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

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

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In the Matter of)
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VoiceStream Wireless Corporation,)
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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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EXECUTIVE SUMMARY

Novaxess B.V. (“Novaxess”), a U.S. owned competitive provider of broadband services in Europe, welcomes the opportunity to comment on the merger between the VoiceStream Wireless Corporation’s (“VoiceStream”) and Deutsche Telekom AG’s (“DTAG”). Novaxess has experienced first hand the trials and tribulations faced when trying to establish a competitive foothold against former European monopolists, such as DTAG. Therefore, Novaxess is concerned about the implications of this merger, and its possible effects in both the United States and in European markets.

Novaxess believes that DTAG should be allowed to invest in the U.S. telecom market if it satisfies several conditions necessary to pry open the German market to further competition.

Novaxess suggests that:

- (1) DTAG must make specific binding commitments to cease immediately its anti-competitive activities such as artificially creating bottlenecks for interconnection; forcing competitors to accept burdensome interconnection rules; chronically exceeding provisioning intervals for collocation space; impeding billing and collection services; and pursuing a strategy of predatory pricing in emerging telecom markets;
- (2) DTAG’s regulators must commit to enforce these commitments vigorously, promptly and in a manner which displays no favoritism toward DTAG; and
- (3) The German Government should commit itself to sell its stake in DTAG within a reasonable time period.

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I. Introduction

Novaxess is pleased to submit its comments on the VoiceStream Wireless Corporation’s (“VoiceStream”) and Deutsche Telekom AG’s (“DTAG”) Application for Transfer of Control and Petition for Declaratory Ruling, received by the Federal Communications Commission (“Commission”) on September 18, 2000 (“Merger Application”). Novaxess, which is owned by U.S. interests, is a leading competitive broadband communications provider for small and medium-sized companies in the Netherlands with subsidiaries in Leeds (U.K.) and in Paris (France). Novaxess also has plans to expand into other European markets, such as Germany and Italy, in order to become a leading player in the broadband market sector. As a result, Novaxess has a strong interest in this proceeding because Novaxess has experienced first hand the trials and tribulations faced when trying to establish a competitive foothold against former European monopolists, such as DTAG.

Novaxess believes that DTAG should be allowed to invest in the U.S. telecom market if it satisfies conditions necessary to pry open the German market to further competition. Novaxess suggests that:

- (1) DTAG must make specific binding commitments to cease immediately its anti-competitive activities such as artificially creating bottlenecks for interconnection; forcing competitors to accept burdensome interconnection rules; chronically exceeding provisioning intervals for collocation space; impeding billing and collection services; and pursuing a strategy of predatory pricing in emerging telecom markets;
- (2) DTAG's regulators must commit to enforce these commitments vigorously, promptly and in a manner which displays no favoritism toward DTAG; and
- (3) The German Government should commit itself to sell its stake in DTAG within a reasonable time period.

II. DTAG's and VoiceStream's Application and Petition Cannot be Approved Without Conditions

A. Scope of the Foreign Participation Order

Section 214 and Section 310 of the Communications Act require the Commission's consent to the transfer of control of VoiceStream's licenses to DTAG. Section 310(b)(4) of the Communications Act places strict limits on the foreign ownership of the wireless licenses held by VoiceStream in order to safeguard the public interest. Novaxess understands the Commission has adopted standards for addressing these foreign ownership limits in its Foreign Participation

Order.¹ In that Order, the Commission adopted a rebuttable presumption that indirect foreign ownership of wireless licenses is in the public interest if the acquiring party stems from a WTO Member State. However, there are several arguments *against* applying this presumption in the present merger case.

First, the *Foreign Participation Order* discusses this presumption in the context of whether to grant or deny a Section 214 authorization and Section 310(b)(4) waiver request. The Commission states that it will deny entry if the transaction poses a “very high risk” to competition. Novaxess does not submit that the entry of DTAG poses a “very high risk” to competition in the United States, which would force the Commission to deny the application.² However, Novaxess believes that there are sufficient public interest reasons to mandate that conditions be placed on the applicants to protect competition. The Commission also should establish a system of fines and forfeitures for violations of these conditions.

Second, the distinction between WTO and Non-WTO countries in the Foreign Participation Order should not apply if the applicant is a global player – such as DTAG. DTAG is a major force throughout the world, both in WTO and Non-WTO countries. The description of DTAG’s activities and corporate structure in the Application (p. 4) is too narrow, and therefore does not adequately describe DTAG’s relevant activities abroad. DTAG has shareholdings in major telecommunications companies, fixed and wireless, in Austria (Max. Mobil), Hungary (Matáv), Slovakia (Slovenske telekomunikácie), U.K. (One-2-One), Switzerland (Multilink), Poland (PTC), Ukraine (UTEL), Malaysia (TRA), Indonesia (Satelindo), and the Philippines

¹ Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order, 12 FCC Rcd 23891 (hereinafter *Foreign Participation Order*).

² *Foreign Participation Order* at 40.

(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 Order³, 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, 2000⁴, 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 Merger⁷, 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)	<i>Rudiger Schulze, vice-chairman, Member of the Central Executive Committee of the German Postal Union</i>
3)	Gert Becker, former chairman of the management board of Degussa AG
4)	<i>Josef Falbisoner, chairman of Deutsche Postgewerkschaft trade union, Bavarian District</i>
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)	<i>Rainer Koch, chairman of the Workers Council of DeTeImmobilien</i>
8)	Dr. H.C. Andre Leysen, chairman of the supervisory board of GEVAERT N.V.
9)	<i>Waltraud Litzenberger, chairwoman of the Workers Council of Branch Office Bad Kreuznach</i>
10)	<i>Michael Loeffler, chairman of the Workers Council at Leipzig Branch Office 1, Deutsche Telekom AG</i>
11)	<i>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)</i>
12)	<i>Rainer Roll, vice-chairman of the Central Workers Council at Deutsche Telekom</i>
13)	<i>Wolfgang Schmitt, head of Freiburgz I.B. Regional Directorate, Deutsche Telekom</i>
14)	Prof. Dr. Helmut Sihler, chairman, Member of the Shareholders' Committee of Henkel KgaA
15)	<i>Michael Sommer, vice-chairman of the Deutsche Post Gewerkschaft (Post trade union)</i>
16)	<i>Ursula Steinke 1995 chairwoman of the Workers Council at DeTeCSM Northern District Service and Computer Center</i>
17)	<i>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)</i>
18)	Bernhard Walter, former chairman of the management board of Dresdner Bank
19)	<i>Wilhelm Wegner, chairman of the Central Workers Council at DTAG</i>
20)	<i>Prof. Dr. Heribert Zitzelsberger, state secretary in BMF, the Federal Finance Ministry (Bundesministerium der Finanzen).</i>

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.

recently stated in a Wall Street Journal interview that with DTAG's shares slumping, "There's no way we're going to sell."⁹

c) Constitutional Protection of DTAG

As shown below, DTAG enjoys special protection under Art. 143b of the German Constitution ("Basic Law") as a former integral part of the German Post monopoly ("Deutsche Bundespost Telekom").

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

(1) The special trust Deutsche Bundespost (German Federal Post) shall be transformed into enterprises under private law in accordance with a federal law. The Federation shall have exclusive power to legislate with respect to all matters arising from this transformation.

(2) The exclusive rights of the Federation existing before the transformation may be transferred by a federal law for a transitional period to the enterprises that succeed to the Deutsche Bundespost Postdienst and to the Deutsche Bundespost Telekom. The Federation may not surrender its majority interest in the enterprise that succeeds to the Deutsche Bundespost Postdienst until at least five years after the law takes effect. To do so shall require a federal law with the consent of the Bundesrat (Second Chamber of Parliament).

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

Although the standstill period of 5 years for giving up its majority interest in DTAG expired August 20, 1999, the German Government has not given up its majority interest. In addition, this Article would allow the German Government to keep a stake of more than 25% for an indefinite period of time while at the same time maintaining the protection of the former federal civil servants under Article 143b (3) Basic law. Therefore, Novaxess does not agree with

⁹ Wall Street Journal 10/24/2000, Page C1.

the Applicants' statement that the German Federal Government "has divested its stake as rapidly as possible taking into account the prevailing market conditions."¹⁰

d) Immunity

In the proposed JV Agreement between DTAG and VoiceStream, the German Government is *not* treated as an "ordinary" (private) shareholder. DTAG and its subsidiaries waive their immunity "on the ground of sovereignty or otherwise based on its status as an agency or an instrumentality of the government relating to the JV Agreement".¹¹ The only conclusion is that DTAG is an "instrumentality" of the government, or at least that this danger exists. The German Government never agreed to a similar immunity waiver to allow claims against it as DTAG's shareholder, whereas a private DTAG shareholder could never raise this defense.

2) DTAG's Government Control has a Negative Effect on the U.S. Market

There are no entities controlled by the U.S. Government active in the telecommunications market in the United States or in Germany. DTAG, a government-controlled entity, is one of the world's largest and most powerful government-controlled carriers. The Commission must address this imbalance because globally telecommunications markets, in particular wireless markets, are converging. The Commission cannot rely on the Applicants' argument that the only relevant market to examine is the U.S. domestic wireless market. For instance, the European Commission is clearly promoting a trans-national market approach in its recently proposed "Directive on the 1999 Review Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and

¹⁰ Merger Application, p. 9.

¹¹ Sec. 9.10. of the Agreement and Plan of Merger between DTAG and VoiceStream.

services” of June 12, 2000.¹² The European Commission states in Article 14 (2) of this document that the Commission may identify "transnational" markets in order to decide which markets are competitive and where sector-specific obligations must be imposed. In Consideration 14 and 21 of this proposed Directive, the European Commission is taking the same position. The cooperation requirements under this Directive clearly indicate that only concerted regulatory action may resolve the problems created by a dominant carrier in these markets.

This is particularly true for the wireless sector. A cell phone is portable and trans-border use commonplace. The wireless sector with its possibilities of roaming, and the possibility to combine voice and Internet services (3-G services), is in fact a striking example of how national markets are growing together. The project of Iridium to provide global wireless service failed in large measure because surface-based wireless networks already meet the need for a global wireless communication network. As described above, DTAG has recognized the market potential and the globalization of the wireless market and has invested astronomic amounts for auctioned UMTS licenses in several European countries, and one can fully expect DTAG to push for similar spectrum in the United States through VoiceStream.

Therefore, in order to protect U.S. industry and consumers, the Commission must enact conditions to prevent a government-controlled entity from getting an unfair competitive advantage by using its proceeds obtained from predatory pricing and other anti-competitive behavior at home to subsidize its expansion into other countries, such as the United States. Unless Germany makes significant progress in spurring competition, DTAG’s market entry in

¹² Directive Proposal Com(2000)393 - at <http://www.ispo.cec.be/infosoc/telecompolicy/review99/com2000-393en.pdf>

the United States will enable DTAG to significantly harm U.S. competitors by exploiting its unfair market advantage in offering global wireless services that it has been able to amass through its anti-competitive activities abroad.

III. Current Market Situation in Germany

Competitors entering the German market face strong resistance from DTAG and little help from the German Government. As demonstrated below, the German market conditions do not reflect implementation of Germany's WTO commitments. Therefore, the Commission should not award such behavior by granting approval to this specific merger without imposing merger conditions upon DTAG. Novaxess believes that the description of the German market in the VATM testimony (Annex A) is accurate, in particular with regard to the:

- History of anti-competitive practices of DTAG
- Obstructionist strategy of DTAG
- Protectionist actions of the German Government in favor of DTAG.

The statements made in VATM's testimony are backed by VATM's most recent data on the German market (submitted as Annex B). The facts speak for themselves. DTAG's more than 86% market share in the fixed-line market sector (local and long-distance combined) remains overwhelming. In the German local market, competitors' market share remains insignificant (see charts in Annex B). No significant growth is expected. Competitors were only able to generate local traffic of 4 million minutes/day (equal to a market share of 1.1 %).

In the emerging Unbundled Local Loop ("ULL") market sector, DTAG typically does whatever it can to delay the entrance of competitors. Problems with the delivery of unbundled loops and emergency/overflow routing are also commonplace. In particular, DTAG does not

suffer any consequences for exceeding provisioning intervals. At the same time, DTAG penalizes carriers that fall short of their long-term forecasts by imposing hefty contractual fines.

“Call-by-Call” (dial around) is the most important instrument for a competitor to enter into the German long distance market. Nearly one third of the traffic of the competitive carriers is generated through Call-by-Call. The competitors’ actual customer base is small: 21.3% of their end-users generate nearly 55% of the traffic. DTAG uses anti-competitive practices to block competition in the long distance market, in particular by offering “bundled offers,” which open the door for cross-subsidization and will significantly harm “Call-by-Call.”

IV. Conclusion

DTAG’s government control imposes particular risks on competition in the United States. In order to contain these risks, Novaxess urges the Commission to rule that DTAG’s regulators must enforce and monitor merger conditions vigorously, promptly and in a manner that displays no favoritism toward DTAG. The German Government must also commit itself to reduce its stake in DTAG within a reasonable time period.

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