

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

In the Matter of

Applications of Clearwire Corporation for
Transfer of Control

To: Chief, Wireless Telecommunications
Bureau

IB Docket No. 12-343

ULS File No. 0005480932

**REPLY OF CREST FINANCIAL LIMITED
IN SUPPORT OF PETITION FOR RECONSIDERATION**

Kathleen M. H. Wallman
WALLMAN CONSULTING, LLC
9332 Ramey Lane
Great Falls, VA 22066
(202) 641-5387
wallmank@wallman.com

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Viet D. Dinh
H. Christopher Bartolomucci
Jeffrey M. Harris
Stephen V. Potenza
Brian J. Field
BANCROFT PLLC
1919 M Street, NW, Suite 470
Washington, DC 20036
(202) 234-0090
vdinh@bancroftpllc.com

Counsel for Crest Financial Limited

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REPLY IN SUPPORT OF PETITION FOR RECONSIDERATION

Pursuant to 47 C.F.R § 1.106(h), Crest Financial Limited (“Crest”) submits this reply in support of its Petition for Reconsideration of the Commission’s approval of the Eagle River transaction, which involves Sprint Nextel Corporation’s (“Sprint”) acquisition of the stock held by Eagle River Investment, LLC (“Eagle River”) in Clearwire Corporation (“Clearwire”), thereby giving Sprint a majority, controlling stake in Clearwire. This brief also replies to the opposition brief of Sprint (filed through Clearwire) to Crest’s petition.¹

INTRODUCTION

Sprint presented the Eagle River transaction for approval at the bureau level on a *pro forma* basis, assuring staff of the Wireless Telecommunications Bureau (“the Bureau”) that “the Commission need not place the application on public notice” but rather should “expeditiously grant the application pursuant to [its] *pro forma* procedures.”² In retrospect, it is clear why Sprint wanted the Commission to process its application quickly and quietly: The Eagle River transaction was a necessary step in a larger scheme to buy out *all* of Clearwire’s minority shareholders and then transfer control of Clearwire’s spectrum to Softbank Corporation (“Softbank”). The Bureau approved the Eagle River application on December 12; *the very next day*, Sprint publicly disclosed its plan to buy out all of Clearwire’s remaining minority shareholders.

Sprint’s insistence that the Eagle River transaction was merely a “non-substantial (*pro*

¹ See Opposition of Clearwire Corporation, IB Docket No. 12-343 & ULS File Nos. 0005480932 *et al.* (Jan. 14, 2013) (“Opp.”). DISH Network L.L.C. (“DISH”) has also petitioned for reconsideration of the summary approval of the Eagle River transaction. See Petition of DISH Network L.L.C. for Reconsideration, ULS File No. 0005480932 (Jan. 11, 2013) (“DISH Petition”).

² Applications of Clearwire Corporation for *Pro Forma* Transfer of Control, ULS File Nos. 0005480932 *et al.*, Exhibit A, at 1, 2 (Nov. 15, 2012).

forma)”³ transfer for which public notice was unnecessary should be rejected. *First*, the Eagle River transaction clearly is an essential part of the larger transactions that all agree are not *pro forma* — the proposed Sprint-Clearwire merger and the proposed Softbank-Sprint merger. The Commission has given public notice and invited comment on these transactions as part of its public interest review of them. It should have done so before approval of the Eagle River transaction and should do so now to reflect the reality of the transactions now pending.

Second, in important ways, the Eagle River transaction gives Sprint a degree of control over Clearwire that it never had before. That transaction allows Sprint, for the first time, to nominate seven non-independent Clearwire board members, a majority of the board. It allows Sprint to block certain change-of-control transactions that Sprint dislikes (and hence steer Clearwire toward a change-of-control transaction that Sprint desires). And it eliminates Eagle River’s ability to safeguard the interests of Clearwire’s minority stockholders under the Equityholders’ Agreement.

Where an application is truly *pro forma*, the use of summary procedures is entirely proper. But where, as here, a transaction admittedly gives the applicant *de jure* control and the issue of *de facto* control is hotly contested, the Commission should employ its ordinary procedures, invite public comment, and give the matter full consideration.⁴

³ 47 C.F.R. § 1.933(d)(2). Section 1.933(d)(2) provides that applications need not be placed on public notice if they concern “non-substantial (*pro forma*) assignments and transfers.”

⁴ Crest adopts DISH’s argument that the Commission’s regulations preclude use of *pro forma* procedures for the Eagle River transaction because Sprint and Clearwire provide wireless services that are used to provide interconnected mobile voice and data services. *See* DISH Petition at 10–11.

ARGUMENT

I. The Eagle River Transaction Is an Integral Part of Sprint's Transactions With Clearwire and Softbank.

The Commission is reviewing Sprint's strategic plans to acquire 100% of Clearwire's stock and transfer 70% of its own stock to Softbank.⁵ No one disputes that those transactions demand full Commission review and rigorous public comment to determine if they serve the public interest.⁶ No one would dream of asking for *pro forma* approval of Sprint's proposed transactions with Clearwire and Softbank. The Eagle River transaction is clearly an integral part of those transactions and hence should not have been approved as a one-off, non-substantial transaction.

In the Petition for Reconsideration, Crest explained that the Eagle River transaction "was the first step in Sprint's plan to force out Clearwire's minority shareholders ... and deliver control of Clearwire's spectrum to Softbank."⁷ As Crest explained:

The Eagle River transaction was hardly *pro forma*, as it was the first step in a proposed transaction through which Sprint will acquire 100% ownership of Clearwire, a transaction appropriately undergoing public comment and Commission review. And that transaction is itself part of a

⁵ See Softbank and Sprint File Amendment to their Previously Filed Applications to Reflect Sprint's Proposed Acquisition of *De Facto* Control of Clearwire, IB Docket No. 12-343, Public Notice, DA 12-2090 (rel. Dec. 27, 2012).

⁶ Sprint acknowledges that "the SoftBank Transaction and the Clearwire Merger Agreement would result in a 'change in *de facto* control of Clearwire.'" Opp. 7 (quoting *December 27, 2012 Public Notice* at 3).

⁷ Petition for Reconsideration at 8, IB Docket No. 12-343 (Jan. 4, 2013) ("Crest Petition"). Crest also filed its petition in ULS File No. 0005480932 on January 10, 2013. Crest filed the petition in the IB Docket because, as explained herein, the Eagle River transaction is intermeshed with the transactions being reviewed in that docket. Furthermore, the Commission's only explanation for its *pro forma* treatment of Sprint's application came in the *December 27, 2012 Public Notice* released in IB Docket No. 12-343. Accordingly, Sprint's request for dismissal of Crest's petition from the IB Docket (*see* Opp. at 1 n.2) should be denied. In any event, Crest's January 10 ULS filing was timely for purposes of seeking reconsideration, since the Bureau announced its approval of Sprint's *pro forma* application on December 12. Sprint does not contend otherwise.

larger transaction also undergoing such scrutiny — Sprint’s proposed transfer to Softbank Corporation of a controlling 70% interest in Sprint.⁸

Sprint does not dispute that the Eagle River transaction was the first phase of this larger scheme — the proverbial camel’s nose under the tent. Nor does Sprint dispute that, when the Bureau approved Sprint’s *pro forma* application, the Bureau’s staff did not know that Sprint intended to seek 100% of Clearwire stock once the Commission had approved the acquisition of Eagle River’s 5% stake.⁹ Instead, Sprint argues that none of this matters: “even if the Commission had known about the Clearwire Merger Agreement when reviewing the *pro forma* Applications, it would have been irrelevant to its consideration of them” because the Commission may “only consider[] the transaction before it.”¹⁰

This is a remarkable conception of the Commission’s duty to determine whether a transaction (or set of related transactions) is in the public interest — and of an applicant’s obligations to the Commission. In Sprint’s view, even while its Eagle River application was pending, Sprint had no duty to tell the Commission about its plan to follow up the Eagle River buy-out with the buy-out of *all* Clearwire’s minority shareholders — a plan it publicly unveiled just one day after it secured *pro forma* approval of the Eagle River transaction and certainly had in the works well before that day despite its public comments to the contrary — because the Commission was required to focus myopically on the transaction “before it,” Eagle River. In other words, Sprint believes it was perfectly fine to do a Texas two-step: first get staff to approve the Eagle River transaction as a *pro forma* transaction, then use its new leverage within Clearwire to squeeze out the other minority shareholders.

