

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

In the Matter of
Auction of Priority Access Licenses for the 3550
3650 MHz Band (Auction 105)
Petition of Comcast Corporation for Waiver of
Section 1.2105(a)(3) and (b)(1)(ii)(B) of the
Commission’s Rules
Request of Midcontinent Communications for
Waiver of Portions of Section 1.2105 of the
Commission’s Rules
AU Docket No. 19-244

ORDER

Adopted: May 5, 2020

Released: May 5, 2020

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

I. INTRODUCTION

1. In this Order, the Wireless Telecommunications Bureau, in conjunction with the Office of Economics and Analytics, grants the separate requests for waiver of Sections 1.2105(a)(3) and 1.2105(b)(1)(ii)(B) of the Commission’s rules filed by Comcast Corporation (Comcast) and Midcontinent Communications (Midco) (together, petitioners), so that the parties may each file separate applications to participate in the upcoming auction of Priority Access Licenses in the Citizens Broadband Radio Service in the 3550-3650 MHz band (Auction 105), despite Comcast’s interest in Midco. We

1 The Wireless Telecommunications Bureau (WTB) takes this action in conjunction with the Office of Economics and Analytics (OEA) pursuant to delegated authority in sections 0.271 and 0.331 of the Commission’s rules. 47 CFR §§ 0.271, 0.331. The Commission recently revised the delegated authority for OEA. See Establishing a 5G Fund for Rural America; Universal Service Reform – Mobility Fund, Notice of Proposed Rulemaking and Order, FCC 20-52, para. 206 and Appendix B (Apr. 24, 2020) (modified 47 CFR § 0.271(m) pending publication in the Federal Register).

2 Petition of Comcast Corporation for Waiver – Expedited Action Requested, AU Docket No. 19-244 (filed Apr. 15, 2020), https://ecfsapi.fcc.gov/file/1041570070258/Comcast%20Petition%20for%20Waiver%20re%20Auction%20105%20(PUBLIC%20VERSION%2015Apr2020).pdf (Comcast Petition). Pursuant to 47 CFR §§ 0.457 and 0.459, Comcast has requested confidential treatment of the information contained in Attachment 1, which it has provided separately to Commission staff.

3 Letter from Christina H. Burrows, Counsel to Midcontinent Communications, to Marlene H. Dortch, Secretary, FCC, AU Docket No. 19-244 (filed Apr. 15, 2020), https://ecfsapi.fcc.gov/file/10415165580547/Midco%20-%20CBRS%20Auction%20Rule%20Waiver%20Request%2004-15-2020.pdf (Midco Waiver Request). Midco also requests a waiver of any other portions of 47 CFR §§ 1.2105(a) and (b) “as needed such that Comcast is not deemed to control Midco and thus will not be considered to be an ‘applicant’ as to Midco’s Auction 105 application for purposes of the Commission’s auction rules.” Midco Waiver Request at 1, n.1.

4 See Auctions of Priority Access Licenses for the 3550-3650 MHz Band; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 105; Bidding in Auction 105 Scheduled to (continued....)

grant these requests, subject to certain conditions, because the underlying purpose of the rule would not be served by application of the rule in the instant case and granting the requested waivers serves the public interest.

II. BACKGROUND

2. In the *2015 3.5 GHz Report and Order*, the Commission made available 150 megahertz of spectrum in the 3550-3700 MHz band (3.5 GHz band) for both licensed and licensed-by-rule use.⁵ In that Order, the Commission established licensing and operating rules for the 3.5 GHz band, including the assignment of up to seven Priority Access Licenses (PALs) per geographic license area through the use of competitive bidding.⁶ In that Order, the Commission also adopted an aggregation limit to allow licensees to hold no more than four PALs in one license area at a time.⁷ Each PAL consists of a 10-megahertz unpaired channel within the 3550-3650 MHz band.⁸ In the *2018 3.5 GHz Report and Order*, the Commission adopted a county-based geographic license area for PALs⁹ and affirmed the Commission's prior decision to permit licensees to aggregate no more than four PALs per license area.¹⁰

3. On February 28, 2020, the Commission adopted the procedures to be used to conduct an auction of PALS in the 3.5 GHz Band, including requirements for filing a short-form application to participate in the auction and the detailed bidding procedures to be used.¹¹ In order to qualify to bid in an auction, an interested party must timely submit a short-form application and make an appropriate upfront payment.¹²

