

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

In re Application of)
)
US WEST Communications, Inc.) File No. 820EF0011
)
For Facilities in the Broadband Personal)
Communications Systems in the D, E, and)
F Blocks)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 16, 1998 Released: March 16, 1998

By the Commission:

I. INTRODUCTION

1. By this Order, we find US WEST Communications, Inc. ("US WEST") apparently liable for a forfeiture in the amount of \$1,200,000. For the reasons stated below, we conclude that US WEST, a participant in the Commission's Broadband Personal Communications Services (PCS) D, E and F block auction, apparently violated Sections 1.2105(c) and 1.65 of the Commission's Rules, 47 C.F.R. §§ 1.2105(c) and 1.65, by disclosing and discussing during the auction its bidding strategy to a competing auction participant, Western PCS BTA I Corporation ("Western"), for the Olympia, Washington market; cooperating with Western during the auction; and failing to timely notify the Commission of the prohibited disclosure, discussion and arrangement.

II. BACKGROUND

2. US WEST is the incumbent local exchange carrier ("LEC") in a 14-state region that includes the State of Washington. Western is a wireless service provider with a cellular and PCS service area centering in the western United States. Both companies participated in the Commission's Broadband PCS D, E, and F block auction, which consisted of 493 Basic Trading Area ("BTA") licenses for 10 megahertz of spectrum in each of the three blocks. During the auction, both US WEST and Western placed bids on BTA Market 331 (Olympia, Washington) (hereinafter "Olympia, Washington BTA"). US WEST's Vice President of Business Development and External Affairs, Corey Ford, was the head of US WEST's D, E, and F block auction team.

Western's Director and Senior Vice President for Corporate Development, Cregg Baumbaugh,¹ was a member of Western's D, E, and F block auction team and reported directly to the John Stanton, the Chairman/Chief Executive Officer of Western's parent company, Western Wireless Corporation ("WWC").² Apparently Messrs. Ford and Baumbaugh had both a professional and personal acquaintance that antedated the auction.³ As described below, the communications between these corporate officials form the basis of this Notice.

3. Conversations Prior to Short-Form Filing Deadline. It appears that before the D, E, and F block auction, the PCS markets in general, and the PCS markets in the State of Washington in particular, had been the subject of conversation between Messrs. Ford and Baumbaugh. According to Western, more than one year before the D, E, and F block auction commenced, "Messrs. Ford and Baumbaugh first had a conversation about the PCS auctions following the A/B PCS block auction in the March/April 1995 time frame in which they generally discussed their respective companies' interests in PCS."⁴ Western reported that Mr. Ford and Ken Denman, US WEST's then-Vice President of Wholesale Wireless Markets, met with Mr. Baumbaugh and Robert Stapleton, WWC's President.⁵ During the meeting, the two US WEST representatives purportedly stated "that it was US WEST's intention to obtain D or E block PCS licenses within its landline service area and inquired whether [Western] would be interested in sharing infrastructure (and possibly spectrum) with US WEST."⁶ According to Western, the "US WEST proposal did not fit within [Western's] PCS strategy and therefore [Western] chose not to pursue US WEST's proposal."⁷

4. Western's discussions with a third party confirmed Western's understanding that US West intended to acquire PCS licenses within its landline service area. According to Western, later in 1995 and prior to the C block auction,⁸ a principal of BDPCS, Inc., visited Western in an

¹ Mr. Baumbaugh also held the position of Director and Senior Vice President-Corporate Development of Western Wireless Corporation ("WWC"), the parent company of Western. 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 Response"), at Declaration.

² Western Response, *supra*, Question 12.

³ 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 Response"), Question 1. According to Western, since approximately 1992, Messrs. Ford and Baumbaugh have had a professional relationship arising out of their respective roles within their companies. See Western Response, Question 1.

⁴ Western Response, *supra*, Question 1.

⁵ Western Response, *supra*, Question 1.

⁶ Western Response, *supra*, Question 1.

⁷ Western Response, *supra*, Question 1.

⁸ The Commission's C block Broadband PCS auction commenced on December 18, 1995 and closed on May 6, 1996.

effort to enlist Western as a C block partner.⁹ The BDPCS, Inc. principal subsequently informed Western that it had reached an agreement with US WEST with respect to participation in the C block auction.¹⁰ Western reported that "[c]onsistent with the intent suggested by US WEST in the March/April 1995 meeting, BDPCS, Inc. bid on licenses within US WEST's landline service area."¹¹

5. Another discussion took place between Messrs. Ford and Baumbaugh approximately one month before the short-form application (FCC Form 175) filing deadline for the D, E, and F block auction. According to US WEST, during a round of golf played on June 30, 1996¹², "Mr. Baumbaugh casually asked [Mr. Ford] whether the rumor was true that US WEST had entered into an agreement with another carrier for PCS spectrum in the Seattle area. Mr. Ford reported that he declined to answer and the two completed their golf game without further discussion of the matter."¹³ According to Western during that golf game, Mr. Ford also made an unsolicited comment to Mr. Baumbaugh to the effect that US WEST was likely to bid in those PCS markets in which it had existing landline telephone operations.¹⁴ Mr. Ford reported to US WEST that "he does not recall making such a comment but that such a comment was consistent with earlier discussions with other companies, including Western, which occurred prior to US WEST's filing of the FCC Form 175, regarding potential joint ventures."¹⁵ US WEST further maintains that "[s]uch a comment was also consistent with information US WEST publicly provided to the investment community."¹⁶ Apparently, Mr. Baumbaugh made no comment in response to Mr. Ford's unsolicited comment.¹⁷ According to Western, the information about US WEST's bidding plans "did not come as a surprise to [Western] because of the earlier comment by US WEST in March/April 1995 meeting and because it was generally understood that US WEST would bid on

⁹ Western Response, *supra*, Question 1.

