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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
VOICESTREAM WIRELESS CORPORATION,	)	
	)	
Transferor,	)	
	)	
and	)	No. _____
	)	
DEUTSCHE TELEKOM AG,	)	
	)	
Transferee,	)	
	)	
Application for Consent to Transfer of Control	)	

APPLICATION FOR TRANSFER OF CONTROL
AND PETITION FOR DECLARATORY RULING

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will give VoiceStream access to DT's experience as it deploys next-generation services in other markets.

Accelerating deployment of next-generation wireless services promotes competition not only in U.S. wireless markets but also in mass-market, high-speed data services, which today are provided either over telephone lines through xDSL services or over cable lines through cable modems. VoiceStream's next-generation wireless services will provide consumers with another technological means of obtaining high-speed data services.

3. The Merger Will Not Cause Any Anticompetitive Effects in Either Relevant Market.

The merger's substantial procompetitive benefits will not be offset by any anticompetitive effects in the wireless telephony or international services market. VoiceStream's mobile telephony services do not overlap with any DT service in the United States, and the overlap of the two carriers' international services will have no significant impact on competition.

Mobile Telephony. DT does not presently provide any mobile telephony services in the United States.[87] Nor can DT be characterized as a potential entrant (apart from this merger or a similar transaction). Even if building a new network from the ground up were a viable competitive strategy, allocated and unassigned spectrum necessary to do so simply does not

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[87] DT owns an interest of approximately 9 percent in Sprint PCS, with no rights to elect or nominate any members of Sprint's Board. DT receives the same information about the operations of Sprint PCS as any other shareholder. Under the Commission's rules, DT's interest in Sprint PCS is nonattributable. *See* 47 C.F.R. § 20.6(d); *1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, 15 FCC Rcd 9219, ¶ 86 (1999). Because the Commission considers only attributable interests in conducting its public interest analysis, *see, e.g.*, *VoiceStream-Omnipoint* ¶ 23, DT's interest in Sprint PCS is irrelevant to this proceeding. In any event, DT plans to dispose of its Sprint shares in an orderly manner, taking into account market conditions and any applicable legal and contractual restrictions. *See* Deutsche Telekom AG, SEC Form 20-F, at 34 (filed Apr. 19, 2000).

exist.[18] The merger thus will not eliminate any actual or potential competition in the U.S. mobile telephony market. Moreover, in *VoiceStream-Aerial* and *VoiceStream-Omnipoint*, the Commission ruled that, even though each merger eliminated a relatively significant regional mobile telephony operator, the procompetitive benefits of the transaction easily outweighed this potential anticompetitive effect.[19] Here, where there are no anticompetitive effects whatsoever, and there are considerable procompetitive benefits (*see infra* Part III.A.3), it is all the more clear that the merger will be procompetitive.

International Services. The merger will have no significant impact on competition in the U.S. market for originating or terminating international calls. Because VoiceStream does not own any international transport facilities, this transaction will not "eliminate any significant potential participant in the provision of international services."[20] As in VoiceStream's transactions with Omnipoint and Aerial, the *de minimis* nature of the transferor's international services precludes a finding of anticompetitive effects, in particular because neither VoiceStream nor DTI controls any bottleneck facility in the United States on which other carriers rely to provide service.[21] In fact, the combination of two tiny competitors will only strengthen their

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18 *See AirTouch-Vodafone* ¶ 14 ("any other avenue for Vodafone to enter the U.S. market [other than proposed merger] would generally have required it to acquire licensed spectrum from an existing licensee"). The Commission currently has plans to conduct two auctions, one for reclaimed C & F Block licenses, and one for the 700 MHz band. These licenses, either together or separately, would not be sufficient to form a new nationwide current-generation wireless network. The C & F Block licenses do not have a national footprint. And the 700 MHz licenses are subject to significant uncertainty as to when they will be available for wireless telecommunications because of the need to relocate existing UHF television stations (particularly in the northeastern United States), and because analog television licenses are reclaimed only if digital penetration reaches certain prescribed thresholds.

