

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Application of)	
NORTHEAST COMMUNICATIONS OF)	File No. EB-02-IH-0768
WISCONSIN, INC.)	NAL/Acct. No. 200332080022
)	FCC Account ID No. 0442010372
For C Block Facilities in the)	FRN No. 0002706190
710-716 and 740-746 MHz Bands)	

FORFEITURE ORDER

Adopted: September 21, 2004

Released: September 22, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order, issued pursuant to section 503 of the Communications Act of 1934, as amended (the "Act"), and section 1.80 of the Commission's rules,¹ we find that Northeast Communications of Wisconsin, Inc. ("Northeast") engaged in collusive conduct during a Commission-conducted auction in 2002, in willful violation of section 1.2105(c) of the Commission's rules.² Based on the information before us, we conclude that Northeast is liable for a forfeiture in the amount of One Hundred Thousand Dollars (\$100,000).

II. BACKGROUND

2. This matter arises from misconduct by Northeast and Star Wireless, LLC ("Star"), both applicants in the Commission's August 27-September 18, 2002, auction of 740 Lower 700 MHz Band C and D block geographic area licenses ("Auction No. 44"). On August 27, 2003, following a comprehensive investigation of possible collusive activities between Northeast and Star, the Chief, Enforcement Bureau ("Bureau"), issued a Notice of Apparent Liability for Forfeiture ("NAL"), proposing a forfeiture in the amount of \$100,000 against Northeast.³ The facts that formed the basis for the proposed forfeiture are set forth at considerable length in the NAL and are specifically incorporated by reference herein. The NAL found that Northeast and Star were both applicants for 734 of the same geographic license areas in Auction No. 44 and that, during the course of that auction, a representative of Northeast apparently engaged in prohibited communications with his counterpart at Star about bidding strategy in that auction, in apparent willful violation of section 1.2105(c) of the rules. Specifically, the NAL found that Northeast had apparently violated section 1.2105(c) on August 29, 2002, when Patrick Riordan, a shareholder, officer, director of and authorized bidder for Northeast,⁴ spoke by telephone with

¹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

² 47 C.F.R. § 1.2105(c).

³ *In re Northeast Communications of Wisconsin, Inc.*, 18 FCC Rcd 17,672 (EB 2003) ("NAL").

⁴ Northeast is a closely-held telecommunications holding company located in Green Bay, Wisconsin, owned and controlled by four siblings, Patrick D. Riordan, Robert H. Riordan, Micki Harper and Ray J. Riordan, who are each

David G. Behenna, Star's authorized bidder and the President of PCSGP, Inc., Star's operating manager.⁵ During their conversation, Mr. Riordan identified and discussed with Mr. Behenna the interest of Northeast, which had not made the necessary upfront payment and, accordingly, could not bid, in five Wisconsin markets for which licenses were to be auctioned in Auction No. 44.⁶

3. On September 26, 2003, Northeast filed its response to the NAL, requesting rescission or reduction of the proposed forfeiture.⁷ Northeast argues that it did not violate section 1.2105(c) because: it was not an applicant in Auction No. 44 when the communications in question took place and, thus, was not subject to the anti-collusion rule;⁸ its communication with Star did not result in the harm against which the rules were designed to protect;⁹ section 1.2105(c), as interpreted in the NAL, is not sufficiently clear to be enforced;¹⁰ the interpretation in the NAL of the anti-collusion rule is overly broad and not binding on Northeast;¹¹ such interpretation would, if accurate, cause the rule to be unconstitutional;¹² the NAL is at odds with prior Commission determinations;¹³ Northeast's communication with Star conveyed less information than communications expressly permitted by the rules;¹⁴ and enforcement of the rule under the unique circumstances presented in Auction 44 would frustrate the intent of the rule.¹⁵ In addition, Northeast claims that section 1.2105(c) and the NAL are invalid because there was no valid display of an Office of Management and Budget control number.¹⁶ In support of its position, Northeast also argues in the alternative that the proposed forfeiture amount should be reduced because its violation of the rule was unintentional.