¹⁰ Western Response, *supra*, Question 1.

¹¹ Western Response, *supra*, Question 1.

¹² According to US WEST, although Mr. Ford was unable to pinpoint the exact date of the golf game, his expense report showed that it took place June 30, 1996. US WEST Response, Question 1. According to Western, WWC's General Counsel, Alan Bender, also participated in the June 30 golf game. Western Response, *supra*, Question 1.

¹³ US WEST Response, *supra*, Question 1.

¹⁴ Western Response, *supra*, Question 1.

¹⁵ US WEST Response, *supra*, Question 1.

¹⁶ US WEST Response, *supra*, Question 1. In its response, US WEST notes that "such a comment would be consistent with a public comment filed by US WEST with the FCC on March 15, 1996, which indicated that US WEST 'plans to provide 10 MHz PCS on an integrated basis to customers within USWC's landline service area.'" *Id.*

¹⁷ Western Response, *supra*, Question 1.

licenses within their service areas, to the extent they could."¹⁸

6. FCC Form 175. Pursuant to the Commission's rules, in order to participate in the D, E, and F block auction, each applicant was required to submit by July 29, 1996 an FCC Form 175 (short-form application) which, among other things, lists the licenses on which an applicant intends to bid and identifies the names of the applicant's authorized bidders.¹⁹ Each applicant must certify under penalty of perjury that "it has not entered into and will not enter into any explicit or implicit agreements or understandings of any kind with parties not identified in [its] application regarding the amount to be bid, bidding strategies or the particular license on which the applicant or other parties will or will not bid."²⁰

7. US WEST indicated in its short-form application that it intended to bid for all licenses in the D and E blocks.²¹ US WEST identified three authorized bidders for the company, including Mr. Ford. US WEST certified in the affirmative that it had not and would not enter into any explicit or implicit agreement or understandings of any kind with parties not identified in its application regarding the amount to be bid, bidding strategies or the particular license on which it would or would not bid. US WEST's application listed 69 companies with which it had "entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings relating to the D, E, and F block licenses, including agreements relating to the post-auction market structure."²² Western was not among the identified companies.

8. Western indicated in its short-form application that it intended to bid for all licenses in the D and E blocks.²³ Western identified three authorized bidders, including Mr. Baumbaugh. Mr. Baumbaugh executed the certification on behalf of Western. Like US WEST, Western certified that it did not have any agreements or understandings with any undisclosed parties. In its application, Western identified only one company, Cook Inlet Western Wireless PV/SS, L.P., with which it had entered into a joint bidding arrangement.²⁴

9. Communications During the Auction. The Broadband PCS D, E, and F block auction

¹⁸ Western Response, *supra*, Question 1. According to Western, the strategy of pursuing PCS licenses within a local exchange carrier's service area was pursued by several telephone companies in the A/B block PCS auction, including BellSouth, Ameritech, Pacific Bell, and SBC. *Id.*

¹⁹ See 47 C.F.R. § 1.2105(a)(2).

²⁰ See FCC Form 175, at Certification (4); see also 47 C.F.R. § 1.2105(a)(2)(ix).

²¹ Although the auction was for the Broadband PCS D, E, and F blocks, US WEST was only eligible to apply for frequencies in the D and E blocks. The F block was designated as an entrepreneurial block and reserved for small businesses.

²² US WEST's FCC Form 175, Exhibit B.

²³ Similarly, Western was only eligible to apply for frequencies in the D and E blocks.

²⁴ Western's FCC Form 175, Exhibit B.

commenced on August 26, 1996. During the auction, six bidders actually placed bids for the E block, Olympia, Washington BTA, including US WEST, Western, Whidbey Telephone Company ("Whidbey"), OPCSE-Galloway Consortium a/k/a Omnipoint Corporation ("Omnipoint"), NorthCoast Operating Co., Inc. ("NorthCoast") and Electric Lightwave, Inc. ("Lightwave").²⁵

10. The first bids for the E block, Olympia, Washington BTA were placed on August 27, 1996, in round 2, with Lightwave's bid in the amount of \$1,000 and NorthCoast's bid of \$11.²⁶ On September 9, in round 10, US WEST placed a new high bid in the amount of \$27,000. On September 10, in round 11, Western countered with a bid of \$79,088. This remained the high bid until September 19, when US WEST placed a bid in round 24, in the amount of \$105,000. US WEST states that this was the first time it had bid on a license for which Western held the high bid.²⁷ According to US WEST, Mr. Ford was unaware that the US WEST auction team had bid on the Olympia, Washington BTA license unseating Western's standing high bid.²⁸ Apparently, Mr. Ford "had not wanted US WEST to bid directly against Western because from watching Western's activity in the auction, he believed Western was a vindictive bidder, and he feared that bidding against Western could trigger retaliatory bidding by that company in markets important to US WEST."²⁹

