

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

In the Matter of)
CASCADE ACCESS, L.L.C.) File No.: EB-09-IH-0012
Applicant for 700 MHz band licenses in Auction 73) NAL/Acct. No.: 200932080027
) FRN: 0004381547

FORFEITURE ORDER

Adopted: January 10, 2013

Released: January 11, 2013

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, we find that Cascade Access, L.L.C. (Cascade or Applicant), an applicant in Auction No. 73 for licenses in the 700 MHz band, engaged in collusive conduct and failed to notify the Commission of such behavior, in willful violation of Sections 1.2105(c)(1) and (c)(6) of the Commission’s rules. For the reasons stated below, we issue a monetary forfeiture against Cascade in the amount of \$75,000.

II. BACKGROUND

2. This matter arises from misconduct by Cascade during the Commission’s Auction No. 73. On February 10, 2009, following a comprehensive investigation of possible collusive activities between Cascade and Cellco Partnership d/b/a/ Verizon Wireless (Verizon Wireless), the Enforcement Bureau (Bureau), issued a Notice of Apparent Liability for Forfeiture against Cascade. The facts that formed the basis for the proposed forfeiture are set forth in the NAL and are incorporated herein by reference. The NAL found that Cascade and Verizon Wireless were both applicants for the same geographic license area, CMA547-B (Nevada 5-White Pine), in Auction No. 73 and that, during the course of that auction, a representative of Cascade apparently engaged in a collusive communication with a representative of Verizon Wireless. Specifically, the NAL found that Bob Milliken, an associate of Cascade, sent an email to William Hickey, Executive Director – Strategic Alliances for Verizon Wireless, stating, “[w]e have dropped out of the 700 MHz auction” and are “ready to talk/meet” with Verizon Wireless. The NAL concluded that Cascade had engaged in a prohibited communication about its

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

2 47 C.F.R. § 1.2105(c)(1), (c)(6).

3 See Cascade Access, L.L.C., Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 1350 (Enf. Bur. 2009) (NAL).

4 NAL, 24 FCC Rcd at 1351. See also Request for Cancellation or Reduction of Proposed Forfeiture, filed March

bidding strategy, in apparent willful violation of Section 1.2105(c)(1) of the Commission's rules.⁵ The NAL also concluded that Cascade had failed to inform the Commission about its communication with Verizon Wireless, in apparent willful violation of Section 1.2105(c)(6) of the Commission's rules.⁶ The NAL proposed a forfeiture in the total amount of \$75,000 against Cascade.

3. On March 12, 2009, Cascade filed its response to the NAL, requesting cancellation or reduction of the proposed forfeiture.⁷ In support of its position that the proposed forfeiture should be cancelled, Cascade argued that it did not violate Section 1.2105(c) because: (1) Mr. Milliken's statement did not communicate the "substance" of bids or bidding strategies, as required by the Commission's anti-collusion rule;⁸ (2) the conduct prohibited is not clearly stated in the anti-collusion rule;⁹ (3) the FCC previously disseminated to the public the type of information disclosed by Mr. Milliken;¹⁰ and (4) in a prior decision, the Wireless Telecommunications Bureau's Auctions Division permitted communications between auction applicants that were similar to Mr. Milliken's email.¹¹ Cascade also argued in its NAL Response that the forfeiture should be reduced because: (1) Cascade did not intend to violate the anti-collusion rule;¹² (2) Cascade's action did not cause Verizon Wireless to modify its bidding strategy or otherwise compromise the integrity of the auction process;¹³ (3) Cascade's offense, if any, is less egregious than that in the *Star Wireless* case;¹⁴ and (4) Cascade and its affiliated entities have a history of complying with the Commission's rules.¹⁵

4. On June 9, 2009, Cascade's counsel, Tom Gutierrez, Esq., and its President, Brenda Crosby, met with Enforcement Bureau and Wireless Telecommunications Bureau (WTB) staff about its conduct in Auction 73. During the meeting, Mr. Gutierrez and Ms. Crosby reiterated the arguments made in Cascade's NAL Response for cancellation or reduction of the proposed forfeiture. At that time, Cascade also stated that, although it is a small business,¹⁶ it is able to pay the full forfeiture amount.

