

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

In the Matter of)	
)	
Competitive Bidding Procedures for Auction 103 (Upper 37 GHz, 39 GHz, 47 GHz))	AU Docket No. 19-59
)	
Requests of T-Mobile US, Inc., Sprint Corporation, and DISH Network Corporation for Waiver of Section 1.2105(a)(2)(ix) of the Commission's Rules)	GN Docket No. 14-177
)	

ORDER

Adopted: October 7, 2019

Released: October 7, 2019

By the Acting Chief, Office of Economics and Analytics, and the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we grant the request of Sprint Corporation (Sprint) for a waiver of section 1.2105(a)(2)(ix) of the Commission's rules with respect to its short-form application (FCC Form 175) for Auction 103, notwithstanding the Business Combination Agreement (BCA) between T-Mobile US Inc. (T-Mobile) and Sprint.¹ That rule requires an auction applicant to certify that it (or any party that controls or is controlled by it) has not entered and will not enter into any arrangement or understanding of any kind relating to the licenses being auctioned that addresses or communicates, directly or indirectly, bidding, bidding strategies, or post-auction market structure with another auction applicant or a nationwide provider.² We deem unnecessary, and thus dismiss as moot, the requests of T-Mobile, Sprint, and DISH Network Corporation (DISH) for a waiver of the same section with respect to the related Asset

¹ See FCC Form 175 of ATI Sub LLC., FCC File No. 0008792342, Request for Waiver (filed Sept. 9, 2019) (Sprint Request). ATI Sub LLC is a subsidiary of Sprint. *Id.* at 1.

² 47 CFR § 1.2105(a)(2)(ix). As explained in the FCC Form 175 filing instructions for Auction 103, FCC Form 175 includes several certifications required of all applicants for Auction 103. 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. FCC, Short-Form Application (FCC Form 175) Filing Instructions for Auction 103, at 25, paras. 105, 107 (2019). As the Office of Economics and Analytics (Office) and Wireless Telecommunications Bureau (Bureau) did in the Orders granting similar requests by T-Mobile and Sprint in Auctions 101 and 102 and by T-Mobile in Auction 103, we are granting Sprint a waiver in so far as it permits Sprint to submit an FCC Form 175, including the certification required under section 1.2105(a)(2)(ix), notwithstanding the merger agreement with T-Mobile. See *Competitive Bidding Procedures for Auction 101 (28 GHz) and Auction 102 (24 GHz) et al.*, Order, 33 FCC Rcd 8667, 8667, para. 1 n.3 (WTB 2018) (*T-Mobile/Sprint Waiver Order*); *Competitive Bidding Procedures for Auction 103 (Upper 37 GHz, 39 GHz, 47 GHz)*; *Request of T-Mobile US, Inc. for Waiver of Section 1.2105(a)(2)(ix) of the Commission's Rules*, Order, DA 19-821 at 1, para. 1 n.3 (OEA/WTB Aug. 26, 2019) (*T-Mobile Waiver Order*).

Purchase Agreement (APA) between T-Mobile, Sprint, and DISH,³ which the parties entered into as a condition of the U.S. Department of Justice's (DOJ) approval of the BCA.

2. As described herein, we grant Sprint's request for a waiver as applied to the BCA because, in light of the unique circumstances of the BCA, including its overall purpose and timing in relation to Auction 103, its provisions regarding independent bidding by the parties, and our prior grant of analogous waiver requests filed by T-Mobile and Sprint in Auctions 101 and 102 and by T-Mobile in Auction 103, the public interest is served by enabling Sprint to apply and participate in Auction 103, notwithstanding its proposed transaction with T-Mobile. We dismiss the additional requests for waiver with respect to the APA because the APA, as described by T-Mobile, Sprint, and DISH, does not relate to the licenses being auctioned, and thus does not fall within the scope of section 1.2105(a)(2)(ix)'s certification requirement.

II. BACKGROUND

3. On April 29, 2018, T-Mobile and Sprint announced an agreement, referred to as the BCA, for Sprint to merge into T-Mobile in an all-stock transaction.⁴ On June 10, 2018, pursuant to the BCA, the parties 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.⁵ On August 3, 2018, the Commission released the public notice establishing application and bidding procedures for Auctions 101 and 102.⁶

4. On September 11, 2018, the Bureau granted, in part, the separate petitions of T-Mobile and Sprint for a waiver of section 1.2105(a)(2)(ix) of the Commission's rules to allow each party to certify and submit a short-form application (FCC Form 175) for Auctions 101 and/or 102, notwithstanding the BCA.⁷ In the Order, the Bureau concluded that "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 . . . create

³ See Letter from Trey Hanbury, Partner, Hogan Lovells US LLP, Counsel for T-Mobile US, Inc., to Marlene H. Dortch, Secretary, FCC, AU Docket No. 19-59, GN Docket No. 14-177 (filed Sept. 9, 2019) (T-Mobile Request); Sprint Request at 1, 2; Letter from Jeffrey H. Blum, Senior Vice President, Public Policy & Government Affairs, DISH, to Marlene H. Dortch, Secretary, FCC, AU Docket No. 19-59, GN Docket No. 14-177 (filed Sept. 11, 2019) (DISH Request).

⁴ See *Commission Opens Docket for Proposed Transfer of Control of Sprint Corporation to T-Mobile US, Inc.*, Public Notice, 33 FCC Rcd 6046 (WTB 2018).

⁵ In furtherance of T-Mobile's and Sprint's merger agreement, the parties 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, 33 FCC Rcd 6771 (WTB 2018). These requests remain pending before the Commission as of the date of this Order.

⁶ *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*, Public Notice, 33 FCC Rcd 7575 (2018).

⁷ *T-Mobile/Sprint Waiver Order*, 33 FCC Rcd at 8667, para. 1. The Order did not decide and dismissed as moot the request from T-Mobile for clarification and the petition for declaratory ruling from Sprint concerning the Commission's prohibition of joint bidding arrangements and how it applies to the BCA. *Id.* at 8668, para. 1. The Bureau further declined to address Sprint's additional requests for a limited waiver of section 1.2105(b)(2) or section 1.2105(b)(4) of the Commission's rules. *Id.* at 8668, para. 2.

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.”⁸

5. On July 11, 2019, more than a year after the BCA was announced, the Commission released a public notice establishing application and bidding procedures for the upcoming incentive auction of Upper Microwave Flexible Use Service licenses in the Upper 37 GHz (37.6–38.6 GHz), 39 GHz (38.6–40 GHz), and 47 GHz (47.2–48.2 GHz) bands, which is designated as Auction 103.⁹ Pursuant to the *Auction 103 Procedures Public Notice*, a party seeking to participate in Auction 103 must have electronically submitted an FCC Form 175 prior to 6:00 pm (ET) on September 9, 2019.¹⁰

6. On July 26, 2019, the U.S. Department of Justice (DOJ) filed a proposed final judgment in the U.S. District Court for the District of Columbia that would fully resolve the DOJ’s investigation into the merger of T-Mobile and Sprint, as set forth in the BCA.¹¹ Under the terms of the DOJ’s proposed settlement, T-Mobile and Sprint must divest to DISH certain assets, including Sprint’s prepaid wireless business, and make available certain other assets and services.¹² To satisfy the requirements of the proposed settlement, T-Mobile, Sprint, and DISH entered into an Asset Purchase Agreement, referred to as the APA, that same day.¹³

7. On August 26, 2019, the Office and Bureau granted T-Mobile’s request for a waiver of section 1.2105(a)(2)(ix) to allow T-Mobile to certify and submit a short-form application (FCC Form 175) for Auction 103, notwithstanding the BCA.¹⁴ In the Order, the Office and Bureau concluded that “the circumstances that warranted the Bureau’s partial grant of T-Mobile’s analogous request in the context of Auctions 101 and 102 have not materially changed, and that it continues to be in the public

⁸ *Id.* at 8674, para. 16. Prior to adopting the Order, the Bureau released a public notice seeking comment on the requests. 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, 33 FCC Rcd 8067 (WTB 2018).

⁹ *Incentive Auction of Upper Microwave Flexible Use Service Licenses in the Upper 37 GHz, 39 GHz, and 47 GHz Bands for Next-Generation Wireless Services; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 103; Bidding in Auction 103 Scheduled to Begin December 10, 2019*, Public Notice, FCC 19-63 (July 11, 2019) (*Auction 103 Procedures Public Notice*). The Commission released a public notice seeking comment on the competitive bidding procedures to be used in Auction 103 on April 15, 2019. *Incentive Auction of Upper Microwave Flexible Use Service Licenses in the Upper 37 GHz, 39 GHz, and 47 GHz Bands for Next-Generation Wireless Services; Comment Sought on Competitive Bidding Procedures for Auction 103*, Public Notice, 34 FCC Rcd 2656 (2019) (*Auction 103 Comment Public Notice*). The *Auction 103 Comment Public Notice* did not propose a date for bidding to begin in the auction.

¹⁰ *Auctions 103 Procedures Public Notice* at 7, para. 12. An application to participate in Auction 103, 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 7, para. 13.

¹¹ T-Mobile Request at 1.

¹² *Id.* at 1-2.

¹³ *Id.* at 2. According to T-Mobile, at the closing of the APA, which is conditioned on the consummation of the merger, the parties will enter into a series of additional agreements to effectuate the conditions of the DOJ’s

interest to grant T-Mobile's current request so that it may certify and submit a short-form application to participate in Auction 103."¹⁵

8. Before the September 9, 2019 deadline for submitting short-form applications, T-Mobile, Sprint, and DISH each submitted a short-form application for Auction 103. T-Mobile separately filed its request for waiver with respect to the APA on September 9, 2019. Sprint submitted its request for waiver with respect to both the BCA and APA as an attachment to its application on September 9, 2019. On September 11, 2019, DISH filed its request for waiver with respect to the APA.

9. As explained in the *Auction 103 Procedures Public Notice*, the Commission's rules generally prohibit an applicant from being party to joint bidding and other arrangements involving another auction applicant (including any party that controls or is controlled by such applicant) or involving a nationwide provider that is not an applicant.¹⁶ The general prohibition of 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 that they do not 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.¹⁷ To implement the prohibition of joint bidding arrangements, section 1.2105(a)(2)(ix) 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 to the licenses being auctioned that directly or indirectly address or communicate bidding, bidding strategies, or post-auction market structure with, among others, "any other applicant" or a nationwide provider.¹⁸

III. DISCUSSION

10. To receive a waiver under section 1.925 of the Commission's rules, the petitioner 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.¹⁹

11. *Sprint's Request for Waiver of Section 1.2105(a)(2)(ix) with Respect to the BCA*. For the reasons explained in the *T-Mobile Waiver Order*, we conclude that the same unique circumstances warrant granting Sprint's request 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.²⁰ Specifically, we find that the circumstances that

proposed settlement, including a License Purchase Agreement for certain 800 MHz licenses held by Sprint, a Transition Services Agreement in connection with DISH's purchase of Sprint's prepaid wireless business, and a Master Network Services Agreement for the provision of network services to DISH's prepaid customers for a certain period of time. *Id.* at 2 n.5.

¹⁴ *T-Mobile Waiver Order* at 1, para. 1.

¹⁵ *Id.* at 4, para. 9.

¹⁶ *Auction 103 Procedures Public Notice* at 11, para. 26.

¹⁷ 47 CFR § 1.2105(a)(2)(ix)(C); *see also 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, 7576, para. 197 (2015) (modified by Erratum, 30 FCC Rcd 8518 (2015)) (*2015 Part 1 Report and Order*).

¹⁸ *See* 47 CFR § 1.2105(a)(2)(ix); *see also 2015 Part 1 Report and Order*, 30 FCC Rcd at 7575-76, paras. 195-97.

¹⁹ 47 CFR § 1.925(b)(3)(i)-(ii).

²⁰ Although Sprint asserts, as did T-Mobile, that the BCA does not relate to the licenses at auction, Sprint Request at 1, we emphasize—as we did in granting T-Mobile's and Sprint's prior requests—that we are not determining

supported the Bureau's grant of T-Mobile's and Sprint's analogous requests in the context of Auctions 101 and 102 have not materially changed, and that it continues to be in the public interest to grant Sprint's current request so that it may certify and submit a short-form application to participate in Auction 103.²¹ These circumstances include: (1) T-Mobile and Sprint entered into the BCA well in advance of the release of the *Auction 103 Procedures Public Notice*;²² (2) the terms of the BCA require compliance with Commission rules designed to promote bidder independence and protect auction integrity; and (3) granting the waiver will offer similar potential public interest benefits by allowing a party without substantial holdings in the millimeter wave bands for which new licenses are being offered to participate in Auction 103.²³ These considerations, which informed the Bureau's prior decision to grant in part Sprint's request for a waiver in Auctions 101 and 102, as well as T-Mobile's requests for waiver in Auctions 101, 102, and 103, constitute unique and unusual circumstances that convince us that application of the rule to bar Sprint from participating in Auction 103 would be inequitable and contrary to the public interest.

