

Pantelis Michalopoulos
202 429 6494
pmichalo@steptoe.com



1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoe.com

May 16, 2013

FILED IN ECFS

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:

On behalf of DISH Network Corporation (“DISH”), this letter draws the Commission’s attention to recently reported conduct of Applicant SoftBank Corporation (“SoftBank”) that further militates in favor of either holding this proceeding in abeyance or initiating a further evaluation by designating it for a hearing. DISH has reportedly been the target of possible extortionate behavior on the part of SoftBank that is directly related to this proceeding. In order to win control over Sprint Nextel Corporation (“Sprint”), SoftBank has reportedly threatened banks that, if they fund DISH’s offer for Sprint, they will hurt their chances of participating in the planned Initial Public Offering (“IPO”) of the Chinese e-commerce giant Alibaba Group Holding Ltd. (“Alibaba”), in which SoftBank apparently has a 33% equity stake.¹

This conduct, if true, is wrong. SoftBank is trying to force its offer on Sprint’s shareholders by underhandedly seeking to undermine a superior bid. Equally relevant, these reported acts bear on the Commission’s public interest analysis in this proceeding because: (i)

¹ Soyoung Kim and Olivia Oran, *Exclusive: SoftBank Asks Banks Not to Finance DISH’s Sprint Bid*, Reuters.com, May 10, 2013, <http://www.reuters.com/article/2013/05/10/net-us-sprint-softbank-idUSBRE9490YB20130510> (last visited May 15, 2013) (“Reuters Article”); see also Paul J. Davies, *SoftBank Leans on Banks in Effort to Disrupt DISH’s Sprint Bid*, Financial Times, May 13, 2013, <http://www.ft.com/intl/cms/s/0/77c60e2a-bb99-11e2-82df-00144feab7de.html> (last visited May 15, 2013); *SoftBank Warns Banks on Rival Sprint Bid*, FoxBusiness.com, May 12, 2013, <http://www.foxbusiness.com/news/2013/05/12/softbank-warns-banks-on-rival-sprint-bid/> (last visited May 15, 2013).

they suggest that the Commission may need to evaluate the relationship between SoftBank and Alibaba; (ii) they indicate anticompetitive conduct by a foreign company—a factor weighing heavily in the Commission’s foreign ownership analysis; and (iii) they highlight a problem that arises due to the proposed foreign ownership, since SoftBank’s conduct would be subject to additional restrictions if it were a U.S. company.

First, the reported conduct raises questions about the relationship between SoftBank and Alibaba, a Chinese company. If SoftBank has the power to influence crucial financing decisions of a Chinese company and enlist those decisions in the service of its effort to acquire Sprint, then the proposed foreign ownership needs to be assessed in light of this Chinese company as well. A source close to Alibaba has stated to Reuters that SoftBank “does not make decisions for Alibaba management.”² The question remains, of course: If SoftBank has had the communications with banks that Reuters and the Financial Times have reported, what influence has SoftBank represented it has over the hiring of such banks for Alibaba’s planned IPO? And, what influence do the banks on the receiving end of the reported threats think SoftBank has?³ The fact that it is SoftBank that is a substantial equity investor in Alibaba, rather than the other way around, should not be dispositive in the Commission’s analysis.⁴ Moreover, the relationship between SoftBank and Alibaba appears to be a close one. SoftBank holds a considerable stake in Alibaba, and the two appear to have interlocking Boards of Directors.⁵ This close relationship may allow the two companies to coordinate their activities, as the Commission has recognized in other contexts.⁶

² See Reuters Article, *supra* note 1.

³ The reported withdrawal of “[a]t least one major Wall Street bank . . . from financing the DISH bid” suggests that at least one bank has viewed the threat as effective. *Id.*

⁴ Indeed, in an analogous context, the Commission has interpreted the program access rules, which apply on their face only to programmers in which a cable operator has an interest, to also reach a programmer that has an interest *in* a cable operator. See News Corp. and DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, For Authority to Transfer Control, *Memorandum Opinion and Order*, 23 FCC Rcd. 3265, 3299-3300 ¶ 77 (2008) (“*Liberty/DIRECTV Order*”) (noting that “Liberty Media has conceded that it is subject to the prohibitions in the program access rules” by virtue of its attributable interest in a Puerto Rico cable system).

⁵ Specifically, Yun Ma and Masayoshi Son currently serve on Board of Directors for both Alibaba and SoftBank. See *Biography: Yun Ma*, SoftBank, http://www.softbank.co.jp/en/info/profile/officer/member_06/ (last visited May 15, 2013).

⁶ See *Liberty/DIRECTV Order*, 23 FCC Rcd. at 3300-01 ¶ 78 (discussing the ability of Discovery to coordinate with Liberty Media and DIRECTV due to, among other things, the companies

(Continued...)

Second, if the conduct is true, it may bespeak SoftBank's ability to exercise market power in the global financial markets. This is relevant in the Commission's foreign ownership analysis. In particular, the Commission has said that the presumption in favor of foreign entry may be overcome in extraordinary circumstances, where the foreign ownership creates "competitive risks by virtue of [a foreign company's] ability to exercise market power in a relevant foreign market" that "cannot be addressed by [the Commission's] safeguards or conditions."⁷ The term "relevant foreign market" should not be interpreted narrowly to include only the provision of communications services. The globalized financial markets are essential to any attempt to provide communications services on a significant scale. If SoftBank has the power to distort these markets by boycotting banks that fund competing bids, that fact by itself may be sufficient to overcome the presumption.

Third, the conduct highlights the problems of the proposed foreign ownership in this case because SoftBank is subject to fewer relevant restrictions than a U.S. company would be. SoftBank has its own interests in banking activities. Through Japanese subsidiaries, SoftBank has a controlling interest in SoftBank Capital (a venture capital firm) and SBI Sumishin Net Bank, Ltd. (an Internet bank that accepts deposits and makes consumer loans).⁸ Its participation in the finance industry may facilitate SoftBank's communications with other banks in its apparent efforts to stop those banks from funding DISH's bid. This is relevant because, if SoftBank were a U.S. company engaged in telecommunications and other non-financial activities, it would be prohibited from having a controlling (or even substantial) interest in a bank holding company or a bank.⁹ Notably, if SoftBank sought to register as a bank holding company with the Federal Reserve, SoftBank's reported conduct would likely be relevant to the Federal Reserve's evaluation of its qualifications.¹⁰

Accordingly, DISH respectfully requests that the Commission either hold the proceeding in abeyance or engage in a more robust analysis of SoftBank's conduct by means of setting this application for a hearing.

having "interlocking directorates that could facilitate communication or cooperation leading to discrimination by Discovery in favor of DIRECTV").

⁷ See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market: Market Entry and Regulation of Foreign-Affiliated Entities, *Report and Order and Order on Reconsideration*, 12 FCC Rcd. 23891, 23924 ¶ 51 (1997).

⁸ See SoftBank Capital, <http://softbank.com/newweb/> (last visited May 15, 2013); *Aiming to Become an Innovative Internet Bank Via Internet Full Banking*, SBI Sumishin Net Bank, <http://www.sbigroup.co.jp/english/company/group/netbank.html> (last visited May 15, 2013).

⁹ 12 U.S.C. § 1843.

¹⁰ *Id.* § 1842(c)(5).