12, 2009, by Cascade Access, L.L.C. at 1 (NAL Response); Letter from Thomas Gutierrez, Esq., Counsel for Cascade Access, L.L.C., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated January 26, 2009 (LOI Response), at Exhibit 1.

⁵ 47 C.F.R. § 1.2105(c)(1). Section 1.2105(c) is commonly referred to as the Commission's "anti-collusion" rule.

⁶ 47 C.F.R. § 1.2105(c)(6).

⁷ See NAL Response.

⁸ See NAL Response at 3.

⁹ See *id.*

¹⁰ See NAL Response at 3–4.

¹¹ See NAL Response at 5.

¹² See *id.*

¹³ See NAL Response at 6.

¹⁴ See *id.* See also *Star Wireless, LLC and Northeast Communications of Wisconsin, Inc.*, Order on Review, 22 FCC Rcd 8943 (2007), appeal denied, *Star Wireless, LLC v. FCC & USA*, 522 F.3d 469 (D.C. Cir. 2008) (*Star Wireless*).

¹⁵ See NAL Response at 6.

¹⁶ See June 11, 2009, letter from Brenda Crosby, President, Cascade Access, L.L.C., to Judy Lancaster, Investigations and Hearings Division, FCC Enforcement Bureau (wherein Cascade informally states that it is a small business).

III. DISCUSSION

5. In order to prevent collusive conduct and ensure the competitiveness of both the auction process and the post-auction market structure,¹⁷ the Commission adopted Section 1.2105(c), the anti-collusion rule. Section 1.2105(c) 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).¹⁸

This prohibition against collusive communications set forth in Section 1.2105(c) commences with the filing of the Form 175 application to participate in an auction, extends through the duration of the actual auction, and concludes after the successful auction participants have made any required down payment on the licenses. The anti-collusion rule applies to all applicants that file a Form 175 to participate in an auction, regardless of whether the applicants actually participate in the auction itself.¹⁹

6. As noted in the NAL, both before and after commencement of the auction, WTB issued multiple public notices warning auction applicants of their obligations to comply with Section 1.2105(c).²⁰ WTB also issued public notices notifying auction applicants that new anonymous bidding procedures would be used in Auction 73 to prevent the release of bidding-related information to the public and competing applicants during the auction.

¹⁷ See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2386–88 (1994) (Competitive Bidding Second Report and Order). See also *id.* at 2387, para. 225 (“[W]e 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.”); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Memorandum Opinion and Order, 9 FCC Rcd 7684, 7685–7688, para. 10 (1994) (“Our anti-collusion rules are intended to protect the integrity and robustness of our competitive bidding process.”).

¹⁸ 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).

¹⁹ 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, paras. 7–8.

²⁰ See, e.g., *Auction of 700 MHz Band Licenses, Auction of 700 MHz Band Licenses Scheduled for January 24, 2008*, Public Notice, 22 FCC Rcd 18141, 18148–54 (2007) (Procedures PN); *Auction of MHz Band Licenses, Status of Short-Form Applications to Participate in Auction 73*, Public Notice, 23 FCC Rcd 18 (2008) (Status PN); *Auction of 700 MHz Band License, 214 Bidders Qualified to Participate in Auction 73*, Public Notice, 23 FCC Rcd 276, 283–286 (2008) (Qualified Bidders PN); *Wireless Telecommunications Bureau Reminds 700 MHz Auction Applicants of Confidential Nature of Upfront Payment and Other Bidding-Related Information*, 23 FCC Rcd 18, (2008) (Confidential Information Reminder PN); *Auction of 700 MHz Band Licenses Closes, Winning Bidders Announced for Auction 73*, Public Notice, 23 FCC Rcd 4572, 4581 (2008) (Winning Bidders PN).

7. Initially, we reject Cascade's contention that it did not violate Section 1.2105(c) because its communication did not discuss the "substance" of Cascade's bids or bidding strategies.²¹ By revealing to Verizon Wireless, a competing bidder in Auction 73, that it was withdrawing from the auction and would consequently no longer be bidding, Cascade clearly disclosed its bidding strategy.²² Affirmatively revealing to another auction participant that you intend to refrain from bidding is no less significant than disclosing an intention to make a bid of a particular dollar amount or a bid for a license in a particular market. Such an interpretation of Section 1.2105(c) of the Commission's rules is both reasonable and supported by case precedent.²³ While the anti-collusion rule does not prohibit *all* business discussions between or among auction applicants,²⁴ it unquestionably prohibits communications about bidding strategies while an auction is in progress.²⁵

8. We also reject Cascade's claim that its communication with Verizon Wireless involved permissible "business negotiations."²⁶ Contrary to Cascade's assertion, business negotiations are expressly prohibited when, as here, they are between competing applicants who are not members of a bidding consortium or other joint bidding arrangement identified on a bidder's short-form application.²⁷ Indeed, the kind of communication in which Cascade engaged in this instance is *precisely* the type of activity which the anti-collusion rule was intended to prevent, given that the communication had the potential to compromise the competitive nature of the auction's bidding process and the post-auction market structure.²⁸ The confidential nature of bidding-related information was emphasized and reinforced by Auction 73's anonymous bidding procedures, which required "any information" indicating "specific applicants' interests in the auction," to be withheld until *after completion* of Auctions 73 and 76.²⁹ Thus,

²¹ See NAL Response at 2–3.

²² See 47 C.F.R. § 1.2105(c); *Star Wireless, LLC and Northeast Communications of Wisconsin, Inc.*, Order on Review, 22 FCC Rcd 8943 (2007), *appeal denied*, *Star Wireless, LLC v FCC and USA*, 522 F.3d 469 (D.C. Cir. 2008) (*Star Wireless*).

²³ See *id.* See also *Lotus Communications Corporation*, 23 FCC Rcd 9107 (WTB 2008). There is no merit to Cascade's argument that Section 1.2105(c) has never been applied to facts such as those presented here. See Response at 3, 7–9. It is axiomatic that the facts and circumstances of two cases will never be identical and, although Cascade attempts to distinguish its behavior from that in *Star* by pointing out inconsequential factual differences between them, the facts are sufficiently similar to find the legal principles applied in that case to be applicable here.

²⁴ See 47 C.F.R. § 1.2105(c). See also *Mr. Robert Pettit*, Letter, 16 FCC Rcd 10080 (WTB Auctions Div. 2000) ("[T]he anti-collusion rule does not prohibit all business discussions among applicants for licenses in the same geographic license areas . . . [but] such discussions . . . must be conducted with great care not to convey the substance of bids or bidding strategies of any such applicant"); *David L. Nace*, 11 FCC Rcd 11363, 4 CR 1080 (1996) (*David L. Nace*), cited by Cascade ("As a general matter, the anti-collusion rule does not prohibit business negotiations between D, E and F block applicants who have applied for the same markets [but] [a]uction applicants are reminded . . . that such negotiations should not amount to 'cooperating, collaborating, discussing or disclosing in any manner the substance of . . . bids or bidding strategies.'").

²⁵ 47 CFR § 1.2105(c)(1). See also *supra*, note 19.

²⁶ NAL Response at 5.

²⁷ See 47 C.F.R. § 1.2105(c).

²⁸ See NAL, 24 FCC Rcd at 1354.

²⁹ Qualified Bidders PN, 23 FCC Rcd at 285. Auction 76 was the contingent, subsequent auction to Auction 73. The identities of qualified applicants and auction results were released in January 2008. See Qualified Bidders PN, 23 FCC Rcd at 288–299; *Auction of 700 MHz Band Licenses, Additional Information Regarding the FCC Auction System and Results Files for Auctions 73 and 76*, Public Notice, 23 FCC Rcd 303 (2008) (Auction Results PN).

during Auction 73, applicants were not allowed to disclose to the public or other applicants *any* “confidential” information regarding an applicant’s “bidding-related actions,” such as the fact that the applicant had withdrawn from further bidding in the auction.³⁰

9. We also reject Cascade’s contention that the proposed forfeiture should be reduced because the violation was unintentional. While Cascade may not have set out with the specific intention of violating the anti-collusion rule, there is no doubt that Cascade’s representative intended to and did contact Verizon Wireless to initiate a conversation about Cascade’s participation in Auction No. 73 during the period of time when such communications were strictly proscribed. Stated otherwise, Cascade did not accidentally contact Verizon Wireless to convey that it was withdrawing from further bidding in the auction. Thus, Cascade’s actions were indisputably willful, as defined under the Act, and patently inconsistent with the plain language of Section 1.2105(c).³¹

10. We are not persuaded by Cascade’s assertion that the proposed forfeiture is “far too high”³² compared to *Star Wireless*, a case in which the Commission imposed a \$75,000 forfeiture. Cascade maintains that its conduct is less egregious than that in *Star Wireless* because its email to Verizon Wireless did not alter or otherwise affect the bidding in Auction 73. To the contrary, Cascade’s conduct, insofar as Section 1.2105(c)(1) is concerned, is similar to that in *Star Wireless*—Cascade transmitted a prohibited communication that revealed its bidding strategy to a competing auction applicant. The fact that Verizon Wireless refrained from acting on the information it received from Cascade does not provide a basis for mitigating the proposed forfeiture amount.

11. The Commission’s *Forfeiture Policy Statement*³³ specifies that the Commission shall impose a forfeiture based upon consideration of the factors enumerated in Section 503(b)(2)(E) of the Act, 47 U.S.C. § 503(b)(2)(E), such as “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”³⁴ We have, again, carefully considered each of these factors, including Cascade’s history of compliance with the Commission’s rules, and find no basis for mitigating the proposed forfeiture. Cascade’s misconduct was willful and serious. Given the multiple admonitions about collusion issued by WTB to auction applicants in Auction No. 73,³⁵ Cascade knew or should have known that the communication in which it engaged was proscribed. It also knew or should have known

³⁰ Confidential Information Reminder PN, 12 FCC Rcd at 18 (“[T]he Bureau recently warned applicants that the direct or indirect communication to other applicants or the public disclosure of such non-public information could violate the Commission’s anonymous bidding procedures and the anti-collusion rule”). Thus, contrary to Cascade’s argument, it is irrelevant whether the Auctions Division may have allowed similar information to be disseminated in a much earlier, prior auction.

³¹ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 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 Act,³¹ and the Commission has so interpreted the term in the Section 503(b) context. *See, e.g., Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

³² NAL Response at 5–6.

³³ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997), *recon. denied* 15 FCC Rcd 303 (1999) (Forfeiture Policy Statement); 47 C.F.R. § 1.80(b).

³⁴ Forfeiture Policy Statement, 12 FCC Rcd at 17100–01, para. 27.

³⁵ *See supra*, note 19.

to report such prohibited communications to the Commission in a timely manner. Therefore, taking all of these factors into consideration, we find that Cascade is liable for a forfeiture in the amount of \$75,000.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that, pursuant to Section 503(b) of the Communications Act of 1934, as amended,³⁶ Section 1.80 of the Commission's rules,³⁷ and authority delegated by Sections 0.111, 0.204, and 0.311 of the Commission's rules,³⁸ Cascade IS LIABLE FOR A MONETARY FORFEITURE in the amount of Seventy-five Thousand Dollars (\$75,000) for willfully violating Sections 1.2105(c)(1) and 1.2105(c)(6) of the Commission's rules.

13. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within ten (10) calendar days after the release of this Forfeiture Order.³⁹ If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.⁴⁰ Cascade Access, L.L.C. shall send electronic notification of payment to Gary Schonman at Gary.Schonman@fcc.gov and Judy Lancaster at Judy.Lancaster@fcc.gov on the date said payment is made.

14. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.⁴¹ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank - Government Lockbox #979088, SL-MO-C2- GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications

³⁶ 47 U.S.C. § 503(b).

³⁷ 47 C.F.R. § 1.80.

³⁸ 47 C.F.R. §§ 0.111, 0.204, and 0.311.

³⁹ 47 C.F.R. § 1.80.

⁴⁰ 47 U.S.C. § 504(a).

⁴¹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank - Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

15. Any request for full payment under an installment plan should be sent to Chief Financial Officer – Financial Operations, Federal Communications Commission, 445 12th Street, SW, Room 1-A625, Washington, DC 20554. If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by telephone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

16. IT IS FURTHER ORDERED that a copy of this Forfeiture Order shall be sent by Certified Mail Return - Receipt Requested, to: Brenda C. Crosby, President, Cascade Access, L.L.C., 303 SW Zobrist, Estacada, Oregon 97023; and to Cascade's counsel: Thomas Gutierrez, Esq. and Elizabeth R. Sachs, Esq., Lukas, Nace, Gutierrez & Sachs, L.L.P., 1650 Tysons Blvd., Suite 1500, McLean, VA 22102.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau