

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

In re Application of)
)
Mercury PCS II, LLC)
)
For Facilities in the Broadband Personal)
Communications Systems in the D, E, and)
F Blocks)

MEMORANDUM OPINION AND ORDER

Adopted: August 18, 1998

Released: August 28, 1998

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (a) a *Notice of Apparent Liability for Forfeiture*¹ ("NAL") in which the Commission found Mercury PCS II, LLC ("Mercury") apparently liable for a forfeiture in the amount of \$650,000 for having apparently violated Section 1.2105(c) of the Commission's Rules; and (b) a Response to the NAL filed by Mercury on November 28, 1997. Also before the Commission, is a Petition for Partial Reconsideration of the NAL filed by High Plains Wireless, L.P. ("High Plains") on November 26, 1997. For the reasons explained herein, we hereby rescind Mercury's forfeiture liability and dismiss High Plains' Petition for Partial Reconsideration. We make clear, however, that reflexive bid signalling is detrimental to the auctions process and we put future auction participants on notice that such signalling is covered under Section 1.2105(c) of the Commission's Rules.

II. BACKGROUND

2. The Commission's broadband PCS D, E, and F block auction commenced on August 26, 1996 and closed on January 14, 1997. Each of the 1,479 licenses being auctioned was assigned a BTA market number ("BTA number") between 1 and 493 in each of the three blocks. Bidders were allowed to bid any whole dollar amount above the minimum acceptable bid. The

¹ 12 FCC Rcd 17,970 (1997).

bids placed during a given round could be viewed through the bidding software at the close of that round.

3. During the auction, Mercury placed a series of bids in several markets that incorporated trailing digits reflecting certain BTA numbers ("trailing numbers bids"). These bids were placed in a reflexive manner ("reflexive bid signals"). For example, in connection with the Lubbock, Texas and Amarillo, Texas markets, Mercury placed, within a short number of rounds, three bids for the Lubbock, Texas (BTA market number 264) F block license containing trailing digits which reflected the BTA number for the Amarillo, Texas market and two bids for the Amarillo, Texas (BTA market number 013) F block license containing trailing digits which reflected the BTA number for the Lubbock, Texas market. These bids were placed as follows:

BTA 264(F block); round 117; Mercury's bid \$1,375,013
BTA 013(F block); round 121; Mercury's bid \$1,615,264
BTA 264(F block); round 123; Mercury's bid \$1,922,013
BTA 013(F block); round 125; Mercury's bid \$1,866,264
BTA 264(F block); round 127; Mercury's bid \$2,326,013²

4. High Plains filed two separate complaints with the Commission, objecting to Mercury's bidding behavior in the auction.³ High Plains claimed that Mercury's use of trailing numbers communicated bidding strategy to competing bidders in violation of Section 1.2105(c) of the Commission's Rules.⁴ According to High Plains, Mercury's bid signals in the Lubbock, Texas and Amarillo, Texas markets were intended to warn High Plains that if it did not cease bidding for the Lubbock, Texas F block license, Mercury would retaliate by outbidding High Plains for the Amarillo, Texas F block license. High Plains claimed that after it ceased bidding for the Lubbock, Texas F block license, Mercury, in turn, ceased bidding for the Amarillo, Texas F block license.⁵ Mercury denied having violated any Commission Rules, particularly, Section

² Mercury placed trailing numbers bids in a similar reflexive pattern in the Eagle Pass, Texas; San Angelo Texas; Victoria, Texas; McComb Mississippi; and Lake Charles, Louisiana markets. See, *Mercury PCS II, LLC*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 17970, 17973-74 (¶ 11) (1997) ("*Mercury NAL*") (listing reflexive bid signals placed by Mercury in the D, E, and F block auction).

³ On November 26, 1996, during the auction, High Plains filed an Emergency Motion for Disqualification with the Commission ("High Plains' Emergency Motion"). On March 21, 1997, following the close of the auction, High Plains filed with the Wireless Telecommunications Bureau a Petition to Deny 32 applications of Mercury for its D, E, and F block licenses ("High Plains' Petition to Deny").

⁴ Section 1.2105(c) of the Commission's Rules generally prohibits auction participants from cooperating, collaborating, discussing, or disclosing in any manner the substance of their bids or bidding strategies. This rule section is often referred to as the Commission's "anti-collusion" rule.

⁵ High Plains' Emergency Motion, at 3; High Plains' Petition to Deny, at 3-5.

1.2105(c).⁶ In subsequent filings with the Commission, Mercury continued to deny any wrongdoing, maintaining, among other things, that its use of trailing numbers was not prohibited by Section 1.2105(c).⁷

5. On October 28, 1997, the Commission issued the subject NAL against Mercury for its use of reflexive bid signals during the auction. The Commission held that Mercury's use of reflexive bid signals "not only violated the plain language of our anti-collusion rule, which prohibits disclosure of bidding strategy, but also violated the spirit and intent of our rule by disclosing its bidding strategy in a manner that explicitly invited other auction participants to cooperate and collaborate on their bidding in specific markets."⁸ The Commission reasoned, "Mercury's very specific bid signals, coded within its bid and apparently aimed at particular markets had the potential to affect other auction participant's bidding strategy with a substantial likelihood of influencing the outcome of the auction."⁹

6. On November 26, 1997, High Plains filed a Petition for Partial Reconsideration of the NAL in which it requested the Commission to increase Mercury's forfeiture liability beyond the \$650,000 already imposed. High Plains argued that "the magnitude of the forfeiture [imposed in the NAL] is extremely small in light of the size of the bids [Mercury] placed in the market."¹⁰ High Plains further argued that the NAL failed to account for all of the reflexive bid signals Mercury placed during the auction.¹¹

7. On November 28, 1997, Mercury filed its Response to the NAL in which it requested rescission of the forfeiture liability or, in the alternative, a reduction in the forfeiture amount. In support, Mercury claimed, among other things, that the conduct in question did not violate Section 1.2105(c);¹² that Section 1.2105(c) does not clearly proscribe the conduct in question¹³;

⁶ See Mercury's Opposition to High Plains' Emergency Motion for Disqualification.

⁷ See Letter dated September 17, 1997, from Mercury submitted in response to Wireless Telecommunications Bureau letter of inquiry.

⁸ *Mercury NAL*, at 17,976 (¶ 17).

⁹ *Mercury NAL*, at 17,976 (¶ 17).

¹⁰ High Plains Petition, at 8-12.

¹¹ High Plains Petition, at 5-8.

¹² Mercury Response, at 3-10.

¹³ Mercury Response, at 10-16.

that the conduct was a natural product of the auction design itself;¹⁴ that Mercury was being singled out wrongfully for punitive, disparate treatment;¹⁵ and that the proposed forfeiture amount is arbitrary and capricious.¹⁶

III. DISCUSSION

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

[A]ll applicants are prohibited from cooperating, collaborating, discussing, or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the high bidder makes the required down payment, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to Section 1.2105(a)(2)(viii).

47 C.F.R. § 1.2105(c)(1) (emphasis added).

9. The anti-collusion rule is sufficiently broad to prohibit reflexive bid signaling. Indeed, Section 1.2105(c) of the Commission's Rules explicitly admonishes auction participants to refrain from disclosing in any manner the substance of their bids or bidding strategies. As we stated in the NAL:

In our view, Mercury's use of reflexive bid signaling with the use of trailing bid numbers during the PCS auction not only violated the plain language of our anti-collusion rule, which prohibits disclosure of bidding strategy, but also violated the spirit and intent of our rule by disclosing its bidding strategy in a manner that explicitly invited other auction participants to cooperate and collaborate on their bidding in specific markets. Mercury's very specific bid signals, coded within its bid and apparently aimed at particular markets had the potential to affect other auction participant's bidding strategy with a substantial likelihood of influencing the outcome of the auction. In fact, the record indicates that this was precisely the effect in the Lubbock market.

NAL, at ¶ 17 (footnotes omitted).

¹⁴ Mercury Response, at 16-23.

¹⁵ Mercury Response, at 24-28.

¹⁶ Mercury Response, at 28-31

10. We find, upon further consideration, however, that neither the Commission's interpretation of Section 1.2105(c) nor its actions during the relevant auction, when the allegation of reflexive bid signaling arose, afforded notice to auction participants in the D, E, and F Block auction that the use of such bidding activities constituted prohibited conduct.¹⁷ Where a violation of a rule subjects a licensee to sanctions, the Commission must be clear in interpreting the rule.¹⁸ Furthermore, we believe that a review of the administrative history and prior Commission decisions¹⁹ concerning this rule section militates against a finding of adequate notice to auction participants in the D, E, and F block auction that the conduct at issue was prohibited under Section 1.2105(c) because none of this precedent dealt with bid signaling or any activity akin to bid signaling. Finally, although understandable under the circumstances, the Wireless Telecommunications Bureau's neutral pronouncement immediately following the initial allegation of reflexive bid signaling could reasonably have been interpreted by auction participants as indicative of an undefined position on whether reflexive bid signaling was covered under the anti-collusion rule.²⁰ Hence, we do not believe that Mercury received adequate notice that the

¹⁷ Traditional concepts of due process preclude the Commission from penalizing a licensee for violating a rule without first providing advance, clear and adequate notice as to the conduct required or prohibited by the rule. *Satellite Broadcasting Company, Inc. v. FCC*, 824 F.2d 1, 3-4 (D.C. Cir. 1987); *Abundant Life, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 11724 (1997).

