

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

In the Matter of	)	FCC File Numbers:
	)	
Applications of Mercury PCS II, LLC	)	00114CWL97 <i>et al.</i>
	)	
For Authority to Construct and Operate	)	
Broadband PCS Systems on Frequency	)	
Blocks D, E, and F	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 21, 1997**

**Released: August 21, 1997**

By the Acting Chief, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. On March 21, 1997, High Plains Wireless L.P. (High Plains) filed a petition to deny 32 applications of Mercury PCS II, LLC (Mercury) for D, E, and F block broadband Personal Communications Services (PCS) licenses.<sup>1</sup> High Plains alleges that Mercury engaged in improper "bid signaling" during the auction with respect to two applications, and that such behavior disqualifies Mercury from holding Commission licenses.<sup>2</sup> For the reasons stated below, we deny, in part, High Plains' Petition and conditionally grant 23 of Mercury's applications.<sup>3</sup> For reasons discussed below, nine applications will remain pending until the completion of further investigation by the Bureau and the Department of Justice into allegations of improper bidding activity by various D, E, and F block bidders, including Mercury.<sup>4</sup> We emphasize that our conditional grant of Mercury's applications is without prejudice to any future action the Commission may take in light of the ongoing investigations being conducted by the Commission and the Department of Justice.

**II. BACKGROUND**

2. The allegations raised by High Plains in its Petition arise from Mercury's conduct in

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<sup>1</sup> These are listed in Appendix A.

<sup>2</sup> High Plains' Petition to Deny (Mar. 21, 1997) (Petition) at 1-7.

<sup>3</sup> These are listed in Appendix B.

<sup>4</sup> These are listed in Appendix C.

bidding for two markets, Amarillo and Lubbock, Texas, during the course of the D, E, and F block broadband PCS auction, which began on August 26, 1996, and concluded on January 14, 1997. On November 26, 1996, High Plains filed an Emergency Motion with the Commission alleging that in some of Mercury's bids for the F block licenses in the Amarillo and Lubbock markets, Mercury had incorporated the Amarillo and Lubbock BTA market numbers (namely, 264 for Lubbock and 013 for Amarillo) into the last three digits of its bids as a means of sending a signal to High Plains, which was also bidding for these markets.<sup>5</sup> High Plains contended that this use of "trailing numbers" by Mercury was intended as a warning to High Plains that if it did not cease bidding for the Lubbock F block broadband PCS license, Mercury would retaliate by outbidding High Plains for the Amarillo F block broadband PCS license.<sup>6</sup> High Plains alleged that Mercury's conduct violated the Commission's prohibition against collusion as embodied in 47 C.F.R. § 1.2105(c).<sup>7</sup> High Plains argued that based on this conduct, Mercury should be disqualified from further bidding in the Amarillo and Lubbock markets.<sup>8</sup> Mercury responded that its use of trailing numbers was consistent with a "common practice" utilized by many other participants in the D, E, and F block auction and that it had violated no Commission rule.<sup>9</sup>

3. In light of High Plains' allegations and Mercury's response, the Wireless Telecommunications Bureau (Bureau) initiated a general investigation to determine the extent to which bidders in the D, E, and F block auction might have engaged in bid signaling, using trailing numbers or other means, and whether such activity violated the anti-collusion rule. During the auction, the Bureau also issued a notice to all D, E, and F block bidders alerting them to High Plains' allegations and reminding them of the importance of complying with the anti-collusion rule.<sup>10</sup> In addition, the Bureau forwarded High Plains' motion to the Department of Justice (DOJ). DOJ also commenced a civil investigation into bidding activity in the D, E, and F block auction, as well as other auctions. Both the Bureau's investigation and DOJ's investigation remain ongoing.

4. Following the initiation of these investigations, at the close of the auction, High Plains was determined to be the high bidder for the Amarillo F block license and the Lubbock D block license. Mercury was determined to be the high bidder for the Lubbock F block license, as well as D, E, and F block licenses in 31 other markets.<sup>11</sup> On March 21, 1997, High Plains petitioned to

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<sup>5</sup> High Plains' Emergency Motion for Disqualification (Nov. 26, 1996) (Emergency Motion).

<sup>6</sup> *Id.* at 3.

<sup>7</sup> Specifically, Section 1.2105(c) of the Commission's rules provides that, except in certain circumstances, after the filing of the short-form applications, all "applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies . . ." 47 C.F.R. § 1.2105(c).

<sup>8</sup> Emergency Motion at 4.