III. DISCUSSION

4. In order to enhance and ensure the competitiveness of markets for communications services, the Commission adopted rules designed to prevent collusive conduct during auctions, facilitate the detection of such misconduct and maintain public confidence in the integrity of the auction process.¹⁷

officers and directors and collectively hold over 52 percent of its stock.

⁵ Mr. Behenna holds 100% of PCSGP's fully diluted shares of common stock. He is PCSGP's President, Secretary, Treasurer and sole Director. *See* Star FCC Form 175, Exhibit A.

⁶ *See* NAL, paras. 11-14.

⁷ *See Response To Notice of Apparent Liability*, filed by Thomas Gutierrez, Esquire, counsel for Northeast, on September 26, 2003 ("Response").

⁸ *Id.* at 4.

⁹ *Id.* at 6.

¹⁰ *Id.* at 7-9.

¹¹ *Id.* at 9.

¹² *Id.* at 11.

¹³ *Id.* at 12.

¹⁴ *Id.* at 13.

¹⁵ *Id.* at 14-15.

¹⁶ *Id.* at 15-16.

¹⁷ *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2386-88, ¶¶221-226 (1994) ("Competitive Bidding Second Report and Order") ("[W]e

If collusive conduct were permitted during the auction process, the result could be the elimination of potential participants in auctions and competitors in the marketplace.¹⁸ Consequently, the Commission adopted section 1.2105(c), frequently referred to as the “anti-collusion rule.” Section 1.2105(c)(1) states, in pertinent part:

[A]fter the [FCC Form 175] short-form application filing deadline, all applicants for licenses in any of the same geographic license areas are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicant's bids or bidding strategies, or discussing or negotiating settlement agreements, until after the down payment deadline, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to § 1.2105(a)(2)(viii).¹⁹

Thus, the prohibition against collusive communications set forth in section 1.2105(c) takes effect on the pre-auction short-form application deadline and remains in effect until the post-auction down payment deadline.²⁰ By its very language, the prohibition contained in section 1.2105(c) applies to all *applicants* for licenses in a Commission auction. Moreover, the Commission and the staff have repeatedly made clear that the prohibition against collusive contacts and communications contained in section 1.2105(c) applies to all entities that file short-form applications, *regardless of whether they are qualified to bid*.²¹

believe that the competitiveness of the auction process and of post-auction market structure will be enhanced by certain additional safeguards designed to reinforce existing laws and facilitate detection of collusive conduct.”).

¹⁸ *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348, 2387, ¶223; *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, Memorandum Opinion and Order, 9 FCC Rcd 7684, 7687-7688, ¶10 (1994) (“Our anti-collusion rules are intended to protect the integrity and robustness of our competitive bidding process.”).

¹⁹ 47 C.F.R. § 1.2105(c)(1). Section 1.2105(a) requires that each auction applicant submit a short-form application (FCC Form 175) in order to participate in an auction. *See* 47 C.F.R. § 1.2105(a).

²⁰ 47 C.F.R. § 1.2105(c)(1). *See also Amendment of Part 1 of the Commission's Rules- Competitive Bidding Procedures*, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 15923 (2000) at 15297-98, ¶¶ 7-8.

²¹ The public notice announcing how parties could apply to participate in Auction No. 44 explicitly reminded potential participants of the Commission's anti-collusion rule, that the rule was applicable to all applicants, and that the rule would apply to all applicants from the deadline for filing short-form applications until the post-auction down payment deadline. *See Auction of Licenses in the 698-746 MHz Band Scheduled for June 19, 2002*, Public Notice, DA 02-563 (WTB rel. March 20, 2002) at 7 (“*Procedures PN*”) (“[T]he Commission's rules prohibit applicants for the same geographic license area from communicating with each other during the auction about bids, bidding strategies, or settlements. This prohibition begins at the short-form application filing deadline and ends at the down payment deadline after the auction.”). The *Procedures PN* directed applicants to a list of precedents applying the anti-collusion rule, several of which explicitly applied the rule to applicants, such as Northeast here, that subsequently did not bid in the auction. *Id.* at Attachment G (citing, *inter alia*, Letter to Robert Pettit, Esquire, from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 16 FCC Rcd 10080 (WTB 2000) (declining to except an applicant's controlling interest from coverage by the anti-collusion rule, even though the applicant never made an upfront payment for the auction and was not listed as a qualified bidder); Letter to Mark Grady, President, Communications Venture PCS Limited Partnership, from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, Federal Communications Commission, 11 FCC Rcd 10895 (WTB 1996) (“Even when an applicant has withdrawn its application during the course of the auction, the applicant may not enter into a bidding agreement with another applicant bidding on the geographic license areas from which the first applicant withdrew.”)). *See also Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fourth

5. Turning to the instant case, we reject Northeast's claim that it did not violate section 1.2105(c) because it was not an applicant in Auction No. 44 on August 29, 2002, when the communication at issue took place.²² Northeast maintains that it ceased being an "applicant," subject to section 1.2105(c), when it failed to make its upfront payment by the May 30, 2002, deadline.²³ Although Northeast's failure to timely make its upfront payment disqualified it from bidding in Auction No. 44, and suggested that WTB would in due course dismiss its application, the fact remains that, as of August 28 and 29, WTB had not dismissed Northeast's application and it thus remained pending under the rules.

6. Both before and after commencement of the auction, WTB issued multiple public notices warning auction applicants that they were required to comply with section 1.2105(c).²⁴ Two of those public notices, released shortly before Mr. Behenna telephoned Mr. Riordan, contained a specific reminder that *all* parties that had submitted a short-form application to participate in Auction No. 44 -- even those that were disqualified from bidding -- remained subject to the anti-collusion rule until the October 4, 2002, post-auction down payment deadline,²⁵ consistent with the definition of "applicant" contained in the anti-collusion rule.²⁶ Thus, Northeast was beyond question an "applicant for licenses"

Memorandum Opinion and Order, 9 FCC Rcd 6858, 6867 ¶ 50-51 (1994) (rejecting the argument that communications prohibited by the anti-collusion rule should be permitted during auctions between active and non-active bidders); Letter to John Reardon, Secretary to the Board of Directors and General Counsel, Mobex Communications, Inc., from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 13 FCC Rcd 17877 (WTB 1998) ("When the short-form filing deadline passes, the anti-collusion rule applies to all applicants with submitted short-form applications . . . We . . . remind applicants that submitted applications, once the short-form deadline passes, trigger application of the anti-collusion rule even if they are later withdrawn.").

²² *Response* at 2-7.

²³ Northeast's reliance on section 1.935 of the rules to support its claim that it ceased being an applicant for the purposes of the anti-collusion rule lacks merit. *Response* at 5-6. Section 1.935 relates to agreements among mutually exclusive applicants to dismiss their applications and clearly is inapplicable here. Northeast's further reliance on Public Notice, DA 02-659, 17 FCC Rcd 5,140 (WTB rel. March 19, 2002) and Public Notice, DA 02-1346, 17 FCC Rcd 10,700 (WTB rel. June 7, 2002), also is misplaced. The March 19 Public Notice was issued in connection with Auction No. 31, not Auction No. 44, and the June 7 Public Notice merely identified Northeast as among those applicants that had failed to timely make upfront payments and were, therefore, ineligible to bid in Auction No. 44. Neither public notice affected Northeast's status as an "applicant" in Auction No. 44 for purposes of the anti-collusion rule. We also reject Northeast's argument that, because it decided the term "bidder" may be substituted for the term "applicant" in the context of section 1.2105(c), and Northeast was not a bidder in Auction No. 44, it follows that the Commission is prevented from lawfully concluding that Northeast violated section 1.2105(c). *Response* at 2-3. Northeast's interpretation of section 1.2105(c) ignores the plain language of the rule. In this regard, although section 1.2105(c) initially referenced "bidders," it was subsequently amended in 1994 to apply to "applicants." That amendment occurred years before the Star and Northeast applications were filed. See *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd 7,684 (1994).

²⁴ *Procedures PN* at 8; *Status PN* at 4-5; *Auction of Licenses for 698-746 MHz Band; 128 Qualified Bidders*, Public Notice, DA 02-1346 (WTB rel. June 7, 2002) ("Qualified Bidders PN") at 7; *Auction No. 44, Revised Qualified Bidder Notification; 125 Qualified Bidders*, Public Notice, DA 02-1933 (WTB rel. August 7, 2002) ("Revised Qualified Bidders PN") at 7-8; *Auction No. 44 Revised Schedule, License Inventory, and Procedures*, Public Notice, DA 02-1491 (WTB rel. June 26, 2002) ("Revised Schedule, Inventory and Procedures PN") at 2.

²⁵ *Revised Schedule, Inventory and Procedures PN* at 2; *Revised Qualified Bidders PN* at 7.

²⁶ "The term *applicant* shall include all controlling interests in the entity submitting a short-form application to participate in an auction (FCC Form 175) . . ." 47 C.F.R. § 1.2105(c)(7)(i).

for the purposes of section 1.2105(c) when the two companies engaged in their discussion -- a communication plainly prohibited by section 1.2105(c).

7. There also is no merit to Northeast's contention that, because the communication in question did not result in harm to the auctions process, Northeast cannot be found to have violated section 1.2105(c).²⁷ While it is accurate to say that the underlying purpose of section 1.2105(c) is to prevent auction abuses, it is the substance and timing of specific communications that are key in determining whether there has been a violation of section 1.2105(c), not the impact or claimed lack thereof on a particular auction. Thus, although we find on the basis of the information before us that Star indeed altered its bidding behavior as a result of its communication with Northeast,²⁸ and that the communication disadvantaged other auction participants by providing Star with information that the others lacked,²⁹ we need not rely on that determination to conclude that Northeast violated section 1.2105(c).³⁰

8. Northeast next makes the bare assertion that section 1.2105(c) is so lacking in specificity "that any attempt at enforcement of the rule in this particular instance would violate . . . fundamental due process . . .".³¹ However, Northeast does not articulate in what manner the rule is vague. In fact, the rule prohibits certain, specific, and carefully defined conduct, with temporal limitations, of which Northeast was or should have been aware, and it explicitly applies to a narrow class of entities (*i.e.*, "applicants") of which Northeast unquestionably was, and during all relevant times remained, a member. Northeast also claims that the Commission failed to provide due notice as to whom section 1.2105(c) applies because the rule section does not distinguish between applicants that actually participate in bidding and those, like Northeast, that have been disqualified from doing so.³² Section 1.2105(c) does not make any distinction between "bidder/applicants" and "non-bidder/applicants" because the prohibition on collusive conduct applies to *all* applicants for licenses, regardless of whether they are qualified to bid. Given the plain language of section 1.2105(c) and the plethora of information that was provided to applicants in Auction No. 44,³³ Northeast had sufficient notice regarding the entities to which section 1.2105(c) applied.

9. We also reject Northeast's claim that it should not be bound by the interpretation of section 1.2105(c) contained in the NAL because the staff expanded the rule to include applicants that have been

²⁷ Response at p. 6-7, 13-14.

²⁸ The Commission's bidding records reveal that, after the August 29, 2002, conversation between Star's Behenna and Northeast's Riordan, Star began to bid actively and aggressively for Wisconsin and Iowa markets -- areas for which Star had shown no interest in its earlier bidding and in which Star, unlike Northeast, had no operations. Thus, the parties' denials notwithstanding, the evidence shows that the subject communication significantly impacted Star's auction bidding strategy. See NAL, paras. 14 and 19, note 60.

²⁹ See NAL, para. 20.

³⁰ As described in the NAL, Star learned of Northeast's interest in certain markets from the auction-related communications that occurred between Mr. Behenna and Mr. Riordan, and thus knew about potential post-auction demand for the licenses in certain markets in Auction No. 44. During those communications, Northeast had an opportunity to influence Star's auction plan and strategy for its own purposes. NAL, 18 FCC Rcd at 17,681. See *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, WT Docket No. 97-82, Third Report and Order and Second Further Notice of Proposed Rule Making, 13 FCC Rcd 374, 468 (1997) ("[A]uction applicants should avoid all discussions with each other that will likely affect bids or bidding strategy . . .").

³¹ Response at 8.

³² *Id.* at 9.

³³ *Supra*, note 20.

disqualified from bidding without having first provided notice and comment in the form of a rulemaking proceeding.³⁴ The NAL did nothing more than apply the rule's definition of the word "applicant" to Northeast. In this regard, Northeast filed an application to participate in Auction No. 44, and despite the fact that it ultimately did not participate in the bidding and its application was subject to dismissal, it remained at all relevant times an "applicant" therein. Contrary to Northeast's claim, the Bureau did not rewrite, expand, or otherwise modify section 1.2105(c) when it concluded in the NAL that Northeast was an "applicant" subject to the prohibitions encompassed by that rule.

10. There also is no merit to Northeast's further contention that section 1.2105(c), as interpreted in the NAL, is unconstitutional.³⁵ The First Amendment³⁶ does not prohibit all regulation of protected speech. "[G]overnment regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."³⁷ A restriction that regulates the time, place, or manner of speech may be imposed so long as it is reasonable.³⁸ Such regulations, when narrowly tailored to further an important governmental interest, may be regarded as content-neutral as long as the restriction imposed is not substantially broader than necessary to achieve the government's interest.³⁹ The requirement to narrowly tailor speech-related regulation is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."⁴⁰ In the instant case, the Commission has a legitimate and substantial interest in assuring the integrity of its auctions. Section 1.2105(c) furthers that interest by proscribing certain communications during a specific period of time between and among members of a limited class of persons and entities that voluntarily file applications to participate in an FCC auction. Because the Commission's anti-collusion rule is narrowly tailored to achieve a permissible governmental objective, it is, unlike the restrictions that were the subject of the cases cited by Northeast,⁴¹ constitutionally sound.

³⁴ Response at 9-11.

³⁵ *Id.* at 11-12.

³⁶ U.S. Const. amend. I ("First Amendment"). The First Amendment states: "The Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

³⁷ *U.S. v. O'Brien*, 391 U.S. 369 at 377, 88 S.Ct. 1675 at 1678, 20 L.Ed.2d 672 at 680 (1968) ("O'Brien").

³⁸ *Consolidated Edison Co. of N.Y. v. Public Service Commission of N.Y.*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) ("Consolidated Edison").

³⁹ *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) ("Ward").

⁴⁰ *Ward* at 491 U.S. 799, citing *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985).

⁴¹ In *Simon & Schuster v. New York Crime Victims Board*, 505 U.S. 105 (1991), the Supreme Court invalidated New York State's so-called "Son of Sam" law, which prohibited a criminal from profiting from his crimes. The Court determined that the law was inconsistent with the First Amendment because it was not narrowly tailored to achieve the State's intended objective. See also *Consolidated Edison*, *supra*, note 38. There the Supreme Court invalidated a New York Public Service Commission regulation which prohibited utility bill inserts that discussed controversial issues of public policy. The Court found that the restriction directly infringed the appellant's rights under the First and Fourteenth Amendments because it was not a valid time, place or manner restriction, a permissible subject-matter regulation, or a narrowly drawn prohibition justified by a compelling state interest.

11. Northeast's reliance on *Western PCS BTA 1 Corporation*⁴² in support of its argument that the NAL's interpretation of section 1.2105(c) is inconsistent with Commission precedent also lacks merit.⁴³ In *Western*, the Commission clarified that section 1.2105(c) prohibits not only a communication of an applicant's own bids or bidding strategy, but also a communication of another applicant's bids or bidding strategy.⁴⁴ As previously stated, there is no lack of clarity with regard to the applicability of section 1.2105(c) to Northeast as an applicant in Auction No. 44. Therefore, Northeast's attempt to claim that *Western* is a relevant precedent is unavailing. Northeast knew or should have known that any communications with Star during the restricted period about either one or both of their bidding strategies would be patently inconsistent with the letter and spirit of section 1.2105(c).

