

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of )
Notice of Apparent liability for Forfeiture of )
WESTERN PCS BTA 1 CORPORATION ) File No. 820EF0012
For Facilities in the Broadband Personal )
Communications systems in the D, E, and F Blocks )

MEMORANDUM OPINION AND ORDER

Adopted: December 7, 1999

Released: December 13, 1999

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (a) a Notice of Apparent Liability for Forfeiture, 13 FCC Rcd 8305 (1998) ("NAL"), in which the Commission found Western PCS BTA I Corporation ("Western") apparently liable for a forfeiture in the amount of \$1,200,000 for having apparently violated Sections 1.2105(c)1 and 1.652 of the Commission's Rules; (b) a Response to the NAL filed by Western on April 15, 1998; (c) an Erratum and Supplement to the Response to the NAL filed by Western on April 17, 1998; and (d) a Supplement to Response to NAL filed by Western on September 11, 1998. For the reasons explained herein, we conclude that evidence in the record, taken as a whole, is not sufficient to support a finding that Western violated our rules. Accordingly, we rescind the Notice of Apparent Liability.

II. BACKGROUND

2. On August 26, 1996, the Commission commenced its Broadband Personal Communications Services D, E, and F block auction. Among the participants were Western PCS BTA I, Corporation ("Western") and US WEST Communications, Inc. ("US WEST"). In September 1996, while the auction was still underway, Mr. Corey Ford, US WEST Wireless Group's Vice President of Business Development and External Affairs, and Cregg Baumbaugh, Western's Director and Senior Vice President for Corporate Development exchanged telephone communications about the auction (the "Ford/Baumbaugh communications").

3. At a meeting with Commission staff on July 22, 1997, US WEST orally related to the Commission staff details about the referenced telephone communications. On August 1, 1997, US WEST filed a Statement for the Information of the Commission in Accordance with Section 1.65 of the

1 47 C.F.R. § 1.2105(c).

2 47 C.F.R. § 1.65.

Commission's Rules ("Section 1.65 Statement"), in which it formally provided to the Commission the details of the Ford/Baumbaugh communications. On August 6, 1997, Western submitted a letter in response to the Section 1.65 Statement filed by US WEST. Western stated that there "never was any agreement or understanding of any kind between Western PCS and US WEST pertaining to bidding or bidding strategies."

4. On November 21, 1997, the Wireless Telecommunication Bureau's Enforcement and Consumer Information Division directed letters of inquiry to both Western and US WEST involving the Ford/Baumbaugh communications, pursuant to Section 308(b)<sup>3</sup> of the Communications Act of 1934, as amended. Both Western and US WEST submitted their respective Responses to the letters of inquiry on December 16, 1997 ("308(b) Responses"). Based on the information then before us, we made the following tentative findings in the NAL:

a. After placing the round 24 bid on September 19, 1996, Mr. Ford left a voice mail message on September 19<sup>th</sup> for Mr. Baumbaugh, informing him that "one of US WEST's bids had been mistakenly placed."<sup>4</sup> According to Western, the substance of Mr. Ford's voice mail message was "that US WEST, without Mr. Ford's knowledge and while he was out of town, inadvertently placed a bid in Round 24 in the Olympia BTA, thereby displacing [Western] as the high bidder."<sup>5</sup> According to US WEST's account, the message "stated generically that the auction process was stimulating and hectic and that mistakes could be made."<sup>6</sup>

b. On September 19 or 20, 1996, after receiving legal advice from Western's General Counsel, Mr. Baumbaugh left a voice mail message for Mr. Ford,<sup>7</sup> which "indicated that in an auction it was inevitable that bidders would bid against each other, that he did not take the matter personally, and that Mr. Ford should likewise not take the process personally."<sup>8</sup>

c. Mr. Ford returned Mr. Baumbaugh's call on or about September 20, 1996. At the outset of this conversation, Messrs. Ford and Baumbaugh acknowledged that "they would

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<sup>3</sup> 47 U.S.C. § 308(b).

<sup>4</sup> See Statement for the Information of the Commission filed by US WEST, dated August 1, 1997 ("US WEST Section 1.65 Statement").

<sup>5</sup> See Letter dated December 15, 1997, from Western PCS BTA I Corporation, submitted in response to the Wireless Telecommunications Bureau Enforcement Division's letter of inquiry ("Western 308(b) Response"), Questions 1 and 2.

<sup>6</sup> See Letter dated December 16, 1997, from US WEST Communications, Inc., submitted in response to the Wireless Telecommunications Bureau Enforcement Division's letter of inquiry ("US West 308(b) Response"), Question 1.

<sup>7</sup> Western 308(b) Response, *supra*, Question 2.

<sup>8</sup> Western 308(b) Response, *supra*, Question 1. US WEST's account differs slightly from that of Western. According to the US WEST Statement, this information was relayed in a telephone conversation apparently initiated by Mr. Ford, and not a voice mail message from Mr. Baumbaugh, wherein "[Mr. Ford] believes that [Mr. Baumbaugh] communicated that he was not upset about the bid." In response to this point, Western denies that Mr. Baumbaugh told Mr. Ford that he was "not upset." See Letter dated August 6, 1997, from Louis Gurman to William Caton ("Western Section 1.65 Statement").

not discuss the particulars of the D/E/F auction."<sup>9</sup> According to Western, "Mr. Ford did comment that the auction process was as intellectually stimulating as Mr. Baumbaugh had advised him it would be. Mr. Baumbaugh is certain, however, that there was no discussion of bidding information (including, but not limited to, bidding intentions, plans and strategies)."<sup>10</sup>

5. On March 16, 1998, the Commission issued the referenced NAL<sup>11</sup> finding Western apparently liable for a forfeiture in the total amount of \$1,200,000.<sup>12</sup> Specifically, the NAL concluded that Western apparently violated Section 1.2105(c) of the Commission's Rules on the basis that the communications between Mr. Ford and Mr. Baumbaugh constituted a discussion of bidding strategies. The NAL proposed a forfeiture in the amount of \$200,000 for Western's apparent violation of Section 1.2105(c). The NAL also concluded that Western apparently violated Section 1.65 of the Commission's Rules<sup>13</sup> by failing to timely report the Ford/Baumbaugh communications. The NAL proposed a \$1,000,000 forfeiture for the apparent continuing Section 1.65 violation.

### III. DISCUSSION

6. On April 15, 1998, Western submitted a Response to the NAL in which it requested the Commission set aside the NAL. In support, Western represented that it had not violated Section 1.2105(c) of the Commission's Rules because "Western did not enter any sort of agreement with US WEST, and it did not disclose anything about its own bids or bidding strategy."<sup>14</sup> Western also represented that it had not violated Section 1.65 of the Commission's Rules because "Western entered no agreement with US WEST, so the certification in Western's application was correct and complete throughout the auction."<sup>15</sup>

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<sup>9</sup> US WEST 308(b) Response, *supra*, Question 1. See also Western Response, *supra*, Question 1.

<sup>10</sup> Western 308(b) Response, *supra*, question 1.

<sup>11</sup> *In the Matter of Western PCS BTA I Corporation*, 13 FCC Rcd 8286 (1998). ("NAL").

<sup>12</sup> This Order only addresses Western's participation in the Ford/Baumbaugh communications. The Commission addressed US WEST's participation in the matter through a Notice of Apparent Liability for Forfeiture. See *In the Matter of US WEST Communications Inc.*, 13 FCC Rcd 8286 (1998). The US WEST forfeiture proceeding was ultimately resolved by a Consent Decree between the Commission and US WEST. See *In the Matter of US WEST Communications Inc.*, Order Adopting Consent Decree, 1999 WL 279806 (released May 7, 1999).

<sup>13</sup> The Commission, citing Letter to Linda Feldman from Kathleen O'Brien Ham, Chief Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 97-2261 (rel. October 24, 1997), has stated:

[P]ursuant to Section 1.65 of the Commission's Rules, each auction applicant is required to assure the continuing accuracy and completeness of information furnished in a pending application. Each applicant is therefore under a continuing obligation to update its short-form and long-form applications as appropriate to reflect any changes that would make a pending application inaccurate or incomplete, or that are necessary to determine that an applicant is in compliance with our rules. (footnotes omitted).

Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, Third Report and Order and Second Notice of Proposed Rule Making, 13 FCC Rcd 374, 416 (1998).

<sup>14</sup> Western Response to Notice of Apparent Liability for Forfeiture (Western Response), April 15, 1998, at p. 40.

<sup>15</sup> Western Response, *supra*, at p. 40.

7. The anti-collusion rule set forth in Section 1.2105(c) of the Commission's Rules, states in pertinent part:

[A]ll 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 high bidder makes the required down payment, 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).<sup>16</sup> (emphasis added).

We note initially that there is some ambiguity with respect to the scope of Section 1.2105(c). Section 1.2105(c) clearly prohibits parties from discussing or disclosing their own bids or bidding strategies. Less clear is whether Section 1.2105(c) reaches a party who is the "passive" recipient of information about another's bids or bidding strategy, but does not discuss or disclose its own strategies. In this case, Western's defense that it did not violate the rule is based, in part, on its assertion that it did not discuss *its* bidding strategy with U S WEST.<sup>17</sup>

8. In this Order, we clarify that the Section 1.2105(c)(1) prohibition on applicants' "cooperating, collaborating, discussing or disclosing in any manner the substance of *their* bids or bidding strategies" prohibits an auction applicant from cooperating or collaborating with respect to, or discussing, another applicant's bids or bidding strategies, even if it does not discuss its own bids or bidding strategy. Our clarification is grounded in the policy underlying the rule.

9. Section 1.2105(c)(1) is intended "to protect the integrity and robustness of [the Commission's] competitive bidding process."<sup>18</sup> The prohibition of "discussing" bids or bidding strategy would be less effective in furthering this purpose if an applicant to whom bidding information is disclosed could discuss such information (but not discuss its own bidding information) without violating the rule. Accordingly, the clarification we adopt today that Section 1.2105(c)(1) 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, better serves the policies underlying the rule than would the more circumscribed interpretation advanced by Western.

10. However, Western also asserts that the responses it made to US WEST were so limited in scope and non-substantive in nature that they do not constitute a discussion of any party's bids or bidding strategies, whether its own or US WEST's. At the time the Commission issued the NAL, the information before us suggested that Mr. Baumbaugh's statements to Mr. Ford were a discussion of bidding strategies. Specifically, when Mr. Baumbaugh indicated that "he did not take the matter personally," at the time of the NAL, it was reasonable to interpret that statement as meaning that Western did not view the bid in

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<sup>16</sup> 47 C.F.R. § 1.2105(c).

<sup>17</sup> Western Response, *supra*, at iv, 23, 24 ("The unassailable fact is that at no time did Western ever disclose the substance of its bids or bidding strategies to U S WEST or discuss them . . . ."; "Mr. Baumbaugh's message to Mr. Ford and subsequent telephone conversation did not disclose any information about Western's bids or bidding strategy. . . ."; and "Western's two communications with Mr. Ford also did not discuss or disclose anything about Western's bids or bidding strategies.")

<sup>18</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Memorandum Opinion and Order, 9 FCC Rcd at 7684, 7688 (1994) (*Collusion MO&O*).

question as being worthy of retaliation. In reaching that conclusion, we relied upon our tentative conclusion that “the behavior of US WEST and Western was influenced by the disclosure and, in addition, that they may have cooperated in order to influence the outcome of the auction.”<sup>19</sup> On the other hand, Western argues that Mr. Baumbaugh’s statement was not intended as a discussion of bids or bidding strategies but as a polite rebuff of Mr. Ford.<sup>20</sup> Based upon the additional information and analysis provided in Western’s Response, and our reexamination of the record, we now are unable to conclude, in the context of this enforcement action, that Mr. Baumbaugh’s conversations amounted to discussions of bids or bidding strategies with Mr. Ford, as contemplated by the rule.

11. In the NAL, our interpretation of Mr. Baumbaugh’s ambiguous statement was largely influenced by our tentative conclusion that the telephone call appeared to influence Western’s bidding behavior. In reaching that conclusion, we relied upon the fact that Western stopped bidding on the Olympia market after round 24, but that US WEST continued to bid for the license until round 56, when Western again became the high bidder. This fact pattern suggested that “Western and US WEST intended to violate the anti-collusion rule by engaging in communications concerning bidding strategies . . . .”<sup>21</sup> It also suggested that US WEST and Western had, prior to the conversation, coordinated their bidding strategies and reached an implicit agreement in violation of Section 1.65(a) of the Commission’s Rules.

