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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 services[1] — 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).

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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

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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

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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.

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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 entreprise of the other Contracting State . . . and . . . conditions are made or imposed between the two entreprises 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

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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 German 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-á-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.

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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).

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:

Year	% of Guaranteed Debt Remaining	Amount of Such Debt Remaining
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.

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 of 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

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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 Hultzsch
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.

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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. Helmust 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 Röll
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

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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-á-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

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[36] *See* German Stock Corporation Act, § 90.

Time" (*i.e.*, the date the merger becomes effective with the filing of the Certificate of Merger with the Secretary of State of the State of Delaware). These forms must be returned by the "Election Deadline," which is five business days prior to the Closing Date set by the parties. *See* DT-VoiceStream Merger Agreement, § 1.03.

As described more fully in the Registration Statement (SEC Form S-4/F-4) filed February 9, 2001,[37] the basic consideration in the VoiceStream-DT merger is $30 in cash and 3.2 DT shares for each VoiceStream common share outstanding at the completion of the merger, and each VoiceStream stockholder is entitled to elect to receive this basic mix. VoiceStream stockholders also may elect to receive instead more cash and fewer DT shares, or more DT shares and less cash, by making a "cash" election or a "stock" election. However, the cash and stock elections are subject to proration to preserve an overall mix of $30 in cash and 3.2 DT shares for all of the outstanding VoiceStream shares taken together, and all three elections also are subject to a tax-related adjustment in some circumstances.

18. Please state whether DT, the German government, or KfW has entered into any other agreements that are currently in effect that permit a party to "put" (or otherwise sell) DT shares back to DT or KfW as recently occurred with France Telecom?

None of DT, the German government, and KfW has entered into any other agreement to sell DT shares back to DT or KfW as recently occurred with France Telecom.

19. Please provide a list of all DT shareholders holding 5% or more of the entire issued share capital of DT.

The German government and KfW are the only shareholders that hold 5 percent or more of the issued share capital of DT.

20. Has the total post-merger German government interest changed from 44% due to the 1.8% interest sold by France Telecom to the German government? If so, what will it be?

Yes, as a result of France Telecom's exercise of its option, the total post-merger interest of the German government has changed from our earlier estimate of approximately 44 percent. Our best estimate at this time is that the German government's post-merger interest will be approximately 45 percent. *See* Reply Comments at 37.

21. Please provide us with a copy of the Powertel-DT merger agreement.

A copy is attached at Appendix B.

22. As we requested during our ex parte meeting on January 19, 2001, please provide a more detailed legal and factual analysis of the paid-in capital issue raised in

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[37] We will submit a copy of the Registration Statement to the Commission on or about Monday, February 12. Attached to the Registration Statement are amendments the merger agreements.

connection with DT's $5 billion investment in VoiceStream, and particularly focus on how you would distinguish the present case from Fox [cite] and NextWave [cite]. Please explain how the amount of the aggregate consideration for the VS convertible preferred stock was calculated. Please explain why DT made the $5 billion investment in VS in exchange for convertible preferred stock rather than by simply acquiring common stock. Please explain the methodology used in calculating the ownership interest in VS that was purchased by DT when making the $5 billion investment.

Summary

Senator Hollings has argued that the $5 billion investment made by DT in VoiceStream in September 2000 in return for convertible preferred stock amounts to 39 percent of VoiceStream's "capital stock," as that term is used in section 310(b)(4) of the Act, rather than 11.49 percent. Senator Hollings argues that, under Commission precedent interpreting section 310(b)(4), DT's current share of VoiceStream must be judged by comparing DT's investment with VoiceStream's total "paid-in capital." This argument is simply wrong, and it is based on a misinterpretation of the *Fox* and *Nextwave* decisions that loses sight of the Commission's objective of determining the amount of "alien beneficial ownership."[38] Unlike transactions under review in *Fox* and *Nextwave*, share ownership is the only accurate means to evaluate alien beneficial ownership of VoiceStream.

Indeed, if the Commission were to apply a "paid-in capital" analysis to DT's investment in VoiceStream, it would greatly overstate the actual amount of alien beneficial ownership — contrary to the clear economic reality of the transaction. The Commission has expressly recognized that the "paid-in capital" methodology relied on by Senator Hollings "could present . . . problems when applied to widely-held corporations."[39] Use of a "paid-in capital" analysis here would (a) ignore the plain meaning of the term "capital stock," (b) disregard the Commission's prior interpretations of that statutory language in the context of analogous investments in public companies (including DT's investment in Sprint and British Telecom's proposed investments in McCaw and MCI), (c) be contrary to the Commission's own recent acknowledgement of those principles in clarifying its "equity/debt plus" rule, and (d) flout common sense. Adopting a "paid-in capital" test now for this transaction would amount to changing the rules of the road in the middle of the game — for no discernable public policy purpose.

