



Telecom Decision CRTC 2010-264

Ottawa, 7 May 2010

Data & Audio-Visual Enterprises Wireless Inc. – Ownership and control review

File number: 8656-D45-200917445

In this decision, the Commission sets out its determination in the ownership and control review of Data & Audio-Visual Enterprises Wireless Inc. (DAVE Wireless). In its review, the Commission considered whether non-Canadians own or control DAVE Wireless. The Commission determines that, subject to certain modifications to the Amended and Restated Shareholders Agreement, as set out in the Appendix to this decision, DAVE Wireless 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. Data & Audio-Visual Enterprises Wireless Inc. (DAVE Wireless), which is now doing business as Mobilicity, successfully bid \$243,159,000 for 10 spectrum licences.
2. At that time, DAVE Wireless was owned by Data & Audio-Visual Enterprises Holdings Inc. (DAVE Holdings), which was in turn owned by two investors, one Canadian and the other non-Canadian.
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*. DAVE Wireless submitted its documentation to Industry Canada on 1 August 2008.
4. On 22 December 2008, Commission staff sent a letter to DAVE Wireless, 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 DAVE Wireless' 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. Industry Canada issued spectrum licences to DAVE Wireless, having completed its ownership review and determined that DAVE Wireless 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 18 December 2009, DAVE Wireless 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 5 March 2010, the Commission provided public notice that it would be proceeding with a Type 2 review of the ownership and control of DAVE Wireless in order to determine its eligibility to operate as a Canadian telecommunications common carrier. A summary of documents submitted by DAVE Wireless was appended to this letter.

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 DAVE Wireless. 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 $66 \frac{2}{3}$ 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 DAVE Wireless 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 DAVE Wireless 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. DAVE Wireless' board of directors consists of one member, who is an individual Canadian. DAVE Wireless is wholly owned by DAVE Holdings and has no separate control over its affairs; rather, DAVE Holdings governs the affairs of both itself and DAVE Wireless on behalf of the shareholders of DAVE Holdings.

20. All of DAVE Wireless' issued and outstanding voting shares are held by DAVE Holdings, a qualified corporation by virtue of the fact that 66.67 percent of its issued and outstanding voting shares are held by Data & Audio-Visual Enterprises Investments Inc. (DAVE Investments), a qualified corporation, which is ultimately controlled by John Bitove, an individual Canadian.
21. The remaining 33.33 percent voting interests in DAVE Holdings are held by a non-Canadian, QCP CW S.A.R.L. (QCP), a corporation established under the laws of Luxembourg. QCP is owned by Quadrangle (Offshore) Capital Partners II LP, Quadrangle (Offshore) Capital Partners II-A LP, and Quadrangle (Offshore) Select Partners II LP, which are managed by affiliates of Quadrangle Group LLC, a private equity fund manager based in New York.
22. In light of the above, the Commission determines that DAVE Wireless has met the test for legal control.

Control in fact

23. As noted in Broadcasting Decision 2007-429 (the CanWest² decision) and applied in Broadcasting Decision 2008-69 (the BCE³ decision), the Commission considers that the appropriate test for assessing control in fact was set out in the Canadian Airlines decision⁴ 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.

24. 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.
25. Based on an analysis of all the information submitted in the course of this proceeding, the Commission considers that the following matters raise concerns relevant to control in fact:
 - veto rights and monetary thresholds for vetoes;

² CanWest MediaWorks Inc.

³ BCE Inc.

⁴ National Transportation Agency Decision No. 297-A-1993, 27 May 1993

- composition of DAVE Holdings' board of directors; and
- the possibility of DAVE Holdings' Chairperson being a non-Canadian and/or the nominee of a non-Canadian shareholder.

A. Veto rights and monetary thresholds for vetoes

26. As noted above, DAVE Wireless is wholly owned by DAVE Holdings (hereafter, these two companies together will be referred to as DAVE), which in turn is held by two shareholders, one Canadian and one non-Canadian. On 17 December 2009, the shareholders signed an Amended and Restated Shareholders Agreement (the Shareholder Agreement), which requires that certain management decisions be authorized by Special Board Approval. Special Board Approval cannot be met without a positive vote of at least one nominee of each shareholder; thus, both shareholders are effectively granted veto rights.
27. Special Board Approval is required for various transactions involving amounts greater than \$10 million. It is also required for the hiring of investment bankers or financial advisers for aggregate fees in excess of \$250,000. These monetary thresholds are lower than five percent of the enterprise value of DAVE, a level which the Commission has approved in previous ownership and control decisions.
28. In response to a Commission interrogatory asking DAVE to explain how the provisions in the Shareholder Agreement⁵ would be consistent with a threshold set at five percent of the enterprise value of DAVE, DAVE submitted that spending capital outside of the board-approved budget may affect the ability of the company to meet its objectives.

Commission's analysis and determination

29. 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 minority 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 minority shareholder rights do not undermine control of that entity by its Canadian management team or board of directors.
30. In Telecom Decisions 2009-678 (the Globalive⁶ decision) and 2010-226 (the Public Mobile⁷ 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.

⁵ Section 3.06 of the Shareholder Agreement contains the relevant provisions.

⁶ Globalive Wireless Management Corp.

⁷ Public Mobile Inc.

31. Accordingly, the Commission directs DAVE to modify the monetary threshold for vetoes to five percent of its enterprise value as determined by its board every two years, based on a third-party valuation. Considering the importance of the role of investment bankers or financial advisers, especially regarding a liquidity event, an exception is granted for the \$250,000 threshold for the hiring of any such bankers or advisers.

B. Composition of DAVE Holdings' board of directors

32. Under the Shareholder Agreement, DAVE Holdings' board of directors is composed of nine directors. Each of DAVE Investments and QCP has the right to nominate and elect three directors to the board.
33. The three other directors are Independent Directors. Initially, DAVE Investments nominated two of the Independent Directors and QCP nominated the third. The Shareholder Agreement provides for the formation of a nominating committee to propose future nominees for Independent Directors. The committee will include one nominee of each of DAVE Investments and QCP, as well as the Independent Directors then in office.
34. In its interrogatories to DAVE, the Commission expressed concerns about the composition of DAVE Holdings' board of directors, including the equal number of Independent Directors, directors nominated by DAVE Investments, and directors nominated by QCP.
35. In response, DAVE submitted that it would like the flexibility to become a public company. According to DAVE, to be listed on a stock exchange, the company will need to become a reporting issuer and file a prospectus in connection with an initial public offering. DAVE submitted that, under National Instrument 52-110 (securities legislation) of the Ontario Securities Commission, an audit committee must be composed of a minimum of three members who are directors and, subject to certain exceptions, every audit committee member must be independent.

Commission's analysis and determination

36. In the present case, the Commission notes that representation on DAVE Holdings' board of directors does not proportionately reflect the number of voting shares held by each shareholder.
37. In order to address this point, the Commission concludes that DAVE must increase the number of Canadian shareholder nominees to four. The number of directors will thus be ten, which raises the possibility of a deadlocked board. Accordingly, the Commission further concludes that a casting vote must be granted to the Chairperson of the board. The Commission considers that this new composition will better reflect the number of voting shares owned by each shareholder while providing DAVE with the flexibility to become a public company.

C. Possibility of DAVE Holdings' Chairperson being a non-Canadian and/or the nominee of a non-Canadian shareholder

38. According to the Shareholder Agreement, the Chairperson of DAVE Holdings' board of directors shall be elected annually by the affirmative vote of the majority of the directors. As such, the Chairperson can be a non-Canadian director and/or a director nominated by a non-Canadian shareholder.
39. In response to a Commission interrogatory, which raised the possibility of the Chairperson being an individual Canadian who has no relationship with a non-Canadian shareholder, DAVE submitted that the Chairperson has only a coordination role and has no ability to cast a tie-breaking vote nor to bind the company, except as expressly provided by the board.

Commission's analysis and determination

40. The Commission notes the importance of the casting vote accorded to the Chairperson in paragraph 37. Consequently, the Commission directs that the Shareholder Agreement be amended such that the Chairperson must be a Canadian director and cannot be a director nominated by a non-Canadian shareholder.

Conclusion

41. The Commission notes that DAVE's revised structure, as set out in this decision, will enable the Canadian shareholder to nominate more directors than the non-Canadian shareholder. When coupled with the nomination of three Independent Directors, the revised structure will ensure Canadian control of the board of directors.
42. In addition, the economic participation of non-Canadians in DAVE 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. Furthermore, DAVE Wireless has reached a debt financing agreement with a number of Canadian investors and has entered into a facilities agreement with an arm's-length, third-party bank to purchase equipment and services to be used in DAVE's network. These two agreements have significantly reduced the influence of the non-Canadian investor.
43. The Commission considers that the issues addressed in this decision—namely, veto rights and the monetary thresholds for vetoes, the composition of DAVE Holdings' board of directors, and the possibility of DAVE Holdings' Chairperson being a non-Canadian and/or the nominee of a non-Canadian shareholder—provide the potential for the non-Canadian shareholder to exercise a determinative influence over the decision-making activities of DAVE. However, assuming the completion of the amendments to the Shareholder Agreement described in paragraphs 31, 37, and 40 above, the Commission is satisfied that the arrangements and agreements governing DAVE do not allow it to be controlled in fact by non-Canadians.

44. As such, the Commission finds that, upon completion of the required modifications to the Shareholder Agreement set out in the Appendix to this decision, DAVE Wireless 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

- *Public Mobile Inc. – Ownership and control review*, Telecom Decision CRTC 2010-226, 22 April 2010
- *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 DAVE Wireless to file, within **30 days** of the date of this decision, an executed Amended and Restated Shareholders Agreement that requires that

- the monetary threshold amount requiring Special Board Approval be increased to five percent of the enterprise value of DAVE as determined by its board every two years, based on a third-party valuation (section 3.06), except for the hiring of any investment bankers or financial advisers, which can remain at \$250,000 (as written in sections 3.06(d) and 3.06(g));
- the board of directors be comprised of four nominees of DAVE Investments, three nominees of QCP, and three Independent Directors (section 3.02(4));
- the Chairperson of DAVE Holdings' board of directors be a Canadian director and not be a director nominated by a non-Canadian shareholder (section 3.02(2)); and
- a casting vote be granted to the Chairperson of the board of directors (section 3.02(2)).