



licenses and deferred action on nine other such applications.<sup>2</sup> High Plains seeks reconsideration of the Bureau's decision, arguing that Mercury's bid signaling in the D, E, and F block auction reflects on its character and makes it unfit to be a Commission licensee.<sup>3</sup> High Plains also asserts that the Bureau failed to consider the full record with respect to one of Mercury's principals who had knowledge of High Plains' bidding strategy.<sup>4</sup> On September 23, 1997, Mercury filed a petition for reconsideration of the Bureau's *Order*, challenging the addition of conditions to its 23 licenses and requesting immediate action on its remaining nine applications.<sup>5</sup> According to Mercury, the Commission has granted licenses unconditionally to a "multitude" of other applicants who have engaged in conduct similar to its own during the course of Commission auctions, and the Bureau had no basis for treating Mercury differently.<sup>6</sup> For the reasons stated below, we deny High Plains' Petition for Partial Reconsideration, grant in part Mercury's Petition for Reconsideration, and grant Mercury's nine remaining applications.

## II. BACKGROUND

2. Emergency Motion. During the course of the D, E, and F block auction, which was conducted from August 26, 1996, to January 14, 1997, High Plains filed an Emergency Motion for Disqualification with the Commission, alleging that in some of Mercury's bids, Mercury had incorporated three-digit market numbers into the last digits of its bids as a means of sending a signal to High Plains.<sup>7</sup> High Plains argued that Mercury's use of such "trailing numbers" was intended as a warning that if High Plains 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.<sup>8</sup> High Plains alleged that this use of trailing numbers violated the Commission's anti-collusion rule, which prohibits communications between bidders for common markets regarding bidding or bidding strategy after the filing of short-form applications and prior to the submission of down payments.<sup>9</sup> In response,

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<sup>2</sup> Applications of Mercury PCS II, LLC for Authority to Construct and Operate Broadband PCS Systems on Frequency Blocks D, E, and F, *Memorandum Opinion and Order*, DA 97-1782 (rel. Aug. 21, 1997) (*Order*).

<sup>3</sup> High Plains' Petition at 5.

<sup>4</sup> *Id.* at 7-10.

<sup>5</sup> Mercury's Petition for Reconsideration (Sept. 23, 1997) (Mercury's Petition). A list of the 23 licenses previously granted to Mercury is contained in Appendix A and a list of Mercury's nine remaining applications is contained in Appendix B.

<sup>6</sup> Mercury's Petition at ii and 7-9.

<sup>7</sup> High Plains' Emergency Motion for Disqualification at 3 (Nov. 26, 1996).

<sup>8</sup> *Id.* at 3-4.

<sup>9</sup> The Commission's anti-collusion rule, which is set forth at 47 C.F.R. § 1.2105(c), was adopted in the *Second Report and Order* in the Competitive Bidding Docket to prevent potential collusive conduct among bidders in the Commission's auctions. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2386-2388 (1994). The rule prohibits auction participants from "cooperating, collaborating,

Mercury argued that, to the best of its knowledge, it had not violated any Commission rule, and that its use of trailing numbers was a common practice utilized by many other participants in the D, E, and F block auction.<sup>10</sup>

3. At the close of the auction, High Plains was the high bidder for the Amarillo F block license and the Lubbock D block license. Mercury was the high bidder for the Lubbock F block license, as well as D, E, and F block licenses in 31 other markets. In light of High Plains' allegations and Mercury's response, the 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. In addition, during the auction the Bureau issued a notice to all D, E, and F block bidders alerting them to High Plains' allegations and inviting them to review the anti-collusion rule and assess whether they were complying with the letter and spirit of the rule.<sup>11</sup> The Bureau also forwarded High Plains' motion to the Department of Justice (DOJ), which commenced a civil investigation into bidding activity in the D, E, and F block auction as well as other Commission auctions.<sup>12</sup>

