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Filed Electronically

January 24, 2013

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: IB Docket No. 12-343, DISH Network L.L.C., Ex Parte Letter

Dear Ms. Dortch:

Pursuant to Sections 1.41 and 1.1206(b)(2) of the Commission's rules,¹ DISH Network L.L.C. ("DISH") files this ex parte letter in response to the opposition filed by Sprint Nextel Corporation ("Sprint"), SoftBank Corp. ("SoftBank"), and Starburst II, Inc. ("Starburst") (collectively, "Applicants") to DISH's request to hold the above-referenced proceeding in abeyance.²

¹ 47 C.F.R. §§ 1.41, 1.1206(b)(2). The Applicants attempt to shoehorn DISH's request into Section 1.45 of the Commission's rules. *See* Sprint Nextel Corporation, SoftBank Corp., and Starburst II, Inc. Opposition to Request to Hold Proceeding in Abeyance, IB Docket No. 12-343, at 1 & n.1, 9 n.30 (Jan. 23, 2013) ("Opposition"). DISH's request is more properly considered under Section 1.41 as an informal request for Commission action or Section 1.46 as a request for an extension of time than a request for temporary relief. Ex parte filings such as this letter are appropriate under both Section 1.41 and 1.46. In any event, the Commission should not countenance any attempt to discourage public input. It is important that the Commission consider the issues raised by groups such as the Consortium for Public Education so it can fully understand the potential negative ramifications of the proposed transactions.

² DISH Network L.L.C. Request to Hold Proceeding in Abeyance, IB Docket No. 12-343 (Jan. 16, 2013).

While purporting to follow the principle of neutrality,³ Sprint's demand that the Commission plow ahead without hesitation would in fact violate this principle. Sprint disparages DISH's offer as "illusory" and a "non-viable distraction."⁴ It states that "DISH's offer is a non-binding, complex mix of proposed spectrum purchases, governance changes, commercial agreements, and debt and equity arrangements that are subject to a range of interrelated and unrealistic conditions."⁵ Omitted in Sprint's pleading, of course, is the fact that the offer it disparages values Clearwire at \$5.5 billion, some \$550 million more than Sprint's own offer. But the point of neutrality is that the Commission does not want to sit as a judge in a contest between bids and declare that one of them is realistic and one is illusory. DISH merely asks that an effort be made "to avoid tipping the balance of the regulatory burden in favor of management or in the favor of the offeror."⁶ Sprint, on the other hand, is attempting to wield the imprimatur of Clearwire's initial agreement and this proceeding as weapons to ward off any and all competing (and superior) offers.

Rather than allow this proceeding to move forward, neutrality strongly suggests standing back to allow Clearwire to make its business determination without wasting the Commission's resources or risking the Commission prejudging the matter. Clearwire's Board of Directors is currently reviewing DISH's offer for Clearwire's remaining stock, which offers Clearwire's shareholders significantly greater value. Far from opposing the offer, "[t]he Special Committee of the Clearwire Board of Directors . . . determined that its fiduciary duties require it to engage with DISH to discuss, negotiate and/or provide information in connection with the DISH proposal."⁷ Clearwire's Board of Directors is taking a position of neutrality as it evaluates the proposals; the Commission should do the same.

Sprint's denigration of DISH's offer is, moreover, an exercise in bootstrapping. Sprint does not (and cannot) claim that the offer is illusory based on DISH's ability to fund its offer. It claims that it is illusory almost exclusively because Sprint does not like it and will use its powers to thwart it. Specifically, Sprint cites the rights it has as a shareholder, vendor, and customer of Clearwire.⁸ But this is merely a euphemism for a more simple statement: Sprint will oppose DISH's offer even though that offer would fully compensate Clearwire shareholders for the value of their holdings.

³ See Opposition at 9.

⁴ *Id.* at 4.

⁵ *Id.* at 4 n.11.

⁶ See Tender Offers and Proxy Statements, MM Docket No. 85-218, Policy Statement, FCC 86-67 ¶ 24 (rel. Mar. 17, 1986).

⁷ See Press Release, Clearwire Corporation, Clearwire Corporation Provides Transaction Update (Jan. 8, 2013), *available at* <http://corporate.clearwire.com/releasedetail.cfm?ReleaseID=732316> ("January 8 Clearwire Press Release").

⁸ Opposition at 4 n.11.

Contrary to the Applicants' position, DISH's request does not rest on commonplace contingencies. If the only thing standing between Sprint and its purchase of the remaining Clearwire shares were the need for shareholder approval, it might not be sufficient reason for the Commission to hold this proceeding in abeyance. But the need for shareholder approval is very different than the uncertainties found here, including the pending consideration by the Special Committee of the Clearwire Board of a different transaction altogether, and one which values Clearwire approximately 11 percent more than the proposal Sprint would like the Commission to devote ample resources to evaluating.

This degree of uncertainty, in turn, means a lack of ripeness. In that respect, DISH does not argue that the Commission *must* hold the proceeding in abeyance. Abeyance for lack of ripeness is not mandatory for the agency. Rather, what DISH points out is that the Commission has the discretion to do so. The Applicants are not correct in arguing that the Commission is barred from considering ripeness to hold a proceeding in abeyance. Ripeness concerns are "useful" in helping the Commission determine whether to proceed on a given issue.⁹ Contrary to the Applicants' assertion, *Omnipoint* did not "expressly" limit the application of ripeness to a "single narrow context."¹⁰ Instead, *Omnipoint* stands for the proposition that ripeness is a discretionary tool that the Commission can disregard when there are "unusual or compelling circumstances" that cause the Commission to consider an issue before its time.¹¹ Both the neutrality principle and the complementary principles of promoting efficiency and avoiding waste militate in favor of abeyance in this case.

Sprint also objects to DISH's call for the submission of spectrum aggregation and data usage because it provided the data back in 2008. That submission, however, was made almost five years ago. Since then, by its own admission, Sprint divested itself of control over Clearwire. It is now trying to reacquire it. A public interest finding is not like a pure legal ruling, which, once made, can be perpetually relied upon. The showing that Sprint made then cannot be banked and reused now. For example, it does not take into account any new leases Clearwire may have entered into. The 2008 decision also tells the public nothing about the Applicants' spectrum deployment in the intervening years.

As for the claim that "Clearwire's spectrum has always been attributed to Sprint," Sprint appears to want to have it both ways. Here, Sprint claims that the Clearwire and Sprint spectrum has always been combined so that the Commission need not worry about

⁹ *Omnipoint Communications, Inc., Memorandum Opinion and Order*, 11 FCC Rcd. 10785, 10789 ¶ 9 (1996) ("*Omnipoint*").

¹⁰ *See* Opposition at 7 n.21. *Omnipoint* was issued in response to a petition for declaratory ruling, but there was no limitation on the ability of the Commission to use ripeness as a justification for its actions.

¹¹ *Omnipoint*, 11 FCC Rcd. at 10789 ¶ 9

