



Telecom Decision CRTC 2010-226

Ottawa, 22 April 2010

Public Mobile Inc. – Ownership and control review

File number: 8656-P56-200917180

In this decision, the Commission sets out its determination in the ownership and control review of Public Mobile. In its review, the Commission considered whether non-Canadians own or control Public Mobile. The Commission determines that, subject to certain modifications to the Unanimous Shareholders Agreement, as set out in the Appendix to this decision, Public Mobile will meet the requirements of the ownership and control regime and will therefore be 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. Public Mobile Inc. (PMI), then known as 6934579 Canada Inc., successfully bid \$52,385,077 for four spectrum licences.
2. At that time, PMI was owned by 6934617 Canada Inc. (hereafter referred to as Holdco or, together with PMI, as Public Mobile), which was in turn owned by multiple Canadian and non-Canadian investors.
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*. Public Mobile submitted its documentation to Industry Canada on 18 September 2008.
4. On 22 December 2008, Commission staff sent a letter to PMI, 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 PMI'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 26 March 2009, Industry Canada issued spectrum licences to PMI, having completed its ownership review and determined that PMI was Canadian-owned and controlled within the meaning of the *Radiocommunication Act*.
6. 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.

7. On 4 November 2009, Public Mobile 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.
8. By letter dated 18 December 2009, the Commission provided public notice that it would be proceeding with a Type 2 review of the ownership and control of PMI in order to determine its eligibility to operate as a Canadian telecommunications common carrier.

Proceeding

9. Pursuant to the framework established in Telecom Regulatory Policy 2009-428, a Type 2 review is a written, bilateral review resulting in the release of a public record and a decision. The Commission undertakes this type of review in cases where an ownership or governance structure is of a complex or novel nature, such that the Commission considers that its determination will hold precedential value for industry players and the general public.
10. Accordingly, the Commission is releasing this decision along with a public record of the ownership and control review of PMI. The public record of this proceeding is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.

Canadian ownership and control regime

11. 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)¹ (collectively, the ownership and control regime).
12. 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;

¹ SOR/94-667, 25 October 1994

- (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.
13. 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."
14. 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.
15. 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.
16. 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).
17. The Commission notes that PMI 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 PMI has satisfied these requirements and is thus eligible to operate in this capacity.

Legal control

18. 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.
19. PMI's board of directors consists of five members, four of whom are Canadians. The quorum provisions set out in the Unanimous Shareholders Agreement (USA) require the presence of all five directors at a board meeting. In the event that quorum is not reached, at a reconvened meeting quorum can be met by those directors in attendance, so long as a majority of the directors present are Canadian Directors, as defined in the USA.

20. PMI is wholly owned by Holdco, a corporation in turn owned by several Canadian and non-Canadian investors. Canadian investors hold 66.67 percent of the voting interests in Holdco; these investors include the Ontario Municipal Employees Retirement System (OMERS) Private Equity Wireless Opportunities Corp. (29.9 percent voting interest), Donald A. Wright (12.32 percent voting interest), Alek Krstajic (9.9 percent voting interest), and Thomvest Seed Capital Inc. (6.3 percent voting interest).
21. The remaining 33.33 percent voting interests in Holdco are held by non-Canadians, including Columbia² (8.1 percent voting interest), M/C AWS Canada S.à.r.l. (8.1 percent voting interest), and CRP XIII AWS Canada S.à.r.l. (3.86 percent voting interest).
22. All of PMI's issued and outstanding voting shares are held by Holdco, a qualified corporation by virtue of the fact that 66.67 percent of its issued and outstanding voting shares are held by individual Canadians or other qualified entities.

Commission's analysis and determination

23. The Commission notes that there is currently one vacancy on the PMI board of directors. As such, the board is only 75 percent Canadian, in contravention of paragraph 16(3)(a) of the Act. The board would nonetheless be able to achieve quorum at a reconvened meeting.
24. Consequently, the Commission directs PMI to modify the quorum provisions contained in the USA to require that directors present at a meeting be at least 80 percent Canadian Directors for the board to transact business. The Commission determines that PMI has met the test for legal control, conditional upon the completion of the amendment to the quorum provision.

Control in fact

25. As noted in Broadcasting Decision 2007-429 (the CanWest³ decision) and applied in Broadcasting Decision 2008-69 (the BCE⁴ decision), the Commission considers that the appropriate test for assessing control in fact was set out in the Canadian Airlines decision⁵ 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.

² Columbia is Columbia CANAWS Partners IV S.à.r.l. and Columbia Public Partners V S.à.r.l.

³ CanWest MediaWorks Inc.

⁴ BCE Inc.

