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DEC 13 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554
December 13, 2000

In the Matter of)	
)	
VoiceStream Wireless Corporation)	IB Docket No. 00-187
Powertel, Inc.)	
)	
Applications under Section 214 and 310(d) of)	
the Communications Act of 1934, as amended,)	
for transfer of control to Deutsche Telekom AG)	

COMMENTS

I. Summary of Argument

The Federal Communications Commission ("FCC") must reject the merger application of Deutsche Telekom ("DT") and VoiceStream Wireless Corp. ("VoiceStream") as that transaction is flatly prohibited by 47 U.S.C. Section 310(a). Section 310(a) prohibits the FCC from granting or permitting the transfer of telecommunications licenses to foreign governments or their representatives. That prohibition is unequivocal and cannot be waived. A combined Deutsche Telekom-VoiceStream falls squarely within the reach of this prohibition. Indeed, the evidence clearly and amply demonstrates that the German government will exercise direct control over and will influence the combined entity post-transaction. This evidence even demonstrates that the parties themselves believe that Deutsche Telekom will continue to be a representative of the German government post-transaction.

47 U.S.C. Section 310(b)(4) does not provide the FCC the authority to waive the prohibition contained in Section 310(a). To find otherwise would read Section 310(a) out of the law and would contravene the plain language of the statute. Moreover, the FCC's only action in this area involved a bureau level decision that appears to be incorrectly decided, lacks

Telekom appears to be implicitly retaining its sovereign immunity as an "agency or instrumentality of government" with respect to other legal actions not relating to the merger agreement. The retention of such sovereign immunity is direct proof that a combined DT-VoiceStream will continue to operate as a representative of the German government as contemplated by 47 U.S.C. Section 310(a).

The German government apparently agrees with Deutsche Telekom that DT is an arm of the German government. In response to a request to contribute to a foundation to compensate the victims of Nazi era forced and slave laborers, the German Finance Ministry determined that Deutsche Telekom's contributions to the fund would be classified as state or government contributions, rather than as private corporate contributions.²⁰

III. Section 310(b)(4) Does Not Give the FCC Authority to Waive the Prohibition on Foreign Government Control

VoiceStream and Deutsche Telekom have applied for a waiver of the FCC's foreign ownership rules under section 310(b)(4). The FCC does not have authority, however, under section 310(b)(4) to waive the requirements of section 310(a). Section 310(b)(4) only gives the FCC the power to find that foreign government ownership interests *below* control might be in the public interest.

A. Sections 310(a) and 310(b)(4)

As noted above, section 310(a) specifically prohibits the FCC from granting authorizations to entities *controlled* by foreign governments, either directly or indirectly. Section 310(b)(3) and (4) then fill the gap as to how to address foreign government ownership that amounts to less than control. Under section 310(b)(3), direct foreign government ownership interests above 20% are forbidden without any exceptions. Under section 310(b)(4), the FCC is given some discretion to allow indirect foreign government ownership of broadcast, common carrier, and aeronautical licenses in amounts above 25% if the public interest is served. However, nowhere does section 310(b)(4) state that the FCC can find the public interest served by allowing a "foreign government or the representative thereof" to control a "station license." To interpret this section otherwise, would be to read out of existence section 310(a). The only way to reconcile these two sections, then, is to conclude that section 310(b)(4) allows the FCC to find the public interest is served by allowing indirect foreign control, and/or ownership up to 100% of "station licenses" only when the foreign ownership is by a non-government controlled entity. If a foreign government controlled entity indirectly invests in an FCC licensee subject to section 310, then the entity can invest indirectly up to 25% without triggering section 310(b)(4), but investments above 25% have to be approved by the FCC, and must not give the foreign government controlled entity control of the FCC "station license" holder. Such control would contravene Section 310(a). To find otherwise, would be contrary to the Act.

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employment rights vis-à-vis DT that they had with the Federal Republic of Germany. By law, Germany shifted all responsibility over the then-civil servants to DT. As a result, these individuals are not employees of the German government; they are employees of a private corporation. They report to, and are subject to promotion by, DT, not the government. Far from demonstrating any intention on the part of the corporation to act on behalf of (or in connection with) the German government, the requirement to maintain the former civil servants' old level of benefits is only a holdover from DT's former state ownership. Critically, even if the German government had already divested 100 percent of its shares in DT, that would not alter DT's obligations to its employees who were civil servants.

