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September 11, 2019

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
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:

Window Wireless L.L.C. (“Window”), an indirect, wholly-owned subsidiary of DISH Network Corporation (“DISH”), 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 Window filed a short-form application (Form 175) on September 9, 2019 to seek eligibility to participate in Auction 103 (“Window Short-Form Application”).² The requested relief would be consistent with, among other things, similar relief granted to T-Mobile US, Inc. to participate in Auctions 101, 102, and 103.³

DISH is a party to a certain Asset Purchase Agreement, dated as of July 26, 2019, made by and among DISH, T-Mobile US, Inc. and Sprint Corporation (“Asset Purchase Agreement”). This agreement is identified in the Window Short-Form Application as “Agreement 1.”⁴ Pursuant to the Asset Purchase Agreement, upon the terms and subject to the conditions thereof, following the consummation 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

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

² See FCC ULS File No. 0008791848.

³ See Competitive Bidding Procedures for Auction 101 (28 GHz) and Auction 102 (24 GHz) et al., *Order*, 33 FCC Rcd 8667, 8667 ¶ 1 n.3 (WTB 2018) (“T-Mobile/Sprint Auctions 101/102 Waiver Order”); Competitive Bidding Procedures for Auction 103 (Upper 37 GHz, 39 GHz, 47 GHz) et al., AU Docket No. 19-59, GN Docket No. 14-177, *Order*, DA 19-821 ¶ 1 n.3 (OEA & WTB, rel. Aug. 26, 2019) (“T-Mobile Auction 103 Waiver Order”).

⁴ See FCC ULS File No. 0008791848.

prepaid brands⁵ and certain other specified assets, and will assume certain related liabilities.⁶ While auction applicants may not enter into agreements with nationwide carrier applicants 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 addition, the Asset Purchase Agreement does not relate to the licenses that are the subject of Auction 103. However, out of an abundance of caution, the existence of the Asset Purchase Agreement was identified in the Window Short-Form Application, and Window accordingly seeks this waiver to confirm it may participate in Auction 103.

I. BACKGROUND

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 communications provider, including a nationwide provider.⁷ 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.⁸

The section 1.2105(a)(2)(ix) certification requirement thus was not intended to block transactions during an auction, so long as the underlying agreement does not relate to and have an impact on the auction.⁹ The Commission has subsequently issued similar guidance clarifying that arrangements and/or discussions among auction applicants (or discussions between nationwide

⁵ The transaction excludes Assurance brand Lifeline customers and the prepaid wireless customers of Shenandoah Telecommunications Company and Swiftel Communications, Inc.

⁶ These agreements will include, among other things, a License Purchase Agreement for certain 800 MHz spectrum licenses held by Sprint. Pursuant to the Asset Purchase Agreement, the parties also intend to enter into a series of ancillary agreements. For purposes of this exhibit, the Asset Purchase Agreement and these related agreements are referred to collectively as the "Asset Purchase Agreement." See generally DISH Network Corporation, Form 8-K, (Jul. 26, 2019), available at <https://ir.dish.com/index.php/static-files/8c37ba04-a0aa-462b-89c9-843c269133a1>.

⁷ 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, AU Docket No. 19-59, GN Docket No. 14-177, *Public Notice*, FCC 19-63 ¶ 27 (rel. July. 11, 2019) ("Auction 103 Procedures Public Notice").

⁸ 47 C.F.R. § 1.2105(a)(2)(ix)(C).

⁹ 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) ("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.")

providers where at least one is an applicant) that relate to post-auction market structure are permissible as long as they do not relate to the licenses being auctioned.¹⁰ The Public Notice for Auction 103 also states as follows: “[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.”¹¹

II. WAIVER STANDARD

Section 1.925 governs waivers of rules related to wireless radio services.¹² 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.”¹³ Window’s waiver request meets both elements.

III. WINDOW’S PARTICIPATION IN AUCTION 103 WILL NOT FRUSTRATE THE PURPOSE OF SECTION 1.2105(a)(2)(ix)

Wireless Bureau precedent confirms that the Asset Purchase Agreement is distinguishable from the kinds of arrangements that section 1.2105(a)(2)(ix) intends to prohibit.¹⁴ As with the similar waivers granted to T-Mobile, the Asset Purchase Agreement “is a complex agreement that involves business decisions and assets beyond the limited scope of licenses being offered in the auction, and whether or not the agreement could be said to ‘relate to’ the licenses available in the auction or the post-auction market structure within the meaning of the rule, there is no indication that the licenses available in Auction 103 were a material consideration of the parties in concluding the agreement.”¹⁵ Indeed, the Asset Purchase Agreement does not relate to

¹⁰ See, e.g., Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000, *Public Notice*, 30 FCC Rcd 10794, 1111 ¶¶ 33-35 (2015).

¹¹ Auction 103 Procedures Public Notice ¶ 47.

¹² 47 C.F.R. § 1.925.

¹³ 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, 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).

¹⁴ T-Mobile/Sprint Auctions 101/102 Waiver Order ¶ 12; T-Mobile Auction 103 Waiver Order ¶ 2.

¹⁵ T-Mobile Auction 103 Waiver Order ¶ 9.

the licenses being auctioned in Auction 103; nor does it address or communicate bids, bidding strategies, or the post-auction market structure of any parties to the agreement.¹⁶

In addition, granting this waiver would further the public interest. Broad auction participation serves the Commission's directives to promote economic opportunity and competition,¹⁷ and to ensure the public recovers a portion of the value of public spectrum made available for commercial use.¹⁸ As the Bureau explained in granting T-Mobile's prior requests for waivers for 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."¹⁹ The same reasoning applies to Window's desire to participate in Auction 103. Excluding Window would undermine the Commission's efforts to encourage deployment of millimeter wave spectrum by diverse wireless competitors.

IV. CONCLUSION

Window's participation in Auction 103 serves the public interest without frustrating the purpose of section 1.2105(a)(2)(ix) of the Commission's rules. The Asset Purchase Agreement is unrelated to the licenses that are the subject of Auction 103, and it does not address or communicate anything regarding Window's potential participation in Auction 103. This waiver request is being filed out of an abundance of caution, paired with Window's disclosure of the Asset Purchase Agreement in Window's short-form application, in order to confirm Window's eligibility to participate in Auction 103. Precluding Window from participating in Auction 103 would be inequitable, unduly burdensome, and contrary to the public interest, and would reduce competition and participation in the auction. Accordingly, Window's waiver request should be granted without delay.

/s/ Jeffrey H. Blum

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¹⁶ See 47 C.F.R. § 1.2105(a)(2)(ix).

¹⁷ 47 U.S.C. §309(j)(3)(B).

¹⁸ 47 U.S.C. §309(j)(3)(C).

¹⁹ T-Mobile/Sprint Auctions 101/102 Waiver Order ¶ 15; T-Mobile Auction 103 Waiver Order ¶ 11.