

RECEIVED

FEB 9 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 9, 2001

Mr. Donald Abelson
Chief, International Bureau
Federal Communications Commission
Washington, D.C. 20554

Re: Responses to Supplemental Requests for Information in IB Docket No. 00-187

Dear Mr. Abelson:

This letter responds to the questions set forth in your February 2, 2001 letter regarding the proposed transactions involving VoiceStream, Powertel, and Deutsche Telekom ("DT"). We also provide some information requested by Bureau staff at our meeting of January 18, 2001. We wish to stress that, while some of the questions relate to the state of competition or regulation in Germany, the record makes clear that there is no substantial possibility that either the competitive situation or the regulatory environment in Germany could harm competition in the United States. In particular, there is nothing in the record to demonstrate that the merged company could engage in anticompetitive cross-subsidization or predation. We are nevertheless pleased to provide all the information you have requested.

1. How does Germany regulate the rates and earnings of DT's domestic, international, and foreign operations (including the operations of DT's U.S. affiliates)? For instance, if price caps are the form of regulation, please explain the overall structure of the price cap plan, including which domestic, international, and foreign services are excluded from price caps; which services are in the same basket; the extent of pricing flexibility within baskets; headroom under the price cap in each basket; earnings limitations; and relevant ongoing rulemakings.

Price cap regulation — which reduces the incentive for shifting costs from unregulated to regulated services¹ — constitutes the primary means of overseeing the rates and earnings of DT's

¹ See *Amendment of the Commission's Rules To Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, Report and Order, 12 FCC Rcd 15668, 15703-04 ¶ 59 (1997); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21952-53 ¶ 97 (1996).

domestic and international operations. The German price cap regime came into force on January 1, 1998 and is now in a second two-year period that expires on December 31, 2001.

There are two price cap baskets, based on the two main customer groups. Basket 1 covers services for residential customers, Basket 2 covers services for business customers. More specifically, Basket 1 includes subscriber line charges (analog and ISDN) as well as call charges for local, regional, domestic long-distance, international, and Inmarsat satellite calls. Basket 2 includes essentially the same services for business customers, plus a number of special rates offered to business customers only.²

Services not falling in either of the baskets are subject to a different regulatory process in which individual tariffs are approved based on detailed cost studies pursuant to sections 25 and 27 of the German Telecommunications Act. These services include interconnection and local loop access for other carriers, as well as new optional rate plans (including DT's "BusinessCall 550") under which a customer pays a flat surcharge on the subscription fee in exchange for significantly reduced calling charges. Services such as value-added services or mobile communications services are regulated only to the extent that rates may be challenged after they have become effective.

The cap for each price cap basket declines over time based on an x-factor ("productivity factor") minus a consumer price index factor set individually for each period of the plan (*i.e.*, for two years).³ The x-factor was set at the beginning of price caps at 6 percent and has thus far remained unchanged. For Period 1 (1998-2000), the consumer price index was set at 1.7 percent. As a result, the average price within each basket had to be lowered by 4.3 percent during that period. For Period 2 (2001-02), the consumer price index was set at 0.4 percent, meaning that the average price within each basket had to be lowered by 5.6 percent.

DT's prices for services in the residential basket are currently set at the maximum aggregate level allowed by law; there is thus no headroom under the price cap in the residential basket. Because of competition in the business services market, DT has voluntarily reduced its prices for business services more than the required 5.6 percent, leaving DT about five percentage points of headroom for price increases in that basket, subject of course to what competition permits.

The price cap regime permits limited pricing flexibility — almost none in the residential basket, and very little in the business basket. As noted above, there is no upward flexibility in the residential basket; nor is there significant downward flexibility, because RegTP has required DT to maintain a minimum price level for local calling equal to the interconnection charge plus 25 percent for each individual call charge, in order to allow competitors to make similar offerings (either by relying on DT's interconnection services or based on their own

² See, *e.g.*, Official Notice of Government Decision issued by the Ministry for Post and Telecommunications (Bundesministerium fuer Post und Telekomunikation) on Price Cap Regulation of Telephone Services (December 9, 1997) ("*Ministry Price Cap Order*").

³ See *id.*

infrastructure).⁴ This limit on downward flexibility restricts the upward flexibility that otherwise might exist in the business basket, because rates can increase for one service only if they can be reduced for another to maintain the overall price level for the basket. In other words, prices for each individual rate may be adjusted only so long as the mandatory overall price reduction for the basket is fulfilled.⁵

There are no explicit earnings limitations applicable to DT, just as U.S. ILECs under price caps have no explicit earnings limitations. But section 24 of the German Telecommunications Act constrains earnings by mandating that rates shall be based on the costs of efficient service provision and shall contain no anticompetitive surcharges or discounts.

While most of DT's services are subject to price cap regulation, RegTP has granted DT nondominant status with respect to some services, including DT's international wholesale services, for which DT's market share has fallen below 33 percent.⁶ Relevant ongoing rulemakings have resulted from DT's filing of four motions with RegTP seeking to be declared nondominant with respect to (a) DT's international services between Germany and the United States, Germany and Turkey, and Germany and Denmark, and (b) local and long distance calling in Berlin. As a result of high levels of competition in the wake of the full liberalization of the German telecommunications market, DT believes it is no longer dominant in the provision of these services. RegTP is expected to rule on DT's motions in the next few weeks, although further delays are possible.

Finally, Germany does not regulate DT's foreign operations, including the operations of U.S. affiliates.

2. How are the foreign holdings of DT treated for regulatory purposes? For instance, are costs subject to either accounting or non-accounting safeguards?

We assume this question asks about the application of German law to non-German holdings. The German regulatory system does not directly apply to non-German holdings. But just as German law requires separate cost accounting for organizations having significant market power as well as for cable businesses,⁷ European Union law as well as the applicable national law provides for similar standards in the EU.⁸ In addition, DT maintains separate books of

⁴ In addition, just as in individual rate approval proceedings, RegTP monitors rates to ensure that they do not contain anticompetitive discounts.

⁵ See *Ministry Price Cap Order*.

⁶ See RegTP Case 4e-99/019. Other services for which DT has been granted nondominant status deal with connections to mobile satellite services (RegTP Case 4e-99-038) and free phone services (RegTP Case 4e-99/054).

⁷ See German Telecommunications Act, § 14 (2).

⁸ See European Commission Directive 97/33/EC, Article 8(2).

account for each of its subsidiaries in non-EU countries as a result of corporate law requirements.⁹ For international tax reasons as well, companies have no interest in subsidizing their foreign subsidiaries, because they wish to avoid being taxed for such transactions.¹⁰

In addition to accounting separation, DT's foreign subsidiaries — such as max.mobil in Austria and One2One in Great Britain — are substantially separate from both DT and T-Mobile in several other respects. For example, such subsidiaries all have separate corporate identities from DT and largely separate officers and directors, and transactions between and among these subsidiaries, DT, and T-Mobile are negotiated and conducted on a separate contractual basis. See Reply Comments at 18-19.

3. Please describe how DT's employer rights and obligations (e.g., hiring, termination, benefits) with respect to its civil service employees differ from the company's rights and obligations with respect to its non-civil service employees. Are the expenses of DT's civil service obligations, for example salaries and/or retirement funding, defrayed by the German government?

DT's employees who have civil servant status enjoy the following special rights under German law: Their salaries are set by statute rather than by DT or by collective bargaining; they are protected from unilateral termination except in extraordinary, statutorily defined circumstances; and their pension benefits are set at statutorily defined levels.¹¹ In addition, the government confers on those employees the usual privileges and incidents of civil servant status: The government guarantees their pension benefits, and it contributes on their behalf to government health care and pensions. DT's privatization in 1995 could not alter these employees' statutory rights. But DT does not receive any financial advantage as a result of its remaining civil servant employees. To the contrary, civil service obligations impose substantial costs on DT. For example, DT is required by law to contribute an amount equal to 33 percent of the civil servants' total income toward their government pensions, compared to a contribution for all other employees equal to approximately 11 percent of their total income.

⁹ See, e.g., German Commercial Code, § 242.

¹⁰ See Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, Aug., 29, 1989, U.S.-F.R.G., art. 9, 1708 U.N.T.S. 3 (“Where . . . an enterprise of a Contracting State participates . . . in the . . . capital of an enterprise of the other Contracting State . . . and . . . conditions are made or imposed between the two enterprises in their commercial or financial relations that differ from those that would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.”).

¹¹ See Basic Law Article 33 (GG); Federal Civil Service Act (Bundesbeamtengesetz); Federal Pay Act, § 2 (Bundesbesoldungsgesetz); Civil Service Benefits Act, § 3 (Beamtenversorgungsgesetz).

4. What options do carriers have to bypass DT facilities when bringing traffic into Germany from European countries where there are landing stations for U.S.-Europe submarine cable landing stations? Are there any German or European laws or regulations that ensure non-discrimination with regard to non-DT traffic that terminates in landing stations in Europe owned or controlled by DT?

Carriers have numerous options to bypass DT facilities when transporting Germany-bound traffic. Carriers can route their traffic into any point in Germany without using any DT facilities by using Vodafone's facilities from the United States (via the United Kingdom) and Vodafone's submarine cable landing station in Grossheide, Germany. Carriers also can connect to other pan-European network operators' backbone facilities at submarine cable landing stations in the Netherlands, Belgium, or France, to send traffic to any point in Germany. Carriers that own and operate such network facilities that transport traffic into Germany from other European countries include Global Crossing, Worldcom, KPN-Qwest, Colt, Equant, Global TeleSystems, and Carrier1, among many others. Moreover, carriers are able to construct new cable landing sites in Germany in relatively short order, without even having to obtain a cable landing license.

The variety of alternatives to DT's transmission facilities makes clear that no bottleneck exists for international services in Germany. Indeed, the fact that DT's wholesale international services have been ruled nondominant, based on the reduction of DT's market share to less than 33 percent, underscores the competitiveness of the international services market generally. In any event, German and European Union antitrust laws act as safeguards against potential discriminatory conduct.¹²

5. What percentage of the German domestic long distance market is controlled by DT?

RegTP, the agency responsible for regulation of the long distance market, has not published DT's market share for domestic long distance separately from all other services. Nor has the European Union published such information. RegTP's *Mid-Year Report 2000* does indicate, however, that DT controlled 60 percent of the markets for domestic long distance, international, and fixed-to-mobile calls.¹³ RegTP is scheduled to release its Annual Report for 2000 on February 13, 2001.

6. What percentage of business and residential local loops in Germany is controlled by DT?

RegTP has not published any data indicating the percentage of business or residential loops in Germany that are controlled by DT. However, DT and its competitors have reached at

¹² See German Act Against Restraints of Competition, § 19 and 20; EC Treaty, Article 82.

¹³ Federal Republic of Germany, Regulatory Authority for Telecommunications and Posts, *Mid-Year Report 2000*, at 13, available at www.regtp.de/en/market/start/fs_15.html ("RegTP *Mid-Year Report 2000*").

least 87 local loop access agreements.¹⁴ In addition, many city-owned carriers and other entities (e.g., NetCologne and Colt) have deployed local network infrastructure of their own, and 18 carriers have been awarded licenses to provide service using wireless local loops.¹⁵ Other alternative providers include broadband cable operators, which have access to more than 25 million homes, and electric utilities. As a result, approximately 50 percent of towns in Germany with more than 50,000 inhabitants, and 64 percent of Germany's 83 largest towns and cities, have a choice of at least one alternative provider, and new entrants handle over 20 percent of the total volume of calls placed in Germany.¹⁶

7. Please explain the discrepancy between the weighted average cost of capital estimates provided in the statements by Sidak (at 14) and Fisher (at 8) included in the appendices to the Applicants' Reply.

The Declaration of Gregory Sidak fully explains the methodology he employed in calculating DT's weighted average cost of capital ("WACC").¹⁷ Because we are not privy to Ambassador Richard Fisher's methodology, however, we cannot explain with any degree of certainty the discrepancy between the WACC estimate for DT provided by Mr. Sidak (11.7%) and that provided by Ambassador Fisher (5.32%). Most likely, this discrepancy results from the use of different values for DT's average borrowing rate and return on equity. Because these components of the equation are subject to change as a result of differing methodologies, the results are subject to change as well.¹⁸

Importantly, the overarching point made by both Mr. Sidak and Ambassador Fisher is exactly the same: An analysis of the WACC of many of the leading privatized and partially government-owned telecommunications carriers fails to demonstrate that DT has preferential access to capital vis-à-vis other global telecommunications companies. In Mr. Sidak's analysis, he showed that DT's WACC is actually *higher* than that of Sprint, SBC, AT&T, BellSouth, and Verizon, all fully privatized corporations. Similarly, Ambassador Fisher concluded that DT's WACC is only slightly lower than that of Verizon or BellSouth.

¹⁴ European Commission, *Sixth Report on the Implementation of the Telecommunications Regulatory Package*, Annex 2, at 123 (Dec. 7, 2000).

¹⁵ *RegTP Mid-Year Report 2000* at 9.

¹⁶ *Id.* at 12-13.

¹⁷ See Sidak Declaration at 12-14 (Exh. B to Reply Comments).

¹⁸ Notably, the market risk premium of 8.4 percent used by Mr. Sidak — and not by Bloomberg (Ambassador Fisher's source) — is a standard estimate used in leading text books. See, e.g., Richard A. Brealey and Stewart C. Myers, *Principals of Corporate Finance* 180 (5th ed. 1996).

RECEIVED

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

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

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 portent 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 R. HOLLINGS
U.S. Senate
December 13, 2000

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 DI f.p.

COPY

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

RECEIVED

DEC 13 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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
GLOBAL TELESYSTEMS, INC.

December 13, 2000

Grier Raclin
Global TeleSystems, Inc.
on behalf of Global TeleSystems
(Deutschland) GmbH
4121 Wilson Boulevard
8th Floor
Arlington, VA 22203
(703) 236-3710 (Telephone)
(703) 236-3605 (Facsimile)

Troy F. Tanner
David D. Rines
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Telephone)
(202) 424-7645 (Facsimile)

Counsel for Global TeleSystems, Inc.

- (3) To accept effective contractual penalties for late delivery or non-delivery;
- (4) To accept shorter forecasting intervals by competitors and to reduce the contractual penalties for ordering shortfalls to a reasonable level; and
- (5) To grant RegTP and competitive providers access to DTAG's internal provisioning standards in order to establish an effective system for automatic performance measurement.

These conditions will address serious competition issues in Germany that, if left unchecked, will have an adverse effect on competition in the U.S. market as well. Taken together, they ensure that competitive carriers will be able to provide consumers with high-quality, low-cost, reliable services. They also ensure that DTAG, a government-owned and controlled dominant foreign carrier, will be unable to leverage its advantages to the detriment of U.S. consumers.

file DT 4.p.

Comments of Novaxess
IB Docket 00-187
December 13, 2000

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

RECEIVED

DEC 13 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

Marc Destree
Chief Executive Officer
Novaxess B.V.
Adammium
Joop Geesinkweg 222
1096 AV Amsterdam
Netherlands
(31) 20 798-9898 (Telephone)
(31) 20 798-9899 (Facsimile)

Andrew D. Lipman
Axel Spies
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Telephone)
(202) 424-7545 (Facsimile)

Counsel for Novaxess B.V.

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 Internet 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>



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

RECEIVED

JAN - 8 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
VOICESTREAM WIRELESS)
CORPORATION, and)
)
POWERTEL, INC.,)
)
Transferors,)
)
and)
)
DEUTSCHE TELEKOM AG,)
)
Transferee,)
)
Applications for Consent to Transfer of Control)

IB Docket No. 00-187

REPLY IN SUPPORT OF
APPLICATIONS FOR CONSENT TO TRANSFER OF CONTROL

Cheryl A. Tritt
Louis Gurman
Doane F. Kiechel
Christa M. Parker
MORRISON & FOERSTER
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1500

John T. Nakahata
Karen L. Gulick
Samuel L. Feder
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth St., N.W.
Washington, D.C. 20036
(202) 730-1300

Counsel for VoiceStream Wireless Corp.

William T. Lake
John H. Harwood II
William R. Richardson, Jr.
Matthew A. Brill
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Hans-Willi Hefekäuser
Wolfgang Kopf
Andreas Tegge
DEUTSCHE TELEKOM, INC.
1020 Nineteenth Street, N.W., Suite 850
Washington, D.C. 20036
(202) 452-5100

Counsel for Deutsche Telekom AG

Moreover, DT and T-Mobile enter into written contracts to prescribe the terms of their relationship. For instance, DT and T-Mobile have entered into a licensing agreement under which T-Mobile must pay DT an annual license fee and must comply with fixed guidelines at the risk of financial penalties for noncompliance. T-Mobile contracts with a separate DT subsidiary, T-Nova Deutsche Telekom Innovationsgesellschaft mbH, for research and development work, but T-Mobile also is free to, and does, utilize other research and development.

Second, within T-Mobile, VoiceStream and T-Mobile's existing operating subsidiaries will be separate entities. Several other wireless subsidiaries that DT owns through T-Mobile, including One-2-One in the United Kingdom and max.mobil in Austria, maintain separate corporate identities, keep separate books of account, and have their own officers and employees. Apart from using DT's international network for inter-country traffic, those wireless subsidiaries have no substantial overlap with DT or with each other. Transactions between and among DT, its wireless subsidiaries, and its other subsidiaries (such as IT or systems solutions companies that may provide services to wireless subsidiaries) are negotiated and conducted on a separate contractual basis. VoiceStream's relationship with DT, T-Mobile, and other DT subsidiaries is expected to involve the same separation.

2. *DT Could Not Leverage Any "Bottleneck" Control of Local German Wireline Facilities To Undermine Competition in the U.S. Wireless Market.*

The German Competitors and Senator Hollings also assert — again without any factual or analytical support — that DT will be able to leverage its position in wireline local telecommunications markets in Germany to impede competition in the U.S. wireless

telecommunications market.^{66/} These assertions are at best fanciful and have already been considered and rejected by DOJ.

The Commission has long recognized that lack of overlap between a mobile operator's service territory and the service territory of an affiliated dominant wireline carrier eliminates the threat that a carrier will use its bottleneck control of local exchange facilities to favor its wireless affiliate.^{67/} In this case, the facts further underscore DT's inability to leverage any "bottleneck" control it allegedly has in its wireline network in Germany into the wireless market in the United States. As discussed above, DT's provision of local wireline services in Germany is subject to strict regulatory oversight by RegTP that forecloses any possibility of DT's discriminating in the termination of wireless calls originating in the United States (or elsewhere). Moreover, VoiceStream will be subject to the Commission's dominant carrier regulations with respect to the U.S.-Germany route and two other routes.^{68/} This regulatory oversight, together with the miniscule amount of U.S.-Germany traffic handled by VoiceStream and DT's existing U.S. affiliate,^{69/} remove any possible incentive for DT to attempt to favor VoiceStream with lower termination charges (or the like). Because DT would have to apply any reduced charges to *all* carriers terminating traffic, any savings associated with VoiceStream traffic would be far outweighed by foregone revenue associated with the vastly greater amount of traffic terminated by other carriers. Accordingly, leveraging of "bottleneck" control is simply not an issue here.

^{66/} See Comments of Senator Hollings at 10-12; Comments of GTS at 25; Comments of Novaxess at 10.

^{67/} See, e.g., *CMRS Safeguards Order*, 12 FCC Rcd at 15693 ¶ 39.

^{68/} See VoiceStream-DT App. at 31; Powertel-DT App. at 21-22.

^{69/} See VoiceStream-DT App. at 24, 32.

RECEIVED

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

during the auction.¹⁵ Such conditions demonstrate that rather than an autonomous bidder, VoiceStream will serve as an agent for Deutsche Telekom and the German government in the December 12 auction.

b) Financial backing of the Government

The fact that the German government controls Deutsche Telekom also is clearly recognized by the financial community. For example, Deutsche Telekom's recently released 3rd Quarter financial report of October 31, 2000, shows the accumulated debts of Deutsche Telekom to have increased dramatically to an overwhelming DM 121.5 billion (approximately US \$53 billion). Despite this burden, Deutsche Telekom is still able to easily attract capital because lenders are aware that the German government, as Deutsche Telekom's principle shareholder, will back the debts of Deutsche Telekom. For instance, the German government already provides on-going financial support by serving as guarantor of almost EUR 32 billion of Deutsche Telekom's liabilities.¹⁶ This preferred status appears likely to continue post transaction – in other words – without regard to whether the German government's stake in the combined entity is diluted.

The financial community has recognized this benefit of government ownership and control and has rewarded Deutsche Telekom with substantial loans that have made it possible for it to bid DM 16.6 billion in the German UMTS auction and put forth high bids in other European countries. Deutsche Telekom's unique status as a government owned carrier, therefore, confers on it a tremendous competitive advantage in relation to its private sector counterparts that lack such preferential access to capital.

c) Constitutional Protection of Deutsche Telekom Employees

Deutsche Telekom's employees also enjoy special protection under Art. 143 b of the German Constitution ("Basic Law"). This protection is conferred due to Deutsche Telekom's status as a former integral part of the German Post monopoly ("Deutsche Bundespost Telekom"):

Article 143b [Privatization of the Deutsche Bundespost (Federal Post)]

....

(3) Federal civil servants employed by the Deutsche Bundespost shall be given positions in the private enterprises that succeed to it, without prejudice to their legal status or the responsibility of their employer. The enterprises shall exercise the employer's authority. Details shall be regulated by a Federal law.

¹⁵ *Id.*

¹⁶ "Deutsche Telekom: Germany Online Goes Global," Precursor Group, October 25, 2000.

file DT 4.p.

Comments of Novaxess
IB Docket 00-187
December 13, 2000

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

RECEIVED

DEC 13 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

Marc Destree
Chief Executive Officer
Novaxess B.V.
Adammium
Joop Geesinkweg 222
1096 AV Amsterdam
Netherlands
(31) 20 798-9898 (Telephone)
(31) 20 798-9899 (Facsimile)

Andrew D. Lipman
Axel Spies
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Telephone)
(202) 424-7545 (Facsimile)

Counsel for Novaxess B.V.

In the DTAG/VoiceStream merger agreement, DTAG has agreed to use reasonable efforts after the closing to recommend to the shareholders and organizational bodies of DTAG that they include on the Supervisory Board a person nominated by VoiceStream in consultation with DTAG. One may doubt whether this commitment is a firm legal obligation. In any event, one representative of the U.S. interest (out of 20) will *not* significantly diminish the German Government's influence.

b) Financial backing of the Government

According to DTAG's recently released 3 Q financial report of October 31, 2000, the accumulated debts of DTAG have increased dramatically to a gigantic DM 121.5 billion (approximately US\$ 53 billion). It is only possible for DTAG to bear this burden because its lenders must believe that the German Government, as DTAG's principle shareholder, will bail the company out in case it runs into serious financial difficulties. Counting on this support, international banking consortia were prepared to fund DTAG's recent bid in the German UMTS auction of DM 16.6 billion and high bids in other European countries. In view of the tremendous debts of DTAG, the current rating of single A reflects the financial backing of the German Government appropriately. In addition, it is highly unlikely that the German Government will reduce its participation in DTAG. Although the Applicants, state in their SEC filing that "the Federal Republic of Germany has publicly stated its intention to substantially reduce its ownership of DTAG's shares,"⁸ there is no commitment to any reasonable time frame and no definition what the term "substantially" means. In fact, it is improbable that the German Government will sell its shares in DTAG in the near future. A German government official

⁸ At p. 123.