



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF THE
CHAIRWOMAN

August 28, 2023

The Honorable Ted Cruz
Ranking Member
Committee on Commerce, Science, and Transportation
United States Senate
Washington, DC 20510

The Honorable John Thune
Ranking Member
Committee on Commerce, Science, and Transportation
Subcommittee on Communications, Media, and Broadband
United States Senate
Washington, DC 20510

Dear Ranking Members Cruz and Thune:

Thank you for your letter of August 14, 2023, with respect to the status of certain pending long-form applications filed by winning bidders for spectrum licenses won in the 2496-2690 MHz (2.5 GHz) auction (Auction 108). I agree that the 2.5 GHz band holds great promise for expanding access to modern wireless services and closing the digital divide, including for those who live in rural communities. For three decades the Federal Communications Commission has held spectrum license auction authority under Section 309 of the Communications Act without interruption—and this authority has been a powerful economic force. It has supported domestic deployment and innovation that, in turn, has made the United States a global leader in wireless technology.

Section 309(j)(11) explicitly states that the Commission’s authority to “grant a license or permit” for any spectrum that is auctioned “shall expire March 9, 2023.” This provision is straightforward.

Furthermore, any effort to license these airwaves with temporary authority is conditioned on the agency’s having relevant authority. To this end, the Communications Act states that special temporary authority pursuant to Section 309(f) may be granted only “if the grant of such application is otherwise authorized by law.” Here, that authorization expired on March 9, 2023. If the Commission were to expend funds to continue to process the licenses won in Auction 108 notwithstanding the sunset of our authority to do so, it would put the agency staff at risk of criminal penalties for violating the Antideficiency Act.

In light of these statutory restraints, it is imperative that Congress renew the Commission's spectrum auction authority as soon as possible. This lapse has delayed more than just the grant of remaining 2.5 GHz band licenses; it has slowed the ability of the United States to advance our historic leadership role on spectrum planning and development issues. This is especially important right now, with the World Radiocommunication Conference 2023 scheduled to begin in less than three months. Spectrum authorities around the world are preparing for this gathering and other nations, including China, are investing substantial resources in planning and proposals. In light of this, it is imperative that the United States have the statutory authorities it needs for global leadership in wireless policy and innovation.

Specific responses to the questions raised in your letter are detailed in the attached staff appendix. If you have any additional questions, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Jessica Rosenworcel", with a long horizontal flourish extending to the right.

Jessica Rosenworcel

Appendix – T-Mobile License and STA Applications

Attached is information responsive to the questions contained in your letter. For purposes of clarity, each response notes the question asked followed by the Commission staff response.

Question 1: Statutory Authority Governing the Grant of Auctioned Licenses. An essential part of the Commission’s responsibility in carrying out the requirements of the Communications Act is to examine all relevant provisions of the authority delegated to the Commission by Congress, including giving effect to other relevant provisions of the Communications Act’s licensing framework. Together, these provisions are best read as prohibiting the Commission from granting a license for the right to use any spectrum that is auctioned and is not otherwise exempt from the expiration of authority in Section 309(j)(11).¹

T-Mobile has filed an application for 2.5 GHz licenses as a winning bidder in Auction 108, under Section 309(j)’s competitive bidding process and pursuant to rules under which the Commission has accepted mutually exclusive applications.² In determining the sources of authority for granting these licenses, “[w]e start, of course, with the statutory text.”³ Section 309(j)(11) of the Communications Act provides that the Commission’s authority to “grant” a “license” under Section 309(j) of the Act (which sets forth statutory requirements for the assignment of licenses via “competitive bidding,” or auctions) “expire[d]” on March 9, 2023. Thus, the plain language of the statute suggests that, with the exception of certain spectrum bands inapplicable to T-Mobile’s application,⁴ the Commission lacks authority to grant auctioned licenses.

This interpretation is further supported by other provisions of Section 309(j).⁵ For example, Section 309(j)(15) describes the actions of “completing licensing processes and assigning licenses” as being “[s]ubject to the provisions of [Subsection 309(j)] (*including paragraph 11*)” (emphasis added), “notwithstanding any other provision of law.” Thus, the statute itself makes the process of “completing

¹ See 47 U.S.C. § 309(j)(11) (extended authority with respect to spectrum identified under Section 1004(a) of the Spectrum Pipeline Act of 2015 and spectrum identified under Section 90008(b)(2)(A)(ii) of the Infrastructure Investment and Jobs Act).

² See 47 U.S.C. § 309(j); see also 47 C.F.R. § 1.2107.

³ *BP America Production Co. v. Burton*, 549 U.S. 84, 91, 127 S. Ct. 638, 643 (2006) (Alito, J.).

⁴ See n.1 above. Section 309(j)(11) includes two exceptions to the generally applicable March 9, 2023, expiration date. First, the Commission’s authority extends until September 30, 2025 with respect to 30 megahertz of spectrum to be identified pursuant to Section 1004(a) of the Spectrum Pipeline Act of 2015, Pub. L. No. 114-74, § 1004(a) (2015) (codified at 47 U.S.C. § 921 note). Second, the Commission’s authority extends until November 2028 with respect to with respect to the 3.1–3.45 GHz band, which was identified under section 90008(b)(2)(A)(ii) of the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 90008(b)(1)(A) (2021) (codified at 47 U.S.C. § 921 note). See 47 U.S.C. § 309(j)(11) (authority with respect to spectrum identified under the Infrastructure Investment and Jobs Act “shall expire on the date that is 7 years after November 15, 2021”). Neither of these exceptions involve the 2.5 GHz band.

⁵ See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 1813 (1988) (“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 24, at 167 (2012) (“Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.”).

licensing” for T-Mobile’s auctioned licenses explicitly subject to the expiration of authority in Section 309(j)(11). Similarly, Section 309(j)(6)(D) specifies that auctioned licenses are considered to be issued pursuant to Section 309(j)—in contrast to equivalent rights applicable “to other licenses within the same service that were not issued pursuant to this subsection.”⁶ The statute provides that if mutually exclusive applications are accepted for any initial license or construction permit, the Commission “shall” grant the license or permit “through a system of competitive bidding that meets the requirements of [47 U.S.C. § 309(j)],” presumably including, without limitation, the provisions in Subsection 309(j)(11).⁷ The legislative history similarly notes that Section 309(j) “is a generic statute that will govern the *issuance* of licenses” and will be used “as a means of *granting* licenses.”⁸ In short, the interrelationship of these statutory provisions, including those cited in your letter, requires the Commission to give effect to each relevant directive in its licensing decisions.

Question 2: Other Spectrum License Authorities. The Communications Act and related statutes provide numerous sources of statutory authority to grant spectrum licenses,⁹ but most of these provisions pertain to licenses for broadcast services or wireless services other than the 2.5 GHz band. Thus, for example, the Commission retains authority under Sections 301, 303, 307, 308, 309(a), 309(h), 309(j)(2)(A), and 337 to issue licenses for public safety services. Likewise, the Commission may issue

⁶ 47 U.S.C. § 309(j)(6)(D); *see also id.* § 309(j)(1), (3) (the Commission “shall grant” (or “grants”) auction winners’ licenses “through [this] competitive bidding system”). To be sure, Section 309(j)(6)(D) does require auction applicants to comply with the Act’s requirements applicable to all license applicants, including applicants for licenses “not issued pursuant to this subsection.” But that does not suggest, for example, that the public interest standard established in Section 309(a) means that auction winners are granted licenses under Section 309(a) rather than “pursuant to this subsection” (j). Indeed, Section 309(a) is expressly made “[s]ubject to the provisions of this section,” which for auction applicants includes Section 309(j). 47 U.S.C. § 309(a); *see also id.* § 307(a) (grant of licenses in the public convenience, interest, or necessity “subject to the limitations of this chapter”). Similarly, section 309(j)(5) provides that – as with license applicants not subject to a prior auction – auction winners must be “qualified pursuant to subsection [309](a) and sections 308(b) and 310.” *Id.* § 309(j)(5). In this respect, the requirement for satisfying the public interest standard of subsection 309(a) is no different from the requirements for satisfying the character, citizenship, and other requirements of these other provisions of the Act.

⁷ 47 U.S.C. § 309(j)(1).

⁸ H.R. Rep. No. 103-111, at 253, 256, 1993 U.S.C.C.A.N. 378, 580, 583 (emphases added). Nothing in the Wireless Telecommunications Bureau’s routine public notices announcing grant of licenses to auction winners pursuant to section 309(a) suggests any prior view by staff in conflict with this language of the statute. As the former FCC General Counsels’ letter recognizes (Letter from Samuel L. Feder, Partner, Jenner & Block LLP, et al., to P. Michele Ellison, General Counsel, FCC (Mar. 23, 2023)), these public notices simply reflect a finding required for the grant of any license (auctioned or not), i.e., “because [grant] will serve the public, interest, convenience, and necessity.” *See, e.g.*, Wireless Telecommunications Bureau Grants Lower 700 MHz Band Licenses, Auction Event No. 49, *Public Notice*, 20 FCC Rcd 15179 (2005); Wireless Telecommunications Bureau Grants AWS-3 Licenses in the 1695-1710 MHz, 1755-1780 MHz and 2155-2180 MHz Bands, Auction No. 97, *Public Notice*, 33 FCC Rcd 1926, 1927 (2018); Wireless Telecommunications Bureau Grants 28 GHz Band Upper Microwave Flexible Use Licenses, Auction No. 101, *Public Notice*, 34 FCC Rcd 12067 (2019); Wireless Telecommunications Bureau Grants 24 GHz Band Upper Microwave Flexible Use Licenses, Auction No. 102, *Public Notice*, 34 FCC Rcd 12079 (2019).

⁹ *See, e.g.*, 47 U.S.C. §§ 301, 303(c), 303(r), 307, 308, 309(a), 309(c)(2) (special temporary authority), 309(f) (special temporary authority), 309(i), 309(j), 309(k), 310(d), 316(a), 319(c) (construction permits), 331, 336, 337. *See also* 47 U.S.C. §§ 1421, 1451, 1452 (authorities conferred by the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Title VI (Spectrum Act of 2012), §§ 6201, 6401, 6403, 126 Stat. 156, 206, 222-230 (Feb. 22, 2012)).

licenses for non-commercial broadcast television stations under Sections 301, 303, 307, 308, 309(a), 309(h), 309(j)(2)(C), 310 and 397(6). T-Mobile is not seeking such licenses.

Question 3: Special Temporary Authority (STA). Since March 9, 2023, the Wireless Telecommunications Bureau and the Public Safety and Homeland Security Bureau have granted applications for special temporary authority for use of wireless spectrum. The majority of these grants have been in services not subject to competitive bidding. In addition, ten STAs have been granted to ensure continuity of service in connection with license renewals, a type of application that is not subject to competitive bidding.¹⁰ Finally, three 60-day emergency STAs, to address critical recovery efforts in Guam in response to Typhoon Mawar, have been granted in the AWS-3 and PCS services pursuant to a different source of statutory authority that allows grant of short-term STAs without public notice. To the last part of your question, since March 24, 2023, eight requests for special temporary authority for use of wireless spectrum have been pending more than 60 days.

T-Mobile's STA request differs from these other STAs because there are two legal requirements under Section 309(f) that are uniquely applicable here. First, such temporary authority may be granted only "if the grant of [the underlying] application is otherwise authorized by law."¹¹ Here, as noted above, there has been a lapse of authority to grant T-Mobile's underlying long-form application following expiration of authorization in the law on March 9, 2023. Second, Section 309(f) requires the Commission, "[w]hen any such grant of a temporary authorization is made," to "give expeditious treatment to any timely filed petition to deny such application," and a petition to deny has been filed here.¹²

Question 4: Information on T-Mobile Licenses in the 2.5 GHz Auction. T-Mobile filed one long-form application covering all markets that it won in Auction 108 (the 2.5 GHz auction), ULS File No. 0010206629. The initial application was filed on September 16, 2022, and amended on October 4, 2022, November 7, 2022, February 1, 2023, and April 17, 2023. The applicant is T-Mobile License LLC, and payment of the filing fee was confirmed on September 20, 2022. There are no pending long-form applications that are mutually exclusive to ULS File No. 0010206629, although T-Mobile's long-form application is subject to a petition to deny, filed pursuant to 47 U.S.C. § 309(d).

¹⁰ Applications for renewal of licenses in Wireless Radio Services, including those assigned pursuant to competitive bidding procedures, are not subject to competing applications. See Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95 and 101 To Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services, *Second Report and Order and Further Notice of Proposed Rulemaking*, 32 FCC Rcd 8874, 8891, paras. 42-44 (2017). As such, mutual exclusivity does not arise in connection with such renewal applications and Section 309(j)'s competitive bidding requirement does not apply. See 47 U.S.C. § 309(j)(1) ("If ... mutually exclusive applications are accepted for any initial license or construction permit, then ... the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection [j].").

¹¹ 47 U.S.C. § 309(f).

¹² *Id.* T-Mobile filed one long-form application covering all markets that it won in Auction 108, see ULS File No. 0010206629. AT&T Services Inc. filed a petition to deny the application on November 7, 2022. See Petition to Deny of AT&T Services, Inc., ULS File No. 0010206629 (Nov. 9, 2022). We also note that our authority to dispose of this petition is constrained by Section 309(d)(2)'s directive to "*make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition*" upon a finding that the petition has not raised any material issues and that the public interest standard has been met because the Commission lacks authority to make any such grants at this time. 47 U.S.C. § 309(d)(2) (emphasis added).

Question 5: Auction Deposit Funds. The funds deposited by T-Mobile were paid voluntarily and pursuant to the Commission's auction rules. *See* 47 C.F.R. §§ 1.2107, 1.2109. Payment was not compelled, was not confiscated by the Commission or the Treasury Department, and does not constitute a taking under the Fifth Amendment. These funds currently reside in an FCC Auctions Program deposit fund account in the United States Treasury. The Treasury Department does not pay interest on FCC deposit accounts.¹³ The FCC has not formally notified the Treasury Department that T-Mobile's specific deposit remains in the FCC Auction Program deposit fund account in the United States Treasury because the funds in this account are generally not available to be spent or allocated by the U.S. Government until Congress restores the statutory authority allowing the licenses for which the deposit has been made to be granted by the FCC.

¹³ Until 2018, 47 U.S.C. § 309(j)(8)(C) provided that pre-auction deposits would be paid into "an interest bearing account at a financial institution designated for this purpose by the Commission." *See* 47 U.S.C. § 309(j)(8)(C) (1996). In 2018, Congress amended 47 U.S.C. § 309(j)(8)(C) to provide that pre-auction deposits to qualify to bid "shall be deposited in the Treasury" and deleted the provision covering the interest generated by the deposits. *See* Consolidated Appropriations Act, 2018, P.L. 115-141, Division P, Title I, § 101, the Repack Airwaves Yielding Better Access for Users of Modern Services Act (RAY BAUM'S Act) (Mar. 23, 2018) (codified at 47 U.S.C. § 309(j)(8)(C)).