In assessing compliance with section 310(b), the Commission "must examine the economic realities of the transactions under review,"[40] not distort them. As described below, the

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38 *Application of Fox Television Stations, Inc., for Renewal of License of Station WNYW-TV, New York, New York*, Memorandum Opinion and Order, 10 FCC Rcd 8452, 8470 (1995) ("*Fox I*").

39 *Id.* at 8474 ¶ 49.

40 *Application of Fox Television Stations, Inc. for Renewal of License of Station WNYW-TV, New York, New York,* Second Memorandum Opinion and Order, 11 FCC Rcd 5714, 5719 ¶ 14 (1995) ("*Fox II*").

Fox and *NextWave* decisions referred to above arose in entirely different factual contexts where, in the absence of any other reliable metric for assessing beneficial ownership, paid-in capital was the only useful analytical tool available to gauge the "economic realities." In contrast, here the public market for VoiceStream stock at the time DT contemplated its purchase *was* the economic reality that formed the basis for the parties' arm's-length negotiation of that purchase. Therefore, in the absence of any facts showing that the shares that DT ultimately purchase did not "fairly reflect" the extent of its ownership in such a public company,[41] both *Fox* and *NextWave* would support the proposition that those shares are, in fact, the most accurate measure of DT's stake in the company.

Background

On July 23, 2000, DT entered into an agreement to purchase 3,906,250 shares of voting preferred stock in VoiceStream for $5 billion.[42] It acquired those shares on September 6, 2000. Based on the total number of VoiceStream common shares outstanding at the time it acquired its preferred shares, DT's investment entitled it to only approximately 1.79 percent of the votes of VoiceStream.[43] However, the investment agreement also provides that, in the event the proposed merger of the two companies is terminated, DT may elect to convert each of its voting preferred shares into eight shares of VoiceStream common stock (i.e., into a total of 31,250,000 shares of common). Based on the number of shares outstanding at the time the investment was made, and similarly treating certain convertible non-voting preferred shares held by a subsidiary of Hutchison Whampoa Ltc. ("Hutchison") as converted, this holding of common stock would have represented approximately 11.49 percent of the shares (and votes) of VoiceStream on a fully diluted basis.[44]

DT's $5 billion investment was the product of an arm's-length transaction that reflected VoiceStream's then-current value in the market. It amounted to a $160 share price for the

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41 *Fox I*, 10 FCC Rcd at 8473 ¶ 47.

42 *See* Stock Subscription Agreement by and between VoiceStream Wireless Corp. and Deutsche Telekom AG, July 23, 2000.

43 DT's 3,906,250 preferred shares plus 214,458,732 outstanding common shares represented a total of 218,364,982 voting shares outstanding. *See* FCC Form 602 for VoiceStream Wireless Corporation (filed September 18, 2000), Attachment 1, at 3-4.

44 The shares of VoiceStream common stock then outstanding (214,458,732) combined with the common shares into which the preferred shares of both Hutchison (26,227,586) and DT (31,250,000) were convertible, represented 271,936,318 shares. *See id.* Because VoiceStream has since issued additional shares to other third parties and Hutchison has converted its non-voting preferred stock to common, DT's interest if converted to common shares would now represent only approximately 11.08 percent of the shares (and votes) of VoiceStream. For similar reasons, DT's current voting power based on its preferred stock is only approximately 1.53 percent. *See* FCC Form 602 for VoiceStream Wireless Corporation (filed January 12, 2001), Schedule A at 5.

common shares into which DT may convert its interest on termination of the merger — a price $1 less than the opening price of VoiceStream's stock two days before the execution of the agreement.[45] The market price DT agreed to pay for its shares did not entitle it to shareholder rights that are any different from the rights of all common shareholders, except that the preferred stock ranks senior in rights upon liquidation or dissolution of VoiceStream's common stock and 2.5 percent Convertible Junior Preferred Stock until converted to common stock and that DT's voting power remains only one-eighth of what it would be in the event of conversion.[46] DT's voting preferred stock casts its votes together with the VoiceStream common stock as a single class. It is also entitled to receive the same dividends and other distributions to which common shareholders are entitled, calculated on an as-converted basis.[47]

Although Senator Hollings does not provide a source for his assertion that VoiceStream had $7.8 billion in paid-in capital, he may have been referring to the amount of shareholder equity on VoiceStream's balance sheet, included in its recent SEC Form 10-Q/A. The balance sheet (attached hereto as Appendix C) reflects assets of $19.4 billion.[48] The excess of assets over current liabilities, long-term debt, and VoiceStream's preferred stock is reflected on that balance sheet as "Total shareholders' equity" in the amount of $7.8 billion, an amount that appears to be Senator Hollings's measure of the share of capital stock held by all other shareholders.[49]

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[45] *See* <http://chart.yahoo.com/t?a=05&b=03&c=99&d=12&e=31&f=00&g=d&s=vstr&y=0&z=vstr>.

[46] DT's preferred shares do carry a preference in liquidation of $1,280 per share, reflecting the price paid by DT for the eight shares into which each of its preferred shares may be converted, "and then shall be entitled to no further distribution or payment." Certified Designation at 4-5.

[47] DT's investment was made in preferred rather than common stock in order to provide DT with greater seniority rights. The particular features of the preferred stock were negotiated by the parties based on tax considerations, VoiceStream covenants limiting its assumption of additional debt without third party approval, and the desire by VoiceStream to minimize the voting rights of DT prior to consummation or termination of the merger.

[48] *See* VoiceStream Wireless Corp., SEC Form 10-Q/A, Dec. 5, 2000 (Appendix C), at 3; SEC Form 10-Q, Nov. 14, 2000, at 3.

[49] In fact, the actual "paid in capital" entry to the balance sheet at issue is not $7.8 billion, but $10.2 billion. *Id.* Thus, even under Senator Hollings' approach, the actual total of paid in capital would include this amount, plus $5 billion from DT, as well as $401 million in connection with the 2.5 percent convertible junior preferred. *Id.*

Analysis

Senator Hollings's use of paid-in capital or shareholder equity as a measure of capital stock in this case violates the plain language of the Communications Act. The question here is whether DT's shareholding constitutes "more than one-fourth *of the capital stock*" of VoiceStream. 47 U.S.C. § 310(b)(4) (emphasis added). In assessing how much of the capital stock any particular shareholder holds, the threshold question is what "capital stock" means. In the usual case, that clearly is not a matter of the different prices that shareholders have paid for their shares at different times. It is instead the measure of their equity interest — the economic stake in the corporation that they hold in consideration for their payments. This stake consists of the rights to vote and to receive dividends, and — as *Fox* held — to share in the "profits and losses" of the enterprise.[50] All of these are part of what *Fox* characterized as the "economic incidents of the [corporation's] operation."[51] Unlike the complex financing schemes evaluated in both *Fox* and *Nextwave*, in this case shares of paid in capital and shareholder equity do not reflect DT's stake in the profits and losses of VoiceStream. Thus, DT's equity stake in VoiceStream is not a function of the price it paid for its shares. That stake is no different, on a share-for-share basis, from that of any other shareholder of the corporation, regardless of what they may have paid at various times for their shares.[52]

When assessing the foreign ownership of publicly traded companies, the Commission has repeatedly measured ownership of capital stock in public corporations for purposes of section 310(b)(4) by analyzing the number of shares that foreign investors hold. In doing so, it has not — except in the "unusual" cases we discuss below — examined the "paid-in capital" for these shares.[53]

- In 1989, for example, the Commission reviewed a proposed British Telecom investment of $1.5 billion in McCaw, under which BT would be entitled to a specific share (22%) of McCaw's outstanding stock. The Commission did not seek to determine how much of McCaw's total paid-in capital this investment constituted; it simply found that the investment complied with the statute because

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50 *Fox I*, 10 FCC Rcd at 8474 ¶ 50.

51 *Id.* at 8456 ¶ 6.

52 Thus, as VoiceStream noted in its December 5, 2000, response to Senator Hollings, here the number of common shares into which DT's shares may be converted accurately reflects the "assumed post-investment value" of DT's investment (ignoring, for these purposes, the possibility of further dilution of that investment by the issuance of additional VoiceStream shares to holders of options and other contingent interests).

53 *See, e.g., Application of HLT Corporation and Hilton Hotels Corporation for Consent to Interim Transfer of Control of ITT Broadcasting Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 18144, 18152-53 ¶ 28 (1997) (accepting for 310(b)(4) analysis the estimated foreign ownership percentages issuing from Hilton's stockholder survey).

under the agreement BT was "acquiring less than one fourth of the capital stock of McCaw."[54]

- Similarly, in 1994, when BT entered into an agreement to acquire 20 percent of the outstanding shares of MCI for $4.3 billion, the Commission did not challenge the "count the shares" approach to an investment in such a public corporation, or insist on a paid-in capital measurement.[55]

- In 1996 (after the *Fox* decisions), when DT and France Telecom each sought to acquire an interest in Sprint, the agreement filed with the Commission made clear both that DT's interest would amount to 10 percent and that DT would acquire no more and no less than a 10 percent interest — even though the terms of the agreement contemplated payment by DT of as little as $ 3.5 billion or as much as $4.2 billion for those shares.[56] This significant potential difference in paid-in capital under the terms of the agreement did not alter the Commission's analysis.[57]

In none of these cases would it have made any economic sense to examine whether the price paid for these investments in public companies would have led to a different "capital stock" figure when compared with "paid-in capital" or any other historical valuation. As long as all shareholders are obtaining the same "economic incidents" of ownership for their shares, it should make no difference what the shareholder initially paid for his stock when measuring the portion of the corporation's "capital stock" held by a shareholder.

Assume, for example, that an initial investor in Microsoft paid $6 for 10 shares, and that an investor today would pay $6,000 for 10 shares. Both investors now have the same "economic incidents" of ownership, and they both would be credited with the same share of Microsoft's "capital stock."

Even when a capital analysis other than proportion of shares might be applicable, the Commission, in its broadcast attribution rules, has recently rejected reliance paid in capital alone. In clarifying on reconsideration how to calculate the amount of equity for purposes of its

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54 *See Request of McCaw Cellular Communications, Inc., Concerning Compliance with Section 310(b)(4) of the Communications Act (Alien Ownership) with Regard to an Investment in McCaw by British Telecom*, Memorandum Opinion and Order, 4 FCC Rcd 3784, 3788 ¶ 31 (1989).

55 *See Request of MCI Communications Corporation, British Telecommunications plc*, Declaratory Ruling and Order, 9 FCC Rcd 3960 (1994).

56 *See Sprint Corporation*, Declaratory Ruling and Order, 11 FCC Rcd 1850, 1851 ¶ 10 (1996).

57 *See id.* at 1857-58 ¶ 47.

"equity/debt plus" rule for ownership attribution,[58] the Commission agreed to permit the use of fair market value for these purposes in order to facilitate the "most accurate valuation"[59] so as to capture the appreciated value of the company.

Fox is fully consistent with the foregoing decisions. *Fox* involved the formation of Twentieth Holdings Corp. ("THC"), the parent of Fox Television Stations ("FTS"). FTS had been created to acquire six television stations that THC had agreed to purchase from Metromedia, Inc. Although News Corp. (an Australian firm) received only 24 percent of THC's stock when the company was formed, it contributed more than 99 percent of THC's capital. Most importantly, however, that disparity led to substantially different rights of ownership: News Corp. was "entitled to virtually all of the economic incidents of THC's operation," including "substantially all of THC's profits and losses" and "the right to all of THC's assets upon its sale or dissolution."[60]

But the Commission did not prescribe a paid-in capital analysis for every case; indeed, it expressly cautioned that use of a paid-in capital methodology "could present . . . problems when applied to widely-held corporations."[61] *Fox* does require the Commission to undertake a "*bona fide* assessment of the extent of foreign ownership interests in corporations."[62] But the paid-in capital approach employed to do so in that case was required only in the "unusual" circumstances posed there — where the two classes of stock created at the company's formation "ha[d] widely divergent characteristics."[63]

The Wireless Bureau's *NextWave* decision, relied upon by Senator Hollings, was an application of *Fox* to the same effect.[64] Indeed, in that case, it was impossible to count shares of stock, because the instruments at issue had been (improperly) characterized as debt rather than equity to begin with, and because those "Convertible Promissory Notes" were to "convert at an

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58 *See Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy*, Memorandum Opinion and Order on Reconsideration, FCC 00-438, at ¶ 28 & n.79 (rel. Jan. 19, 2001) ("*Attribution Reconsideration Order*").

59 *Attribution Reconsideration Order*, at ¶ 28.

60 *Fox I*, 10 FCC Rcd at 8456 ¶ 6, 8474 ¶ 50.

61 *Id.* at 8474 ¶ 49.

62 *Id.* at 8473 ¶ 48.

63 *Id.* at 8468 ¶ 36.

64 *See Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS License*, Memorandum Opinion and Order, 12 FCC Rcd 2030 (1997).

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

Conclusion

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

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

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

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65 *Id.* at 2057 ¶ 58.

66 *Fox I*, 10 FCC Rcd at 8471 ¶ 43.

67 *Fox II*, 11 FCC Rcd at 5719 ¶ 14.

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

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

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

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

69 *See id.*

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

79 *See id.* at 9243 ¶¶ 52-53.

80 *Id.* at 9245 ¶ 56 n.138.

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

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

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

Sincerely,

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

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

Counsel for Deutsche Telekom AG

[Additional counsel on next page]

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

82 VoiceStream-DT Application at 29 n.87.

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.

cc: attached service list

Edward A. Yorkgitis, Jr.
Paul G. Madison
KELLEY DRYE & WARREN L.L.P.
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600
Counsel for Powertel, Inc.