¹⁸ *Salzer v. FCC*, 778 F.2d 869, 871-72 (D.C. Cir. 1985) ("fundamental fairness . . . requires that an exacting application standard, enforced by the severe sanction of dismissal without consideration on the merits, be accompanied by full and explicit notice of all prerequisites for such consideration.") See also *Gates & Fox Company, Inc. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) ("If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.")

¹⁹ See, e.g., *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); *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Fourth Report and Order, 9 FCC Rcd 6858, 6866 (1994); *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, 5570-71 (1994) (making Section 1.2105(c) applicable to broadband PCS auctions); *Commercial Realty St. Pete*, Notice of Apparent Liability for Forfeiture, 10 FCC Rcd 4277 (1995). See also e.g., "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules," *Public Notice*, DA 95-2244 (released October 26, 1995); "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); *Letter to Gary M. Epstein and James H. Barker from William E. Kennard, General Counsel, Federal Communications Commission* (released October 25, 1994); *Letter to David L. Nace from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau*, DA 96-1566 (released September 17, 1996).

²⁰ As noted in the NAL, at ¶ 15, on December 20, 1996, after receiving a formal complaint alleging the illegal use of bid signaling during the auction, the Commission issued, via the bidding software, an announcement to all auction participants. The announcement acknowledged receipt of the complaint and stated that "[w]e have reached no determination on the merits of this argument. However, we invite all bidders to review the anti-collusion rule . . . and assess whether they are complying with the letter and spirit of the rule." In response to the initial allegation of illegal bid signaling, Mercury denied that it had violated Section 1.2105(c)

activities in which it engaged would violate the anti-collusion rule. For these reasons, we believe it appropriate to rescind the forfeiture liability against Mercury stemming from the company's use of reflexive bid signaling in the D, E, and F block auction.

11. We take this opportunity, however, to clarify, to the extent we have not already done so, that the use of bid signaling in Commission auctions constitutes conduct that falls within the ambit of the proscription of Section 1.2105(c) of the Commission's Rules.²¹ The signals employed by Mercury in the D, E, and F Block auction contained bidding information embedded in the trailing digits of the bid, which was relayed in a specific pattern, targeted at particular bidders, directed at particular markets, and designed to entice other bidders into an undisclosed, non-verbal agreement. This type of activity has the potential to undermine the integrity of the auction process.²² This type of "disclosure" is prohibited under the anti-collusion rule. Auction participants are hereby placed on notice for future auctions that using the bidding system in this manner to disclose market information to competitors will not be tolerated and will subject bidders to sanctions. Based on this ruling, it is unnecessary to address the remaining arguments raised by Mercury.

12. Finally, in light of the foregoing analysis, we deny High Plains' Petition for Partial Reconsideration, which seeks to increase the amount of forfeiture assessed against Mercury and to sanction Mercury for alleged bid signaling activities in other markets.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that the Response to the Notice of Apparent Liability for Forfeiture filed by Mercury PCS II, LLC on November 28, 1997, IS GRANTED to the extent that it requests rescission of the proposed forfeiture, and, pursuant to Section 504(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 504(b), the proposed forfeiture IS HEREBY RESCINDED.

and argued that the use of trailing numbers bids constituted nothing more than gamesmanship and aggressive competition. In any event, a Bureau investigation shows that Mercury ceased its trailing digit activities after the bidder announcement was issued.

²¹ See "Preventing Collusion" in FCC Report to Congress on Spectrum Auction, WT Docket No. 97-150, Report, FCC 97-353, at 15-16 (Commission implemented click-box bidding in part to prevent bid signaling practices).

²² NAL, at ¶ 17. See also *US WEST Communications, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 98-41, (released March 16, 1998) (failure by auction participant to maintain continuing accuracy of its application under Section 1.65 of the Commission's rules is also detrimental to the auctions process).

14. IT IS FURTHER ORDERED that the Petition for Partial Reconsideration of The Notice of Apparent Liability for Forfeiture filed by High Plains Wireless, L.P. on November 26, 1997, IS HEREBY DENIED.

15. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order SHALL BE SENT to Mercury PCS II, LLC and to High Plains Wireless, L.P. by Certified Mail, Return Receipt Requested.

16. IT IS FURTHER ORDERED that this forfeiture proceeding IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary