

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

In the Matter of

Applications of Sprint Nextel Corporation,  
Transferor

and

SoftBank Corp., and Starburst II, Inc.,  
Transferees

for Consent to Transfer of Control of Licenses  
and Authorizations.

IB Docket No. 12-343

**CREST FINANCIAL LIMITED'S  
OPPOSITION TO REQUEST TO HOLD PROCEEDING IN ABEYANCE**

Pursuant to Section 1.45(b) of the Commission's Rules, Crest Financial Limited ("Crest") hereby opposes the Request to Hold Proceeding in Abeyance ("Request") of DISH Network L.L.C. ("DISH") filed on January 16, 2013. In its Request, DISH asks the Commission to halt its ongoing review of the Application of Sprint Nextel Corporation ("Sprint") and Softbank Corporation ("Softbank") (the "Applicants") for consent to transfer control of licenses, authorizations, and spectrum leases held by Clearwire Corporation ("Clearwire") and Sprint (the "Proposed Transaction"). DISH urges the Commission to "stop the shot clock" and delay review of the Proposed Transaction until there is "resolution of significant unresolved contingencies concerning [Sprint's] offer to acquire all of [Clearwire]." <sup>1</sup> Chief among those uncertainties is DISH's own competing offer to acquire all of Clearwire.

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<sup>1</sup> Request at 1.

Crest shares many of the concerns voiced by DISH in the Request, particularly regarding the impropriety of the processes that Sprint has employed in its attempt to extract all of Clearwire's value for itself at the expense of the public and other Clearwire shareholders. And Crest agrees that there are instances where typical practice would counsel in favor of holding Commission transaction review proceedings in abeyance pending the resolution of related uncertainties. However, the Proposed Transaction is far from typical and requires the Commission's swift action to prevent the public from being further harmed. Any delay in the Commission's consideration of the Proposed Transaction will only exact greater harm by allowing Sprint to continue holding Clearwire's spectrum away from the public while simultaneously increasing the coercive effect of Sprint's pending offer to purchase Clearwire.

In just the last year, Sprint suspended Clearwire's efforts to raise necessary capital, announced to the market that Clearwire is near bankruptcy, and structured its merger to saddle Clearwire with even *more* debt at terms highly favorable to Sprint. In the face of these efforts by Sprint to hold Clearwire's spectrum outside of the public's reach and to coerce minority shareholders into approving the Proposed Transaction, the Commission ought to act swiftly to deny the Proposed Transaction or to order Clearwire to sell its excess spectrum, unleashing the possibility of adding several new competitors to the market for advanced wireless services.

***Sprint has used its control of Clearwire's board to block the build-out of a 4G LTE network and to repudiate proposals that would ensure a successful build-out of the network.***

Over the years, Sprint and Clearwire have pursued several different plans to develop its 2.5 GHz spectrum. At the behest of Sprint, Clearwire initially focused on developing a nationwide Worldwide Inter-Operability for Microwave Access ("WiMAX") mobile broadband network. WiMAX is a technology used for providing broadband internet access over distances of several

miles (as opposed to Wi-Fi, which generally has a coverage area of a few hundred feet). Clearwire invested billions of dollars in its WiMAX effort, but that effort ultimately failed when the market rejected Sprint's leadership and coalesced around a different technological standard for wireless broadband.<sup>2</sup>

After it became clear that WiMAX technology would not be the future of broadband, Clearwire developed a plan to reposition its spectrum for an advanced 4G LTE network. In August 2010, Clearwire announced that it would begin to deploy 4G LTE technology on its networks.<sup>3</sup> And in April 2012, Clearwire reaffirmed its plan to expand its 4G LTE network, a development that would have eased the spectrum crunch and provided consumers with much faster broadband service.<sup>4</sup> One month later, Clearwire CEO Erik Prusch labeled 2013 a “year of opportunity” for developing a next-generation network and adding new wholesale customers. Indeed, Prusch emphasized that those new customers could include Sprint's direct competitors, AT&T and Verizon, both of which are facing significant spectrum constraints. Clearwire's ambitious plans for deployment of a 4G LTE network required a significant infusion of

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<sup>2</sup> See Kevin Fitchard, *Clearwire's Growing Financial Problems Threaten Sprint's 4G Plans*, GIGAOM.com (Nov. 18, 2011), <http://gigaom.com/2011/11/18/clearwires-growing-financial-problems-threaten-sprints-4g-plans/> (“WiMAX turned out to be a flop, but as the network technology slowly dies, the spectrum it runs over remains just as valuable, if not more so.”).