4. Section 1.2105(a)(3) of the Commission's rules states that no individual or entity may file more than one short-form application or have a controlling interest in more than one short-form application.¹³ Section 1.2105(b)(1)(ii)(B) states that, if "entities commonly controlled by the same individuals or same set of individuals submit applications for any set of licenses in the same or overlapping geographic area in a single auction, then only one of such application may be deemed complete, and the other such application(s) will be deemed incomplete, such applicants will not be found qualified to bid, and the associated upfront payment(s), if paid, will be returned."¹⁴ Additionally, the *Auction 105 Procedures Public Notice* warns interested parties that, "consistent with the Commission's general prohibition of joint bidding agreements, a party generally is permitted to participate in a

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_____ *Begin June 25, 2020*, AU Docket No. 19-244, Public Notice, FCC 20-18 (Mar. 2, 2020) (*Auction 105 Procedures Public Notice*); *Auction of Priority Access Licenses for the 3550-3650 MHz Band Rescheduled to Begin July 23, 2020*; *Auction 105 Short-Form Application Deadline Postponed to May 7, 2020*, AU Docket No. 19-244, Public Notice, DA 20-330 (Mar. 25, 2020) (*Auction 105 Rescheduling Public Notice*).

⁵ See *Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, GN Docket No. 12-354, Report and Order and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd 3959 (2015) (*2015 3.5 GHz Report and Order*).

⁶ *Id.* at 3982, 4000, paras. 67, 123.

⁷ *Id.* at 3998, para. 117; see also 47 CFR § 96.31(a).

⁸ 47 CFR § 96.25(b)(2); see also *2015 3.5 GHz Report and Order*, 30 FCC Rcd at 3989, para. 91.

⁹ *Promoting Investment in the 3550-3700 MHz Band*, GN Docket No. 17-258, Report and Order, 33 FCC Rcd 10598, 10607, para. 19 (2018).

¹⁰ *Id.* at 10653-54, para. 107; *2015 3.5 GHz Report and Order*, 30 FCC Rcd at 3998, para. 117.

¹¹ See generally *Auction 105 Procedures Public Notice* at paras. 14-103; 47 CFR § 1.2105(a).

¹² 47 CFR § 1.2105(a).

¹³ *Id.* § 1.2105(a)(3).

¹⁴ *Id.* § 1.2105(b)(1)(ii)(B).

Commission auction only through a single bidding entity. Accordingly, the filing of applications in Auction 105 by multiple entities controlled by the same individual or set of individuals will not be permitted.”¹⁵

5. As described by the parties, Midco is a general partnership in which Midcontinent Communications Investor (MCI) and Comcast Midcontinent, LLC (Comcast Midcontinent), an indirectly owned subsidiary of Comcast, each hold a 50% general partnership interest.¹⁶ Under the Commission’s rules, a controlling interest includes individuals or entities with positive or negative *de jure* or *de facto* control of the applicant.¹⁷ *De jure* control includes holding a general partnership interest in a partnership.¹⁸ The parties acknowledge that, as a general partner of Midco, Comcast is therefore considered one of its controlling interests. Accordingly, in the absence of waivers, Comcast and Midco could not participate in Auction 105 as separate applicants.

6. On April 15, 2020, the petitioners separately filed requests for waiver of the Commission’s Part 1 rules to allow them to participate separately in Auction 105. On April 27, 2020, the Auctions Division of the Office of Economics and Analytics (OEA) and the Mobility Division of the Wireless Telecommunications Bureau (WTB) released a public notice seeking comment on the Comcast and Midco requests for waiver.¹⁹ We received one comment, which supports the requested waivers.²⁰

III. DISCUSSION

7. 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 waiver would be in the public interest, or (2) in view of the unique or unusual 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.²¹ We find that the waiver requests submitted by Comcast and Midco meet the first prong of this standard, and therefore grant of the waivers is appropriate in this particular case.²²

¹⁵ *Auction 105 Procedures Public Notice* at 9, para. 21 (citing 1.2105(a)(3), (a)(4)(i), (b)(1)(ii), *Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170, GN Docket No. 12-268, 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, 7580-81, paras 206-08 (2015) (*Updating Part 1 Report and Order*). This prohibition on multiple applications, in conjunction with the prohibition against joint bidding agreements, protects the competitiveness of the Commission’s auctions. *Auction 105 Procedures Public Notice* at 9, para 21.

¹⁶ Comcast Petition at 1; Midco Waiver Request at 1.

¹⁷ 47 CFR § 1.2105(a)(4)(i).

¹⁸ *Id.* Although the term general partner is often used to refer to a partner that conducts the business of a limited partnership, the term includes any partner in a general partnership, such as the one here.

¹⁹ *Office of Economics and Analytics and Wireless Telecommunications Bureau Seek Comment on the Requests of Comcast Corporation and Midcontinent Communications for Waiver of the Commission’s Rules for Auction 105*, AU Docket No. 19-244, Public Notice, DA 20-456 (Apr. 27, 2020).

²⁰ See NCTA – The Internet and Television Association Comments (rec. May 4, 2020).

²¹ 47 CFR § 1.925(b)(3).

²² Petitioners also assert that enforcement of the rule is inequitable because in the absence of the waivers, only one of the two companies would be permitted to participate in the auction, leaving the other with no reasonable alternative to seeking a waiver. We note, however, that entities that share a controlling interest do, in fact, have a reasonable alternative—participation together through as a joint venture as permitted by the Commission’s rules. See *Auction 105 Procedures Public Notice* at 11, para. 29; *Updating Part 1 Report and Order*, 30 FCC Rcd at 7573-74, 7576, paras. 187, 190, 198. Although we find it appropriate to grant these particular waivers under the first prong of the waiver standard given the specific facts of this case, we generally would expect that entities that share a

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8. Midco and Comcast each argue that, in this particular case, enforcing the prohibition against an entity holding a controlling interest in more than one applicant would not serve the underlying purpose of the rule. We agree. As the petitioners point out, the Commission's purpose in establishing the prohibition against commonly controlled parties filing multiple applications is to guard against anticompetitive bidding behavior²³ and "to ensure that auction participants bid in a straightforward manner."²⁴ Comcast and Midco have sufficiently demonstrated that, should they both apply, they will operate independently in the auction based on Comcast's lack of management and decision-making control over Midco and the additional internal controls on communications they assert they have agreed to. Accordingly, we find that waiver of the rule is warranted because it will not undermine the rule's purpose and will serve the public interest.

9. In their waiver requests, the petitioners explain that, under the terms of the partnership agreement between MCI and Comcast Midcontinent (Partnership Agreement), which was entered into 20 years ago, long before Auction 105, "for the principal purpose of operating television service,"²⁵ Comcast "in no way controls Midco. . . ."²⁶ Although the parties have equal ownership interests in Midco, the petitioners explain that the Partnership Agreement specifically states that MCI is the managing general partner of Midco, and therefore has "complete and unrestricted power and authority to manage the day-to-day business and operations of the Partnership in its sole and absolute discretion."²⁷ As a result, "MCI makes all decisions concerning the operation of Midco and its business, including decisions concerning services to be offered, pricing, marketing, customer service, geographic expansion, spectrum acquisition, and all other operational aspects of the business."²⁸ Additionally, although Comcast appoints two members of the Management Committee that "set[s] the overall direction of the partnership,"²⁹ the petitioners maintain that the Management Committee's role is extremely limited, and that the Management Committee is not involved in the day-to-day management of Midco.³⁰ More importantly, the petitioners explain that the Management Committee is ultimately controlled by MCI, which appoints the majority of the committee members.³¹ For these reasons, the petitioners contend that Comcast's role in the relationship between the petitioners is more akin to that of a limited partner, as opposed to a controlling interest, which limits the risk of collusive or anti-competitive behavior.

10. The petitioners also describe in their waiver requests and a subsequent ex parte letter the internal controls that they have implemented to prevent their employees and representatives from sharing information about the petitioners' bids or bidding strategies in order to further reduce the risk of collusive

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common controlling interest would not be permitted to apply independently because they can avail themselves of this option.

²³ Comcast Petition at 2.

²⁴ Comcast Petition at 7, citing *Updating Part 1 Report and Order*, 30 FCC Rcd at 7579, para. 206. The Commission noted that this restriction will apply across all short-form applications in a particular auction without regard to the licenses or geographic areas selected, consistent with the prohibition on joint bidding agreements. *Updating Part 1 Report and Order*, 30 FCC Rcd at 7579, para. 206.

²⁵ Comcast Petition at 2.

²⁶ Comcast Petition at 3-4; Midco Waiver Request at 2-3.

²⁷ Midco Waiver Request at 2; see also Comcast Petition at 4.

²⁸ Midco Waiver Request at 3.

²⁹ Comcast Petition at 5.

³⁰ *Id.*; see also Midco Waiver Request at 3, citing Declaration of Scott Anderson, Chief Legal Officer, Midcontinent Communications Investor, LLC, para. 3 (attachment) (Anderson Declaration).

³¹ Comcast Petition at 4; Midco Waiver Request at 3.

or anti-competitive behavior between the two entities.³² The parties represent that management and other personnel from Comcast, Comcast Midcontinent, and Midco that interact with one another for purposes of the partnership do not have and will not have access to information concerning their respective companies' plans for Auction 105 and related information.³³ Comcast Midcontinent has waived the Partnership Agreement's requirement that at least one Comcast Midcontinent manager be present for a quorum and has agreed not to seek access to any of the books and records of the partnership until after the deadline for submitting down payments for Auction 105 to avoid the potential that they could reveal Midco's plans with regard to Auction 105.³⁴ Midco has also undertaken internal controls, such as limiting information about its possible bids and bidding strategies to a very small number of personnel on a "need to know" basis.³⁵ Both petitioners assert that these internal controls will allow them to certify truthfully that they have not entered into any joint bidding agreements, arrangements, or understandings,³⁶ as required by section 1.2105(a)(2)(ix).³⁷

11. In light of Comcast's limited role in the management and decisions of Midco under a long-standing agreement unrelated to the auction and the internal controls implemented by the parties, we find that application of the prohibition against commonly controlled applicants would not serve its intended purpose in these specific circumstances and that waiver serves the public interest. We agree with the petitioners that, in the limited circumstances of this case, the public interest is served by allowing them both to participate as separate applicants in this auction. Specifically, granting the waivers potentially will increase the number of applicants competing in the auction.³⁸ We find that, given the totality of the circumstances here, the public interest will be most effectively served by permitting the petitioners to participate in the auction as separate applicants.

12. We emphasize, however, that the Commission's interest in maximizing auction participation to provide for robust competition must be balanced against the public interest harms of permitting non-qualified applicants or applicants that do not comply with all relevant Commission rules to participate in the auction. While we seek to avoid "unnecessary disqualifications of applicants that may otherwise be determined qualified to bid,"³⁹ in the vast majority of cases where an applicant does not

³² See Comcast Petition at 5-6; Midco Waiver Request at 3-5; Letter from David M. Don, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, AU Docket No. 19-244, at 2 (filed Apr. 30, 2020), [https://ecfsapi.fcc.gov/file/10430045201395/Comcast%20Ex%20Parte%20re%20Auction%20105%20Waiver%20\(30Apr2020\).pdf](https://ecfsapi.fcc.gov/file/10430045201395/Comcast%20Ex%20Parte%20re%20Auction%20105%20Waiver%20(30Apr2020).pdf) (Comcast *Ex Parte*) (detailing the expansion of the protections first outlined in the waiver requests). The petitioners also attest that the Management Committee will not meet during the auction's quiet period.

³³ See Comcast Petition at 5-6; Midco Waiver Request at 4-5 & Anderson Declaration.

³⁴ See Comcast Petition at 6; Midco Waiver Request at 5.

³⁵ See Midco Waiver Request at 4.

³⁶ Comcast Petition at 5; Midco Waiver Request at 4.

³⁷ 47 CFR § 1.2105(a)(2)(ix). We remind applicants that the rules require the disclosure of any agreements or understandings relating to licenses being auctioned, including those that involve non-applicants. *Id.* § 1.2105(a)(2)(viii). See *Auction 105 Procedures Public Notice* at 10, para. 26. We warn the petitioners, however, that a joint bidding arrangement includes any arrangement relating to the licenses being auctioned that addresses or communicates, directly or indirectly, bidding at the auction, bidding strategies, including arrangements regarding price or the specific licenses on which to bid, and any such arrangement relating to the post-auction market structure, even if such agreement is not reduced to writing. *Id.* at 10-11, paras. 26-27.

³⁸ See Comcast Petition at 2-3.

³⁹ *Competitive Bidding Procedures for Auction 101 (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* (continued....)

meet the standards contained in the competitive bidding rules disqualification is necessary to ensure that an auction is conducted fairly and efficiently. If the Commission's only goal were to maximize the number of bidders in general, without regard to each bidder's qualifications, then it would not have adopted rules that prohibit entities from filing multiple applications (or, for that matter, any number of other rules that restrict applicants' behavior in order to ensure the integrity of the auction process). Instead the Commission has found that the principle that an entity may generally participate in bidding only through a single auction applicant promotes transparency and straightforward bidding activity.⁴⁰ We grant the requested waivers in this case only because the specific facts presented demonstrate that, in practice, Comcast does not exercise control over Midco, Comcast and Midco operate as separate entities, and they have represented that they will take precautions specific to Auction 105 to prevent Comcast from exerting control (either positive or negative) over Midco, and to prevent Comcast and Midco from sharing information with respect to the auction and any related plans. Thus, the general concerns regarding coordinated bidding and anti-competitive behavior that led to the adoption of the prohibition on multiple applications are not present here.

13. Although we agree with the parties that, given the terms of their Partnership Agreement and the internal controls that they have implemented to prevent the exchange of information regarding bids and bidding strategies as well as business operations, allowing each to submit separate applications to participate in Auction 105 does not implicate the concerns about communications between applicants or anti-competitive behavior that gave rise to the prohibition on separate applications from commonly-controlled entities, we nonetheless impose certain additional conditions on the grant of the requested waivers that will further mitigate any remaining risks of such behaviors.

14. First, because under the terms of the Partnership Agreement Comcast's interest in Midco is akin to a non-controlling limited partnership interest, we require both parties, as we do in any case where one applicant has a disclosable, non-controlling interest in another, to certify in their short-form applications that they have established internal control measures necessary "to preclude any person acting on behalf of the applicant[s] from possessing information about the bids or bidding strategies of more than one applicant or communicating such information with respect to either applicant to another person acting on behalf of and possessing such information regarding another applicant."⁴¹

15. Second, to further reduce the risk of inadvertent disclosure of information regarding bidding or bidding strategies during the quiet period,⁴² we condition the waivers on the parties' commitment to refrain from communicating during the quiet period, either orally or in writing, about any business operations, including decisions regarding services to be offered, pricing, marketing, customer service, geographic expansion, spectrum acquisition, or any other operational aspects of the business. We do not expect that this condition will be overly burdensome for the petitioners, as Comcast's designated members of the Management Committee have already recused themselves "from all Management Committee and other Midco discussions, deliberations, and decisions, whether they relate to Midco's direct or indirect participation or lack of participation in the Auction or to Midco's business operations, business strategy, or business results"⁴³ We also require the applicants to certify that they will not

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Request of Sprint Corporation for Limited Waiver of Section 1.2105(b)(2) or Section 1.2105(b)(4) of the Commission's Rules, AU Docket No. 18-85, Order, 33 FCC Rcd 8667, 8673, 8674, para. 15 (WTB 2018).

⁴⁰ *Updating Part 1 Report and Order*, 30 FCC Rcd at 7581, para. 208.

⁴¹ *Id.* at 7577, para. 199.

⁴² A so-called "quiet period" arises under section 1.2105(c)'s prohibition on certain communications between auction applicants; this quiet period begins at an auction's short-form application filing deadline and ends at the auction's down payment deadline after the auction closes. 47 CFR § 1.2105(c)(1).

⁴³ See Comcast Ex Parte, Declaration of Robert Eatroff and Robert Pick (attachment).

conduct any such communication during the quiet period. Moreover, we remind the petitioners that, regardless of compliance with the Commission's rules, all applicants remain subject to all relevant antitrust laws,⁴⁴ and to the extent we become aware of specific allegations that suggest that violations of the federal antitrust laws may have occurred, we may refer such allegations to the United States Department of Justice for investigation.⁴⁵ We further caution that—as is the case with all applicants—neither the submission of a certification of compliance with the prohibited communications rule nor the implementation of internal controls will outweigh specific evidence that a communication violating the Commission's rules (or the conditions outlined in this order) has occurred, nor will it preclude the initiation of an investigation when warranted.⁴⁶

IV. ORDERING CLAUSES

16. 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), and 309(j), and Sections 0.131(c), 0.271, 0.331, 1.3, and 1.925 of the Commission's Rules, 47 CFR §§ 0.131(c), 0.271, 0.331, 1.3, 1.925, that this Order is ADOPTED.

17. IT IS FURTHER ORDERED that the requests for waiver of Sections 1.2105(a)(3) and 1.2105(b)(1)(ii)(B) of the Commission rules filed by Comcast Corporation and Midcontinent Communications ARE GRANTED to the extent and under the conditions described herein.

FEDERAL COMMUNICATIONS COMMISSION

Giulia McHenry
Chief
Office of Economics and Analytics

Donald K. Stockdale
Chief
Wireless Telecommunications Bureau

⁴⁴ See *Auction 105 Procedures Public Notice* at 22, para. 66, citing *Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures*, WT 97-82, Third Further Notice of Proposed Rulemaking, 14 FCC Rcd 21558, 21560-61, para. 4 & n.17 (1999).

⁴⁵ See *Auction 105 Procedures Public Notice* at 22, para. 67, citing *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2388, para. 226 (1994).

⁴⁶ *Auction 105 Procedures Public Notice* at 19-20, para. 55, 59; see also *id.* at 22, para. 66, citing 47 C.F.R. § 1.17 (prohibiting material misrepresentation to the Commission).