12. We also reject Northeast's assertion that the NAL imposed an "overly-broad" interpretation of the anti-collusion rule because certain communications prior to the short-form filing deadline are not prohibited.⁴⁵ Significantly, the application of the rule to Northeast is based not on an interpretation of the rule, but on the plain language of the rule. In addition, we reject Northeast's argument that its private communication of bidding strategy with one other applicant should be permissible because at the end of each bidding round during the auction the Commission makes available to all participants the bids submitted for that round. Northeast's attempt to revise the language of the rule is unavailing because it is tantamount to an untimely request for reconsideration of the 1994 rulemaking order which adopted the anti-collusion rule.⁴⁶

13. Northeast also contends that section 1.2105(c) is inapplicable to applicants in Auction No. 44 because the auction was "unique" in that bidding was delayed until after the auction process commenced and a new upfront payment date was established after the short-form applications were filed.⁴⁷ According to Northeast, these circumstances "were not the ones against which the anti-collusion rule was intended to protect."⁴⁸ There is no rational basis why rules prohibiting collusive conduct should somehow be rendered inapplicable in this instance. The policy objective of the rule, preservation of the integrity of Commission auctions, is as valid here as in any other Commission-conducted auction.⁴⁹

⁴² *Western PCS BTA 1 Corp.*, 14 FCC Rcd 21,571 (1999) ("Western").

⁴³ See Response at 12.

⁴⁴ Northeast's analysis of the *Western* decision is directly contradicted by the Commission's characterization of the Order: "In this order, we clarify that the Section 1.2105(c)(1) prohibition on applicants' "cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies" prohibits an auction applicant from cooperating or collaborating with respect to, or discussing, another applicant's bids or bidding strategies, even if it does not discuss its own bids or bidding strategy." (emphasis added). *Western*, 14 FCC Rcd at 21,574. See also *Amendment of Part I of the Commission's Rules – Competitive Bidding Procedures*, WT Docket No. 97-82, Seventh Report and Order, 16 FCC Rcd 17,546 (2001).

⁴⁵ Northeast also provides as an example the provisions of Section 1.2105(c)(4), which permit non-controlling attributable interests in a short-form applicant to acquire an ownership interest in, or enter into a joint bidding arrangement with, other auction applicants. However, the rule does not permit non-controlling attributable interest holders to communicate bids or bidding strategies of more than one of the applicants in which it holds an attributable interest.

⁴⁶ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386 – 88 ¶¶ 221 – 226.

⁴⁷ Response at 14-15.

⁴⁸ *Id.* at 15.

⁴⁹ In fact, after Auction No. 44 had been delayed, applicants for the auction were reminded of the continued applicability of the anti-collusion rule in two public notices released before the auction-related communications of Mr. Behenna and Mr. Riordan. *Revised Schedule, Inventory and Procedures*, Public Notice, 17 FCC Rcd 11,935,

14. Northeast's claim that section 1.2105(c) and the NAL are invalid because the rule did not display a valid control number pursuant to section 3512 of the Paperwork Reduction Act⁵⁰ is similarly meritless.⁵¹ The anti-collusion rule was adopted in a notice and comment rulemaking proceeding. As part of a larger submission, the anti-collusion rule was submitted to the Office of Management and Budget (OMB) for approval. After the Office of Management and Budget approved these information collections, including the anti-collusion rule, the appropriate notice was published in the Federal Register.⁵² This notice in the Federal Register specifically mentioned modifications to the Commission's anti-collusion rules and stated that the OMB Control Number for the anti-collusion rule and related information collections is 3060-0600. According to the exact language of the first sentence of 5 C.F.R. § 1320.5(b)(2)(ii), the Commission can meet OMB's requirement to display an OMB control number in a manner which is "reasonably calculated to inform the public"⁵³ by several methods, including by publishing in the Federal Register an announcement of OMB's approval for the relevant information collections.⁵⁴ Therefore, according to the Office of Management and Budget regulations, there was at least one appropriate display of the OMB control number for the anti-collusion rule prior to the submission of the short-form applications for Auction No. 44.

15. We also find no basis for reducing the forfeiture proposed in the NAL. Northeast contends that the proposed forfeiture amount is excessive because it did not intend to violate section 1.2105(c).⁵⁵ We take issue with this contention. Northeast's representative did not accidentally engage in a telephone conversation with his counterpart at Star relating to bidding strategies in Auction No. 44 during a period of time when such communications were strictly proscribed. While Northeast may not have set out with the specific intention of violating the rule, its actions were indisputably willful and inconsistent within the plain language of section 1.2105(c). In this regard, section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.⁵⁶ The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act⁵⁷ and the Commission has so interpreted the term in the section 503(b) context.⁵⁸

11,936 (WTB 2002); *Revised Qualified Bidders*, Public Notice, 17 FCC Rcd 15,543, 15549 (2002).

⁵⁰ 44 U.S.C. § 3512 ("The Paperwork Reduction Act").

⁵¹ *Response* at 15-16. "Here, no valid control number is displayed with respect to section 1.2105(c). See section 0.408 of the rules . . . Due to the lack of display of a proper control number, the forfeiture proposed in the Notice must be rescinded." *Response* at 16 (citing *Kent S. Foster*, Memorandum Opinion and Order, 7 FCC Rcd 7971 (1992)).

⁵² *Public Information Collections Approved by Office of Management and Budget*, PP Docket No. 93-253, Notice, 59 Fed. Reg. 52,302 (Oct. 17, 1994); see also *Public Information Collection Requirements Submitted to Office of Management and Budget for Review*, PP Docket No. 93-253, Notice, 59 Fed. Reg. 49,938 (Sept. 30, 1994).

⁵³ 5 C.F.R. § 1320.5(b)(2)(ii) stipulates that "[a]n agency shall provide the information described in paragraph (b)(2)(i) of this section in a manner that is reasonably calculated to inform the public."

⁵⁴ 5 C.F.R. § 1320.5(b)(2)(ii)(C).

⁵⁵ *Response* at 16.

⁵⁶ 47 U.S.C. § 312(f)(1).

⁵⁷ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

⁵⁸ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

16. Finally, we also reject Northeast's contention that the NAL did not properly consider the factors in imposing forfeitures, as set forth in section 503(b)(2)(D) of the Act.⁵⁹ In fact, in the NAL, we carefully considered each of these factors and have done so again here and find no basis for mitigating the proposed forfeiture. In light of the repeated admonitions about collusion by WTB to auction applicants in Auction No. 44, Northeast knew or should have known that the communications in which it engaged were proscribed. The violation committed by Northeast had the potential to affect the fundamental integrity of Auction No. 44. We conclude that the amount of the proposed forfeiture is justified in light of the severity of Northeast's misconduct.

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED THAT, pursuant to section 503(b) of the Act,⁶⁰ and sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules,⁶¹ Northeast IS LIABLE FOR A MONETARY FORFEITURE in the amount of One Hundred Thousand Dollars (\$100,000) for willfully violating section 1.2105(c) of the Commission's rules.

18. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259.

19. IT IS FURTHER ORDERED that a copy of this Forfeiture Order shall be sent by Certified Mail Return - Receipt Requested, to: Northeast Communications of Wisconsin, Inc., 450 Security Boulevard, P.O. Box 19079, Green Bay, Wisconsin 54307-9079; and to its counsel: Thomas Gutierrez, Esq., Lukas, Nace, Gutierrez & Sachs, Chtd., 1111 Nineteenth Street, N.W., Suite 1200, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

⁵⁹ *Id.* at 16-18.

⁶⁰ 47 U.S.C. § 503(b).

⁶¹ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).