

9. Other than the Articles of Incorporation, please provide copies and certified translations of DT's other organizational documents (e.g., the equivalent of the By-laws) which, together with the Articles of Incorporation, show how many directors can be appointed by the German government and Kreditanstalt für Wiederaufbau ("KfW") and to which of DT's boards.

There are no organizational documents other than the Articles of Incorporation that address the number of directors that can be appointed by the German government and KfW to the Supervisory Board or Board of Management.

10. Please provide an explanation of how DT's dual board structure operates, including an explanation of the duties/powers of each of the boards and whether, and to what extent, individuals may be members of both boards. In addition, please identify the current members of each of the boards with an annotation as to who nominated each of them.

As required by the German Stock Corporation Act, DT has a two-tiered board system under which the Board of Management is responsible for managing the company day-to-day and representing it in dealings with third parties, and the Supervisory Board appoints and removes the members of the Board of Management and broadly oversees the management of the company. A person may not serve on both boards simultaneously.²⁰ Members of both boards owe a duty of care and loyalty to the corporation and its shareholders and employees. German law prohibits shareholders from using their influence on DT to cause a member of either board to act in a way that is harmful to DT; any violation of this prohibition can result in an award of damages against the offending shareholder.²¹

The members of the Board of Management, who shall be at least two in number, are appointed by the Supervisory Board.²² The Supervisory Board appoints a Chairman and Deputy Chairman, and additional officers may be appointed.²³ The Board of Management takes action by simple majority vote, unless otherwise provided by law. The German Stock Corporation Act requires the Board of Management to "manage the company under its own responsibility" and precludes delegation of responsibility to the Supervisory Board.²⁴ The Board of Management must notify the Supervisory Board of any commitment to acquire an interest of more than 25 percent of another company or to increase or sell such an interest.²⁵ Moreover, certain business

²⁰ See German Stock Corporation Act § 105.

²¹ See generally Deutsche Telekom Articles of Incorporation (attached as Exhibit A to Application), §§ 6-17; Deutsche Telekom SEC Form 20-F/A, at 109-112 (filed Dec. 5, 2000).

²² Deutsche Telekom Articles of Incorporation, § 6(1).

²³ *Id.* § 6(3).

²⁴ German Stock Corporation Act §§ 76, 111(4).

²⁵ Deutsche Telekom Articles of Incorporation, § 8(2).

transactions that affect the corporate structure or strategy or that meet other criteria must be approved in advance by the Supervisory Board.²⁶

The Supervisory Board consists of 20 members, 10 of whom represent the shareholders and 10 of whom represent the employees.²⁷ The shareholders and employees elect their Supervisory Board members for terms of approximately five years.²⁸ The Board elects a Chairman and Deputy Chairman.²⁹ The current Supervisory Board will propose a new slate of members on April 11, 2001, in anticipation of the shareholder meeting scheduled to occur in May 2001. Members of the Supervisory Board may be removed only by a majority of at least three-quarters of the votes cast by the relevant class of shareholders or employees.³⁰ The Supervisory Board meets at least four times per calendar year. Ten members constitute a quorum. The Board generally takes action by a simple majority of the votes cast.

The members of the Board of Management and Supervisory Board of DT are as follows:

Board of Management

All members of the Board of Management were appointed by the Supervisory Board. They are:

Dr. Ron Sommer (Chairman)
Josef Brauner
Detlev Buchal
Jeffrey Hedberg
Dr. Hagen Hultsch
Dr. Heinz Klinkhammer
Dr. Karl-Gerhard Eick
Gerd Tenzer

Supervisory Board

All members of the current Supervisory Board have been elected by the shareholders or have replaced a departing member by way of judicial appointment.³¹ The current members of the Supervisory Board are listed below, with annotations noting the Chairman, Vice Chairman, German government representative, and KfW representative. No other members of the Supervisory Board are representatives of the German government or KfW.

²⁶ See *id.* § 9.

²⁷ See *id.* § 10(1).

²⁸ *Id.* § 10(2).

²⁹ *Id.* § 11.

³⁰ German Stock Corporation Act, § 103.

³¹ *Id.* § 104

Shareholder Representatives:

Dr. Hans-Dietrich Winkhaus (Chairman)
Gert Becker
Dr. Dieter Hundt
Dr. André Leysen
Hans W. Reich (KfW)
Prof. Dr. Helmut Sihler
Prof. Dr. Dieter Stolte
Dr. Hubertus von Grünberg
Bernhard Walter
Prof. Dr. Heribert Zitzelsberger (German Ministry of Finance)

Employee Representatives:

Rüdiger Schulze (Vice Chairman)
Josef Falbisoner
Waltraud Litzenberger
Michael Löffler
Rainer Koch
Rainer Röhl
Wolfgang Schmitt
Michael Sommer
Ursula Steinke
Wilhelm Wegner.

11. You have stated that the government and KfW together are entitled to appoint up to 10 directors of the supervisory board but at this time have appointed only two such members. Please explain who appoints the 8 other directors.

Although the German government and KfW currently are entitled *de jure* to appoint up to 10 members of the Supervisory Board, that has not been true *de facto*, and the German government no longer will have the *de jure* ability to appoint any board members after the close of these transactions. After these mergers, the German government and KfW together will no longer own a majority of DT's stock.

Shareholder representatives on the Supervisory Board are appointed as follows. The sitting Supervisory Board nominates a slate of 10 new members to represent the shareholders, including the two members representing the federal government and KfW. Other shareholders also may nominate slates. DT's shareholders vote on the proposed slates. Thus, all 10 shareholder-elected members are chosen by a simple majority vote of the shareholders.³² At the next shareholder meeting, shareholders either may approve the slate of members proposed by the

³² See Deutsche Telekom Articles of Incorporation, § 10(2); see also German Stock Corporation Act § 102.

current Supervisory Board or instead may vote for an alternative slate proposed by any shareholder.

12. Are there term limits or other restrictions currently in place that would prevent the government (or KfW) from using its power post-merger to appoint all 10 directors?

While there is no limit on the number of terms that a member of the Supervisory Board may serve, there are several important restrictions on the German government's ability to appoint Supervisory Board members. Most importantly, because the shareholder-elected members of the Board are chosen by a simple majority vote (without any cumulative voting), and the German government and KfW together will hold less than half of DT's stock following the proposed mergers, the German government and KfW will not have the power unilaterally to elect all 10 shareholder-elected members of the Supervisory Board.³³ Moreover, it is the internal practice of the German government with respect to DT to seek election of no more than two of its representatives to DT's Supervisory Board. That practice is consistent with the election of government representatives to the Supervisory Boards of comparable corporations in which the government owns shares, such as Deutsche Post AG (one government representative among 12 board members), Deutsche Postbank AG (three out of 16), Bundesdruckerei GmbH (two out of 12), and Deutsche Bahn AG (three out of 16). Finally, members of the Supervisory Board may be removed only by a majority of at least three-quarters of the votes cast by the relevant class of shareholders or employees.³⁴ Thus, even without the dilution caused by the mergers, the German government and KfW have no power unilaterally to remove Supervisory Board members.

13. What power (direct or indirect) does the government (or KfW) have to make appointments to the managing board or directly to line management?

Under DT's Articles of Incorporation, the Supervisory Board alone appoints the members of the Board of Management.³⁵ Apart from its two votes (out of 20) on the Supervisory Board, the German government (including KfW) has no power to make appointments to DT's Board of Management or line management.

14. Other than attending shareholder meetings and the annual report, what other reports are produced for the government, KfW or their nominees and what other meetings are held for the benefit of the government or KfW?

Because all large German stock corporations — irrespective of whether they have any governmental ownership — meet with and provide information to the German government on public policy matters, we assume that the Bureau's question focuses on extraordinary reports and

³³ As noted above, as shareholders the government and KfW are eligible to elect only up to 10 of the 20 members on the Supervisory Board; the other 10 are elected by DT's employees. See Deutsche Telekom Articles of Incorporation, § 10(1).

³⁴ German Stock Corporation Act, § 103.

³⁵ See Deutsche Telekom Articles of Incorporation, § 6.

meetings that (a) concern the government as shareholder, rather than as sovereign, and (b) confer benefits on the government or KfW that are not available to other shareholders or to all members of the Supervisory Board. As a matter of principle, it would be impossible under the German Stock Corporation Act to direct information regarding the management of DT only to the governmental members of the Supervisory Board, because such information necessarily would become available to the entire Supervisory Board and, in turn, its various constituencies.³⁶ Consistent with this principle, DT does not hold meetings or produce reports that treat the German government or KfW preferentially vis-à-vis other shareholders or members of the Supervisory Board. Other shareholders and members of the Supervisory Board are also able to obtain information from or meetings with company officials on issues of concern to them.

15. Other than through voting at shareholder meetings and regulation through RegTP, what influence over DT's business strategy does the government have?

There are no formal or informal mechanisms for the German government to exercise any influence over DT's business strategy, apart from the government's votes at shareholder meetings. Of course, regulation by RegTP also affects DT's business decisions, just as with other participants in regulated industries.

16. You state that "[t]he government has always cast its votes in line with the majority of other shareholders..." (See Application p.10). Please advise whether the government is, in any way, bound to vote in this manner and, if so, please provide supporting documentation.

There is no formal mechanism that binds the German government to vote in line with the majority of other shareholders.

17. The applicants state that the total government share of DT is currently 60%, and that this share will decrease to approximately 45.7% if the VoiceStream merger is consummated and to approximately 44% if the Powertel merger is subsequently consummated. Section 1.05 of the DT-VoiceStream merger agreement provides that VoiceStream shareholders have the right to receive (1) all cash, (2) all DT shares, or (3) a mix of cash and shares. In addition, the merger agreement calls for adjustments to the cash or stock exchange based on market price. Have the shareholders made their election? How does the possible election combination affect the dilution of the government's interest in DT? What are the assumptions regarding shareholder election and stock value that the statements regarding dilution are based upon? What would the percentage of DT held by the government be if all VS shareholders tendered their shares for an all cash option?

Regardless of what options shareholders elect under the merger agreement, the German government and KfW will no longer own a majority of DT's stock after the mergers close. The VoiceStream shareholders have not yet made their elections. As outlined in section 1.05(i) of the VoiceStream-DT Merger Agreement, Election Forms will "be mailed to record holders of VoiceStream Common Shares not less than forty five (45) days prior to the anticipated Effective

³⁶ See German Stock Corporation Act, § 90.

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Washington, DC 20554
December 13, 2000

In the Matter of)

VoiceStream Wireless Corporation)
Powertel, Inc.)

IB Docket No. 00-187

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.

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government attempted to account for DT's contribution to the German forced-labor fund as a governmental, rather than corporate, contribution; and (4) DT purported to waive sovereign immunity in an SEC filing.^{134/} None of these elements, singly or together, remotely establish that DT will act on behalf of or in connection with the German government in using the FCC licenses over which it seeks to obtain indirect control. Indeed, these factors simply reflect (if anything) the historical fact that DT was *formerly* a state-owned business.

1. While a portion of DT's old debt is guaranteed by the German government, that is unremarkable in light of DT's former status as a government entity. When DT became a stock corporation (*i.e.*, was privatized) in 1995, the German government chose to transfer all outstanding debt to the new corporation (rather than retaining such debt as a governmental obligation, as has occurred in other instances). Because all pre-1995 debt instruments were issued by the German government, their repayment remains backed by the German government. To remove the governmental guarantee that attaches to this pre-1995 debt would require the consent of the holders of the debt instruments and indeed would constitute a default if undertaken unilaterally. By contrast, no debt instrument issued by DT since privatization in 1995 is subject to any guarantee by the German government; such debts are backed by DT alone. In any event, in the five years since privatization, DT has paid off about half of the debt that was outstanding in 1995, and by 2004 virtually all of the remaining debt will be paid off by DT under its scheduled payments.

2. The civil service-like benefits extended to some of DT's employees are another relic of DT's former status as being part of the German government. When DT became a private corporation more than five years ago, its civil service employees were granted the same

^{134/} Comments of Senator Hollings at 5-8.

8. Please provide an English version of DT's annual report or comparable document. What has been the schedule of the retirement of government backed debt since January 1995, and what is the anticipated schedule until the debt is fully retired?

A copy of DT's supplemental annual report (SEC Form 20-F/A) is attached at Appendix A.

As DT stated in its Reply Comments, the company has already paid off more than half of the 63.9 billion Euros worth of government-guaranteed debt that was outstanding in 1995.¹⁹ Approximately 97 percent of that government-backed debt will be paid off by the year 2004. The following chart provides the percentage and amount of government-backed debt that remained (or will remain) after each year from 1995 to 2005:

<u>Year</u>	<u>% of Guaranteed Debt Remaining</u>	<u>Amount of Such Debt Remaining</u>
1995	86.5%	55.3 billion Euros
1996	77.3%	49.4 billion Euros
1997	68.9%	44.0 billion Euros
1998	60.3%	38.5 billion Euros
1999	50.1%	32.0 billion Euros
2000	44.1%	28.2 billion Euros
2001	35.4%	22.6 billion Euros
2002	22.7%	14.5 billion Euros
2003	18.2%	11.6 billion Euros
2004	3.1%	2.0 billion Euros
2005	3.0%	1.9 billion Euros.

As of 2005, the remainder of the government-backed debt will consist of zero-coupon bonds worth 650 million Euros (due 2019/2020) and other debt securities due in 2016.

¹⁹ See Reply Comments at 42.

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¹⁵ *Id.*

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

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.

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¹³⁴ Comments of Senator Hollings at 5-8.

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

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).