

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

In the Matter of)
)
Amendment of Part 1 of the)
Commission's Rules --) WT Docket No. 97-82
Competitive Bidding Procedures)
)
)
)
)

SEVENTH REPORT AND ORDER

Adopted: September 19, 2001

Released: September 27, 2001

By the Commission:

I. INTRODUCTION

1. In this Seventh Report and Order, we adopt modifications to Section 1.2105(c) of the Commission's rules, the competitive bidding "anti-collusion rule." Specifically, we amend the rule so that its language clearly reflects the Commission's practice of prohibiting communications regarding bids or bidding strategies only between auction applicants that have applied to bid on licenses in any of the same geographic areas. In addition, we amend the rule to (1) clarify that it prohibits an auction applicant from discussing a competing applicant's bids or bidding strategies even if the first applicant does not discuss its own bids or bidding strategies, and (2) require auction applicants that make or receive a prohibited communication of bids or bidding strategies to report the communication immediately to the Commission in writing.

II. BACKGROUND

2. The Commission adopted Section 1.2105(c)(1) to deter anticompetitive conduct during auctions of spectrum licenses and to ensure the competitiveness of post-auction markets. The Commission's anti-

1 47 C.F.R. § 1.2105(c).

2 See 47 C.F.R. § 1.2105(c)(1).

3 Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348, 2387 ¶ 223 (1994) ("Competitive Bidding Second Report and Order") ("[T]he Commission is concerned that collusive conduct by bidders prior to or during the auction process could undermine the competitiveness of the bidding process and prevent the formation of a competitive post-auction market structure.").

Section 1.2105(c)(1) provides that:

(continued....)

collusion rule seeks to foster a level competitive playing field during auctions and to “ensure that the government receives a fair market price for the use of the spectrum.”⁴ In promulgating the rule, the Commission was particularly concerned that some firms might engage in behavior that would unfairly disadvantage other bidders.⁵ Communications that violate Section 1.2105(c)(1) have the potential to undermine the competitiveness of our auction process and public confidence in the integrity of that process.⁶

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after 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, 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).

47 C.F.R. § 1.2105(c)(1).

An applicant “include[s] all controlling interests in the entity submitting a short-form application to participate in an auction (FCC Form 175), as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application, and all officers and directors of that entity.” 47 C.F.R. § 1.2105(c)(6)(i).

Section 1.2105(c)(6)(ii) provides that “[t]he term bids or bidding strategies shall include capital calls or requests for additional funds in support of bids or bidding strategies.” 47 C.F.R. § 1.2105(c)(6)(ii).

Section 1.2105(a)(2)(ix) provides that in order to be eligible to participate in a spectrum auction, an applicant must file a short-form application (FCC Form 175) in which it certifies that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties not identified in the application regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid. 47 C.F.R. § 1.2105(a)(2)(ix).

⁴ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386, ¶ 221.

⁵ *Id.*

⁶ Compliance with Section 1.2105(c)(1) does not obviate compliance with federal antitrust laws. *See* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Memorandum Opinion and Order*, 9 FCC Rcd 7684, 7689, ¶ 12 (1994) (“[W]e wish to emphasize that all applicants and their owners continue to be subject to existing antitrust laws. Applicants should note that conduct that is permissible under the Commission’s Rules may be prohibited by the antitrust laws.”). *See also* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Fourth Memorandum Opinion & Order*, 9 FCC Rcd 6858, 6868 n.134 (1994) (“*Fourth MO&O*”). As discussed in the *Fourth MO&O*, the antitrust laws prohibit discussions with respect to bid prices between applicants that have applied for licenses in the same geographic market. *Id.* In addition, agreements between actual or potential competitors to submit collusive, noncompetitive or rigged bids are *per se* violations of Section One of the Sherman Antitrust Act. *Id.* Further, actual or potential competitors may not agree to divide territories horizontally in order to minimize competition, regardless of whether they split a market in which they both do business, or whether they merely reserve one market for one and another for the other. *Id.* The Commission may refer allegations of anticompetitive auction conduct to the Department of Justice for investigation. *See* (continued....)

3. In the *FNPRM*, we proposed to amend Section 1.2105(c)(1) to prohibit an auction applicant from discussing another applicant's bids or bidding strategies even if the first applicant does not discuss or disclose its own bids or bidding strategies.⁷ We also proposed to amend Section 1.2105(c) to require any auction applicant that makes or receives a communication of bids or bidding strategies prohibited under Section 1.2105(c)(1) to report such a communication to the Commission promptly.⁸ In addition, we sought comment on whether other changes to Section 1.2105(c)(1) may be warranted at this time in light of Congress's mandate that we ensure competitive auctions.⁹ We received one comment on the amendments proposed in the *FNPRM*.¹⁰

III. DISCUSSION

A. Amendments to Section 1.2105(c)(1)

4. **Background.** Subject to certain exceptions, Section 1.2105(c)(1) prohibits auction applicants that have applied to bid on any common license area from communicating their bids or bidding strategies with each other from the short-form application filing deadline to the post-auction down payment deadline, unless such applicants are members of a bidding consortium or other joint bidding agreement reported on their short-form applications.¹¹ In other words, if two auction applicants (that have not entered into an agreement and identified each other on the FCC Form 175) are each eligible to bid on numerous license areas but there is only one license area for which they are both eligible to bid, they may not discuss or disclose to each other their bids or bidding strategies relating to any license area that either of them is eligible to bid on.

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Competitive Bidding Second Report and Order, 9 FCC Rcd at 2388 ¶ 226. See also "Justice Department Sues Three Firms Over FCC Auction Practices," Press Release 98-536 (Nov. 10, 1998).

⁷ Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, *Third Further Notice of Proposed Rule Making*, WT Docket 97-82, 14 FCC Rcd 21558, 21563, ¶¶ 10-11 (1999) ("*FNPRM*").

⁸ *Id.* at 21561-62, ¶¶ 5-9.

⁹ *Id.* at 21563, ¶ 11 (*citing* 47 U.S.C. § 309(j)(3)).

¹⁰ See Comments of Blooston, Mordofsky, Jackson & Dickens (Blooston Comments). We also received comments on the Initial Regulatory Flexibility Analysis from the Office of Advocacy, U.S. Small Business Administration (SBA Comments).

¹¹ 47 C.F.R. § 1.2105(c)(1). See also "Wireless Telecommunications Bureau Responds to Questions About the Local Multipoint Distribution Service Auction," *Public Notice*, 13 FCC Rcd 341 (1998); "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules," *Public Notice*, 11 FCC Rcd 9645 (1995); and Letter to R. Michael Senkowski from Rosalind K. Allen, Acting Chief, Commercial Radio Division, Wireless Telecommunication Bureau (rel. December 1, 1994). We recently amended Section 1.2105(c)(1) to make clear that competing bidders may not engage in communications prohibited by the rule from the date that short-form applications are due to the Commission until after the down payment deadline has passed. See 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*, WT Docket 97-82, FCC 00-274, 2000 WL 1140602 (rel. Aug. 14, 2000) ("*Part 1 Order on Reconsideration of Third R&O*"). This amendment codified our practice of using the short-form application and down payment deadlines to define the period during which collusive communications are prohibited, which was previously explained in bidding information packages and public notices.

5. **Discussion.** *Applicants subject to Section 1.2105(c)(1).* Section 1.2105(c)(1) of the Commission's rules states that "all applicants" are prohibited from discussing or disclosing their bids or bidding strategy from the short-form application filing deadline until after the down payment deadline. Notwithstanding the term "all applicants," the Commission has applied the prohibitions of the rule only to auction applicants that have applied to bid for licenses in any of the same geographic license areas, and thus are competing applicants.¹² Thus, as noted above, even if two auction applicants that have not identified each other as parties to an agreement on the FCC Form 175 are each eligible to bid on only one license area in common, they may not discuss or disclose to each other their bids or bidding strategies relating to any license area that either of them is eligible to bid on.¹³ On the other hand, auction applicants that have not applied to bid on licenses in any of the same geographic areas, and thus are not competing applicants, are not subject to the prohibitions of Section 1.2105(c)(1).¹⁴

6. We find that it would be helpful to auction applicants to amend Section 1.2105(c)(1) so that it accurately reflects the Commission's application of the rule. Thus, we amend Section 1.2105(c)(1) to make clear that only auction applicants that have applied for licenses in any of the same geographic license

¹² See *Fourth MO&O*, 9 FCC Rcd at 6868, ¶ 55; see also "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules," *Public Notice*, 11 FCC Rcd 9645 (1995); 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 and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Order*, 11 FCC Rcd 9655, 9657-58, ¶¶ 6-8 (1995); "Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rule for D, E, and F Block Bidders," *Public Notice*, 11 FCC Rcd 10134 (1996); Letter to David L. Nace from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, 11 FCC Rcd 11363 (1996); "Wireless Telecommunications Bureau Responds to Questions About the Local Multipoint Distribution Service Auction," *Public Notice*, 13 FCC Rcd 341 (1998).

The geographic license area is the market designation of the particular service, e.g., MTA, BTA, and EA. See "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules," *Public Notice*, 11 FCC Rcd 9645 (1995).

¹³ For example, two applicants not listed on each other's short-form applications for an auction of broadband PCS licenses may not discuss bids or bidding strategies with each other if they are bidding for licenses in any of the same MTAs or BTAs, even if they are not bidding for the same frequency blocks. See *Fourth MO&O*, 9 FCC Rcd at 6868, ¶ 55; see also "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules," *Public Notice*, 11 FCC Rcd 9645 (1995).

¹⁴ This construction of Section 1.2105(c)(1) is consistent with Sections 1.2105(c)(2) and 1.2105(c)(3), which the Commission adopted in 1994 in the *Competitive Bidding Second Memorandum Opinion and Order*. Those rule sections allow bidders who have not filed short-form applications for any of the same geographic license areas to engage in discussions and enter into consortia or joint bidding arrangements during the course of an auction. In adopting these amendments to its original anti-collusion rule, the Commission found that its "prohibition on communication among bidders and formation of agreements among bidders after applications have been filed may have been excessively broad in that it includes communications and agreements with bidders who are not bidding against each other, and so may prevent useful agreements that have no effect on the competitiveness of bidding." 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 ¶ 51 (1994) ("*Competitive Bidding Second Memorandum Opinion and Order*"). See also 47 C.F.R. §§ 1.2105(c)(2) and 1.2105(c)(3).

areas are prohibited from discussing with or disclosing to each other their bids or bidding strategy.¹⁵ We also caution auction applicants that apply to bid for licenses in any of the same geographic license areas (and that are not listed on each other's FCC Form 175) against indirectly communicating their bids or bidding strategies to each other through third-party discussions or disclosures to other auction applicants that have not applied to bid on licenses in any of the same geographic license areas.

7. *Communications regarding other applicants' bids or bidding strategies.* In the *Western PCS Order*, we provided auction applicants with official notice that Section 1.2105(c)(1) prohibits an auction applicant from cooperating or collaborating with respect to, or discussing or disclosing, another applicant's bids or bidding strategies. Thus, an auction applicant may violate Section 1.2105(c)(1) even if it does not discuss its own bids or bidding strategies.¹⁶ Nevertheless, we stated in the *FNPRM* that we believe that auction applicants would benefit if the text of the rule plainly stated that it prohibits an auction applicant from discussing another applicant's bids or bidding strategies even if it does not discuss or disclose its own bids or bidding strategies.¹⁷

8. We amend Section 1.2105(c)(1) to clarify the prohibition against an auction applicant cooperating or collaborating with respect to, discussing with, or disclosing to a competing applicant the substance of the bids or bidding strategies of any competing applicant. We believe that the rule's prohibition against discussing, or disclosing, bids or bidding strategy would have minimal deterrent force if an applicant to whom a competing applicant's bidding information is disclosed could discuss such information with either that or another competing applicant without violating the rule.¹⁸ For instance, absent such a prohibition, it would be easy to circumvent the rule's prohibitions as Bidder A could pass on to competing Bidder C bidding strategy information of Bidder B with whom Bidder A has a bidding agreement. We believe that an applicant's discussion with a competing applicant of any other competing applicant's bids or bidding strategy could have a deleterious effect on the integrity and competitiveness of our auctions and that it is therefore essential to explicitly prohibit such discussions.

B. Required Disclosure of Communications Regarding Bids or Bidding Strategies

9. **Background.** Whenever the information furnished in a pending application is no longer substantially accurate and complete in all significant respects, Section 1.65(a) of the Commission's rules requires the applicant to amend the application so as to furnish additional or corrected information "as promptly as possible and in any event within 30 days. . . ."¹⁹ Pursuant to Section 1.65(a), auction applicants are required to maintain the accuracy and completeness of their pending short-form applications. Because the short-form application contains a certification under penalty of perjury that the applicant has not entered and will not enter into any agreements other than those identified in its application, auction applicants that engage in communications of bids or bidding strategies that result in a bidding agreement, arrangement or understanding not already identified on their short-form applications are required to

¹⁵ See Appendix B for the text of the Final Rules.

¹⁶ See *Western PCS BTA 1 Corporation, Memorandum Opinion and Order*, 14 FCC Rcd 21571, 21574, ¶¶ 7-9 (1999) ("*Western PCS Order*").

¹⁷ *FNPRM*, 14 FCC Rcd at 21563, ¶ 10.

¹⁸ See *id.* (citing *Western PCS Order*, 14 FCC Rcd at 21574, ¶ 8).

¹⁹ 47 C.F.R. § 1.65(a).

promptly disclose any such agreement, arrangement or understanding to the Commission by amending their pending applications.²⁰ Thus, even though competing applicants are prohibited by Section 1.2105(c)(1) from communicating their bids or bidding strategies to each other after the short-form application filing deadline, applicants that engage in such prohibited discussions are nonetheless required by Section 1.65(a) to promptly disclose any resulting agreements or understandings by amending their pending applications.²¹

10. In the *FNPRM*, we sought comment on whether the integrity and competitiveness of our auction process would be enhanced if we required auction applicants that make or receive communications prohibited under Section 1.2105(c)(1) to report promptly such communications to the Commission even if the communications do not result in an agreement, arrangement or understanding that must be reported to the Commission under Section 1.65(a). We invited comment on whether would-be disseminators of prohibited bidding or bidding strategy information, knowing that recipients of such prohibited information would have an affirmative duty to disclose promptly such communications to the Commission, would be deterred from making such communications. We also solicited comment on any potential burden that may be associated with such a reporting requirement, and the appropriate deadline for making such a report.²²

11. **Discussion.** We amend Section 1.2105(c) to require auction applicants that make or receive a communication of bids or bidding strategies prohibited under Section 1.2105(c)(1) to report such a communication to the Commission immediately, even if the communication does not result in an agreement, arrangement or understanding that must be reported under Section 1.65(a). As we noted in the *FNPRM*, we have found that even when a prohibited communication of bids or bidding strategies is limited to one applicant's bids or bidding strategies, it may unfairly disadvantage the other bidders in the market by creating an impermissible asymmetry of information.²³ Thus, when one bidder is privy to a competing bidder's strategic bidding information without reporting this fact, it may use such information to manipulate the auctions process and gain an unfair competitive advantage over other bidders in the market who are unable to access, analyze, and act upon this strategic information in making bidding decisions. Section 1.2105(c)(1) of the Commission's rules attempts to address this concern by prohibiting all auction applicants that have applied to bid on any of the same geographic areas from cooperating or collaborating with respect to, discussing or disclosing to each other in any manner the substance of their bids or bidding strategies.²⁴ The Commission has encountered instances of violations of Section 1.2105.²⁵ In some

²⁰ See 47 C.F.R. § 1.2105(a)(2)(ix).

²¹ Failure to make the notification required by Section 1.65(a) would constitute a separate violation of our rules in addition to the underlying violation of Section 1.2105(c)(1). See Letter to Jonathan D. Blake and Robert J. Rini from Kathleen O'Brien-Ham, Chief, Auctions Division, WTB, 10 FCC Rcd 13783, 13785 (1995). It should be noted, however, that in order to find a Section 1.65(a) violation, we would need to first establish that the auction applicant violated the anti-collusion rule. If the evidence is insufficient to establish a Section 1.2105(c) violation, we may not find a Section 1.65(a) violation. See *Western PCS Order*, 14 FCC Rcd at 21577-78, ¶ 20.

²² *FNPRM*, 14 FCC Rcd at 21562, ¶ 7.

²³ See *id.* (citing *US West Communications, Inc., Notice of Apparent Liability for Forfeiture*, 13 FCC Rcd 8286, 8299 at ¶ 34 (1998)).

²⁴ 47 C.F.R. § 1.2105(c)(1). As explained above, we today are amending Section 1.2105(c)(1) to also explicitly prohibit competing auction applicants from cooperating or collaborating with respect to, discussing, or disclosing to each other the substance of any competing applicant's bids or bidding strategies. See *supra* at ¶ 9.

instances, there has been concern expressed about a bidder's obligation to report information received from another bidder that potentially violates our rule, and we have previously counseled applicants that the safest course of action for a recipient of a prohibited communication during the period in which Section 1.2105(c) prohibitions are in effect would be to terminate the discussion and promptly report the communication to the Commission.²⁶ Therefore, we further clarify the anti-collusion rule by including a reporting requirement, as a deterrent to would-be disseminators of prohibited information regarding bids or bidding strategies. This will, we believe, make clear the responsibility to report such behavior and will thereby enhance the competitiveness and fairness of our spectrum auctions.

12. Thus, an applicant's duty under Section 1.2105(c) is two-fold. Applicants may not engage in prohibited communications with competing applicants, and they are obligated to report to the Commission all communications prohibited under Section 1.2105(c)(1). Thus, an applicant's failure to report a prohibited communication pursuant to Section 1.2105(c) may constitute a rule violation distinct from any act of collusion that violates Section 1.2105(c)(1). Moreover, the Section 1.2105(c) reporting requirement we adopt today applies even if the communication of bids or bidding strategies does not result in a bidding arrangement, agreement or understanding that must be reported to the Commission under Section 1.65(a).²⁷

As explained previously, applicants have always had, under section 1.65(a), an affirmative duty to report any communications of bids or bidding strategies that result in a bidding arrangement, agreement or understanding after the filing of a short-form application. By requiring applicants to update pending applications to reflect such prohibited collusive agreements and communications, the Commission has sought to ensure the integrity and transparency of its auction processes. By now amending our rules to include an affirmative reporting requirement that applies even if a communication does not rise to the level of that which must be reported under Section 1.65(a), we can ensure that all bidders remain on a level playing field throughout the course of an auction. Of course, the fact that a party complies with the reporting requirements of Section 1.65(a) and Section 1.2105(c) will not insulate it from any sanctions that may be appropriate in connection with a violation of the Section 1.2105(c)(1) prohibition against collusive communications.²⁸

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²⁵ See, e.g., *In re Commercial Realty St. Pete, Inc., Memorandum Opinion and Order*, 11 FCC Rcd 15374 (1996); *US West Communications, Inc., Notice of Apparent Liability for Forfeiture*, 13 FCC Rcd 8286 (1998).

²⁶ In the *Western PCS Order*, the Commission stated that:

Western's safest course of action, therefore, would have been to: (a) limit its reply solely to an unequivocal statement that they could not talk about bidding, and (b) promptly report the communications to the Commission. Indeed, if an auction participant is contacted by another auction participant during the period within which Section 1.2105(c) prohibitions are in effect, it would be prudent for the parties to relate the substance of that contact to the Commission out of an abundance of caution. In the instant case, had Western taken the above steps it would have eliminated any doubt whether its conduct violated the anti-collusion rule and avoided any appearance of impropriety.

Western PCS Order, 14 FCC Rcd. at 21577, ¶ 18.

²⁷ 47 C.F.R. § 1.65(a).

²⁸ The reporting requirement we adopt today does not relieve any applicant from its duty pursuant to Section 1.65(a) to update its pending application any time a communication of bids or bidding strategies results (continued....)

13. We disagree with Blooston's suggestion that recipients of bidding information should be exempt from the requirement to report such communications to the Commission. Blooston asserts that while it may be fair to require the initiator of a collusive communication to report such matters to the Commission, it is unfair to apply the same reporting requirement to the recipient of such a communication.²⁹ According to Blooston, the proposed amendment requires a recipient to make a "snap decision" as to whether or not a communication has triggered the anti-collusion notification rule.³⁰ Blooston further contends that if the Commission later disagrees with this judgment call (i.e., finds the communication to be non-collusive), the reporting "innocent third party" could find itself entangled in expensive litigation with substantial liability exposure.³¹ Conversely, Blooston argues that if the recipient makes the judgment that it should not report the communication, and the Commission later finds the communication to have violated the anti-collusion rule, the recipient may face sanctions for failing to disclose the violator.³²

14. Section 1.2105(c) does not distinguish between initiators and recipients in terms of their duty to avoid a collusive communication.³³ Rather, the anti-collusion rule focuses on the content of the communication (i.e., the discussion or disclosure must involve direct or indirect information that affects, or could affect, bids or bidding strategy, or the negotiation of settlement agreements) that occurs between auction applicants for any of the same geographic license areas after the short-form filing deadline.³⁴ Thus, all auction applicants that have applied for a license in the same geographic area, and have not reported in their short-form applications that they have an agreement with each other, must affirmatively avoid all communications with each other that disclose their or a competing applicant's bids or bidding strategy.³⁵ In

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in an arrangement, agreement or understanding. See *US West Communications, Inc., Notice of Apparent Liability for Forfeiture*, 13 FCC Rcd at 8299, ¶ 34 (1998).

²⁹ Blooston Comments at 4-5.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See 47 C.F.R. § 1.2105(c)(1).

³⁴ *Id.* See also Letter to R. Michael Senkowski from Rosalind K. Allen, Acting Chief, Commercial Radio Division (rel. December 1, 1994); "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules," *Public Notice*, 11 FCC Rcd 9645 (1995); and "Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rule for D, E, and F Block Bidders," *Public Notice*, 11 FCC Rcd 10134 (1996).

³⁵ "Wireless Telecommunications Bureau Responds to Questions About the Local Multipoint Distribution Service Auction," *Public Notice*, 13 FCC Rcd 341 (1998), citing "Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rule for D, E and F Block Bidders," *Public Notice*, 11 FCC Rcd 10134 (1996) (providing hypothetical examples of collusive conduct), and Letter to David L. Nace from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, 11 FCC Rcd 11363 (1996). We note that when communications between auction applicants have the potential to undermine the integrity of the auction process and our rules, a violation of the anti-collusion rule can be found even if there is no demonstrable impact on bidding behavior. See *Western PCS Order*, 14 FCC Rcd at 21577, ¶ 18 ("Our anti-collusion rules are intended to have a prophylactic effect, and a violation can be found even if there is no demonstrable impact on bidding behavior. For example, a discussion of bidding strategies by applicants constitutes a violation of the rule whether or not it ultimately results in changes in bidding behavior").

light of the fact that our current rules do not focus on whether a party is initiating or receiving a communication, we do not believe that we should limit the reporting requirement we adopt today to initiators of prohibited communications. Moreover, because initiators of collusive communications are less likely to report such communications, we consider recipients of prohibited oral or written communications regarding bids or bidding strategies to be an important deterrent against collusive behavior. We also believe that recipients should be held to the same reporting standard as initiators because, even if a recipient does not reach an agreement or understanding with the initiator, a recipient nevertheless derives substantial benefit from obtaining details of a competitor's bids or bidding strategy prior to or during an auction.³⁶ If we were to allow recipients to possess strategic bidding information that other applicants are not privy to, we would unfairly disadvantage other bidders in the market by sanctioning an asymmetry of information that could be used to manipulate the auction process.³⁷ Therefore, the mere occurrence of a communication by or among auction applicants for the same geographic license area about their own or a competing applicant's bids or bidding strategy triggers the reporting requirement.

15. We do not believe that there is any merit to Blooston's assertion that compliance with this reporting requirement will expose recipients of communications to substantial legal liability.³⁸ Blooston asserts that the anti-collusion rule must be applied to many factual circumstances and, as a result, what does or does not constitute a violation of the anti-collusion rule is not easily definable.³⁹ Blooston further notes that in the past the Commission has indicated that auction applicants, rather than the Commission, are in the best position to determine in the first instance when communications may constitute potential violations of the rule.⁴⁰ We continue to believe that this is the case and that, rather than requiring the Commission to take on the impossible task of screening all applicant communications, we should place the responsibility for identifying potentially unauthorized communications on auction applicants. Applicants, during the course of their day-to-day operations, are better equipped to identify and report such communications. Nonetheless, we emphasize that applicants are not responsible for deciding whether a violation of the anti-collusion rule has occurred. Thus, the purpose of the reporting requirement we adopt today is to obligate parties to notify the Commission of communications that appear to violate the anti-collusion rule and to allow the Commission to determine whether a violation has occurred. The determination of whether a violation of the rule has occurred rests with the Commission, not with bidders.⁴¹ Thus, while the reporting requirement places an affirmative duty on all auction applicants to report what they perceive to be prohibited communications, auction applicants are required only to act in good faith and to report truthfully the facts and circumstances of what they perceive to be a communication covered by

³⁶ A recipient may adjust its bids or bidding strategy on the basis of information proffered by the initiator regarding its own or a competitor's auction plan. Similarly, an initiator may also reap substantial benefits from its disclosure or communication. For example, an initiator who discloses which markets it will bid on, or not bid on, would benefit if the recipient modified its bidding strategy in a manner beneficial to both applicants.

³⁷ See US West Communications, Inc., *Notice of Apparent Liability for Forfeiture*, 13 FCC Rcd at 8284, ¶ 34 (1998).

³⁸ Blooston Comments at 4-5.

³⁹ *Id.* at 3.

⁴⁰ *Id.* at 3-4.

⁴¹ See *Western PCS Order*, 14 FCC Rcd. at 21577, ¶ 18.

Section 1.2105(c). The Commission will then investigate these reports and reach a judgment as to whether a violation has occurred. By simply reporting the facts, auction applicants can insulate themselves from liability.

16. We also find that any burden associated with the reporting requirement we establish today will be slight, particularly in comparison with the potential benefits to the auction process and bidders. Applicants will be required only to submit a letter to the Commission describing the facts of a communication that appears to be prohibited.⁴²

17. In sum, we amend Section 1.2105(c) to require all auction applicants to report prohibited discussions or disclosures regarding bids or bidding strategy to the Commission in writing immediately, but in no case later than five business days after the communication occurs. Thus, an auction applicant must report a prohibited communication within five business days even if the communication does not result in an agreement or understanding regarding bids or bidding strategy.⁴³ Although we believe that applicants generally should need less than five business days to make such reports to the Commission, we will not impose a shorter deadline because we find that there may be circumstances in which applicants, particularly small businesses, may need five business days to file a report. An auction applicant that receives a communication prohibited under Section 1.2105(c)(1) orally should respond immediately and unequivocally that it is unwilling to participate in any violation of Section 1.2105(c)(1). If a prohibited communication is received other than orally, an auction applicant should respond immediately in writing that it is unwilling to participate in any violation of Section 1.2105(c)(1). In either case, the auction applicant must report the improper communication to the Commission in writing within five business days after the communication occurs.

IV. CONCLUSION

18. In this Seventh Report and Order, we amend Section 1.2105(c)(1) of the Commission's rules to clarify that the rule prohibits only auction applicants that have applied to bid for licenses in any of the same geographic license areas from cooperating or collaborating with respect to, or discussing or disclosing to each other bids or bidding strategies. We also amend the rule to clarify that it prohibits such auction applicants from cooperating or collaborating with respect to, or discussing or disclosing to each other any competing applicant's bids or bidding strategies. Thus, the rule may be violated even if an applicant does not discuss or disclose its own bids or bidding strategies. Finally, we amend Section 1.2105(c) to require any auction applicant that makes or receives a communication of bids or bidding strategies prohibited under Section 1.2105(c)(1) of our rules to report such communication to the Commission in writing immediately, but in no case later than five business days after the communication occurs.

⁴² As we noted in the *FNPRM*, in past auctions applicants have voluntarily reported the receipt of potentially improper communications to the Commission. *See, e.g.*, Letter from Carl W. Northrop, counsel for WNP Communications, Inc., to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (dated April 14, 1998).

⁴³ As explained above, under Section 1.65(a) an auction applicant's duty to report (by amending its short-form application) arises only when an agreement, arrangement, or understanding is reached.

V. PROCEDURAL MATTERS**A. Regulatory Flexibility Act**

19. The Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") of the possible significant economic impact on small entities of the rule amendments adopted herein. The FRFA is set forth in Appendix A. The Commission's Reference Information Center, Consumer Information Bureau, will send a copy of this Seventh Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

B. Final Paperwork Reduction Act of 1995 Analysis

20. This Report and Order contains a new information collection, which was proposed in the *FNPRM*. As required by the Paperwork Reduction Act of 1995, the Commission sought comment from the public and from the Office of Management and Budget (OMB) on this proposed change to the Commission's information collection requirements. This new information collection will be submitted to OMB for approval, as prescribed by the Paperwork Reduction Act.

C. Ordering Clauses

21. Authority for issuance of this Seventh Report and Order is contained in Sections 4(i), 4(j), 303(r), 309(j) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 309(j) and 403.

22. Accordingly, IT IS ORDERED that Part 1 of the Commission's Rules IS AMENDED as specified in Appendix B, effective 30 days after publication in the Federal Register, except new Section 1.2105(c)(6), which will be effective upon OMB approval.

23. IT IS FURTHER ORDERED that the Commission's Reference Information Center, Consumer Information Bureau, SHALL SEND a copy of this Seventh Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act ("RFA"),¹ an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Third Further Notice of Proposed Rule Making* ("FNPRM") in this proceeding.² The Commission sought written public comment on the proposals in the FNPRM, including comment on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.³

An RFA certification, rather than an analysis, is appropriate where "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."⁴ We believe that the rule amendments we have adopted will not have a significant economic impact on a substantial number of small entities. We nonetheless voluntarily perform this FRFA in order to thoroughly explain this conclusion and to address concerns raised in comments submitted by the Small Business Administration ("SBA").⁵ We discuss our conclusion further in Section B, *infra*.

A. Need for and Objectives of the Report and Order:

The amendments to 47 C.F.R. § 1.2105(c) adopted in this Seventh Report and Order are intended to enhance the competitiveness and integrity of the Commission's auctions. First, we amend Section 1.2105(c)(1) so that its language clearly reflects the Commission's application of the rule to prohibit communications regarding bids or bidding strategies only between applicants that have applied to bid on licenses in any of the same geographic areas. Second, we clarify Section 1.2105(c)(1) to explicitly prohibit auction applicants that have applied to bid on licenses in any of the same geographic areas from discussing with or disclosing to each other any competing applicant's bids or bidding strategies. Although we have previously interpreted the rule to prohibit an applicant's discussion of a competing applicant's bids or bidding strategies, we believe that all auction applicants would benefit from this amendment, which ensures that the text of the rule is unambiguous. Third, we amend Section 1.2105(c) to require any auction applicant that makes or receives a communication of bids or bidding strategies prohibited by 47 C.F.R. § 1.2105(c)(1) to report such communication to the Commission. We believe that this reporting requirement will act as a deterrent to would-be disseminators of prohibited information and will thereby enhance the competitiveness and fairness of our auctions.

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

² Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, *Third Further Notice of Proposed Rule Making*, 14 FCC Rcd 21558 (1999) ("FNPRM").

³ See 5 U.S.C. § 604.

⁴ 5 U.S.C. § 605(b).

⁵ The IRFA was inadvertently omitted from the February 8, 2000 (65 Fed. Reg. 6113) Federal Register publication of the FNPRM. In comments submitted on March 28, 2000, the SBA pointed out the failure of the Commission to publish an IRFA. The IRFA was subsequently published in the Federal Register on August 9, 2000 (65 Fed. Reg. 48658). In response to the IRFA, the SBA submitted comments on August 29, 2000 ("SBA Comments").

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA:

The SBA filed comments in response to the IRFA. The SBA asserts that the Commission failed to describe the impact its proposed rules would have on small businesses as required by the RFA.⁶ Further, the SBA states that the Commission's proposals would expand the obligations that applicants must meet when they participate in an auction.⁷ The SBA states that the amended anti-collusion rule would impose reporting requirements on applicants, cover a broader range of communications, and increase the risk of punitive action, including monetary forfeitures.⁸ The SBA asserts that small businesses have far fewer financial resources than their larger counterparts and they are therefore less able to absorb the costs of forfeitures.⁹ According to the SBA, the Commission did not discuss the potential burden posed by the risk of punishment as it should have. The SBA also states that the Commission failed to propose any alternatives designed to minimize the impact of its proposed rules on small business, as the RFA requires.¹⁰

We acknowledge that the amendment to Section 1.2105(c) that we proposed in the *FNPRM*, and that we adopt today, imposes a reporting requirement on all auction participants, including small businesses. However, we have previously urged parties to report communications prohibited under Section 1.2105(c)(1) to the Commission,¹¹ and parties have done so in the past.¹² Thus, we view the adoption of this requirement as consistent with conduct that the Commission has urged on applicants in the past. Further, the amendment to Section 1.2105(c)(1) that we adopt today to prohibit auction applicants from discussing the bids or bidding strategies of competing applicants merely clarifies the text of the rule to make it consistent with the interpretation we announced in the *Western PCS Order*.¹³ Nonetheless, we recognize that these amendments to our anti-collusion rule impose increased duties and present the possibility of sanctions against auction applicants, including small entities, that do not comply with the revised rules.

Based on past experience, however, we do not believe the impact of these amendments on small businesses will be significant. In all of our auctions held to date except for the auctions for broadcast licenses, 1,513 out of a total of 1,881 qualified bidders have been small businesses as that term has been

⁶ SBA Comments at 1.

⁷ *Id.* at 1-2.

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *Western PCS BTA 1 Corporation, Memorandum Opinion and Order*, 14 FCC Rcd 21571, 21577, ¶ 18 (1999) ("*Western PCS Order*").

¹² See, e.g., Letter from Carl W. Northrop, counsel for WNP Communications, Inc. to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (dated April 14, 1998).

¹³ See *Western PCS Order*, 14 FCC Rcd at 21574, ¶¶ 7-9.

defined under rules adopted by the Commission for specific services,¹⁴ but only two forfeitures have been assessed in all, *i.e.*, against businesses of all sizes. Thus, despite the large number of small businesses that have participated in the auctions program since its inception, an extremely small percentage of auction participants have made or received communications that have violated the anti-collusion rule. We believe that the vast majority of applicants comply with the Commission's rules and do not engage in prohibited behavior, and that this will continue to be the case. Therefore, we expect these amendments to have little impact on small businesses generally. The amended rules will deter the few that would try to gain an advantage unfairly by creating an asymmetry of information that is detrimental to other participants.

Moreover, while we acknowledge that the reporting requirement we adopt today constitutes a potential burden, we expect the actual burden to be slight. In addition to the fact that we expect there to be few instances of prohibited communications to be reported, we note that the new filing requirement will place a *de minimis* reporting burden upon auction participants because it merely requires those who make or receive a communication of bids or bidding strategies prohibited by Section 1.2105(c)(1) to send a letter to the Secretary. Furthermore, Section 223 of the SBREFA allows agencies to reduce or eliminate fines or other enforcement actions taken against small entities. Indeed, Section 223 requires agencies to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity. Under appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities.¹⁵ In amending Section 1.80 of its rules in 1997 to incorporate guidelines for assessing forfeitures, the Commission also made clear that its forfeiture policies are consistent with this approach.¹⁶ We cannot in good conscience alter the uniform standards of behavior required of all auction participants, even if to do so might assist small businesses.

¹⁴ As provided in Section 1.2110(c)(1) of the Commission's rules, and in conformity with the Small Business Act and the regulations of the Small Business Administration, the Commission establishes small business definitions for purposes of its auctions on a service-specific basis. *See* 47 C.F.R. § 1.2110(c)(1); 15 U.S.C. § 632(c)(2)(C); 13 C.F.R. § 121.902(b). *See also* note 19, *infra*. Statistics for broadcast license auctions are not available.

¹⁵ *See* 5 U.S.C. § 601 Note.

¹⁶ The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, *Report and Order*, 12 FCC Rcd 17087 (1997). The Commission stated specifically:

The Commission intends to continue its policy of being sensitive to concerns of small entities who may not have the ability to pay a particular forfeiture amount or the ability to submit the same kind of documentation to corroborate the inability to pay. This is consistent with section 503(b)(2)(D) of the Communications Act and section 1.80(b)(4) of our rules, which provides that the Commission will take into account ability to pay in assessing forfeitures, and with our longstanding case law.

Id. at 17107, ¶ 44. The Commission further explained:

Our existing policies, as reflected in our precedent, and as retained here, comply with Section 223 of SBREFA. Warnings, rather than forfeitures, may continue to be appropriate in particular cases involving small businesses or others. . . . Under Section 503(b)(2)(D) of the Communications Act and section 1.80(b)(4) of our rules, we will continue to consider inability to pay a relevant factor in assessing forfeitures.

Id. at 17109, ¶ 52.

Public confidence in the fairness of our auction process could be undermined if all entities were not subject to the same standards of behavior. However, in light of the provisions of the SBREFA and for the other reasons discussed above, we conclude that the amendments we adopt today are not likely to have a significant economic impact on a substantial number of small entities.

We also believe generally that any burden associated with these rule amendments is outweighed by the advantages presented by a fair auction process that does not allow some bidders to gain an advantage over others through collusive behavior. Thus, we find that the rule amendments that we adopt today will benefit all bidders, including small businesses. First, we believe that the amendments will enhance the competitiveness and fairness of our auction process to the benefit of small auction applicants. Second, under the amendments, general confidence in the integrity of our auctions should increase. In short, we conclude that the public policy benefits of the amendments substantially outweigh the minimal impact the reporting requirement imposes on small entities.

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply:

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.¹⁷ The RFA generally defines the term “small entity” as having the same meaning as the terms “small organization,” “small business,” and “small governmental jurisdiction.”¹⁸ The term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁹ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. A small organization is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”²⁰ Nationwide, as of 1992, there were approximately 275,801 small organizations.²¹ “Small governmental jurisdiction” generally means “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.”²² As of 1992, there were approximately 85,006 such jurisdictions in the United States.²³ This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000. The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we

¹⁷ 5 U.S.C. § 603(b)(3).

¹⁸ 5 U.S.C. § 601(6).

¹⁹ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

²⁰ 5 U.S.C. 601(4).

²¹ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

²² 5 U.S.C. § 601(5).

²³ 1992 Census of Governments, U.S. Bureau of the Census, U.S. Department of Commerce.

estimate that 81,600 (91 percent) are small entities. According to SBA reporting data, there were 4.44 million small business firms nationwide in 1992.²⁴

The amendments to Section 1.2105(c) adopted in this Seventh Report and Order will apply to all entities that apply to participate in Commission auctions, including small entities. The number of entities that may apply to participate in future Commission auctions is unknown. The number of small businesses that have participated in prior auctions has varied. As stated previously, small businesses, as defined under the Commission's rules, have accounted for 1,513 out of a total of 1,881 qualified bidders in all prior auctions, not including broadcast auctions.²⁵ Given these statistics, we expect a large percentage of participants in our auctions program generally to be small businesses in the future, although this may not be the case in each individual auction.

D. Description of Reporting, Recordkeeping and Other Compliance Requirements:

As a result of the actions taken in this Seventh Report and Order, disseminators and recipients of communications prohibited by Section 1.2105(c)(1) will be required to report such communications to the Commission, in writing, within five business days after the communication occurs.²⁶

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives, among others: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.²⁷ In this Seventh Report and Order, we amend Section 1.2105(c) to require auction applicants that make or receive a communication of bids or bidding strategies prohibited by Section 1.2105(c)(1) of the Commission's rules²⁸ to report such a communication in writing to the Commission immediately, but in no case later than five business days after the communication occurs. We considered, but decided against, imposing a shorter deadline for such reports. We believe that five business days will lessen the burden of the reporting requirement, particularly for small businesses.²⁹ We also considered not applying the requirement to recipients of prohibited communications. However, we believe that recipients of prohibited communications are more likely to report such communications and thus serve as an important deterrent against collusive behavior. Moreover, we believe that recipients of prohibited communications must be held to the same enforcement standard as initiators, because a recipient may derive substantial unfair

²⁴ See note 21, *supra*.

²⁵ See note 14, *supra*.

²⁶ See para. 18, *supra*.

²⁷ 5 U.S.C. §§ 603(c)(1)-(4)

²⁸ 47 C.F.R. § 1.2105(c)(1).

²⁹ See para. 18, *supra*.

benefit from obtaining details of a competitor's bids or bidding strategy.

Report to Congress: The Commission will send a copy of the Seventh Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the Seventh Report and Order, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Seventh Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

APPENDIX B**Final Rules**

Subpart Q of Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 – PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

1. **Authority citation:** Sections 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. Section 1.2105 is amended by revising paragraph (c)(1) to read as follows:

§ 1.2105 Bidding application and certification procedures; prohibition of collusion.

* * * * *

(c) *Prohibition of collusion.*

(1) Except as provided in paragraphs (c)(2), (c)(3) and (c)(4) of this section, after the 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 applicants' 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).

3. Section 1.2105 is amended by redesignating current paragraph (c)(6) as new paragraph (c)(7), and by adding new paragraph (c)(6) to read as follows:

(6) Any applicant that makes or receives a communication of bids or bidding strategies prohibited under paragraph (c)(1) shall report such communication in writing to the Commission immediately, and in no case later than five business days after the communication occurs. Such reports shall be filed with the Office of the Secretary, and a copy shall be sent to the Chief of the Auctions and Industry Analysis Division, Wireless Telecommunications Bureau.

* * * * *