

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Applications of Sprint Nextel Corporation,
Transferor

SOFTBANK CORP., and Starburst II, Inc.,
Transferees

for Consent to Transfer of Control of Licenses
and Authorizations.

To: Chief, Wireless Telecommunications Bureau

IB Docket No. 12-343

PETITION FOR RECONSIDERATION

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Table of Contents

PETITION FOR RECONSIDERATION.....	1
BACKGROUND.....	2
ARGUMENT	6
CONCLUSION.....	11

PETITION FOR RECONSIDERATION

On November 15, 2012, Sprint Nextel Corporation (“Sprint”) filed an application requesting that Commission staff exercise its delegated authority and approve without prior public notice a transaction in which Sprint would take a majority, controlling interest in Clearwire Corporation (“Clearwire”) through Sprint’s acquisition of the Clearwire stock owned by Eagle River Investment, LLC (“Eagle River”). Although this transaction (“the Eagle River transaction”) increased Sprint’s ownership of Clearwire to 50.45% from 48.15% and, for the first time, gave Sprint the power to appoint a majority of the Clearwire board (without having to fill any of its seats with independent directors), Sprint portrayed the Eagle River transaction to Commission staff as a *pro forma* matter for which public notice and review above the staff level were unnecessary. Sprint urged that “the Commission need not place the application on public notice ..., and the Commission staff, acting under delegated authority, can expeditiously grant its consent”¹ On December 12, 2012, Commission staff announced the approval of this supposedly *pro forma*, non-substantial transaction.²

Crest Financial Limited (“Crest”) is a minority shareholder in Clearwire aggrieved by the Eagle River transaction. Pursuant to 47 C.F.R. § 1.106, Crest hereby petitions for reconsideration of the decision to approve that transaction through *pro forma* procedures. Contrary to Sprint’s representation to Commission staff, the Eagle River transaction was anything but *pro forma*, as events subsequent to the approval of the transaction have amply

¹ Clearwire Corporation; Application for *Pro Forma* Transfer of Control, Exhibit A, at 1-2 (Nov. 15, 2012) (hereinafter, “Application”).

² See Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control License Applications, *De Facto* Transfer Lease Applications and Spectrum Manager Lease Notifications, Designated Entity Reportable Eligibility Event Applications, and Designated Entity Annual Reports, Report Nos. 8300, 8300-A, 8300-B, and 8300-C, *Public Notice* (WTB rel. Dec. 12, 2012).

demonstrated. Far from being a non-substantial matter, the Eagle River transaction gave Sprint both *de jure* and *de facto* control over Clearwire. Therefore, the public should have been given notice and afforded the opportunity to comment upon it. The Eagle River transaction was hardly *pro forma*, as it was the first step in a proposed transaction through which Sprint will acquire 100% ownership of Clearwire, a transaction appropriately undergoing public comment and Commission review. And that transaction is itself part of a larger transaction also undergoing such scrutiny — Sprint’s proposed transfer to Softbank Corporation (“Softbank”) of a controlling, 70% interest in Sprint (“the Sprint-Softbank transaction”). The Commission, or the Wireless Bureau acting on the Commission’s behalf, should therefore reconsider the decision to approve the Eagle River transaction on delegated authority, place Sprint’s application to acquire Eagle River’s shares of Clearwire on public notice, and consider that application along with Sprint’s proposed acquisition of all Clearwire shares and the proposed Sprint-Softbank transaction.

BACKGROUND

Crest, a Houston-based investment company, is a long-term investor in Clearwire and its spectrum. In 1996, the Commission awarded to Digital & Wireless Television LLC, a Crest affiliate, licenses providing rights to frequencies in nineteen markets in a Basic Trending Areas auction. In June 2004, Clearwire, then still a privately-held corporation, acquired these licenses from Digital & Wireless. As part of the consideration for this sale, Crest received a significant number of Clearwire shares. Earlier this year, Crest, together with its affiliates and other related persons, increased their holdings in Clearwire through purchases in the public market. Crest and its affiliates and related persons currently own more than 57 million of Clearwire’s Class A shares, which constitute approximately 8.34 percent of Clearwire’s outstanding Class A common stock. Crest is the plaintiff in an action pending in the Delaware Court of Chancery seeking

relief from Sprint's breaches of fiduciary duty relating to the Eagle River and Sprint-Softbank transactions.³