⁵ National Transportation Agency Decision No. 297-A-1993, 27 May 1993

26. 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.
27. Based on an analysis of all the information submitted in the course of this proceeding, the Commission considers that the following matters relating to shareholder rights raise concerns relevant to control in fact:
 - veto rights;
 - monetary threshold for vetoes; and
 - liquidity rights.

Shareholder issues – Introduction

28. As noted above, PMI is wholly owned by Holdco, which in turn is held by numerous investors, both Canadian and non-Canadian. The issued share capital of Holdco consists of 177,635,000 class A preferred non-voting shares (class A shares) and 8,100,000 class B voting non-participating shares (class B shares).
29. Canadian investors hold 31.4 percent of the issued and outstanding class A shares; these investors include OMERS Private Equity Wireless Opportunities Corp. (19.7 percent), Thomvest Seed Capital Inc. (3.9 percent), and Kensington⁶ (2.8 percent). The remaining 68.6 percent of the issued class A shares are held by non-Canadians, including Columbia (16.6 percent), M/C AWS Canada S.à.r.l. (16.6 percent), and Rho⁷ (11.42 percent).
30. Since the class A shares are the primary vehicle for equity investment in Holdco, the USA governing Public Mobile allocates a significant array of rights to investors holding these shares. These rights include required approvals of certain management decisions as well as certain liquidity provisions.
31. For the purposes of allocating these rights, the USA establishes two key thresholds. Majority Preferred Shareholders (majority) refers to the holders of at least 50 percent of the issued and outstanding class A shares. Super Majority Preferred Shareholders (super majority) refers to the holders of at least 66.67 percent of the issued and outstanding class A shares.

A. *Veto rights*

32. Sections 2.7 and 2.8 of the USA establish restrictions on the actions of Public Mobile's management. Section 2.7 contains items which require the approval of the majority of class A shareholders; items listed in section 2.8 require approval of the super majority.

⁶ Kensington is Kensington Private Equity Fund IV, L.P.; Kensington Global Private Equity Fund; and Kensington Private Equity Co-Investment Fund (2008) L.P.

⁷ Rho is Rho Canada Ventures, L.P.; Rho Investment Partners Canada, L.P.; and Rho Ventures AWS Canada S.à.r.l.

Because these items limit the authority of the Canadian-controlled board of directors, the Commission carefully examined the specific provisions and the participation of Canadians in the decision-making process.

33. Public Mobile submitted that the items enumerated in sections 2.7 and 2.8 of the USA are standard provisions put into place for early stage enterprises. The items provide security for venture investors by allowing for their consultation on corporate changes which would or could have a significant and deleterious impact on the value of all shareholders' investments. Public Mobile contended that the items are similar to those approved by the Commission in the BCE decision.

Commission's analysis and determination

34. The Commission considers that the appropriateness of the vetoes accorded to non-Canadian shareholders must be considered in the context of the particular facts of this case. Vetoes and required approvals are standard in the context of shareholders' agreements, as they provide shareholders with a measure of security for their investment. However, in the case of an entity operating as a Canadian telecommunications common carrier, the Commission is obligated to ensure that shareholder rights do not undermine control of that entity by its Canadian management team or board of directors.
35. Accordingly, while the Commission considers that it is appropriate to allow a veto by a super majority of shareholders over certain decisions, it has consistently articulated the need for Canadian investors to be party to any significant decision that could result in the board being contradicted or overruled.
36. The Commission notes that the super majority threshold of 66.67 percent of the class A shares can be met with the involvement of non-Canadian investors only, as non-Canadians hold 68.6 percent of the class A shares in Holdco. The Commission is thus concerned that significant decisions altering the approved business plan could be taken without the involvement of Canadian investors.
37. As such, the Commission directs PMI to amend the USA such that the super majority threshold be increased from 66.67 percent to 75 percent. The Commission considers that the revised threshold will allow Canadian shareholders to participate in any decision allowing or vetoing an action covered in section 2.8 of the USA.
38. In addition, the Commission is concerned that three specific items in section 2.8 could overly limit the authority of the Canadian-controlled board to manage the affairs of Public Mobile. Items (h), (m), and (n) relate to indebtedness, transactions out of the ordinary course of business, and the disposition of assets, respectively.
39. The Commission notes that items (m) and (n) are already subject to ordinary course of business exceptions, and that all three items are limited to transactions above a monetary threshold. As such, in order to ensure the board's ability to respond to changing circumstances, the Commission directs PMI to move items (h), (m), and (n) from section 2.8 to section 2.7 of the USA, thereby requiring only majority approval for these items.

