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May 6, 2013

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: IB Docket No. 12-343; Sprint Nextel Corp. and SoftBank Corp., Joint Application for Consent to Transfer International and Domestic Authority

Dear Ms. Dortch:

DISH Network Corporation (“DISH”) submits this letter in response to the May 1, 2013 *ex parte* letter¹ filed by SoftBank Corp., Starburst I, Inc., and Starburst II, Inc. (collectively, “SoftBank”) in the above-referenced proceeding.

SoftBank’s letter attempts to minimize concerns raised by DISH about the admitted misconduct of UTStarcom, Inc. (“UTSI”), a company with ties to SoftBank, by arguing that the misconduct in question is irrelevant because the Commission’s *Character Policy Statement* does not reach “non-adjudicated claims of non-FCC misconduct.”² But this argument ignores two key facts—that much of the misconduct in question (1) has been admitted by UTSI and thus goes beyond mere claims, and (2) goes directly to the “proclivity of an applicant to deal truthfully with the Commission”³—the type of misconduct with which the Commission is most concerned.

Specifically, the non-prosecution agreement between UTSI and the Department of Justice (“DOJ”) specifies that UTSI “*admitt[ed], accept[ed], and acknowledge[d] responsibility*” for bribery and other deceptive acts.⁴ The *Character Policy Statement*’s distinction between

¹ Letter from John R. Feore, Counsel for SoftBank Corp., Starburst I, Inc., and Starburst II, Inc., to Marlene H. Dortch, Secretary, FCC, IB Docket No. 12-343 (May 1, 2013) (“SoftBank Letter”).

² SoftBank Letter at 2 (citing Policy Regarding Character Qualifications in Broadcasting Licensing, *Report, Order and Policy Statement*, 102 FCC 2d 1179, 1205 ¶ 48 (1986) (“*Character Policy Statement*”).

³ *Character Policy Statement*, 102 FCC 2d at 1190 ¶ 23.

⁴ Letter from Steven A. Tyrrell, Chief, Fraud Section, Criminal Division, U.S. Dep’t of Justice, to Leo Cunningham, Counsel for UTStarcom, Inc., at 1 (Dec. 31, 2009) (“DOJ Agreement”) (emphasis added); *see also id.* at App. A ¶¶ 4-9 (articulating the instances of bribery and other deceptive acts admitted by UTSI).

adjudicated and non-adjudicated misconduct is intended to avoid reliance on uncorroborated or still disputed allegations.⁵ Here, adjudication is unnecessary to determine the accuracy of the allegations made by DOJ, because UTSI admitted to the misconduct. Notably, the Commission has clarified that convictions based on *nolo contendere* pleas, in which the defendant neither admits nor denies the charges, “could be considered relevant for the purposes of [the Commission’s] character examination.”⁶ In the case of UTSI, DOJ’s charges have actually been admitted, providing an even stronger foundation for the Commission to rely upon than a *nolo contendere* plea.

SoftBank also discounts the relevance of “non-FCC misconduct.” The *Character Policy Statement*, however, makes clear that the FCC’s evaluation does extend to certain non-FCC behavior, including convictions for crimes that involve “dishonesty” and “fraudulent conduct.”⁷ The misconduct admitted here is of that nature, as it included acts of deception.⁸ In the Commission’s words:

[T]he non-FCC behavior of concern to us is that which allows us to predict whether an applicant has or lacks the character traits of ‘truthfulness’ and ‘reliability’ that we have found relevant to the qualifications to operate a broadcast station in accordance with the requirements of the Communications Act and of our rules and policies.⁹

In short, SoftBank cannot credibly argue that admitted violations of the Foreign Corrupt Practices Act involving Chinese government officials in the telecommunications sector are irrelevant to the Commission’s character evaluation.

SoftBank also seeks to discount the relevance of UTSI’s admitted misconduct by stating that “[t]hose settlements do not involve SoftBank . . . or Mr. Masayoshi Son” and that Mr. Son simply served as UTSI’s Chairman “at one time.”¹⁰ But, it appears that SoftBank was UTSI’s

⁵ See *Character Policy Statement*, 102 FCC 2d at 1204-06 ¶ 48 (stating that the policy has been intended to prevent Commission action based on misconduct “prior to adjudication”). Cf. Policy Regarding Character Qualifications in Broadcasting Licensing, *Memorandum Opinion and Order*, 6 FCC Rcd. 3448, 3448 ¶ 6 (1991) (“1991 Character Policy Order”) (“Where that litigation has ended in a settlement agreement, consent decree, or acquittal *and there is no admission or finding of unlawful misconduct*, we believe it is generally inappropriate for us to reach legal conclusions on the basis of any stipulated facts.”) (emphasis added).

⁶ See *Character Policy Statement*, 102 FCC 2d at 1205-06 ¶ 48 n.64 (distinguishing convictions based on *nolo contendere* pleas from consent decrees).

⁷ *Id.* at 1196-97 ¶ 37.

⁸ See DOJ Agreement at App. A ¶¶ 7-9 (describing false accounting and concealment).

