

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Competitive Bidding Procedures for Auction 101) AU Docket No. 18-85
(28 GHz) and Auction 102 (24 GHz))
Request of T-Mobile US, Inc. for Confirmation or)
Waiver of Section 1.2105(a)(2)(ix) of the)
Commission’s Rules)
Petition of Sprint Corporation for Expedited)
Declaratory Ruling or Waiver of Section)
1.2105(a)(2)(ix) of the Commission’s Rules and)
Request of Sprint Corporation for Limited Waiver)
of Section 1.2105(b)(2) or Section 1.2105(b)(4) of)
the Commission’s Rules)

ORDER

Adopted: September 11, 2018

Released: September 11, 2018

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we grant, in part, the separate petitions of T-Mobile US, Inc. (T-Mobile)1 and Sprint Corporation (Sprint)2 (collectively, petitioners) for a waiver of Section 1.2105(a)(2)(ix) of the Commission’s rules to allow each petitioner to certify and submit a short-form application (FCC Form 175) for Auctions 101 and/or 102, notwithstanding the petitioners’ Business Combination Agreement (BCA).3 That rule requires an auction applicant to certify that it (or any party that controls or is

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 See Business Combination Agreement By and Among T-Mobile US, Inc., Huron Merger Sub LLC, Superior Merger Sub Corporation, Sprint Corporation, Starburst I, Inc., Galaxy Investment Holdings, Inc., and for the limited purposes set forth in this Agreement, Deutsche Telekom AG, Deutsche Telekom Holding B.V., and SoftBank Group Corp. (Apr. 29, 2018) (BCA), https://www.sec.gov/Archives/edgar/data/101830/000110465918028087/a18-12444_1ex2d1.htm#Exhibit2_1_122313. As explained in the FCC Form 175 filing instructions for Auctions 101 and 102, FCC Form 175 includes several certifications required of all applicants for Auctions 101 and 102. Clicking the “Certify & Submit” button to submit an application constitutes a representation by the person certifying that the contents of the application, its certifications, and any attachments are true, complete, and correct. See Wireless Telecommunications Bureau Announces Availability of FCC Form 175 Application Instructions for Auctions 101 and 102; FCC Form 159 Instructions for Auction 101 Upfront Payments; and Technical Guides for Auction 102 Bidding, Public Notice, DA 18-817 (WTB Aug. 6, 2018); FCC, Short-Form Application (FCC Form 175) Filing Instructions for Auction 101 and Auction 102, at 26, paras. 105, 107 (2018). We are therefore granting the petitioners’ waivers in so far as they permit the petitioners to submit an FCC Form 175, including the certification required under Section 1.2105(a)(2)(ix), notwithstanding their merger agreement.

controlled by it) has not entered and will not enter into any arrangement or understanding of any kind relating directly or indirectly to bidding at auction with another auction applicant or a nationwide provider. We need not decide, and thus dismiss as moot, the request from T-Mobile for clarification and the petition for declaratory ruling from Sprint concerning the Commission's prohibition on joint bidding arrangements and how it applies to the BCA.

2. As described herein, we grant the waivers outlined above because, in light of the unique circumstances of the BCA, including its overall purpose, its provisions regarding independent bidding by the parties, and its timing in relation to the unusual sequence of Auctions 101 and 102, the public interest is served by enabling T-Mobile and Sprint to both apply and participate in both auctions, notwithstanding their proposed transaction. Recognizing the possibility that the same circumstances could justify waivers of other rules that might deter Sprint's participation should the Commission consent to the transaction and consummation become imminent while the parties have applications pending that are related to Auctions 101 and/or 102, we will act contemporaneously with any such consent to address Sprint's request for relief from rules that could hinder consummation. Specifically, should the Commission decide to grant the applications for transfer of control, we will then act on Sprint's request for waiver of Section 1.2105(b)(2) to allow it to make a major modification to its FCC Form 175 for Auction 101 and/or 102 and on its alternative request for waiver of its obligation to maintain the accuracy and completeness of information furnished in its short-form applications.⁴ We defer action at this time on Sprint's additional petition for waivers because the timing of consummation, should the Commission approve the applications for transfer of control, will determine which specific rules governing auction-related applications may need to be waived or otherwise addressed to provide appropriate relief and to protect the integrity of the auction for all applicants.

II. BACKGROUND

3. On April 29, 2018, the petitioners announced an agreement, referred to by the petitioners as the BCA, for Sprint to merge into T-Mobile in an all-stock transaction.⁵ On June 10, 2018, pursuant to the BCA, the petitioners filed applications seeking Commission consent to the transfer of control of the licenses, authorizations, and spectrum leases held by Sprint and its wholly-owned and controlled subsidiaries to T-Mobile.⁶

4. On August 3, 2018, several months after the BCA was announced, the Commission released a public notice establishing application and bidding procedures for the upcoming auctions of approximately 6,000 Upper Microwave Flexible Use Service (UMFUS) licenses in the 27.5–28.35 GHz (28 GHz) band, which is designated as Auction 101, and the 24.25–24.45 and 24.75–25.25 GHz (24 GHz) bands, which is designated as Auction 102.⁷ Pursuant to the *Auctions 101 and 102 Procedures Public*

⁴ The waivers discussed in this Order relate solely to the application of the Commission's competitive bidding rules to the parties' agreement and do not address in any way the parties' pending applications for consent to the transaction contemplated by that agreement.

⁵ See *Commission Opens Docket for Proposed Transfer of Control of Sprint Corporation to T-Mobile US, Inc.*, Public Notice, DA 18-625 (WTB June 15, 2018).

⁶ In furtherance of T-Mobile's and Sprint's merger agreement, the petitioners also filed applications for Commission consent to the *pro forma* transfer of control of the licenses, authorizations, and spectrum leases held by T-Mobile US, Inc., and its subsidiaries, and T-Mobile filed a petition for declaratory ruling to permit foreign ownership in excess of the statutory benchmark in Section 310(b) of the Act. *T-Mobile US, Inc., and Sprint Corporation Seek FCC Consent to the Transfer of Control of the Licenses, Authorizations, and Spectrum Leases Held by Sprint Corporation and Its Subsidiaries to T-Mobile US, Inc., and the Pro Forma Transfer of Control of the Licenses, Authorizations, and Spectrum Leases Held by T-Mobile US, Inc., and Its Subsidiaries*, Public Notice, DA 18-740 (WTB July 18, 2018) (*Sprint/T-Mobile Transaction Public Notice*). These requests remain pending before the Commission as of the date of this Order.

⁷ 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*

Notice, a party seeking to participate in Auction 101 and/or Auction 102 must file a separate FCC Form 175 electronically for each auction in which it wishes to participate prior to the initial filing deadline – September 18, 2018.⁸

5. On August 6, 2018, the petitioners separately filed requests for relief from certain Commission rules and procedures for Auctions 101 and 102 as they relate to the BCA. Specifically, 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 certification requirement with regard to the BCA so that it could participate in Auctions 101 and 102.⁹ Similarly, Sprint filed a petition for declaratory ruling that the BCA does not constitute a joint bidding arrangement or, alternatively, a request for waiver of the bar on joint bidding by national carriers to enable it to participate in Auctions 101 and 102.¹⁰

6. As explained in the *Auctions 101 and 102 Procedures Public Notice*,¹¹ 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).¹² The general prohibition on joint bidding

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102 (24 GHz); Bidding in Auction 101 Scheduled to Begin November 14, 2018, Public Notice, FCC 18-109 (Aug. 3, 2018) (*Auctions 101 and 102 Procedures Public Notice*); see also *Wireless Telecommunications Bureau Releases Updated List of Licenses to be Offered in Auction 102 (24 GHz); Announces Adjustment to the Categories and Number of Generic License Blocks*, Public Notice, DA 18-835 (WTB Aug. 10, 2018) (announcing the release of an updated list of licenses to be offered in Auction 102 and an adjustment to the categories and number of generic license blocks available for bidding in Auction 102). The Commission released a public notice seeking comment on the competitive bidding procedures to be used in Auctions 101 and 102 on April 17, 2018. *Auctions of Upper Microwave Flexible Use Licenses for Next-Generation Wireless Services; Comment Sought on Competitive Bidding Procedures for Auctions 101 (28 GHz) and 102 (24 GHz)*, Public Notice, FCC 18-43 (Apr. 17, 2018) (*Auctions 101 and 102 Comment Public Notice*) (also proposing that bidding would begin in Auction 101 on November 14, 2018).

⁸ *Auctions 101 and 102 Procedures Public Notice* at 14, para. 29. An application to participate in Auction 101 or Auction 102, referred to as a short-form application or FCC Form 175, provides information that the Commission uses to determine whether the applicant has the legal, technical, and financial qualifications to participate in a Commission auction for spectrum licenses. *Id.* at 13, para. 28.

⁹ T-Mobile Request at 1.

¹⁰ Sprint Petition at 1-2.

¹¹ See *Auctions 101 and 102 Procedures Public Notice* at 16-20, paras. 39-46.

¹² “The short-form application must contain . . .