11. After placement of the round 24 bid, Mr. Ford left a voice mail message for Mr. Baumbaugh, informing him that "one of US WEST's bids had been mistakenly placed."³⁰ According to US WEST's account, the message "did not mention any specific round or market," rather it "stated generically that the auction process was stimulating and hectic and that mistakes could be made."³¹ US WEST later determined that the bid to which Mr. Ford's voice mail message referred was the bid placed by US WEST in round 24 for block E in the Olympia, Washington BTA, where Western had previously held the high bid.³² According to US WEST, although Mr. Ford did not recall the precise date of his voice mail message, Mr. Ford's cellular telephone records show that he placed two calls to Mr. Baumbaugh on September 19, 1996,

²⁵ With the exception of Omnipoint, the same participants bidding for the E block, Olympia, Washington BTA license were also bidding for the D block license, along with one additional participant, AT&T Wireless PCS Inc.

²⁶ See Bidding Record for block E, Olympia, Washington BTA, at Attachment.

²⁷ US WEST Response, *supra*, Question 7.

²⁸ US WEST Response, *supra*, Question 1.

²⁹ US WEST Response, *supra*, Question 1.

³⁰ See Statement for the Information of the Commission filed by US WEST, dated August 1, 1997 ("US WEST Statement").

³¹ US WEST Response, *supra*, Question 1.

³² US WEST Statement, *supra*; US WEST Response, *supra*, Question 7.

which corresponds to round 24 of the auction.³³ Western's account of the voice mail message is more specific than that of US WEST and corroborates US WEST's conclusion that Mr. Ford was referring to the Olympia, Washington BTA. 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."³⁴

12. According to Western, shortly after receiving the voice mail message from Mr. Ford, Mr. Baumbaugh briefly discussed the message with Alan Bender, WWC's Senior Vice President/General Counsel and Mr. Stanton, the Chairman/Chief Executive Officer.³⁵ On September 19 or 20, 1996, after receiving legal advice from the General Counsel during that discussion, Mr. Baumbaugh left a voice mail message for Mr. Ford,³⁶ 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."³⁷

13. Thereafter, Mr. Ford called Mr. Baumbaugh on or about September 20, 1996.³⁸ At the outset of this conversation, Messrs. Ford and Baumbaugh acknowledged that "they would not discuss the particulars of the D/E/F auction."³⁹ 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)."⁴⁰

14. According to the Commission's bidding record, after the subject disclosure, US WEST held the high bid in the Olympia BTA until round 40, when a fifth bidder, Whidbey, placed a bid for \$150,000. An apparent "bidding war" ensued in rounds 40 through 48, between US WEST and Whidbey. In round 48, US WEST held the high bid in the amount of \$283,000. In

³³ US WEST Response, *supra*, Question 7.

³⁴ See Western Response, *supra*, Questions 1 and 2.

³⁵ Western Response, *supra*, Questions 1 and 2.

³⁶ Western Response, *supra*, Question 2.

³⁷ Western 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 [Mr. Baumbaugh] 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 Statement").

³⁸ Western Response, *supra*, Question 1.

³⁹ US WEST Response, *supra*, Question 1. See also Western Response, *supra*, Question 1.

⁴⁰ Western Response, *supra*, Question 1.

round 53, Whidbey placed a bid in the amount of \$311,000. In that same round, Western matched Whidbey's bid, however, because Whidbey had placed its bid before Western, under the auction rules, Whidbey was designated the high bidder of that round.⁴¹ In round 54, US WEST placed the high bid in the amount of \$342,000. In round 56, Western placed a bid in the amount of \$376,320, once again becoming the high bidder. Thereafter, US WEST ceased bidding for that particular license. Western held the high bid until round 83, when Whidbey placed a bid for \$414,000. Thereafter, an apparent "bidding war" ensued in rounds 83 through 120, between Western and Whidbey. In round 120, Whidbey held the high bid in the amount of \$579,000. On November 19, 1996, in round 121, Omnipoint placed its first and only bid for the market in the amount of \$637,000. In that same round, Western placed a bid in the amount of \$637,001, becoming the high bidder for the market. No other bids were placed for that license, rendering Western the winning bidder on the block E, Olympia, Washington BTA license.⁴²

15. On January 14, 1997, after 276 rounds, the auction closed. On February 19, 1997, the Commission released a Public Notice announcing the winning bidders.⁴³ The Public Notice indicated that Western was the high bidder on 100 licenses and that US WEST was the high bidder on 53 licenses of which approximately 48 were those PCS licenses located within US WEST's landline service region.⁴⁴