19 *See VoiceStream-Aerial* ¶ 48; *VoiceStream-Omnipoint* ¶ 51.

20 *See VoiceStream-Aerial* ¶ 39; *VoiceStream-Omnipoint* ¶ 33.

21 *Id.*

ability to chip away at the dominance of market leaders AT&T, WorldCom, and Sprint, and therefore will *promote* competition in the international services market.

In reviewing the competitive effects of a merger on the international market, the Commission also considers whether the transferee will become affiliated with a foreign carrier, in order to determine whether to classify the merged entity as a dominant carrier on certain international routes.[22] Here, VoiceStream is expected to become a subsidiary of T-Mobile, and therefore an "affiliate" of DT under the FCC's rules. As a result, as noted in the accompanying section 214 application, VoiceStream (like DTI) will be subject to dominant carrier regulation with respect to three European routes: U.S.-Germany, U.S.-Slovakia, and U.S.-Hungary. *See supra* at 9 n.19. Under the Commission's rules, VoiceStream will be required to file international service tariffs on one day's notice; maintain separate books of account from DT; not jointly own transmission or switching facilities with DT; file quarterly reports of revenue and transmission; file quarterly reports summarizing the provisioning and maintenance of all basic network facilities and services procured from DT; and file quarterly circuit status reports.[23] These requirements are designed to make a carrier's interaction with its affiliated foreign carrier transparent and thereby guard against discriminatory conduct. To the extent that VoiceStream's relationship with DT poses any potential threat of such conduct, the Commission's dominant-carrier regulations are an adequate safeguard.[24]

22/ *See, e.g., VoiceStream-Omnipoint* ¶ 34.

23/ *See* 47 C.F.R. § 63.10(c).

24/ Moreover, the existence of any such threat would not be a result of the merger, because the combined international operations of VoiceStream and DTI are no more significant than DTI's alone. *See International Services Report* at 25.

This merger bears no resemblance to transactions in which the Commission has imposed safeguards above and beyond dominant-carrier regulation. For example, in approving investments by DT and France Telecom in Sprint, the Commission imposed additional safeguards because Germany and France *at that time* did not offer effective competitive opportunities to U.S. carriers, and Sprint, as the third-largest U.S. provider of international service, was capable of bringing about substantial anticompetitive effects.[25]

Those factors are not present here. The German and French markets no longer are closed to competition by U.S. carriers. Indeed, in 1998, the Commission lifted the conditions it had imposed on Sprint, including dominant-carrier regulation, based on its conclusion that "the French and German telecommunications markets are now open to competition."[26] Moreover, VoiceStream — unlike Sprint — is incapable of discriminating against other international carriers; to the contrary, as a pure reseller, VoiceStream is entirely dependent on other carriers to transport its customers' calls.[27] Even in combination with DTI's small facilities-resale operations, the diminutive scale of the merged entity's presence in the U.S. international market will preclude the sort of competitive threat that exists where a carrier — such as Sprint — can exercise bottleneck control.

25/ *See generally Sprint Corp.*, Declaratory Ruling and Order, 11 FCC Rcd 1850, 1859 ¶ 52 (1996). Notably, this order was issued before negotiation of the WTO Basic Telecommunications Agreement.

26/ *Sprint Corp.*, Declaratory Ruling and Order, 13 FCC 17223, 17228 ¶ 14 (1998).

27/ *See VoiceStream-Aerial* ¶ 39; *VoiceStream-Omnipoint* ¶ 33.

In sum, the net impact of the proposed merger on competition will be overwhelmingly positive. Therefore, this transaction easily satisfies the standard adopted in *Bell Atlantic-NYNEX* and applied in subsequent orders.[98]

B. The Merger Is Consistent with Section 310(b)(4), Because DT's Foreign Ownership Poses No Threat to Competition, and Any Concerns Regarding National Security or Law Enforcement Will Be Addressed in Cooperation with Executive Branch Officials.

Because DT will acquire 100 percent of VoiceStream through the merger — and therefore will exert *indirect* control over VoiceStream's licensee subsidiaries — the Commission must determine under section 310(b)(4) of the Act that the merger is in the public interest.[99] In addition, the applicants seek a declaratory ruling that the transfer to DT of VoiceStream's noncontrolling interests in other wireless carriers (*see supra* n.5) also is in the public interest. In similar proceedings, the Commission has said that it is "guided . . . by the U.S. Government's commitment under the World Trade Organization ("WTO") Basic Telecommunications Agreement, which seeks to promote global markets for telecommunications so that consumers may enjoy the benefits of competition."[100] The Commission accordingly adheres to the principles that "additional foreign investment can promote competition in the U.S. market," and that "the public interest will be served by permitting more open investment by entities from WTO Member countries in U.S. common carrier wireless licensees."[101] Based on these principles, the Commission has adopted a "strong presumption that no competitive concerns are

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98 *See supra* n.57.

99 *See* 47 U.S.C. § 310(b)(4).

100 *VoiceStream-Aerial* ¶ 9; *Vodafone AirTouch-Bell Atlantic*, 12 FCC Rcd at 20008-09 ¶ 13.

101 *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23939, ¶ 111 (1997) ("*Foreign Participation Order*").

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of VoiceStream Wireless Corporation, Transferor, and Deutsche Telekom AG, Transferee, Application for Consent to Transfer of Control and Petition for Declaratory Ruling	IB Docket No. 00-187

COMMENTS OF NOVAXESS B.V.

December 13, 2000

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Order.[1] In that Order, the Commission adopted a rebuttable presumption that indirect foreign ownership of wireless licenses is in the public interest if the acquiring party stems from a WTO Member State. However, there are several arguments *against* applying this presumption in the present merger case.

First, the *Foreign Participation Order* discusses this presumption in the context of whether to grant or deny a Section 214 authorization and Section 310(b)(4) waiver request. The Commission states that it will deny entry if the transaction poses a "very high risk" to competition. Novaxess does not submit that the entry of DTAG poses a "very high risk" to competition in the United States, which would force the Commission to deny the application.[2] However, Novaxess believes that there are sufficient public interest reasons to mandate that conditions be placed on the applicants to protect competition. The Commission also should establish a system of fines and forfeitures for violations of these conditions.

Second, the distinction between WTO and Non-WTO countries in the Foreign Participation Order should not apply if the applicant is a global player – such as DTAG. DTAG is a major force throughout the world, both in WTO and Non-WTO countries. The description of DTAG's activities and corporate structure in the Application (p. 4) is too narrow, and therefore does not adequately describe DTAG's relevant activities abroad. DTAG has shareholdings in major telecommunications companies, fixed and wireless, in Austria (Max. Mobil), Hungary (Matáv), Slovakia (Slovenske telekomunikácie), U.K. (One-2-One), Switzerland (Multilink), Poland (PTC), Ukraine (UTEL), Malaysia (TRA), Indonesia (Satelindo), and the Philippines

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[1] Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order, 12 FCC Rcd 23891 (hereinafter *Foreign Participation Order*).

[2] *Foreign Participation Order* at 40.

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VOICESTREAM WIRELESS CORPORATION, and	)	
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POWERTEL, INC.,	)	
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and	)	IB Docket No. 00-187
	)	
DEUTSCHE TELEKOM AG,	)	
	)	
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	)	
Applications for Consent to Transfer of Control	)	

REPLY IN SUPPORT OF APPLICATIONS FOR CONSENT TO TRANSFER OF CONTROL

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$282 billion."[19] DT has already invested $5 billion in VoiceStream — money that supports the creation of high-skill, high-paying jobs and the deployment of advanced mobile networks, all on American soil. The proposed mergers will only further these beneficial developments.

In sum, the record on the public interest benefits of the proposed merger is clear. Commenters supporting the merger speak with a single voice about increased competition and innovation, accelerated deployment, greater choice and lower prices, job creation, and capital investment. Even those commenters opposing the unconditional license transfer do not dispute these benefits, but rather object on erroneous or irrelevant grounds.

B. The Record Is Clear That the Proposed Transactions Pose No Risk to Competition in the United States, Let Alone a "Very High Risk."

No commenter argues — and none could argue — that this merger will result in the disappearance of an actual competitor. As the Institute for International Economics notes in its comments,

> [t]he Deutsche Tele[k]om acquisition of VoiceStream (and Powertel) exemplifies the sort of horizontal expansion that *adds* to competition in the U.S. market. Deutsche Tele[k]om . . . has no significant presence in the US market. If Deutsche Tele[k]om makes an entry, it will add to competition. . . . Unless [VoiceStream] combines with another player, it won't have the capital and technology to expand and compete. And with Verizon, [Cingular], AT&T and Sprint already nationwide carriers, unless VoiceStream combines with a carrier not already in the US market, a VoiceStream merger is likely to *subtract* competition.[20]

Nor does any commenter allege — and none could — that DT is a significant potential competitor that would have been likely independently to enter the U.S. wireless market in the absence of a merger or acquisition. There is no doubt that the allocated, unassigned spectrum is

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[19] *See* Comments of OFII at 9; *see also* Comments of Chamber of Commerce at 6-7.

[20] Comments of IIE, Attachment at 2-3.

insufficient to permit independent entry by DT.[21] And no commenter argues — and none could — that this merger would lead to undue concentration in the U.S.-Germany route; to the contrary, Applicants' combined share of the international services market is de minimis with respect to any route.[22]

Nonetheless, a few commenters vaguely assert that the proposed transactions threaten competition in the U.S. markets for wireless and international services.[23] These assertions lack any sound analytical foundation, much less any factual basis. None of these naked assertions establishes any risk to competition, let alone the "very high risk to competition" required by the *Foreign Participation Order*.[24]

DOJ's Antitrust Division already has concluded that the proposed transactions do not pose such a risk to competition. In a September 14, 2000 letter to Congressman Billy Tauzin, DOJ explained that it had "carefully reviewed both the potential horizontal and vertical effects of the proposed acquisition of VoiceStream Wireless Corp. (VoiceStream) by Deutsche Telekom AG (DT)."[25] With respect to wireless competition, DOJ concluded that, because DT has no operations in the United States, "the proposed acquisition would not eliminate any competition

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21/ VoiceStream-DT App. at 29-30, n.88 (citing *AirTouch-Vodafone*, which stated "any other avenue for Vodafone to enter the U.S. market [other than proposed merger] would generally have required it to acquire licensed spectrum from an existing licensee").

22/ *See* VoiceStream-DT App. at 24; *see also* Powertel-DT App. at 21-22.

23/ *See* Comments of Senator Hollings; Comments of Global TeleSystems ("GTS"); Comments of Novaxess; Comments of QS Communications ("QSC").

24/ *Foreign Participation Order*, 12 FCC Rcd at 23913-14, 23922 ¶¶ 51, 69. *See also id.* ¶¶ 111-12.

25/ Letter of Robert Raben, Asst. Attorney General, to Billy Tauzin, Chairman, Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce, at 2 (Sept. 14, 2000) (attached as Appendix C).

between DT and VoiceStream in any U.S. wireless market."[26] Likewise, with respect to international services, DOJ "concluded that the limited vertical integration resulting from the proposed acquisition would not be likely to substantially lessen competition in violation of the antitrust laws."[27] While the public interest analysis includes factors in addition to those relating to competition, the Commission traditionally has taken the views of the relevant antitrust authorities into account in its license-transfer decisions.[28]

DOJ's conclusions are confirmed by the absence of opposition to the transactions by consumers or competitors of VoiceStream or Powertel. If DT's acquisition of VoiceStream and Powertel threatened the U.S. markets for wireless or international services, as alleged by Senator Hollings and a few of DT's German competitors,[29] surely at least one of the participants in the markets for those services would have come forward to make that case. In fact, the users of

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[26] *Id.*

[27] *Id.*

[28] *See Applications of Shareholders of Jacor Communications, Inc., Transferor, and Clear Channel Communications, Inc., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 6867, 6886-87 ¶ 17 (1999) (finding "the Department of Justice's antitrust determination to be relevant and probative evidence regarding the competitive effect of the proposed transactions"). *See also Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18170 (1998) (Separate Statement of Commissioner Michael Powell) (the Commission should consider the findings of DOJ in order "to minimize duplications of effort in the area of competitive analysis"); *Amendment of the Commission's Ex Parte Rules*, Order, 9 FCC Rcd 6108, 6108 ¶ 2 (1994) (Ex parte presentations from DOJ or the Federal Trade Commission "promote the public interest through the exchange of information and ideas between the Commission and the other principal agencies responsible for promoting or ensuring competition in the telecommunications industry."); Letter from Christopher J. Wright, General Counsel, FCC, to Arthur H. Harding, Esq., Peter D. Ross, Esq., George Vradenburg, III, Esq., Steven N. Teplitz, Esq., and Catherine R. Nolan, Esq., CS Docket No. 00-30, (Oct. 11, 2000) (Commission ordinarily waits for action by DOJ or the Federal Trade Commission because the Commission's public interest review may be affected by the findings of those agencies).

[29] For ease of reference, Applicants refer below to GTS, Novaxess, and QSC — three actual or potential competitors of DT in Germany — as the "German Competitors."

wireless telecommunications services, represented by the National Consumers League and the Alliance for Public Technology, strongly *support* granting the transfer Applications.[30/] The absence of any complaint by consumers or U.S. competitors places this case in stark contrast to other proceedings in which the merging parties' competitors have alleged grave threats to their competitive prospects.[31/]

In addition, the few comments asserting that the transactions threaten competition are entirely conclusory and wholly unsubstantiated.[32/] These comments therefore fail to meet the standard of section 309(d). Under that section, a petition to deny an application must "contain specific allegations of fact" establishing both that the petitioner is a "party in interest" and that "a grant of the application would be prima facie inconsistent with" the public interest.[33/] The

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30/ *See* Comments of NCL at 1 (NCL "supports the applicants . . . because we believe that both consumers and workers will benefit without any detriment to our national security."); Comments of APT at 3.

31/ *See, e.g., Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee*, Memorandum Opinion and Order, FCC 00-221, CC Docket No. 98-184, at Appendix A (rel. June 16, 2000); *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer of Control*, Memorandum Opinion and Order, 14 FCC Rcd 14712, at Appendix A (1999); *Application of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee*, Memorandum Opinion and Order, 12 FCC Rcd 19985, at Appendix A (1997); *Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee*, Memorandum Opinion and Order, 12 FCC Rcd 2624, at Appendix A (1997).

32/ For example, after cataloguing DT's supposed anticompetitive practices in Germany, GTS asserts without elaboration — let alone factual support — that such "serious competition issues in Germany . . . will have an adverse effect on competition in the U.S. market." Comments of GTS at 25. *See also* Comments of Novaxess at 10 (asserting without factual support that the global nature of the wireless market means that DT's conduct in Germany threatens competition in the United States).

33/ 47 U.S.C. § 309(d)(1). Allegations that are conclusory, lack specificity, or are merely speculative cannot meet these threshold requirements. *See Application of MCI Communications Corp., Transferor, and Southern Pacific Telecommunications Corp., Transferee*, Memorandum Opinion and Order, 10 FCC Rcd 1072, 1074 ¶ 11 (1994); *Application of Pinelands, Inc., Transferor, and BHC Communications, Inc., Transferee*, Memorandum Opinion and Order, 7 FCC Rcd 6058, 6063 ¶ 18 (1992) ("*Pinelands*") (finding petitioner did not have standing because

Commission's decisions applying section 309(d)(1) make clear that a party's failure to comply with these standards will result in dismissal of the petition.[34/] Parties cannot sidestep these statutory obligations simply by styling their pleadings as comments rather than petitions to deny this application for transfer of control.

For all these reasons, the Commission should give no weight at all to the few comments in this proceeding claiming that the proposed mergers will have anticompetitive effects. Those comments offer mere naked assertions that (1) DT will be able to leverage its alleged market power in Germany to engage in improper cross-subsidization of VoiceStream's U.S. wireless operations;[35/] (2) DT's alleged market power will enable it to engage in a price squeeze or other discriminatory conduct;[36/] and (3) DT has preferential access to capital as a result of its partial governmental ownership, which in turn would give VoiceStream a competitive advantage vis-á-vis other U.S. wireless carriers.[37/] As shown immediately below, these conclusory assertions do not even begin to overcome the strong presumption in favor of approving the transactions under section 310(b)(4). Indeed, one commenter making such assertions expressly concedes that the

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claimed injuries were merely speculative). Moreover, all factual allegations must be supported by affidavits from persons "with personal knowledge" of those facts, unless the Commission can take "official notice" of such facts. 47 U.S.C. § 309(d)(1).

34/ *See, e.g., Pinelands* at ¶ 18 (competitor alleging injury that was "merely speculative" and "unlikely" lacked standing in license-transfer proceeding); *Application of Los Angeles Cellular Telephone Company for Renewal of Domestic Public Cellular Radio Telecommunications Service Station*, 13 FCC Rcd 4601, 4603-06 ¶ 5-9 (1998) (finding that a competitor lacked standing in license-renewal proceeding).

35/ *See* Comments of Senator Hollings at 10-12; Comments of Novaxess at 10.

36/ *See* Comments of Senator Hollings at 10; Comments of Novaxess at 10-11.

37/ *See* Comments of Senator Hollings at 6; Comments of Novaxess at 7.

proposed transactions do *not* pose a "very high risk" to competition in this country,[38] and others implicitly make such a concession by openly asking the Commission to disregard that standard.[39] The Commission should reject this invitation to contravene its own orders.[40]

1. DT Could Not Improperly Cross-Subsidize VoiceStream's Wireless Operations in the United States.

There is nothing at all to the notion that DT could improperly cross-subsidize VoiceStream's wireless operations in the United States. As an initial matter, a postmerger VoiceStream plainly could not drive its much-larger rivals — including Verizon, AT&T, Cingular, and Sprint — out of the U.S. market and thereby attain a dominant position. Yet, without doing so, VoiceStream could not recoup the losses that necessarily attend predatory pricing and therefore could not profit from such a scheme. The competitiveness of the German market (*see* Appendix A) also would stand in the way of any attempt to increase DT's rates in Germany; and absent a rate increase, there could be no improper cross-subsidy. Statutory and regulatory safeguards, as well as the geographic and operational separation between DT's operations in Germany and VoiceStream's U.S. wireless operations, further make clear that commenters alleging a threat of improper "cross-subsidization" cannot possibly demonstrate any credible risk to competition, much less the "very high risk" required under the Commission's open-entry standard.[41]

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[38] *See* Comments of Novaxess at 3.

[39] *See* Comments of QSC at 25 (arguing that DT should be treated as if it were based in a non-WTO country); Comments of GTS at 6 (arguing that Commission should ignore strong presumption favoring entry adopted in *Foreign Participation Order*).

[40] *See Reuters Ltd. v. FCC*, 781 F.2d 946 (D.C. Cir. 1996) ("It is elementary that an agency must adhere to its own rules and regulations.").

[41] *Foreign Participation Order*, 12 FCC Rcd at 23913-14, 23922 ¶¶ 51, 69.

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December 13, 2000

In the Matter of	)	
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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

It is worth noting that the European Union ("EU") appears to agree that the WTO Telecommunications Agreement is inconsistent with 47 U.S.C. Section 310. In a 1999 trade barriers report, the EU stated that Section 310 retains force and effect notwithstanding the 1997 WTO Telecommunications Agreement. Specifically, the EU report states: "Section 310 of the Communications Act of 1934 remains basically unchanged following the adoption of the new Communications Act of 1996 . . . This situation has not changed through the Basic Telecom Agreement."[22] As the EU correctly recognizes, and as the FCC should recognize, an executive agreement cannot and does not repeal existing United States statutory law.

