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

DISPATCHED BY

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

THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: December 7, 1999

Released: December 13, 1999

Comments Due: No later than 60 days after publication in the Federal Register

Reply Comments Due: No later than 120 days after publication in the Federal Register

By the Commission:

I. INTRODUCTION

1. In this Further Notice of Proposed Rulemaking, we seek comment on our proposal 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 rules¹ to report promptly such a communication to the Commission. As explained below, the proposed reporting requirement is intended to deter anticompetitive conduct during spectrum auctions. In this Notice, we also propose to amend Section 1.2105(c)(1) to reflect our clarification of the rule that it prohibits an auction applicant from discussing another applicant's bids or bidding strategies even if the first applicant does not discuss its own bids or bidding strategies.² Lastly, we seek comment regarding whether other changes to Section 1.2105(c)(1) may be warranted at this time.

¹ Section 1.2105(c)(1), also known as the anti-collusion rule, provides that, subject to certain exceptions, "all applicants [in a Commission spectrum auction] are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies" unless they are members of a bidding consortium that has been properly disclosed to the Commission. 47 C.F.R. § 1.2105(c)(1).

² See *Western PCS BTA 1 Corporation*, Memorandum Opinion and Order at ¶¶ 7-9, FCC 99-385 (rel. Dec. 13, 1999) ("*Western PCS Order*").

II. BACKGROUND

2. In 1993, Congress added new Section 309(j) to the Communications Act of 1934, as amended (the "Act").³ Section 309(j) authorizes the Commission to employ competitive bidding procedures (*i.e.*, auctions) to choose among mutually exclusive applications for initial licenses to use radio spectrum. On March 8, 1994, the Commission adopted rules to govern the competitive bidding process,⁴ including Sections 1.2105(a) and (c).⁵ 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 into 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.⁶

Section 1.2105(c)(1) provides that:

after the filing of short-form applications, all applicants⁷ are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies,⁸ 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 consortium⁹ or other joint bidding arrangement identified on the bidder's short-form application pursuant to § 1.2105(a)(2)(viii).¹⁰

³ 47 U.S.C. § 309(j). On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (Pub. L. No. 103-66) added Section 309(j) to the Act. Section 309(j) was substantially amended by Section 3002 of the Balanced Budget Act of 1997 (Pub. L. No. 105-33).

⁴ See 47 C.F.R. Part 1, Subpart Q (competitive bidding procedures).

⁵ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348, 2386-88 ¶¶ 221-226 (1994) ("*Competitive Bidding Second Report and Order*"), *on recon.*, Second Memorandum Opinion and Order, 9 FCC Rcd 7245 (1994).

⁶ 47 C.F.R. § 1.2105(a)(2)(ix).

⁷ 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).

⁸ 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).

⁹ See, *e.g.*, 47 C.F.R. § 101.1112(f) (definition of consortium under LMDS competitive bidding procedures).

¹⁰ 47 C.F.R. § 1.2105(c)(1) (internal footnotes added).

3. The Commission adopted Section 1.2105(c)(1) to deter anticompetitive conduct during spectrum auctions and to ensure the competitiveness of post-auction markets,¹¹ thereby implementing Congress' directive that the Commission's auction rules "promot[e] economic opportunity and competition"¹² Section 1.2105(c)(1) is intended to "help ensure that the government receives a fair market price for the use of the spectrum,"¹³ and to foster a level competitive playing field during auctions. In promulgating the rule, the Commission was particularly concerned that the largest firms might engage in behavior that would unfairly disadvantage other bidders.¹⁴

4. Conduct that violates Section 1.2105(c)(1) has the potential to undermine the competitiveness of our auction process and public confidence in the integrity of that process. Violation of Section 1.2105(c)(1) is a serious matter that is subject to a range of sanctions. Violation of the rule could subject applicants to forfeiture penalties.¹⁵ It could also result in "forfeiture of their down payment or their full bid amount and revocation of their license(s), and they may be prohibited from participating in future auctions."¹⁶ Compliance with Section 1.2105(c)(1), moreover, does not obviate compliance with federal antitrust laws.¹⁷ The Commission may refer allegations of anticompetitive auction conduct to the

¹¹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2387 ¶ 222 ("[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.").

¹² 47 U.S.C. § 309(j)(3)(B).

¹³ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386 ¶ 221. We believe that achievement of this goal has furthered Congress' directive that the Commission promote "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use . . ." 47 U.S.C. § 309(j)(3)(C).

¹⁴ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386 ¶ 221. See also FCC Auction Bidder Information Package, C, D, E & F Broadband PCS Auction at 109 (March 23, 1999) ("To ensure the competitiveness and integrity of the auction process, the 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.").

¹⁵ See 47 U.S.C. § 503(b)(2).

¹⁶ *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5571 ¶ 92 (1994).

¹⁷ 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 *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, PP Docket No. 93-253, Fourth Memorandum Opinion & Order, 9 FCC Rcd 6858, 6869 n.134 (1994) ("Fourth MO&O"). As discussed in the Fourth MO&O, under the antitrust laws, the parties to an agreement may not discuss bid prices if they have applied for licenses in the same geographic market. *Id.*

Department of Justice for investigation.¹⁸

III. DISCUSSION

5. Section 1.2105(c)(1) of our rules provides that "all [auction] applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies . . ." ¹⁹ The Commission's experience enforcing Section 1.2105(c)(1) over the past five years, however, indicates that, on occasion, some auction applicants engage in communications prohibited by the rule. In this Further Notice of Proposed Rulemaking, we seek comment on amending Section 1.2105(c) to require anyone who makes or receives a communication of bids or bidding strategies prohibited under Section 1.2105(c)(1) to report promptly such a communication to the Commission. This amendment is intended to deter parties from engaging in prohibited conduct and thereby enhance the competitiveness and fairness of our spectrum auctions. We also propose to amend Section 1.2105(c)(1) to codify our clarification of the rule that it prohibits an auction applicant from discussing another applicant's bids or bidding strategies even if the first applicant does not discuss its own bids or bidding strategies.²⁰

A. Disclosure of Communications Prohibited By Section 1.2105(c)(1)

6. Subject to certain exceptions, Section 1.2105(c)(1) prohibits auction applicants, who are eligible to bid on any common license area, from communicating their bids or bidding strategies with each other during the auction process.²¹ If auction applicants nonetheless engage in communications prohibited by Section 1.2105(c)(1) that result in a bidding agreement, arrangement or understanding, the applicants must promptly disclose any such agreement, arrangement or understanding to the Commission pursuant to Section 1.65(a) of the Commission's rules.²²

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.*

¹⁸ See *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).

¹⁹ 47 C.F.R. § 1.2105(c).

²⁰ See *Western PCS Order* at ¶¶ 7-9.

²¹ For example, if two auction applicants are each eligible to bid on numerous license areas but have only one license area for which they are both eligible, they may not discuss their bids or bidding strategies relating to any license area that either of them is eligible to bid on.

²² 47 C.F.R. § 1.65(a). Section 1.65(a) provides that if a prohibited communication does result in an agreement, arrangement, or understanding regarding bids or bidding strategies, then all applicants involved are required to notify the Commission, by amendment of their pending applications, "as promptly as possible and in any event within 30 days . . ." *Id.* 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, DA 95-2404, 10 FCC Rcd 13783, 13785 (rel. Nov. 28,

7. We have found that even when a communication of prohibited 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 This is so because bidders deprived of the prohibited information are unable "to access, analyze, and act upon this strategic information,"²⁴ otherwise available only to the recipient. In this proceeding, we therefore invite comment on whether the integrity and competitiveness of our auction process would be enhanced if we require 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 seek comment on any potential burden that may be associated with this reporting requirement,²⁵ and the appropriate deadline for making such a report. We also invite 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 prohibited communications to the Commission, would be deterred from making such communications.

8. The proposed rule, which is set forth at Appendix B to this Further Notice, would, if adopted, apply even if the communication prohibited by Section 1.2105(c)(1) did not result in a bidding arrangement, agreement or understanding that must be reported to the Commission under Section 1.65(a).²⁶ Under the proposed rule, failure to report timely a prohibited communication would constitute a rule violation distinct from the violation of Section 1.2105(c)(1) for making the prohibited communication. If such communications resulted in a bidding arrangement, agreement or understanding, the applicants also must update their pending applications pursuant to Section 1.65(a).²⁷

9. Pending the outcome of this proceeding, we recommend that if an auction applicant receives a communication prohibited under Section 1.2105(c)(1) orally, its best course of action is to respond immediately and unequivocally that it is unwilling to participate in any violation of Section 1.2105(c)(1), and to report promptly the improper communication to the Commission. If such a prohibited communication is received other than orally, we recommend that an auction applicant immediately respond in writing that it is unwilling to participate in any violation of Section 1.2105(c)(1) and report promptly the

1995) (noting that Section 1.65 requires an auction applicant to bring to the Commission's attention any communication not permissible under the applicant's Form 175 certifications).

²³ *US West Communications, Inc.*, Notice of Apparent Liability for Forfeiture, 13 FCC Rcd 8286, 8284 at ¶ 34 (1998).

²⁴ *Id.*

²⁵ In past auctions, auction 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, Auction and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (dated April 14, 1998).

²⁶ 47 C.F.R. § 1.65(a). Such a Section 1.65(a) notification, even if timely, would not exempt such prohibited conduct from Section 1.2105(c)(1) and administrative sanctions.

²⁷ See n.23, *supra*.

improper communication to the Commission.

B. Amendment of Section 1.2105(c)(1)

10. In the *Western PCS Order*, we clarify that Section 1.2105(c)(1) 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 strategies.²⁸ In clarifying Section 1.2105(c)(1), we note that the rule's prohibition of "discussing" bids or bidding strategy would have minimal deterrent force if an applicant to whom bidding information is disclosed could discuss such information (but not discuss its own bidding information) without violating the rule.²⁹ The *Western PCS Order* thus provides auction applicants official notice 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 its own bids or bidding strategies. Nevertheless, we believe that auction applicants would benefit if the text of the rule plainly states 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. Accordingly, we seek comment on our proposal to add the italicized text below to Section 1.2105(c)(1):

all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their *own or other applicants'* bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants . . . 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).³⁰

11. We also seek comment regarding whether other changes to Section 1.2105(c)(1) may be warranted at this time in light of Congress' mandate that we ensure competitive auctions.³¹ For example, could the text of the rule be refined to further enhance its clarity? In addition, we seek comment regarding whether there are types of conduct currently prohibited by Section 1.2105(c)(1) that do not impact the integrity of the Commission's auction process. We seek comment regarding any changes in our rules that would eliminate this possible overinclusiveness.

IV. PROCEDURAL MATTERS

Ex Parte Rules - Permit-But-Disclose Proceeding

12. This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under 47 C.F.R. § 1.1206(b), as revised. Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence

²⁸ *Western PCS Order* at ¶¶ 7-9.

²⁹ *Id.* at ¶ 8.

³⁰ 47 C.F.R. § 1.2105(c)(1) (internal footnotes added).

³¹ 47 U.S.C. § 309(j)(3).

description of the views and arguments presented is generally required.³² Additional rules pertaining to oral and written presentations are set forth in 47 C.F.R. § 1.1206(b).