4. High Plains' Petition to Deny. On March 21, 1997, High Plains filed a petition to deny all of Mercury's applications, repeating its earlier allegations regarding Mercury's bid signaling behavior.<sup>13</sup> In opposition, Mercury acknowledged that it had used trailing numbers in its bids, but denied that such conduct violated the anti-collusion rule.<sup>14</sup> In its *Order* of August 21, 1997, the Bureau conditionally granted 23 of Mercury's applications and deferred action on the remaining nine applications. The Bureau determined that the evidence collected to that point indicated that bid signaling using trailing numbers had occurred in nine of the markets in which Mercury was the high bidder and not in the other 23.<sup>15</sup> The Bureau concluded that, since no evidence existed that Mercury had engaged in bid signaling in 23 of the 32 markets, "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 [ongoing investigations]."<sup>16</sup> However, the Bureau also decided that further investigation was necessary to determine whether grant of the licenses in the nine markets in which

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discussing or disclosing in any manner the substance of their bids or bidding strategies . . . with other applicants," except in narrowly defined instances not relevant here. *See also Public Notice*, "Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rule for D, E, and F Block Bidders," DA 96-1460 (rel. Aug. 28, 1996).

<sup>10</sup> Mercury's Opposition to Emergency Motion at 7 (Dec. 6, 1996).

<sup>11</sup> Commission Announcement No. 47 of the D, E, and F Block Auction, entitled "Signalling Bids" (rel. Dec. 20, 1996).

<sup>12</sup> DOJ's investigation remains ongoing.

<sup>13</sup> High Plains' Petition to Deny (Mar. 21, 1997).

<sup>14</sup> Mercury's Opposition to Petition to Deny (Apr. 8, 1997).

<sup>15</sup> *Order*, ¶ 6.

<sup>16</sup> *Id.*, ¶ 7.

bid signaling had occurred would be in the public interest and deferred action on those nine applications pending completion of the Bureau's investigation.<sup>17</sup>

5. High Plains' Petition for Partial Reconsideration. In its petition, High Plains argues that grant of the 23 licenses was premature because of the ongoing investigation and the possibility that the Commission would determine that Mercury's behavior in the nine markets was sufficient to render Mercury ineligible to hold these nine licenses. According to High Plains, if Mercury is found to be unfit to hold nine licenses, it is unfit to hold any licenses.<sup>18</sup> At the very least, High Plains maintains that the Bureau should have refrained from any action on Mercury's applications until completion of the ongoing investigations.<sup>19</sup> In addition, High Plains argues that it submitted numerous documents demonstrating that William Mounger (Mounger), a member of Mercury's control group who held an interest in a limited partner of High Plains, had detailed knowledge of High Plains' business plans and auction strategy, and it alleges that Mercury used this knowledge in sending bid signals in the course of the D, E, and F block auction.<sup>20</sup> According to High Plains, the Bureau failed to consider this documentation in concluding that High Plains "failed to present evidence of specific knowledge or communication by Mounger to support its allegations."<sup>21</sup> High Plains concludes that all of Mercury's D, E, and F block license applications should be denied.<sup>22</sup>

6. In opposition, Mercury asserts that the Bureau's *Order* made no determination of any character flaws on Mercury's part and "affirmatively determined that the twenty-three Mercury applications should be granted, regardless of what is found in [the] investigation."<sup>23</sup> Mercury responds to High Plains' argument that the Bureau should defer action on Mercury's applications until completion of the pending investigation by contending that grant of all of the applications of the 50 parties included in the Bureau's investigation are automatically conditioned upon the outcome of the investigation and to "single out" Mercury for additional penalties would be arbitrary and capricious.<sup>24</sup> Finally, Mercury argues that (i) Mounger ceased his involvement in the minority limited partner in High Plains in 1994; (ii) minority partners in High Plains were permitted to receive information regarding High Plains' bidding strategies only if they executed certain documents designed to safeguard the bidding strategies, and no Mercury principal executed such documents or received or

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

<sup>18</sup> High Plains' Petition at 5. High Plains points to the September 10, 1997 letter from the Bureau's Enforcement and Consumer Information Division (Enforcement Division) as evidence that the Bureau has launched a full scale investigation into Mercury's fitness to be a Commission licensee.

<sup>19</sup> *Id.* at 6-7.

<sup>20</sup> *Id.* at 7-10.