IV. The Acquisition of VoiceStream by Deutsche Telekom Will Severely Harm Competition in the U.S. Market and therefore is Contrary to the Public Interest

In addition to the fact that Section 310(a) a bar to the acquisition of VoiceStream by Deutsche Telekom, the FCC must find that this acquisition is contrary to the public interest. Indeed, FCC approval would be tantamount to a complete abandonment of the FCC's obligations to safeguard the public interest. This conclusion is inescapable in light of the tremendous threat posed by foreign government control of U.S. licensed telecommunications carriers to our competitive market and our national security. In this instance, the potential abuses caused by the German government's control of Deutsche Telekom cannot be remedied by the imposition of safeguards and conditions by the FCC.

In reviewing these potential abuses, the Commission must focus on the unique per se anticompetitive aspects of substantial government ownership. By permitting its widespread entry into the U.S. market, grant of the instant application will provide Deutsche Telekom strong incentives to use its financial backing from the German government to compete anticompetitively in the United States. As the dominant telecommunications provider in Germany, the FCC already has found that Deutsche Telekom possesses the ability to discriminate against other U.S. carriers on the U.S.-Germany route. Indeed, the FCC in the past has expressed concern about competition in the German telecommunications market, especially regarding unfair limitations on interconnection with Deutsche Telekom's local exchange.

Approval of the VoiceStream acquisition will permit Deutsche Telekom to offer end-to-end services to U.S. customers at rates subsidized by monopoly rents reaped in Germany to undercut economically the services offered by true U.S. competitors. In other words, this acquisition increases the incentive, and ability, of Deutsche Telekom to behave anticompetitively against U.S. carriers, to the detriment of U.S. consumers. Thus, the addition of this government owned telecommunications power to the U.S. marketplace can only create the harm to the public interest that the FCC has long sought to avoid.

As in many countries, telecommunications in Germany is dominated by a single player

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[22] Report on United States Barriers to Trade and Investment, p. 55, European Commission, Brussels, August 1999.

that is owned by the very government that purports to regulate the market. Such relationships are by their very nature anticompetitive. After all, the degree to which their markets are opened depends on regulatory decisions made by the governments that own them. While U.S. policy cannot unilaterally alter these relationships, we certainly need not take steps to encourage them. FCC consideration of this merger must remain true to the U.S. core policy principles of promoting capitalism and competition across the globe. For more than fifty years, U.S. international trade policy has encouraged governments to separate themselves from the private or commercial sector. Unfortunately, some nations' important industrial sectors remain shackled by government owned monopolists. These monopolists distort competition in their markets, stand in the way of private capitalism, and leverage their market dominance to amass capital that enables them to forage the globe for targets ripe for acquisition. While we cannot force foreign governments to reduce their stake in their countries' telecommunications assets, we need not encourage them by green lighting their acquisitions of attractive U.S. telecommunications companies.

Deutsche Telekom is one of the world's largest and most powerful government controlled carriers. As demonstrated above, Deutsche Telekom has access to financial and government resources that no private company could match. Deutsche Telekom has a proven track record in using its vast power to stifle competition in whatever market it operates. As the FCC already knows, DT is the dominant local phone company, the dominant long distance company, the largest Internet service provider, and possesses a 45 percent stake in most of the cable companies competing in Germany. No American company can leverage such dominance to benefit its competitive forays abroad. The claims that this power cannot be wielded in the U.S. market are self-serving, and ignore the global marketplace in which a combined VoiceStream and Deutsche Telekom will compete. Take for example, Deutsche Telekom's claim that it has divested significant control of cable facilities in Germany and that that market is becoming competitive. According to a recent article in the New York Times, DT apparently retained a 45 percent stake in these supposed "privatized" companies and segregated them geographically so that they could not truly compete effectively.[23] In light of the U.S. experience that cable companies can provide true facilities based competition to local phone monopolies, DT's activities represent an ominous portend for such competition in Germany.

