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United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
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November 30, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Chairman William E. Kennard
Federal Communications Commission
445 12th St., SW
Room 8-B201
Washington, DC 20554

RE: IB Doc. No. 00-187

Dear Chairman Kennard:

Thank you for your letter of November 21, 2000, regarding the proposed merger between VoiceStream Wireless and Deutsche Telekom ("DT"). In particular, I draw your attention to your statement that the "purchase of a U.S. carrier by a foreign-government-controlled company presents unique competition issues." Your acknowledgment that Deutsche Telekom is a foreign-government controlled carrier, and your assurance that the Commission, beginning with its International Bureau, "will scrutinize very carefully" any transaction in which such "carrier seeks to control a U.S. carrier" assumes heightened urgency in light of the impending December 12, 2000, reauction of certain C and F Block spectrum licenses.¹

Specifically, I am filing this letter as a request that you use your authority to issue a declaratory ruling as to whether VoiceStream may participate in the upcoming spectrum auctions in light of Deutsche Telekom's investment of 5 billion dollars in VoiceStream and the associated contractual conditions accompanying that investment.

From the facts publicly available, and for the reasons described below, it appears both that VoiceStream, as a result of the 5 billion dollar investment and associated contractual conditions, is already a representative of Deutsche Telekom, and thereby of the German government and that, in any event, the Deutsche Telekom investment is well above the statutory

¹ Moreover, recent events in Germany suggest that the German government concurs in this opinion. In response to a request to contribute to a foundation to compensate the victims of Nazi-era forced and slave laborers, the German Finance ministry determined that Deutsche Telekom's contributions to the fund would be classified as state or government contributions rather than as private corporate contributions.

Debate over Telecom Stake Mires Bid, *The Financial Times*, October, 18, 2000.

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25 percent threshold requiring FCC approval. Because the Commission has not approved this additional foreign investment, and under 310(a) cannot approve this investment, participation by VoiceStream in the December 12 spectrum auction would be inappropriate and would subject the auction to additional and unnecessary litigation risk.

First, I refer you to the September 6, 2000, \$5 billion cash transfer from Deutsche Telekom to VoiceStream, which, according to press accounts, is intended for use in the December 12 auction and to the SEC Form F-4, filed by DT on October 4, 2000. Form F-4 discloses that Deutsche Telekom will be formulating an auction plan for VoiceStream, and requires VoiceStream to obtain prior approval from Deutsche Telekom's "Acquisitions Committee," comprised solely of Deutsche Telekom senior management officials, before it can participate in the auction or deviate from the schedule during the auction. Such conditions make it clear that Deutsche Telekom's \$5 billion investment is far from a passive one; rather, it appears that VoiceStream is merely a Deutsche Telekom agent and that Deutsche Telekom will be the effective bidder. This \$5 billion investment arrangement was not reviewed by the Commission and, on its face, raises the very "unique" foreign ownership issues (separate from the overall merger) which you have said you will address in a timely manner.

Second, the cash infusion alone may give Deutsche Telekom an ownership interest greater than now permitted by 47 U.S.C. § 310(b)(4). The \$5 billion transaction is described by the parties as the purchase of a new class of stock, with limited voting power. However, the Commission's rules provide that its foreign ownership analysis does not merely count the number of shares but also examines the percentage of capital being invested by the foreign entity in relationship to the total invested capital.² This conclusion was restated, ironically enough, in the NextWave Personal Communications, Inc. matter, where the Commission acknowledged that its 310(b)(4) analysis also measures the "benefits of ownership" (12 FCC 2030 at par 36). Using the same "paid-in capital" measure in the instant case, adding the \$5 billion investment from Deutsche Telekom to VoiceStream's previously reported shareholder equity of \$ 7.8 billion leads to the conclusion that the Deutsche Telekom investment represents 39% of the new total of \$ 12.8 billion in paid-in equity.³

These facts lead to the unmistakable conclusion that the limitations contractually imposed on VoiceStream's conduct make that company a "representative" of the German Government. Because we agree that Deutsche Telekom is a foreign government-owned carrier, were VoiceStream to be so "controlled" by Deutsche Telekom, as I previously have stated, Section 310(a) of the Act flatly bars VoiceStream from being a Commission licensee. In addition, and separately, if VoiceStream's ownership (beneficial or voting) was more than 25 percent attributable to Deutsche Telekom, then the Communications Act requires VoiceStream to seek and obtain additional authority under 47 U.S.C. § 310(b)(4) for that investment. I do not believe

²NextWave Personal Communications, 12 FCC Rcd 2030, Para 36 (Wireless Bureau, 1997).

³ The \$5 billion transaction appears to increase the foreign ownership in VoiceStream over what was already authorized. Additional investment requires additional approval under FCC rules. VoiceStream Wireless Corp., 15 FCC Rcd 3341 para. 20 (2000).

that this approval has occurred with regard to this specific transaction. Regardless, I believe I have raised two separate substantive questions about VoiceStream's qualifications to obtain additional Commission licenses and to participate in the December 12 auction.

Accordingly, the Commission's duty is plain; you should exercise your authority under Section 5(d) of the Administrative Procedure Act, and Section 1.2 of your own rules and issue a Declaratory Ruling resolving the foreign ownership issue implicated by the \$5 billion dollar investment and associated contractual requirements. If this controversy is left unresolved, there is a serious risk that the conduct of the auction will be fraught with uncertainty and may cause irrevocable harm to qualified bidders and to U.S. interests generally. As you well know, such declaratory relief is an appropriate action for "terminating a controversy or removing uncertainty" (47 C.F.R. § 1.2), and this step should be accomplished well ahead of the full merger review and prior to VoiceStream's participation in the December 12 auction.

Sincerely,


ERNEST F. HOLLINGS
Ranking Democrat

CC: Commissioner Ness
Commissioner Powell
Commissioner Furchtgott-Roth
Commissioner Tristani

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