<sup>9</sup> Mercury Opposition to Emergency Motion (Dec. 6, 1996) at 7.

<sup>10</sup> Auction Announcement # 11 229.01, Signaling Bids (rel. Dec. 23, 1996).

<sup>11</sup> See Appendix A for a list of the D, E, and F block broadband PCS licenses for which Mercury was the high bidder.

deny all of Mercury's applications. In its Petition, High Plains repeats its earlier allegations of bid signaling by Mercury.<sup>12</sup> High Plains argues that Mercury's alleged rule violation has undermined the integrity of the auction process and renders Mercury unfit to be a Commission licensee. High Plains urges the Commission to deny all of its applications for D, E, and F block broadband PCS licenses. High Plains also urges the Commission to initiate a revocation proceeding with respect to broadband PCS licenses previously obtained by Mercury in the C block auction.<sup>13</sup> High Plains also contends that Mercury was aware of High Plains' interest in Lubbock because one of Mercury's principals, William Mounger II (Mounger), is a member of the partnership that formed High Plains and allegedly participated in preparing of High Plains' bidding strategy.<sup>14</sup>

5. In opposition to High Plains' Petition, Mercury does not dispute that it used trailing numbers in some of its bids, but denies that such conduct violates the anti-collusion rule.<sup>15</sup> Mercury also disputes High Plains' contention that Mercury's conduct rises to the level that would disqualify it as a Commission licensee. Mercury argues that for such a sanction to be warranted, it must be established not only that a rule violation occurred, but that Mercury acted with scienter, *i.e.*, that it violated the Commission's rules knowingly and intentionally.<sup>16</sup> Mercury contends that High Plains has failed to make such a showing. Under these circumstances, Mercury contends, it cannot be found to have engaged in the type of deliberate violation of Commission rules that would warrant its disqualification as a licensee.<sup>17</sup> Finally, Mercury denies that Mounger knew of any confidential information concerning High Plains' bidding strategy or that he used such information for Mercury's benefit.<sup>18</sup>

### III. DISCUSSION

6. Although our investigation remains ongoing, the evidence developed so far indicates, with respect to Mercury, that bid signalling using trailing numbers occurred in nine of the

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<sup>12</sup> High Plains' Emergency Motion remains pending. Because the arguments in the Emergency Motion are identical to those High Plains raises in the Petition, we will consider them together. Except as otherwise indicated, however, we will cite the Petition and related pleadings only.

<sup>13</sup> Petition at 7; Reply at 7.

<sup>14</sup> *Id.* at 2, note 2; High Plains' Reply to Opposition (April 30, 1997) (Reply) at 4.

<sup>15</sup> Mercury Opposition to Petition to Deny (April 8, 1997) (Opposition). In addition to responding to High Plains' petition, Mercury has filed a petition to deny High Plains' applications. We will address Mercury's petition in a separate order.

<sup>16</sup> *Id.* at 13.

<sup>17</sup> *Id.* at 19.

<sup>18</sup> *Id.* at 18.

markets<sup>19</sup> and did not occur in the other 23.<sup>20</sup> We find that further investigation is necessary to determine whether grant of the nine involved licenses would be in the public interest or whether they should be designated for hearing.<sup>21</sup> Therefore, action on these applications will be deferred. As to the 23 uninvolved licenses, we find, for the reasons discussed in the next paragraph, that the evidence currently before us does not warrant designation for hearing and that a grant of these applications conditioned on the outcome of the pending investigations would best serve the public interest.

7. The findings developed by the ongoing investigation will lead to a determination of: (1) whether Mercury violated 47 C.F.R. § 1.2105(c) by its conduct, (2) whether any violations implicate Mercury's basic character qualifications with respect to the nine licenses in question, and (3) what sanctions are appropriate. Even assuming that the first two questions are answered affirmatively, denial of the involved applications, loss of the applicable upfront and down payment amounts, or possible forfeitures may well be a sufficient deterrent to future misconduct by Mercury and other applicants.<sup>22</sup> Therefore, with respect to the 23 uninvolved licenses, we conclude that it would best serve the public interest to permit construction of facilities necessary to provide a valuable new telecommunications service subject to the outcome of the proceedings discussed above. Of course, our decision to conditionally grant these 23 applications should in no way be construed as prejudging or circumscribing the scope or potential outcome of the ongoing investigations. We emphasize that our granting of these 23 licenses does not affect our ability to take action against any and all of Mercury's licenses as warranted by the results of the Bureau's or DOJ's investigations.<sup>23</sup>

8. We also conclude that High Plains' allegations regarding William Mounger fail to raise a substantial and material question of fact as to Mercury's qualifications. Section 309(d)(1) of the Communications Act specifies that a petition to deny must allege "specific allegations of fact" sufficient to show that the license grant would not serve the public interest.<sup>24</sup> High Plains has failed to present any evidence of specific knowledge or communication by Mounger to support its allegations. Instead, High Plains relies solely upon the fact that Mounger was a limited partner in

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<sup>19</sup> See note 4, *supra*.

