



DLA Piper LLP (US)
500 Eighth Street, NW
Washington, DC 20004
www.dlapiper.com

Nancy J. Victory
nancy.victory@dlapiper.com
T 202.799.4216
F 202.799.5616

July 23, 2018
VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

**Re: Notification of Oral Ex Parte Presentations
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); AU Docket No. 18-85**

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.1206(b), notice is hereby provided of oral *ex parte* communications in the above-captioned docket. On July 19-20, 2018, representatives of T-Mobile US, Inc. ("T-Mobile")¹ met or had telephone calls with Commissioner Brendan Carr and Will Adams, Legal Advisor to Commissioner Carr; Erin McGrath, Legal Advisor to Commissioner O'Rielly; Umair Javed, Legal Advisor to Commissioner Rosenworcel; Don Stockdale, Dana Shaffer and Joel Taubenblatt, the Wireless Telecommunications Bureau Chief and Deputy Bureau Chiefs; Margaret Wiener, Chief of WTB's Auctions and Spectrum Access Division; Bill Richardson, Deputy Associate General Counsel; Anjali Singh, Office of General Counsel; and Michael Carowitz and Kevin Costello, Special Counsel to Chairman Pai and intern in Chairman Pai's Office. During these meetings, T-Mobile discussed aspects of the Commission's pre-adoption Public Notice in the above-captioned proceeding.²

T-Mobile sought confirmation that pending merger agreements, such as its BCA with Sprint, are not a joint-bidding arrangement within the meaning of Commission rules. T-Mobile noted that the Commission intended for the joint-bidding prohibition to be narrow in scope³ and explained that agreements pending at the short-form deadline are permissible provided that such arrangements are disclosed in the short-form application and do not *both* (i) relate to the licenses at auction, and (ii) address or communicate, directly

¹ These representatives were Kathleen Ham and Steve Sharkey of T-Mobile; Trey Hanbury of Hogan Lovells, US, LLP, counsel to T-Mobile; and the undersigned counsel to T-Mobile.

² *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)*, Draft Public Notice, FCC-CIRC-1808-1, AU Docket No. 18-85 ¶¶ 40 (rel. July 12, 2018) ("*Draft Public Notice*").

³ The Commission circumscribed the definition of "joint-bidding arrangements" in 2015 and excluded arrangements regarding the transfer or assignment of licenses existing at the deadline for short-form applications. See *Updating Part 1 Competitive Bidding Rules, 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 ¶¶ 182-186 (2015) ("*Part 1 Order*"); see also 47 C.F.R. § 1.2105(a)(2)(ix).



Marlene H. Dortch
July 23, 2018
Page Two

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.⁴ The Commission has issued guidance clarifying that arrangements or discussions among applicants that relate to post-auction market structure are permissible so long as they do not “relate to the licenses being auctioned.”⁵ T-Mobile sought confirmation that agreements that do not address or communicate bids or bidding strategy are not joint-bidding agreements.

An agreement to merge two companies with a combined enterprise value of approximately \$146 billion and a broad and diverse set of network, retail, service and spectrum assets does not “relate to the licenses being auctioned.” 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 102.⁶ A determination that a proposed transfer or assignment of licenses that has no causal relationship to Auctions 101 and 102 “relate[s] to the licenses” at issue in this proceeding would be based on an unnatural reading of the Commission’s rules, finds no support in the text of the regulations, and has never previously been disclosed to regulated entities.⁷

A similarly over-broad interpretation of the term “post-auction market structure” would create uncertainty over the permissibility of nearly any business decision with the potential to alter the wireless communications sector, in any way or degree. For example, a nationwide provider’s decision to cooperate with another nationwide provider on infrastructure deployment could be said to alter the “post-auction market structure” of the existing wireless sector.⁸ But the Commission wisely did not seek to disqualify bidders with such a strained and impractical interpretation and application of the rule. The

⁴ See 47 C.F.R. § 1.2105(a)(2)(ix)(C); *Part 1 Order* at ¶ 197 (stating that “any agreement for the transfer or assignment of licenses existing at the deadline for filing short-form applications will not be regarded as a prohibited arrangement, provided that it does not both relate to the licenses at auction and include terms or conditions regarding a shared bidding strategy and expressly does not communicate bids or bidding strategies”).

⁵ See *Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000*, Public Notice, 30 FCC Rcd 10794 ¶¶ 33-35 (2015); see also *Draft Public Notice* ¶ 61.

⁶ Indeed, Section 6.20 of the BCA expressly states that it is not intended to restrict the ability of either party from participating in any FCC auction and prohibits the parties from discussing or entering into any agreements related to bids, bidding strategies or post-auction market structure related to licenses being auctioned.

⁷ See 47 C.F.R. §§ 1.1205(a)(2)(ix), 1.1205(c)(1).

⁸ See, e.g., *AT&T, Verizon Strike Tower Agreement in Effort to Diversify Vendors*, Reuters Nov. 13, 2017 (describing a joint infrastructure agreement between AT&T and Verizon and a tower company), available at <https://www.reuters.com/article/us-at-t-verizon-mobilephone/att-verizon-strike-tower-agreement-in-effort-to-diversify-vendors-idUSKBN1DD2G2>.



Marlene H. Dortch
July 23, 2018
Page Three

Commission's purpose in adopting its joint-bidding rule was to prevent improper, *anti-competitive* collusion among bidders, not to hamstring investment and innovation in a highly dynamic industry.

T-Mobile said the Commission's rules do not, and were not meant to, bar bidders from participating in an auction under the circumstances here. At a bare minimum, the rules are vague. An interpretation of the joint-bidding rule that allows either of these potential ambiguities to persist would run counter to foundational principles of administrative and constitutional law that bar administrative agencies from enforcing rules that are overly vague. And vagueness is of particular concern where, as here, the rules at issue can threaten communicative and expressive speech.⁹ By making clear that the Commission interprets its rules to limit restrictions to those necessary to prevent anti-competitive collusion in Auction 101 and 102 proceedings, the Commission can achieve its policy goal of protecting the integrity of the Commission auction process while remaining within the bounds of its authority.

T-Mobile also noted that merger parties whose pending transaction, including the BCA, is subject to Hart-Scott-Rodino (HSR) antitrust review before the Department of Justice (DOJ) are particularly cognizant of the need to avoid any form of inappropriate coordination of competitive activity prior to consummation of the transaction, given the need to avoid "gun-jumping" under the HSR Act and other potential violations of the antitrust laws applicable to the parties' conduct while they remain independent companies. The parties have protections in place to guard against the inappropriate sharing of competitively sensitive information, including any strategies or plans the parties may have in regard to spectrum auctions that occur while the transaction is pending.

T-Mobile emphasized that broad auction participation is a prerequisite to satisfying the Commission's directives to promote economic opportunity and competition,¹⁰ and to ensure the public recovers a portion of the value of public spectrum made available for commercial use.¹¹ T-Mobile noted that allowing T-Mobile to participate in Auctions 101 and 102 maximizes revenues to the U.S. Treasury by accounting for the true demand for millimeter-wave spectrum, while also serving as a check against speculative bids. Maximizing auction participation also helps fulfill spectrum auction's core statutory and economic rationale of efficiently determining bands' highest and best use – an objective that could not be achieved if T-Mobile is barred from participating. Conversely, foreclosing T-Mobile's participation in Auctions 101

⁹ See *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–254 (2012) ("Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.") (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972)).

¹⁰ 47 U.S.C. § 309(j)(3)(B).

¹¹ 47 U.S.C. § 309(j)(3)(C).



Marlene H. Dortch
July 23, 2018
Page Four

and 102 would have the anticompetitive effect of further concentrating millimeter wave spectrum, with the lasting effect of inefficiently distributing an important resource.

To resolve any perceived ambiguity in the FCC's description of joint-bidding arrangements regarding merger agreements such as the BCA, T-Mobile requested that the adopted Public Notice clarify that the Commission will construe the terms "relate to" the licenses and "post-auction market structure" in a manner that prevents anti-competitive collusion among bidders. In this regard, T-Mobile sought clarification that agreements existing at the time of the short-form filing deadline that would merge existing businesses are not inherently joint-bidding agreements. Alternatively, to the extent that the Commission determines that a fact-based review of such agreements is required before such a determination can be made, the adopted Public Notice should find that pending merger agreements are not *per se* preclusive of auction participation and articulate an opportunity for a potential auction participant to submit its merger agreement for review and seek written confirmation that the agreement does not constitute a joint-bidding agreement. The adopted Public Notice should further provide that staff shall complete this review and provide its findings well in advance of the short-form filing deadline of Auctions 101 and 102.

Finally, T-Mobile reviewed with the staff several formulas and calculations contained in the *Draft Public Notice*. T-Mobile noted that paragraphs 154, 195, and 245 contain ambiguous language that may conflate minimum opening bids and upfront payments and explained that the Appendix appears to incorrectly identify market-specific opening bids and upfront payments. T-Mobile subsequently noted that the 28 GHz appendix appears to have included four counties that do not exist in the 2010 census, namely Yellowstone National Park in Montana and three boroughs in Alaska. Yellowstone National Park was absorbed into Yellowstone County, Montana, and the three boroughs in Alaska had their borders redrawn and were replaced with other borough names as follows: Prince Of Wales-Outer Ketchikan Cens, AK (FIPS 02201), Skagway-Yakutat-Angoon Cens, AK (FIPS 02231), and Wrangell-Petersburg, AK (FIPS 02280). T-Mobile requested that the Commission clarify the amounts of the upfront payments and minimum opening bids and, through this submission, asks the agency to correct any misidentification in the 28 GHz geographic-license areas.



Marlene H. Dortch
July 23, 2018
Page Five

Please direct any questions regarding the foregoing to the undersigned.

Respectfully submitted,

DLA Piper LLP (US)

/s/ Nancy Victory

Nancy J. Victory
Partner

cc: Commissioner Brendan Carr
Will Adams, Legal Advisor to Commissioner Carr
Erin McGrath, Legal Advisor to Commissioner O'Rielly
Umair Javed, Legal Advisor to Commissioner Rosenworcel
Don Stockdale, Chief, Wireless Telecommunications Bureau
Dana Shaffer, Deputy Chief, Wireless Telecommunications Bureau
Joel Taubenblatt, Deputy Chief, Wireless Telecommunications Bureau
Margaret Wiener, Chief, Auctions and Spectrum Access Division
Bill Richardson, Deputy Associate General Counsel
Anjali Singh, Office of General Counsel
Michael Carowitz, Special Counsel to Chairman Pai
Kevin Costello, Intern, Office of Chairman Pai