16. Post-Auction Conduct. On March 21, 1997, Western filed a Petition to Condition [or Deny] Grant of Licenses against US WEST's applications for D and E block PCS licenses. In its Petition, Western requested that the Commission deny, or in the alternative, condition the grant of the 48 licenses to US WEST upon US WEST's provision of local exchange access for Western, as required by Commission's rules. Western further requested that the Commission take action to require US WEST to meet its interconnection and reciprocal compensation obligations. The Petition contained no mention of the Ford/Baumbaugh communications during the auction. On April 3, US WEST filed an opposition to the Petition and, on April 14, Western filed a reply. On April 28, the Commission granted three of US WEST's D and E block PCS licenses. The three licenses did not involve markets within US WEST's landline service area.⁴⁵ On April 28, 1997, the Commission granted 95 of Western's D and E block PCS licenses, which included the license

⁴¹ The Commission date- and time-stamps each bid upon receipt. In the event of tie bids, the Commission identifies the high bidder on the basis of the order in which bids are received, starting with the earliest bid. *See*, Bidder Information Package, FCC Broadband PCS Auction, D/E/F Blocks (1996), at 50, ¶ 3.

⁴² *Public Notice*, Broadband Personal Communications Services D, E, and F blocks Service Information, Applications Accepted for Filing, DA 97-356 (rel. February 19, 1997).

⁴³ *Public Notice* (rel. February 19, 1997), *supra*.

⁴⁴ *Public Notice* (rel. February 19, 1997), *supra*.

⁴⁵ *Public Notice*, FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses Balance of Winning Bids (D and E Block) and Final Down Payment (F Block) are Due by May 12, 1997, DA 97-883 (rel. April 28, 1997).

for the Olympia, Washington BTA, E block.⁴⁶

17. By early 1997, the United States Department of Justice launched an investigation into bidding practices employed by participants during the Commission's PCS auctions. In connection with the investigation, the Department of Justice issued Civil Investigative Demands ("CIDs") regarding potential violations of Section 1 of the Sherman Act to the auction participants. On April 25, 1997, the Department of Justice sent a CID to US WEST.⁴⁷ "After receiving the CID, US WEST began an extensive internal investigation of its activities during the D/E/F auction."⁴⁸ US WEST states that as part of its investigation, US WEST's lawyers interviewed each member of the company's auction team, including Mr. Ford.⁴⁹ According to US WEST, an initial interview of Mr. Ford occurred on May 1, at which time "Mr. Ford disclosed that he had spoken to Mr. Baumbaugh during the auction but insisted on close questioning that the conversation consisted only of Mr. Ford expressing to Mr. Baumbaugh that the auction was exciting."⁵⁰ Apparently, during the May 1 interview, Mr. Ford maintained "that he and Mr. Baumbaugh carefully avoided discussing bidding information" and "that he knew that auction rules prohibited communication of bidding information with other bidders and that he did not discuss bidding information with Mr. Baumbaugh or with any other bidders."⁵¹ Apparently a second interview of Mr. Ford, conducted on May 19, disclosed no additional information on the subject communication.⁵²

18. On June 26, 1997, the Bureau dismissed Western's Petition.⁵³ The June 26 MO&O further granted US WEST's pending applications for 48 licenses in the D and E blocks.⁵⁴ On June 27, the Commission granted US WEST's application with regard to two additional D and E block PCS licenses.⁵⁵

19. Western had also received a CID from the Department of Justice. In June 1997, in

⁴⁶ *Public Notice* (rel. April 28, 1997), *supra*.

⁴⁷ US WEST Response, *supra*, Question 5.

⁴⁸ US WEST Response, *supra*, Question 5.

⁴⁹ US WEST Response, *supra*, Question 5.

⁵⁰ US WEST Response, *supra*, Question 5.

⁵¹ US WEST Response, *supra*, Question 5.

⁵² US WEST Response, *supra*, Question 5.

⁵³ *See In re Applications of US WEST Communications, Inc. for Various D & E Block Broadband PCS Licenses*, Memorandum Opinion & Order, DA 97-1346 (rel. June 26, 1998) ("June 26 MO&O").

⁵⁴ June 26 MO&O, *supra*.

⁵⁵ *In re Applications ACC-PCS, Inc et. al*, Memorandum Opinion and Order, 12 FCC Rcd 8449 (WTB 1997).

the context of preparing a response to the Justice Department inquiry, Western reviewed "the existence of the Ford/Baumbaugh communications".⁵⁶ In connection with the company's internal investigation, Western's outside counsel interviewed Mr. Baumbaugh, Mr. Stanton (WWC's Chairman/Chief Executive Officer) and Alan Bender (WWC's General Counsel).⁵⁷

20. According to US WEST, on July 5, 1997, the company's outside counsel disclosed to Western's outside counsel, "the existence of a conversation between Mr. Ford and Mr. Baumbaugh as Mr. Ford had reported it to US WEST's counsel during his first interview [held on May 1]."⁵⁸ On July 11, at a meeting between outside counsel for US WEST and Western, Western's outside counsel disclosed to US WEST's attorneys "that Mr. Ford had left the subject voice mail for Mr. Baumbaugh."⁵⁹ On July 14, US WEST's outside and in-house counsel again interviewed Mr. Ford⁶⁰ where it appears that after being "confronted with this new information Mr. Ford confirmed that he had left the message."⁶¹ According to US WEST, following this interview, Mr. Ford retained personal counsel.⁶² On July 17, after being orally advised of the subject communication, the senior management unanimously determined to terminate Mr. Ford's employment with US WEST.⁶³ On July 18, Mr. Ford was dismissed.⁶⁴

21. During the period from July 15 through August 1, 1997, US WEST conducted interviews of Mr. Ford's supervisors and subordinates, as well as other senior company officials involved in the auction process, to determine who had been aware of the Ford/Baumbaugh communications and to determine whether any other communications occurred.⁶⁵ US WEST states that the interviews of Mr. Ford's supervisors and other senior company officials involved in the auction process revealed no evidence that any of them was aware of the incident. The company further indicates that some of the subordinates recalled having heard during the auction period that Mr. Ford had spoken with an acquaintance at Western, but none was aware of the

⁵⁶ Western Response, *supra*, Question 5.

⁵⁷ Western Response, *supra*, Question 5.

⁵⁸ US WEST Response, *supra*, Question 4.

⁵⁹ US WEST Response, *supra*, Question 4.

⁶⁰ US WEST Response, *supra*, Question 5.

⁶¹ US WEST Statement, *supra*.

⁶² US WEST Response, *supra*, Question 5.

⁶³ US WEST Response, *supra*, Question 10.

⁶⁴ US WEST Response, *supra*, Question 10.

⁶⁵ US WEST Response, *supra*, Question 5.

details or timing of the conversation.⁶⁶

22. On July 22, 1997, US WEST representatives met with Commission staff to informally reveal the incidence of the Ford/Baumbaugh communications. Sometime during July 1997, Western learned that US WEST was "preparing to make a disclosure of the incident" pursuant to Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65.⁶⁷ Western further states that around this time, Western's outside counsel again interviewed Mr. Baumbaugh, Mr. Stanton (WWC's Chairman/Chief Executive Officer) and Alan Bender (WWC's General Counsel), and it was around this time that Western's FCC counsel was "apprised of the incident."⁶⁸

23. On July 28, 1997, Western filed an Application for Review of the Bureau's June 26 MO&O, which denied Western's Petition to Condition [or Deny] Grant of US WEST's D and E block Licenses. Western's Application for Review did not raise the issue of the Ford/Baumbaugh communications.

24. On August 1, 1997, US WEST submitted a "Statement for the Information of the Commission in accordance with Section 1.65 of the Commission's Rules" ("US WEST Statement"), which formally disclosed Mr. Ford's voice mail message, the receipt of Mr. Baumbaugh's return voice mail message and a telephone conversation with Mr. Baumbaugh during the auction. In response to US WEST's Statement, Western submitted a letter on August 6 to clarify certain factual assertions ("Western Statement").

25. On August 12, 1997, US WEST filed an opposition to Western's Application for Review, and on August 27, Western filed its reply. The Commission has not issued a final ruling on Western's Application for Review. On September 26, the Commission granted the remaining five PCS licenses to Western.⁶⁹

26. On November 21, 1997, the Bureau's Enforcement and Consumer Information Division issued each company a letter of inquiry pursuant to Section 308 of the Communications Act of 1934, as amended, 47 U.S.C § 308(b). Western submitted its response to the Division's letter of inquiry on December 15 ("Western Response"), and US WEST submitted its response to the letter on December 16 ("US WEST Response").

III. DISCUSSION

27. Given the Commission's statutory obligation to use auctions as a primary licensing

⁶⁶ US WEST Response, *supra*, Question 5.

⁶⁷ US WEST Response, *supra*, Question 5.

⁶⁸ Western Response, *supra*, Question 5.

⁶⁹ *Public Notice*, FCC Announces Grant of Broadband Personal Communications Services D and E Block Licenses to Western PCS BTA I Corporation, 12 FCC Rcd 15264 (WTB 1997).

tool, the protection of the integrity of the auction process is of paramount importance. Consequently, we are concerned about actions that compromise the integrity of the auction process. This is particularly true with regard to behavior that violates the anti-collusion rule, Section 1.2105(c) of the Commission's Rules.

28. Section 1.2105(c) states in pertinent part:

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

47 C.F.R. § 1.2105(c)(1).

29. The purpose of the anti-collusion rule is to preserve the integrity and competitiveness of the auction process.⁷⁰ Just two days after the commencement of the Broadband PCS D, E, and F block auction, the Bureau warned "auction applicants who have applied for the same geographic areas . . . [to] avoid all discussions with each other which affect, or in their reasonable assessment, have the potential to affect their bids or bidding strategies."⁷¹ A few weeks later, the Bureau again emphasized to applicants that the anti-collusion rule prohibits them from "cooperating, collaborating, discussing, or disclosing in any manner the substance of their bids or bidding strategies."⁷² Further, the Commission has stressed that any bidder found in violation of the anti-collusion rule faces potential sanctions of license revocation or forfeiture and may even be prohibited from participating in future auctions.⁷³

30. Here, US WEST concedes that the "[Ford/Baumbaugh] communications raise an issue under Section 1.2105(c) of the [Commission's] Rules."⁷⁴ One of US WEST's vice presidents, who was also the head of the company's D, E, and F block auction team, disclosed

⁷⁰ *Second Report and Order*, 9 FCC Rcd at 2386-87.

⁷¹ "Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rule for D, E, and F Block Bidders," *Public Notice*, DA 96-1460 (released August 28, 1996).

⁷² Letter from Kathleen O'Brien Ham, Chief, Auctions Division, to David L. Nace, Esq., 11 FCC Rcd 11363 (September 17, 1996).

⁷³ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, 5570-71 (1994) ("Fifth Report and Order"). The United States Department of Justice supported efforts by the Commission to minimize the risk of tacit collusion in the Commission's auctions. See Comments of the United States Department of Justice, dated October 8, 1997, in W.T. Docket No. 97-82 ("DOJ Comments"), at 2.

⁷⁴ See Letter dated August 1, 1997., from William T. Lake (counsel to US WEST) to William F. Caton, Acting Secretary, Federal Communications Commission.

information about the company's bidding strategy concerning a particular market to a competing bidder during the auction. The message, *i.e.*, US WEST's bid in round 24 was mistakenly placed, is precisely the type of disclosure prohibited under the anti-collusion rule. The voice mail message revealed to Western that although US WEST was bidding in the market, US WEST was not interested in winning the Olympia, Washington BTA. US WEST concedes that the information was disclosed for the purpose of affecting Western's bidding strategy in the auction, *i.e.*, to avoid retaliatory bidding by Western in markets important to US WEST.⁷⁵

31. Furthermore, it appears 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. The Commission's bidding record shows that after Mr. Ford's voice mail message was sent at or about the time of round 24, Western stopped bidding on the Olympia, Washington market. At the same time, US WEST, which by its own account was not interested in the Olympia, Washington market, nonetheless continued to bid actively for the license and engaged in a "bidding war" with a third bidder (Whidbey) over the market. However, after Western reentered the bidding and became the high bidder in round 56, US WEST stopped bidding for the license. Thereafter, a "bidding war" ensued between Western and Whidbey, after which Western ultimately won the E block Olympia, Washington BTA license.⁷⁶

32. These facts refute US WEST's assertion that the subject disclosure and discussion had no impact on the outcome of the auction.⁷⁷ The factual record shows that the subject communications very likely benefitted US WEST and Western and disadvantaged other bidders. US WEST likely benefitted from the disclosure by reducing the possibility that Western would compete in markets of interest to US West. Indeed, 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. Additionally, it appears that after the subject disclosure, US WEST obtained a relatively safe haven (the Olympia market) in which to "park eligibility."⁷⁸ Normally, an auction participant that parks eligibility runs the risk of having to either purchase the license or pay a substantial withdrawal payment if another bidder does not subsequently place a higher bid

⁷⁵ US WEST Response, *supra*, Question 1.

⁷⁶ See *Public Notice*, DA 97-81 (released January 15, 1997) (identifying Western as the winning bidder for the Olympia, Washington BTA, E block).

⁷⁷ US WEST Response, *supra*, Question 1.

⁷⁸ Under the auction rules, bidders were required to actively bid on a certain percentage of their maximum eligibility, as initially determined by their upfront payment, in each round of the auction. See, *Public Notice*, Auction of Broadband PCS (D, E, and F Blocks), Qualified Bidders and Bidder Instructions, 11 FCC Rcd 9958, 9960 (WTB 1996). Rather than bidding directly on markets of interest, some auction participants bid elsewhere to preserve eligibility while not driving prices higher in markets of interest to themselves. This strategy is informally known as "parking eligibility."

on the market.⁷⁹ US WEST reduced this risk by disclosing to Western that it was not a serious contender for the Olympia market. In so doing, US WEST had effectively guaranteed that Western would later outbid US WEST in that market, since Western would have no fear of triggering a "bidding war" against US WEST over the Olympia market. US WEST subsequently placed four bids for Olympia (in rounds 41, 45, 48, and 54) with minimal risk that such bids would result in winning the license or in a withdrawal payment for the company.

33. Western likely benefitted from the communications as well. Western learned of US WEST's lack of interest in Olympia and, thus, learned more about the true overall demand for that market. Western also got a window into US WEST's overall auction plan and strategy. Mr. Ford's disclosure gave Western unique and exclusive information to the effect that US WEST's bidding strategy was not what it appeared. Until the voice mail message, Western possessed evidence (i.e., through the March/April 1995 meeting with US West representatives; the June 1996 golf game; and discussions with a third party, BDPCS, Inc.) of US West's desire to win the Olympia, Washington BTA. It also appears that US WEST avoided directly competing with Western in Olympia, as evidenced by the fact that US WEST immediately removed itself from bidding on the market once Western returned as the high bidder in round 56.

34. It is apparent that US WEST and Western's conduct unfairly disadvantaged the other bidders in the market by creating an impermissible asymmetry of information. Western alone was privy to US WEST's strategic bidding information. Other bidders were at a competitive disadvantage vis-a-vis Western because of their inability to access, analyze, and act upon this strategic information. In particular, Whidbey expended its auction time, energy and resources responding to the insincere bids of US WEST in Olympia, an expenditure Western was able to avoid. In addition, the continued presence of US WEST, a bidder with vast resources, may have had considerable impact on other bidders' estimates of the overall demand for the Olympia market and thus on their willingness to enter or to remain in the BTA.

35. The fact that Messrs. Ford and Baumbaugh may have had a prior acquaintance does not make their conversation permissible. Indeed, their relationship should have placed US WEST and Western on notice that heightened precautions may have been needed to ensure that prohibited discussions did not occur. Furthermore, the fact that the PCS markets had been the topic of pre-auction conversations (i.e., at the March/April 1995 meeting and the June 30, 1996 golf game) between Messrs. Ford and Baumbaugh does not mitigate the violation. Rather, the pre-auction conversations may have given further substance and context to Mr. Ford's voice mail message.

36. Although the record in this matter appears to show that the disclosed information was

⁷⁹ Under the auction rules, a bidder is permitted to withdraw a bid it previously placed in a particular market, subject to certain withdrawal payments. Where no subsequent bid is placed, the penalty is assessed at a percentage of the total amount of the withdrawn bid until the full amount can be assessed, i.e., when the license is reaucted. If another bidder subsequently places a bid for the market, the bidder that placed the withdrawn bid is subject to a payment equivalent to the difference between the amount of the withdrawn bid and the amount of the winning bid. No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid. *See e.g.*, 47 C.F.R. § 24.704.

used to advantage US WEST and Western, such a finding is not necessary to issue a penalty under the anti-collusion rule. Irrespective of whether the information was used, a violation results from the mere communication or conveyance of prohibited information. It would severely hamper the Commission's ability to maintain the integrity of its auctions if a penalty for violations of Section 1.2105(c) could result only after a showing that prohibited information was actually used in an anticompetitive manner. The basis for the rule is to prohibit such disclosures in the first instance.

37. Further, the circumstances presented constitute an apparent violation of Section 1.65 of the Commission's Rules. 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.⁸⁰ In its short-form application, US WEST 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. Here, the subject conduct -- *i.e.*, conveying bidding strategy to an undisclosed competing bidder and cooperating with that undisclosed competing bidder in obtaining a license -- invalidated US WEST's certification, thereby comprising a "substantial change" in US WEST's application.⁸¹ As such, the incident was a reportable event under Section 1.65 and required US WEST to bring the matter to the Commission within 30 days.⁸² US WEST's reporting of the incident was untimely under the rule. By its own admission, US WEST, through Mr. Ford, had knowledge that a "substantial change" occurred on September 19 and 20, 1996, at the time of the subject communications. US WEST, however, did not formally report the "substantial change" to the Commission until August 1, 1997, approximately 11 months after it occurred. US WEST's failure to promptly notify the Commission constitutes a violation of Section 1.65 of the Commission's Rules.⁸³ The fact that Mr. Ford did not disclose the incident to US WEST until after the expiration of the 30 day time period does not absolve US WEST from the requirements of Section 1.65. The violation was committed by US WEST's then-Vice President of Business Development and External Affairs, Wireless Group, who headed the company's auction team, and had also held a variety of in-house counsel positions in the company over a period of 11 years. As such, the company is fully accountable for the actions of its

⁸⁰ 47 C.F.R. § 1.65. *See also* Letter from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, to Jonathan D. Blake and Robert J. Rini, DA 95-2404 (rel. November 28, 1995) ("Blake Letter") (noting that Section 1.65 requires an auction applicant to bring to the Commission's attention any communication not permissible under the applicant's certification pursuant to Section 1.2105(c)).

⁸¹ Under the auction rules, US WEST would not be permitted to amend its short-form application after expiration of the filing deadline to reflect the creation of a joint bidding arrangement with Western. *See* Blake Letter, DA 95-2404 (rel. November 28, 1995), *supra*.

⁸² 47 C.F.R. § 1.65. The United States Department of Justice stressed that the Commission's imposition of notification requirements for auction competitors engaging in discussions or negotiations during the auction would facilitate detection of potential anticompetitive arrangements. *See* DOJ Comments, at 3.

⁸³ *See Elwood Beach Broadcasting, Ltd.*, 8 FCC Rcd 453 (1993) (where company's principal/general partner had knowledge that company's proposed transmitter site had become unavailable, company's failure to promptly notify the Commission constituted a violation of Rule 1.65).

officials, including those of Mr. Ford.⁸⁴

38. We also find the timing of US WEST's voluntary disclosure to the Commission somewhat disconcerting. Specifically, while US WEST claims to have reported this incident to the Commission within three weeks of discovering the violation, the incident was not formally reported to the Commission until approximately four weeks after the Wireless Telecommunications Bureau granted 48 of US WEST's pending applications for D and E block licenses and after the expiration of the 30 day time period within which the Bureau, on its own motion, could have set aside the grant.⁸⁵

39. Under Section 503(b) of the Act, a forfeiture can be imposed against any applicant or licensee that willfully or repeatedly fails to comply with any rule of the Commission.⁸⁶ For purposes of Section 503(b), the term "willful" means that the violator knew it was taking the action in question, regardless of whether there was an intent to violate the rule.⁸⁷ Pursuant to that definition, we conclude that US WEST willfully engaged in two violations of Section 1.2105(c) of the Commission's rules by intentionally disclosing and discussing bidding strategy with a competing bidder during the auction -- the voice mail that Mr. Ford left for Mr. Baumbaugh and the telephone conversation between Messrs. Ford and Baumbaugh. US WEST also willfully violated Section 1.65 of the Commission's rules by not timely informing the Commission of the prohibited communications.