<sup>3</sup> See Press Release, Clearwire Announces New 4G LTE Technology Trials Expected to Yield Unmatched Wireless Speeds in the U.S. (Aug. 4, 2010).

<sup>4</sup> See Press Release, Clearwire Reports First Quarter 2012 Results (Apr. 26, 2012).

additional capital.<sup>5</sup> Clearwire thus engaged Cantor Fitzgerald in May 2012 to pursue a \$300 million stock offering to finance its network upgrades.<sup>6</sup>

Unfortunately for consumers, Clearwire's plans—to complete the stock offering, fully deploy its spectrum, and make that capacity available to a number of providers in the wholesale market—were abandoned when Sprint and Softbank began to discuss the Softbank transaction.<sup>7</sup> With the scuttling of the stock offering, a critical opportunity for Clearwire to deploy its next-generation network and bring the benefits of its valuable spectrum to the open market was lost.

And if this weren't enough, the Sprint-controlled board has ignored recent proposals to ensure the successful built-out of Clearwire's spectrum assets. In November 2012, Mount Kellett Capital Management LP, which owns approximately 7.3% of Clearwire's outstanding voting stock that is not owned by Sprint, proposed that Clearwire's board sell off excess wireless spectrum to help fund the expansion of its network.<sup>8</sup> Crest supported Mount Kellett's recommendations and urged the Board to take “immediate steps to raise capital through the offering and sale of additional common shares,” explaining that “[p]roceeds from such an offering, together with proceeds from the sale of a portion of the Company's excess spectrum to a third party or parties, would ensure a successful build-out of the Company's network ....”<sup>9</sup>

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<sup>5</sup> Following the failure of the WiMAX network, Clearwire was severely undercapitalized. This led it to cut 15% of its workforce, delay the launch of new products, and discontinue expansion into new markets, all in an effort to save between \$100 and \$200 million. See Larry Dignan, *Clearwire's Cash Crunch Prompts Layoffs*, CNET.com (Nov. 5, 2012), [http://news.cnet.com/8301-1035\\_3-20021887-94.html](http://news.cnet.com/8301-1035_3-20021887-94.html). Even with those actions, however, many analysts continued to believe that Clearwire was undercapitalized. See Stacey Higginbotham, *Clearwire Digs Its Foxhole to Fight for Its Life*, GIGAOM.com (Nov. 5, 2010), <http://gigaom.com/2010/11/05/clearwire-digs-its-foxhole-to-fight-for-its-life/>.

<sup>6</sup> See Clearwire, Current Report (Form 8-K) (May 4, 2012).

<sup>7</sup> See Clearwire, Current Report (Form 8-K), at Item 7.01 (July 26, 2012) (announcing that Clearwire had elected to discontinue any further sales under the agreement with Cantor Fitzgerald).

<sup>8</sup> See Letter from Jonathan Fiorello, COO, Mt. Kellett Capital Mgmt. LP, to Clearwire Corporation Board of Directors (Nov. 1, 2012).

<sup>9</sup> Letter from David K. Schumacher, Gen. Counsel, Crest Fin. Ltd. to Jonathan Fiorello, COO, Mt. Kellett Capital Mgmt. LP (Nov. 6, 2012).

Instead of facilitating the development and use of Clearwire's spectrum, Sprint has kept Clearwire's spectrum underdeveloped and Clearwire's share price artificially deflated in order to buy-out the entirety of Clearwire on the cheap. At the same time that Sprint has been inhibiting Clearwire's development, broadband technology has been evolving on a daily basis and the looming spectrum crunch has inched closer. Each day that Clearwire has been prevented from participating in this technological development is another day that its spectrum has been unavailable to help avert this looming spectrum crunch.<sup>10</sup> The United States is now in desperate need of more spectrum to support consumers' growing reliance on mobile networks.<sup>11</sup> And Clearwire's spectrum is in a prime position to be immediately developed into a vibrant 4G LTE network.<sup>12</sup> But it has been held back from such development at Sprint's insistence. By holding the proceedings in abeyance, the Commission would only be further delaying Clearwire's ability to act independently to meet its obligations to build-out the network.

*Sprint has announced to the market that Clearwire is starved of cash.* In addition to further delaying Clearwire's network build-out, any postponement of these proceedings runs the risk of doing significant damage to Clearwire's financial wellbeing. Indeed, Sprint coupled its disclosure of its proposed merger with Clearwire with an announcement that Clearwire had engaged corporate restructuring advisers.<sup>13</sup> It is thus vitally important that the Commission quickly address the Proposed Transaction and ensure that Clearwire's spectrum is developed for

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<sup>10</sup> See, e.g., Federal Communications Commission, *Connecting America: The National Broadband Plan* 77 (2010), <http://www.broadband.gov/download-plan/> ("National Broadband Plan").

<sup>11</sup> See, e.g., Jonathan Bloom, *FCC Considers Spectrum Shortage at Stanford Panel*, ABCNews (Sept. 12, 2012), <http://abclocal.go.com/kgo/story?section=news/technology&id=8808781>; see also Executive Office of the President, Council of Economic Advisers, *The Economic Benefits of New Spectrum for Wireless Broadband* i (Feb. 2012), [http://www.whitehouse.gov/sites/default/files/cea\\_spectrum\\_report\\_2-21-2012.pdf](http://www.whitehouse.gov/sites/default/files/cea_spectrum_report_2-21-2012.pdf) ("one industry forecaster projects that mobile data traffic will increase by a factor of 20 between 2010 and 2015. It is unlikely that wireless carriers will be able to accommodate this surging demand without additional spectrum.").

<sup>12</sup> See Clearwire, *Our Network* (2013), <http://www.clearwire.com/company/our-network>.

<sup>13</sup> Investor Presentation at 13, Sprint Nextel Corp., Schedule 14A (DEF14A) (Dec. 17, 2012).

consumers as rapidly as possible. In light of the financial predicament that Sprint has forced it into, Clearwire cannot withstand any delay in these proceedings.

*Sprint has saddled Clearwire with a structurally coercive \$800 million debt financing arrangement that becomes even more coercive with each passing day.* The need to unleash Clearwire’s spectrum from Sprint’s oppressive grasp is reason enough to deny the Request. But denial is even more important where, as here, delay will actually *further* the coercive nature of the Sprint offer, risk plunging Clearwire into even greater debt, and increase Sprint’s grasp on Clearwire’s spectrum. Sprint’s merger with Clearwire includes a separate highly coercive note purchase agreement whereby Sprint would give Clearwire funds in return for convertible notes. That convertible debt is not a lifeline for cash, as Sprint would portray it, but rather a noose of coercive terms and diluted share conversion.<sup>14</sup> Sprint has forced Clearwire to announce that it is bled of cash, cannot seek any alternative source of financing, and thus likely forced to draw down financing under Sprint’s note purchase agreement. But if the Clearwire shareholders ultimately reject Sprint’s buy-out offer, the note purchase agreement is terminated and Sprint may convert the notes it received up to that point for \$1.50 per share, half of the stated offer price of \$2.97.<sup>15</sup> This means that the more money Clearwire is forced to draw down the greater the vote dilution and the size of the break-up fee it must pay to Sprint—possibly reaching as high as 30% of the value of the entire Clearwire transaction. Such increasing vote dilution and expense associated with rejecting Sprint’s offer will serve to coerce shareholders into supporting

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<sup>14</sup> Considering that Sprint stunted Clearwire’s efforts to raise capital and prognosticated Clearwire’s bankruptcy, its extension of the coercive debt as a supposed financial lifeline is the very definition of chutzpa: “a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan.” *Breneman v. FAA*, 30 Fed. Appx. 7, 8 (D.C. Cir. 2002) (per curiam).

<sup>15</sup> Pursuant to the Form of Indenture filed with the SEC, Sprint would have the right to exchange its notes “at an initial exchange rate of 666.6700 shares of Common Stock (equivalent to an initial exchange price of approximately \$1.50 per share)[,]” subject to certain adjustments. Sprint Nextel Corp., Current Report/Form of Indenture (Form 8-K/DEF14A), at § 1301(a) (Dec. 17, 2012).

the unfair merger and to cement Sprint's effort to wall Clearwire's spectrum away from public use and the public markets.

Adding insult to injury, Sprint conditions further build-out of Clearwire's spectrum on a build-out agreement to be entered into with Sprint.<sup>16</sup> This further agreement, the terms of which have not been publicly disclosed, would strengthen Sprint's claws around Clearwire by dictating the terms of spectrum development, increasing the dependence of Clearwire on Sprint, and diminishing the value of excess spectrum to any alternative user.

***Expeditious consideration of the Proposed Transaction is in the public interest and at a minimum the Commission should require that Clearwire sell its excess spectrum.*** In light of the harm inflicted to date, and the harm that will be inflicted by prolonging the Commission's review process, the Commission should expeditiously deny the Proposed Transaction outright. Alternatively, the Commission should immediately require that Clearwire develop its spectrum into a vibrant 4G LTE network.

These arguments are developed further in Crest's Petition to Deny the Proposed Transaction. Suffice it to say here that Clearwire's CFO has acknowledged that it needs only between 80 to 100 MHz of its total 160 MHz for such build-out.<sup>17</sup> To facilitate consumer access to spectrum and increase competition in the wireless market, the Commission should not only require an independent build-out plan for that spectrum, but also require that Clearwire negotiate in good faith with DISH on its offer to purchase Clearwire spectrum. The DISH offer shows that

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<sup>16</sup> Clearwire Corp., Current Report (Form 8-K/DEFA14A) (Dec. 18, 2012).

<sup>17</sup> See *Clearwire's CEP Discusses Q4 2011 Results - Earnings Call Transcript* (Feb. 15, 2012), <http://seekingalpha.com/article/370421-clearwire-s-ceo-discusses-q4-2011-results-earnings-call-transcript?part=single> ("80 to 100 megahertz is what we need ... but we've got 160. So we definitely have some room."); see also *Clearwire: Assessing the Impact of the iPhone 5, the Earthlink Deal, and the Road Ahead*, SeekingAlpha.com (Sept. 14, 2012), <http://seekingalpha.com/article/866811-clearwire-assessing-the-impact-of-the-iphone-5-the-earthlink-deal-and-the-road-ahead> ("At the end of the day, we do have an asset. We've got 160 megahertz of spectrum. I don't know how in the world I would ever utilize all of that in my business plan.").

there is, today, a buyer waiting for an opportunity to purchase and develop specific bands of Clearwire's spectrum. As Crest's Petition to Deny will explain in more detail, a combination of Clearwire and a well-capitalized international partner, without Sprint, would result in a much stronger entity to challenge current market incumbents, and the most efficient use of Clearwire's spectrum. In that event, Clearwire's excess spectrum could and presumably would be sold to DISH, which could then enter into a partnership with Sprint to form a fourth network, taking advantage of Sprint's assets. Indeed, we have seen exactly this before. DISH and Sprint had reportedly engaged in negotiations,<sup>18</sup> but those talks did not bear fruit. Sprint was too laden with debt.<sup>19</sup>

So, just to review the bidding: Clearwire's management has acknowledged that it sits on valuable spectrum that it does not need for a vibrant 4G-LTE network; the public interest favors alienating such excess spectrum to the highest value user rather than allowing Sprint to squirrel it away; and Clearwire has received multiple offers to purchase that unused spectrum.<sup>20</sup>

What is the hold up? Clearwire's Board of Directors has resisted shareholder calls to explore the sale of the excess spectrum. And its supposedly independent Special Committee failed to follow up on a prior offer to purchase spectrum, characterizing the offer as credible but

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<sup>18</sup> See Trefis Team, *Dish Looks Ready to Dance with Clearwire or Sprint*, Forbes (Sept. 27, 2011), [http://www.forbes.com/sites/greatspeculations/2011/09/27/dish-looks-ready-to-dance-with-clearwire-or-sprint/#footnote\\_0\\_76089](http://www.forbes.com/sites/greatspeculations/2011/09/27/dish-looks-ready-to-dance-with-clearwire-or-sprint/#footnote_0_76089) ("Dish Network may consider partnering with or buying a wireless carrier such as Clearwire or Sprint") and Alex Sherman and Scott Moritz, *Sprint is Said to Suggest Dish Partnership*, Bloomberg (Dec. 7, 2012), <http://www.bloomberg.com/news/2012-12-07/sprint-is-said-to-suggest-dish-partnership.html> ("Sprint Nextel Corp. has approached Dish Network Corp. about a partnership that would allow the satellite-TV company to offer mobile-phone services over the carrier's network").

<sup>19</sup> David Goldman, *Sprint is Running Out of Money*, CNNMoney (Oct. 7, 2011), <http://money.cnn.com/2011/10/07/technology/sprint/index.htm>.

<sup>20</sup> See Press Release, Clearwire Corporation Provides Transaction Update (Jan. 8, 2013); Tim Farrar, *Playing Three Dimensional Chess*, TMF Associates MSS Blog (Dec. 15, 2012).

preliminary.<sup>21</sup> Instead of exploring that option to further the public interest and the best interests of Clearwire, the Special Committee precipitously signed a merger agreement—one devoid of customary go-shop and fiduciary-out provisions to protect exactly against this type of predicament—and entered into the coercive convertible debt agreement to strengthen Sprint’s hands against Clearwire and any potential bidder. Through its actions, the Special Committee has shown its hand and declared itself complicit in Sprint’s effort to warehouse Clearwire’s spectrum rather than allow it to be developed to serve the public. Notably, Clearwire has not joined the Applicants in their opposition to holding this proceeding in abeyance. The right thing for the Commission to do, as Crest will request in its Petition to Deny the Proposed Transaction, is to order an expeditious and fair competitive sale of the excess spectrum that Sprint would squirrel away.

In a time of spectrum scarcity, when carriers are desperate for additional spectrum resources to meet consumer demand, the hoarding of spectrum causes significant anti-competitive effects. Spectrum warehousing thwarts development of the wireless market because potential competitors, both incumbent licensees and new entrants, are starved of access to an essential input to the provision of wireless service. With each additional MHz that is kept from use, it will become more and more difficult for smaller carriers to provide effective competition.

By requiring Clearwire to sell its substantial amount of excess spectrum, the Commission will drastically increase the competition in the wireless broadband market. Not only will Clearwire be able to mount a successful challenge to the extant duopoly, but so too will the purchaser of Clearwire’s excess spectrum. In short, rather than delaying this proceeding, the

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<sup>21</sup> Investor Presentation at 13, Sprint Nextel Corp., Schedule 14A (DEF14A) (Dec. 17, 2012) (“Over past several weeks received one credible, but preliminary, proposal”).

Commission should take the opportunity to add two new competitors to the wireless broadband market.

**Conclusion.** For the foregoing reasons, these proceedings should not be held in abeyance and the Commission should instead proceed to review the applications in this matter such that a proper evaluation will occur and a fair record developed with appropriate Requests for Additional Information, as needed, within the clock period. Holding these proceedings in abeyance would only increase the harm to the public interest, and the Commission should act swiftly to deny these transactions or, at a minimum, institute the conditions suggested herein.

Respectfully submitted,

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January 25, 2013

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Crest Financial Limited's Opposition to Request to Hold Proceeding in Abeyance was served by electronic mail on January 25, 2013, to the following recipients:

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