Regulatory Flexibility Act

13. With respect to this Notice, an Initial Regulatory Flexibility Analysis ("IRFA") is contained in Appendix A. As required by the Regulatory Flexibility Act,³³ the Commission has prepared an IRFA of the possible significant economic impact on small entities by the policies and rules proposed in this Notice. Written public comments are requested on the IRFA. We ask questions in the IRFA regarding the prevalence of small businesses in the industries covered by this Notice. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the Notice and must have a distinct heading designating them as responses to the IRFA.

Comment Submission

14. **Filing of Comments and Reply Comments.** Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 & 1.419, interested parties may file comments no later than sixty (60) days after the date of publication of this Notice in the Federal Register and reply comments no later than one hundred twenty (120) days of the date of publication of this Notice in the Federal Register. Comments and reply comments may be filed using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. In completing the transmittal screen, commenters should include their full name, postal service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If you want each Commissioner to receive a copy of your comments, you must file an original plus eleven copies. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, TW-A306, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.

15. Parties who choose to file by paper should also submit their comments on diskette. Diskettes should be submitted to: Richard Arsenault, Federal Communications Commission, 445 12th Street, S.W., Room 4-A234, Washington, D.C. 20554. Such a submission should be on a 3.5-inch diskette formatted in an IBM compatible format using Microsoft Word for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number in this case – WT Docket No. 97- 82), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an

³² See 47 C.F.R. § 1.1206(b)(2).

³³ 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").

Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20036.

16. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room CY-A257, 445 12th Street, S.W., Washington, D.C. 20554.

17. Written comments by the public and the Office of Management and Budget (OMB) on the proposed and/or modified information collections are due on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary of the Commission, a copy of any comments on the information collections contained herein should be submitted to Jody Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Virginia Huth, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to vhuth@omb.eop.gov.

Initial Paperwork Reduction Act of 1995 Analysis

18. This Notice proposes a new rule that may contain information collection requirements. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the OMB to take this opportunity to comment on the information collections contained in this Notice, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public, OMB and agency comments are due at the same time as other comments on this Notice (not later than 60 days after the date of publication of this Notice in the Federal Register). Comments should address: (a) whether the proposed collection of data is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

Further Information

19. For further information, contact Richard Arsenault, Commercial Wireless Division, Wireless Telecommunications Bureau, (202) 418-0920 or rarsenau@fcc.gov.

V. CONCLUSION

20. In the foregoing Further Notice of Proposed Rulemaking, we seek comment on requiring 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 disclose such a communication to the Commission in writing. We also seek comment on amending the text of Section 1.2105(c)(1) to reflect our recent clarification of the rule 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.

VI. ORDERING CLAUSES

21. IT IS ORDERED that, pursuant to 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, notice is hereby given of proposed amendments to Part 1 Commission's Rules, 47 C.F.R. Part 1, in accordance with the proposals, discussions, and statement of issues in this Third Further Notice of Proposed

Rulemaking.

22. IT IS FURTHER ORDERED that comments on the Third Further Notice of Proposed Rulemaking shall be filed no later than 60 days after publication of a summary of the Third Further Notice of Proposed Rulemaking in the Federal Register and reply comments shall be filed no later than 120 days after such publication in the Federal Register.

23. IT IS FURTHER ORDERED that the Commission's Reference Information Center, Consumer Information Bureau, SHALL SEND a copy of the Third Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act ("RFA"),³⁴ the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities by the policies and rules proposed in this Third Further Notice of Proposed Rule Making ("Notice"). Written and electronically filed public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on this *Notice* provided above in paragraph 14. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. *See* 5 U.S.C. § 603(a). In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register. *See id.*

A. Need for and Objectives of the Proposed Rules:

1. This rulemaking proceeding is initiated to obtain comments concerning a proposal to amend 47 C.F.R. § 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 disclose such communication to the Commission. The proposed amendment is intended to deter anticompetitive behavior during Commission spectrum auctions and foster competitive post-auction markets. We also seek comment on amending Section 1.2105(c)(1) to reflect our clarification that the rule 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. The proposed amendment is intended to facilitate compliance with the rule by ensuring that its text is unambiguous.

B. Legal Basis:

2. Authority for issuance of this Notice of Proposed Rule Making 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.

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

3. 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.³⁵ The RFA generally defines the term "small entity" as having the same meaning as the terms "small organization," "small business," and "small governmental jurisdiction."³⁶ The term "small business" has the same meaning as the term "small business concern" under the Small Business Act.³⁷ A small business concern is one which: (1)

³⁴ *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").

³⁵ 5 U.S.C. § 603(b)(3).

³⁶ 5 U.S.C. § 601(6).

³⁷ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern in 15

is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA"). A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."³⁸ Nationwide, as of 1992, there were approximately 275,801 small organizations.³⁹ "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."⁴⁰ As of 1992, there were approximately 85,006 such jurisdictions in the United States.⁴¹ 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 estimate that 81,600 (91 percent) are small entities. According to SBA reporting data, there were 4.44 million small business firms nationwide in 1992.⁴²

4. The amendment to Section 1.2105(c)(1) proposed above will only apply to applicants in Commission spectrum auctions. The number of entities that may apply to participate in future Commission spectrum auctions is unknown. In the past, the number of small businesses that have participated in prior auctions has varied.

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

5. As a result of the actions proposed in this rulemaking proceeding, disseminators and recipients of communications prohibited by Section 1.2105(c) would be required to report such communications to the Commission. No other new reporting, recordkeeping, or other compliance requirements would be imposed on applicants or licensees as a result of the actions proposed in this rule making proceeding.

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

6. 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: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources

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).

³⁸ 5 U.S.C. 601(4).

³⁹ 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).

⁴⁰ 5 U.S.C. § 601(5).

⁴¹ 1992 Census of Governments, U.S. Bureau of the Census, U.S. Department of Commerce.

⁴² See n.39, *supra*.

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.⁴³ In the *Notice*, we seek comment on our proposal 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 rules⁴⁴ to report promptly such a communication to the Commission. We also propose to amend Section 1.2105(c)(1) to reflect our recent clarification of the rule that it prohibits an auction applicant from discussing another applicant's bids or bidding strategies even if the first applicant does not discuss its own bids or bidding strategies.⁴⁵ We anticipate no significant impact on affected entities, including small businesses. The proposed amendment to Section 1.2105(c) discussed above will have several public interest benefits with little or no impact on small businesses and local government entities. First, we believe that the proposed amendment will enhance the competitiveness of our auction process to the benefit of small auction applicants. Second, under the proposed amendment, general confidence in the integrity of our auctions should increase. Public confidence could be undermined if all entities were not subject to the proposed disclosure requirements. Therefore, the public policy benefits of the proposed amendments are great and we anticipate no significant impact on small businesses. We seek comment on these tentative conclusions.

F. Federal Rules that may Duplicate, Overlap, or Conflict with the Proposed Rules:

7. None.

⁴³ 5 U.S.C. §§ 603(c)(1)-(4)

⁴⁴ 47 C.F.R. § 1.2105(c)(1).

⁴⁵ See *Western PCS BTA 1 Corporation*, Memorandum Opinion and Order at ¶¶ 7-9, FCC 99-385 (rel. Dec. 13, 1999).

APPENDIX B

Proposed Rules

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

PART 1 – PRACTICE AND PROCEDURE

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

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 proposed to be amended (the proposed new text is double underlined) 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 filing of short-form applications, all applicants are prohibited from cooperating, collaborating, discussing, or disclosing in any manner the substance of their own or other applicants' 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).

3. Section 1.2105 is proposed to be amended by renumbering current paragraph (c)(6) to become new paragraph (c)(7), and by adding new paragraph (c)(6) as follows:

(6) Any applicant that makes or receives a communication of bids or bidding strategies prohibited under paragraph (c)(1) shall disclose such communication in writing to the Commission within ____ calendar days of the receipt of such communication.

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