3. The German government's proposed accounting for DT's contribution to the German forced-labor foundation is another red herring. The foundation, which was established in August 2000 to compensate former victims of forced and slave labor during the Nazi regime, is to be financed with 10 billion DM: five billion contributed by the German government and five billion by German industry. Under the applicable German law, German business entities are invited to contribute to the foundation, while the German government is obligated to contribute its share. On June 13, 2000, before the foundation was formally established, DT voluntarily contributed approximately 100 million DM to the private-industry side of the foundation. Subsequently, the German government claimed that, because a majority of DT's shares were still state-owned, the foundation law required that DT's contribution count toward the government's obligation to the foundation. German industry claims that DT's contribution should be booked on the industry side. The government's attempt to count DT's contribution says nothing about whether DT will use its indirect control over Commission licenses on behalf of the German

government. Rather, the question of how to account for DT's contribution is simply a political and historical issue that has no bearing on DT's operation of its wireless business.

4. Finally, Senator Hollings relies on a boilerplate provision of the VoiceStream-DT merger agreement stating that DT waives any sovereign immunity rights it may have in any subsequent dispute with VoiceStream. This precautionary measure, designed to resolve any future uncertainty, does not establish that DT in fact possesses any sovereign immunity, much less that any such legal status would answer the question here — whether DT would use its U.S. wireless licenses on behalf of or in connection with the German government. Rather, DT merely agreed (at VoiceStream's request) that, "*to the extent that it . . . is or becomes entitled to any immunity on the grounds of sovereignty or otherwise based on its status as an agency or instrumentality of the government, it . . . expressly, irrevocably, and unconditionally waives . . . any such immunity.*"¹³⁵ This routine waiver provision is included in such documents any time there is *any* ownership interest — whether controlling or noncontrolling — by a governmental entity. DT is a private corporation that can be sued in Germany just like any other corporation, and a waiver provision in a merger document does not change this fact.

III. THE COMMISSION SHOULD SUMMARILY REJECT COMMENTERS' REQUESTS TO IMPOSE CONDITIONS RELATING TO DT'S INTERACTION WITH NEW ENTRANTS IN GERMANY AND OTHER MATTERS THAT HAVE NOTHING TO DO WITH THE PROPOSED TRANSACTIONS OR THE PUBLIC INTEREST ANALYSIS.

The German Competitors ask the Commission to reverse its decision in the *Foreign Participation Order* to forego the ECO test for entry from WTO signatory countries and to impose a wide-ranging set of conditions to remedy alleged anticompetitive practices by DT in

¹³⁵ Agreement and Plan of Merger Between Deutsche Telekom AG and VoiceStream Wireless Corp. at 61, July 23, 2000 (emphasis added).

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I. Summary of Argument

The Federal Communications Commission ("FCC") must reject the merger application of Deutsche Telekom ("DT") and VoiceStream Wireless Corp. ("VoiceStream") as that transaction is flatly prohibited by 47 U.S.C. Section 310(a). Section 310(a) prohibits the FCC from granting or permitting the transfer of telecommunications licenses to foreign governments or their representatives. That prohibition is unequivocal and cannot be waived. A combined Deutsche Telekom-VoiceStream falls squarely within the reach of this prohibition. Indeed, the evidence clearly and amply demonstrates that the German government will exercise direct control over and will influence the combined entity post-transaction. This evidence even demonstrates that the parties themselves believe that Deutsche Telekom will continue to be a representative of the German government post-transaction.

