

Pantelis Michalopoulos
202 429 6494
pmichalo@steptoe.com



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

June 5, 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 responds to an ex parte presentation submitted by Applicant SoftBank Corporation (“SoftBank”) on May 29, 2013.¹ SoftBank wants the Commission to hurry up. It urges the Commission to approve these applications within days so that SoftBank will have an approval in hand before the June 12th vote by Sprint’s shareholders on SoftBank’s proposed acquisition of Sprint Nextel Corporation (“Sprint”).

Requests for expedition are not uncommon. But this one is based on the remarkable assertion that not acting immediately would be illegal. Neither Section 310(d) of the Communications Act nor any other statute requires Commission action on proposed transactions by a date certain.

Such a rushed approval would also not be in the public interest. There are many outstanding issues in this proceeding that need careful evaluation. They include the proposed benefits of the transaction, the qualifications of SoftBank, and the risks arising from foreign control by a company that has a number of ties with China and whose attempted use of these ties raises questions. Contrary to SoftBank’s assertion, DISH is not asking the Commission to compare the proposed acquisition with DISH’s offer to merge with Sprint. The superiority of DISH’s offer is only relevant to highlight the areas in which the information about the benefits of the SoftBank acquisition is lacking, and indeed the areas in which the transaction appears to fall short when judged against, not another transaction, but rather the public interest standard.

¹ Letter from Michael H. Pryor, Counsel for SoftBank Corp., to Marlene H. Dortch, FCC, IB Docket No. 12-343 (May 29, 2013) (“SoftBank Letter”).

DISH's interest in Sprint and Clearwire Corporation ("Clearwire") is relevant for another reason—it may make the proposed transactions impossible to consummate as a practical matter. Even if the Commission's public interest review could be completed in a matter of days, the Commission should still hold the proceeding in abeyance. SoftBank seizes on a Commission statement—that the Commission is required to process applications "as though no other person were interested in securing such permit or license"—and interprets it more broadly than warranted.² In fact, the Commission may, and must, take into account the reality on the ground. The facts on the ground changed substantially last week, after DISH commenced a tender offer that heightens the uncertainty regarding Sprint's acquisition of the remaining Clearwire stock. In view of that uncertainty, abeyance here is particularly appropriate. The Commission should therefore refrain from haste, and indeed hold its hand.

A Hasty Decision Is Not Required and the Commission's Analysis Is Not Done

SoftBank argues that it is "unprecedented and contrary to law for the Commission to delay its approval."³ The idea that immediate approval is required seems to be based on a meteoric leap from Section 310(d). In SoftBank's words, "Section 310(d) requires the Commission to process applications 'as though no other person were interested in securing such permit or license' [and] delaying the pending application as requested by DISH directly contravenes that proscription because the only reason for such a delay would be that another person is interested in securing the Sprint licenses."⁴ Section 310(d) states in the relevant part: ". . . in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."⁵ But no interpretative stretch can make this language tantamount to a legal requirement compelling the Commission to act by a certain date. And there is no requirement imposed by the Commission on itself, either. The Commission's 180-day "shot clock" is "merely a guideline for informational purposes, not a rule

² *See id.* at 3.

³ *Id.* at 2.

⁴ *Id.* at 3.

⁵ 47 U.S.C. § 310(d).

or guarantee conferring legal rights.”⁶ It is “a flexible tool, not an effort to force the review of all diverse transactions into one inflexible mold.”⁷

The Commission should thus not approve the proposed transaction until and unless it can conclude that the “the public interest, convenience, and necessity will be served thereby.”⁸ But the Applicants have yet to provide sufficient information to permit the Commission to reach this conclusion. The Applicants have failed to provide any information regarding their plans to provide service in unserved and underserved areas of the United States.⁹ Nor have they disclosed their plans, if any, to use the more than 200 MHz of mobile broadband spectrum at stake in the transaction.¹⁰ SoftBank has similarly not provided a substantive response to any of the questions raised by the Minority Media and Telecommunications Council regarding diversity and inclusion.¹¹ Similarly, SoftBank has not yet responded to the allegations of “gun-jumping” made by Crest Financial Ltd¹²—the assertion that SoftBank has been conducting itself as if it controls Sprint already. And the Commission should evaluate the risks of foreign control in fulfillment of its own statutory obligations under the Communications Act, separate and apart from the narrower, more technical work of the Committee on Foreign Investment in the United

⁶ Application of Motorola, Inc. and Teledesic, LLC for Consent to Assignment of Authority to Launch and Operate the Millennium Geostationary Fixed-Satellite Service System, *Memorandum Opinion and Order*, 17 FCC Rcd. 16543, 16549 ¶ 16 (2002).

⁷ Federal Communications Commission, *Informal Timeline for Consideration of Applications for Transfers or Assignments of Licenses or Authorizations Relating to Complex Mergers*, <http://www.fcc.gov/encyclopedia/informal-timeline-consideration-applications-transfers-or-assignments-licenses-or-autho> (last visited May 30, 2013). DISH acknowledges that the Commission is not required to wait until a shareholders’ vote in order to issue its decision. *See* SoftBank Letter at 2. But, conversely, there is also no requirement that the Commission act before a shareholders’ vote. And, in the recent T-Mobile/MetroPCS proceeding cited by SoftBank, there were no outstanding public interest issues for the Commission to consider.

⁸ 47 U.S.C. § 310(d).

⁹ *See* Letter from Jeffrey H. Blum, DISH Network Corporation, to Marlene H. Dortch, Secretary, FCC, IB Docket No. 12-343 (Apr. 26, 2013).

¹⁰ Letter from Jeffrey H. Blum, DISH Network Corporation, to Marlene H. Dortch, Secretary, FCC, IB Docket No. 12-343 (May 23, 2013).

¹¹ *See* Letter from David Honig, President, Minority Media & Telecom Council, to Mignon Clyburn, Chairwoman, FCC, IB Docket No. 12-343 (May 28, 2013).

¹² *See* Letter from Viet D. Dinh, Counsel for Crest Financial Ltd., to Marlene H. Dortch, Secretary, FCC, IB Docket No. 12-343 (May 28, 2013).

States (“CFIUS”).¹³ Sprint’s spectrum resources, fiber backbone, wireless networks, systems, and government contracts are essential to the security of U.S. telecommunications. These key assets would come under the control of a company with many, and still unexplained, ties to China, including a past affiliation with a U.S. company that admitted to bribing Chinese government officials for telecommunications contracts.

DISH is not asking the Commission to compare its proposed deal to SoftBank’s. But the benefits of DISH’s proposal, including the promotion of broadband deployment to unserved, underserved, rural and minority Americans, do highlight what SoftBank’s proposal is lacking.

Abeyance is Warranted

Even if the outstanding issues could be evaluated and the Commission’s public interest review could be completed in one day, the Commission should still hold its hand while the reality of the various proposals stabilizes over the next few weeks. SoftBank says that “Section 310(d) requires the Commission to process applications ‘as though no other person were interested in securing such permit or license.’”¹⁴ As mentioned, DISH is not requesting a Commission determination that its proposal is superior to SoftBank’s—Sprint’s shareholders will do that. But the sentence cited by SoftBank cannot be read to require an ostrich-like pretense that reality does not exist. The Commission has the ability to, and indeed should, consider the existence of another pending offer and its implications for the proposed acquisition.¹⁵ Abeyance

¹³ While the Commission generally defers to the Executive Branch (Team Telecom and/or CFIUS) on national security issues, it still reviews the National Security Agreements entered into by the Executive Branch and applicants to ensure that those agreements do indeed serve the public interest. Application of VoiceStream Wireless Corp., Powertel, Inc., Transferors, and Deutsche Telecom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act, *Memorandum Opinion and Order*, 16 FCC Rcd. 9779, 9821-23 ¶¶ 73-77 (2001); Application of Vodafone AirTouch, *Memorandum Opinion and Order*, 15 FCC Rcd. 16507, 16520-21 ¶¶ 34-37 (2000).

¹⁴ SoftBank Letter at 3.

¹⁵ See, e.g., Letter from Rick Kaplan, Senior Counsel to the Chairman for Transactions, FCC, to Michael Samsock, Cellco Partnership d/b/a/ Verizon Wireless, et al., WT Docket No. 12-4 (June 26, 2012) (stopping the clock for 14 days to allow for comments regarding the effect of another pending transaction on the proceeding); Letter from Ruth Milkman, Chief, Wireless Telecommunications Bureau, FCC, to Michael Samsock, Verizon Wireless, and William R. Drexel, AT&T Inc., WT Docket No. 09-121 (May 19, 2010) (stopping the clock until submission of applicants’ responses to an Information Request); Public Notice, Federal Communications Commission, Media Bureau Announces Extension of Comment Period in AT&T-Comcast

(Continued...)

is appropriate in circumstances of great uncertainty over the fate of a licensee. This uncertainty only increased last week with DISH's tender offer for Clearwire.¹⁶ If that tender offer is successful, the transaction proposed by SoftBank and Sprint to the Commission likely will be impossible to consummate, as Sprint will be unable to acquire all of Clearwire.

To urge immediate action, SoftBank invokes again the specter of a possible Clearwire bankruptcy—in its words, the “possible implications of delay on Clearwire’s financial condition.”¹⁷ This is the kind of repeated “Peter and the Wolf” warning that does not seem to correspond to an imminent threat. Since the date of the Securities and Exchange Commission filing made by Clearwire and cited by Sprint, Sprint has raised its offer from \$2.97 per share to \$3.40 per share,¹⁸ and DISH has countered with a far superior proposal at \$4.40 per share.¹⁹ Far from harming Clearwire, the delay has, in fact, been providing real value to Clearwire.

SoftBank goes on to somehow suggest that delaying approval would violate the Commission’s long-standing policy of neutrality.²⁰ But Sprint ignores what the neutrality policy is based on. The neutrality policy is designed to ensure that the Commission does not tip the balance in favor of incumbent proposals (in this case, SoftBank’s) over outside offers (DISH’s proposal).²¹ Far from violating the policy of neutrality, waiting a few weeks avoids tipping the scale in favor of the incumbent proposal.

* * * * *

In sum, many unanswered questions still must be fully and adequately answered before the Commission can realistically even draft a proper order and put it on circulation. Further,

Proceeding, 17 FCC Rcd. 16275, 16275-76 (2002) (stopping the clock to allow for a full comment period on a new proposal by the applicants).

¹⁶ Press Release, DISH Network Corp., DISH Network Announces Commencement of Tender Offer to Purchase All Clearwire Corporation Class A Common Stock (May 30, 2013), *available at* <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=768253> (“DISH Tender Offer Press Release”).

¹⁷ SoftBank Letter at 4.

¹⁸ News Release, Sprint Nextel Corp., Sprint Submits Increased Offer for Clearwire (May 21, 2013), *available at* http://newsroom.sprint.com/article_display.cfm?article_id=2594.

¹⁹ DISH Tender Offer Press Release.

²⁰ SoftBank Letter at 4. The only support for SoftBank’s position comes from a letter from its co-Applicant Clearwire.

²¹ Tender Offers and Proxy Contests, *Policy Statement*, 59 R.R.2d 1536 (1986).