⁹ *Character Policy Statement*, 102 FCC 2d at 1195 ¶ 34. The Commission’s *Character Policy Statement* applies outside of the broadcast context, too. See, e.g., Nattel, LLC, Petition to Deny Application of Puerto Rico Telephone Company, Inc. for 700 MHz Band Licenses, Auction No. 73, 24 FCC Rcd. 428, 432 ¶ 12 (2009).

¹⁰ SoftBank Letter at 1.

principal shareholder,¹¹ that a SoftBank affiliate was one of UTSI's largest customers,¹² and that Mr. Son was not only a Director of UTSI, but its *Chairman*, during periods of time when at least some of the admitted misconduct occurred.¹³

SoftBank also cites no authority in support of its assertion that Mr. Son was not an “operating” officer and its apparent inference that this makes the admitted misconduct somehow irrelevant. Indeed, SoftBank seems to imply that Mr. Son had no insight into the operations of UTSI, when Mr. Son repeatedly signed, as the Chairman of the Board or as a Director, annual reports filed by UTSI with the U.S. Securities and Exchange Commission that covered periods when at least some of the admitted misconduct occurred.¹⁴

The ties between SoftBank, Mr. Son, and UTSI, which at minimum raise the question of whether Softbank was in control of UTSI during the relevant period,¹⁵ make SoftBank's assertion that the non-prosecution agreement does “not relate to” either SoftBank or Mr. Son difficult to believe.

In light of the close involvement of SoftBank and Mr. Son with UTSI, SoftBank's effort to discount the relevance of UTSI's admitted misconduct appears misguided. SoftBank would better aid the Commission's evaluation of its applications by providing additional information. For example, who were the employees of the government-controlled telecommunications companies who were the beneficiaries of the admitted misconduct? With what agencies or departments of the Chinese government were they affiliated? Were they involved in regulation

¹¹ As of February 28, 2003, for example, SoftBank and affiliated entities held a 21.16% stake in UTSI. UTStarcom, Inc., Proxy Statement (Schedule 14A) at 18-19 (Apr. 2, 2003).

¹² The revenue recognized by UTSI from sales to a SoftBank affiliate constituted 12.5% of its total net sales in 2002, the same percentage of sales attributed to UTSI's second-largest customer. *See* UTStarcom, Inc., Annual Report (Form 10-K) at 98-101 (Feb. 21, 2003) (stating that UTSI's second-largest customer accounted for 12.5% of its sales, that UTSI recognized \$123 million in revenue from a SoftBank-affiliated entity, and that UTSI had total net sales of \$605 million.). Similarly, in 2003, the revenue recognized by UTSI for sales to a SoftBank affiliate constituted 9.4% of UTSI's total net sales, while the percentage of sales attributed to UTSI's largest customer was 11%. *See* UTStarcom, Inc., Annual Report (Form 10-K) at 58, 103 (Mar. 9, 2004) (stating that UTSI's largest customer accounted for 11% of its sales, that UTSI recognized \$184.4 million in revenue from a SoftBank-affiliated entity, and that UTSI had total net sales of \$1.964 billion).

¹³ Mr. Son served as Chairman of the Board of UTSI from October 1995 until March 2003, and then as a Director of UTSI until September 2004. SoftBank Letter at 1 n.2. The DOJ agreement addresses misconduct occurring between 2002 and 2007. DOJ Agreement at App. A ¶ 7.

¹⁴ *See* UTStarcom, Inc., Annual Report (Form 10-K) at 111 (Feb. 21, 2003) (covering the 2002 calendar year); UTStarcom, Inc., Annual Report (Form 10-K) at 113 (Mar. 9, 2004) (covering the 2003 calendar year). *Cf.* 1991 *Character Policy Order*, 6 FCC Rcd. at 3449 ¶ 9 (“In our attribution rules, we generally determined that officers, directors and persons holding a five percent or greater voting interest may exercise influence or control over a licensee.”).

¹⁵ *UTStarcom, Inc. Sec. Litig.*, 617 F. Supp. 2d 964, 979-80 (N.D. Cal. 2009).

of the telecommunications sector? Also, while the Securities and Exchange Commission's allegations of green cards obtained on false pretenses and "phony" employment records¹⁶ do not appear to have been acknowledged by UTSI (in contrast with the admitted misconduct reflected in the non-prosecution agreement), the fact remains that they were made by an agency of the U.S. federal government, and that they are serious. SoftBank should provide full explanations about these allegations too. Among other things, it should answer whether any Chinese government officials or their relatives indeed received green cards, giving them permanent resident status and allowing them to come to the United States at will.

Finally, SoftBank's assertion that "the Commission has no reason to delay this proceeding or to do anything but promptly grant the pending applications"¹⁷ disregards several facts, including without limitation the need to evaluate the admitted misconduct in question and the review of the transaction by other government agencies.

Respectfully submitted,

/s/

Pantelis Michalopoulos

Counsel for DISH Network Corporation

¹⁶ Complaint, *Sec. & Exch. Comm'n v. UTStarcom, Inc.*, No. 3:09-cv-06094-TEH ¶¶ 19-21 (N.D. Cal. Dec. 31, 2009).

¹⁷ SoftBank Letter at 3.