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September 9, 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.<sup>1</sup> 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.<sup>2</sup> On July 26, 2019, the Antitrust Division of the U.S. Department of Justice (“DOJ”) filed with the U.S. District Court for the District of Columbia a complaint and a proposed final judgment agreed to by T-Mobile, Deutsche Telekom, Sprint, SoftBank, and DISH Network Corporation (“DISH”), which would fully resolve the DOJ’s investigation into the merger of T-Mobile and Sprint outlined in the BCA, as amended.<sup>3</sup> Under the terms of DOJ’s proposed settlement, T-Mobile and Sprint must divest

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

<sup>2</sup> 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”), Deutsche Telekom Holding B.V., and SoftBank Group Corp. (“SoftBank”). The BCA was subsequently amended on July 26, 2019. See T-Mobile, Form 8-K, Ex. 2.2 (Jul. 26, 2019) (“T-Mobile 8-K”).

<sup>3</sup> The proposed final judgment is subject to judicial approval under the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16.

to DISH certain assets and make available certain other assets and services.<sup>4</sup> To satisfy the requirements of the proposed settlement, T-Mobile, Sprint, and DISH entered into an Asset Purchase Agreement (“DISH APA”), also on July 26, 2019.<sup>5</sup> The DISH APA is thus an outgrowth of the BCA and the DOJ’s review and approval process for the BCA.

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 that do not relate 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 with respect to T-Mobile’s BCA with Sprint to participate in Auctions 101, 102, and 103.<sup>6</sup> In the orders granting these requests, the Wireless Telecommunications Bureau (“Bureau”) concluded that T-Mobile was entitled to relief because the licenses at auction were not a material consideration underlying the BCA, among other things.<sup>7</sup> Consistent with its approach with respect to the BCA, and in an abundance of caution, T-Mobile now seeks a waiver of section 1.2105(a)(2)(ix) of the Commission’s rules with respect to the DISH APA. The same rationale that supported the Bureau’s grant of T-Mobile’s waiver request regarding the BCA supports the grant of T-Mobile’s current waiver request with respect to the DISH APA. Indeed, the DISH APA—to an even greater extent than the BCA—is unrelated to the licenses that are the subject of Auction 103.<sup>8</sup>

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<sup>4</sup> See Proposed Final Judgment, at 6-18, *United States v. Deutsche Telekom*, No. 1:19-cv-02232 (D. D.C., July 26, 2019) (*DOJ Proposed Final Judgment*).

<sup>5</sup> The DISH APA, dated as of July 26, 2019, is made by and among Sprint, T-Mobile, and DISH. T-Mobile 8-K, Ex. 2.1. Pursuant to the DISH APA, upon the terms and subject to the conditions thereof, following the closing of the merger of T-Mobile and Sprint, DISH will acquire Sprint’s prepaid wireless business currently operated under the Boost Mobile, Virgin Mobile, and Sprint prepaid brands (excluding the Assurance brand Lifeline customers and the prepaid wireless customers of Shenandoah Telecommunications Company and Swiftel Communications, Inc.). At the closing of the transaction that is the subject of the DISH APA (which will not occur unless the merger between T-Mobile and Sprint is consummated), the parties will enter into a series of additional agreements that will effectuate the conditions required for DOJ’s approval of the proposed merger of T-Mobile and Sprint. See, e.g., *id.* at 1-2, 9, 50. These agreements will include, among other things, a License Purchase Agreement for certain 800 MHz spectrum licenses held by Sprint, a Transition Services Agreement in connection with DISH’s prepaid business purchase, and a Master Network Services Agreement for the provision of network services to DISH’s prepaid customers for a certain time period. See T-Mobile 8-K, item 1.01. The parties also intend to enter into a series of ancillary agreements. See *id.*, Ex. 2.1 at 1. For purposes of this waiver request, the DISH APA and all of its related agreements are referred to collectively as the “DISH APA.”

