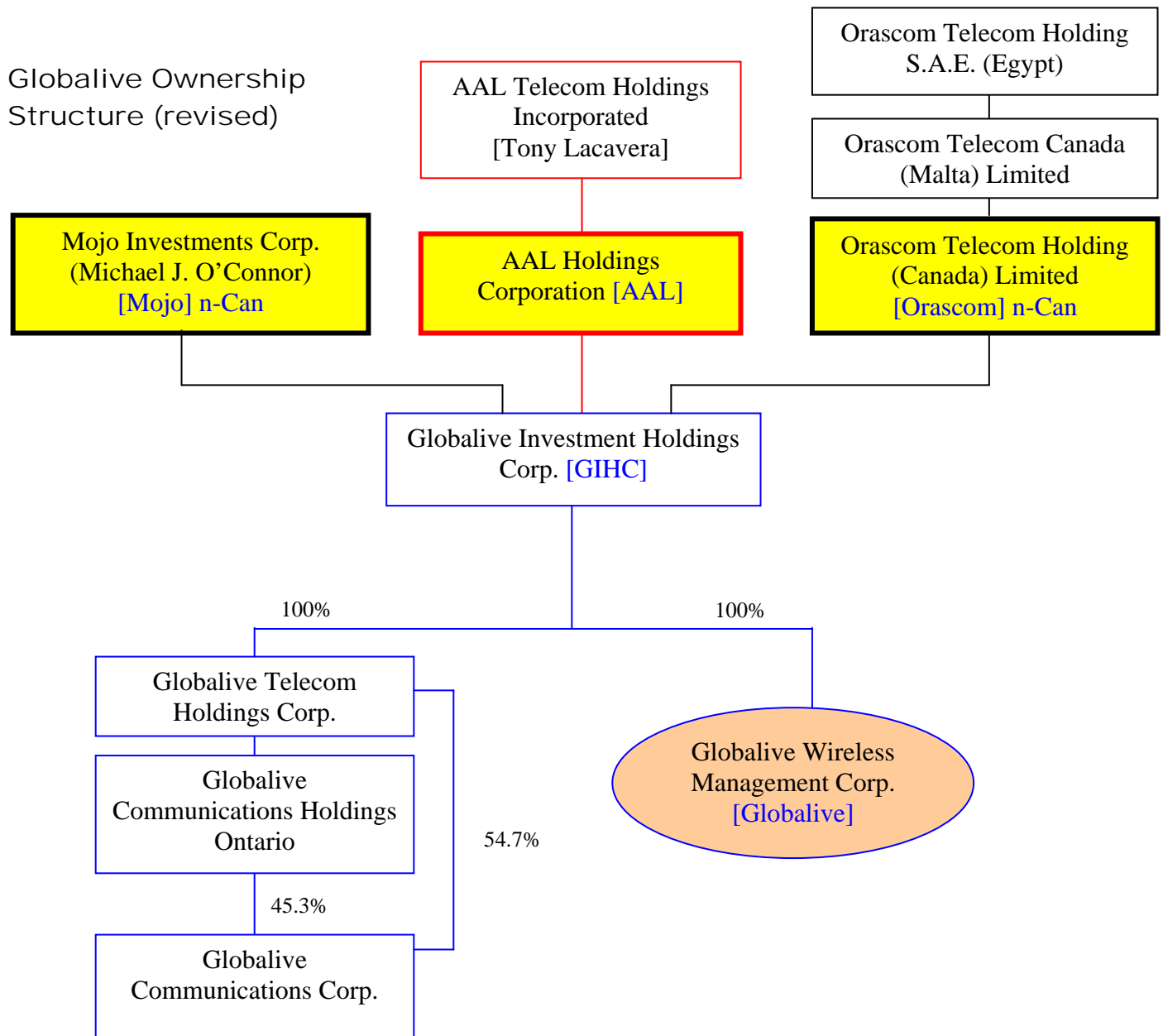
### GCHC Shares and Equity

Voting Shares: 66.67% GIHC; 33.33% Orascom

Total Equity: 66.67% GIHC; 33.33% Orascom

### Globalive Board of Directors (7)

(7) GCHC



**GIHC Shares and Equity**

Voting Shares: 1.30% Mojo; 66.68% AAL; 32.02% Orascom  
Non-voting Shares: 0% Mojo; 0% AAL; 100% Orascom  
Total Equity: 0.67% Mojo; 34.25% AAL; 65.08% Orascom

**Globalive Board of Directors (11)**

(4) AAL  
 (4) Orascom  
 (3) Independent Directors

**GIHC Board of Directors (11)**

(4) AAL  
 (4) Orascom  
 (3) Independent Directors