B. Monetary threshold for vetoes

40. Certain vetoes contained in sections 2.7 and 2.8 of the USA are subject to a monetary threshold. This threshold is defined in section 1.1 of the USA as five percent of the Invested Capital, which in turn is defined as

the sum of (a) the aggregate stated capital accounts of Holdco and Opco (without duplication for the amounts invested by Holdco in the capital stock of Opco), and (b) the aggregate of any debt which is required to be classified and accounted for as debt on a balance sheet of such Person (without duplication) in accordance with GAAP.

41. Public Mobile submitted that Invested Capital is a proxy for enterprise value based on financial statements that avoids the cost and burden of a periodic valuation.

Commission's analysis and determination

42. In Telecom Decision 2009-678 (the Globalive⁸ decision), the Commission approved vetoes with a monetary threshold of five percent of the enterprise value of the corporation. The Commission considers that the use of a consistent base value for these thresholds provides clarity to the industry. In addition, since the term "enterprise value" is a commonly understood term that can be used without reference to a specific definition, the Commission considers that it represents an appropriate base value for veto thresholds.
43. Accordingly, the Commission directs PMI to modify the monetary threshold for vetoes to five percent of Public Mobile's enterprise value as determined by its board every two years, based on a third-party valuation.

C. Liquidity rights

44. Public Mobile's USA provides its non-voting shareholders with certain liquidity rights. Of particular concern to the Commission are the drag-along rights contained in section 6.3, which allow the super majority to approve the sale of the company and "drag along" all other shareholders, including the controlling Canadian shareholders.
45. Public Mobile submitted that liquidity rights are common in companies backed by venture capital. With respect to the drag-along rights, Public Mobile submitted that it would be impracticable to complete the sale of the company without the approval of the boards of directors. Similarly, the company contended that each shareholder, Canadian or non-Canadian, has the ability to participate in the decision to trigger the drag-along rights.

Commission's analysis and determination

46. The Commission considers that the ability to sell a company is an important indicator of influence. While liquidity rights are appropriately held by shareholders, the Commission

⁸ Globalive Wireless Management Corp.

does not consider the implicit requirement for board approval to be a satisfactory assurance that Canadian shareholders will be involved in such a significant decision.

47. As indicated above, the non-Canadian class A shareholdings in Holdco are sufficient to meet the super majority threshold without the involvement of Canadian investors. In addition, the USA explicitly grants the liquidity rights to the shareholders, without requiring that a decision to sell the business be initiated by the board of directors.
48. The Commission notes that the amendment to the super majority threshold specified in paragraph 37 above will require that Canadian investors participate in any decision taken by the super majority shareholders. As such, the Commission is satisfied that the drag-along rights contained in section 6.3 of the USA will not be triggered without Canadian shareholder consent.

Conclusion

49. The Commission notes that Public Mobile's structure enables the Canadian shareholders to nominate a majority of the boards of directors that serve as the primary governing bodies of the venture, and includes independent Canadian directors and appropriate quorum provisions to ensure Canadian control of the boards of directors.
50. In addition, the economic participation of non-Canadians in Public Mobile is in line with other ventures in the telecommunications and broadcasting industries. The equity participation of non-Canadians, while significant, is consistent with levels of non-Canadian investment previously approved by the Commission. Significantly, all financing comes through arm's-length, third-party arrangements without any equity conversion rights or other factors that are relevant to an analysis of control in fact.
51. The Commission considers that the issues addressed in this decision, namely veto rights, the monetary threshold for vetoes, and liquidity rights, provide the potential for non-Canadians to exercise a determinative influence over the decision-making activities of Public Mobile. However, assuming the completion of the amendments to the USA described in paragraphs 24, 37, 39 and 43 above, the Commission is satisfied that the arrangements and agreements governing Public Mobile do not allow it to be controlled in fact by non-Canadians.
52. As such, the Commission finds that, upon completion of the required modifications to the USA set out in the Appendix to this decision, PMI will be Canadian-owned and controlled, meeting the requirements set out in section 16 of the Act, and will be eligible to operate as a telecommunications common carrier.

Secretary General

Related documents

- *Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime*, Telecom Decision CRTC 2009-678, 29 October 2009, as varied by Order in Council P.C. 2009-2008, 10 December 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

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>.

Required modifications

The Commission requires PMI to file, within 30 days of the date of this decision, an executed amended Unanimous Shareholders Agreement that

- requires that the directors present at a meeting of the PMI board of directors be at least 80 percent Canadian Directors in order to transact business (section 2.6);
- amends the definition of Super Majority Preferred Shareholders to the shareholders of at least 75 percent of the class A shares (section 1.1);
- moves the vetoes contained in subsections 2.8(h), 2.8(m), and 2.8(n) to section 2.7; and
- amends the definition of Threshold to five percent of Public Mobile's enterprise value as determined by its board every two years, based on a third-party valuation (section 1.1).