12. *T-Mobile's, Sprint's, and DISH's Requests for Waiver of Section 1.2105(a)(2)(ix) with Respect to the APA.* We conclude, based on the record before us, that a waiver of section 1.2105(a)(2)(ix) with respect to the APA is not required with respect to the parties' certifications as required under that section on their short-form applications (FCC Form 175) to participate in Auction 103. The APA concerns the transfer of preexisting businesses and related assets, specifically Sprint's "Boost Mobile, Virgin Mobile and Sprint-branded prepaid wireless businesses and the [Sprint's] 800 MHz spectrum holdings."²⁴ By contrast, the BCA concerns the merger of two nationwide providers each of which might acquire licenses in Auction 103.²⁵ Notwithstanding the complexity of the APA, the parties all concur that it does not involve licenses in Auction 103.²⁶ Absent any indication that future spectrum licenses acquired by any party, including those being auctioned in Auction 103, fall within the scope of the APA, the APA does not raise the same questions as the BCA pertaining to the application of section

whether the BCA relates to the licenses at auction and to the post-auction market structure, and are not ruling on whether the BCA constitutes a joint bidding arrangement or concluding that Sprint may participate in a joint bidding arrangement. See *T-Mobile/Sprint Waiver Order*, 33 FCC Rcd at 8672, para. 12 & n.29; *T-Mobile Waiver Order* at 4, para. 9 n.17. Rather, we are once again permitting Sprint to certify and submit an FCC Form 175, notwithstanding the questions that the BCA might raise. See *T-Mobile/Sprint Waiver Order*, 33 FCC Rcd at 8672, para. 12 n.29.

²¹ We note that we find, as we did in the *T-Mobile/Sprint Waiver Order*, that resolving Sprint's request for waiver of the certification requirement in section 1.2105(a)(2)(ix) is ripe. *T-Mobile/Sprint Waiver Order*, 33 FCC Rcd at 8671-72, para. 11.

²² Notably, as the Office and Bureau acknowledged in the *T-Mobile/Sprint Waiver Order* and *T-Mobile Waiver Order*, the BCA is a complex agreement that involves business decisions and assets beyond the limited scope of licenses being offered in the auction, and 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, there is no indication that the licenses available in Auction 103 were a material consideration of the parties in concluding the agreement. *Id.* at 8672, para. 13; *T-Mobile Waiver Order* at 4, para. 9.

²³ *T-Mobile/Sprint Waiver Order*, 33 FCC Rcd at 8673-74, paras. 14-15; *T-Mobile Waiver Order* at 4-5, paras. 10-11; see also 47 U.S.C. § 309(j)(3)(A)-(B).

²⁴ Asset Purchase Agreement, Recitals, p.1 (T-Mobile Form 8-K, July 26, 2019, Exhibit 2.1, available at <https://www.sec.gov/Archives/edgar/data/1283699/000119312519203431/d771930dex21.htm>).

²⁵ See *T-Mobile Waiver Order* at 2-3, paras. 3-5.

²⁶ See T-Mobile Request at 2 ("[T]he [APA]—to an even greater extent than the BCA—is unrelated to the licenses that are the subject of Auction 103." (footnote omitted)); Sprint Request at 2 ("The [APA] was entered into for reasons unrelated to the licenses that are the subject of Auction 103."); DISH Request at 3-4 ("[T]he [APA] does not relate to the licenses being auctioned in Auction 103").

1.2105(a)(2)(ix). Because the APA does not relate to the licenses being auctioned, we need not determine whether the APA itself also communicates, directly or indirectly, bids, bidding strategies, or post-auction market structure.²⁷

13. For these reasons, we find that the existence of the APA does not, in and of itself, affect the parties' ability to truthfully certify their compliance with the Commission's rules and, therefore, no waiver is necessary. Accordingly, we dismiss the requests for waiver regarding the APA as moot.

IV. ORDERING CLAUSES

14. 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 0.21(m) – (n), 0.271(a), 0.131, 0.331, 1.3, and 1.925 of the Commission's rules, 47 CFR §§ 0.21(m) – (n), 0.271(a), 0.131(c), 0.331, 1.3, 1.925 that this Order IS ADOPTED.

15. 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 in part and DISMISSED in part, as described herein.

16. 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 DISMISSED, as described herein.

17. IT IS FURTHER ORDERED that the request for waiver of Section 1.2105(a)(2)(ix) of the Commission's rules filed by DISH Network Corporation is DISMISSED, as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Giulia McHenry
Acting Chief
Office of Economics and Analytics

Donald K. Stockdale
Chief
Wireless Telecommunications Bureau

²⁷ See 47 CFR § 1.2105(a)(2)(ix).