In analyzing Deutsche Telekom's ability to leverage its dominance, the FCC must not limit its review to the U.S. domestic wireless market as VoiceStream and Deutsche Telekom would suggest. Telecommunications markets generally, and in particular the wireless marketplace, are converging around the world. For instance, the European Commission recently recognized this in its "Directive on the 1999 Review Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic

[23] "Deutsche Telekom's Sideshow; Selling Cable Units to Small Fry to Keep the Sharks at Bay," New York Times, Section C, Page 1, July 26, 2000.

communications networks and services" of June 12, 2000.[24] The European Commission stated in Article 14 (2) of this document that the Commission should identify "transnational" markets in order to decide which markets are competitive and where sector-specific obligations must be imposed. The Directive clearly calls for concerted regulatory action to resolve the problems created by a dominant carrier when it operates across borders.

The Deutsche Telekom acquisition of VoiceStream is a prime example of the need to look at competition globally, especially in the wireless sector. Cell phones know no borders. They are portable and often used across borders, particularly in Europe. VoiceStream itself, in arguing for approval of this transaction, trumpets the benefits of international roaming that its customers will enjoy over its GSM network that is compatible with the European network, and in particular Deutsche Telekom's network in Germany. When you add to this the possibility to combine voice and Internet services (3-G services), and the amount Deutsche Telekom has invested in acquiring UMTS licenses throughout Europe, it is clear that Deutsche Telekom is positioning itself as the dominant provider of wireless services in the global market.

In order to protect the U.S. telecommunications market, the FCC must prevent a government controlled entity from using its monopoly profits from predatory pricing and other anti-competitive behaviors at home to subsidize its expansion into other countries, such as the United States. Deutsche Telekom's anticompetitive practices in Europe provide a clear indication of the type of activities the FCC should expect from Deutsche Telekom if it is allowed into the U.S. market. For instance in Hungary, there are reports that Deutsche Telekom, with the backing of the German government, used its majority stake in the incumbent carrier Matav Rt, to influence the Hungarian regulator to take action to the detriment of its competitors.[25] The only sure way that the FCC can protect the U.S. market from the negative effects resulting from Deutsche Telekom's government ownership is to keep Deutsche Telekom out of the U.S. market until the German government relinquishes control and divests its ownership interest through the public sale of its stock below 25 percent.

ERNEST F. HOLLINGS
U.S. Senate
December 13, 2000

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[24] Directive Proposal Com(2000)393 - at
http://www.ispo.cec.be/infosoc/telecompolicy/review99/com2000-393en.pdf

[25] *See* Market Strategies: Matav Blocks Competitive IP Network Build, *Communications Week International*, February 21, 2000.

file DT 1.9.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of VoiceStream Wireless Corporation, Transferor, and Deutsche Telekom AG, Transferee, Application for Consent to Transfer of Control and Petition for Declaratory Ruling	IB Docket No. 00-187

COMMENTS OF NOVAXESS B.V.

December 13, 2000

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services" of June 12, 2000.[12] The European Commission states in Article 14 (2) of this document that the Commission may identify "transnational" markets in order to decide which markets are competitive and where sector-specific obligations must be imposed. In Consideration 14 and 21 of this proposed Directive, the European Commission is taking the same position. The cooperation requirements under this Directive clearly indicate that only concerted regulatory action may resolve the problems created by a dominant carrier in these markets.

This is particularly true for the wireless sector. A cell phone is portable and trans-border use commonplace. The wireless sector with its possibilities of roaming, and the possibility to combine voice and Intern services (3-G services), is in fact a striking example of how national markets are growing together. The project of Iridium to provide global wireless service failed in large measure because surface-based wireless networks already meet the need for a global wireless communication network. As described above, DTAG has recognized the market potential and the globalization of the wireless market and has invested astronomic amounts for auctioned UMTS licenses in several European countries, and one can fully expect DTAG to push for similar spectrum in the United States through VoiceStream.

Therefore, in order to protect U.S. industry and consumers, the Commission must enact conditions to prevent a government-controlled entity from getting an unfair competitive advantage by using its proceeds obtained from predatory pricing and other anti-competitive behavior at home to subsidize its expansion into other countries, such as the United States. Unless Germany makes significant progress in spurring competition, DTAG's market entry in

[12] Directive Proposal Com(2000)393 - at http://www.ispo.cec.be/infosoc/telecompolicy/review99/com2000-393en.pdf