<sup>21</sup> *Id.* at 7, citing *Order*, ¶ 8.

<sup>22</sup> High Plains' Petition at iii, 2, 5, 7, 11.

<sup>23</sup> Mercury's Opposition to Petition for Partial Reconsideration at 3 (Oct. 7, 1997).

<sup>24</sup> *Id.* at 4.

used any confidential information from High Plains; and (iii) the correspondence relied on by High Plains as evidence of conveyance of confidential information provides only general information and fails to satisfy the statute's requirement of specificity.<sup>25</sup>

7. Mercury's Petition for Reconsideration. In its petition, Mercury asserts that the Bureau's deferral of action on nine of its applications was unjustified and irrational.<sup>26</sup> According to Mercury, there is no need for further investigation or for a hearing because it has already explained all the relevant facts and the issue of whether its bid signaling behavior was a violation of Section 1.2105(c) is purely a question of law.<sup>27</sup> Mercury further argues that the decision to defer the grant of its applications was unwarranted because it amounts to disparate treatment of similarly situated applicants, *i.e.*, applicants who engaged in similar conduct.<sup>28</sup> Mercury maintains that bid signaling is a legitimate strategy in a competitive auction and that even if the Commission determines that bid signaling is prohibited, the rules are too vague to be enforced at this juncture.<sup>29</sup> Finally, Mercury seeks expeditious action on its petition so that it may compete in the marketplace.<sup>30</sup>

8. In opposition, High Plains argues that the anti-collusion rule contains a clear warning that communication of bidding strategies to other bidders is prohibited and Mercury's use of trailing numbers unquestionably constitutes prohibited communication.<sup>31</sup> Further, High Plains contends that Mercury's reliance on the "everyone's doing it" defense is misplaced because the activities of other parties in the auction are not relevant to whether Mercury acted improperly and violated the Commission's anti-collusion rule.<sup>32</sup> While High Plains recognizes the need to expeditiously resolve petitions, it submits that "fundamental notions of equity and due process mandate that disposition not come at the expense of a thorough investigation into and consideration of the issues involved in the Commission's proceeding."<sup>33</sup> High Plains opposes expeditious treatment of Mercury's applications if it would compromise the Bureau's ongoing investigation.<sup>34</sup>

### III. DISCUSSION

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<sup>25</sup> *Id.* at 4-8.

<sup>26</sup> Mercury's Petition at 7-8.

<sup>27</sup> *Id.* at 10.

<sup>28</sup> *Id.* at 7-9.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> *Id.* at 15-16.

<sup>31</sup> High Plains' Opposition to Mercury's Petition for Reconsideration at 2-3 (Oct. 7, 1997) (High Plains' Opposition).

<sup>32</sup> *Id.* at 4.

<sup>33</sup> *Id.* at 6.

<sup>34</sup> *Id.* at 9.

### **A. High Plains' Petition**

9. **Character Issue.** In a Notice of Apparent Liability for Forfeiture (NALF) released on October 28, 1997, the Commission concluded its investigation into the bid signaling behavior of Mercury in the D, E, and F block auction. The Commission determined that Mercury's use of "reflexive bid signaling" -- a type of bidding that involves a bidder placing a bid in one market in which the final three digits of the bid reflect the three-digit BTA number of a second market that the bidder is targeting or that a competitor is targeting -- was a disclosure of its bidding strategy in violation of the anti-collusion rule, and assessed Mercury a forfeiture in the amount of \$650,000.<sup>35</sup> Nonetheless, we conclude herein that Mercury is qualified to be a Commission licensee. The evaluation of an applicant's character qualifications is not an end in itself, but is instead a step in the process through which we determine whether the public interest would be served by grant of a particular application.<sup>36</sup> In order to establish a substantial and material question of fact regarding Mercury's fitness to be a licensee, the petitioner must establish not only that Mercury violated a Commission rule, but that Mercury's conduct raises sufficient questions regarding its character to warrant possible disqualification.<sup>37</sup> Although violations of the Commission's rules may result in forfeitures or other penalties, not all violations necessarily rise to the level of disqualifying an applicant.<sup>38</sup> A range of sanctions, short of denying an application, are available to the Commission, and in only the most egregious cases should termination of all rights be considered.<sup>39</sup>

10. In examining character issues relating to violations of the Commission's rules, we

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<sup>35</sup> Applications of Mercury PCS II, LLC for Facilities in the Broadband Personal Communications Systems in the D, E, and F Blocks, *Notice of Apparent Liability for Forfeiture*, FCC 97-388 (rel. Oct. 28, 1997) (NALF).