40. Violations of the anti-collusion rule during an auction directly threaten the integrity and competitiveness of the auctions process.⁸⁸ We believe that the actions of US WEST and Western are particularly egregious because they evidence a specific intent to violate the anti-collusion rule. While, as noted above, a party's intent to violate the rule is not necessary to a determination of whether that party acted willfully, we find that an intent to violate a Commission rule is probative in determining the penalty to be assessed. US WEST and Western intended to violate the anti-collusion rule by engaging in communications regarding bidding strategy -- precisely the types of communications the rule was adopted to prohibit. In light of the above, we assess against US WEST a forfeiture in the amount of \$100,000 for each of its two willful violations of Section 1.2105(c) of the Commission's rules, for a total of \$200,000.

⁸⁴ *Elwood Beach Broadcasting, Ltd., supra.* See also, *In re Applications of PCS 2000, LP*, Memorandum Opinion and Order, 12 FCC Rcd 1681, ¶ 16 (1997) (holding company ultimately responsible for the misrepresentations made during the auction by its officer/registered bidding agent).

⁸⁵ 47 C.F.R. § 1.108.

⁸⁶ 47 U.S.C. § 503(b).

⁸⁷ See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

⁸⁸ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2386-87 (1994)(anti-collusion rule adopted to preserve integrity and competitiveness of auctions process).

41. In addition, US WEST, through its vice president, knew that its bidding strategy had been disclosed to and discussed with a competing bidder. US WEST's violation of Section 1.65 by failing to timely report to the Commission the communications between Messrs. Ford and Baumbaugh was not only willful but was repeated. Thus, it was a "continuing violation" under Section 503(b) of the Communications Act. Each day of a continuing violation is considered a separate violation for purposes of computing a forfeiture.⁸⁹ In this case, the violation began on October 19, 1996, 30 days after the date of the disclosure, and continued until US WEST reported the incident to the Commission (US WEST reported the incident to the Commission informally on July 22, 1997 and in writing on August 1, 1997). We find that the appropriate forfeiture amount for each day of this continuing violation was \$5,000, for a total of \$1,000,000.

42. In determining the amount of the forfeiture, we have considered the relevant statutory factors enumerated in Section 503(b)(2) of the Communications Act of 1934, as amended, including the nature, circumstances, extent and gravity of the violations. Pursuant to Section 1.80 of the Commission's Rules, US WEST may avail itself of the opportunity to present mitigating evidence showing why a forfeiture should not be imposed or why the amount should be adjusted downward. Upon receipt of such evidence, we will consider all relevant factors, including the licensee's overall compliance history, whether the licensee voluntarily disclosed the violation to the Commission, and the circumstances under which the licensee came forward with information concerning the incident.

IV. CONCLUSION

43. Accordingly, 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, US WEST Communications, Inc., is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of one million and two hundred thousand dollars (\$1,200,000) for its willful and repeated violation of Section 1.2105(c) of the Commission's Rules, 47 C.F.R. § 1.2105(c) and its willful and repeated violation of Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2)(D) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(2)(D).

44. Therefore, IT IS HEREBY ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3), that within thirty (30) days of the release date of this Notice, US WEST Communications, Inc., SHALL PAY the full amount of the proposed forfeiture OR SHALL FILE a response showing why the proposed forfeiture should not be imposed or the amount should be reduced.

45. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482. The payment should note the

⁸⁹ See *Eastern Carolina Broadcasting, Inc.*, 6 FCC Rcd 6154, 6155 (1991).

File Number of the above-captioned proceeding. Payment of the forfeiture may be made by credit through the Commission's Billing and Collections Branch at (202) 418-1995.

46. IT IS FURTHER ORDERED that a copy of this Notice SHALL BE SENT to US WEST Communications, Inc., by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

ATTACHMENT

BIDDING RECORD
OLYMPIA, WASHINGTON BTA (MARKET 331)
BLOCK E, BROADBAND PCS AUCTION

Round	Lt.Wave	N.Coast	Omnip.	USWEST	Western	Whidbey
2	\$1,000	\$11				
10				\$27,000		
11					\$79,088	
24				\$105,000		
40						\$150,000
41				\$176,000		
44						\$205,000
45				\$231,000		
46						\$257,000
48				\$283,000		
53					\$311,000	\$311,000*
54				\$342,000		
56					\$376,320	
83						\$414,000
84					\$455,001	
93						\$501,000
94					\$551,001	
120						\$579,000
121			\$637,000		\$637,001	

* high bid for round 53