

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

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

ORDER

Adopted: August 26, 2019

Released: August 26, 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 T-Mobile US, Inc. (T-Mobile) for a waiver of section 1.2105(a)(2)(ix) of the Commission's rules to allow T-Mobile to certify and submit a short-form application (FCC Form 175) for Auction 103, notwithstanding the Business Combination Agreement (BCA) between T-Mobile and Sprint Corporation (Sprint). 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 directly or indirectly to bidding at auction with another auction applicant or a nationwide provider.

2. As described herein, we grant this waiver 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 an analogous waiver request filed by T-Mobile

1 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 July 31, 2019) (T-Mobile Request).

2 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), https://www.sec.gov/Archives/edgar/data/101830/000110465918028087/a18-12444_1ex2d1.htm#Exhibit2_1_122313.

3 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 Wireless Telecommunications Bureau (Bureau) did in the Order granting a similar request by T-Mobile in the context of Auctions 101 and 102, we are granting T-Mobile's waiver in so far as it permits T-Mobile to submit an FCC Form 175, including the certification required under section 1.2105(a)(2)(ix) notwithstanding the merger agreement with Sprint. 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).

with respect to Auctions 101 and 102, the public interest is served by enabling T-Mobile to apply and participate in Auction 103, notwithstanding its proposed transaction with Sprint.

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 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 electronically file an FCC Form 175 prior to the initial filing deadline of September 9, 2019.¹⁰

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.

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*

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6. On July 31, 2019, T-Mobile filed a request for a waiver of section 1.2105(a)(2)(ix)'s certification requirement with regard to the BCA so that it could participate in Auction 103.¹¹

7. 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.¹² 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.¹³ 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 directly or indirectly to bidding at auction with, among others, "any other applicant" or a nationwide provider.¹⁴ For Auction 103, the Commission identified AT&T, Sprint, T-Mobile, and Verizon Wireless as "nationwide providers."¹⁵

III. DISCUSSION

8. 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.¹⁶

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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. Sprint has not filed any such request for relief to participate in Auction 103.

¹² *Auction 103 Procedures Public Notice* at 11, para. 26.

¹³ 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*).

¹⁴ 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.

¹⁵ *Auction 103 Procedures Public Notice* at 11, para. 27. 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.

¹⁶ 47 CFR § 1.925(b)(3)(i)-(ii).

9. We conclude, based on the record before us, that unique circumstances warrant granting the request of T-Mobile 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.¹⁷ Specifically, we find 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 interest to grant T-Mobile's current request so that it may certify and submit a short-form application to participate in Auction 103.¹⁸ First, as was the case for Auctions 101 and 102, T-Mobile and Sprint entered into the BCA well in advance of the release of the *Auction 103 Procedures Public Notice*, which adopted the final application and bidding procedures for Auction 103.¹⁹ As the Bureau acknowledged in the *T-Mobile/Sprint 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. Thus, given that the timing and underlying purpose of the BCA have not changed since the Bureau partially granted T-Mobile's prior request, application of the rule in this instance to bar T-Mobile from participating in Auction 103 would be inequitable and contrary to the public interest.

10. Second, the terms of the BCA require compliance with Commission rules designed to promote bidder independence and protect auction integrity, which apply to participation in Auction 103 as they did to participation in Auctions 101 and 102.²⁰ Consistent with our conclusion in the *T-Mobile/Sprint Waiver Order*, we are persuaded by T-Mobile's assertions that the terms of these provisions are designed as safeguards against anticompetitive behavior and that they demonstrate T-Mobile's intention to comply with the Commission's rules during the pendency of its merger application.²¹

¹⁷ Although T-Mobile asserts that "the BCA does not relate to the licenses being auctioned, or communicate bids, bidding strategies, or the post-auction market," T-Mobile Request at 4, we emphasize—as the Bureau did in partially granting T-Mobile's prior request—that we are not determining 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 T-Mobile may participate in a joint bidding arrangement. See *T-Mobile/Sprint Waiver Order*, 33 FCC Rcd at 8672, para. 12 & n.29. Rather, we are once again permitting T-Mobile to certify and submit an FCC Form 175, notwithstanding the questions that the BCA might raise. See *id.*

¹⁸ We note that we find, as we did in the *T-Mobile/Sprint Waiver Order*, that resolving T-Mobile'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.

¹⁹ See T-Mobile Request at 4. In this case, T-Mobile entered into the BCA more than a year before the release of the *Auction 103 Procedures Public Notice*, as compared to the three months separating the BCA and the announcement of procedures for Auctions 101 and 102. See *T-Mobile/Sprint Waiver Order*, 33 FCC Rcd at 8668, 8672, paras. 3-4, 12.

²⁰ See T-Mobile Request at 5. As described in the *T-Mobile/Sprint Waiver Order*, these provisions include, among others, section 6.20 of the BCA, which expressly prohibits the parties 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 explicitly preserves the rights of T-Mobile and Sprint to participate separately in any such auctions. *T-Mobile/Sprint Waiver Order*, 33 FCC Rcd at 8673, para. 14. In addition, section 5.1 of the BCA expressly exempts the acquisition of spectrum by T-Mobile and Sprint from business conduct limitations, such as limitations on debt incurrence, that restrict the parties while the merger is pending. T-Mobile Request at 5.

²¹ We again note that such provisions are not an absolute defense to liability if a violation of a rule occurs. See, e.g., *Auction 103 Procedures Public Notice* at 20, para. 56. The Commission may 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

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11. Third, we agree that granting the waiver, as cabined by the protective procedures described in the BCA, offers similar potential public interest benefits in Auction 103. Specifically, granting the requested waiver could allow a party without substantial holdings in the millimeter wave spectrum bands for which new licenses are being offered to participate and compete in Auction 103, furthering the Commission's statutory objectives to promote "economic opportunity and competition" and "the development and rapid deployment of new technologies, products and services."²² Moreover, Auction 103 will make available the largest amount of high-band spectrum for advanced wireless services ever in American history, releasing 3,400 megahertz of spectrum into the commercial marketplace for 5G deployment. In these circumstances, we conclude that the public interest will be best served by permitting T-Mobile to seek to participate in this historic auction and by avoiding the unnecessary disqualification of an applicant whose circumstances have not materially changed since an analogous waiver was granted in a previous auction.

12. The considerations discussed above, which informed the Bureau's prior decision to grant in part T-Mobile's request for a waiver in Auctions 101 and 102, constitute unique and unusual circumstances that convince us that application of the rule to bar T-Mobile from participating in Auction 103 would be inequitable and contrary to the public interest.

IV. ORDERING CLAUSES

13. 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.

14. 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.

FEDERAL COMMUNICATIONS COMMISSION

Giulia McHenry
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subject the applicant to a forfeiture and prohibit the applicant from participating further in Auction 103 and in future auctions, among other sanctions. *Id.* at 23-24, para. 68.

²² 47 U.S.C. § 309(j)(3)(A)-(B).