47 U.S.C. Section 310(b)(4) does not provide the FCC the authority to waive the prohibition contained in Section 310(a). To find otherwise would read Section 310(a) out of the law and would contravene the plain language of the statute. Moreover, the FCC's only action in this area involved a bureau level decision that appears to be incorrectly decided, lacks

German law allows this constitutional protection to endure even if the government's stake in the company is below 50 percent. In fact, Business Week recently stated that more than one third of Deutsche Telekom's employees are government civil servants "who can't be fired."¹⁷ Deutsche Telekom's SEC filings confirm Business Week's conclusion, and indicate that those civil servants enjoy special protection in that they cannot be terminated except in extraordinary statutorily defined circumstances.¹⁸ As such, much of Deutsche Telekom's workforce is actually part and parcel of the German government's workforce. Absent statutory intervention, these workers will likely remain employed by the German government if Deutsche Telekom's acquisition of VoiceStream is approved, thereby leaving the combined entity with a sizeable portion of its workforce under the near permanent employ of the German government.

So, the German Constitution and German statutes will enshrine a significant degree of government control over a sizeable portion of the workforce in a combined DT-VoiceStream, notwithstanding any dilution of the German government's equity stake after the completion of the transaction. This further indicia of government influence and control clearly fits within the framework of Section 310(a), which prohibits the transfer of a license to a "foreign government or the representative thereof." Thousands of statutory government civil servants certainly seem to fit within that plain language.

d) Acknowledgement that Deutsche Telecom is a Representative of the German Government

Finally, the Applicants themselves recognize that the German government has control and will legally remain a part of a combined DT-VoiceStream once their transaction is completed. In the merger Agreement filed at the Securities and Exchange Commission by Deutsche Telekom and VoiceStream, they do not treat the German Government as an "ordinary" (private) shareholder. Rather, they describe Deutsche Telekom's "status as an agency or instrumentality of government."¹⁹ There can be no misinterpretation of this unequivocal language. The only logical conclusion is that Deutsche Telekom and VoiceStream both believe that under the law, DT is in fact an arm of the German government. A further reading of their merger agreement filed at the SEC supports this conclusion. In that document, DT agrees to waive the sovereign immunity they would otherwise enjoy as an "instrumentality of government from any legal action . . . initiated against DT with respect to this agreement."

The necessity to waive sovereign immunity arises from Deutsche Telekom's recognition that it will legally constitute an arm of the German government after DT and VoiceStream are combined. Furthermore, given the limited waiver contained in the merger agreement, Deutsche

¹⁷"America or Bust for Deutsche Telekom," Business Week, July 17, 2000.

¹⁸ DTAG 20-F filing with SEC for 1999, p. 60.

¹⁹ Sec. 9, 10. of the Agreement and Plan of Merger between Deutsche Telekom and VoiceStream.

Telekom appears to be implicitly retaining its sovereign immunity as an "agency or instrumentality of government" with respect to other legal actions not relating to the merger agreement. The retention of such sovereign immunity is direct proof that a combined DT-VoiceStream will continue to operate as a representative of the German government as contemplated by 47 U.S.C. Section 310(a).

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VoiceStream and Deutsche Telekom have applied for a waiver of the FCC's foreign ownership rules under section 310(b)(4). The FCC does not have authority, however, under section 310(b)(4) to waive the requirements of section 310(a). Section 310(b)(4) only gives the FCC the power to find that foreign government ownership interests *below* control might be in the public interest.

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The German government exercises control over Deutsche Telekom in a variety of ways. The government plays a large role in influencing management decisions. The government provides substantial financial backing to Deutsche Telekom. And, many of Deutsche Telekom's employees are statutory government civil servants who enjoy special protections under the German Constitution that are not available to workers of private companies. Finally, the parties themselves acknowledge that Deutsche Telekom is a representative of the German government

a) **Government Influence on Management Decisions**

The German government meets both formally and informally on a regular basis with the management of Deutsche Telekom to direct its activities. In fact, there is a specific division within the German Ministry of Finance that oversees Deutsche Telekom, along with the other shareholdings of the Government.

The German government also actively exercises its control as the majority shareholder during Deutsche Telekom's annual shareholder meetings. At these meetings, the government engages in activities such as appointing the representatives to Deutsche Telekom's Supervisory Board under the German Stock Corporation Act, and approving the annual financial statements. In its annual report for 1999, Deutsche Telekom candidly admits:

"As long as the Federal Republic directly or indirectly controls the majority of Deutsche Telekom's shares, it will, like any majority shareholder in a German stock corporation, have the power to control most decisions taken at shareholders' meetings, including the appointment of all of the members of the Supervisory Board elected by the shareholders and the approval of the proposed dividend payments."¹³

The Government's role in appointing the Supervisory Board is critical because it is Deutsche Telekom's Supervisory Board that plays a key role in appointing the company's top managers and determining its strategy.¹⁴ Although Deutsche Telekom and VoiceStream claim in their merger agreement that Deutsche Telekom will recommend the inclusion of a person nominated by VoiceStream on the Supervisory Board, it is highly unlikely that this one representative, if elected, will have any effect on the German government's influence.

It is worth noting that, although the merger has yet to be approved, there is evidence that the German government, through Deutsche Telekom, is already exercising control over VoiceStream. On October 4, 2000, Deutsche Telekom filed a SEC Form F-4 indicating that Deutsche Telekom will be formulating an auction plan for VoiceStream as it bids in the December 12, 2000 spectrum auctions. Specifically, the Form F-4 discloses that VoiceStream is required to obtain prior approval from DT's "Acquisitions Committee," comprised solely of DT senior management officials, before it can participate in the auction or deviate from the schedule

¹³ DTAG 20-F filing with SEC for 1999, p. 68.

¹⁴ DTAG F-4 filing with SEC of October 4, 2000.

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who receives monies and profits from the operations of the facilities?^{128/} The Commission has made clear that it evaluates these factors “in terms of actual and not theoretical control.”^{129/} Nothing in the record remotely shows that the German government will exercise *actual* control over the licenses currently held by subsidiaries of VoiceStream and Powertel. As ordinary shareholders, the German government and KfW have no say over the use of facilities and equipment, daily operations, personnel matters, or financial matters; nor does the German government receive any profits beyond the dividends earned by shareholders generally.^{130/}

For essentially the same reasons, DT is not the “representative” of the German government, contrary to Senator Hollings’s contention. The Commission has ruled that, in order to qualify as the representative of a foreign government, a company must act “in behalf of” or “in

^{128/} *Id.* The Commission applies these factors in the context of mobile wireless services, in addition to fixed services. See, e.g., *Ellis Thompson Corp.*, Memorandum Opinion and Order and Hearing Designation Order, 9 FCC Rcd 7138, 7138-39 ¶¶ 9-11 (1994).

^{129/} See *Ellis Thompson Corp.*, 9 FCC Rcd at 7140 ¶ 16.

^{130/} Senator Hollings asserts incorrectly that “there is evidence that the German government, through Deutsche Telekom, is already exercising control over VoiceStream.” Comments of Senator Hollings at 5. The Senator argues that the agreement by VoiceStream’s management to work with DT in developing maximum bidding amounts for Spectrum Auction 35 demonstrates DT’s control over VoiceStream. As VoiceStream’s Chairman has explained, however, this kind of routine investor safeguard by no means gives DT (much less the German government) day-to-day control of VoiceStream, and the Commission has upheld such arrangements under its licensee control requirements. See Letter of John W. Stanton, Chairman and CEO, VoiceStream Wireless Corp., to William E. Kennard, FCC Chairman, at 2 (Dec. 5, 2000). See also *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 447-49 ¶ 81 (1994) (“non-majority or non-voting shareholders may be given a decision-making role (through supermajority provisions or similar mechanisms) in major corporate decisions that fundamentally affect their interests as shareholders without being deemed to be in *de facto* control”); *Request of MCI Communications Corporation British Telecommunications plc, Joint Petition For Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended*, Declaratory Ruling and Order, 9 FCC Rcd 3960, 3962 ¶ 14 (1994) (“covenants that give a party the power to block certain major transactions of a company do not in and of themselves represent the type of transfer of corporate control envisioned by Section 310(d) [of the Act].”).

indexed conversion price based on the fair market value of NTI's stock at the time of issuance," which could not be predicted.⁶⁵

Conclusion

Fox and *NextWave* adopt a paid-in capital approach to measuring "capital stock" *only* in circumstances that are so "unusual"⁶⁶ that it is necessary to do so to recognize "the economic realities of the situation."⁶⁷ In the usual case, where there is no difference in the "economic incidents" of ownership of shares held by different shareholders, there is no basis to depart from the plain meaning of the term "capital stock" in measuring the extent of a shareholder's equity interest in the corporation. Indeed, as noted above, *Fox* itself adverts to the significant problems that the Commission would face in adopting a paid-in capital test for public corporations. Many shareholders of such corporations are likely to have purchased their shares at different prices in different offerings over time, and there can be no guarantee that future offerings will not result in yet further differences in share prices. For a corporation whose shares are publicly traded, this inevitable fact simply reflects the vicissitudes of the market — risks that lie at the core of what an equity interest really is. Any effort to measure such an interest based on paid-in capital would not simply be inconsistent with this economic fact. It would also be an impossible exercise in trying to determine what prices each shareholder has paid in at each point in time, and to recompute that figure with every subsequent offering of the stock of the corporation, and every subsequent merger or other recapitalization in which it may be involved. That is not what Congress intended by the term "capital stock."

23. Section 5.15 of the Merger Agreement between DT and VoiceStream restricts the type and amount of "Acquisitions" that may be made by VoiceStream. Please provide examples of Commission decisions that (1) support your argument that these types of provisions are common and have been consistently upheld by the Commission, and (2) indicate that these types of provisions do not constitute a de facto transfers of control.

As VoiceStream noted in its December 5, 2000 letter responding to Senator Hollings, DT's veto rights relating to VoiceStream's bidding at auction are intended to prevent VoiceStream from making substantial outlays of capital or expenditures that could substantially affect VoiceStream's market capitalization. As such, they are a permissible investment protection provisions intended to protect DT's interests both as a minority shareholder in, and as the intended purchaser of, VoiceStream. VoiceStream, not DT, made all decisions with respect to placing bids below the authorized ceilings, even in those few instances in which ceilings were subsequently increased during the auction.

⁶⁵ *Id.* at 2057 ¶ 58.

⁶⁶ *Fox I*, 10 FCC Rcd at 8471 ¶ 43.

⁶⁷ *Fox II*, 11 FCC Rcd at 5719 ¶ 14.

The Commission has concluded that certain “investment protection” provisions vesting limited powers in minority shareholders do *not* cede control of the licensee.⁶⁸ One such provision that the Commission has found acceptable is the right to block certain major corporate transactions.⁶⁹ Similar investment protection measures have been found acceptable when granted to an entity that entered into an agreement to acquire control of a licensee. In the context of such pending mergers or acquisitions, the Commission has approved certain “purchaser safeguards” intended to prevent a target company from “depart[ing] from its own ordinary business practices” without first obtaining the consent of the buyer.⁷⁰ One such provision is the limitation on the target company’s ability to make substantial outlays of capital.⁷¹

Such investment protection provisions have been approved in the particular context of PCS as an appropriate means of allowing venture capitalists and other strategic investors to provide funding to a “designated entity” without obtaining *de facto* control of the entity. In providing guidance on this issue, the Commission has indicated that noncontrolling investors may have veto rights over major corporate decisions that fundamentally affect their interests as shareholders, including decisions with respect to expenditures that significantly affect market capitalization.⁷² For start-up designated entities, there is no expenditure that affects their capitalization more than spectrum auctions and it is therefore not surprising that the Commission has sanctioned investor protection provisions specifically in the auction context.⁷³

DT’s veto rights relating to VoiceStream’s participation at auction thus are fully consistent with FCC policies. Under Section 5.15 of the Merger Agreement, VoiceStream must obtain DT’s consent to an acquisition of any entity with FCC licenses where the individual transaction exceeds \$500 million, or the total of such acquisitions exceeds \$750 million. In

⁶⁸ See *Application of Baker Creek Communications, L.P. for Authority To Construct and Operate Local Multipoint Distribution Services in Multiple Basic Trading Areas*, Memorandum Opinion and Order, 13 FCC Rcd 18709, 18714-15 ¶ 9 (1998).

⁶⁹ See *id.*

⁷⁰ *Applications of Puerto Rico Telephone Authority, Transferor, and GTE Holdings (Puerto Rico) LLC, Transferee*, 14 FCC Rcd 3122, 3141-42 ¶¶ 43-44 (1999).