⁸ *Id.* at 2 (parentheticals omitted).

⁹ *See* Opp. at 8.

¹⁰ *Id.*

The decisions Sprint cites in its opposition¹¹ merely stand for the unremarkable proposition that the Commission need not consider *unrelated* transactions in tandem.¹² The Eagle River transaction is clearly related to the Sprint-Clearwire and Sprint-Softbank transactions. And the Commission obviously has the power to consider related transactions together: It is doing exactly that with respect to Sprint’s proposed transactions with Clearwire and Softbank.¹³

II. The Eagle River Transaction Is By No Means *Pro Forma*.

Apart from the fact that the Eagle River transaction is bound up with a larger scheme of transactions that require, and are receiving, full Commission review, the Eagle River transaction itself can scarcely be called *pro forma* or insubstantial — nor could it reasonably have been called that when Sprint put it before the Commission for approval.

The Eagle River transaction gave Sprint, for the first time, a clear-cut majority on the Clearwire board. Before the transaction, Sprint had the right to nominate seven of 13 directors, but one of them had to be independent. The Eagle River transaction, by Sprint’s own acknowledgement, “relieved Sprint of the obligation to nominate at least one independent director.”¹⁴ And a company’s “power to constitute or appoint more than fifty percent of the board of directors” is one of the tell-tale indicators of *de facto* control under the Commission’s

¹¹ See Opp. at 8 n.32.

¹² See *Acquisition of Certain Assets of Cimco Communications, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 3401, 3404 ¶ 8 n.16 (2010) (transactions were “unrelated”); *Applications of Nextel Communications, Inc. for Transfer of Control of OneComm Corporation, N.A., and C-Call Corp.*, Order, 10 FCC Rcd 3361, 3363 ¶ 18 (1995) (transactions were not “interrelated”).

¹³ See *supra* note 5.

¹⁴ Opp. at 5. See also Applications, *supra* note 1, Exhibit A, at 1 n.1 (“none of the Sprint appointees would be required to be independent”).

precedents.¹⁵

Sprint admits that its board majority gives it “[v]eto power.”¹⁶ That is, Sprint does not quarrel with Crest’s observation that “Sprint’s majority shareholding gives Sprint the power to block any proposed or potential alternatives to its plan to buy out Clearwire’s minority shareholders” except to say that “[v]eto power does not equal *de facto* control.”¹⁷ But a true analysis of the facts does not support Sprint’s statement. The fact of the matter is that with Sprint empowered to fill seven of 13 board seats with non-independent directors, Clearwire is prevented from making any major corporate change unless it meets with Sprint’s approval. Regardless of whether Sprint has the raw power to force Clearwire to accept its proposed squeeze out of minority shareholders, Sprint — with its board majority — clearly has the votes to make it impossible for Clearwire to do anything else. Sprint’s veto power was demonstrated just a few days after Crest filed its petition. On January 8, 2013, Clearwire announced that it had received a proposal from DISH to acquire all of Clearwire’s stock for \$3.30 per share (more than the \$2.97 per share offered by Sprint).¹⁸ Clearwire’s press release summarized Sprint’s response, reporting that “Sprint has stated it would not vote in favor of the proposed transaction with DISH.”¹⁹ With a majority of shares and a majority of board seats, Sprint has the power to kill any deal except the one it wants. This is the very definition of *de facto* control — control

¹⁵ *Federal Communications Bar Association’s Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers*, Memorandum Opinion and Order, 13 FCC Rcd 6293, ¶ 7 (1998) (“*FCBA Forbearance Order*”).

¹⁶ Opp. at 6.

¹⁷ *Id.* (quoting Crest Petition at 10).

¹⁸ Clearwire Press Release, *Clearwire Corporation Provides Transaction Update* (Jan. 8, 2013).

¹⁹ *Id.*

that is “in fact, in deed, actual.”²⁰

There is no doubt that the Eagle River transaction brings about a sea change in terms of Sprint’s power over Clearwire. Not only does that transaction give Sprint (1) a majority of Clearwire stock and (2) the power to appoint a majority of non-independent directors, but it eliminates Eagle River’s special rights under the 2008 Equityholders’ Agreement (“EHA”). The EHA provides that no amendments to Clearwire’s Bylaws, Charter, or Operating Agreement, and no change to the size of the Clearwire board, can be made without Eagle River’s approval if the change would “uniquely or disproportionately adversely affect Eagle River or *the public stockholders* of the Company.”²¹ Thus, under the EHA, Eagle River has the unique power to act as a watchdog for Clearwire’s public shareholders. With the Eagle River transaction approved, Eagle River would have no ability to play that important role.

Sprint’s opposition attacks a straw man when it discusses the super-majority and related-party provisions of the EHA.²² When it approved the Eagle River transaction on a *pro forma* basis, the Bureau did not explain why it regarded the transaction as *pro forma*.²³ In the *December 27, 2012 Public Notice*, the Commission stated that the transaction was *pro forma* because under the EHA “a super-majority vote of the board of directors (10 of 13 members) is required to replace Clearwire’s CEO and certain other members of senior management and to

²⁰ Black’s Law Dictionary 374 (5th ed. 1979) (defining “*de facto*”) (quoted in *2000 Biennial Regulatory Review*, Notice of Proposed Rulemaking, 15 F.C.C.R. 24264, 24271 n.32 (2000)).

²¹ EHA § 2.7(b)(ii) (emphasis added); *see also* DISH Petition at 8-9.

²² *See Opp.* at 5-6.

²³ *See* Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control License Applications, *De Facto* Transfer Lease Applications and Spectrum Manager Lease Notifications, Designated Entity Reportable Eligibility Event Applications, and Designated Entity Annual Reports, Report Nos. 8300, 8300-A, 8300-B, and 8300-C, *Public Notice* (WTB rel. Dec. 12, 2012).

approve a change of control of Clearwire.”²⁴ Notably, the *Public Notice* cited not the EHA itself, but a footnote in a 2008 filing by Sprint describing the EHA in summary fashion.²⁵ Crest’s Petition for Reconsideration pointed out that § 2.6(b)(v) of the EHA does not require the vote of ten directors for a “Change of Control of the Company” in a “Related Party Transaction.”²⁶ Contrary to Clearwire’s assertions, Crest did not “misstate[]” this provision and did not make that provision the “primary basis for its argument” that the Eagle River transaction gave Sprint *de facto* control over Clearwire.²⁷ Moreover, Crest made no assertion regarding whether the Sprint-appointed directors were or were not required to vote on the proposed Sprint-Clearwire merger under EHA § 2.6(b)(v). Crest’s discussion of EHA § 2.6(b)(v) was accurate and was offered only to show that the EHA and its super-majority vote provision are more complicated than the *Public Notice* had recited. And the EHA’s super-majority provision is the only basis cited in the *Public Notice* for the *pro forma* treatment of Sprint’s application.

Sprint’s remaining arguments clearly lack merit. Sprint argues that its “reacquisition of a *de jure* controlling interest in Clearwire was appropriately processed under *pro forma* procedures given that the Commission previously approved such an interest in 2008.”²⁸ But the Commission’s 2008 approval, following full public interest review, did not give Sprint a license to surrender and then reacquire such a controlling interest five years later, under very different circumstances, subject only to *pro forma* review.²⁹

²⁴ See *December 27, 2012 Public Notice* at 2.

²⁵ See *id.* at 2 n.12. It is also noteworthy that the rationale of the *Public Notice* was *not* the rationale offered by Sprint for treating its application as *pro forma*.

²⁶ EHA § 2.6(b)(v); see Crest Petition at 9.

²⁷ Opp. at 9.

²⁸ *Id.* at 6–7.

²⁹ See Crest Petition at 10; DISH Petition at 7.

Sprint suggests that “Crest’s real concern is [Sprint’s] pending transactions” with Clearwire and Softbank.³⁰ But it is not for Sprint to say whether Crest, or the Commission, may raise concerns about the Eagle River transaction. That transaction is subject to public interest review and Commission approval. Sprint may not escape such review by asserting that Crest’s “real” concerns lie elsewhere. Sprint also argues that the Commission is the “wrong forum” for Crest’s claims.³¹ But the Commission is absolutely the right forum for deciding whether the Eagle River transaction is in the public interest.

Sprint further contends that the Commission “will not adjudicate contractual issues and the adjudication of securities law matters is beyond the Commission’s authority and expertise.”³² But no one has asked the Commission to adjudicate such issues. Crest seeks ordinary (not *pro forma*) Commission review of whether the Eagle River transaction serves the public interest. The Commission clearly has the authority to conduct that review.

* * *

Where a proposed transaction is truly *pro forma*, Commission rules permit staff to approve it on delegated authority without placing it on public notice. But determining whether a particular transaction is *pro forma* will often require careful consideration.³³ By its nature, a summary, *pro forma* application may not present all of the relevant facts to the Commission. Thus, where there is any reasonable doubt about whether a transaction is substantial, the use of *pro forma* procedures should be eschewed. Certainly a transaction should not be regarded as *pro forma* merely because the applicant says it is. Here, there are sound reasons for regarding the

³⁰ Opp. at 7.

³¹ *Id.* at 9.

³² *Id.* at 3.

³³ See *FCBA Forbearance Order*, 13 FCC Rcd at ¶ 7 (“Because it inherently involves issues of fact, *de facto* control is determined on a case-by-case basis”).

Eagle River transaction as more than *pro forma*. Sprint, not surprisingly, contends otherwise. But the fact that this is at all debatable suggests that the transaction should receive full, not summary, review. Granting Crest's (or DISH's) Petition for Reconsideration would not mean that Eagle River transaction must be denied. It would just mean that the transaction will receive the careful consideration that it deserves but has not to date received.

CONCLUSION

For the foregoing reasons, and those stated in Crest's Petition for Reconsideration, the Commission or its staff should reconsider the approval of Sprint's application regarding the Eagle River transaction through *pro forma* procedures, put that application on public notice, and review that transaction in IB Docket No. 12-343 along with Sprint's proposed transactions with Clearwire and Softbank.

Respectfully submitted,

/s/ Viet D. Dinh

Viet D. Dinh
H. Christopher Bartolomucci
Jeffrey M. Harris
Stephen V. Potenza
Brian J. Field
BANCROFT PLLC
1919 M Street, NW, Suite 470
Washington, DC 20036
(202) 234-0090
vdinh@bancroftpllc.com

Kathleen M. H. Wallman
WALLMAN CONSULTING, LLC
9332 Ramey Lane
Great Falls, VA 22066
(202) 641-5387
wallmank@wallman.com

January 22, 2013

Counsel for Crest Financial Limited

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply of Crest Financial in Support of Petition for Reconsideration was served by electronic mail on January 22, 2013, to the following recipients:

Regina M. Keeney
Lawler, Metzger, Keeney & Logan, LLC
2001 K Street, NW, Suite 802
Washington, DC 20006
(202) 777-7700
gkeeney@lawlermetzger.com
Counsel for Sprint

John R. Feore
Dow Lohnes P.L.L.C.
1200 New Hampshire Avenue, NW, Suite 800
Washington, DC 20036
(202) 776-2818
jfeore@dowlohn.com
*Counsel for Softbank Corp. and Starburst I, Inc.
and Starburst II, Inc.*

Nadja S. Sodos-Wallace
Clearwire Corporation
1250 Eye Street, NW, Suite 901
Washington, DC 20005
(202) 330-4011
nadja.sodoswallace@clearwire.com
Counsel for Clearwire Corporation

/s/ Brian J. Field
Brian J. Field
BANCROFT PLLC
1919 M Street, NW, Suite 470
Washington, DC 20036
(202) 234-0090
bfield@bancroftpllc.com
Counsel for Crest Financial Limited