<sup>36</sup> See 47 U.S.C. §§ 307(a) and 309(a) of the Communications Act of 1934, as amended; see also *In re Application of Richard Richards*, 10 FCC Rcd 3950, 3955 (1995) (the purpose behind the *Character Policy Statement* is not to pass moral judgment on applicants, but to determine if the public interest will be served by grant of the specific application before us).

<sup>37</sup> See *In the Matter of Policy Regarding Character Qualifications In Broadcast Licensing, Report, Order and Policy Statement*, 102 FCC 2d 1179 (1986), *recon. granted in part and denied in part*, 1 FCC Rcd 421 (1986) (hereinafter, *Character Policy Statement*). Although the policies established in the *Character Policy Statement* were established to determine the qualifications of broadcast applicants, they also set forth the analytical framework under which the Commission determines character qualifications of non-broadcast applicants. See *Western Telecommunications, Inc.*, 3 FCC Rcd 6405 (1988) (*Character Policy Statement* used to evaluate qualifications of microwave radio licensees); *A.S.D. Answer Service, Inc.*, 1 FCC Rcd (1986) (*Character Policy Statement* standards applied to a domestic public radio service application). Accordingly, we will use the standards outlined in the *Character Policy Statement* as a guideline in this instance.

<sup>38</sup> See, e.g., *WPOM Radio Partners, Ltd.*, 6 FCC Rcd 1413, 1414 (Audio Services Division, MMB, 1991) (although licensee violated several rules, the allegations made did not raise a substantial question of fact regarding the licensee's fitness to be a Commission licensee); *Virginia RSA 6 Cellular Limited Partnership*, 6 FCC Rcd 405, 407 (1991) (while premature construction is a violation of the Commission's rules, it does not warrant inquiry into the applicant's fitness to be a Commission licensee).

<sup>39</sup> *Character Policy Statement*, 102 FCC 2d at 1228.

concentrate on the "truthfulness" and "reliability" of the proposed licensee.<sup>40</sup> Based on the facts presented, we must determine whether the proposed licensee will be forthright in its future dealings with the Commission and utilize its licenses in accordance with the Communications Act, the Commission's rules, and its policies.<sup>41</sup> In order to accord proper weight to the rule violation in relation to the licensee's ability to be truthful and reliable in future dealings with the Commission as well as its ability to operate the facility in the public interest, we consider the nature of the violation, the circumstances surrounding it, and whether the misconduct was isolated or recurring and whether it was inadvertent or deliberate.<sup>42</sup>

11. The allegations of reflexive bid signaling before us raise serious concerns. The anti-collusion rule was adopted to protect the integrity and robustness of the Commission's competitive bidding process, and the conveyance of bidding information among bidders in a manner that violates this rule undermines this process.<sup>43</sup> Nonetheless, there is no indication that Mercury has shown a lack of truthfulness or reliability in its dealings with the Commission, with High Plains, or with other applicants or licensees. There is no allegation that Mercury has attempted to deceive or mislead the Commission or other parties participating in the auction regarding its actions. To the contrary, Mercury has forthrightly admitted that it used trailing numbers as alleged.<sup>44</sup> Moreover, we have no reason to doubt Mercury's assertion that its use of reflexive bid signaling was undertaken in the belief that its behavior was permissible under the Commission's rules. While the Commission has concluded that Mercury's use of reflexive bid signaling during the course of the auction is a violation of the anti-collusion rule, there is nothing in the record to suggest that Mercury will not deal truthfully with the Commission in the future. In sum, we find that the facts established regarding Mercury's bid signaling activities do not disqualify Mercury from becoming a Commission licensee, and conclude that the public interest will be served by granting the licenses so that the public may be provided with new services as quickly as possible.