⁷¹ See *id.* at 3142 ¶ 44 & n.118 (citing *Flathead Valley Broadcasters*, 5 RR2d 74, 76 (1965)).

⁷² See *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 447-48 ¶ 81 (1994).

⁷³ See *GWI PCS, Inc. FCC Form 600, File Number 00447CWL96, Rule Exhibit 1 (Public Interest Showing), Exhibit J at 3 (filed May 22, 1996)* (GWI’s stockholder agreement provided institutional investors with a prior consent right with respect to “any material change to the general terms of GWI’s bidding in the Entrepreneurs’ Auction.”). GWI’s application was granted. See *GWI PCS, Inc. For Authority to Construct and Operate Broadband PCS Systems Operating on Frequency Block C*, 12 FCC Rcd 6441 (1997).

addition, that provision requires VoiceStream to obtain the consent of DT's Acquisitions Committee to any bid at FCC auction for an acquisition that would exceed the amount set forth in a Bid Schedule, either for a particular acquisition or in the aggregate. As the sixth highest bidder in the recently concluded C block reauction, VoiceStream placed winning bids totaling over \$482 million, and holds an ownership interest in another entity that placed winning bids totaling over \$500 million more. These significant acquisitions are just the sort of major expenditures that the FCC has recognized may legitimately be subject to approval from a minority investor, or a buyer with an enforceable obligation to acquire the business of the licensee — and certainly from a party that is *both* such an investor and a prospective buyer.

Moreover, as a practical matter, the process employed in this case makes clear that DT did not exercise control over VoiceStream's bidding in the auction, much less its ongoing operations. Prior to the auction, VoiceStream prepared a proposal for its own Board of Directors setting forth maximum bids for individual markets and in the aggregate. After VoiceStream's Board approved the document, DT's Acquisitions Committee was given an opportunity to exercise its veto power *but did not do so*. VoiceStream determined when and where to place bids, and the level of those bids. When VoiceStream wanted to increase the preset bid maximums in 19 of the hundreds of markets in which VoiceStream had contemplated bidding, the Acquisitions Committee did not object. Once these ceilings were raised, VoiceStream again determined when and where to bid and the levels of its bids. The fact that the aggregate bid ceilings established in the Bid Schedule was several times greater than the actual aggregate amount of winning bids actually submitted by VoiceStream further demonstrates that these were, in fact, ceilings.

Beyond VoiceStream's actual conduct in the auction, which totally belies Senator Hollings' claims, Section 4.05 of the Merger Agreement provides that: "Nothing contained in this Agreement shall give DT, directly or indirectly, the right to control or direct VoiceStream's operations prior to [the date on which the merger takes effect]. Prior to [that time], VoiceStream shall exercise, consistent with the terms and conditions of this Agreement, complete control and supervision over its respective operations." VoiceStream's Chairman and CEO, John Stanton has unequivocally confirmed that he adheres to these provisions and that, prior to the merger, VoiceStream has not and will not cede control to DT.⁷⁴

* * *

At our January 18 *ex parte* meeting, the Bureaus inquired whether DT's minority stake in Sprint PCS is relevant to the competitive analysis. We take the opportunity to respond to that question here. As the Department of Justice concluded, the answer is no.

Under the CMRS spectrum cap, only controlling interests, partnership interests, and other ownership interests (including stock interests) amounting to 20 percent or more of the equity or

⁷⁴ See Letter of John W. Stanton, Chairman and Chief Executive Officer of VoiceStream Wireless Corporation, to William E. Kennard, Chairman of the Federal Communications Commission, dated December 4, 2000.

outstanding stock of the licensee are considered attributable.⁷⁵ DT has a voting interest of less than 9 percent of Sprint PCS, has no rights to elect or nominate any members of the board of Sprint PCS, and receives no information about the operations of Sprint PCS other than that provided to all shareholders.⁷⁶ This interest therefore is nonattributable for purposes of the spectrum cap.

The Commission has consistently followed a policy of considering only attributable interests in conducting its public interest analysis of proposed transactions.⁷⁷ It also has recognized that the spectrum cap's bright-line test for determining permissible ownership interests in a specific market provides licensees with greater regulatory certainty, particularly in contexts that apply specifically to the VoiceStream/DT merger: where wireless companies are undertaking "efforts to create national footprints" or to pursue "larger mergers within the telecommunications industry."⁷⁸ The cap expedites and facilitates the Commission's review of proposed transactions by minimizing the processing time and burdens on Commission staff that could result from a case-by-case analysis of competitive issues associated with larger transactions.⁷⁹

For these reasons, the Commission has noted that "where a licensee would continue to be in compliance with the spectrum cap after a proposed ... transfer of control ... [the Commission] would generally presume that [the proposed combination] does not cause an undue risk o[f] market concentration unless specific evidence to the contrary is presented by either interested parties or through review by Commission staff."⁸⁰

No interested parties have presented any contrary evidence. Indeed, no party has even mentioned DT's Sprint PCS interest.

⁷⁵ See 47 C.F.R. § 20.6(d); see also *1998 Biennial Regulatory Review — Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, Report and Order, 15 FCC Rcd 9219 (1999) ("1998 Biennial Review Order"), affirmed on reconsideration, 2000 WL 1672835 (FCC) (Nov. 8, 2000).

⁷⁶ See *VoiceStream Wireless Corporation and Deutsche Telekom AG, Application for Transfer of Control and Petition for Declaratory Ruling* (filed September 18, 2000) ("Application") at 29 n.87. DT's voting interest in Sprint PCS (including all series of shares) has been diluted since the filing of the Applications to approximately 8.86 percent. DT's equity interest in Sprint PCS is approximately 5.87 percent.

⁷⁷ See *Applications of VoiceStream Wireless Corp. or Omnipoint Corp., Transferors, and VoiceStream Wireless Holding Co., Cook Inlet/VS GSM II PCS, LLC, or Cook Inlet/VS GSM III PCS, LLC, Transferees*, Memorandum Opinion and Order, FCC 00-53, DA 99-1634 & 99-2737 (rel. Feb. 15, 2000).

⁷⁸ *1998 Biennial Review Order*, 15 FCC Rcd at 9242-43 ¶¶ 50-51.

⁷⁹ See *id.* at 9243 ¶¶ 52-53.

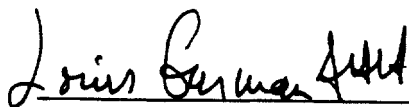
⁸⁰ *Id.* at 9245 ¶ 56 n.138.

The DT-Sprint PCS overlap was reviewed by the Antitrust Division of the Department of Justice ("DOJ") in connection with the parties' HSR filings on this transaction. The DOJ "concluded that DT's ownership of Sprint PCS shares would not give DT any significant ability to influence Sprint PCS's competitive behavior, and would not materially affect the incentives of either VoiceStream or Sprint PCS to compete against one another and against other wireless firms."⁸¹ Given the limited size of DT's interest in Sprint PCS, its passive nature, the far greater size of DT's interest in VoiceStream, and the fact that the Sprint and VoiceStream networks use competing technologies (CDMA v. GSM), this conclusion is clearly correct.

In any event, as set forth in the parties' Application, DT plans to dispose of its Sprint PCS shares in an orderly manner, taking into account market conditions and any applicable legal and contractual restrictions.⁸²

Finally, we take this opportunity to make a minor correction to an assertion in a footnote in Appendix A to our Reply Comments. In footnote 25, on page 7 of that Appendix, we stated that "DT already includes . . . terms [relating to binding loop provisioning intervals and contractual penalties for breach thereof] in contracts with other carriers." This is true with respect to binding provisioning intervals. However, we have since learned that, while DT has offered penalty provisions in contractual negotiations with several carriers, and remains willing to include such provisions, DT and other carriers have not yet agreed on such provisions in any finalized contract.

Sincerely,



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⁸¹ Letter from Assistant Attorney General Robert Raben to The Honorable Billy Tauzin, Sept. 14, 2000 (attached as Exhibit C to applicants' Reply in Support of Applications for Consent to Transfer of Control).

⁸² VoiceStream-DT Application at 29 n.87.