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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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

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new operating subsidiary, VoiceStream, and therefore over any licenses VoiceStream holds. This control stands in direct contravention to the prohibitions contained in section 310(a), and requires the Commission to deny approval of the transfer of control.

1. De Jure Control

The German Government's direct stake in Deutsche Telekom is 58%, giving it *de jure* control over DT, and over VoiceStream if it successfully acquires that U.S. company. While DT was wholly owned by the German government until 1996, it has divested some of its shares to the public. Notwithstanding public promises to the contrary, Deutsche Telekom's divestment appears to have come to an abrupt halt, reflecting the empty promise of the German Government's commitment to privatize further in the near future. Indeed, Deutsche Telekom may not be able to afford the necessary divestment because of the massive debt it has incurred recently, as well as the recent drastic reduction in the price of its stock price. As one German government official put it plainly, "there is no way we are going to sell."[11]

Deutsche Telekom may assert that it does not meet the *de jure* control test for the purposes of the transaction. They may assert that after their acquisition of VoiceStream, the German government's stake in the combined corporation will be diluted to below 50 percent, thereby eliminating any *de jure* control under the FCC's rules. This argument, if carried to its logical extreme, undercuts the plain meaning of Section 310(a). The question of government control must be addressed before, not after the acquisition takes place.

2. De Facto Control

Regardless of whether DT argues that the German government stake will be diluted once VoiceStream has been acquired, numerous facts clearly demonstrate that the German government will exercise and retain control over the acquired telecommunications licenses, post transaction. In other words, the record shows that DT-VoiceStream will serve as a representative of the German government post merger, notwithstanding any dilution of the German government's equity stake in the combined entity. These facts completely counter Deutsche Telekom's claim, in its application, that "the German Government exercises no right beyond those of other shareholders in Deutsche Telekom."[12] In reality, the German government's exercise of control over Deutsche Telekom is extensive, and far exceeds the scope of influence of a private shareholder. Indeed, because of this relationship, some telecommunications companies have asserted that Germany has failed to live up to the WTO standard of having open competitive markets and its regulatory regime has been skewed by conflicts of interest between Deutsche Telekom and its German government owners.

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[11] "Time is Working Against Deutsche Telekom's Plan," Wall Street Journal, October 24, 2000.
[12] Deutsche Telekom Petition at ¶ 10.

The German government exercises control over Deutsche Telekom in a variety of ways. The government plays a large role in influencing management decisions. The government provides substantial financial backing to Deutsche Telekom. And, many of Deutsche Telekom's employees are statutory government civil servants who enjoy special protections under the German Constitution that are not available to workers of private companies. Finally, the parties themselves acknowledge that Deutsche Telekom is a representative of the German government

a) Government Influence on Management Decisions

The German government meets both formally and informally on a regular basis with the management of Deutsche Telekom to direct its activities. In fact, there is a specific division within the German Ministry of Finance that oversees Deutsche Telekom, along with the other shareholdings of the Government.

The German government also actively exercises its control as the majority shareholder during Deutsche Telekom's annual shareholder meetings. At these meetings, the government engages in activities such as appointing the representatives to Deutsche Telekom's Supervisory Board under the German Stock Corporation Act, and approving the annual financial statements. In its annual report for 1999, Deutsche Telekom candidly admits:

> "As long as the Federal Republic directly or indirectly controls the majority of Deutsche Telekom's shares, it will, like any majority shareholder in a German stock corporation, have the power to control most decisions taken at shareholders' meetings, including the appointment of all of the members of the Supervisory Board elected by the shareholders and the approval of the proposed dividend payments."[13]

The Government's role in appointing the Supervisory Board is critical because it is Deutsche Telekom's Supervisory Board that plays a key role in appointing the company's top managers and determining its strategy.[14] Although Deutsche Telekom and VoiceStream claim in their merger agreement that Deutsche Telekom will recommend the inclusion of a person nominated by VoiceStream on the Supervisory Board, it is highly unlikely that this one representative, if elected, will have any effect on the German government's influence.

It is worth noting that, although the merger has yet to be approved, there is evidence that the German government, through Deutsche Telekom, is already exercising control over VoiceStream. On October 4, 2000, Deutsche Telekom filed a SEC Form F-4 indicating that Deutsche Telekom will be formulating an auction plan for VoiceStream as it bids in the December 12, 2000 spectrum auctions. Specifically, the Form F-4 discloses that VoiceStream is required to obtain prior approval from DT's "Acquisitions Committee," comprised solely of DT senior management officials, before it can participate in the auction or deviate from the schedule

[13] DTAG 20-F filing with SEC for 1999, p. 68.
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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)]
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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

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[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.

Telekom appears to be implicitly retaining its sovereign immunity as an "agency or instrumentality of government" with respect to other legal actions not relating to the merger agreement. The retention of such sovereign immunity is direct proof that a combined DT-VoiceStream will continue to operate as a representative of the German government as contemplated by 47 U.S.C. Section 310(a).

The German government apparently agrees with Deutsche Telekom that DT is an arm of the German government. 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.[20]

III. Section 310(b)(4) Does Not Give the FCC Authority to Waive the Prohibition on Foreign Government Control

VoiceStream and Deutsche Telekom have applied for a waiver of the FCC's foreign ownership rules under section 310(b)(4). The FCC does not have authority, however, under section 310(b)(4) to waive the requirements of section 310(a). Section 310(b)(4) only gives the FCC the power to find that foreign government ownership interests *below* control might be in the public interest.

A. Sections 310(a) and 310(b)(4)

As noted above, section 310(a) specifically prohibits the FCC from granting authorizations to entities *controlled* by foreign governments, either directly or indirectly. Section 310(b)(3) and (4) then fill the gap as to how to address foreign government ownership that amounts to less than control. Under section 310(b)(3), direct foreign government ownership interests above 20% are forbidden without any exceptions. Under section 310(b)(4), the FCC is given some discretion to allow indirect foreign government ownership of broadcast, common carrier, and aeronautical licenses in amounts above 25% if the public interest is served. However, nowhere does section 310(b)(4) state that the FCC can find the public interest served by allowing a "foreign government or the representative thereof" to control a "station license." To interpret this section otherwise, would be to read out of existence section 310(a). The only way to reconcile these two sections, then, is to conclude that section 310(b)(4) allows the FCC to find the public interest is served by allowing indirect foreign control, and/or ownership up to 100% of "station licenses" only when the foreign ownership is by a non-government controlled entity. If a foreign government controlled entity indirectly invests in an FCC licensee subject to section 310, then the entity can invest indirectly up to 25% without triggering section 310(b)(4), but investments above 25% have to be approved by the FCC, and must not give the foreign government controlled entity control of the FCC "station license" holder. Such control would contravene Section 310(a). To find otherwise, would be contrary to the Act.

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[20] "Debate Over Telecom State Mires Bid," The Financial Times, October 18, 2000.

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Transferors,	)	
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and	)	IB Docket No. 00-187
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DEUTSCHE TELEKOM AG,	)	
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Transferee,	)	
	)	
Applications for Consent to Transfer of Control	)	

REPLY IN SUPPORT OF APPLICATIONS FOR CONSENT TO TRANSFER OF CONTROL

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Counsel for Deutsche Telekom AG

B. Section 310(a) Does Not Apply in Any Event Because DT Is Not a "Foreign Government or the Representative Thereof."

Senator Hollings's argument fails for a second key reason: DT is not a representative of the German government, and neither the German government nor any representative thereof will exercise *de jure* or *de facto* control over the licensee.[118/] The Commission has defined *de jure* control as control of more than 50 percent of a corporation's shares.[119/] The German government currently owns 43.2 percent of DT's shares and KfW, the German public bank, owns an additional 16.8 percent (for a total governmental stake of 60 percent).[120/] As a result of DT's mergers with VoiceStream and Powertel (taking into account France Telecom's recent sale of its DT shares to KfW), the German government's interest (held directly or through KfW) will be reduced to approximately 45 percent.[121/] Therefore, the German government (either separately, or together with KfW) will lack *de jure* control over DT — and, in turn, over DT's licensee subsidiaries — following the Commission's approval of the proposed transactions.

Senator Hollings's assertion that the Commission should consider the German government's *pre*merger interest, rather than its *post*merger interest, is both logically unsound and at odds with the Commission's precedents. Contrary to the Senator's assertion that

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118/ *See Intelsat* at ¶ 48 (applying control test); *Starsys Global Positioning Inc.*, Declaratory Ruling, 10 FCC Rcd 9392, 9393 ¶ 9 (1995) ("*Starsys*") (same).

119/ *Starsys* at 9393 ¶ 9.

120/ DT reported in the Applications that KfW's interest was 15 percent. As reported in DT's SEC Form 20-F, in 1998 France Telecom purchased from KfW what amounts today to a 1.8 percent stake in DT. On December 15, 2000, France Telecom decided unilaterally to exercise its option to sell that stake in DT back to KfW. As a result of that transaction, KfW's ownership interest will increase to 16.8 percent, and the overall premerger governmental interest in DT will increase to 60 percent.

121/ This is Applicants' current estimate and is subject to certain adjustment mechanisms set out in the Agreement and Plan of Merger Between Deutsche Telekom AG and VoiceStream Wireless Corporation, dated July 23, 2000.

considering the postmerger figure would "undercut[] the plain meaning of section 310(a),"[122] it is irrelevant how much of DT the German government currently owns. Because the postmerger combination of DT-VoiceStream-Powertel is the entity that will control Commission licenses, the relevant question is how much of *that* entity will be owned by a foreign government. For that reason, the Commission always has examined postmerger ownership percentages in analyzing transactions under section 310.[123]

Nor will the German government have *de facto* control over the licenses indirectly held by DT. Far from "dominat[ing] the management" of DT,[124] the German government plays a minimal role in that process. The government possesses no rights superior to those of other shareholders, such as a "golden share" or a special veto right. In fact, the government even has refrained from exercising its full rights as a shareholder. Contrary to Senator Hollings's suggestion that the government selects all (or a majority of) the members of DT's Supervisory Board, the government and KfW each have named only one member to that board. And even if the German government and KfW were to select all 10 non-labor members of the Supervisory Board, the presence of 10 labor members on the board would deny the German government a

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122/ Comments of Senator Hollings at 4.

123/ *See, e.g., 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, ¶ 14 (rel. Feb. 15, 2000); *Nextwave*, 12 FCC Rcd 2030 (stating that the Bureau agrees to reassess section 310(b)(4) compliance *after* promised transactions diluting foreign interests have been taken).

124/ *Benjamin L. Dubb Decision*, 16 F.C.C. 274, 289 ¶ 3 (1951). *See also Nonbroadcast and General Action Report No. 1142*, Public Notice, 12 F.C.C.2d 559, 560 (1963) ("*Intermountain Microwave*") (discussing other indicia of *de facto* control).

voting majority in any event.[125] Senator Hollings also overlooks the fact that the government has not appointed any member of DT's Management Board, which oversees the day-to-day operations of the company. Moreover, the government has always voted with the majority of other shareholders, and it has never opposed the actions of the Management Board or Supervisory Board.[126]

Nor is any of the other indicia of control identified in *Intermountain Microwave* present here.[127] In that order, the Commission identified six factors as relevant to whether an entity has *de facto* control over a licensee: (1) Does the licensee have unfettered use of all facilities and equipment? (2) Who controls daily operations? (3) Who determines and carries out policy decisions, including preparing and filing applications with the Commission? (4) Who is in charge of employment, supervision, and dismissal of personnel? (5) Who is in charge of payment of financial obligations, including expenses arising out of operation? And finally, (6)

125/ The suggestion by Novaxess that the labor-appointed members of DT's Supervisory Board are close to the German ruling party SPD, and therefore constitute some kind of proxy for the German government, *see* Comments of Novaxess at 5-6, proves too much. In fact, because the supervisory boards of *all* major German stock corporations (including those without any governmental ownership) have half their members appointed by labor interests, Novaxess's assumption would mean that every major German corporation is a vote away from being controlled by the German government.

126/ Senator Hollings is simply incorrect that "[t]he German government meets both formally and informally on a regular basis with the management of Deutsche Telekom *to direct its activities*." Comments of Senator Hollings at 5 (emphasis added). The only entity that "direct[s] the activities" of DT is the Management Board, which operates entirely independently from the German government. The division of the German Ministry of Finance that supervises the government's stock holdings has been established not to manage specific companies but, quite the opposite, to privatize them.

127/ *See Intermountain Microwave*, 12 F.C.C.2d at 560; Public Notice, 1 FCC Rcd 3 (1986) (providing guidance regarding questions of control based on *Intermountain Microwave*).

who receives monies and profits from the operations of the facilities?[128] The Commission has made clear that it evaluates these factors "in terms of actual and not theoretical control."[129] Nothing in the record remotely shows that the German government will exercise *actual* control over the licenses currently held by subsidiaries of VoiceStream and Powertel. As ordinary shareholders, the German government and KfW have no say over the use of facilities and equipment, daily operations, personnel matters, or financial matters; nor does the German government receive any profits beyond the dividends earned by shareholders generally.[130]

For essentially the same reasons, DT is not the "representative" of the German government, contrary to Senator Hollings's contention. The Commission has ruled that, in order to qualify as the representative of a foreign government, a company must act "in behalf of" or "in

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128/ *Id.* The Commission applies these factors in the context of mobile wireless services, in addition to fixed services. *See, e.g., Ellis Thompson Corp.*, Memorandum Opinion and Order and Hearing Designation Order, 9 FCC Rcd 7138, 7138-39 ¶¶ 9-11 (1994).

