

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

In the Matter of	)	
	)	
Improving Public Safety Communications in the 800 MHz Band	)	WT Docket No. 02-55
	)	
Petition for Declaratory Ruling of Sprint Nextel Corporation Concerning 800 MHz Rebanding “Anti-Windfall” Payment and Letter of Credit Minimum Amount	)	
	)	

**COMMENTS OF DISH NETWORK CORPORATION**

**I. INTRODUCTION AND SUMMARY**

DISH Network Corporation (“DISH”) submits these comments in the above-referenced proceeding. Sprint Nextel Corporation (“Sprint”) has requested a Commission ruling that Sprint will not have to make an “anti-windfall” payment to the U.S. Treasury pursuant to the Commission’s 800 MHz and 1990-2025 MHz rebanding orders.<sup>1</sup> Sprint’s request is not supported by adequate documentation, and further scrutiny of Sprint’s claimed expenditures is needed before the Commission can reasonably determine that no “anti-windfall” payment is required.

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<sup>1</sup> See Sprint Nextel Corporation, Petition for Declaratory Ruling, WT Docket No. 02-55, (Jan. 22, 2013) (“Sprint Petition”); see also Public Notice, Federal Communications Commission, Public Safety and Homeland Security Bureau Seeks Comment on Petition for Declaratory Ruling by Sprint Nextel Corporation Concerning 800 MHz Rebanding “Anti-Windfall” Payment and Letter of Credit Minimum Amount, WT Docket No. 02-55, DA 13-98 (rel. Jan. 25, 2013).

Sprint claims that its obligation to pay \$2.8 billion to the U.S. Treasury in return for receiving the G Block PCS spectrum<sup>2</sup> has been totally erased by some \$3.422 billion it has either spent or is contractually obligated to spend on relocating incumbents. The amount claimed by Sprint in relocation costs is vast and appears unprecedented. Sprint's claims should be scrutinized carefully, not accepted at face value. Particular scrutiny is warranted for three reasons.

First, few of these claimed costs have been vetted by anyone other than Sprint and its auditors. The 800 MHz Transition Administrator ("TA") has not reviewed all of Sprint's claimed 800 MHz expenses, and has indicated that a further accounting is necessary even for the claims it has reviewed. Moreover, the TA has not reviewed *any* of Sprint's 1.9 GHz relocation expenses, as the TA's scope of review extends only to the 800 MHz band. All in all, at least \$2.3 billion of Sprint's claims have yet to be reviewed by an independent third party.

Second, Sprint claims a significant amount in indirect expenses—costs whose inclusion is questionable under the Commission's rules—and makes other questionable claims for its 1.9 GHz relocation activities.

Third, Sprint has lacked an incentive to keep these costs low. This is because a claim of \$3.4 billion in transition costs—the claim made by Sprint here—presents Sprint with an unusual benefit; it could allow Sprint both to offset its \$2.8 billion obligation to the U.S. government *and* to recover from third-party beneficiaries of the relocation. This makes it all the more important to ensure that the costs claimed by Sprint have been prudently incurred. The required true-up

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<sup>2</sup> See Improving Public Safety Communications in the 800 MHz Band, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd. 14969, 15018 ¶ 76 (2004) ("800 MHz Order").

and a full and independent accounting are necessary to ensure that the American taxpayer is not short-changed.

DISH further urges the Commission to hold this petition in abeyance pending the outcome of Sprint's proposal to be acquired by a foreign company, Softbank. In the SoftBank proceeding, Sprint has claimed that the proposed acquisition can take advantage of the presumption in favor of entry for World Trade Organization ("WTO") country investors acquiring control over certain licensees set forth in Section 310(b) of the Communications Act.<sup>3</sup> But in reply comments filed today in that proceeding, DISH points out that it is questionable whether the presumption applies to all of the services in question.<sup>4</sup> And, even if the presumption does apply, it is only intended to place foreign investors on comparable footing with the treatment generally available to U.S. companies. The WTO Basic Telecommunications Services Agreement, on which the presumption was based,<sup>5</sup> does not mean that foreign investors are entitled to receive windfalls that are not generally available to other U.S. companies. The question of whether the \$2.8 billion "anti-windfall" payment obligation has been entirely offset by legitimate Sprint expenditures is a fact-intensive one. If these expenditures are in fact less than \$2.8 billion, and the FCC nevertheless proceeds to grant the petition, then Sprint, and therefore also SoftBank, would effectively be receiving an "undue windfall."<sup>6</sup> Thus, the

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<sup>3</sup> Joint Opposition to Petitions to Deny and Reply to Comments of Sprint Nextel Corp., SoftBank Corp, Starburst I, Inc., Starburst II, Inc., IB Docket No. 12-343, at 19-22 (Feb. 12, 2013).