Eagle River is an investment firm owned by Craig McCaw, the founder of Clearwire. Prior to October 18, 2012, Eagle River owned 5% of Clearwire's outstanding Class A shares. Under an Equityholders' Agreement between Sprint, Eagle River, and several other significant investors in Clearwire executed in 2008, Eagle River possessed the right to nominate a director to the Clearwire board so long as Eagle River held Clearwire stock and the right to approve or block amendments to Clearwire's bylaws or any change to the size of the Clearwire board — thus giving Eagle River the ability to veto significant transactions of Clearwire.⁴

On October 18, 2012, Sprint disclosed in an SEC filing its intent to acquire Eagle River's share of Clearwire for \$100 million and thereby increase Sprint's stake in the company from 48.15% to 50.45%.⁵ This transaction was critical to the future of Clearwire, as it resulted in Sprint becoming Clearwire's *de jure* controlling shareholder.

On November 7, 2012, DISH Network Corporation ("DISH") petitioned the Commission to require Sprint "to obtain Commission approval prior to acquiring additional voting interests in Clearwire" and to "consolidate the Commission's review of the ... Transaction with the Commission's review of Sprint's pending transfer of control to Softbank."⁶ DISH noted that Sprint previously had failed to notify the Commission and obtain its approval "when Sprint's

³ See *Crest Financial Ltd. v. Sprint Nextel Corp., et al.*, C.A. No. 8099-CS (Del. Ch.) ("*Crest v. Sprint*").

⁴ See Verified Second Amended Complaint ¶¶ 50, 78, 80, *Crest v. Sprint*.

⁵ See Clearwire 10/18/12 Schedule 13D/A Ex. 99.30.

⁶ DISH Network Corporation; Petition to Require Full Commission Review of Sprint Nextel Corp.'s Acquisition of Control Over Clearwire Corp., and to Consolidate Review with the Pending Review of Softbank Corp.'s Acquisition of Control Over Sprint Nextel Corp. at 1 (Nov. 7, 2012).

voting interests in Clearwire fell below 50% in mid-2011.”⁷ The Commission did not, however, act on DISH’s petition and instead proceeded to handle the Eagle River transaction under *pro forma* procedures, as discussed below.

On November 15, 2012, Sprint and Softbank filed an application requesting the Commission’s authorization for Softbank to acquire a 70% controlling interest in Sprint.⁸ In a footnote in that filing, Sprint indicated that it “has entered into an agreement to acquire Eagle River Investments LLC’s interest in Clearwire. Clearwire will be filing *pro forma* license transfer applications for FCC consent to the Eagle River transaction.”⁹ In another footnote, Sprint stated that it “is acquiring additional shares in Clearwire as part of a separate transaction with Eagle River Investments LLC, which will give Sprint a *de jure* controlling interest in Clearwire.”¹⁰

The same day, November 15, 2012, Clearwire on Sprint’s behalf filed the application seeking Commission staff’s approval on a *pro forma* basis of the Eagle River transaction, which would increase Sprint’s stake in Clearwire from 48.15% to 50.45%.¹¹

On November 30, 2012, the Commission issued a Public Notice regarding the proposed Sprint-Softbank transaction.¹² The Commission noted that Sprint “has a voting interest of

⁷ *Id.* at 4.

⁸ See Applications of Sprint Nextel Corporation, Transferor, SoftBank Corp., and Starburst II, Inc., Transferees, for Consent to Transfer of Control of Licenses and Authorizations, Public Interest Statement, IB Docket No. 12-343 (Nov. 15, 2012).

⁹ *Id.* at 4 n.4 (parenthetical omitted).

¹⁰ *Id.* at 9 n.12.

¹¹ See *supra* note 1.

