



PUBLIC NOTICE

Federal Communications Commission
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DA 18-831
August 8, 2018

WIRELESS TELECOMMUNICATIONS BUREAU SEEKS COMMENT ON T-MOBILE US, INC. AND SPRINT CORPORATION REQUESTS FOR A DECLARATORY RULING OR WAIVER OF THE COMMISSION'S RULES FOR AUCTIONS 101 AND 102

AU Docket No. 18-85

Comments Due: August 22, 2018

By this Public Notice, the Wireless Telecommunications Bureau (Bureau) seeks comment on the separate requests of T-Mobile US, Inc. (T-Mobile)¹ and Sprint Corporation (Sprint)² for a clarification and declaratory ruling, respectively, on the certification requirement in Section 1.2105(a)(2)(ix) of the Commission's rules,³ or alternatively a waiver of that provision, designed to ensure that their Business Combination Agreement (BCA) will not bar their independent participation in Auctions 101 and 102. The Bureau also seeks comment on Sprint's request for a limited waiver of the Commission's rule prohibiting major modifications of short-form applications, or alternatively a waiver of its obligation to maintain the accuracy of its short-form applications, to allow Sprint and T-Mobile to close their transaction promptly if the proposed merger is approved.⁴

On August 6, 2018, T-Mobile filed a request for confirmation that its BCA with Sprint is exempt from the Commission's prohibition on joint bidding arrangements or, alternatively, for a waiver of the prohibition with regard to the BCA so that it may be able to participate in Auctions 101 and 102.⁵ The Commission's rules generally prohibit joint bidding and other arrangements involving auction applicants (including any party that controls or is controlled by, such applicants).⁶ The general prohibition on joint bidding arrangements excludes certain agreements, including agreements for the transfer or assignment of licenses, provided that such agreements do not both relate to the licenses at auction and address or

¹ See Letter from Nancy J. Victory, Partner, DLA Piper LLP (US), Counsel for T-Mobile US, Inc., to Marlene H. Dortch, Secretary, FCC, AU Docket No. 18-85 (filed Aug. 6, 2018) (T-Mobile Request).

² See Petition of Sprint Corporation for Expedited Declaratory Ruling or Waiver Regarding Joint Bidding and Request for Limited Waiver of Auction Form Rules, AU Docket No. 18-85 (filed Aug. 6, 2018) (Sprint Petition).

³ 47 CFR § 1.2105(a)(2)(ix).

⁴ Sprint Petition at 7-11.

⁵ T-Mobile Request at 1.

⁶ To implement the prohibition on joint bidding arrangements, the Commission's rules require each auction applicant to certify in its short-form application that it (or any party that controls or is controlled by it) has not entered into and will not enter into any arrangement or understanding of any kind relating directly or indirectly to bidding at auction with, among others, "any other applicant" or a nationwide provider. See 47 CFR § 1.2105(a)(2)(ix); *Updating Part 1 Competitive Bidding Rules et al.*, Report and Order, Order on Reconsideration of the First Report and Order, Third Order on Reconsideration of the Second Report and Order, Third Report and Order, 30 FCC Rcd 7493, 7575-76, paras. 195-97 (2015) (*2015 Part 1 Report and Order*) (modified by Erratum, 30 FCC Rcd 8518 (2015)).

communicate, directly or indirectly, bidding at auction (including specific prices to be bid) or bidding strategies (including the specific licenses on which to bid) or post-auction market structure.⁷ This prohibition applies to the upcoming Auctions 101 and 102.⁸ T-Mobile has expressed its interest in participating in Auctions 101 and 102 and contends that the BCA falls within this exemption because it neither relates to the licenses at issue nor addresses bidding, bidding strategy, or the post-auction market structure.⁹

Alternatively, T-Mobile seeks a waiver of the prohibition on joint bidding arrangements. It presents three arguments in favor of its request. First, it argues that its participation in Auctions 101 and 102 will promote broad auction participation and thereby serve the objective of determining the highest and best use of the spectrum.¹⁰ Second, T-Mobile maintains that the facts here are unique because it is party to an agreement contemplating a merger between two nationwide wireless providers at the same time as a major spectrum auction,¹¹ and, accordingly, that application of the rule would be inequitable, unduly burdensome, and contrary to the public interest.¹² Third, it asserts that it has no reasonable alternative to seeking a clarification or rule waiver because delaying the merger for the duration of both Auctions 101 and 102 would present inordinate financial and operational risks to both companies.¹³

On August 6, 2018, Sprint filed a petition for declaratory ruling that the BCA does not constitute a joint bidding arrangement or, alternatively, request for waiver of the bar on joint bidding by national carriers to enable it to participate in Auctions 101 and 102.¹⁴ Sprint urges the Commission to find that the BCA is not a joint bidding arrangement because the BCA, by its express terms, is neither an arrangement that relates to the licenses being auctioned nor an arrangement that addresses or communicates bidding, bidding strategies, or post-auction market structure.¹⁵

Sprint also requests that, if the Commission declines to issue a declaratory ruling, it grant Sprint a waiver of the prohibition against joint bidding arrangements.¹⁶ In support, Sprint argues that: (1) applying the rule would block parties that have expressed an interest in the auctions from participating, thereby reducing competition in the auctions; (2) the BCA cannot be construed as a vehicle for the parties to engage in auction-related “anticompetitive behavior” because the terms of the arrangement have been publicly available for months; and (3) grant of the waiver would serve the public interest because it would allow Sprint to compete for millimeter wave spectrum and therefore promote competition in the mobile wireless marketplace and between bidders in auctions.¹⁷

Finally, Sprint seeks a waiver of Section 1.2105(b)(2) of the Commission’s rules prohibiting major amendments to short-form auction applications, in the event that Sprint is a winning bidder and its

⁷ 47 CFR § 1.2105(a)(2)(ix)(C); *2015 Part 1 Report and Order*, 30 FCC Rcd at 7576, para. 197.

⁸ *See Auctions of Upper Microwave Flexible Use Licenses for Next-Generation Wireless Services; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auctions 101 (28 GHz) and 102 (24 GHz); Bidding in Auction 101 Scheduled to Begin November 14, 2018*, AU Docket No. 18-85, Public Notice, FCC 18-109, Section II.D (Aug. 3, 2018) (*Auctions 101 and 102 Procedures Public Notice*).

⁹ T-Mobile Request at 1-5.

¹⁰ *Id.* at 6-7.

¹¹ *Id.* at 3-4, 7-8.

¹² *Id.* at 7-8.

¹³ *Id.* at 8.

¹⁴ Sprint Petition at 1.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 2, 6-7.

merger with T-Mobile is approved.¹⁸ Sprint asserts that the requested waiver would allow it to make a major amendment to its auction application, reflecting a change in ownership, after the bidding has ended but before long-form license applications are due.¹⁹ Alternatively, Sprint seeks a waiver of its obligation under Section 1.2105(b)(4) to update its short-form application to reflect a change of ownership between the end of bidding and the deadline for long-form applications.²⁰ Sprint submits that special circumstances support its waiver request and that grant of its request would be in the public interest.²¹

In the recent *Auctions 101 and 102 Procedures Public Notice*, the Commission directed the Bureau to act expeditiously on requests for a determination of how the prohibition on joint bidding arrangements might apply in the context of specific agreements.²² Accordingly, we seek comment on these two filings on a schedule designed to provide prompt responses to the parties' requests.²³

Procedural Matters

The requests and comments can be accessed electronically via the Commission's Electronic Comment Filing System, <https://www.fcc.gov/ecfs/>. Search for filings using the docket number shown on the first page of this Public Notice. The full text of the requests and comments will be available for inspection and duplication during regular business hours in the FCC Reference Information Center (RIC) of the Consumer and Governmental Affairs Bureau, Federal Communications Commission, 445 12th Street, S.W., Room CY-A257, Washington, DC 20554.

Comment Filing Procedures

Interested parties may file comments on or before the date indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.²⁴ When filing documents, please reference AU Docket No. 18-85.

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <https://www.fcc.gov/ecfs/filings>. Filers should follow the instructions provided on the website for submitting comments. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number shown on the first page of this Public Notice.
- **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing.

¹⁸ See *id.* at 8; see also 47 CFR § 1.2105(b)(2) ("Major amendments cannot be made to a short-form application after the initial filing deadline. Major amendments include changes in ownership of the applicant that would constitute an assignment or transfer of control, changes in an applicant's size which would affect eligibility for designated entity provisions, and changes in the license service areas identified on the short-form application on which the applicant intends to bid.").

¹⁹ Sprint Petition at 8.

²⁰ *Id.*; see also 47 CFR § 1.2105(b)(4).

²¹ Sprint Petition at 8-9.

²² See *Auctions 101 and 102 Procedures Public Notice* at 17-18, para. 41.

²³ In doing so, we specify a filing deadline for responsive pleadings that is shorter than the default deadline set forth in the Commission's rules, and we waive on our own motion the establishment of a period for the filing of replies. See 47 CFR § 1.2(b) ("Unless otherwise specified by the bureau or office, the filing deadline for responsive pleadings to a docketed petition for declaratory ruling will be 30 days from the release date of the public notice, and the default filing deadline for any replies will be 15 days thereafter."); see also *id.* § 1.3 (establishing that provisions of the Commission's rules may be waived for good cause shown).

²⁴ See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

Filings in response to this Public Notice may be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Dr., Annapolis Junction, Annapolis MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 888-835-5322 (tty).

Ex Parte Rules—Permit-But-Disclose: This proceeding has been designated as a “permit-but-disclose” proceeding in accordance with the Commission's *ex parte* rules.²⁵ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Section 1.1206(b) of the Commission's rules.²⁶

In proceedings governed by Section 1.49(f) of the Commission's rules²⁷ or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

For further information, contact Angela Kung, at (202) 418-0660, or by e-mail at angela.kung@fcc.gov.

By the Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau.

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²⁵ 47 CFR §§ 1.1200(a); 1.1206.

²⁶ *Id.* § 1.1206(b).

²⁷ *Id.* § 1.49(f).