(ix) Certification that the applicant (or any party that controls as defined in paragraph (a)(4) of this Section or is controlled by the applicant) has not entered and will not enter into any partnerships, joint ventures, consortia or other agreements, arrangements, or understandings of any kind relating to the licenses being auctioned that address or 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 not to bid), or post-auction market structure with: any other applicant (or any party that controls or is controlled by another applicant); with a nationwide provider that is not an applicant (or any party that controls or is controlled by such a nationwide provider); or, if the applicant is a nationwide provider, with any non-nationwide provider that is not an applicant (or with any party that controls or is controlled by such a non-nationwide provider), other than:

(A) Agreements, arrangements, or understandings of any kind that are solely operational as defined under paragraph (a)(4) of this Section;

(B) Agreements, arrangements, or understandings of any kind to form consortia or joint ventures as defined under paragraph (a)(4) of this Section;

(C) Agreements, arrangements or understandings of any kind with respect to the transfer or assignment of licenses, provided that such agreements, arrangements or understandings do not both relate to the licenses

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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 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.¹³ To implement the prohibition on joint bidding arrangements, Section 1.2105(a)(2)(ix) of the Commission's rules requires each auction applicant to certify in its FCC Form 175 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.¹⁴ For Auctions 101 and 102, the Commission identified AT&T, Sprint, T-Mobile, and Verizon Wireless as "nationwide providers," and it directed the Wireless Telecommunications Bureau (Bureau) to make case-by-case determinations of whether the prohibition applies to a specific agreement based on the details of that arrangement.¹⁵

7. Concurrent with its request for relief from the joint bidding prohibition, Sprint submitted a request for waiver of Section 1.2105(b)(2) of the Commission's rules prohibiting major amendments to short-form applications.¹⁶ As the Commission noted in the *Auctions 101 and 102 Procedures Public Notice*, after the initial FCC Form 175 filing deadline, an Auction 101 and/or Auction 102 applicant is permitted to make only minor changes to its FCC Form 175 (e.g., the deletion or addition of authorized bidders (to a maximum of three); the revision of addresses and telephone numbers of the applicant, its responsible party, and its contact person; and change in the applicant's selected bidding option (electronic or telephonic)).¹⁷ Major modifications to an FCC Form 175, such as changes in ownership that would constitute an assignment or transfer of control of the applicant, are not permitted after the initial FCC Form 175 filing deadline.¹⁸ Sprint seeks a limited waiver of the Commission's rules prohibiting major modifications to short-form applications so that, in the event that its merger with T-Mobile is approved, it can consummate the transaction and modify its short-form application after bidding has ended but before long-form applications are due to reflect a change of ownership resulting from the approved merger.¹⁹

8. Sprint also requested, as an alternative to a waiver of Section 1.2105(b)(2) of the Commission's rules, a limited waiver of its obligation under Section 1.2105(b)(4). Pursuant to Sections 1.65 and 1.2105(b)(4) of the Commission's rules, each applicant has a continuing obligation to maintain the accuracy and completeness of information furnished in a pending application, including a pending

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at auction and address or 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 not to bid), or post-auction market structure."

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)).

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

¹⁴ *Auctions 101 and 102 Procedures Public Notice* at 18, para. 43. In adopting the prohibition and certification requirement in 2015, the Commission noted that "the entities that qualify as nationwide providers will generally be identified in procedures public notices released before each auction." *2015 Part 1 Report and Order*, 30 FCC Rcd at 7571, para. 182 n.596.

¹⁵ *Auctions 101 and 102 Procedures Public Notice* at 17-18, 19, paras. 41, 44.

¹⁶ Sprint Petition at 2, 8.

¹⁷ See 47 CFR § 1.2105(b)(2); *Auctions 101 and 102 Procedures Public Notice* at 43, para. 112.

¹⁸ See *id.*

¹⁹ Sprint Petition at 8.

application to participate in Auction 101 or Auction 102,²⁰ even if a reported change may result in the dismissal of the application because it is subsequently determined to be a major modification.²¹ In its alternative request, Sprint seeks waiver of the obligation to update its short-form application for the brief period between the end of bidding and the due date for long-form applications and to permit Sprint, instead, to timely file a long-form application “reflecting a post-bidding transfer” with new ownership information following any grant of Commission consent to the merger and consummation thereof.²²

9. On August 8, 2018, the Bureau released a public notice seeking comment on the requests.²³ Two parties filed comments—the Competitive Carriers Association (CCA) and Verizon. CCA’s comments support the petitioners’ requests with respect to the Commission’s prohibition on joint bidding arrangements and how it relates to the BCA.²⁴ Verizon states that it has “no opinion” on the specific requests and urges the Commission to “evaluate and determine whether the BCA constitutes a joint bidding arrangement under its rules and take any precautions it deems prudent to ensure that the spirit and letter of the joint bidding prohibition are satisfied.”²⁵ Neither party addresses Sprint’s request for waiver of the Commission’s rules prohibiting major amendments to short-form applications or Sprint’s alternative request for waiver of its obligation to maintain the accuracy and completeness of information furnished in a pending application.

III. DISCUSSION

10. To receive a waiver under Section 1.925 of the Commission’s rules, the petitioners must demonstrate that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the waiver would be in the public interest, or (2) in view of the unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or that the applicant has no reasonable alternative to seeking a waiver of the rule.²⁶

11. *Petitions for Waiver of Prohibition on Joint Bidding.* As a threshold matter, we find that resolving the petitioners’ requests for waiver of the certification requirement in Section 1.2105(a)(2)(ix) of the Commission’s rules is ripe. While the petitioners have not yet filed an FCC Form 175 to participate in either Auctions 101 or 102, both parties have expressed an interest in participating in

²⁰ See 47 CFR §§ 1.65; 1.2105(b)(4). For purposes of Sections 1.65 and 1.2105(b)(4), an applicant’s FCC Form 175 and associated attachments for a particular auction will remain pending until the release of a public notice announcing the close of that auction. *Auctions 101 and 102 Procedures Public Notice* at 43-44, para. 113.

²¹ *Auctions 101 and 102 Procedures Public Notice* at 43-44, para. 113.

²² Sprint Petition at 8.

²³ See *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*, Public Notice, DA 18-831 (WTB Aug. 8, 2018).

²⁴ CCA Comments at 3 & n.6 (arguing that “the Commission should provide clear guidance that the BCA does not constitute (sic) a prohibited joint bidding agreement and therefore does not prevent participation in the auction” or alternatively “waive the anti-collusion rules as they apply to the BCA”).

²⁵ Verizon Comments at 1.

²⁶ See 47 CFR § 1.925(b)(3)(i)-(ii). We recognize that the petitioners requested waivers pursuant to Section 1.3 of the Commission’s rules. T-Mobile Request at 6; Sprint Petition at 6. We note that Section 1.925 governs waivers of rules in the context of wireless radio services licenses and that the waiver standard applied under Section 1.3 is substantially the same as the waiver standard applied under Section 1.925. See *Connect America Fund; Petition of Hawaiian Telcom, Inc. and Cincinnati Bell Inc. for Expedited Waiver of Section 1.21001(d)(4) of the Commission’s Rules, Request of Horizon Telcom, Inc. for Waiver of Section 1.21001(d)(4) of the Commission’s Rules*, Order, DA 18-661, at 3, para. 7 n.19 (WCB/WTB June 25, 2018).

Auctions 101 and 102.²⁷ In addition, the BCA includes precautions that the petitioners would take to prevent a violation of auction rules in the event that either petitioner sought to participate in Auctions 101 or 102 during the pendency of their merger application before the Commission.²⁸ Accordingly, we have reviewed the petitioners' requests on the merits.

12. We conclude, based on the record before us, that unique circumstances warrant granting the separate petitions of T-Mobile and Sprint for a waiver of the certification requirement in Section 1.2105(a)(2)(ix) of the Commission's rules as it relates to the BCA.²⁹ First, as T-Mobile and Sprint explain, the petitioners entered into the BCA well in advance of the release of the *Auctions 101 and 102 Procedures Public Notice*, which adopted the final application and bidding procedures for Auctions 101 and 102. Indeed, the petitioners note that their merger discussions began prior to the Commission's identification of these bands for auction.³⁰ The BCA contemplates a merger between two nationwide providers with a combined value of approximately \$146 billion and an extensive set of network, retail, service, and spectrum assets as well as millions of subscribers.³¹ T-Mobile asserts that Auctions 101 and 102 were not a factor in the petitioners' decision to merge and that the BCA was instead the result of a lengthy period of discussions between the parties about merging the two entities and gaining the scale, spectrum, and sites to deploy a nationwide 5G network and compete more effectively.³² Sprint adds that the enormous scope of the transaction alone demonstrates that any millimeter wave licenses acquired at auction "would be ancillary."³³

13. We acknowledge that the BCA is a complex agreement that involves business decisions and assets beyond the limited scope of licenses being offered in Auctions 101 and 102. Thus, whether or not the agreement could be said to "relate to" the licenses available in the auction or the post-auction market structure within the meaning of the rule, the record in this case indicates that the licenses available in the upcoming auctions were not a material consideration in concluding the agreement. Moreover, the bidding in these auctions is closely timed, and the application windows for them will run concurrently.³⁴

²⁷ T-Mobile Request at 8 ("T-Mobile has a long history of participating in spectrum auctions and has announced a strong intention to bid in Auctions 101 and 102"); Sprint Petition at 6, 9 (arguing that applying the rule prohibiting joint bidding arrangements would block the participation of "parties who have publicly expressed interest in obtaining high-band spectrum" and that, absent a waiver, there is a "very real chance" that "Sprint will elect not to participate in the millimeter wave auctions").

²⁸ T-Mobile Request at 4-6; Sprint Petition at 4-5.

²⁹ We emphasize that, in granting the separate waiver requests, we are not determining whether the BCA relates to the licenses at auction and to the post-auction market structure. We are therefore not ruling on whether the BCA constitutes a joint bidding arrangement or concluding that the petitioners may participate in a joint bidding arrangement. Rather, we are permitting each petitioner to certify and submit its respective FCC Form 175 for Auctions 101 and 102, notwithstanding the questions that the BCA might raise.

³⁰ T-Mobile Request at 3, 4 (claiming that the merger was announced "prior to the FCC's announcement of the auction date for the millimeter wave auctions and the issuance of the draft public notice relating to bidding procedures"); Sprint Petition at 3 n.7, 6 (asserting that the merger agreement "was contemplated for an extended period and executed on April 29, 2018, before the Commission adopted the schedule for the millimeter wave auction" and that the terms of the BCA have been publicly available for months). As noted above, the Commission proposed the start date for bidding in Auction 101 in the *Auctions 101 and 102 Comment Public Notice*, which was released on April 17, 2018. *See supra* note 7.

³¹ T-Mobile Request at 7-8; Sprint Petition at 3.

³² T-Mobile Request at 3 (pointing out that T-Mobile and Sprint did not enter into the BCA to effect a change in control of licenses that the Commission would subsequently identify for competitive bidding in Auctions 101 and 102); *see also* CCA Comments at 5-6 (arguing that, as T-Mobile explained, the BCA "does not discuss or otherwise relate to the 24 GHz and 28 GHz spectrum at issue in Auctions 101 and 102").

³³ Sprint Petition at 3.

³⁴ *Auctions 101 and 102 Procedures Public Notice* at 3, 12, paras. 2, 24-25.

They are also the first auctions of millimeter wave spectrum licenses in more than a decade. In such circumstances, application of the rule would be unduly burdensome by serving to preclude the parties from seeking initial licenses to operate in these bands.

14. Second, the petitioners assert that terms of the BCA require compliance with Commission rules designed to promote bidder independence and protect auction integrity. For example, the petitioners argue that Section 6.20 of the BCA expressly prohibits the petitioners from discussing or entering into any agreements related to bids, bidding strategies or post-auction market structure regarding the licenses being auctioned in any auction that either carrier wishes to participate in while the Commission considers their merger application, and it explicitly preserves the rights of Sprint and T-Mobile to participate separately in any such auctions.³⁵ In addition, the petitioners contend that Section 5.1 of the BCA contains covenants under which the petitioners will conduct their separate businesses and is designed not to limit their participation in the auctions.³⁶ They note specifically that the usual covenants of merger parties not to incur extraordinary debt during the pendency of the agreement have exceptions designed to facilitate both parties' independent participation in acquiring spectrum licenses.³⁷ We have examined the pertinent provisions of the BCA and are persuaded that the terms of these provisions are designed as safeguards against anticompetitive behavior and that they demonstrate the parties' intention to comply with the Commission's rules during the pendency of their merger applications.³⁸

³⁵ Sprint Petition at 4 (adding that Section 6.20 of the BCA provides that the petitioners will enforce safeguards to ensure strict compliance with the Commission's prohibited communications rules); T-Mobile Request at 5 (same); *see also* CCA Comments at 5 (observing that petitioners state that they "will fully comply with the prohibited-communications rules by barring discussions about bidding strategies, instituting a compliance unit to police prohibited conduct, and establishing segregated bidding committees during the pendency of the merger review process, among other measures" and that "Section 6.20 of the BCA notes that the Parties maintain their independence regarding auction decisions"); Verizon Comments at 3 (noting that "[b]oth parties state that they will take certain actions to insulate bidding personnel from interactions with the other merger party, such as use of firewalls and third party non-disclosure requirements").

³⁶ T-Mobile Request at 4-5 (arguing that Section 5.1 of the BCA makes clear that the acquisition of spectrum by the petitioners is expressly exempted from business conduct limitations that restrict the parties while the merger is pending); Sprint Petition at 4-5 (explaining that Section 5.1 of the BCA preserves Sprint's right to acquire wireless spectrum pursuant to an auction and contains clauses that do not place any limits on the value or amount of spectrum that Sprint may acquire in an FCC auction).

³⁷ T-Mobile Request at 6 (stating that the BCA enables each of T-Mobile and Sprint "to take on additional indebtedness specifically for purposes of acquiring spectrum at auction"); Sprint Petition at 5 ("Section 5.1 also provides that Sprint may incur 'incremental Indebtedness' of up to \$1 billion for the specific purpose of participating in spectrum auctions."); *see also* CCA Comments at 6 ("[T]he BCA appears to expressly preserves (sic) the Parties' unequivocal right to incur additional debt to participate in the auctions.").

³⁸ *See also* Verizon Comments at 1 (stating that while Verizon has "no opinion" on the specific requests, "[m]aking sure that the Commission's joint bidding and anti-collusion rules are followed will serve both T-Mobile and Sprint as well as any other participants in Auctions 101 and 102 by promoting certainty and administrative ease and protecting the integrity of the auction outcomes"). We note that such provisions are not an absolute defense to liability if a violation of the rule occurs. *Auctions 101 and 102 Procedures Public Notice* at 28, para. 71. However, we are not inclined to impose additional procedural requirements for certifications or attestations from the petitioners as proposed by Verizon. Verizon Comments at 3. We prefer instead to rely on the Commission's rules as specifically implemented for Auctions 101 and 102 and the representations of the parties with respect to the commitments reflected in the terms of the BCA. In addition, as the Commission explained in the *Auctions 101 and 102 Procedures Public Notice*, the Commission may, as Verizon requests, refer any specific allegations suggesting that violations of the federal antitrust laws may have occurred to the United States Department of Justice for investigation, and, if an applicant is found to have violated the antitrust laws or the Commission's rules, may subject the applicant to a forfeiture and prohibit the applicant from participating further in Auction 101, Auction 102, and in

(continued...)

15. Third, we agree that granting the waivers, as cabined by the protective procedures described in the BCA, offers potential public interest benefits. Specifically, granting the waivers could allow parties without substantial holdings in millimeter wave spectrum to participate and compete in Auctions 101 and 102,³⁹ furthering the public interest objectives of auctions, including promoting “economic opportunity and competition.”⁴⁰ Granting the requested waivers could also encourage the swift entry of new competitors for millimeter wave spectrum that may be deployed for 5G wireless and other advanced spectrum-based services in furtherance of the Commission’s statutory objective to promote “the development and rapid deployment of new technologies, products and services.”⁴¹ We find that, given the totality of circumstances here, the public interest will be most effectively served by permitting these parties to seek to participate and avoiding unnecessary disqualifications of applicants that may otherwise be determined qualified to bid.

16. The considerations discussed above – i.e., the timing and underlying purpose of the agreement, the BCA provisions designed to promote independent auction participation and protect auction integrity, and the public interest benefits – as well as the close timing of these auctions, which are the first auctions of millimeter wave spectrum in more than a decade, create unique and unusual circumstances that convince us that application of the rule to bar the petitioners from participating in Auctions 101 and 102 would be unduly burdensome and contrary to the public interest.⁴²

17. Because we grant the petitioners’ waiver requests, we need not decide, and thus dismiss as moot, the requests of T-Mobile and Sprint for a clarification and declaratory ruling, respectively, on whether the BCA constitutes a joint bidding arrangement under Section 1.2105(a)(2)(ix) of the Commission’s rules.⁴³

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future auctions, among other sanctions. Verizon Comments at 3-4; *Auctions 101 and 102 Procedures Public Notice* at 32, para. 84.

³⁹ Sprint Petition at 7 (asserting that “[e]xpeditious grant of the requested waiver would serve the public interest by enabling Sprint, which has no millimeter wave spectrum and intends to participate in the auctions, to compete for such high-band spectrum”); T-Mobile Request at 7 & n.23 (stating that it “does not currently have significant mmWave spectrum holdings” and arguing that “foreclosing T-Mobile’s participation in Auctions 101 and 102 would have the anticompetitive effect of further concentrating millimeter wave spectrum”); *see also* CCA Comments at 7 (“Excluding the Parties through the anti-collusion rules would have the perverse, anticompetitive effect of further concentrating a key input for 5G deployment and have the lasting effect of inefficiently distributing an important resource.”).

⁴⁰ 47 U.S.C. § 309(j)(3)(B); CCA Comments at 6 (arguing that achieving the Commission’s goals, including the goal to “promot[e] economic opportunity and competition” requires “broad auction participation” and that “[m]aximizing auction participation helps fulfill the core statutory and economic rationale of spectrum auctions which is to efficiently determine the bands’ highest and best use”).

⁴¹ 47 U.S.C. § 309(j)(3)(A); CCA Comments at 7 (“Allowing the Parties to bid in Auctions 101 and 102 also would promote 5G investment by ensuring a competitively neutral allocation of mmW spectrum.”).

⁴² T-Mobile Request at 8 (arguing that “delaying the merger for the duration of the lengthy quiet period associated with Auctions 101 and 102 – not to mention a long line of proposed upcoming auctions – would have presented inordinate financial and operational risks to both companies”).

⁴³ *See* Verizon Comments at 1 (urging the Commission to determine whether the BCA constitutes a joint bidding arrangement). We disagree with CCA that “[d]ue process requires clarification from the FCC that the BCA is not a *per se* bar on auction participation.” CCA Comments at 7. As CCA acknowledges, the Commission specifically stated in the *Auctions 101 and 102 Procedures Public Notice* that application of the prohibition on joint bidding arrangements “requires a case-by-case determination based on the details of a specific arrangement.” CCA Comments at 7; *Auctions 101 and 102 Procedures Public Notice* at 18, para. 41. Accordingly, whether a violation of this prohibition exists can only be determined based on the specific circumstances of a particular agreement, similar to the Commission’s case-by-case determinations regarding violations of other auction-related prohibitions.

18. *Petition for Waiver of Prohibition on Major Modifications.* Sprint argues that, absent a waiver of the Commission’s prohibition on major modifications to its short-form applications or a waiver of its continuing obligation to maintain the accuracy and completeness of information in its applications, there is a “significant chance” that Sprint will be unable to participate in the auctions.⁴⁴ Given the timing of the auctions, Sprint asserts that it is possible that the Commission may act on and approve its merger with T-Mobile before long-form applications are due. This would force Sprint either to delay closing the merger until after the due date for such applications or to proceed with the merger and risk being disqualified from the auctions.⁴⁵ Sprint argues that the outcome of enforcing the rule may be to prevent it from obtaining the spectrum it needs to remain competitive in a highly competitive national wireless industry.⁴⁶ Furthermore, it asserts that this result would harm the public interest by deterring participation in the auctions – a key goal of the competitive bidding rules.⁴⁷

19. Having found above that the BCA should not be a bar to Sprint and T-Mobile filing applications to participate in Auctions 101 and 102, we recognize that a future grant of relief to Sprint to make application changes to reflect consummation of the merger in the event the Commission grants consent thereto may be in the public interest. The same considerations that have persuaded us to permit the petitioners to apply to participate⁴⁸ could argue in favor of our waiving certain of our rules. We remain open to granting such relief contemporaneously with any grant of consent when we know that Sprint will require relief because consummation is imminent and what specific relief from our auction rules may be required based on Sprint’s continued status at that time as an applicant in Auction 101 or Auction 102. Although the burden would be on the applicant to make a case for the relief requested as with any waiver request, we would consider granting this relief as discussed further below.⁴⁹

20. Until the Commission acts on the transfer of control application, we defer action on Sprint’s request to waive Section 1.2105(b)(2) of the Commission’s rules to allow it to make a major modification to its short-form applications for Auctions 101 and 102 and similarly defer action on its alternative request for waiver of its obligation under Section 1.2105(b)(4) of the Commission’s rules to maintain the accuracy and completeness of information furnished in its short-form applications. We defer action on Sprint’s waiver request because the rules from which Sprint will require relief will depend on when any consummation occurs and the parties’ status as applicants or bidders at that time.⁵⁰ For

⁴⁴ Sprint Petition at 8.

⁴⁵ *Id.* at 9.

⁴⁶ *Id.*

⁴⁷ *Id.* at 9 & n.28 (citing *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2350, para. 6 (1994) (“[T]o encourage participation in the competitive bidding process by all qualified bidders, we have adopted a set of open competitive bidding processes.”)); *id.* at 2376, para. 162 (expressing a desire to “encourage applicants to participate in the [auction]”). Sprint argues such participation is critical for achieving Congress’ goals in Section 309(j) of the Act, including “promoting economic opportunity and competition,” “ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses,” and “recover[ing] for the public of a portion of the value of the public spectrum resource made available for commercial use.” 47 U.S.C. § 309(J)(3)(B)-(C).

⁴⁸ Such considerations include the timing and underlying purpose of the agreement, the BCA provisions designed to promote independent auction participation and protect auction integrity, and the public interest benefits. *See supra* para. 16.

⁴⁹ *See Verizon Comments* at 7 (urging the Commission “to analyze the facts asserted by T-Mobile and Sprint in accordance with its existing precedent and rules” and ensuring that “the final outcome of the auction is irreproachable”); *id.* at 4 (adding that “controversy over compliance with rules can lead to flawed auction outcomes and delays that slow realization of FCC priorities”).

⁵⁰ For instance, under the prohibited communications rule (47 CFR § 1.2105(c)) as applied for Auctions 101 and 102, “a party that submits an application for either auction becomes an ‘applicant’ for both auctions under the rule at

(continued....)

example, should the Commission approve the transfer of control applications and T-Mobile and Sprint consummate their transaction during bidding in either Auctions 101 or 102, Sprint may need relief from the rules prohibiting major modifications to short-form applications and participation by commonly controlled entities.⁵¹ In addition, Sprint may need clarification regarding the ongoing applicability of the prohibited communications rule, as we have provided in the past.⁵² Furthermore, the Commission has determined that T-Mobile and Sprint are both nationwide providers for purposes of Auctions 101 and 102, which has certain consequences under the rules.⁵³ Presuming both parties apply to participate, consideration may need to be given to the status of the post-merger entity and whether the two applicants are now two parts of one nationwide provider.

21. In contrast, if the petitioners were to consummate after the conclusion of bidding in Auction 101 and before the start of bidding in Auction 102, Sprint may require a waiver of the rule requiring the high (winning) bidder as identified on the short-form application to be the same entity that applies for the licenses on the long-form application for Auction 101,⁵⁴ and as with the situation where consummation occurs during bidding, could require relief from other rules regarding the pendency of its application for either Auctions 101 or 102.⁵⁵ On the other hand, if the petitioners were to consummate after the conclusion of bidding in Auction 102, Sprint may require a waiver of the rule requiring the high (winning) bidder as identified on the short-form application to be the same entity that applies for the licenses on the long-form application for Auction 102 or may need relief from the prohibition on major modifications to long-form applications.⁵⁶ Under any of these scenarios, depending on the specific circumstances at that time, we may need to address how to ensure that the applicant will meet the obligations associated with bids placed prior to the change and that the obligations will remain binding on the post-consummation entity.⁵⁷

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the application deadline, and that status does not change based on later developments.” *Auctions 101 and 102 Procedures Public Notice* at 25, para. 59.

⁵¹ See 47 CFR § 1.2105(a)(3), (b)(2). Also, as Sprint notes in its petition, depending on the timing of consummation, relief from the applicant’s continuing obligation to maintain the accuracy and completeness of information furnished in a pending application could permit Sprint, instead, to timely file a long-form application “reflecting a post-bidding transfer” with new ownership information following any grant of Commission consent to the merger and consummation thereof. See Sprint Petition at 8; 47 CFR §§ 1.65; 1.2105(b)(4). We note that in this instance, Sprint may also need relief from Section 1.2107(b) (requiring the winning bidder to submit payments and a long-form application). See 47 CFR § 1.2107(b).

⁵² See 47 CFR § 1.2105(c); *Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000*, Public Notice, 30 FCC Rcd 10794, 10803, para. 23 n.40 (WTB 2015) (*Prohibited Communications Guidance Public Notice*) (“We note that the reverse auction rule prohibiting certain communications will continue to apply with regard to the bids or bidding strategies of the parties to the transaction. Accordingly, while the parties to the transaction may continue to communicate regarding the transaction during the auction, they may not communicate regarding their respective bids or bidding strategies during the quiet period unless one of the exceptions to the rule applies.”).

⁵³ *Auctions 101 and 102 Procedures Public Notice* at 19-20, para. 44.

⁵⁴ See 47 CFR § 1.2107(c).

⁵⁵ See, e.g., *id.* at § 1.2105(c).

⁵⁶ See *id.* §§ 1.927(b), 1.927(h), 1.2107(c). Depending on the status of Auction 101 applications, Sprint could also need relief from the prohibition on major modifications to long-form applications. See *id.* § 1.927(b), (h).

⁵⁷ See *Consent to Transfer Control of License Subsidiaries of Media General, Inc., from Shareholders of Media General, Inc., to Nexstar Media Group, Inc., et al.*, Memorandum Opinion and Order, 32 FCC Rcd 183, 206, para. 61 (MB 2017); *Prohibited Communications Guidance Public Notice*, 30 FCC Rcd at 10803, para. 23.

22. Given these uncertainties, we cannot now identify with specificity the exact relief Sprint may need in order to consummate the merger “promptly,”⁵⁸ if it is consented to by the Commission, as the relevant rules will vary depending on the disposition (e.g., timing and conditions, if any, of approval) and facts relating to the parties’ participation in the auction (e.g., whether the party seeking a waiver remains an applicant under the rules, retains eligibility to bid, and/or becomes a winning bidder).⁵⁹ Therefore, we will act on these waiver requests contemporaneously with any grant of Commission consent to the merger, taking into consideration how the specific circumstances at that time affect the rules from which Sprint may need relief as well as the rules that will have ongoing applicability to Sprint as an applicant and how to ensure that the overall integrity of Auctions 101 and 102 is protected for the benefit of all applicants.

IV. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 309(j), and Sections 0.131, 0.331, 1.3, and 1.925 of the Commission’s rules, 47 CFR §§ 0.131(c), 0.331, 1.3, 1.925 that this Order IS ADOPTED.

24. IT IS FURTHER ORDERED that the request for waiver of Section 1.2105(a)(2)(ix) of the Commission’s rules filed by T-Mobile US, Inc. is GRANTED as described herein.

25. IT IS FURTHER ORDERED that the request for clarification of the rules filed by T-Mobile US, Inc. IS DISMISSED as moot.

26. IT IS FURTHER ORDERED that the request for waiver of Section 1.2105(a)(2)(ix) of the Commission’s rules filed by Sprint Corporation is GRANTED as described herein.

27. IT IS FURTHER ORDERED that the petition for declaratory ruling of the rules filed by Sprint Corporation IS DISMISSED as moot.

28. IT IS FURTHER ORDERED that the request for waiver of Section 1.2105(b)(2) of the Commission’s rules filed by Sprint Corporation is DEFERRED.

29. IT IS FURTHER ORDERED that the request for waiver of Section 1.2105(b)(4) of the Commission’s rules filed by Sprint Corporation is DEFERRED.

FEDERAL COMMUNICATIONS COMMISSION

Donald K. Stockdale
Chief
Wireless Telecommunications Bureau

⁵⁸ Sprint Petition at 7.

⁵⁹ See, e.g., 47 CFR §§ 1.65, 1.2105(a)(3), 1.2105(b)(2), 1.2105(b)(4), 1.2105(c), 1.2107(c), 1.927(b), 1.927(h). As noted above, the burden is on the party seeking a waiver to make a case for the relief requested.