

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Auctions of Upper Microwave Flexible Use)	AU Docket No. 18-85
Licenses for Next-Generation Wireless)	
Services)	
)	
)	EXPEDITED ACTION REQUESTED

**PETITION FOR EXPEDITED DECLARATORY RULING
OR WAIVER REGARDING JOINT BIDDING
AND REQUEST FOR LIMITED WAIVER OF AUCTION FORM RULES**

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I. INTRODUCTION AND SUMMARY

Sprint Corporation (“Sprint”), a wireless carrier with no millimeter wave spectrum, hereby petitions the Federal Communications Commission (“Commission” or “FCC”) to remove potential regulatory uncertainty about Sprint’s ability to participate in the upcoming millimeter wave spectrum auctions (*i.e.*, Auctions 101 and 102) while pursuing approval and consummation of its proposed merger with T-Mobile US, Inc. (“T-Mobile”). Sprint would like to participate in the auctions. Therefore, it specifically requests that the Commission issue an expedited declaratory ruling that its merger agreement with T-Mobile (the “BCA”)¹ does not constitute a joint bidding arrangement. In the alternative, Sprint seeks a waiver of the bar on joint bidding by national carriers to enable it to participate separately in Auctions 101 and 102. In addition, to

¹ See Business Combination Agreement By and Among T-Mobile US, Inc., Huron Merger Sub LLC, Superior Merger Sub Corporation, Sprint Corporation, Starburst I, Inc., Galaxy Investment Holdings, Inc., and for the limited purposes set forth in this Agreement, Deutsche Telekom AG, Deutsche Telekom Holding B.V., and SoftBank Group Corp. (Apr. 29, 2018), https://www.sec.gov/Archives/edgar/data/101830/000110465918028087/a18-12444_1ex2d1.htm#Exhibit2_1_122313 (“BCA”).

ensure that Sprint and T-Mobile would be permitted to close their transaction promptly after receipt of the necessary governmental approvals, Sprint requests a limited waiver of the Commission’s rule prohibiting major modifications of short-form applications.

As Commissioner Michael O’Rielly emphasized in calling for expedited consideration of auction-related petitions, the Commission’s auction rules “make it uniquely challenging for those with pending merger applications to participate” in the millimeter wave auctions.² Grant of the requested relief before the application deadline on September 18, 2018, would advance the purposes of the Commission’s rules and promote the public interest by encouraging robust participation in the upcoming competitive spectrum auctions.³

II. THE COMMISSION SHOULD ISSUE AN EXPEDITED DECLARATORY RULING THAT THE BCA IS NOT A JOINT BIDDING ARRANGEMENT

Sprint urges the Commission to issue an expedited declaratory ruling “removing uncertainty”⁴ and finding that the BCA is not a joint bidding arrangement under the auction rules.⁵ As the Commission has stated, an agreement for the transfer of licenses “existing at the

² *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)*, AU Docket No. 18-85, Statement of Commissioner Michael O’Rielly, FCC 18-109 (rel. Aug. 3, 2018) (stating his expectation that “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”) (“*Commissioner O’Rielly Statement*”); *see also 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)*, AU Docket No. 18-85, Public Notice, FCC 18-109, ¶ 41 (rel. Aug. 3, 2018) (directing the Wireless Telecommunications Bureau to “make such determinations expeditiously”) (“*2018 Public Notice*”).

³ *See 2018 Public Notice* ¶ 24 (establishing that the filing window for short-form applications runs from September 5, 2018, through September 18, 2018).

⁴ 47 C.F.R. § 1.2(a) (“The Commission may . . . issue a declaratory ruling terminating a controversy or removing uncertainty.”).

⁵ The Commission requires auction applicants to certify that they have disclosed any joint

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.”⁶ The BCA is neither an arrangement that relates to the licenses being auctioned nor an arrangement that addresses or communicates bidding, bidding strategies, or post-auction market structure. Thus, the BCA cannot be construed as a joint bidding arrangement.

The BCA, which runs over one hundred pages, is an agreement to combine two large, well-established wireless carriers with significant existing spectrum holdings, substantial capitalization, extensive service offerings, and millions of subscribers into an entity with a combined enterprise value of \$146 billion.⁷ The scope of the transaction between Sprint and T-Mobile alone demonstrates that any millimeter wave licenses acquired at auction would be ancillary.⁸

bidding arrangements. 47 C.F.R. § 1.2105(a)(2)(ix). Excluded from the general prohibition on nationwide providers’ joint bidding arrangements are “[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.” 47 C.F.R. § 1.2105(a)(2)(ix)(C); *see also* 2018 Public Notice ¶ 42.

⁶ *Updating Part 1 Competitive Bidding Rules, et al.*, 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) (“2015 Competitive Bidding Order”).

⁷ *See* Sprint, *T-Mobile and Sprint to Combine, Accelerating 5G Innovation & Increasing Competition*, <http://newsroom.sprint.com/t-mobile-and-sprint-to-combine.htm> (rel. April 29, 2018) (stating Sprint and T-Mobile’s combined enterprise value equals \$146 billion). Also noteworthy is the fact that the complex, multibillion dollar merger agreement was contemplated for an extended period and executed on April 29, 2018, before the Commission adopted the schedule for the millimeter wave auctions.

⁸ *See Applications of Craig O. McCaw, Transferor, and American Telephone and Telegraph Company, Transferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries*, Memorandum Opinion and Order, 9 FCC Rcd 5836,

Moreover, the express terms of the BCA rule out a joint bidding arrangement between the merger parties by providing in Section 6.20 that “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.”⁹ Far from establishing a joint bidding arrangement, the merger agreement explicitly preserves the rights of Sprint and T-Mobile to participate separately in FCC auctions.¹⁰ Further demonstrating that the BCA is neither intended to nor does constitute a joint bidding arrangement, Sprint and T-Mobile expressly provide in Section 6.20 that they will enforce safeguards to ensure strict compliance with the Commission’s prohibited communications rules.¹¹ Specifically, Sprint will prevent interactions between the bidding teams and any employees associated with the other merger party through the use of, *inter alia*, firewalls and third-party nondisclosure agreements; bar members of its bidding team from working on merger-related business integration plans; and name an auction compliance officer, who will prepare and distribute training and guidance materials regarding what constitutes a “prohibited communication” under the Commission’s rules.

As is typical in merger agreements, the BCA contains covenants under which the merger parties will conduct their separate businesses while seeking approval of their proposed transaction. Among other things, Section 5.1 of the BCA expressly preserves Sprint’s right to

¶ 137 (1994) (“The scope of the transactions between McCaw and AT&T demonstrate that the proposed merger is for the transfer of control of an ongoing, operating business, in which the affected applications play only an ancillary role.”).

⁹ BCA, Section 6.20(a), at 106.

¹⁰ See *id.*, Section 6.20, at 106 (“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.”).

¹¹ See *id.*, Section 6.20(b)(ii), at 106 (directing Sprint and T-Mobile to “implement safeguards mutually agreed upon by the parties” and providing examples of such safeguards).

acquire wireless spectrum “pursuant to an auction . . . by a Governmental Entity.”¹² While Section 5.1 also provides that Sprint may incur “incremental Indebtedness” of up to \$1 billion for the specific purpose of participating in spectrum auctions,¹³ this particular limitation does not apply to other financing mechanisms used to acquire spectrum in FCC auctions. Additionally, while Section 5.1 of the BCA contains another clause that permits Sprint to acquire wireless spectrum through transactions as long as the value of those acquisitions does not exceed \$1 billion,¹⁴ this clause only applies to other, non-auction related spectrum acquisition opportunities. Therefore, the BCA places no limit on the value or amount of spectrum that Sprint may acquire in FCC auctions.

Granting the requested expedited declaratory ruling would further the goals of the Commission’s auction rules and promote the public interest by removing any uncertainty about the fact that the BCA does not constitute a joint bidding arrangement.

III. IN THE ALTERNATIVE, THE COMMISSION SHOULD EXPEDITIOUSLY GRANT SPRINT A WAIVER OF THE NATIONWIDE CARRIER JOINT BIDDING PROHIBITION

If the Commission declines to issue the requested expedited declaratory ruling, the Commission should expeditiously grant Sprint a waiver of its prohibition against nationwide carrier joint bidding arrangements,¹⁵ which will allow Sprint to participate in the millimeter

¹² *Id.*, Section 5.1(a)(v)(C), at 72.

¹³ *Id.*, Section 5.1(a)(viii)(D), at 74. Similarly, Section 5.1(b)(viii)(D) provides that T-Mobile may incur up to \$2.5 billion in incremental indebtedness (in addition to other sources of funding) for the specific purpose of participating in spectrum auctions. The different incremental debt limits for Sprint and T-Mobile reflect the relative sizes and debt structures of the two companies.

¹⁴ *See id.*, Section 5.1(a)(v)(D), at 72.

¹⁵ *See* 47 C.F.R. § 1.2105(a)(2)(ix) (requiring a certification from the short-form applicant that the applicant “has not entered and will not enter into any . . . arrangements” with a nationwide provider that both relate to “the licenses being auctioned” and address “bidding at

wave auctions. To be clear, Sprint is not requesting a waiver to permit it to engage in joint bidding with T-Mobile. Rather, Sprint is requesting a waiver solely to address the anomaly that erroneously construing the BCA as a joint bidding agreement would prevent Sprint from bidding on its own.

Under Section 1.3 of the Commission’s rules, the Commission may waive any of its rules for “good cause shown.”¹⁶ Good cause exists to grant a request for waiver if the underlying purpose of a rule would not be served or would be frustrated by a specific application of the rule and the grant would be in the public interest.¹⁷

The Commission adopted its general rule prohibiting joint bidding arrangements between national carriers to address concerns about “reduc[ing] competition within auctions” and “the risk of anticompetitive behavior.”¹⁸ Applying the rule here would have the opposite effect, significantly reducing rivalry by blocking the participation of parties who have publicly expressed interest in obtaining high-band spectrum. Additionally, even if the BCA were erroneously deemed to be a joint bidding arrangement, the terms of the “arrangement” (including the limits on incremental indebtedness described above) have been publicly available for months.¹⁹ The “arrangement” therefore cannot reasonably be construed as a vehicle for the

auction,” “bidding strategies,” or “post-auction market structure”).

¹⁶ 47 C.F.R. § 1.3.

¹⁷ See 47 C.F.R. § 1.925(b)(3)(i); see also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (good cause exists to grant a waiver “if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest”) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972)).

¹⁸ 2015 *Competitive Bidding Order* ¶¶ 184 (regarding competition within auctions), 186 (regarding “the risk of anticompetitive behavior”).

¹⁹ See *supra* n.1.

merger parties to engage in auction-related “anticompetitive behavior.”

Expeditious grant of the requested waiver would serve the public interest by enabling Sprint, which has no millimeter wave spectrum and intends to participate in the auctions, to compete for such high-band spectrum. The waiver would thus “promote competition in the mobile wireless marketplace and between bidders in auctions,”²⁰ two central public interest goals of the joint bidding rules. For these reasons, if it does not issue Sprint’s requested expedited declaratory ruling, the Commission should grant Sprint a waiver of the nationwide carrier joint bidding prohibition.

IV. THE COMMISSION SHOULD GRANT SPRINT A LIMITED WAIVER OF THE RULE AGAINST MAJOR MODIFICATIONS

Additionally, Sprint is seeking relief from the Commission so that, if its proposed merger with T-Mobile is approved, it can both participate in the auctions and close the transaction promptly. Upon the closing of the proposed merger, control of Sprint and its licenses will transfer, and the company will have a change of ownership. Under the Commission’s short-form application rules, however, auction participants are both *required* to maintain the accuracy of the information furnished in their short-form applications²¹ and, following the resubmission period, *barred from* amending their short-form applications to include changes of ownership or transfers of control.²² Therefore, to ensure that Sprint can participate in the millimeter wave auctions and close an approved merger promptly, Sprint seeks a limited waiver of these restrictions.