<sup>4</sup> Reply Comments of DISH Network L.L.C., IB Docket No. 12-343, at 8, 10 (Feb. 12, 2013) ("DISH Reply Comments").

<sup>5</sup> See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities, *Report and Order and Order on Reconsideration*, 12 FCC Rcd. 23891, 23896 ¶ 9 (1997).

<sup>6</sup> See *800 MHz Order*, 19 FCC Rcd. at 14978 ¶ 12 (describing the compensation owed by Sprint minus the offsets as a mechanism intended "[t]o ensure that [Sprint] is treated equitably but does not realize and undue windfall").

uncertainty over the status of Sprint's anti-windfall payment obligation becomes especially troubling when seen through the prism of Sprint's proposed foreign ownership.

## **II. BACKGROUND**

In 2004, the Commission adopted, with some modifications, a plan originally proposed by Nextel (Sprint's predecessor-in-interest) that granted Sprint exclusive use of nationwide spectrum in the 1.9 GHz band in exchange for, among other things, its promise to cure the 800 MHz band of certain interference issues that had impeded use of the 800 MHz spectrum by the public safety community. Specifically, in exchange for immediate access to the PCS G Block's 10 MHz of spectrum in the 1.9 GHz band (1910-1915 MHz and 1990-1995 MHz), Sprint agreed to: (i) relocate public safety services in the 800 MHz band, and its own services in the 800 and 900 MHz bands, *within 36 months*; and (ii) relocate Broadcast Auxiliary Service ("BAS") licensees in the 1.9 and 2 GHz bands *within 30 months*. Sprint did not meet either deadline, and has had to receive a number of successive extensions.

Sprint also undertook a third obligation—to make an anti-windfall payment to the U.S. Treasury for its receipt of the G Block, in the amount by which the value of the new 1.9 GHz spectrum exceeded the value of the 800 MHz spectrum relinquished (and other offsets). This difference was set by the Commission at approximately \$2.8 billion. To offset the difference, Sprint is allowed to use its eligible 800 MHz reconfiguration and BAS relocation expenses as credits to the \$2.8 billion payment obligation.

Sprint was also allowed to recover its relocation expenses from other licensees benefitting from the relocation, but it could not use sums recovered from others as credits to offset its obligation to the Treasury, unless the total eligible relocation expenditures exceeded \$2.8 billion. This regime had an unintended consequence—it undermined Sprint's incentive to keep costs low. The higher Sprint's costs, the lower its payment to the Treasury, and the greater

the chance that Sprint could recover from others. In any event, Sprint was required to pay any amounts found owing to the U.S. Treasury as part of a true-up. The true-up has not yet occurred. And only slightly more than \$1 billion of Sprint's claims have even been submitted to the TA for review.

### **III. THE TRANSITION ADMINISTRATOR HAS REVIEWED ONLY SOME OF SPRINT'S 800 MHZ CLAIMED COSTS, AND NONE OF SPRINT'S 1.9 GHZ RELOCATION COSTS**

In its Petition, Sprint calls on the Commission to put the issue of an anti-windfall payment to rest without having the "TA verify and audit every dollar Sprint spends to implement the 800 MHz reconfiguration plan."<sup>7</sup> Sprint makes its request even though it has only *submitted* slightly more than \$1 billion in claims (approximately 40% of its estimated 800 MHz expenditures) to the TA for approval (and a good portion of those submissions have been rejected).<sup>8</sup> The determination of the amount of Sprint's anti-windfall payment cannot and should not be made without a careful government audit of all claims. The TA himself has already explained that he contemplates an "external audit," to be conducted after the TA has completed its review of Sprint's claims.<sup>9</sup> The American taxpayer deserves nothing less.

As an initial matter, the TA so far has only determined that \$924.3 million of Sprint's claims to be "Creditable Costs" pending a final accounting.<sup>10</sup> This means that more than \$1.6

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<sup>7</sup> Sprint Petition at 13.

<sup>8</sup> See 800 MHz Transition Administrator, LLC Quarterly Progress Report for the Quarter Ended Sept. 30, 2012, WT Docket No. 02-55, at 32-33 (Jan. 2, 2013) ("TA Report"). Sprint has submitted \$802.0 million in claims for TA review related to 800 MHz incumbent license reconfiguration costs and \$272.2 of claims related to its own expenses. *Id.*

<sup>9</sup> *Id.* at 33. The TA's review and approval is considered only as "pending" until the "Final Accounting to be completed at the completion of the reconfiguration and the *results of the external audit.*" *Id.* (emphasis added).

<sup>10</sup> See *id.* at 33.

billion of what Sprint claims it will have spent on the 800 MHz reconfiguration has not been subject to any review.<sup>11</sup>

The TA has also rejected many of Sprint's claims. In the "800 MHz Incumbent Licensee Reconfiguration" category of costs claimed by Sprint, the TA has returned more than ten percent of the value of Sprint's submissions, rejecting them for lack of adequate documentation.<sup>12</sup> While some of these claims may have been resubmitted, Sprint proffers no evidence on how many have been resubmitted and to what extent they have been approved or disallowed. For the category of costs related to Sprint's own expenses, this rejection rate more than doubles to 22.3%.<sup>13</sup> It is unlikely that all of Sprint's claims would be found valid under an independent review.

Finally, the 800 MHz Transition Administrator's job is confined to the 800 MHz band; it does not extend to reviewing a large part of Sprint's claimed costs—those claimed for relocating BAS incumbents from the 1.9 GHz band.<sup>14</sup>

#### **IV. SPRINT'S 1.9 GHZ RELOCATION CLAIMS INCLUDE QUESTIONABLE COSTS**

Sprint's 1.9 GHz claims amount to some \$730 million. When those claims were subject to a thorough review through the significant objections raised by DBSD, TerreStar, ICO Global, and DISH in a number of judicial proceedings where Sprint's demand for payment for its BAS relocation activities became an issue, the resulting scrutiny showed some of the serious weaknesses in Sprint's claims. In particular, there appears to be significant doubt over the propriety of several categories of these claimed expenses (expenses made after the deadline for

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<sup>11</sup> See Sprint Petition at Appendix A.

<sup>12</sup> See TA Report at 33. The TA has sent back \$87.4 million in claims by Sprint for incumbent reimbursement out of a total of \$802 million submitted. *Id.*

<sup>13</sup> *Id.* The TA has sent back \$60.3 million in claims by Sprint for its own expenses out of a total of \$270 million reviewed by the TA. *Id.*

<sup>14</sup> *Id.* at 33-34.

reconfiguration, overhead, indirect costs far in excess of the cap set forth in the Commission's emerging technologies principles on so-called "soft" costs,<sup>15</sup> etc.). Ultimately, Sprint settled with DISH for just 5/8<sup>th</sup> of its claim, which raises serious questions regarding whether the Sprint claims could survive the scrutiny that the taxpayers deserve.<sup>16</sup> Sprint's claims of some \$729.9 million for the BAS relocation costs should not be accepted without verification by the U.S. government. An independent audit is thus necessary to ensure that the taxpayers do not suffer waste.

#### **V. SPRINT HAS HAD NO INCENTIVE TO KEEP COSTS LOW**

Sprint claims that it has incentives to make sure its 800 MHz and BAS relocation expenditures are reasonable and prudent.<sup>17</sup> But the structure of Sprint's offsets casts doubt on the presence of such incentives. As mentioned above, Sprint was allowed to recover its relocation expenses from other licensees benefitting from the relocation, but it could not use sums recovered from others as credits to offset its obligation to the Treasury, unless the total eligible relocation expenditures exceeded \$2.8 billion. This means that Sprint stands to benefit from a high enough expenditure. If the claimed expenditure is below \$2.8 billion, any amounts recovered by Sprint from others reduce Sprint's ability to offset the \$2.8 billion owed to the Treasury. If it stands at \$2.8 billion exactly, then Sprint can entirely offset the payment to the government but cannot keep any amounts recovered from others. But if the expenditure is greater than \$2.8 billion, Sprint can achieve both. It can offset the payment to the government

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<sup>15</sup> The Commission has found that, while the emerging technologies principles do not apply to Sprint's relocation exercise directly, they are useful guideposts by analogy. Improving Public Safety Communications in the 800 MHz Band, *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd. 25120, 25150-51 ¶ 70 (2005).

<sup>16</sup> See DISH Network Corp., Quarterly Report (Form 10-Q), at 17 (Nov. 6, 2012); Sprint Petition at Appendix A (showing \$135 million in amounts received by MSS licensees).

<sup>17</sup> Sprint Petition at 12-13.

*and* recover from others without having to pay these additional monies to the Treasury. At \$3.422 billion, Sprint can supposedly recover up to \$622 million from Mobile-Satellite Service (MSS), H Block, and J Block licensees. Sprint's claim *has* come in at \$3.422 billion. Sprint's lack of incentive to keep costs low demands a close look at that claim.

## VI. CONCLUSION

The Commission should reject Sprint's request and conduct a careful audit of Sprint's claimed expenditures when Sprint does complete the 800 MHz transition. In any case, the Commission also should hold Sprint's petition in abeyance pending the outcome of the proposed SoftBank acquisition proceeding.

Respectfully submitted,

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/s/

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