¹² See Softbank and Sprint Seek FCC Consent to the Transfer of Control of Various Licenses, Leases, and Authorizations from Sprint to Softbank, and to the Grant of a Declaratory Ruling under Section 310(B)(4) of the Communications Act, IB Docket No. 12-343, Public Notice, DA 12-1924 (rel. Nov. 30, 2012).

approximately 48 percent in Clearwire, a Commission licensee, and has entered into an agreement to acquire additional shares in Clearwire. Upon approval and consummation of that agreement, Sprint would own up to 50.45 percent of Clearwire’s voting stock.”¹³

On December 12, 2012, more than three weeks *before* the initial deadline for filing comments in response to the *November 30, 2012 Public Notice*, Commission staff announced that it had approved the *pro forma* application regarding the Eagle River transaction.¹⁴

The very next day, December 13, 2012, Sprint and Clearwire disclosed in SEC filings that Sprint had made a proposal to Clearwire to buy out all of Clearwire’s minority shareholders.¹⁵

On December 20, 2012, Sprint and Softbank amended their application for Commission approval of Softbank’s acquisition of a 70% interest in Sprint.¹⁶ They did so to “notify the Commission of a recent agreement by which Sprint has agreed to acquire the remaining shares of Clearwire Corporation that Sprint does not already own.”¹⁷

On December 27, 2012, the Commission issued a Public Notice revising the comment cycle with respect to the Sprint-Softbank transaction.¹⁸ The Commission observed that earlier that month it had “approved Sprint’s *pro forma* application to increase Sprint’s ownership of

¹³ *Id.* at 1-2 n.4.

¹⁴ *See supra* note 2.

¹⁵ *See* Clearwire 12/13/12 Schedule 13D at 8-9.

¹⁶ *See* Applications of Sprint Nextel Corporation, Transferor, SoftBank Corp., and Starburst II, Inc., Transferees, for Consent to Transfer of Control of Licenses and Authorizations, Amendment, IB Docket No. 12-343 (Dec. 20, 2012).

¹⁷ *Id.* at 1 (parenthetical omitted).

¹⁸ *See* Softbank and Sprint File Amendment to their Previously Filed Applications to Reflect Sprint’s Proposed Acquisition of *De Facto* Control of Clearwire, IB Docket No. 12-343, Public Notice, DA 12-2090 (rel. Dec. 27, 2012).

Clearwire from below 50 percent to approximately 50.45 percent through the acquisition of Clearwire stock held by Eagle River.”¹⁹

ARGUMENT

Sprint’s application for approval to acquire a majority interest in Clearwire through the Eagle River transaction involved a “transfer of control” under the Commission’s regulations.²⁰ Pursuant to 47 C.F.R. § 1.933, pre-approval public notice of that proposed transaction was required unless it involved a “non-substantial (*pro forma*)” transfer.²¹

“In defining when a transfer of control has occurred and whether it is substantial or *pro forma*,” the Commission has said that it “distinguishes between the presence of *de facto* and *de jure* control. If there is a change in *de facto* control, the transfer is considered substantial A change in *de jure* control is generally considered substantial, but if there is an indication that *de facto* control has not changed, the transfer may be considered *pro forma*”²²

“*De jure* control is control as a matter of law and is based on who holds the equity shares of an entity. *De jure* control is present where equity-holders voting together own or control fifty percent or more of the licensee’s voting shares.”²³

In contrast, “*de facto* control is defined as actual control of the licensee, and rests with the party or entity in question that has the power to control or dominate management of the

¹⁹ *Id.* at 2.

²⁰ See 47 C.F.R. § 1.948(b)(1) (“A change from less than 50% ownership to 50% or more ownership shall always be considered a transfer of control.”).

²¹ *Id.* § 1.933(d)(2).

²² 2000 Biennial Regulatory Review, Notice of Proposed Rulemaking, 15 F.C.C.R. 24264, 24270 (2000) (discussing *Federal Communications Bar Association’s Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers*, Memorandum Opinion and Order, 13 FCC Rcd 6293, 6297-99 (1998)).

²³ *Id.*

licensee.”²⁴ “Because it inherently involves issues of fact, *de facto* control must be determined on a case-by-case basis and may vary with the circumstances presented by each licensee.”²⁵ The factors relevant to a finding of *de facto* control include “power to constitute or appoint more than fifty percent of the board of directors.”²⁶

In its *December 27, 2012 Public Notice* the Commission stated that it “approved Sprint’s *pro forma* application to increase Sprint’s ownership of Clearwire from below 50 percent to approximately 50.45 percent through the acquisition of Clearwire stock held by Eagle River.”²⁷ Explaining its decision to treat the Eagle River transaction as *pro forma*, the Commission said:

While that transaction restored Sprint’s *de jure* control over Clearwire, it did not give Sprint *de facto* control because Sprint and the other majority stockholders of Clearwire entered into an Equityholders’ Agreement (“EHA”), through which a super-majority vote of the board of directors (10 of 13 members) is required to replace Clearwire’s CEO and certain other members of senior management and to approve a change of control of Clearwire, thus giving the non-Sprint nominated board members and their nominating shareholders negative control of Clearwire.²⁸

But the notion that the Eagle River transaction did not give Sprint *de facto* control is wrong.

That transaction gave Sprint both *de jure* and *de facto* control of Clearwire.

As Sprint disclosed in its application regarding the Eagle River transaction, “Sprint currently has the right to appoint seven members of Clearwire’s board of directors, with one of these directors required to be independent.”²⁹ In so stating, Sprint acknowledged that, absent the Eagle River transaction, Sprint was required to nominate, among its seven director nominees,

²⁴ *Id.* at 24270-71.

²⁵ *Id.* at 24271.

²⁶ *Id.*

²⁷ *December 27, 2012 Public Notice* at 2.

²⁸ *Id.*

²⁹ Application at 1 n.1.

one independent director.³⁰ But, Sprint continued, “[u]pon the closing of the proposed [Eagle River] transaction, ... *none of the Sprint appointees would be required to be independent* because the director currently nominated by Eagle River would become an independent director.”³¹

Thus, the Eagle River transaction gave Sprint, for the first time, the power to nominate seven, non-independent board members — a majority of the board. In so doing, the transaction gave Sprint and its board nominees actual, *de facto* control of Clearwire. The evidence of Sprint’s new-found power over Clearwire came immediately after the Commission’s announcement on December 12, 2012, of its approval of the Eagle River transaction. The very next day, Sprint began to assert the power to squeeze out all of Clearwire’s minority shareholders, including Crest.

The Eagle River transaction was not a mere *pro forma*, non-substantial transfer. On the contrary, that transaction evidently was the first step in Sprint’s plan to force out Clearwire’s minority shareholders at an artificially low price and deliver control of Clearwire’s spectrum to Softbank. The Eagle River transaction, whether viewed on its own or as the first step in Sprint’s plan to acquire all of Clearwire’s shares, was clearly substantial.

Sprint urged Commission staff to approve the Eagle River transaction as a *pro forma* matter for which public notice and Commission-level approval were not required. At the time it approved Sprint’s application, staff had not been apprised that the Eagle River transaction was a

³⁰ The Commission had noted this requirement in its opinion approving the 2008 transaction between Sprint and Clearwire. *See Sprint Nextel Corporation and Clearwire Corporation; Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, Memorandum Opinion and Order, 23 FCC Rcd 17570, 17575 n.32 (2008) (noting that “at least one of Sprint Nextel’s nominees must qualify as an independent director”) (citing Clearwire Proxy Statement, Schedule 14A, filed by Clearwire Corporation (dated Oct. 9, 2008), at 114).

³¹ Application at 1 n.1 (emphasis added).

prelude to Sprint's attempted acquisition of all of Clearwire's stock. If staff had known then what it knows now, it surely would not have viewed the Eagle River transaction as a "non-substantial (*pro forma*)" stock purchase.³²

The *December 27, 2012 Public Notice* states that the Eagle River transaction "did not give Sprint *de facto* control because Sprint and the other majority stockholders of Clearwire entered into an Equityholders' Agreement ("EHA"), through which a super-majority vote of the board of directors (10 of 13 members) is required to replace Clearwire's CEO and certain other members of senior management and to approve a change of control of Clearwire."³³ But that description of the EHA — which was based upon a footnote in a 2008 filing made by Sprint — is not correct. The EHA does *not* require a super-majority vote for "any Related Party Transaction."³⁴ Instead, only a simple majority vote is required in such cases. The EHA expressly provides that a super-majority vote is required for "any Change of Control of the Company of any of its Subsidiaries (*other than in connection with a transaction that constitutes a Related Party Transaction*) (it being understood that Related Party Transactions are to be addressed as set forth in Section 2.6(a))."³⁵ Thus, contrary to the *December 27, 2012 Public Notice*, the super-majority vote provisions in the EHA do not give the non-Sprint nominated board members "negative control of Clearwire."³⁶

³² 47 C.F.R. § 1.933(d)(2).

³³ *December 27, 2012 Public Notice* at 2 (citing Description of the Transaction and Public Interest Statement, File No. 0003368272 (Lead Call Sign B085 amended June 24, 2008) at 6-7 & n.7).

³⁴ Equityholders' Agreement § 2.6(a)(i) (attached as Exhibit A).

³⁵ *Id.* § 2.6(b)(v) (emphasis added).

³⁶ *December 27, 2012 Public Notice* at 2. In footnote 7 of the 2008 filing, Sprint told the Commission that "certain major corporate decisions" will require supermajority vote, "such as removal of the Chief Executive Officer or a change in control of New Clearwire." Description

Furthermore, after the Eagle River transaction Sprint as majority shareholder has actual, *de facto* control of Clearwire since it has the power to forcibly cash out the minority — as it is now attempting to do. Significantly, Sprint’s majority shareholding also gives Sprint the power to block any proposed or potential alternatives to its plan to buy out Clearwire’s minority shareholders. Sprint can veto any alternative transactions simply by having its non-independent board members vote “no.”

Sprint asserted in its application regarding the Eagle River transaction that *pro forma* procedures should apply because “Sprint’s qualifications to hold *de jure* control of Clearwire has [sic] already been reviewed and approved ... as part of the 2008 Sprint-Clearwire transaction.”³⁷ The Commission relied on no such bootstrap reasoning in the *December 27, 2012 Public Notice* and should reject it. Circumstances have materially changed since 2008. In 2008, Sprint shared the rights of the Equityholders’ Agreement with several other investors, namely Bright House Network, Google, Time Warner Corporation, Intel Corporation, Comcast Corporation, and, most importantly for the purposes of this proceeding, Eagle River. But now several of these investors — Eagle River, Google, and Time Warner — have completely divested of their interest in Clearwire, leaving Sprint as one of the last remaining entities to hold any rights under the Equityholders’ Agreement. Furthermore, the Eagle River transaction gives Sprint for the first time seven, non-independent board seats, and it is now clear that Sprint aims to deliver control of Clearwire’s spectrum to Softbank.

of the Transaction, *supra* note 33, at 7 n.7. That footnote did not, however, inform the Commission about the exception for Related Party Transactions.

³⁷ Application at 1.

CONCLUSION

For the foregoing reasons, Crest's petition for reconsideration of the Commission's approval of the Eagle River transaction through *pro forma* procedures should be granted, the Commission should issue a Public Notice to invite public comment on that transaction, and the Commission should review that transaction in connection with the other transactions of which it is an integral part: Sprint's attempted acquisition of 100% of Clearwire's shares and the proposed Sprint-Softbank transaction. Crest respectfully requests that Commission staff grant this relief or else refer Crest's petition to the Commission so that this relief may be granted by the Commission.³⁸

Respectfully submitted,

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³⁸ See 47 C.F.R. § 1.104 (b) (providing that, when reconsideration is sought of "a final action taken pursuant to delegated authority," the "petition for reconsideration will be acted on by the designated authority or referred by such authority to the Commission").

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing petition was served by electronic mail on January 4, 2013, to the following recipients:

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