

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

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

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 10, 2009

Released: February 10, 2009

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. By this Notice of Apparent Liability for Forfeiture (“NAL”), we find that Cascade Access, L.L.C. (“Cascade”), an applicant to participate in the Commission’s Auction 73, apparently engaged in a prohibited communication and failed to notify the Commission, in apparent violation of Sections 1.2105(c)(1) and (c)(6) of the Commission’s rules.¹ For the reasons stated below, we conclude that Cascade apparently is liable for a monetary forfeiture in the amount of \$75,000.

II. BACKGROUND

2. Cascade and Cellco Partnership d/b/a Verizon Wireless (“Verizon Wireless”) each timely submitted short-form applications to participate in Auction 73.² Cascade selected one license on which to bid, CMA547-B (Nevada 5-White Pine), while Verizon Wireless selected all 1,099 of the licenses available in the auction. Cascade did not identify any other party with which it had an agreement. Verizon Wireless disclosed that it had entered several agreements with other entities relating to the licenses being auctioned, which did not include Cascade or any Cascade-affiliated entities. Because the two entities did not disclose the existence of a bidding agreement between themselves, the Commission’s anti-collusion rule prohibited them from communicating with each other about bids or bidding strategies during the period that the rule was in effect.³

3. For Auction 73, the prohibitions of the anti-collusion rule applied from 6:00 p.m. ET on December 3, 2007, the short-form application filing deadline, until 6:00 p.m. ET on April 3, 2008, the

¹ See 47 C.F.R. §§ 1.2105(c)(1) and (c)(6).

² See FCC Form 175 of Cascade Access, L.L.C., Application to Participate in an FCC Auction, submitted on December 1, 2007, 9:49 a.m. ET, resubmitted with modifications on January 4, 2008, 2:47 p.m. ET; FCC Form 175 of Cellco Partnership d/b/a Verizon Wireless, Application to Participate in an FCC Auction, submitted on December 3, 2007, 2:00 p.m. ET, resubmitted with modifications on December 31, 2007, 2:06 p.m. ET. Cascade and Verizon Wireless were classified as eligible to participate in the auction. See “Auction of 700 MHz Band Licenses: 214 Bidders Qualified to Participate in Auction 73,” *Public Notice*, 23 FCC Rcd 276 (2008).

³ See 47 C.F.R. § 1.2105(c)(1).

down payment deadline. Bidding in Auction 73 began on January 24, 2008 and concluded on March 18, 2008.

4. While bidding remained underway, counsel for Verizon Wireless submitted a letter, dated February 15, 2008, to the Chief of the Auctions and Spectrum Access Division of the Wireless Telecommunications Bureau (“WTB”). Therein, Verizon Wireless reported the unsolicited receipt of a February 11, 2008 e-mail communication, in possible violation of Section 1.2105(c) of the Commission’s rules, from Bob Milliken. Verizon Wireless’s report states that it “believes Mr. Milliken is associated with Rio Virgin Telephone Company, Inc. (“Rio Virgin”), the parent company of Cascade Access, L.L.C., an applicant in FCC Auction 73.”⁴ Thereafter, WTB referred the matter to the Commission’s Enforcement Bureau for investigation.

5. The Enforcement Bureau commenced its investigation of Cascade’s compliance with Section 1.2105(c) of the Commission’s rules by sending a letter of inquiry (“LOI”) to Cascade requesting information about the referenced e-mail communication.⁵ In its response to the LOI,⁶ Cascade identifies Mr. Milliken as a board member of Cascade Utilities, Inc. Cascade clarifies that Cascade Utilities is the 100 percent owner of Rio Virgin and an affiliate of Cascade.⁷ Cascade confirms that on February 11, 2008, while bidding in Auction 73 was underway, Mr. Milliken, sent an e-mail to William Hickey, Executive Director – Strategic Alliances for Verizon Wireless, stating, “[w]e have dropped out of the 700 mhz auction” and are “ready to talk/meet” with Verizon Wireless.⁸ Cascade states that the purpose of the e-mail was “to address when a representative of Cascade could communicate with Verizon Wireless regarding Verizon’s interest in the acquisition of Rio Virgin Telephone’s 33.333% ownership in the AZ 1 RSA Mohave Wireless Partnership.”⁹

6. Cascade did not report this communication to the Commission because, according to Cascade, the e-mail did “not include any information requiring disclosure.”¹⁰ In its February 15, 2008, letter to WTB reporting the communication, Verizon represented that Hickey promptly responded to Milliken that the parties could not have discussions because they were then subject to the Commission’s anti-collusion rule. We have no evidence that Verizon Wireless violated any Commission rule.

⁴ Letter from David H. Solomon and Lawrence J. Movshin, Counsel to Cellco Partnership d/b/a Verizon Wireless, to Margaret Wiener, Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, dated February 15, 2008, at 1. Verizon Wireless properly requested confidential treatment of the letter on the basis of anonymous bidding procedures then in effect. *See Public Notice*, Auction of 700 MHz Band Licenses, AU Docket No. 07-157, DA 08-83 (WTB, rel. Jan. 14, 2008). Those procedures, as they applied to Auction 73, and consequently, the basis for confidential treatment of the Verizon Wireless letter, have since lapsed.

⁵ *See* Letter from Gary Schonman, Special Counsel, Investigations & Hearings Division, Enforcement Bureau, Federal Communications Commission, to Brenda C. Crosby, President, Cascade, L.L.C., dated January 14, 2009.

⁶ *See* Letter from Thomas Gutierrez, Esq., to Marlene H. Dortch, Secretary Federal Communications Commission, dated January 26, 2009 (“Response”) at 1.

⁷ Response at 1, 2 and Declaration of Robert G. Milliken.

⁸ Response at 2 and Exhibit I (copy of 2/11/2008 email from Bob Milliken’s cuaccess.net account to William Hickey).

⁹ Response at 2.

¹⁰ Response at 3.

III. DISCUSSION

7. Under Section 503(b)(1) of the Communications Act of 1934, as amended (the “Act”), any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹¹ In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.¹² The Commission will then issue a forfeiture if it finds, by a preponderance of the evidence, that the person has willfully or repeatedly violated the Act or a Commission rule.¹³ As discussed below, we conclude under this standard that Cascade is apparently liable for a forfeiture for its apparent willful violation of Section 1.2105(c) of the Commission’s rules.

A. Cascade Apparently Violated The Anti-Collusion Rules

8. Section 1.2105(c)(1) of the Commission’s rules 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 applicants’ bids or bidding strategies, or discussing or negotiating settlement agreements, until after the down payment deadline, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder’s short-form application¹⁴

In addition, Section 1.2105(c)(6) of the Commission’s rules requires “any applicant that makes or receives a communication of bids or bidding strategies prohibited under [Section 1.2105(c)(1) of the Commission’s rules to] report such communication in writing to the Commission immediately, and in no case later than five business days after the communication occurs.”¹⁵

9. The Commission adopted its anti-collusion rule to prevent collusive conduct during auctions, to facilitate the detection of such misconduct, and to maintain public confidence in the integrity of the auction process.¹⁶ In so doing, the Commission expressed concern “that collusive conduct by

¹¹ See 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); see also 47 U.S.C. § 503(b)(1)(D)(forfeitures for violation of 18 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (“*Southern California Broadcasting Co.*”).

¹² See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

¹³ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

¹⁴ 47 C.F.R. § 1.2105(c)(1).

¹⁵ 47 C.F.R. § 1.2105(c)(6).

¹⁶ See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2386-88, ¶¶ 221-226 (1994) (“*Competitive Bidding Second Report and Order*”) (“[W]e believe that the competitiveness of the auction process and of post-auction market structure will be enhanced by certain additional safeguards designed to reinforce existing laws and facilitate detection of collusive conduct.”); (continued....)

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.”¹⁷ Thus, Section 1.2105(c) of the Commission’s rules prohibits applicants for any of the same geographic license areas from communicating with each other during an auction about their own, or each other’s, or any other competing applicant’s bids or bidding strategies, or discussing settlement agreements, unless such applicants are members of a bidding consortium or other bidding arrangement that they have identified in their FCC Form 175 (“short-form”) applications. The Commission has also stressed that any applicant found in violation of the anti-collusion rule faces the potential sanctions of license revocation or monetary forfeiture and may be prohibited from participating in future auctions.¹⁸

10. The prohibition against certain communications set forth in Section 1.2105(c) takes effect on the pre-auction short-form application deadline and remains in place until the down payment deadline, after the close of the auction.¹⁹ This prohibition expressly relates to all auction applicants, which are defined by Section 1.2105(c)(7)(i) to include “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” certain ownership interests, “and all officers and directors of that entity.” In the instant case, the prohibition on certain communications for applicants in Auction 73, including Cascade and Verizon Wireless, commenced on December 3, 2007, and ended on April 3, 2008.

11. Cascade does not dispute that it was an applicant and qualified bidder in Auction 73, and that during such auction, Milliken sent the referenced e-mail to Verizon Wireless. Although Cascade asserts that Milliken acted on behalf of Rio Virgin, it also acknowledges that the communication apparently was intended to address when a representative of Cascade could talk to Verizon Wireless about matters relating to Verizon Wireless’s interest in a transaction involving Rio Virgin. Mr. Milliken’s email was sent from his account at cuaccess.net. In addition, in referring to Cascade, Mr. Milliken’s email used the term “we.”²⁰ Thus, Mr. Milliken represented himself as speaking for Cascade and his e-mail plainly disclosed to Verizon Wireless information about Cascade’s status in Auction 73. Indeed, by representing to Verizon Wireless that Cascade had dropped out the auction, Cascade affirmatively

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Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, Seventh Report and Order, 16 FCC Rcd 17546 (2001) (adopting rule imposing continuing obligation on auction applicants to disclose communications that appear to violate the anti-collusion rule).

¹⁷ *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348, 2387, ¶ 223; see also *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Memorandum Opinion and Order, 9 FCC Rcd 7684, 7687-7688, ¶ 10 (1994) (“Our anti-collusion rules are intended to protect the integrity and robustness of our competitive bidding process.”).

¹⁸ See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, 5570-71 (1994). In anticipation of Auction 73, WTB 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). See also “Auction of 700 MHz Band Licenses Scheduled for January 24, 2008; Notice and Filing Requirements, Minimum Opening Bids, Reserve Prices, Upfront Payments, and Other Procedures for Auctions 73 and 76,” *Public Notice*, 22 FCC Rcd 18,141, 18,149-54 ¶¶ 15-34 (2007).

¹⁹ See 47 C.F.R. § 1.2105(c)(1). See also *Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures*, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 15,923, 15,297-298, ¶¶ 7-8 (2000).

²⁰ Cascade states that Milliken is a director of Cascade Utilities, an affiliate of Cascade. We note that the two entities appear to be commonly controlled.

disclosed to another auction applicant information about its bidding strategy, in apparent violation of Section 1.2105(c)(1) of the Commission's rules. By informing Verizon Wireless that Cascade was no longer bidding, Cascade's disclosure could have undermined the competitiveness of the bidding process and jeopardized the formation of a competitive post-auction market structure. Furthermore, given the nature of the communication, Cascade was required, but failed, to disclose this communication to the Commission, in apparent violation of Section 1.2105(c)(6) of the Commission's rules.

B. Proposed Forfeiture

12. The Commission's *Forfeiture Policy Statement*²¹ specifies that the Commission shall impose a forfeiture based upon consideration of the factors enumerated in Section 503(b)(2)(E) of the Act, 47 U.S.C. § 503(b)(2)(E), such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."²²

13. In considering the factors set forth in the *Forfeiture Policy Statement*, we believe a forfeiture is warranted in this instance against Cascade for its apparent willful violation of Sections 1.2105(c)(1) and (c)(6) of the Commission's rules. It is of no matter that the underlying intent of the e-mail communication may have involved a possible transaction between Rio Virgin and Verizon Wireless involving their interests in a third communications entity, which the party alleges is not auction related. In this regard, Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of such act, *irrespective of any intent* to violate . . . any rule or regulation of the Commission"²³ Thus, although Milliken may not have intended to violate Section 1.2105(c), it is clear that he presented himself as a representative of Cascade and initiated a communication with Verizon Wireless containing information on Cascade's bidding. Consequently, for the purposes of Section 503(b)(1) of the Act, Cascade's conduct was willful.

14. We have carefully considered the facts of this case, including Cascade's explanation for its conduct and its history of compliance, as well as the importance that the Commission's anti-collusion and collusion notification provisions play in protecting the integrity of its auctions. On balance, and in light of our legal precedent, we find that a forfeiture in the amount of \$75,000 against Cascade is appropriate in this instance.²⁴

IV. ORDERING CLAUSES

15. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that Cascade Access, L.L.C., is hereby **NOTIFIED** of its **APPARENT**

²¹ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17,087, 17,113 (1997), *recons. denied* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. § 1.80(b).

²² *Id.* at 17,100-101, ¶ 27.

²³ 47 U.S.C. § 312(f)(1) (emphasis added). *See, e.g., Southern California Broadcasting Co.*

²⁴ *See, e.g., Star Wireless, LLC and Northeast Communications of Wisconsin, Inc.*, Order on Review, 22 FCC Rcd 8943 (2007), *appeal denied*, *Star Wireless, LLC v. FCC & USA*, No. 07-1190 (D.C. Cir. April 22, 2008). In the *Order on Review*, the Commission affirmed the Bureau's determination that Star Wireless and Northeast Communications were each liable for a monetary forfeiture for violating Section 1.2105(c) of the Commission's rules, but reduced the forfeiture from \$100,000 to \$75,000 in light of each company's past history of compliance with Commission rules.

LIABILITY FOR FORFEITURE in the amount of seventy five thousand dollars (\$75,000) for its willful violation of Sections 1.2105(c)(1) and (c)(6) of the Commission's rules, 47 C.F.R. §§ 1.2105(c)(1) and (c)(6).

16. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that within thirty (30) calendar days of the release date of this Notice, Cascade Access, L.L.C., **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

17. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer – Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Cascade shall also send electronic notification on the date said payment is made to Hillary.DeNigro@fcc.gov and to Gary.Schonman@fcc.gov.

18. The response, if any, must be mailed to Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW, Room 4-C330, Washington, D.C. 20554, and must include the NAL/Account Number referenced above. In addition, to the extent practicable, a copy of the response, if any, should also be transmitted via e-mail to Hillary.DeNigro@fcc.gov, Gary.Schonman@fcc.gov, and Judy.Lancaster@fcc.gov.

19. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

20. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability For Forfeiture shall be sent, by Certified Mail Return Receipt Requested, to Brenda C. Crosby, President, Cascade Access, L.L.C., 303 SW Zobrist, Estacada, Oregon 97023, and to Thomas Gutierrez, Esq., Lukas, Nace, Gutierrez & Sachs, LLP, 1650 Tysons Boulevard, Suite 1500, McLean, Virginia 22102.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau