

December 22, 2000

Released: December 26, 2000

Mr. Robert Pettit
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Dear Mr. Pettit:

This is in response to your letter dated December 20, 2000, on behalf of Noverr Publishing, Inc. (“NPI”), which seeks clarification of the anti-collusion rule with respect to auction applicants, such as NPI, that failed to submit upfront payments and, therefore, never became qualified to bid.

Your letter states that NPI, holds a controlling interest in Noverr-Omnipoint Wireless, Inc. (“NOW”), which holds PCS licenses in a number of basic trading areas (“BTAs”) in Michigan, including the BTA of Mount Pleasant, Michigan. According to your letter, NOW filed a short-form application (FCC Form 175) indicating an intent to bid only on the Mount Pleasant, Michigan BTA in the now ongoing C and F block PCS broadband auction, Auction No. 35, which opened on December 12, 2000. Your letter further states that NOW never made an upfront payment for the auction and was not listed as a qualified bidder for Auction No. 35.

NPI claims that it wishes to sell its controlling interest in NOW, but that potential buyers of that interest are unwilling to discuss the sale/purchase of NPI’s interest because they believe that such discussions might violate the Commission’s anti-collusion rule. NPI, therefore, requests that we clarify that the anti-collusion rule does not prohibit NPI from discussing with other bidders the sale of NPI’s interest in NOW, or alternatively, that we permit NOW to withdraw its auction application so that NOW would not be deemed an applicant for purposes of the anti-collusion rule.

The Commission’s anti-collusion rule, at 47 C.F.R. § 1.2105(c), states:

[A]fter the short-form application filing deadline, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the down payment deadline

For purposes of the anti-collusion rule the term “applicant” includes “all controlling interests in the entity submitting a short-form application to participate in an auction.” 47 C.F.R. § 1.2105(c)(6)(i).

As NPI holds a controlling interest in NOW, which filed a short-form application, NPI is an applicant subject to the anti-collusion rule even though it is not a bidder in the auction.¹ The Commission

¹ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2387-88 para. 225 (1994) and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7254 paras. 51-52 (1994).

has declined to except such entities from coverage by the anti-collusion rule and we decline to except NPI here.² Nevertheless, as we have noted in the past, the anti-collusion rule does not prohibit all business discussions among applicants for licenses in the same geographic license areas, including discussions concerning the sale of an interest in an applicant's business.³ Therefore, such discussions with other applicants for licenses in the same geographic license areas must be conducted with great care not to convey the substance of bids or bidding strategies of any such applicant.⁴

Sincerely,

Margaret W. Wiener
Chief, Auctions and Industry Analysis Division

cc: Eric DeSilva

² See Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Fourth Memorandum Opinion & Order*, 9 FCC Rcd 6858, 6867 paras. 48-51 (1994); Letter to Mark Grady from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, DA 96-587, 11 FCC Rcd 10895 (1996).

³ See Letter to David L. Nace from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, DA 96-1566, 11 FCC Rcd 11363 (1996); "Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rule for D, E, and F Block Bidders," *Public Notice*, 11 FCC Rcd 10134 (1996); Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd. 374, 467 para. 163 (1997).

⁴ *Id.*