129/ *See Ellis Thompson Corp.*, 9 FCC Rcd at 7140 ¶ 16.

130/ Senator Hollings asserts incorrectly that "there is evidence that the German government, through Deutsche Telekom, is already exercising control over VoiceStream." Comments of Senator Hollings at 5. The Senator argues that the agreement by VoiceStream's management to work with DT in developing maximum bidding amounts for Spectrum Auction 35 demonstrates DT's control over VoiceStream. As VoiceStream's Chairman has explained, however, this kind of routine investor safeguard by no means gives DT (much less the German government) day-to-day control of VoiceStream, and the Commission has upheld such arrangements under its licensee control requirements. *See* Letter of John W. Stanton, Chairman and CEO, VoiceStream Wireless Corp., to William E. Kennard, FCC Chairman, at 2 (Dec. 5, 2000). *See also Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 447-49 ¶ 81 (1994) ("non-majority or non-voting shareholders may be given a decision-making role (through supermajority provisions or similar mechanisms) in major corporate decisions that fundamentally affect their interests as shareholders without being deemed to be in *de facto* control"); *Request of MCI Communications Corporation British Telecommunications plc, Joint Petition For Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended*, Declaratory Ruling and Order, 9 FCC Rcd 3960, 3962 ¶ 14 (1994) ("covenants that give a party the power to block certain major transactions of a company do not in and of themselves represent the type of transfer of corporate control envisioned by Section 310(d) [of the Act].").

connection with" with the foreign government in its use of the station license.[131] The mere fact that a government has some kind of relationship with an applicant does not suffice to make the applicant a governmental representative.[132] Thus, the German government's possession of a partial ownership interest in DT does not suffice to make DT a governmental representative. DT's relationship to the German government is as it is to all other shareholders — as a fiduciary.

There is nothing in the record to suggest that DT acts on behalf of or in connection with the German government. To the contrary, as shown in the Applications and above, DT acts only on behalf of all its shareholders, including those minority shareholders to whom it has a fiduciary duty, and its operations are entirely independent from the government's function as sovereign.[133] And no commenter has provided a single fact supporting any argument that the VoiceStream or Powertel licenses will be used on behalf of the German government, rather than for private, business-related purposes — as DT is required to do under corporate principles of fiduciary duty similar to those applicable to U.S. corporations.

Senator Hollings points to four factors in support of his claim that DT is a representative of the German government: (1) some of DT's old debt is guaranteed by the German government; (2) some of DT's employees are former civil-service workers; (3) the German

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131/ *Russell G. Simpson, Esq.*, 2 F.C.C.2d 640, 640 (1966) ("*Simpson*"). *See also Applications of QVC Network, Inc. for Commission Consent to Interim Transfer of Control of Paramount Communications, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 8485, 8490-91 ¶ 21 (1993).

132/ In *Simpson*, for example, the Commission concluded that the applicant was not a representative of that government because he intended to use the license only for his own purposes, and not in connection with his role with the government. *Simpson*, 2 F.C.C.2d at 640.

133/ Of course, insofar as the German government is a shareholder in DT, the corporation acts in furtherance of the government's interests, but the government's role as shareholder is distinct from its role as sovereign, and both section 310(a) and the Commission's orders are concerned only with the latter function. *Cf. United States Shipping Board Emergency Fleet Corp. v. Western Union Tel. Co.*, 275 U.S. 415, 426 (1928) (holding that private corporations in which a government has an interest are not departments of government).

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

COMMENTS OF NOVAXESS B.V.

December 13, 2000

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(ISLACOM). Therefore, it is not appropriate to analyze DTAG as merely a "German" company.

Finally, and most importantly, neither the Foreign Participation Order, nor the former Effective Competitive Opportunities ("ECO") test found in the Foreign Carrier Entry Order[3], have addressed the problem of foreign government control, which requires specific safeguards by the Commission. DTAG is and will be controlled by a foreign government (the Federal Government of the Federal Republic of Germany). The German Government, before and after the planned merger, will hold a stake of more than 44% in DTAG for the foreseeable future. The German Government has not committed itself to reduce this stake further or even bring it down to 0% within a defined time period. Novaxess believes that DTAG's government ownership, as described below, will have a negative impact on the U.S. telecommunications market, which the Commission can and must prevent by imposing merger conditions.

1) The German Government's influence on DTAG

In their Application (p. 10), the Applicants state that "the German government exercises no right beyond those of other shareholders" in DTAG. In reality, the German Government's ways and means of controlling DTAG are many and far exceed the legal possibilities and the factual scope of influence of a private shareholder.

a) Government Influence on Management Decision

As stated in the written testimony that the German Competitive Carrier Association ("VATM") filed with the House Telecommunications Subcommittee on September 7, 2000[4], the

[3] Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order, FCC 95-475, 11 FCC Rcd. 3873 (1995).

[4] VATM Testimony, see Annex A, p. 11.

DTAG management meets with Government officials on a regular basis. Within the German Ministry of Finance, a specific division is in charge of administering the shareholdings of the German Government. It coordinates the activities and monitors DTAG's strategy.[5] The German Government, for instance, by way of its recent Position Paper released by the German Federal Ministry of Economics and Technology ("BMWi"), has announced that in the near future DTAG will be released from many of its dominant carrier restrictions. The goal of this Position Paper is to create a favorable market environment for DTAG.[6] DTAG is not the only case of direct interference by the German Government to protect a former monopolist. Recently, the German Government bypassed successfully the German regulator, RegTP, to promote another government-controlled entity, the German Post, by determining the charges for domestic mail of the German Post.

The German Government exerts its rights as a majority shareholder during DTAG's annual shareholder meetings, such as approving the annual financial statements of DTAG, and appointing representatives to DTAG's Supervisory Board under the German Stock Corporation Act. By doing so, it influences DTAG's management decisions indirectly.

Moreover, DTAG's Supervisory Board plays a key role in appointing the company's top managers and determining its strategy. According to DTAG's SEC Filing F-4 of October 4, 2000 for the VoiceStream Merger[7], of the current members on DTAG's Supervisory Board, more than half of them are government officials or at least close to the government (marked in

[5] Division VII of the Ministry controls the Federal Agency of Post and Telecommunications, DTAG's principal shareholder and more generally the "policy regarding the public shareholdings" of the Federal Republic of Germany: See the Ministry's organizational chart at http://www.bundesfinanzministerium.de/.

[6] VATM Testimony p. 13 and 25.

[7] http://www.sec.gov/Archives/edgar/data/946770/0000950123-00-009118.txt, at 248 to 249

italics in the list below). Many of them represent institutions controlled by the government or trade unions that traditionally are very close to the German ruling party SPD, many of them being former government officials themselves.

Current List of Members of DTAG's Supervisory Board:

1)	Dr. Hans-Dietrich Winkhaus, chairman of the Supervisory Board, chairman of the management board of Henkel KgaA
2)	*Rudiger Schulze, vice-chairman, Member of the Central Executive Committee of the German Postal Union*
3)	Gert Becker, former chairman of the management board of Degussa AG
4)	*Josef Falbisoner, chairman of Deutsche Postgewerkschaft trade union, Bavarian District*
5)	Dr. Hubertus Von Grunberg, chairman of the supervisory board of Continental AG
6)	Dr. Sc. Techn. Dieter Hundt , managing shareholder of Allgaier Werke GmbH & Co. KG; president of the National Union of German Employers Associations
7)	*Rainer Koch, chairman of the Workers Council of DeTeImmobilien*
8)	Dr. H.C. Andre Leysen, chairman of the supervisory board of GEVAERT N.V.
9)	*Waltraud Litzenberger, chairwoman of the Workers Council of Branch Office Bad Kreuznach*
10)	*Michael Loeffler, chairman of the Workers Council at Leipzig Branch Office 1, Deutsche Telekom AG*
11)	*Hans-W. Reich, speaker of the management board, Kreditanstalt fur Wiederaufbau (remark: the KfW is a vehicle for the German Government to administer a large part of its stake in DTAG)*
12)	*Rainer Roll, vice-chairman of the Central Workers Council at Deutsche Telekom*
13)	*Wolfgang Schmitt, head of Freiburgz I.B. Regional Directorate, Deutsche Telekom*
14)	Prof. Dr. Helmut Sihler, chairman, Member of the Shareholders' Committee of Henkel KgaA
15)	*Michael Sommer, vice-chairman of the Deutsche Post Gewerkschaft (Post trade union)*
16)	*Ursula Steinke 1995 chairwoman of the Workers Council at DeTeCSM Northern District Service and Computer Center*
17)	*Prof. Dr. H.C. Dieter Stolte, director general of the Zweites Deutsches Fernsehen (ZDF) broadcasting organization (remark: the ZDF is administered jointly by the German States)*
18)	Bernhard Walter, former chairman of the management board of Dresdner Bank
19)	*Willhelm Wegner, chairman of the Central Workers Council at DTAG*
20)	*Prof. Dr. Heribert Zitzelsberger, state secretary in BMF, the Federal Finance Ministry (Bundesministerium der Finanzen).*

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

b) Financial backing of the Government

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

[8] At p. 123.

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

REPLY IN SUPPORT OF APPLICATIONS FOR CONSENT TO TRANSFER OF CONTROL

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considering the postmerger figure would "undercut[] the plain meaning of section 310(a),"[122] it is irrelevant how much of DT the German government currently owns. Because the postmerger combination of DT-VoiceStream-Powertel is the entity that will control Commission licenses, the relevant question is how much of *that* entity will be owned by a foreign government. For that reason, the Commission always has examined postmerger ownership percentages in analyzing transactions under section 310.[123]

Nor will the German government have *de facto* control over the licenses indirectly held by DT. Far from "dominat[ing] the management" of DT,[124] the German government plays a minimal role in that process. The government possesses no rights superior to those of other shareholders, such as a "golden share" or a special veto right. In fact, the government even has refrained from exercising its full rights as a shareholder. Contrary to Senator Hollings's suggestion that the government selects all (or a majority of) the members of DT's Supervisory Board, the government and KfW each have named only one member to that board. And even if the German government and KfW were to select all 10 non-labor members of the Supervisory Board, the presence of 10 labor members on the board would deny the German government a

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[122] Comments of Senator Hollings at 4.

[123] *See, e.g., 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, ¶ 14 (rel. Feb. 15, 2000); *Nextwave*, 12 FCC Rcd 2030 (stating that the Bureau agrees to reassess section 310(b)(4) compliance *after* promised transactions diluting foreign interests have been taken).

[124] *Benjamin L. Dubb Decision*, 16 F.C.C. 274, 289 ¶ 3 (1951). *See also Nonbroadcast and General Action Report No. 1142*, Public Notice, 12 F.C.C.2d 559, 560 (1963) ("*Intermountain Microwave*") (discussing other indicia of *de facto* control).

voting majority in any event.[125] Senator Hollings also overlooks the fact that the government has not appointed any member of DT's Management Board, which oversees the day-to-day operations of the company. Moreover, the government has always voted with the majority of other shareholders, and it has never opposed the actions of the Management Board or Supervisory Board.[126]

Nor is any of the other indicia of control identified in *Intermountain Microwave* present here.[127] In that order, the Commission identified six factors as relevant to whether an entity has *de facto* control over a licensee: (1) Does the licensee have unfettered use of all facilities and equipment? (2) Who controls daily operations? (3) Who determines and carries out policy decisions, including preparing and filing applications with the Commission? (4) Who is in charge of employment, supervision, and dismissal of personnel? (5) Who is in charge of payment of financial obligations, including expenses arising out of operation? And finally, (6)

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[125] The suggestion by Novaxess that the labor-appointed members of DT's Supervisory Board are close to the German ruling party SPD, and therefore constitute some kind of proxy for the German government, *see* Comments of Novaxess at 5-6, proves too much. In fact, because the supervisory boards of *all* major German stock corporations (including those without any governmental ownership) have half their members appointed by labor interests, Novaxess's assumption would mean that every major German corporation is a vote away from being controlled by the German government.

[126] Senator Hollings is simply incorrect that "[t]he German government meets both formally and informally on a regular basis with the management of Deutsche Telekom *to direct its activities*." Comments of Senator Hollings at 5 (emphasis added). The only entity that "direct[s] the activities" of DT is the Management Board, which operates entirely independently from the German government. The division of the German Ministry of Finance that supervises the government's stock holdings has been established not to manage specific companies but, quite the opposite, to privatize them.

[127] *See Intermountain Microwave*, 12 F.C.C.2d at 560; Public Notice, 1 FCC Rcd 3 (1986) (providing guidance regarding questions of control based on *Intermountain Microwave*).