<sup>20</sup> See note 3, *supra*.

<sup>21</sup> See *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 629-30 (D.C. Cir. 1978).

<sup>22</sup> See *In the Matter of Policy Regarding Character Qualifications In Broadcast Licensing, Report, Order and Policy Statement*, 102 FCC 2d 1179, 1224-25 and 1228 (1986), *recon. granted in part and denied in part*, 1 FCC Rcd 421 (1986) (hereinafter, *Character Policy Statement*).

<sup>23</sup> *Character Policy Statement* at 1225 (allowing an acquisition does not affect the Commission's discretion to take action if it is ultimately revealed that the applicant does not possess the basic qualifications to remain a licensee).

<sup>24</sup> 47 U.S.C. § 309(d)(1) (party in interest may file a petition to deny an application based on specific allegations of fact sufficient to show that grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity).

the partnership that established High Plains, and later became a principal of Mercury.<sup>25</sup> Such conclusory assertions and speculative inferences are insufficient to raise a substantial and material question of fact.<sup>26</sup> In the absence of specific allegations or evidence demonstrating that Mounger was privy to High Plains' bidding strategy and communicated this knowledge to Mercury, we do not find that a substantial and material question of fact has been raised.

#### IV. CONCLUSION

9. Having reviewed Mercury's applications and the pleadings filed in this matter, we conclude that a conditional grant of 23 of the subject applications will serve the public interest, convenience, and necessity. We further find no substantial and material questions of fact regarding Mercury's basic qualifications to be a licensee in these 23 markets. Therefore, we deny High Plains' Emergency Motion for Disqualification and Petition to Deny, in part, and conditionally grant 23 of Mercury's applications<sup>27</sup> for markets in the D, E, and F block auction subject to the outcome of our ongoing investigation regarding bid signaling and related issues.<sup>28</sup>

#### V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309(d), and Sections 0.331 and 24.830(a)(3) of the Commission's rules, 47 C.F.R. §§ 0.331 and 24.830(a)(3), the Emergency Motion for Disqualification filed November 26, 1996 by High Plains Wireless, L.P. is DENIED TO THE EXTENT INDICATED HEREIN.

11. Additionally, IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309(d), and Sections 0.331 and 24.830(a)(3) of the Commission's rules, 47 C.F.R. §§ 0.331 and 24.830(a)(3), the Petition to Deny filed March 21, 1997 by High Plains Wireless, L.P. is DENIED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 309(d), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d), and 309(j), and

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<sup>25</sup> See Petition at 2-3.

<sup>26</sup> See *American Mobile Phone, Inc. and RAM Technologies, Inc., Order*, 10 FCC Rcd 12,297, 12,298 (1995) (citing *Astroline Communications Co. L.P. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988)) (petitioner has burden of pleading specific allegations of fact necessary to support a conclusion that grant of an application would be inconsistent with the public interest). Allegations that consist of ultimate, conclusive facts, or more general allegations on information and belief, are not sufficient. See *North Idaho Broadcasting Co.*, 8 FCC Rcd 1637 (1993) (citing *Gencom, Inc. v. F.C.C.*, 832 F.2d 171, n.11 (D.C. Cir. 1987)) (petitioner must plead specific facts, not merely factual inferences or conclusions).

<sup>27</sup> See Appendix C for a list of the licenses being granted.

<sup>28</sup> We note that the aforementioned nine licenses will remain pending until the completion of the Bureau's investigation. See paragraph 6, *supra*.

Section 1.2104(g) of the Commission's rules, 47 C.F.R. § 1.2104(g), the 23 Mercury PCS II, LLC applications set forth in Appendix B are conditionally GRANTED. Grant of each license set forth in Appendix B is expressly conditioned on Mercury's compliance with the payment provisions for D, E, and F block licenses set forth in the *Public Notice* DA 97-883, dated April 28, 1997,<sup>29</sup> and submission of the required payment for each license within 10 business days of the date of this *Memorandum Opinion and Order*. Grant of each license is further conditioned on any action that may be taken based on the outcome of any investigation being conducted or that may be conducted by the Commission or the Department of Justice regarding bid signaling or other bidding activity.