12. In its Response, Western provides additional information on its bidding strategy. In light of that additional information, we now conclude that, for purposes of sustaining an enforcement action, we have insufficient evidence to conclude that Western’s conversation rose to the level of a discussion of bids or bidding strategies with US WEST or that the telephone call influenced Western’s bidding in the auction. In its Response, Western described in detail the bidding strategy that it pursued with its partner Cook Inlet. Western stated it is a 49% investor in Cook Inlet and the companies, which are both GSM operators, had targeted at least 20 MHz of spectrum in the densely populated Seattle BTA and 10 MHz in surrounding, less densely populated BTAs such as Olympia and Bellingham.<sup>22</sup>

13. Western also explained that it used the same overall bidding strategy with Cook Inlet in Phoenix and its outlying BTAs. Western noted that the Seattle and Phoenix MTAs were the only ones where Western and Cook Inlet combined to win 20 MHz of spectrum in the major BTAs. Western’s new analysis described how these regions represented holes in the companies’ wireless coverage and in the national GSM footprint.<sup>23</sup> Professor Robert J. Weber, in his analysis of Western’s bidding strategy appended to Western’s Response as Exhibit E, states:

Just as in Olympia and Bellingham, Western appears to have followed the strategy of laying back – and letting Cook Inlet fight its stead - in the early rounds of the auction. Yet just as in Olympia, Western later entered those markets and bid on to be the winning applicant in those markets. (Western entered the two urban markets of Phoenix in Round 8 and Tucson in round 22. Western entered the rural spoke markets of Flagstaff, Nogales Prescott Sierra Vista, and Yuma in Rounds 48-61. Cook Inlet entered Phoenix in Round 5, Tucson in Round 21, and the other five in round 35. Eventually Cook Inlet left Western fighting alone for the smaller five markets, in all of which

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<sup>19</sup> NAL, *supra*, at para. 31.

<sup>20</sup> Western Response, *supra*, at 23-24.

<sup>21</sup> NAL, *supra*, at para. 39.

<sup>22</sup> Western Response, *supra*, at iii, iv, 5, 6, and Exhibit E.

<sup>23</sup> Western Response, *supra*, at iii, 5, and Exhibit E.

Western won 10 MHz to match the 20 MHz won by Western and Cook Inlet in Phoenix and Tucson).<sup>24</sup>

14. In tentatively finding that there was apparently collusive behavior, we stated in the NAL that the “bidding record shows that in the 20 rounds following the disclosure, Western began bidding in 11 new markets and US WEST began bidding in 33 new markets. In no case did either company bid on a market in which the other was designated the high bidder.”<sup>25</sup> Western stated, however, that its behavior is explained by the company’s original bidding plan, including its arrangement with Cook Inlet. Western stated that because Cook Inlet and Western had targeted only 10 MHz in Olympia (as opposed to 20 MHz in Seattle) and Cook Inlet was the high bidder on the Olympia F block after round 24, it made no strategic sense for Western to bid up the price on the E block after being bumped by US WEST. As the NAL acknowledges, Western’s departure from Olympia was only temporary, and when it returned, it bid aggressively until it ultimately placed the winning bid for Block E in round 121.<sup>26</sup> Western explained that the reason it stopped bidding on the Olympia E Block market was consistent with its overall strategy in light of Cook Inlet’s continuing high bid on Olympia F Block. Western explained that subsequently, when Cook Inlet was outbid for the F Block, Western began to bid aggressively on the E block.<sup>27</sup> Western, furthermore, explained that during these same 20 rounds, both Western and US WEST bumped each other’s bids on markets where they had bid prior to round 24.<sup>28</sup>

15. In responding to our statements in the NAL, Western explained that the reason it only entered 11 new markets over the 20 rounds in question was its strategy to let Cook Inlet fight for smaller markets in the early and mid phases of the auction, while bidding on the major markets itself (or in tandem with Cook Inlet).<sup>29</sup> Western explained that its failure to bid against US WEST in “new” markets during Rounds 25-44 was a consequence of the fact that Western’s overall strategy (already in effect during Rounds 9-24) was to not enter many new markets during those rounds.<sup>30</sup>

16. Finally, Western, in responding to our NAL,<sup>31</sup> pointed out through its new analysis that US WEST again overbid Western in Round 54 for the Olympia E Block, after Western had bid in Round 53.<sup>32</sup> Western’s analysis shows that it reentered Olympia in Round 50, bid over US West in Olympia in Round 53. US WEST then bid back onto the same license in Round 54, and Western bid against US WEST once again in Round 56.

