

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

In the Matter of)	
)	File No. EB-02-IH-0768
STAR WIRELESS, LLC)	NAL/Acct. No. 00332080021
)	FCC Account ID No. 0441724048
and)	FRN No. 0007043409
)	
NORTHEAST COMMUNICATIONS OF WISCONSIN, INC.)	File No. EB-02-IH-0768
)	NAL/Acct. No. 200332080022
)	FCC Account ID No. 0442010372
Applicants for C Block Facilities in the 710-716 and 740-746 MHz Bands)	FRN No. 0002706190

ORDER ON REVIEW

Adopted: May 2, 2007

Released: May 4, 2007

By the Commission:

I. INTRODUCTION

1. In this *Order On Review*, we grant in part and otherwise deny an Application for Review¹ filed by Star Wireless, LLC (“Star”) and a Petition for Reconsideration² filed by Northeast Communications of Wisconsin, Inc. (“Northeast”).³ The *Application* and *Petition* were filed in response to forfeiture orders⁴ issued by the Enforcement Bureau (“Bureau”) that imposed a monetary forfeiture in the amount of \$100,000 against each company for its willful violation of section 1.2105(c) of the

¹ See Application For Review, filed by Mark J. Tauber, Esquire and D. Peter Valiotis, Esquire, counsel for Star Wireless, LLC, on October 22, 2004 (“*Application*”). See also Letter from Paul W. Jamieson, counsel for Star, to Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated September 26, 2003 (“*Star Response*”).

² See Petition For Reconsideration, filed by Thomas Gutierrez, Esquire, counsel for Northeast, on October 22, 2004 (“*Petition*”). See also Response To Notice of Apparent [sic] Liability, filed by Thomas Gutierrez, Esquire, counsel for Northeast, on September 26, 2003 (“*Northeast Response*”) (together with *Star Response*, the “*Responses*”).

³ 47 C.F.R. §1.106(a)(1) allows a Bureau to refer to the Commission petitions requesting reconsideration of final actions taken by the Bureau pursuant to delegated authority. Because Star’s *Application* requires Commission-level review, the Bureau has referred Northeast’s *Petition* to the Commission and we shall also treat it as an Application for Review.

⁴ See *Northeast Communications of Wisconsin, Inc.*, Forfeiture Order, 19 FCC Rcd 18635 (Enf. Bur. 2004) (“*Northeast Forfeiture Order*”); see also *Star Wireless, LLC*, Forfeiture Order, 19 FCC Rcd 18626 (Enf. Bur. 2004) (“*Star Forfeiture Order*”) (together, the “*Forfeiture Orders*”). See also *Northeast Communications of Wisconsin, Inc.*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 17672 (Enf. Bur. 2003) (“*Northeast NAL*”); *Star Wireless, LLC*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 17648 (Enf. Bur. 2003) (“*Star NAL*”) (each an “*NAL*”, together the “*NALs*”). Because both cases involve the same underlying facts, we have consolidated our decision regarding each licensee in this *Order*.

Commission's rules, which prohibits auction collusion.⁵ Although we uphold the Bureau's finding of liability for both Star and Northeast, we reduce the forfeiture for each licensee to \$75,000 because of their history of compliance with Commission rules.

II. BACKGROUND

2. The facts that formed the basis for the forfeitures are set forth in detail in the *NALs* and the *Forfeiture Orders* issued individually to Northeast and Star.⁶ A brief discussion of the facts, however, is appropriate. Northeast and Star each filed applications to bid for wireless licenses in the same geographic license areas 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").⁷ In anticipation of the auction, the Wireless Telecommunications Bureau issued several Public Notices specifically warning auction applicants against violating the anti-collusion rule by communicating about bids, bidding strategies or settlements with another applicant seeking to bid for licenses in the same geographic license areas, unless the applicants identified each other in their applications as having entered into agreements under section 1.2105(a)(2)(viii).⁸ The Public Notices also stated that this prohibition applied to all applicants between the deadline for filing a short-form application and the deadline for post-auction down payments.⁹

⁵ 47 C.F.R. § 1.2105(c) (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)." 47 C.F.R. § 1.2105(c)(1).

⁶ See *Northeast Forfeiture Order*, 19 FCC Rcd at 18635-36, ¶¶ 2-3. See also *Northeast NAL*, 18 FCC Rcd at 17672-79, ¶¶ 2-17; *Star Forfeiture Order*, 19 FCC Rcd at 18626-27, ¶¶ 2-3; *Star NAL*, 18 FCC Rcd at 17648-55, ¶¶ 2-16. These documents are incorporated herein by reference.

⁷ See *Northeast NAL*, 18 FCC Rcd at 17676, ¶¶ 8-9. See also *Star NAL*, 18 FCC Rcd 17652-53, ¶¶ 8-9.

⁸ See *Auction of Licenses in the 698-746 MHz Band Scheduled for June 19, 2002*, Public Notice, DA 02-563 at 8 (WTB rel. March 20, 2002) ("*March 20 Procedures Public Notice*"); *Auction of Licenses for 698-746 MHz Band: Status of FCC Form 175 Applications to Participate in the Auction*, Public Notice, DA 02-1213 at 4-5 (WTB rel. May 24, 2002) ("*May 24 Status Public Notice*"); *Auction of Licenses for 698-746 MHz Band: 128 Qualified Bidders*, Public Notice, DA 02-1346 at 7 (WTB rel. June 7, 2002) ("*June 7 Qualified Bidders Public Notice*"); and *Auction No. 44- Revised Qualified Bidder Notification*, Public Notice, DA 02-1933 at 8 (WTB rel. August 7, 2002) ("*August 7 Revised Qualified Bidders Public Notice*"); 47 C.F.R. § 1.2105(a)(2)(viii).

⁹ See, e.g., *March 20 Procedures Public Notice* at 7 ("[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."). Further, the *March 20 Procedures Public Notice* directed applicants to a list of precedents applying the anti-collusion rule, several of which explicitly applied the rule to applicants that subsequently did not bid in the auction (See, e.g., 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); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fourth 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)); *May 24 Status Public Notice* at 4 ("The Bureau has previously stated that auction applicants who have applied for licenses in any of the same geographic areas, and who are also applicants for licenses in the same or competing services must affirmatively avoid all discussions with each other that affect, or in their reasonable assessment have the potential to affect their bidding or bidding strategy. For Auction No. 44, this prohibition

(continued....)

3. Star made its upfront payment and bid in the auction.¹⁰ Northeast did not make an upfront payment and was not allowed to bid in the auction.¹¹ On August 28, 2002, David G. Behenna, Star's authorized bidder and the President of PCSGP, Inc., Star's operating manager,¹² left a voicemail message for Patrick Riordan, a shareholder, officer, director of and authorized bidder for Northeast,¹³ requesting that Mr. Riordan return his call if Northeast was not participating in Auction 44. The next day Mr. Riordan returned the call and spoke to Mr. Behenna. During their conversation, Mr. Riordan identified and discussed with Mr. Behenna Northeast's interest in five Wisconsin markets for which licenses were to be auctioned in Auction No. 44. Prior to that conversation, Star had bid only on licenses in the California and Florida markets. Subsequent to that conversation, Star ceased bidding on those markets and began bidding on markets at or near the geographical areas of interest to Northeast. Star won licenses in three Wisconsin markets located near Green Bay, in which Northeast had expressed its interest, and one Iowa market located adjacent to two markets for which an affiliate of Northeast is a Commission licensee.¹⁴

4. In September 2002, the Bureau received letters from counsel for Star and Northeast regarding the communications between these applicants during the auction.¹⁵ As a consequence, the Bureau investigated the communications and, on August 27, 2003, proposed forfeitures against Star and Northeast, finding that they had willfully violated the anti-collusion rule while they were applicants in Auction No. 44.¹⁶ Star and Northeast responded to the *NALs*,¹⁷ citing various arguments in support of their claim that they did not violate the anti-collusion rule, but on September 22, 2004, the Bureau rejected that contention and affirmed its earlier holdings.¹⁸ Star and Northeast then filed the *Application* and *Petition* challenging the Bureau's findings.

III. DISCUSSION

5. Star and Northeast argue that: (1) Northeast was not an "applicant" at the time of the communications at issue;¹⁹ (2) the anti-collusion rule is too vague to be enforced and has been

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became effective at the short-form application filing deadline on Wednesday, May 8, 2002, and will end on the post-auction down payment deadline, which will be announced in a future public notice.").

¹⁰ See *Auction of Licenses in the 698-746 MHz Band Scheduled for June 19, 2002*, Public Notice, DA 02-1933 at 6 (WTB rel. March 20, 2002) ("*Revised Qualified Bidder Notification*").

¹¹ See *Northeast NAL*, 18 FCC Rcd at 17677, ¶ 10.

¹² See *id.* at 17676, ¶ 8.

¹³ See *id.* at 17676, ¶ 9.

¹⁴ See *id.* at 17678, ¶¶ 13-15, 19.

¹⁵ See Letter from E. Ashton Johnson, Esquire, and Paul W. Jamieson, Esquire, counsel for Star, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated September 6, 2002 (the "Star Notification Letter"); Letter from Timothy E. Welch, Esquire, counsel for Northeast, to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated September 6, 2002 (the "Northeast Notification Letter").

¹⁶ See *NALs*.

¹⁷ See Response To Notice of Apparent Liability, filed by Thomas Gutierrez, Esquire, counsel for Northeast, on September 26, 2003; Letter from Paul W. Jamieson, counsel for Star, to Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated September 26, 2003.

¹⁸ See *Forfeiture Orders*.

¹⁹ See *Application* at 7-10; *Petition* at 3-7.

inconsistently applied;²⁰ (3) these enforcement proceedings are inconsistent with the plain language and intent of the anti-collusion rule;²¹ (4) the anti-collusion rule is unconstitutional;²² (5) the Enforcement Bureau lacks jurisdiction to render a forfeiture order in this case;²³ and, (6) the forfeiture amount imposed in the *Forfeiture Orders* should be reduced.²⁴ Each allegation is addressed below.²⁵ Additionally, we incorporate by reference our prior analyses responding to these allegations.²⁶

A. The Anti-Collusion Rule Applied To Northeast at the Time of the Communications

6. Northeast and Star continue to argue that they did not violate the anti-collusion rule because Northeast was not an applicant at the time of the communications at issue. The Bureau addressed at length both parties' arguments regarding this issue in the *Forfeiture Orders*²⁷ so we will address them only briefly here. Star and Northeast claim that Northeast's short-form application to participate in the auction was incomplete because Northeast did not pay the upfront money required to bid in the auction. They contend that, as a consequence, Northeast was never an "applicant" in the auction. This argument is without merit. Northeast timely submitted a short form application to participate in Auction No. 44. Thus, Northeast was an "applicant" in the auction, as that term is defined by sections 1.2105 of the Commission's rules and as used in the Public Notices associated with the auction.²⁸ Neither the Commission's rules nor the Public Notices regarding Auction No. 44 condition the term "applicant" upon the outcome of the Commission's review of submitted applications or its receipt of an upfront payment.

7. Northeast also contends that its application was automatically and immediately dismissed when it failed to make the auction's required upfront payment and as a consequence, it no longer remained an applicant in the auction. Although the Commission's rules state that an applicant that does not submit the auction's minimum upfront payment "will be ineligible to bid" and the applicant's

²⁰ See *Petition* at 3, 7-10.

²¹ See *Application* at 10-12; *Petition* at 11-13.

²² See *Petition* at 13-14.

²³ See *Petition* at 7.

²⁴ See *Application* at 13-15; *Petition* at 15-16.

²⁵ Northeast also alleges that the *Northeast Forfeiture Order* did not address its prior argument that section 1.2105(c) is invalid because it did not display a valid control number pursuant to section 3512 of the Paperwork Reduction Act. See *id.* at 14-15. Northeast is mistaken. That allegation was addressed in the *Northeast Forfeiture Order* and need not be addressed here. See *Northeast Forfeiture Order*, 19 FCC Rcd at 18642, ¶ 14. See also *Geotek Communications, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 15010 (2001) (summarily denying Application for Review that did not present any new information not previously considered and did not allege an erroneous finding of material fact).

²⁶ See *Northeast Forfeiture Order*, 19 FCC Rcd at 18638, ¶ 5; *Star Forfeiture Order*, 19 FCC Rcd 18626 ¶¶ 2-16.

²⁷ See *Northeast Forfeiture Order*, 19 FCC Rcd at 18638-39; *Star Forfeiture Order*, 19 FCC Rcd at 18629.

²⁸ 47 C.F.R. §§ 1.2105, 1.2106 (Sections 1.2105 and 1.2106 of the Commission's rules are provisions of "Subpart Q – Competitive Bidding Proceedings," which implement section 309(j) of the Act. These rules serve a mutual purpose and, accordingly, should be interpreted so as to be consistent with each other. Both rules continue to refer to those submitting a short-form application as "applicants" even though the applicants may not have made an upfront payment. See *Northeast NAL*, 18 FCC Rcd at 17675, ¶6. See also section 1.2105(c)(7)(1) of the Commission's rules ("The term applicant shall include all controlling interests in the entity submitting a short-form application to participate in an auction (FCC Form 175) . . ."); section 1.2105(c) of the Commission's rules ("[A]fter 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 . . .").

application “will be dismissed,”²⁹ that language does not circumscribe the definition of applicant for purposes of the anti-collusion rule contained in section 1.2105.³⁰ Moreover, the language of section 1.2106(c) indicates future, not immediate or automatic, action. Because the dismissal requires future action by the Commission, the rule is not self-effectuating.³¹ Similarly, the dismissal provisions of sections 24.203(b) and (c) of the Commission’s rules,³² upon which Star and Northeast rely, are not self-effectuating because the termination provisions are not solely contained in the rule. Instead, sections 1.946(c) and 1.955(a)(2) of the Commission’s rules³³ specifically provide for the automatic termination of a licensee’s license for violation of section 24.203.

8. Northeast claims that an auction *applicant* must be able to bid in the auction and, since it did not make the required upfront payment and therefore was not allowed to bid, it was not an auction applicant. But sections 1.2105 and 1.2106 of the Commission’s rules consistently refer to a person or entity that submits a short form application to participate in an auction as an auction “applicant.” At no point does either rule suggest that those who do not make the upfront payment are no longer “applicants.” Pursuant to these sections,³⁴ applicants who submit a completed short form application and the required upfront payment are applicants qualified to bid in the auction. Those whose applications are not accepted and/or who do not submit the upfront payment³⁵ are applicants that failed to qualify to bid in the auction. In either instance, the parties remain auction “applicants.”³⁶

9. Finally, Northeast argues that it could not violate the anti-collusion rule by discussing “bids” or “bid strategies” because it was not a “bidder” or “competing applicant” in the auction and thus had no bids or bidding strategies to discuss. To the contrary, Northeast became a “competing applicant” with Star when it submitted a short-form application specifying its intent to bid on the same markets chosen by Star. Additionally, the plain language of the anti-collusion rule clearly states that applicants are prohibited from discussing not only their own bids and bidding strategies but also those of any other applicants that applied to bid in the same auction markets.³⁷ The Commission repeatedly has explained that the anti-collusion rule applies to all applicants that file a short-form application, regardless of whether

²⁹ 47 C.F.R. § 1.2106(c).

³⁰ The most reasonable interpretation of the anti-collusion rule in section 1.2105(c) is that any party or entity that has timely submitted a short-form auction application for a Commission auction (including certain interest holders in such entity as specifically provided in section 1.2105(c)(7)) is deemed an auction applicant for purposes of the rule. Pursuant to the rule, that applicant status continues until the post-auction down payment deadline.

³¹ The only reasonable interpretation of Section 1.2106(c) is that an applicant’s failure to submit an upfront payment in compliance with that rule makes that applicant ineligible to bid and its application subject to dismissal when no longer relevant for purposes of the auction, *i.e.*, when the application is rendered moot by the completion of the auction process at the post-auction down payment deadline and/or by the winning bidders’ filing of long-form applications with respect to licenses they won.

³² 47 C.F.R. §§ 24.203(b) and (c) (failure of any licensee to meet the build-out construction requirements for a station will result in forfeiture of the license).

³³ 47 C.F.R. §§ 1.946(c), 1.955(a)(2).

³⁴ 47 C.F.R. §§ 1.2105, 1.2106.

³⁵ *See* 47 C.F.R. § 1.2106(c).

³⁶ The rules of statutory construction dictate that, where possible, statutory provisions should be interpreted so as to be consistent with each other. *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (applying “the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning”).

³⁷ 47 C.F.R. § 1.2105(c) (prohibiting competing applicants from discussing “their own, or each other’s, or any other competing applicants’ bids or bidding strategies”).

they qualify to bid in the auction.³⁸ Northeast violated the anti-collusion rule by discussing with Star the markets for which both had applied to bid and by collaborating with Star with respect to Star's bidding strategy in the auction.

B. The Anti-Collusion Rule Is Not Vague or Unenforceable

10. Northeast argues that prior Commission decisions regarding its anti-collusion rule have rendered the rule too vague to be enforceable. Specifically, Northeast claims that its actions are no worse than those permitted by the Commission in the *Mercury*³⁹ and *High Plains*⁴⁰ cases. In those cases, Mercury and High Plains were competing bidders in an auction in which Mercury used trailing bid numbers to indicate the markets in which it was interested and to deter would-be competitors such as High Plains from bidding on a particular license. The Commission found such "reflexive bid signaling" violated the anti-collusion rule but did not merit sanction in that case because the auction participants had not received prior notice that such bidding activities were unlawful.⁴¹ Northeast argues that the Commission's grant of licenses in that instance sends a "garbled" message to applicants such as Northeast, making the anti-collusion rule too vague to be enforced.⁴²

11. Northeast's reliance on the *Mercury* and *High Plains* decisions is misplaced. While both cases also concern application of the Commission's anti-collusion rule, their facts distinguish them from the instant case. Star and Northeast secretly discussed Northeast's market preferences and Star's bids and bidding strategies. Such activities are specifically prohibited by the plain language of the anti-collusion rule. In contrast, the Commission determined that the reflexive bid-signaling in *Mercury* and *High Plains* was not plainly prohibited at the time of the violations. Moreover, the *Mercury* decision specifically provided notice to applicants in future auctions that bid signaling violates the anti-collusion rule and

³⁸ See e.g., *August 7 Revised Qualified Bidders Public Notice* at 5-6 ("Prohibition of Collusion. All parties that submitted short-form applications to participate in Auction No.44, including but not limited to qualified bidders (regardless of whether they elected to depart from the auction) . . . remain subject to the Commission's anti-collusion rule until the post-auction down payment deadline." See also *Northeast NAL*, 18 FCC Rcd at 17674, note 11. An applicant retains its "applicant" status even if it does not qualify to bid because it failed to make an upfront payment or elected to depart the auction. See also note 9, *supra*).

³⁹ Northeast cites *Mercury PCS II, LLC*, Notice of Apparent Liability, 12 FCC Rcd 17970 (1997) (\$650,000 proposed forfeiture). But see *Mercury PCS II, LLC*, Memorandum Opinion and Order, 13 FCC Rcd 23755 (1998) ("Mercury") (rescinding the proposed forfeiture); *Mercury PCS II, LLC*, Memorandum Opinion and Order, 13 FCC Rcd 5756 (1997) (conditional grant of licenses to Mercury), *reconsideration denied in part by Mercury PCS II, LLC*, Memorandum Opinion and Order, 12 FCC Rcd 18093 (1997), *review denied by Mercury PCS II, LLC*, Memorandum Opinion and Order, 15 FCC Rcd 9654 (2000), *affirmed by High Plains Wireless, LP v. FCC*, 276 F.3d 599 (D.C. Cir. 2002).

⁴⁰ *High Plains Wireless, LP v. FCC*, 276 F.3d 599, 606-607 (D.C. Cir. 2002) ("*High Plains*") (affirming the Commission's award of licenses to Mercury, the court reasoned that "the [anti-collusion] rule probably did prohibit Mercury's conduct," but "whether reflexive bidding violated the rule against collusion appears to have been an unsettled – indeed, an unasked – question before the DEF auction. In this circumstance it was not unreasonable for the Commission to have deemed the rule ambiguous with respect to whether reflexive bidding was prohibited."). See also *Mercury PCS II, LLC*, Memorandum Opinion and Order, 13 FCC Rcd 5756 (1997), *reconsideration denied in part by Mercury PCS II, LLC*, Memorandum Opinion and Order, 12 FCC Rcd 18093 (1997), *review denied by Mercury PCS II, LLC*, Memorandum Opinion and Order, 15 FCC Rcd 9654 (2000), *affirmed by High Plains*.

⁴¹ *Mercury*, 13 FCC Rcd at 607; *High Plains*, 276 F.3d at 606-07.

⁴² *Petition* at 11.

thereafter would be subject to enforcement action.⁴³ Thus, contrary to Northeast's assertions, these cases send a consistent, not garbled, message to auction participants.

12. Similarly without merit is Northeast's related allegation that the Commission intends to *facilitate* collusion by identifying to auction participants the bidders and their bids at the end of each bidding round.⁴⁴ It is the nature of an auction that bidders bid against each other. Informing bidders of competing bids so that they have an opportunity to assess their bidding strategy before the next bidding round is consistent with the processes the Commission established for an "open" auction.⁴⁵ Doing so does not mean that the Commission intends to facilitate collusion by the bidders. To the contrary, the Commission vigorously attempts to thwart bidder collusion by defining collusive conduct for auction applicants and repeatedly notifying them in public notices related to the auction that collusion is prohibited; by monitoring auction bidding for suspicious bidding activity; and by diligently enforcing the rules and regulations enacted to prohibit collusive behavior. It is at all times the goal of the Commission to protect the integrity of its auction processes.

C. The Bureau's Rulings Are Consistent With the Language and Intent of the Rule

13. Star and Northeast also argue that the Commission's application of the anti-collusion rule is inconsistent with the language and intent of the rule. Northeast suggests that the standard used to make a finding in this case is based on a "staff clarification"⁴⁶ that is inconsistent with the existing regulations, but it does not identify the "staff clarifications" that were allegedly used. As noted previously, it is the plain language of the anti-collusion rule that prohibits Northeast's and Star's conduct in this case, not a "staff clarification."

14. To support the point that prior notice of an agency's rule's requirements must be given before a party can be sanctioned for violating the anti-collusion rule, Northeast cites *High Plains, Radio Athens, Trinity Broadcasting of Florida*, and *U.S. v Chrysler Corp.*⁴⁷ Unlike the facts presented in those cases, but consistent with the principles enunciated therein, Northeast received clear notice, from both the plain language of the anti-collusion rule itself and the explanations and citations contained in the Public Notices released in conjunction with Auction 44, that it would remain an auction applicant until the post-auction down payment deadline and that it was prohibited from discussing or collaborating regarding bids or bidding strategy with any competing applicant until that time. Citing various cases, Northeast incorrectly classifies the Commission's prior decisions regarding the anti-collusion rule as "substantive" interpretations that require a notice and comment proceeding.⁴⁸ However, the cases cited do not support

⁴³ The *Mercury* decision gave bid signalers the clear notice required by *Satellite Broadcasting Company v. FCC*, 824 F.2d 1 (D.C. Cir. 1987) (because FCC failed to give clear notice of where application should be filed, the court reversed FCC's dismissal of application that was filed at wrong location).

⁴⁴ *Petition* at 9-10.

⁴⁵ See *High Plains*, 276 F.3d at 603.

⁴⁶ *Petition* at 11-13.

⁴⁷ See *High Plains*, 276 F.3d at note 39; *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 2000) ("When the sanction is as drastic as dismissal [of an application] without any consideration whatsoever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration."); *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 631 (D.C. Cir. 2000) (finding the FCC's rule provided insufficient notice of its requirements to justify dismissal of petitioner's application); *U.S. v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998) (holding that an automobile manufacturer cannot be found to be non-compliant with a safety standard if the National Highway Traffic Safety Administration failed to give fair notice of what was required by the standard).

⁴⁸ See *Response* at 13 (citing *Air Transport Ass'n of America, Inc. v. FAA*, 291 F.3d 49 (D.C. Cir. 2002) (notice and comment rulemaking is required if agency's interpretation of rule adopts a new position inconsistent with existing (continued....)

such a finding based upon the facts presented here. Unlike the circumstances presented in *Air Transport* and *National Family*, the Commission's interpretation of the anti-collusion rule in this case is not a new one. Rather, it follows a long line of interpretive decisions that consistently have been based upon the plain language of the rule. The *Orengo* case is most analogous to this one because both concern a governmental agency's interpretation of its own rules. As in *Orengo*, the Commission is not required to provide a notice and comment proceeding under the circumstances presented.

15. Northeast became an "applicant" in the auction when it timely submitted a short-form application. Northeast became a "competing applicant" of Star when, as indicated on its short-form application, it chose to bid for licenses "in any of the same geographic license areas"⁴⁹ chosen by Star on its application. Even though Northeast did not submit its upfront payment and so did not qualify to bid in the auction, it remained an applicant for purposes of the anti-collusion rule, pursuant to section 1.2105(c), because it was an applicant after the short-form filing deadline. Despite Northeast's allegations to the contrary, such an interpretation is consistent with the plain language of the anti-collusion rule and the principles set forth in the *Trinity*⁵⁰ case upon which it relies.⁵¹ Additionally, auction applicants were repeatedly reminded in public notices related to the auction of the consequences of violating the anti-collusion rule and that they remained auction applicants for purposes of the anti-collusion rule until the post-auction down payment deadline.⁵² Coupled with the clear language of the anti-collusion rule, such notifications further satisfy the notice requirements discussed in the *Satellite Broadcasting*⁵³ decision.

16. Similarly, Star claims that "the Bureau failed to apply the anti-collusion rule in a manner consistent with the original intent and public policy considerations underlying the rule."⁵⁴ This argument appears to hinge on the use of the word "bidders," rather than "applicants," in the Commission's discussion of the rule in the *Fifth Report and Order*.⁵⁵ But soon after the release of that order the Commission clarified its intent and the anti-collusion rule's language by substituting the term "applicant" for the term "bidder."⁵⁶ Thus, communications regarding bids or bidding strategies are prohibited

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regulations); *National Family Planning and Reproductive Health Association, Inc. v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992) (distinguishing "substantive" and "interpretive" rules and stating "for purpose of determining whether notice and comment rule making is required under the Administrative Procedure Act, a "legislative" or "substantive rule" is one that does more than simply clarify or explain a statutory term or confirm a regulatory requirement or maintain consistent agency policy"); and *Orengo Caraball v. Reich*, 11 F.3d 186, 196 (D.C. Cir. 1993) ("*Orengo*") (discussing the characteristics of "interpretive" rules, and finding the Department of Labor's risk of loss test to be an interpretation of its regulations, exempt from the notice and rule making requirements of the Administrative Procedure Act ("APA")).

⁴⁹ See 47 C.F.R. § 1.2105(c).

⁵⁰ *Trinity*, 211 F.3d at 625, 628 (although the court accords the Commission's interpretation of its own regulations a "high level of deference, accepting it unless it is plainly wrong," it states that the Commission must give "clear notice" of a rule's meaning before it can sanction a party for its "failure to comply with the rule's requirements").

⁵¹ See *Petition* at 12.

⁵² See *Northeast Forfeiture Order*, 19 FCC Rcd at 18638, ¶ 6.

⁵³ *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3-4 (D.C. Cir 1987) ("The Agency's interpretation is entitled to deference but if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation.").

⁵⁴ *Application* at 10.

⁵⁵ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532 (1994), at ¶ 91.

⁵⁶ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Memorandum Opinion and Order, 9 FCC Rcd 7684, 7687 (1994) ("*Implementation MO&O*").

between auction *applicants* that *have applied to bid* on licenses in any of the same geographic areas.⁵⁷ The Commission also stated that the purpose of the anti-collusion rules is “to protect the integrity and robustness of our competitive bidding process.”⁵⁸ We adopt the rationale of the *Star NAL*⁵⁹ and *Star Forfeiture Order*,⁶⁰ and find that the Bureau’s interpretation of the anti-collusion rule in this case is consistent with the language of the rule itself and with the rule’s underlying intent.

D. The Anti-Collusion Rule Is Constitutional

17. Northeast also claims that the anti-collusion rule’s prohibition against the collusive communications in this case violates the First Amendment as a vague and overbroad restriction on freedom of speech. It should be noted, however, that Northeast’s new allegation is based on a false premise – that its communications with Star occurred “after it exited” the auction.⁶¹ As discussed herein and in the *Northeast NAL* and *Northeast Forfeiture Order*, Northeast remained an auction applicant at the time of the communications at issue.

18. Contrary to Northeast’s assertions, the anti-collusion rule is not vague or inconsistent and does not violate the United States Constitution. Rather, it is a precisely drawn means of serving a compelling governmental interest, to wit, the integrity of the Commission’s auctions. The anti-collusion rule is neither vague nor overly broad. It does not prohibit all communications between applicants or prohibit any communications regarding the markets up for bid between applicants that have previously entered into, and reported on their short-form applications, bidding agreements with each other. Instead, it is narrowly drawn to prohibit competing applicants from discussing or collaborating during the auction regarding bids, bidding strategies and settlements related to licenses for which both parties wish to bid. This prohibition exists only during the time period between the short-form application filing deadline and the post-auction down payment deadline. Further, auction applicants were given ample notice of the anti-collusion rule⁶² and therefore knew of this prohibition when they submitted their short-form applications to participate in the auction.

19. This case presents a good example of a reason the Commission clearly prohibits certain communications under the anti-collusion rule: an applicant that is not qualified to bid in an auction

⁵⁷ *Id.* See also *Amendment of Part 1 Of The Commission's Rules - Competitive Bidding Procedures*, Seventh Report and Order, 16 FCC Rcd 17546 (2001) (“so that [the anti-collusion rule’s] 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*”) (emphasis added).

⁵⁸ See *Implementation MO&O*, 9 FCC Rcd 7684 at ¶ 10.

⁵⁹ *Star NAL*, 18 FCC Rcd at 17657, ¶ 20 (“Star learned of Northeast’s interest in the markets which Mr. Riordan identified for Mr. Behenna and, thus, knew about potential post-auction demand for the licenses in those markets. At the same time, Northeast took advantage of an opportunity to influence Star’s auction plan and strategy for its own purposes. In effect, Northeast was able to participate in the auction from which it had been disqualified to do so without providing notice to other applicants that might wish to compete against it. Indeed, Mr. Riordan’s disclosure gave Star exclusive access to information concerning Northeast’s interest in particular licenses that were unavailable to other auction participants bidding on the Wisconsin and Iowa markets in question.”)

⁶⁰ *Star Forfeiture Order*, 18 FCC Rcd at 18632, ¶ 11 (“it is clear from the parties’ subsequent communication that Star’s Mr. Behenna contacted Northeast’s Mr. Riordan on August 28, 2002, in order to initiate a discussion concerning bidding strategy. Nothing that Star has presented in its Response leads us to any other conclusion. Star concedes it placed the call to, and left a message on the answering machine of, Northeast’s auction representative. The only logical conclusion that one can draw, given the subsequent conversation between the two representatives, is that the message involved a solicitation about a prohibited subject: Star’s auction bidding plans.”)

⁶¹ See *Petition* at 13.

⁶² See *Northeast NAL*, 18 FCC Rcd at 17675, ¶ 6.

nevertheless secretly influences a bidding applicant to obtain the licenses it desires. It is reasonable to presume that the bidding applicant obtained those licenses with an expectation that it would be rewarded by the non-bidder for obtaining the licenses.⁶³ Such conduct is unfair to other applicants and clearly undermines the integrity and success of the Commission's auctions. Prohibiting such communications between applicants during the proscribed auction period protects a valid governmental interest without infringing unduly on the First Amendment rights of auction participants.

E. The Enforcement Bureau Has Jurisdiction To Enforce The Anti-Collusion Rules

20. Northeast argues that section 0.111 of the Commission's rules denies the Enforcement Bureau jurisdiction to render a forfeiture order against it because this matter is related "to a pending application for a license."⁶⁴ Section 0.111(a) of the Commission's rules conveys to the Enforcement Bureau the primary responsibility for enforcement functions related to certain Commission rules and regulations. Contrary to Northeast's implication, by enforcing the anti-collusion rule in this case, the Bureau is not ruling on a pending license. Neither the *NALs* nor the *Forfeiture Orders* addressed the merits of Northeast's or Star's applications for a license, and we do not do so now. Rather, the Bureau's primary focus and jurisdiction in this matter relates to enforcement of the auction's anti-collusion rule. Northeast has failed to present any authority undermining the Bureau's jurisdiction over such enforcement matters.

F. The Forfeiture Amount Should Be Reduced

21. Finally, both Northeast and Star argue that the forfeiture amounts imposed against them should be reduced. They argue that the Bureau did not properly assess the nature, extent and gravity of the offenses presented and that the *Forfeiture Orders* did not properly explain the reasons for imposition of the maximum forfeiture in this case.

22. The Commission's *Forfeiture Policy Statement*⁶⁵ specifies that the Commission shall impose a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), 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."⁶⁶ The *NALs* and *Forfeiture Orders* issued in this case complied with the requirements of the *Forfeiture Policy Statement* and section 503(b)(2)(D) of the Act. Each of these orders reviewed the nature, circumstances, extent and gravity of the anti-collusion rule violations and Northeast's and Star's culpability for them. While finding that Northeast and Star willfully and intentionally violated the anti-collusion rule and that such serious violations directly threaten the integrity and competitiveness of the auction process, the *NALs* invited Northeast and Star to present mitigating evidence showing why forfeiture should not be imposed or why the amount should be adjusted

⁶³ We note that it is not necessary for us to find that there was an agreement between Star and Northeast or that the communications between them actually altered Star's bidding strategy in order for us to find a violation of the anti-collusion rule. See *Star NAL*, 18 FCC Rcd at 17656, ¶ 19.

⁶⁴ *Northeast Response* at 7, citing 47 C.F.R. § 0.111(a) (stating that the Enforcement Bureau shall "(a) [s]erve as the primary Commission entity responsible for enforcement of the Communications Act and other communications statutes, the Commission's rules, Commission orders and Commission authorizations, other than matters that are addressed in the context of a pending application for a license or other authorization . . .").

⁶⁵ *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).

⁶⁶ *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01, ¶ 27.

downward. In each subsequent response and petition,⁶⁷ Northeast and Star have refused to accept responsibility for violating the anti-collusion rule and have failed to present any new evidence to mitigate imposition of the proposed forfeitures.⁶⁸ We note that neither Northeast nor Star has claimed financial hardship as a reason to reduce the forfeiture.⁶⁹

23. Although the *Forfeiture Orders* found no basis for reducing the proposed forfeiture, after additional consideration of the forfeitures imposed, we conclude that a downward adjustment of the forfeitures is warranted. While both Northeast's and Star's actions were clearly willful and inconsistent with the plain language of the anti-collusion rule, their past history of compliance with the Commission's rules merits a reduction from the maximum forfeiture amount.⁷⁰ Based on our records, neither Star nor Northeast, nor any of their affiliated companies, have any previous violations of Commission rules, whether in the auction context or otherwise. Therefore, we reduce the forfeiture amount attributable to each for violation of section 1.2105(c) of the Commission's rules from \$100,000 to \$75,000.

IV. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED THAT, pursuant to section 405(a) of the Act, 47 U.S.C. § 405(a), and sections 1.106(j), 1.115(g) of the Commission's rules, 47 C.F.R. §§ 1.106(j), 1.115(g), that the Petition for Reconsideration filed by Northeast Communications of Wisconsin, Inc. and the Application for Review filed by Star Wireless, LLC are DENIED, except as otherwise noted herein.

25. IT IS FURTHER ORDERED that a copy of this Order On Review 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. A copy shall also be sent by Certified Mail Return - Receipt Requested, to: Star Wireless, LLC, 4000 Palos Verdes Dr. North, Suite 201, Rollings Hills Est., California 90274; and to its counsel: Mark J. Tauber, Esq., Piper Rudnick, 1200 Nineteenth Street, N.W., Washington, D.C. 20036-3900.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁷ See *Star Forfeiture Order*, 19 FCC Rcd at 18630-33; *Star NAL*, 18 FCC Rcd at 17657-58; *Northeast Forfeiture Order*, 19 FCC Rcd at 18643; *Northeast NAL*, 18 FCC Rcd at 17681.

⁶⁸ Star's argument that Mr. Behenna's August 28th voice mail message to Mr. Riordan did not violate the anti-collusion rule is unconvincing. Because the August 28th voice mail message was intended as a solicitation to collude regarding Star's bids and bidding strategies in Auction No. 44, it too violates the anti-collusion rule.

⁶⁹ Northeast does not claim an inability to pay the forfeiture amount imposed against it. Although the *Star Response* may have suggested an inability to pay the proposed forfeiture, its *Application* does not do so. See *Star Forfeiture Order*, 19 FCC Rcd at 18633, ¶ 14 ("Although *Star Response* suggested an inability to pay the forfeiture proposed in the NAL, [*Star Response* at 9] it has presented no documentation in support of such a claim.").

⁷⁰ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17116.