²⁰ 2015 *Competitive Bidding Order* ¶ 177.

²¹ See 47 C.F.R. § 1.2105(b)(4) (“Applicants shall have a continuing obligation to make any amendments or modifications that are necessary to maintain the accuracy and completeness of information furnished in pending applications.”).

²² See 47 C.F.R. § 1.2105(b)(2) (“Major amendments cannot be made to a short-form application after the initial filing deadline.”).

Specifically, Sprint seeks a waiver of Section 1.2105(b)(2) so that it can modify its short-form application to reflect a change of ownership resulting from an approved merger.²³ In the event that the pending merger were approved after the filing of the short-form applications but before long-form applications were due, grant of the requested waiver would permit Sprint to close the merger and make a major modification to its short-form application (to reflect the transfer of control) after the bidding had ended, without incurring any penalty.²⁴ In the alternative, if the Commission finds it would be administratively more efficient, Sprint seeks a time-limited waiver of its obligation under Section 1.2105(b)(4) of the Commission's rules to update its short-form application for the brief period between the end of bidding and the due date for long-form applications under Section 1.2107(c). Such grant would permit Sprint to file a timely long-form application and Form 602 reflecting a post-bidding transfer and new ownership information rather than amend its short-form application.²⁵

As explained below, good cause exists to grant the waiver because there is a significant chance that absent a waiver Sprint will be unable to participate in the auctions and because a grant will not undermine the purposes of the Commission's rule against major amendments.

²³ See *id.* (prohibiting major amendments, which include "changes in ownership of the applicant," to a short-form application "after the initial filing deadline").

²⁴ To avoid administrative burdens or disruption, Sprint requests a limited waiver that would take effect after bidding has ended in accordance with Section 1.2107(a). See 47 C.F.R. § 1.2107(a) ("After bidding has ended, the Commission will identify and notify the high bidder and declare the bidding closed.").

²⁵ See 47 C.F.R. §§ 1.2105(b)(4) (requiring any necessary modifications to be made as promptly as possible and within five business days), 1.2107(c) (requiring high bidders to file long-form applications with ownership information within ten business days of being notified that they are high bidders).

A. Special Circumstances Warrant Waiving the Commission’s Rule Against Major Modifications Because Absent a Waiver, Sprint May Not be Able to Participate in the Millimeter Wave Auctions

This case involves unique circumstances that are not present in most Commission auctions.²⁶ Specifically, the timing of the millimeter wave auctions is such that the Commission may approve Sprint’s proposed merger with T-Mobile before the long-form applications are due in the millimeter wave auctions. Were this to occur, Sprint would be forced either to delay closing the merger until after the long-form applications were due or to proceed with the merger²⁷ and risk being disqualified from the auctions and subject to substantial penalties.

Given these risks, there is a very real chance that absent a waiver Sprint will elect not to participate in the millimeter wave auctions. Not only would this impose a serious and unjust hardship on Sprint, in effect preventing it from acquiring the spectrum it needs to remain competitive in the highly-competitive national wireless industry but, as described below, it would also harm the public interest by decreasing participation in the auctions. Under these circumstances, a waiver of the Commission’s rule against major amendments is warranted.

B. Granting a Waiver Will Serve the Public Interest

A key goal of the Commission’s competitive bidding rules is to promote participation in spectrum auctions.²⁸ As the Commission has explained, participation is critical to achieve

²⁶ See *Commissioner O’Rielly Statement* (noting that the Commission’s auction rules “make it uniquely challenging for those with pending merger applications before the Commission to participate in these auctions”).

²⁷ See *BCA*, Section 1.3, at 3 (stating that the merger shall close on either “the third business day” or when Sprint and T-Mobile mutually agree to close, once the necessary preconditions have been satisfied).

²⁸ See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, ¶¶ 6 (“[T]o encourage participation in the competitive bidding process by all qualified bidders, we have adopted a set of open competitive bidding processes.”), 162 (expressing a desire to “encourage applicants to participate in the

Congress’ goals of “promoting economic opportunity and competition,” “ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses,” and “recover[ing] for the public of a portion of the value of the public spectrum resource made available for commercial use.”²⁹

The Commission has recognized that promoting public participation is a legitimate purpose for granting a waiver of its rule prohibiting major amendments to the short-form application. For example, in the broadcast television spectrum incentive auction, the Commission *sua sponte* waived its bar on the assignment of licenses or transfer of control of an applicant, in part, because “application of the bar on the assignment of the station involved in the reverse auction, or the transfer of control of its licensee, might discourage broadcasters from participating in the auction, contrary to the Commission’s policy of facilitating such participation in order to promote its goals for the incentive auction.”³⁰ The same logic applies with equal force here.

Further, granting a waiver will not undermine the purposes of the Commission’s “no major amendments” rule. As the Commission has explained, the prohibition on major amendments promotes a number of related objectives, including ensuring that “parties relevant to an auction application are identified prior to the auction; the representations and certifications in the application remain effective and enforceable while the application is pending; the pre-auction process is transparent; and the Commission, auction participants, and other applicants have

[auction]”) (1994) (“*1994 Competitive Bidding Order*”).

²⁹ 47 U.S.C. §§ 309(j)(3)(B)-(C); *see also 1994 Competitive Bidding Order* ¶¶ 2-3 (quoting the statutory language).

³⁰ *Guidance Regarding the Prohibition on Certain Communications During the Incentive Auction, Auction 1000*, Public Notice, 30 FCC Rcd 10794, ¶ 23 (2015).

consistent and transparent information about the identity of other applicants, which enhances auction competition by leveling the informational playing field.”³¹ It also “reduce[s] administrative burdens.”³²

Granting a waiver will not hinder these purposes. First, granting a waiver will not deprive the Commission, auction participants, or other applicants of information about the “parties relevant” to Sprint’s application because the merger has already been announced and information about the combined entity’s ownership interests has been made publicly available as part of the Commission’s review process.³³ The Commission also will have the opportunity to review and approve the transfer of control at issue here, thus assuring that the new entity is qualified to use the public spectrum. Furthermore, because Sprint and T-Mobile announced their intention to merge and filed their application for transfer of control long before the rules for the auction were adopted, granting a waiver in this instance will not encourage future applicants to engage in assignments or transfers of control *after* the short-form application is filed. Finally, granting relief for Sprint will not increase the administrative burdens associated with the auction process or cause unnecessary delays because Commission staff has not yet begun to review the auction applications. For all of these reasons, granting a waiver under these circumstances will serve the public interest.

³¹ *Auction of FM Translator Construction Permits Scheduled for June 21, 2018; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 83*, Public Notice, 33 FCC Rcd 2292, ¶ 8 (2018).

³² *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Notice or Proposed Rulemaking, 8 FCC Rcd 7635, ¶ 101 (1993).

³³ *See* Joint Application of Sprint Corporation and T-Mobile US, Inc., for Consent to Transfer Control of International and Domestic Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, WT Docket No. 18-197 (June 18, 2018) (containing Public Interest Statement at Exhibit B).

V. NEED FOR EXPEDITIOUS RELIEF AND CONCLUSION

The September 18th deadline to file short-form applications for participation in the Commission's millimeter wave auctions is approaching quickly. Sprint respectfully requests that the Commission expeditiously grant the relief requested herein so that the company can participate in the upcoming millimeter wave auctions and also be permitted to close its proposed merger with T-Mobile promptly after receipt of the necessary governmental approvals.³⁴

Respectfully Submitted,

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³⁴ 47 C.F.R. §§ 1.2, 1.3, 1.925(b)(4).