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<sup>24</sup> Western Response, *supra*, at Exhibit E.

<sup>25</sup> NAL at paragraph 33.

<sup>26</sup> Western Response, *supra*, at iii, iv, 5, 6, and Exhibit E.

<sup>27</sup> Western Response, *supra*, at 17, and Exhibit E.

<sup>28</sup> Western Response, *supra*, at iv, 18, and Exhibit E.

<sup>29</sup> Western bid during the auction on 184 different BTAs. It entered 101 of those markets in Rounds 1-8, and 69 in Rounds 45-201. In rounds 9-24, it entered only 3 new markets, and in Rounds 25-44, only 11 new markets. *See Western Response, supra, at Exhibit E.*

<sup>30</sup> Western Response, *supra*, at Exhibit E.

<sup>31</sup> NAL, *supra*, at paragraph 33.

<sup>32</sup> Western Response, *supra*, at iii, 6, 17, and Exhibit E.

17. While we believe that Western did receive information about US WEST's bid and inferentially about US WEST's bidding strategy, we are no longer convinced that Western's reply amounted to a discussion by Western of either bids or bidding strategies. Moreover, after reviewing the information and analysis provided by Western, we are unable to conclude that Western's actions rose to the level of communications that are precluded by Section 1.2105(c) of our rules. In this regard, the factual record involving the characterization of Western's discussion is admittedly ambiguous and the discourse between US WEST and Western does not appear to have resulted in harm to the auction process. We therefore are unable to conclude that Western violated Section 1.2105(c) of the Commission's Rules,<sup>33</sup> and we will rescind the NAL with respect to that violation.

18. We note, however, that the communications between Western and US WEST had the potential to undermine the integrity of the auction process and our rules. 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. 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.

19. Western also objects to the Commission's tentative finding of a violation of Section 1.65 of the Commission's Rules.<sup>34</sup> As described in the NAL, Section 1.65 requires an applicant to maintain the accuracy and completeness of information furnished in its pending application and to notify the Commission within 30 days of any substantial change that may be of decisional significance to that application.<sup>35</sup> In its short-form application, Western certified that it had not or would not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any undisclosed parties regarding the amount of their bids, bidding strategies or particular licenses on which they would or would not bid. We can not find that there was a substantial change to Western's certification because we do not have sufficient evidence to find that the Ford/Baumbaugh communications amounted to an explicit or implicit agreement, arrangement or understanding. In order to find such an agreement in this case, we would have to find that Western cooperated, collaborated, discussed, or disclosed the substance of bids or bidding strategies with US WEST. For the reasons stated above, we are unable to make such a conclusive finding. Accordingly, we rescind the NAL with respect to Section 1.65.

#### IV. CONCLUSION

20. Based on the totality of the information before us, we conclude that we do not have sufficient evidence to find that Western violated the anti-collusion rule by cooperating, collaborating, disclosing, or discussing the substance of its bids or bidding strategy with US WEST. Additionally, we find no violation of 47 C.F.R. § 1.65 in the instant case. In order to find a Section 1.65 violation in this case, we

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<sup>33</sup> 47 C.F.R. § 1.2105(c).

<sup>34</sup> Western NAL Response, *supra*, at 35; *see also* 47 C.F.R. § 1.65.

<sup>35</sup> *See* U S WEST NAL, *supra*, at ¶ 37 (*citing* 47 C.F.R. § 1.65).

would need to establish that Western violated the anti-collusion rule. Since the evidence before us is insufficient to support a Section 1.2105(c) violation, we can not find a Section 1.65 violation in this case.

#### V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED, pursuant to Section 504(b) of the Communications Act of 1934, as amended,<sup>36</sup> that the Notice of Apparent Liability for Forfeiture<sup>37</sup> issued against Western PCS BTA I Corporation IS RESCINDED.

22. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order SHALL BE SENT to counsel for Western PCS BTA I Corporation, Louis Gurman, Esq., Gurman Blask & Freedman, 1400 16<sup>th</sup> Street, NW, Suite 500, Washington, DC 20036, by Certified Mail - Return Receipt Requested.

23. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>36</sup> 47 U.S.C. §504(b).

<sup>37</sup> 13 FCC Red 8305 (1998).