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July 31, 2019

VIA ECFS

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

Re: WAIVER – EXPEDITED ACTION REQUESTED
Incentive Auction of Upper Microwave Flexible Use Service Licenses in the Upper 37, 39, and 47 GHz Bands for Next-Generation Wireless Services; Procedures for Auction 103; AU Docket No. 19-59, GN Docket No. 14-177

Dear Ms. Dortch:

T-Mobile US, Inc. ("T-Mobile"), through its attorneys, respectfully requests a waiver of the requirements of section 1.2105(a)(2)(ix) of the Federal Communications Commission's ("Commission's" or "FCC's") rules to participate in Auction 103.¹ Under the terms of a Business Combination Agreement ("BCA") between T-Mobile and Sprint Corporation ("Sprint"), the companies have proposed to merge to provide the combined business with the scale, spectrum, and assets needed to deploy a nationwide 5G network quickly and to compete more effectively in the wireless market.² While nationwide carrier applicants may not enter agreements with one another regarding licenses subject to auction, the prohibition does not apply to pre-existing assignments of licenses and other agreements unrelated to the licenses that are subject to auction. In an abundance of caution, T-Mobile sought and received a waiver of section 1.2105(a)(2)(ix) of the Commission's rules to participate in Auctions 101 and 102.³ In the order granting this analogous request, the Wireless Telecommunications Bureau ("Bureau") concluded that T-Mobile was entitled to relief because the BCA predated the auctions, the licenses that were the subject of the auction were not a material consideration underlying the agreement, and the BCA included provisions to promote independent

¹ See 47 C.F.R. § 1.2105(a)(2)(ix)(C).

² The BCA, dated as of April 29, 2018, is made by and among T-Mobile, Huron Merger Sub LLC, Superior Merger Sub Corporation, Sprint, Starburst I, Inc., Galaxy Investment Holdings, Inc., and for the limited purposes of the covenants and representations and warranties that are expressly obligations of such persons, Deutsche Telekom AG, Deutsche Telekom Holding B.V., and SoftBank Group Corp.

³ See *Competitive Bidding Procedures for Auction 101 (28 GHz) and Auction 102 (24 GHz) et al.*, Order, AU Docket No. 18-85 (rel. Sep. 11, 2018) ("*Waiver Grant Order*").

auction participation, among other things.⁴ The same reasons that supported a grant of T-Mobile's waiver request in Auctions 101 and 102 support a waiver grant with respect to Auction 103.

A. BACKGROUND

Section 1.2105(a)(2)(ix) of the Commission's rules requires an auction applicant that is also a nationwide provider to certify that it has not entered and will not enter into certain agreements or understandings with any other applicant or communications provider.⁵ Subsection C provides an exemption for:

[a]greements, arrangements or understandings of any kind with respect to the transfer or assignment of licenses, provided that such agreements, arrangements or understandings do not both relate to the licenses at auction and 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 not to bid), or post-auction market structure.⁶

The Commission's purpose in adopting the certification requirement was to prevent improper, anticompetitive collusion among bidders, not to hamstring investment and innovation in a highly dynamic industry.⁷ The section 1.2105(a)(2)(ix) certification requirement was not intended to block transactions during an auction, so long as the underlying agreement did not relate to and have an impact on the auction. For example, the Commission expressly stated 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.⁸

The Commission has subsequently issued similar guidance clarifying that arrangements and/or discussions among auction applicants (or discussions between nationwide providers where at least one is an applicant) that relate to post-auction market structure are permissible as long as

⁴ The Bureau, however, declined to determine "whether the BCA relates to the licenses at auction and to the post-auction market structure," "whether the BCA constitutes a joint bidding arrangement," or "that the petitioners may participate in a joint bidding arrangement." *Waiver Grant Order* ¶ 12 n.29. Instead, the Bureau made clear that its waiver grant was limited to permitting T-Mobile to certify and submit its FCC Form 175 for Auctions 101 and 102, "notwithstanding the questions that the BCA might raise." *Id.* Because T-Mobile's waiver request was limited to Auctions 101 and 102, and the proposed merger between T-Mobile and Sprint may not be completed before September 9, 2019, the short-form application filing deadline for Auction 103, Commission staff directed T-Mobile to submit a waiver request with respect to Auction 103.

⁵ See 47 C.F.R. § 1.2105(a)(2)(ix)(C). T-Mobile and Sprint have both been classified by the Commission as nationwide providers with respect to Auction 103. See *Incentive Auction of Upper Microwave Flexible Use Service Licenses in the Upper 37, 39, and 47 GHz Bands for Next-Generation Wireless Services; Procedures for Auction 103, Public Notice, AU Docket No. 19-59; GN Docket No. 14-177*, ¶ 27 (rel. Jul. 11, 2019) ("*Auction 103 Procedures Public Notice*").

⁶ 47 C.F.R. § 1.2105(a)(2)(ix)(C).

⁷ See *Updating Part 1 Competitive Bidding Rules*, Notice of Proposed Rulemaking, 29 FCC Rcd 12426, ¶ 107 (2014).

⁸ 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, ¶197 (2015) ("*Part 1 Order*"); see also 47 C.F.R. § 1.2105(a)(2)(ix).

they do not relate to the licenses being auctioned.⁹ Moreover, in the *Auction 103 Procedures Public Notice*, the Commission reiterated that

[a]pplicants may continue to communicate pursuant to any pre-existing agreements, arrangements, or understandings that . . . provide for the transfer or assignment of licenses, provided that such agreements, arrangements, or understandings are disclosed on their applications and do not both relate to the licenses at auction and address or communicate bids (including amounts), bidding strategies, or the particular permits or licenses on which to bid or the post-auction market structure.¹⁰

B. WAIVER STANDARD

Section 1.925 governs waivers of rules in the context of wireless radio services.¹¹ Consistent with this rule, the Commission may grant a request for waiver if the petitioner shows that (1) “[t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case” and “a grant of the requested waiver would be in the public interest”; or (2) “unique or unusual factual circumstances” would render “application of the rule(s) . . . inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.”¹² Both elements are met in this case.¹³

C. T-MOBILE’S PARTICIPATION IN AUCTION 103 WOULD FURTHER THE PUBLIC INTEREST WITHOUT FRUSTRATING THE PURPOSE OF SECTION 1.2105(A)(2)(IX) OF THE COMMISSION’S RULES.

First, as the Bureau found in the context of Auctions 101 and 102,¹⁴ the timing and the underlying purpose of the BCA distinguishes the agreement from the kinds of arrangements that section 1.2105(a)(2)(ix) intends to prohibit.

⁹ See, e.g., *Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000*, Public Notice, 30 FCC Rcd 10794, ¶¶ 33-35 (2015).

¹⁰ *Auction 103 Procedures Public Notice* ¶ 47.

¹¹ 47 C.F.R. § 1.925; *Waiver Grant Order* ¶ 10. To the extent necessary, and for the same reasons discussed in this waiver request, T-Mobile also seeks a waiver of section 1.2105(a)(2)(ix) of the Commission’s rules pursuant to section 1.3 of the rules. See 47 C.F.R. § 1.3.

¹² 47 C.F.R. § 1.925. See, e.g., *Highland Cellular, Inc.*, Order, 16 FCC Rcd 7821, ¶ 5 (WTB 2001); see also *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, Order, MM Docket No. 94-131, 11 FCC Rcd 9655, ¶ 11 (WTB 1995) (providing a limited waiver of Section 1.2105(a)(2)(ix) due to widespread confusion about the rule’s application in the then upcoming auction). To the extent necessary, T-Mobile also seeks a waiver of section 1.925’s requirement that “[r]equests for waiver of rules associated with licenses or applications in the Wireless Radio Services . . . be filed on FCC Form 601, 603, or 605” for the reasons explained in this waiver request. See 47 C.F.R. § 1.925.

¹³ Cf. *Statement of Commissioner Michael O’Rielly, 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*, AU Docket No. 18-85 (Aug. 2, 2018) (“Moreover, our anti-collusion rules and major modification prohibitions make it uniquely challenging for those with pending applications before the Commission to participate in these auctions. I expect the Commission will expedite consideration of any petitions regarding such issues and will provide parties with answers prior to opening the short-form application window in September.”).

¹⁴ See *Waiver Grant Order* ¶ 12.

The timing of the BCA has not changed: T-Mobile entered into the agreement with Sprint in April 2018.¹⁵ Just as with respect to Auctions 101 and 102, the merger was announced before the Commission gave public notice of the auction date for Auction 103 and issued the draft public notice relating to bidding procedures.¹⁶

The underlying purpose of the BCA likewise remains unchanged. The BCA was the culmination of a lengthy period of discussions¹⁷ between the parties about merging the two entities and gaining the scale, spectrum, and sites to deploy a superior nationwide 5G network and compete more effectively with the much larger market leaders.¹⁸ Such a “complex agreement . . . involves business decisions and assets beyond the limited scope of licenses being offered”¹⁹ in a given auction. This is why the Bureau asserted that the “the licenses available in [Auctions 101 and 102] were not a material consideration in concluding the agreement.”²⁰ The same is true with respect to the licenses available in Auction 103. T-Mobile and Sprint did not enter into 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 to effect a change in control of licenses that the Commission would subsequently identify for competitive bidding. Auction 103 was neither a factor in the decision to merge nor a factor in the timing of the merger decision.

Second, the BCA does not relate to the licenses being auctioned, or communicate bids, bidding strategies, or the post-auction market.²¹ On the contrary, the BCA states that it does not, and is not intended to, affect T-Mobile’s or Sprint’s decision or right to participate individually in any spectrum auction in an unfettered manner. In that regard, the BCA requires compliance with Commission rules designed to promote bidder independence and protect auction integrity.²² This is why, after the Bureau “examined the pertinent provisions of the BCA,” the Bureau concluded that “the terms of these provisions are designed as safeguards against anticompetitive behavior and that they demonstrate the parties’ intention to comply with the Commission’s rules during the pendency of their merger applications.”²³

Section 6.20 of the BCA expressly provides:

¹⁵ *Part 1 Order* ¶ 197; see also 47 C.F.R. § 1.2105(a)(2)(ix).

¹⁶ See Draft Spectrum Frontiers Auction 103 Public Notice, AU Docket No. 19-59, FCC-CIRC1907-02 (rel. June 19, 2019); *Notice of Initial 39 GHz Reconfiguration Procedures; Preparation for Incentive Auction of UMFUS Licenses in the 37 GHz, 39 GHz, and 47 GHz Bands (Auction 103); Order of Modification; 39 GHz License Transfer and Assignment Freeze*, Public Notice, AU Docket No. 19-59; GN Docket No. 14-177 (rel. Mar. 20, 2019).

¹⁷ See, e.g., T-Mobile US, Inc. Form S-4 Registration, Securities and Exchange Commission (filed Jul. 30, 2018), <http://bit.ly/2GhSZGP>; see also Aaron Smith and Jackie Wattles, *T-Mobile and Sprint Agree to Merge, Finally*, CNN (Apr. 29, 2018), <https://cnn.it/2Y9uHch>.

¹⁸ See, e.g., Press Release, *T-Mobile and Sprint to Combine, Accelerating 5G Innovation & Increasing Competition* (April 29, 2018), available at <https://t-mo.co/2Y9L5JV>; see also BCA (Apr. 29, 2018), <http://bit.ly/2JGy5TU>; Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, Public Interest Statement, WT Docket No. 18-197 (filed Jun. 18, 2018).

¹⁹ *Waiver Grant Order* ¶ 13.

²⁰ *Id.* ¶ 13.

²¹ See *Part 1 Order* ¶ 197; see also 47 C.F.R. § 1.2105(a)(2)(ix).

²² See *Waiver Grant Order* ¶ 14.

²³ *Id.* ¶ 14.

Sprint and T-Mobile hereby acknowledge that this Agreement is not intended to, and shall not be interpreted to, restrict the ability of either Sprint and its subsidiaries, or T-Mobile and its subsidiaries, from participating in any FCC auction that may occur after the date of this Agreement and prior to the Closing.²⁴

Each party's freedom to participate in any spectrum auction is reiterated in sections 5.1(a)(v)(C) and 5.1(b)(v)(C) of the BCA, which make clear that the acquisition of spectrum by T-Mobile and Sprint pursuant to a Commission auction is expressly exempted from business conduct limitations that restrict the parties while the merger is pending.²⁵

Section 6.20 of the BCA furthers the purposes of the Commission's auction rules by specifically providing that, if either T-Mobile or Sprint chooses to participate in a spectrum auction, the parties are each prohibited from sharing information regarding bids, bidding strategy, or post-auction market structure regarding the licenses being auctioned, or enter into any agreement or understanding regarding such issues; it also directs the companies to implement measures to prevent communications prohibited under the Commission's rules:

In connection with the foregoing (a) Sprint and T-Mobile shall not discuss or enter into any agreements related to bids, bidding strategies or post-auction market structure related to licenses being auctioned by the FCC and (b) not later than 30 days in advance of the applicable initial auction application deadline, the parties shall (i) distribute guidelines for compliance with the FCC's Prohibited Communications rules to all individuals and consultants involved in the discussions with the other party regarding the transactions contemplated by this Agreement and (ii) implement safeguards mutually agreed upon by the parties, which may include assigning personnel or committees to monitor or evaluate proposed communications between the Parties regarding matters potentially falling under the FCC's Prohibited Communications rules, firewalls and third-party nondisclosure agreements, remedial steps to be followed in the event of any such Prohibited Communication, and other reasonable and appropriate procedures implemented in consultation with outside counsel and intended to prevent communications concerning any FCC licenses to be auctioned, bids or bidding strategy between such parties.²⁶

²⁴ BCA at 6.20. In addition, because the pending transaction is subject to Hart-Scott-Rodino (HSR) antitrust review before the Department of Justice (DOJ), T-Mobile and Sprint 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 BCA, including Sections 6.2(b) and 6.20, contemplates, and the parties have put in place, protections 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.

²⁵ See *id.* at 5.1(a)(v)(C); 5.1(b)(v)(C). To be clear, the language at the end of Sections 5.1(a)(v) and 5.1(b)(v)—“(D) in one or more transactions with respect to which the aggregate consideration for all such transactions (including any cash component of an otherwise fair market value exchange of spectrum licenses) during the period from the date of this Agreement to the Closing Date does not exceed \$[X]”—is separate from subsection C (as indicated by the use of “or” preceding it) and does not impose any limits, monetary or otherwise on either Applicant's acquisition of spectrum at a Commission auction pursuant to subsection C.

²⁶ See *id.* at 6.20. Indeed, T-Mobile has and will continue to observe rigorous procedures to ensure that none of its employees, contractors, or representatives discuss bids, bidding strategies, or any other subject that might directly or indirectly provide information about the company's objectives for, or results in, Auction 103 with any other auction applicant or communications provider. These procedures include, but are not limited to, the following: defining a small number of employees to comprise a bidding team; confining information about bids or bidding strategy to this team to the greatest extent possible; cautioning employees and executives against communications with the bidding team regarding bids,

In addition, to provide further flexibility to the merger parties with respect to auction participation, sections 5.1(a)(viii)(D) and 5.1(b)(viii)(D) of the BCA enable T-Mobile and Sprint to each take on additional indebtedness specifically for purposes of acquiring spectrum at an auction²⁷—this indebtedness represents debt beyond the additional financial obligations otherwise permitted to be incurred under the BCA for business conduct and other customary purposes, such as refinancing existing debt.²⁸ The authorized additional indebtedness listed in sections 5.1(a)(viii) and 5.1(b)(viii) are cumulative and thus all are potential sources for funding auction participation. Each company can also use cash on hand, and other liquidity mechanisms, to participate in an auction. In this context, allowing T-Mobile to participate in Auction 103 would not frustrate the purpose of section 1.2105(a)(2)(ix) of the Commission's rules.

Finally, the waiver grant would further the public interest. Broad auction participation is a prerequisite to satisfying the Commission's directives to promote economic opportunity and competition,²⁹ and to ensure the public recovers a portion of the value of public spectrum made available for commercial use.³⁰ As the Bureau explained in the context of Auctions 101 and 102, enabling T-Mobile to participate in the auction would encourage "new competitors for millimeter wave spectrum that may be deployed for 5G services" and further the Commission's interest in accelerating "the deployment of new technologies, products and services."³¹ To allow T-Mobile to participate in Auction 103 would also help maximize 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 a spectrum auction's core statutory and economic rationale of efficiently determining bands' highest and best use.³² Conversely, foreclosing T-Mobile's participation in Auction 103 would have the opposite, anticompetitive effect of further concentrating millimeter wave spectrum and would not be in the public interest.³³

D. THE UNIQUE FACTS HERE MAKE THE APPLICATION OF SECTION 1.2105(A)(2)(IX) TO THE BCA TO BAR T-MOBILE'S PARTICIPATION IN THE AUCTION INEQUITABLE, UNDULY BURDENSOME, AND CONTRARY TO THE PUBLIC INTEREST.

The unique facts here make the application of section 1.2105(a)(2)(ix) to the BCA to bar T-Mobile's participation in the auction inequitable, unduly burdensome, and contrary to the public interest. A merger between two nationwide wireless providers that is pending at the same time as the

bidding strategy or post-auction market structure; educating employees and executives about the prohibited communications rule; and establishing information and accountability mechanisms to prevent prohibited communications.

²⁷ The reference to "incremental" indebtedness in this provision does not impose any additional limitation but simply refers to the fact that this would be additional indebtedness on top of other authorized debt that each party is otherwise permitted to incur under the BCA.

²⁸ Such provisions limiting the additional debt either party can take on between signing the BCA and closing the transaction are customary for transactions of this type and important for purposes of the parties being able to secure financing in connection with the deal. The different debt limits for each party reflect the difference in the respective sizes of T-Mobile and Sprint.

²⁹ 47 U.S.C. § 309(j)(3)(B).

³⁰ 47 U.S.C. § 309(j)(3)(C).

³¹ See *Waiver Grant Order* ¶ 15 (citing 47 U.S.C. § 309(j)(3)(A)).

³² See 47 U.S.C. § 309(j)(3)(C).

³³ See *id.*; 47 U.S.C. § 309(j)(3)(B); *Waiver Grant Order* ¶ 15.

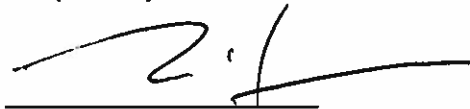
third auction of millimeter wave spectrum licenses in more than a decade³⁴ is announced and commenced constitutes a unique and unusual factual circumstance. In addition, as explained earlier in this filing, the licenses available in Auction 103 were not a material consideration when the parties, over one year ago, decided to enter into 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. Moreover, the BCA's provisions do not raise any of the harms the rule is designed to address. On the contrary, the BCA expressly preserves each party's right to participate freely and individually in any spectrum auction and specifically requires the parties to implement measures to guard against prohibited communications.³⁵ It would be as "unduly burdensome" to preclude T-Mobile from participating in Auction 103 as it would have been to do so with respect to Auctions 101 and 102.³⁶

E. CONCLUSION

In conclusion, T-Mobile's participation in Auction 103 would further the public interest without frustrating the purpose of section 1.2105(a)(2)(ix) of the Commission's rules. Given the unique circumstances presented by the pending T-Mobile and Sprint transaction, particularly in the context of the Commission's recent and upcoming spectrum auctions, to preclude T-Mobile from participating in Auction 103 would be inequitable, unduly burdensome, and contrary to the public interest. The same elements that supported the Bureau's grant of T-Mobile's waiver request with respect to Auctions 101 and 102, including the BCA's timing, underlying purpose, and provisions, are present here and remain equally relevant. Accordingly, T-Mobile's waiver request should be granted without delay.

Please direct any questions regarding the foregoing to the undersigned counsel for T-Mobile.

Respectfully submitted,



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cc: Michael Carowitz
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³⁴ See *Waiver Grant Order* ¶ 13.

³⁵ See *id.* ¶ 14.

³⁶ See *id.* ¶ 13.