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August 6, 2018

*VIA ECFS*

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

**Re: Request for Confirmation or Alternatively, for Waiver  
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:

T-Mobile US, Inc. (“T-Mobile”) hereby seeks confirmation that its Business Combination Agreement (“BCA”) with Sprint Corporation (“Sprint”) falls within exemption C to the certification requirement contained in section 1.2105(a)(2)(ix) of the Commission’s rules.<sup>1</sup> Alternatively, T-Mobile seeks a waiver of section 1.2105(a)(2)(ix) with regard to the BCA so it may be eligible for Auctions 101 and 102. T-Mobile remains very interested in participating in these auctions and requests written confirmation of its eligibility prior to the September 5, 2018 opening of the short-form filing window.<sup>2</sup> The BCA with Sprint clearly does not fall within the joint bidding prohibition because it neither relates to the licenses at issue nor addresses bidding, bidding strategy, or the post-auction market. Moreover, the prohibition was not intended to bar all transactions during auctions, but rather to prevent collusive behavior among bidders. The terms of the BCA, as well as applicable antitrust laws, ensure no collusion or anti-competitive coordination or communication will take place.

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<sup>1</sup> 47 C.F.R. § 1.2105(a)(2)(ix)(C).

<sup>2</sup> *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)*, Public Notice, AU Docket No. 18-85, ¶ 24 (Aug. 3, 2018) (“*Public Notice*”). The filing window closes on September 18, 2018. *Id.*



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Section 1.2105(a)(2)(ix) of the Commission's rules requires an auction applicant to certify that it has not entered and will not enter into certain agreements or understandings with any other applicant or with a nationwide provider.<sup>3</sup> 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.<sup>4</sup>

The Commission's purpose in adopting the certification requirement was to prevent improper, anti-competitive collusion among bidders, not to hamstring investment and innovation in a highly dynamic industry.<sup>5</sup>

The 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.<sup>6</sup>

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

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<sup>3</sup> T-Mobile and Sprint have both been classified by the Commission as nationwide providers.

<sup>4</sup> 47 C.F.R. § 1.2105(a)(2)(ix)(C).

<sup>5</sup> *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, ¶¶ 180-81 (2015) ("*Part 1 Order*").

<sup>6</sup> *See Part 1 Order*, ¶ 197; *see also* 47 C.F.R. § 1.2105(a)(2)(ix).



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they do not relate to the licenses being auctioned.<sup>7</sup> Moreover, in the 2018 *Public Notice*, the FCC 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.<sup>8</sup>

T-Mobile seeks confirmation that the BCA is an exempted arrangement under section 1.2105(a)(2)(ix)(C). 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 cannot plausibly be interpreted to “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. Rather, the BCA was the culmination of a lengthy period of discussions<sup>9</sup> 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.<sup>10</sup> The upcoming Auctions 101 and 102 were neither a factor in the decision to merge, nor a factor in the timing of

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<sup>7</sup> See *Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000*, Public Notice, 30 FCC Rcd 10794, ¶¶ 33-35 (2015) (“*Auction 1000 Guidance*”).

<sup>8</sup> *Public Notice* ¶ 62.

<sup>9</sup> See, e.g., T-Mobile US, Inc. Form S-4 Registration, as filed with the Securities and Exchange Commission (July 30, 2018), available at <https://www.sec.gov/Archives/edgar/data/1283699/000119312518231621/d589303ds4.htm>; see also Aaron Smith and Jackie Wattles, *T-Mobile and Sprint Agree to Merge, Finally* (Apr. 29, 2018), available at <https://money.cnn.com/2018/04/29/news/companies/t-mobile-sprint-merger/index.html>.

<sup>10</sup> Such a determination would also be inconsistent with how the certification provision has been interpreted previously. See Press Release, *T-Mobile and Sprint to Combine, Accelerating 5G Innovation & Increasing Competition* (April 29, 2018), available at <http://investor.t-mobile.com/file/Index?KeyFile=393237761>; see also Business Combination Agreement (BCA) (Apr. 29, 2018), available at [https://www.sec.gov/Archives/edgar/data/101830/000110465918028087/a18-12444\\_1ex2d1.htm](https://www.sec.gov/Archives/edgar/data/101830/000110465918028087/a18-12444_1ex2d1.htm)



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the merger decision.<sup>11</sup> Indeed, the merger was announced prior to the FCC's announcement of the auction date for the millimeter wave auctions and the issuance of the draft public notice relating to bidding procedures. A determination that the BCA is somehow a joint bidding arrangement would be based on an unnatural reading of the Commission's rules. Such a reading would also be inconsistent with how the certification provision has previously been interpreted.<sup>12</sup>

The BCA does not relate to the licenses being auctioned or address bids or bidding strategy in any way. The BCA states that it does not, and is not intended to, affect either party's decision or right to participate individually in any spectrum auction in an unfettered manner. In that regard, section 6.20 of the BCA expressly provides:

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.<sup>13</sup>

This freedom to participate (or not) in any FCC 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

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<sup>11</sup> With the lengthy list of recent and upcoming spectrum auctions planned by the Commission, it would be virtually impossible to propose a merger and complete its regulatory review without overlapping with a spectrum auction.

<sup>12</sup> See, e.g., *AT&T, Verizon Strike Tower Agreement in Effort to Diversify Vendors*, Reuters (Nov. 13, 2017), available at <https://www.reuters.com/article/us-at-t-verizon-mobilephone/att-verizon-strike-tower-agreement-in-effort-to-diversify-vendors-idUSKBN1DD2G2> (describing a joint infrastructure agreement between AT&T and Verizon and a tower company). Although a nationwide provider's decision to cooperate with another nationwide provider on infrastructure deployment during a spectrum auction might be argued to alter "post-auction market structure", the Commission wisely did not seek to disqualify the parties to this agreement from bidding in the auction.

<sup>13</sup> 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), the Applicants 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.



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either party pursuant to an FCC auction is expressly exempted from business conduct limitations that restrict the parties while the merger is pending.<sup>14</sup>

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, they shall not share 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 and directing the companies to implement measures to prevent prohibited communications:

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.<sup>15</sup>

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<sup>14</sup> 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 FCC auction pursuant to subsection C.

<sup>15</sup> BCA at 6.20. T-Mobile will 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, Auctions 101 and 102 with any other applicant. These procedures will include, but are not limited to, the following: defining a



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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 each of T-Mobile and Sprint to take on additional indebtedness specifically for purposes of acquiring spectrum at auction<sup>16</sup> – 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.<sup>17</sup> 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.

For these reasons, the BCA falls within exemption C to the certification requirement contained in section 1.2105(a)(2)(ix) of the Commission’s rules. T-Mobile respectfully requests expedited written confirmation from the Commission in this regard so it is free to participate in the upcoming spectrum auctions without the overhang of regulatory uncertainty.

Alternatively, and to the extent necessary, T-Mobile seeks a waiver of section 1.2105(a)(2)(ix) with regard to the BCA so the company may be eligible for Auctions 101 and 102. Section 1.3 of the Commission’s Rules provides that “[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown.”<sup>18</sup> In relevant precedent, the Commission has elaborated that a rule waiver is appropriate where “(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 requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances of the instant case, application of the rule would

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

<sup>16</sup> 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.

<sup>17</sup> 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 are reflective of differences in the respective sizes of T-Mobile and Sprint.

<sup>18</sup> 47 C.F.R. § 1.3.



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be inequitable, unduly burdensome or contrary to the public interest, or that the applicant has no reasonable alternative.”<sup>19</sup> Both of these tests are met in this case.<sup>20</sup>

Broad auction participation is a prerequisite to satisfying the Commission’s directives to promote economic opportunity and competition,<sup>21</sup> and to ensure the public recovers a portion of the value of public spectrum made available for commercial use.<sup>22</sup> Enabling 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 a 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 and 102 would have the anticompetitive effect of further concentrating millimeter wave spectrum.<sup>23</sup>

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 auctions inequitable, unduly burdensome and contrary to the public interest. A merger between two nationwide wireless providers that is pending at the same time a major spectrum auction is announced and commenced constitutes a unique and unusual factual circumstance. Moreover, as explained earlier in this filing, an agreement to merge two companies with a combined enterprise value of approximately \$146 billion and a broad and

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<sup>19</sup> See, e.g., *Highland Cellular, Inc.*, Order, File No. 0000012881, 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).

<sup>20</sup> See *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.”).

<sup>21</sup> 47 U.S.C. § 309(j)(3)(B).

<sup>22</sup> 47 U.S.C. § 309(j)(3)(C).

<sup>23</sup> T-Mobile does not currently have significant mmWave spectrum holdings.





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diverse set of network, retail, service and spectrum assets cannot plausibly be interpreted to relate to the auction or the licenses being auctioned. In addition, the BCA's provisions do not raise any of the harms the rule is designed to address, but rather expressly preserve each party's right to participate freely and individually in any spectrum auction. Furthermore, the BCA specifically requires the parties to implement measures to guard against prohibited communications. As such, application of the rule here would plainly be inequitable, unduly burdensome and contrary to the public interest. Finally, T-Mobile has no reasonable alternative to seeking a clarification or a waiver of section 1.2015(a)(2)(ix) of the Commission's rules because delaying the merger for the duration of the lengthy quiet period associated with Auctions 101 and 102 – not to mention a long line of proposed upcoming auctions – would have presented inordinate financial and operational risks to both companies.

For the foregoing reasons, T-Mobile seeks confirmation that its BCA with Sprint falls within exemption C to the certification requirement contained in section 1.2105(a)(2)(ix) of the Commission's rules. Alternatively, T-Mobile seeks a waiver of section 1.2105(a)(2)(ix) with regard to the BCA so it may be eligible for Auctions 101 and 102. While the Commission will not opine on whether a speculative or hypothetical course of conduct constitutes a violation of an auction rule, the confirmation that T-Mobile seeks is neither theoretical, nor abstract. T-Mobile and Sprint have announced a merger, and T-Mobile has a long history of participating in spectrum auctions and has announced a strong intention to bid in Auctions 101 and 102. To eliminate the manifest regulatory uncertainty that results from these facts, T-Mobile requests written confirmation or waiver prior to the short-form deadline for the upcoming auctions.

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





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Respectfully submitted,

**DLA Piper LLP (US)**

*/s/ Nancy Victory*

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