12. Mounger. High Plains also contends that the Bureau failed to correctly evaluate whether it made a *prima facie* case with respect to its allegations that Mounger had detailed knowledge of High Plains' business plans and auction strategy and that Mercury used this knowledge to send bid

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<sup>40</sup> *Character Policy Statement* at 1209 (Commission determined that "the relevant character traits with which it is concerned are those of 'truthfulness' and 'reliability'").

<sup>41</sup> *Id.* (Commission examines whether "the licensee will in the future be likely to be forthright in its dealings with the Commission and to operate its stations consistent with the requirements of the Communications Act and the Commission Rules and policies"); *see also HHT/Estate of Robert D. Hanna*, 8 FCC Rcd 6638, 6638 (Domestic Facilities Division, CCB, 1993).

<sup>42</sup> *Id.* at 1210 n.76 and 1226.

<sup>43</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Memorandum Opinion and Order*, 9 FCC Rcd 7684, 7688 (1994).

<sup>44</sup> We also note that our investigation has determined that Mercury's reflexive bid signaling activities ceased subsequent to our December 20, 1996 notice alerting the D, E, and F block participants to High Plains' allegations.

signals during the course of the auction.<sup>45</sup> High Plains states that it provided the Bureau with a specific factual basis for its assertions and submitted several letters supporting its allegation that Mounger had detailed knowledge of High Plains' intentions, plans, and strategies.<sup>46</sup>

13. Under Section 309(d) of the Communications Act of 1934, as amended, parties filing a petition to deny must present allegations that, if true, are sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.<sup>47</sup> A finding of a *prima facie* case is based on the facts, standing alone, along with supported or reasonable inferences.<sup>48</sup> The petitioner bears the burden of pleading sufficient facts to establish a *prima facie* case and these facts must be supported by an affidavit from persons with personal knowledge.<sup>49</sup> Allegations that are conclusory or are based simply on belief are not sufficient to satisfy this test.<sup>50</sup>

14. Having thoroughly considered the documents it has submitted, we believe that High Plains has failed to present a *prima facie* case. High Plains' allegations rely on facts and inferences unsupported by affidavits from persons with personal knowledge. The documents and letters submitted by High Plains are not adequate substitutes for the required affidavits from persons with personal knowledge.<sup>51</sup> Moreover, High Plains has failed to set forth specific factual allegations with regard to the alleged behavior of Mounger. Instead, High Plains relies upon conclusory and speculative assertions and unsubstantiated opinion that Mounger possessed and used knowledge about High Plains' business plans and auction strategy. The letters submitted by High Plains as support for this contention do not provide the necessary evidence. One of the letters, which is addressed to "Interest Owners," provides general information about the formation of High Plains and its intent to participate in the PCS auction. While another letter provides more detailed information about capital calls approved to fund participation in the auction, High Plains provides no evidence that Mounger received this letter. Moreover, Mounger's knowledge of High Plains' plans for the D, E, and F block auction by itself would not be a violation of the Commission's rules, and High Plains has presented no evidence that Mounger used any such information on behalf of Mercury. In light of the absence of any such evidence or documentation supported by affidavits, we find that High Plains has failed to present a *prima facie* case of Mounger's having violated the Commission's anti-

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<sup>45</sup> High Plains' Petition at 7-9.

<sup>46</sup> *Id.* at 8-9.

<sup>47</sup> *See* 47 U.S.C. § 309(d)(1).

<sup>48</sup> *See North Idaho Broadcasting Company*, 8 FCC Rcd 1637, 1639 (1993).

<sup>49</sup> *See* 47 U.S.C. § 309(d)(2); *see also American Mobilephone, Inc. and RAM Technologies, Inc.*, 10 FCC Rcd 12,297 (1995).

<sup>50</sup> *See generally Gencom, Inc. v. FCC*, 832 F.2d 171, 181, n.11 (D.C. Cir. 1987) (general allegations based on information or belief are not sufficient).

<sup>51</sup> *See WFBM, Inc.*, 47 FCC 2d 1267 (1974) ("allegations of fact, except for those of which official notice may be taken, must also be supported by a person or persons with personal knowledge thereof").



collusion rule.

### **B. Mercury's Petition**

15. Conditional Grants. Mercury seeks reconsideration of the Bureau's decision to defer action on its nine remaining applications and requests the immediate and unconditional grant of these applications.<sup>52</sup> Likewise, Mercury requests reconsideration of our decision to place conditions upon the 23 licenses already granted.<sup>53</sup>

16. The Bureau, in its *Order*, determined that action on nine of Mercury's applications should be deferred because the evidence indicated that Mercury used bid signaling in these markets and "further investigation [was] necessary to determine whether grant of the nine involved licenses would be in the public interest . . . ."<sup>54</sup> The Bureau further noted that since there was no evidence of bid signaling in the remaining 23 markets, a conditional grant of Mercury's applications for these markets would best serve the public interest by expediting the availability of a valuable new service.<sup>55</sup> We find no basis for reversing that decision. We do not agree with Mercury's contention that a large number of other applicants have engaged in conduct similar to its own during the course of the Commission's auctions. As the Commission indicated in the NALF, bidding techniques such as jump bidding, bid withdrawals, and retaliatory bidding may have been used by other bidders to warn or punish competing bidders, but these techniques do not involve such direct and specifically targeted offers of collusion as the reflexive bid signaling Mercury engaged in.<sup>56</sup> In light of this important distinction, we do not believe that our earlier decision subjected Mercury to unwarranted disparate treatment. Moreover, no petitions to deny alleging bid signaling activities were filed against any other D, E, and F block participants. We note also that, while our investigation into Mercury's reflexive bid signaling behavior has concluded, we are proceeding with our investigation of bid signaling in general, including other auction participants who may have engaged in prohibited behavior. Under the circumstances, we believe our action placed Mercury in as equitable a position as possible with respect to other D, E, and F block licensees who were also subject to ongoing scrutiny, while preserving our ability to take action against Mercury, had our investigation revealed that Mercury did not possess the requisite basic qualifications to remain a Commission licensee.<sup>57</sup>

17. The Bureau's *Order* stated that its actions were based upon the continuation of the ongoing investigation which would lead to a determination of whether Mercury violated the

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<sup>52</sup> Mercury's Petition at 1.

<sup>53</sup> *Id.*

<sup>54</sup> *Order*, ¶ 6.

<sup>55</sup> *Id.*

<sup>56</sup> *NALF*, ¶ 21.

<sup>57</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).

Commission's anti-collusion rule, whether any violation would implicate Mercury's qualifications to be a Commission licensee, and what sanction, if any, would be appropriate.<sup>58</sup> As discussed above, in the NALF released on October 28, 1997, the Commission concluded that Mercury violated the Commission's anti-collusion rule and assessed Mercury a forfeiture in the amount of \$650,000.<sup>59</sup> Further, in paragraphs 9-11 herein, we determined that Mercury's reflexive bid signaling activities did not disqualify Mercury from becoming a Commission licensee. Having concluded our investigation into Mercury's bid signaling activities, we believe that the public interest would best be served by unconditionally granting the remaining nine applications. Furthermore, although we do not reverse our earlier decision to place conditions upon Mercury's 23 previously granted licenses, these conditions no longer exist because they were put in place during the pendency of an investigation that has been concluded. We note that our decision to unconditionally grant the nine previously deferred applications should in no way be construed as prejudging or circumscribing the scope or potential outcome of DOJ's ongoing investigation, and we emphasize that our grant is without prejudice to any future action the Commission may take in light of that investigation. Moreover, Mercury is subject to the ongoing enforcement of the Commission's rules as is any other licensee.

18. Other matters. In order to proceed with the Bureau's investigation into High Plains' allegations of bid signaling, the Enforcement Division, on September 10, 1997, requested additional information from Mercury. On September 17, 1997, Mercury submitted its response to the Enforcement Division's letter under seal and, pursuant to Section 0.457(d) of the Commission's rules, requested confidentiality asking that its response be withheld from public inspection.<sup>60</sup> This response was not made available to High Plains during the pendency of the confidentiality request. In its opposition to Mercury's petition for reconsideration, High Plains objects to Mercury's failure to provide High Plains with a copy of its response to the Enforcement Division. According to High Plains, this impairs High Plains' ability to participate in the reconsideration proceeding.<sup>61</sup>

19. On October 20, 1997, the Enforcement Division granted Mercury's confidentiality request in part and denied it in part, treating as confidential Mercury's responses to Questions 5 and 6 and Schedules 5 and 6.<sup>62</sup> In addition, the Enforcement Division determined that the materials treated as confidential were to be disclosed to High Plains under the terms of a concurrently released protective order.<sup>63</sup> However, this information has not yet been disclosed because, on October 27, 1997, Mercury filed an Application for Review of the Enforcement Division's action. Although Mercury's

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<sup>58</sup> *Order*, ¶ 7.

<sup>59</sup> *NALF*, ¶ 24.

<sup>60</sup> *See* 47 C.F.R. § 0.457(d).

<sup>61</sup> High Plains' Opposition at 8.

<sup>62</sup> *See* Letter to Thomas Gutierrez, Esq., from Howard Davenport, Chief, Enforcement and Consumer Information Division, Wireless Telecommunications Bureau (Oct. 20, 1997).

<sup>63</sup> *See* In the Matter of Applications of Mercury PCS II, LLC for Authority to Construct and Operate Broadband PCS Systems on Frequency Blocks D, E, and F, Protective Order (rel. Oct. 20, 1997).

entitlement to confidentiality remains subject to further review, we conclude it has no bearing on the reconsideration issues before us here. The information sought by the Enforcement Division pertained to the bid signaling investigation in the NALF proceeding, and is reflected in the NALF adopted by the Commission. To the extent Mercury's response contains information not provided to High Plains or subject to its review, it has not been considered herein.<sup>64</sup>

20. Additionally, High Plains argues that Mercury has improperly attempted to influence the Commission's deliberative processes through *ex parte* communications from members of Congress, and that this effort reflects on Mercury's qualifications to be a Commission licensee.<sup>65</sup> During the course of this proceeding, the Commission received numerous letters from Congressional offices filed on behalf of Mercury regarding the petition to deny and related proceedings.<sup>66</sup> In general, these letters expressed concern regarding possible delay in acting on Mercury's applications, and questioned whether Mercury was being treated similarly to other PCS applicants subject to investigations for bid signaling. Pursuant to the Commission's *ex parte* rules, the Office of the General Counsel responded to the letters, advised the authors of the Commission's *ex parte* rules, placed the letters in the public file, and forwarded copies of the letters to the parties.

21. We do not find that the submission of *ex parte* communications by members of Congress raises a character issue with respect to Mercury's qualifications as a licensee. To the extent that these

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<sup>64</sup> See generally *In the Matter of the People of the State of California and the Public Utility Commission of California to Retain Regulatory Authority over Intrastate Cellular Service Rates, Report and Order*, 10 FCC Rcd 7486, 7506-7508 (1995).

<sup>65</sup> High Plains' Opposition at 14.

<sup>66</sup> See Letter to Reed E. Hundt, Chairman, Federal Communications Commission from Senator Thad Cochran (Oct. 1, 1997); Letter to Chairman Hundt from Congressman Roger F. Wicker (Sept. 29, 1997); Letter to Chairman Hundt from Congressman Bob Clement (Sept. 29, 1997); Letter to Chairman Hundt from Senator Fred Thompson and Senator Bill Frist (Sept. 25, 1997); Letter to Chairman Hundt from Senator John Ashcroft (Sept. 9, 1997); Letter to Chairman Hundt from Congressman Ron Lewis (Sept. 4, 1997); Letter to Chairman Hundt from Congressman John J. Duncan (Aug. 20, 1997); Letter to Chairman Hundt from Congressman Richard H. Baker (Aug. 13, 1997); Letter to Chairman Hundt from Congressman Chris John (Aug. 7, 1997); Letter to Chairman Hundt from Congressman Spencer T. Bachus, III (Aug. 7, 1997); Letter to Director, Legislative Affairs, Federal Communications Commission from Senator Kay Bailey Hutchison (Aug. 5, 1997); Letter to Chairman Hundt from Senator Bob Graham and Senator Connie Mack (Aug. 1, 1997); Letter to Chairman Hundt from Senator John Breaux (Aug. 1, 1997); Letter to Chairman Hundt from Congressman Van Hilleary (July 31, 1997); Letter to Chairman Hundt from Congressman F. Allen Boyd, Jr. (July 30, 1997); Letter to Chairman Hundt from Senator Jeff Sessions (July 29, 1997); Letter to Chairman Hundt from Congressman Bud Cramer (July 28, 1997); Letter to Chairman Hundt from Congressman Chip Pickering (July 24, 1997); Letter to Chairman Hundt from Congressman Mac Thornberry (July 23, 1997); Letter to Chairman Hundt from Senator Richard Shelby (July 23, 1997); Letter to Chairman Hundt from Congressman Joe Scarborough (July 22, 1997); Letter to Chairman Hundt from Congressman Bob Riley and Congressman Robert Aderholt (July 22, 1997); Letter to Chairman Hundt from Congresswoman Ann M. Northup (July 18, 1997); Letter to Chairman Hundt from Senator Trent Lott and Senator Thad Cochran (July 17, 1997); Letter to Chairman Hundt from Congressman Bob Clement (July 15, 1997); Letter to Chairman Hundt from Senator Mitch McConnell (July 11, 1997); Letter to Chairman Hundt from Senator Fred Thompson (July 11, 1997); Letter to Chairman Hundt from Congressman Roger F. Wicker (July 9, 1997); Letter to Chairman Hundt from Congressman Mike Parker (July 9, 1997); Letter to Chairman Hundt from Senator Bill Frist (May 14, 1997).

communications concern the status of proceedings, they are permissible under our rules. To the extent that such communications address the merits, and therefore would be considered *ex parte* communications, they have been placed in the record and served on all parties as required by the *ex parte* rules, thus curing any potential violation. In any event, we do not believe that possible *ex parte* violations by third parties are attributable to Mercury under the circumstances presented here. Although Mercury could presumably have been more diligent in alerting members of Congress to the restricted nature of the proceedings, we do not find that action is warranted on this basis. Nevertheless, we admonish Mercury to exercise great care to ensure that it complies fully with the *ex parte* rules in the future.

#### IV. CONCLUSION

22. Having reviewed the pleadings filed in this matter, we find no substantial and material questions of fact regarding Mercury's basic qualifications to be a Commission licensee in all 32 markets. We conclude that a grant of Mercury's remaining nine applications will serve the public interest, convenience, and necessity. Therefore, we deny High Plains' Petition for Partial Reconsideration. Further, we grant in part Mercury's Petition for Reconsideration and grant Mercury's remaining nine applications.

#### V. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Partial Reconsideration filed on September 22, 1997, by High Plains Wireless L.P. IS HEREBY DENIED.

24. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed on September 23, 1997, by Mercury PCS II, LLC, IS GRANTED TO THE EXTENT INDICATED HEREIN.

25. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.2107, 1.2109, 24.708, and 24.716 of the Commission's rules, 47 C.F.R. §§ 1.2107, 1.2109, 24.708, and 24.716, the nine remaining applications of Mercury PCS II, LLC, set forth in Appendix B ARE HEREBY GRANTED. Grant of each license set forth in Appendix B is expressly conditioned on Mercury's submission of the required payment for each license, as set forth in the *Public Notice* released on April 28, 1997,<sup>67</sup> within 10 business days of the date of this *Memorandum Opinion and Order on Reconsideration*.

FEDERAL COMMUNICATIONS COMMISSION

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<sup>67</sup> *Public Notice*, "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," DA 97-883 (Apr. 28, 1997).

Daniel B. Phythyon  
Chief, Wireless Telecommunications Bureau

**APPENDIX A**  
Mercury PCS II, LLC Applications Previously Granted

<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 B**

Mercury PCS II, LLC Applications Granted Pursuant to this *Memorandum Opinion and 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