<sup>6</sup> See *Competitive Bidding Procedures for Auction 101 (28GHz) and Auction 102 (24GHz) et al*, Order, 33 FCC Rcd 8667 (WTB 2018) (“*Waiver Grant Order*”); *Competitive Bidding Procedures for Auction 103 (Upper 37 GHz, 39 GHz, 47 GHz) et al.*, Order, AU Docket No. 19-59 (rel. Aug. 26, 2019) (“*Waiver Grant Order 2*”).

<sup>7</sup> See *Waiver Grant Order* ¶16, *Waiver Grant Order 2* ¶¶ 9-10. The Bureau made clear that its waiver grant was limited to permitting T-Mobile to certify and submit its FCC Form 175, “notwithstanding the questions that the BCA might raise.” *Waiver Grant Order* ¶ 12 n.29. See also *Waiver Grant Order 2* ¶9, n.17. See also *infra*, n. 8.

<sup>8</sup> The Bureau has previously 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.” See *Waiver Grant Order*, ¶ 12 n.29; see also *Waiver Grant Order 2*, ¶9, n.17.

## 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.<sup>9</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>10</sup>

The Section 1.2105(a)(2)(ix) certification requirement intends to prevent improper, anticompetitive collusion among bidders, not to hamstring investment and innovation in a highly dynamic industry.<sup>11</sup> Indeed, this 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. The Commission has 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>12</sup>

The Commission has subsequently issued guidance clarifying that arrangements 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 they are unrelated to the licenses being auctioned.<sup>13</sup> Moreover, the Commission reiterated in the *Auction 103 Procedures Public Notice* 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>14</sup>

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<sup>9</sup> 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 et al.*, Public Notice, AU Docket No. 19-59; GN Docket No. 14-177, ¶ 27 (rel. Jul. 11, 2019) (“*Auction 103 Procedures Public Notice*”).

<sup>10</sup> 47 C.F.R. § 1.2105(a)(2)(ix)(C).

<sup>11</sup> See *Updating Part 1 Competitive Bidding Rules*, Notice of Proposed Rulemaking, 29 FCC Rcd 12426, ¶ 107 (2014).

<sup>12</sup> 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).

<sup>13</sup> 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).

<sup>14</sup> *Auction 103 Procedures Public Notice* ¶ 47.

## B. WAIVER STANDARD

Section 1.925 governs waivers of rules in the context of wireless radio services.<sup>15</sup> 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.”<sup>16</sup> Both elements are met in this case.<sup>17</sup>

## C. T-MOBILE’S CONTINUED 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 with respect to the BCA in the context of Auctions 101, 102 and 103,<sup>18</sup> the underlying purpose of the DISH APA distinguishes this agreement from the kinds of arrangements that section 1.2105(a)(2)(ix) intends to prohibit. The DISH APA satisfies a condition of T-Mobile’s and Sprint’s proposed settlement with the DOJ.<sup>19</sup> By providing DISH with the assets and services it needs to enter the market as a nationwide facilities-based competitor, the DISH APA places T-Mobile and Sprint one step closer to completing the transaction outlined in the BCA: the merger of two companies with a combined enterprise value of approximately \$146 billion and a broad and diverse set of network, retail, service and spectrum assets.<sup>20</sup> Completing the transaction will, in turn, allow the combined company to expeditiously deploy a superior nationwide 5G network

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<sup>15</sup> 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.

<sup>16</sup> 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.

<sup>17</sup> 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.”).

<sup>18</sup> See *Waiver Grant Order* ¶ 12; *Waiver Grant Order 2* ¶ 2.

<sup>19</sup> See *DOJ Proposed Final Judgment*, 6-18.

<sup>20</sup> See Press Release, T-Mobile, *T-Mobile and Sprint Receive Clearance from Department of Justice for Merger to Create the New T-Mobile* (Jul. 26, 2019), <https://t-mo.co/2k0knRG>. See also, e.g., Press Release, T-Mobile, *T-Mobile and Sprint to Combine, Accelerating 5G Innovation & Increasing Competition* (April 29, 2018), <https://t-mo.co/2k88Kbz>; see also BCA (Apr. 29, 2018), <http://bit.ly/2JGy5TU>.

and compete more effectively with the much larger market leaders.<sup>21</sup> The licenses available in Auction 103 were not a consideration in concluding the agreement, just as they were not a consideration with respect to the BCA.<sup>22</sup>

Second, the DISH APA does not relate to the licenses being auctioned, or communicate bids, bidding strategies, or the post-Auction 103 market structure. Indeed, the agreement, which is publicly available, does not address Auction 103 or the licenses being auctioned.<sup>23</sup> Moreover, T-Mobile and DISH will continue as separate, independent entities before, during and after the auction.

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,<sup>24</sup> and to ensure the public recovers a portion of the value of public spectrum made available for commercial use.<sup>25</sup> As the Bureau explained when it granted T-Mobile's waivers with respect to the BCA in Auctions 101, 102 and 103, 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."<sup>26</sup> 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.<sup>27</sup> This is an especially important goal with respect to Auction 103, which "will make available the largest amount of high-band spectrum for advanced wireless services ever in American history."<sup>28</sup> Conversely, foreclosing T-Mobile's participation in Auction 103 by unnecessarily denying T-Mobile's waiver request with respect to the DISH APA would have the opposite, anticompetitive effect of further concentrating millimeter wave spectrum and would not be in the public interest.<sup>29</sup>

**D. THE UNIQUE FACTS HERE MAKE THE APPLICATION OF SECTION 1.2105(A)(2)(IX) TO THE DISH APA 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 DISH APA to bar T-Mobile's participation in the auction inequitable, unduly burdensome, and contrary to the public interest. The execution of an agreement that satisfies the DOJ's conditions for approving T-Mobile's pending merger with Sprint while the third auction of millimeter wave spectrum licenses in more than a decade<sup>30</sup> is scheduled to commence constitutes a unique and unusual factual circumstance. The

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<sup>21</sup> See 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).

<sup>22</sup> The timing of the DISH APA, like that of the BCA, was neither informed nor motivated by Auction 103. See *Waiver Grant Order* ¶ 13; see also *Waiver Grant Order 2* ¶ 9.

<sup>23</sup> See generally T-Mobile 8-K, Ex. 2.1.

<sup>24</sup> 47 U.S.C. § 309(j)(3)(B).

<sup>25</sup> 47 U.S.C. § 309(j)(3)(C).

<sup>26</sup> See *Waiver Grant Order* ¶ 15 (citing 47 U.S.C. § 309(j)(3)(A)); *Waiver Grant Order 2* ¶ 11.

<sup>27</sup> See 47 U.S.C. § 309(j)(3)(D).

<sup>28</sup> *Waiver Grant Order 2* ¶ 11.

<sup>29</sup> See 47 U.S.C. § 309(j)(3)(B); *Waiver Grant Order 2* ¶ 11; *Waiver Grant Order* ¶ 15.

<sup>30</sup> See *Waiver Grant Order* ¶ 13.

conditions of DOJ's proposed settlement do not raise any of the harms the rule is designed to address and neither does the DISH APA agreement that seeks to satisfy these conditions. As explained earlier in this filing, the licenses available in Auction 103 were not a consideration with respect to the DISH APA and the DISH APA does not address Auction 103. In this context, it would be as "unduly burdensome" to now preclude T-Mobile from participating in Auction 103 by denying its waiver request with respect to the DISH APA, as it would have been to do so with respect to the BCA with Sprint.<sup>31</sup>

## **E. CONCLUSION**

In conclusion, T-Mobile's continued 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 and DOJ's proposed settlement for clearing the 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 rationale and public interest benefits that supported the Bureau's grant of T-Mobile's waiver requests with respect to the BCA in connection with Auctions 101, 102, and 103 support a grant of T-Mobile's waiver request in connection with the DISH APA. 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,

/s/Trey Hanbury

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<sup>31</sup> See *id.* ¶ 13; see also *Waiver Grant Order 2* ¶ 9 ("Specifically, we find that the circumstances that warranted the Bureau's partial grant of T-Mobile's analogous request in the context of Auctions 101 and 102 have not materially changed, and that it continues to be in the public interest to grant T-Mobile's current request so that it may certify and submit a short-form application to participate in Auction 103.").