13. These actions are taken pursuant to delegated authority in accordance with Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Daniel B. Phythyon  
Acting Chief  
Wireless Telecommunications Bureau

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<sup>29</sup> *Public Notice*, "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," DA 97-883 (Apr. 28, 1997).

## APPENDIX A

Mercury PCS II, LLC Applications Subject to Petition to Deny  
Broadband PCS Auction in D, E, and F Block

<u>Market</u>	<u>Block</u>	<u>File No.</u>	<u>Location</u>
B003	F	00114CWL97	Abilene, TX
B032	F	01284CWL97	Baton Rouge, LA
B040	F	01285CWL97	Big Spring, TX
B042	F	01286CWL97	Biloxi-Gulfport-Pascagoula
B052	F	01287CWL97	Bowling Green-Glasgo
B058	F	01288CWL97	Brunswick, GA
B087	F	01289CWL97	Clovis, NM
B115	F	01290CWL97	Dothan-Enterprise, AL
B121	D	01291CWL97	Eagle Pass-Del Rio, TX
B146	F	01292CWL97	Florence, AL
B154	F	01293CWL97	Ft. Walton Beach, FL
B159	F	01294CWL97	Gainesville, FL
B180	F	01295CWL97	Hammond, LA
B186	F	01296CWL97	Hattiesburg, MS
B191	E	01297CWL97	Hobbs, NM
B195	F	01298CWL97	Houma-Thibodaux, LA
B236	F	01299CWL97	Lafayette-New Iberia
B246	E	01300CWL97	Laurel, MS
B263	F	01301CWL97	Louisville, KY
B264	F	01302CWL97	Lubbock, TX
B269	F	01303CWL97	McComb-Brookhaven
B296	F	01304CWL97	Midland, TX
B302	F	01305CWL97	Mobile, AL
B305	F	01306CWL97	Montgomery, AL
B327	F	01307CWL97	Odessa, TX
B340	F	01308CWL97	Panama City, FL
B343	F	01309CWL97	Pensacola, FL
B400	F	01310CWL97	San Angelo, TX
B415	F	01311CWL97	Selma, AL
B439	F	01312CWL97	Tallahassee, FL
B454	F	01313CWL97	Valdosta, GA
B467	F	01314CWL97	Waycross, GA

## APPENDIX B

## Mercury PCS II, LLC Applications Granted Pursuant to this Order

<u>Market</u>	<u>Block</u>	<u>File No.</u>	<u>Location</u>
B003	F	00114CWL97	Abilene, TX
B032	F	01284CWL97	Baton Rouge, LA
B040	F	01285CWL97	Big Spring, TX
B042	F	01286CWL97	Biloxi-Gulfport-Pascagoula
B052	F	01287CWL97	Bowling Green-Glasgo
B058	F	01288CWL97	Brunswick, GA
B087	F	01289CWL97	Clovis, NM
B146	F	01292CWL97	Florence, AL
B159	F	01294CWL97	Gainesville, FL
B180	F	01295CWL97	Hammond, LA
B186	F	01296CWL97	Hattiesburg, MS
B191	E	01297CWL97	Hobbs, NM
B195	F	01298CWL97	Houma-Thibodaux, LA
B236	F	01299CWL97	Lafayette-New Iberia
B246	E	01300CWL97	Laurel, MS
B263	F	01301CWL97	Louisville, KY
B296	F	01304CWL97	Midland, TX
B302	F	01305CWL97	Mobile, AL
B305	F	01306CWL97	Montgomery, AL
B327	F	01307CWL97	Odessa, TX
B415	F	01311CWL97	Selma, AL
B454	F	01313CWL97	Valdosta, GA
B467	F	01314CWL97	Waycross, GA



**APPENDIX C**

## Mercury PCS II, LLC Applications Held in Abeyance Pursuant to this Order

<u>Market</u>	<u>Block</u>	<u>File No.</u>	<u>Location</u>
B115	F	01290CWL97	Dothan-Enterprise, AL
B121	D	01291CWL97	Eagle Pass-Del Rio, TX
B154	F	01293CWL97	Ft. Walton Beach, FL
B264	F	01302CWL97	Lubbock, TX
B269	F	01303CWL97	McComb-Brookhaven
B340	F	01308CWL97	Panama City, FL
B343	F	01309CWL97	Pensacola, FL
B400	F	01310CWL97	San Angelo, TX
B439	F	01312CWL97	Tallahassee, FL