



April 19, 2013

VIA ELECTRONIC FILING

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20054

Re: *IB Docket 12-343 and ULS File No. 0005480932*

Dear Ms. Dortch:

Crest Financial Limited (“Crest”) writes to provide new information to the Commission supporting Crest’s pending petition for reconsideration (“Petition”) in the above-referenced matter.

On January 4, 2013, Crest filed its Petition seeking reconsideration of the Commission’s *pro forma* approval of the Eagle River transaction, which involved Sprint Nextel Corporation’s (“Sprint”) acquisition of the stock held by Eagle River Investment, LLC (“Eagle River”) in Clearwire Corporation (“Clearwire”). As Crest explained in its Petition, the Eagle River transaction was an integral part of a larger series of transactions for which Sprint, SoftBank Corporation (“SoftBank”), and Clearwire (collectively, the “Applicants”) have sought the Commission’s consent to transfer control of licenses, authorizations, and spectrum leases through Sprint’s acquisition of Clearwire and SoftBank’s acquisition of control of Sprint (the “Proposed Transaction”).

Since the Petition was filed, new developments have occurred that confirm that the Eagle River transaction was not properly approved through *pro forma* procedures as it was indeed a substantive transaction. DISH Network (“DISH”) originally offered to purchase Clearwire’s spectrum directly from Clearwire. But Sprint used the majority interest in Clearwire that it gained through the Eagle River transaction to block DISH’s attempt to purchase spectrum. And Sprint used the terms of the merger agreement that was entered into between Sprint and Clearwire, which also was made possible by Sprint’s majority interest in Clearwire, to block any attempt by Clearwire to sell its excess spectrum. Given Sprint’s new-found majority interest in Clearwire, DISH on April 15, 2013, offered to buy Sprint in order to gain access to Clearwire’s spectrum. But for the Eagle River transaction, Sprint would not have had the majority necessary to block DISH’s attempt to purchase and develop Clearwire’s spectrum.

Although the Eagle River transaction gave Sprint a majority interest in Clearwire, for which it ought to have sought Commission-level approval based on a record informed by public comment, Sprint instead presented the Eagle River transaction for approval at the bureau level on a *pro forma* basis, assuring the staff of the Wireless Telecommunications Bureau that “the Commission need not place the application on public notice” but rather should “expeditiously grant the application pursuant to [its] *pro forma* procedures.”¹ According to publicly available records, the Applicants did not inform the Commission at the time that the Eagle River transaction was a substantial step in a larger series of transactions.

Crest’s pending Petition seeks reconsideration of the *pro forma* approval of the Eagle River transaction.² Reconsideration of the Commission’s use of *pro forma* procedures to approve the Eagle River transaction remains appropriate because the Eagle River transaction was an integral component of the Proposed Transaction, allowing Sprint to siphon away from Clearwire the value of its assets.

I. Sprint Has Used The Eagle River Transaction To Acquire Business Opportunities For Itself.

Not surprisingly, the Sprint-SoftBank and Sprint-Clearwire transactions are largely intertwined. After all, it is Clearwire’s spectrum that is the “pot of gold” sought by each of the parties to the Proposed Transaction. The Applicants have explained to the Commission, stockholders, and financial regulators that these transactions bear significant interconnection with one another. In their application to the Commission, the Applicants said that “[t]he Sprint-Clearwire agreement includes provisions that condition Sprint’s obligation to acquire Clearwire on the prior consummation of the SoftBank-Sprint transaction.” And Sprint’s press release announcing the Clearwire transaction informed stockholders that “the closing of the transaction is also contingent on the consummation of Sprint’s previously announced transaction with SoftBank.” And finally, Sprint told the financial markets, through a presentation it filed with the Securities and Exchange Commission (“SEC”), that “[c]ompletion of Sprint’s previously announced transaction with SoftBank” was part of the “roadmap” to completing the Clearwire transaction.

¹ Applications of Clearwire Corporation for *Pro Forma* Transfer of Control, ULS File No. 0005480932 *et al.* (Nov. 15, 2012).

² Even DISH, which is currently pursuing a merger with Sprint and would be a beneficiary of the Eagle River transaction, has objected to the Commission’s use of *pro forma* procedures in approving the transaction, arguing instead that it was substantial and should have been subject to notice and comment. Petition of DISH Network L.L.C. for Reconsideration, ULS File No. 00054840932 (Jan. 11, 2013).

In response to Crest's Petition, the Applicants sought to separate the Eagle River transaction from either component of the Proposed Transaction.³ Crest argued in its Petition that such separation was incorrect then, and its falsity is even clearer now in light of several recent disclosures that belie this narrative and show just how integral the Eagle River transaction was to the Proposed Transaction and the breadth of the effect of Sprint's new-found majority interest. In particular, these disclosures highlight just how incorrect Clearwire was in its assertion that the Eagle River transaction "did not amount to a substantial transfer of control of Clearwire to Sprint."⁴

In the preliminary proxy materials that it submitted to the SEC on February 4, 2013, Sprint and SoftBank revealed that they were intently focused on using their transaction to hand Clearwire and its spectrum over to SoftBank. For example, from the preliminary proxy materials we learned that on September 12, 2012, Sprint's board discussed how to acquire "all of the equity interests in Clearwire that Sprint did not already own." We further learned that SoftBank's true interest was Clearwire, as on September 13, 2012, SoftBank's CEO "indicated that SoftBank was interested in acquiring a controlling interest in Sprint and proposed that in connection therewith, Sprint consider acquiring the shares in Clearwire that Sprint did not already own." And most damning to Applicants' suggestion that the Eagle River transaction had nothing to do with the Proposed Transaction, we learned in the preliminary proxy materials that, on October 9, 2012, SoftBank suggested that Sprint acquire Clearwire interests from another Clearwire equityholder (*i.e.*, Eagle River) in order to acquire a majority interest in Clearwire. In what should come as no surprise, it was only a few days after SoftBank floated this idea that Sprint and Eagle River agreed to the Eagle River transaction, thereby allowing Sprint to lock-up a majority of Clearwire.

These disclosures make clear that the central focus of the Sprint-SoftBank transaction was access to and use of Clearwire's spectrum. And these disclosures highlight that the Eagle River transaction was in fact a central tool—suggested by SoftBank—to delivering a majority interest in Clearwire.

If any questions remained about the substantive nature of the Eagle River transaction, and particularly the significance of Sprint's new-found majority, the recent actions of DISH should put such questions to rest. On January 8, 2013, Clearwire announced that DISH offered to purchase a large swath of Clearwire's excess spectrum. But in the same announcement, Clearwire included a threat from Sprint, telling Clearwire stockholders that it would use its

³ Opposition of Clearwire Corporation at 3, IB Docket No. 12-343 & ULS File Nos. 0005480932 *et al.* (Jan. 14, 2013) ("Opp.").

⁴ *Id.*

majority to block DISH's attempt to purchase Clearwire's spectrum.⁵ After several unsuccessful months of trying to reach an agreement with Clearwire, DISH turned to the next-best alternative for acquiring a majority interest in Clearwire—purchasing Sprint. Only through the Eagle River transaction was Sprint in a position both to block attempts to purchase and develop Clearwire's spectrum and simultaneously take for itself business opportunities with buyers interested in Clearwire's spectrum, such as DISH. The importance of this cannot be understated—Sprint was able to use its newly acquired majority interest in Clearwire to divert DISH from contracting with Clearwire, forcing DISH instead to seek a transaction with Sprint. To say that this power is not substantial is beyond reason.

Without the Eagle River transaction, DISH and SoftBank would have had to engage Clearwire directly to pursue its valuable spectrum. But through the Eagle River transaction, Sprint has driven value away from Clearwire to Sprint through its majority holding of the Clearwire shares. Moreover, the Eagle River transaction gave Sprint significant negotiating leverage over Clearwire with respect to their merger agreement that they entered into and which the Commission is reviewing. The terms of this merger agreement provided Sprint with even more control over Clearwire's assets. Among other things, the merger agreement gives Sprint the ability to block the efficient sale and use of Clearwire's spectrum. Specifically, the agreement prohibits Clearwire from “sell[ing] any spectrum Licenses, spectrum Leases, or any spectrum assets” without Sprint's written consent.⁶ By approving the Eagle River transaction as a *pro forma* transaction, the Commission has effectively taken Clearwire and its spectrum off the market and given control of it to Sprint.

Given Sprint's stranglehold over Clearwire—acquired through the Eagle River transaction and the merger agreement—both DISH and SoftBank have recognized, and with their actions have shown, that there is now only one way to get Clearwire's spectrum—by purchasing Sprint. The Eagle River transaction allowed Sprint to decide the future of Clearwire and its spectrum and to ensure that anyone interested in Clearwire's spectrum make an offer to Sprint, not Clearwire.

II. Reconsideration Of The Eagle River Transaction Is Necessary To Ensure That Clearwire's Spectrum Is Used For The Public Interest.

The preceding discussion shows just how significant the Eagle River transaction was for Sprint and Clearwire, confirming Crest's arguments that the transaction was anything but insubstantial and should not have been approved under the Commission's *pro forma* procedures. Rather, it was the pivotal basis for SoftBank's and DISH's interest in approaching Sprint about a

⁵ Press Release, Clearwire Corporation Provides Transaction Update (Jan. 8, 2013) (“Sprint has stated that it would not vote in favor of the proposed transaction with DISH”).

⁶ Section 4.1(I), Agreement and Plan of Merger by and among Sprint Nextel Corporation, Collie Acquisition Corp. and Clearwire Corporation (Dec. 17, 2012).

possible transaction—it is the only way that either of those companies could receive access to Clearwire’s valuable spectrum.

Crest reiterates its request that the Eagle River transaction be reconsidered and ultimately that it be denied after public comment. Only by doing so will SoftBank, DISH, and any other interested parties be able to publicly compete for Clearwire and its spectrum free of Sprint’s interference. And only by protecting such competition can the Commission ensure that Clearwire’s spectrum is ultimately used by multiple wireless broadband providers to the public’s benefit. As Crest has explained, Clearwire’s spectrum would be used most beneficially for the public if it supports broadband services of multiple customers, thereby greatly increasing competition and services for consumers.⁷

Finally, Crest writes to place the Commission on notice of two other arrangements that Sprint has orchestrated in order to solidify its majority interest in Clearwire, should the Commission ultimately reconsider and deny the Eagle River transaction. As such, upon denial of the Eagle River transaction, it is critical that the Commission also require Sprint and Clearwire to reapply for consent to a change of control before exercising either of these two mechanisms.

First, Sprint and Clearwire entered into a Note Purchase Agreement whereby Clearwire may draw down financing from Sprint in monthly \$80 million tranches in return for providing Sprint with notes that are convertible into Clearwire common stock. Thus far, Clearwire has drawn down \$160 million of financing, meaning that even if the Eagle River shares had not been transferred through the Commission’s *pro forma* approval of the transaction, Sprint could convert the notes into Clearwire common stock, giving it an approximately 51.5% voting majority in Clearwire. This conversion of debt to stock, and the control over Clearwire that Sprint obtains with it, occurs even if Clearwire’s shareholders reject the Sprint-Clearwire merger. As doing so after a reversal of the Eagle River transaction would constitute a substantial change of control, *the Commission must require Sprint to apply for Commission consent to the conversion of such notes.*

Second, in connection with the Sprint-Clearwire transaction, Sprint entered into an agreement with several other companies that hold interests in Clearwire. These parties hold, collectively, a 13% interest in Clearwire. If the Sprint-Clearwire transaction does not close, these holders of common stock are contractually bound to sell their Clearwire shares to Sprint. *As with the Note Purchase Agreement, the Commission should review this transaction if it results in Sprint’s share of Clearwire going from less than 50% to more than 50%.*

Although both of these agreements would have required Commission review before being acted upon (as both would have pushed Sprint over the 50% mark), by undertaking the

⁷ See, e.g., Reply of Crest Financial Limited in Support of Petition to Deny at 30, IB Docket No. 12-343 (Feb. 25, 2013).

Eagle River transaction and approval under *pro forma* procedures, Sprint successfully insulated both of these agreements from Commission review.

* * *

For the foregoing reasons, and those stated in the Petition, the Commission or its staff should reconsider the approval of Sprint's application regarding the Eagle River transaction through *pro forma* procedures, put that application on public notice, and review that transaction in the IB Docket No. 12-343 along with Sprint's proposed transactions with Clearwire and SoftBank.

Respectfully submitted,

/s/ Viet D. Dinh

Viet D. Dinh
Bancroft PLLC
1919 M Street, N.W.
Suite 470
Washington, D.C. 20036
vdinh@bancroftpllc.com

cc: David Krech
Wayne McKee
Neil Dellar
Aaron Goldschmidt
Paul Murray
Christopher Sova
Kathleen Collins