

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

In the Matter of)	FCC File Numbers:
)	
Applications of High Plains)	00093CWL-97
Wireless, L.P.)	01319CWL-97
)	
For Authority to Construct and Operate)	
Broadband PCS Systems on Frequency)	
Blocks D, E, and F)	

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 1997

Released: November 25, 1997

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On March 21, 1997, Mercury PCS II, LLC (Mercury) filed a petition to deny High Plains Wireless L.P.'s (High Plains) applications for broadband Personal Communications Services (PCS) licenses in the D and F blocks.¹ Mercury alleges that High Plains has abused the Commission's licensing process by filing a frivolous pleading, and should not be allowed to hold Commission licenses.² For the reasons stated below, we deny Mercury's Petition to Deny and grant High Plains' applications.

II. BACKGROUND

2. 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 with the Federal Communications Commission (Commission), alleging that Mercury had incorporated three-digit market numbers into the last digits of some of its bids.³ High Plains contended that Mercury's use of such "trailing numbers" was intended as a signal that if High Plains did not cease bidding for a certain market, Mercury would retaliate by outbidding High Plains for another market.⁴ High Plains alleged that this use of trailing numbers violated the Commission's

¹ Mercury Petition to Deny (Mar. 21, 1997) (Mercury Petition). The affected licenses are listed in the Appendix.

² Mercury Petition at 4-7, 11.

³ High Plains Emergency Motion for Disqualification (Nov. 26, 1996) (Emergency Motion).

⁴ *Id.*

anti-collusion rule, 47 C.F.R. § 1.2105(c), which prohibits communications between bidders in common markets regarding their bidding or bidding strategy after the filing of short-form applications and prior to the submission of down payments.⁵ In response, Mercury argued that it had violated no Commission rule, and that its use of trailing numbers was a common practice utilized by many other participants in the PCS auctions.⁶ At the close of the auction, High Plains was the high bidder for two markets and Mercury was the high bidder for 32 markets.

3. In light of High Plains' allegations concerning bid signaling 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 and whether such activity violated the anti-collusion rule. The Bureau also forwarded High Plains' Emergency 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. DOJ's investigation remains ongoing.

4. On March 21, 1997, High Plains filed a petition to deny all of Mercury's applications, in which it repeated its earlier allegations of Mercury's bid signaling.⁷ In opposition, Mercury again denied that it had violated the anti-collusion rule.⁸ In a separately filed petition to deny High Plains' applications, Mercury argues that High Plains' Emergency Motion was filed for improper purposes, *i.e.*, intimidating Mercury during the auction and impeding litigation between the parties.⁹ Mercury maintains that High Plains' Emergency Motion constitutes an abusive or "strike" pleading, and that such behavior renders High Plains unfit to be a Commission licensee.¹⁰

5. In August 1997, the Bureau conditionally granted 23 of Mercury's license applications and deferred action on the remaining nine.¹¹ The Bureau explained that it granted the 23 licenses subject to the ongoing investigation into bid signaling because no evidence existed that Mercury had engaged in bid signaling in those markets, and that it deferred action on the other nine applications because Mercury had used bid signaling in those markets and further investigation was necessary to determine whether grant of the nine licenses would be in the public interest.¹² In October 1997, the Commission released a Notice of Apparent Liability for Forfeiture, in which it concluded its investigation into Mercury's bid signaling in the D, E, and F block auction and determined that Mercury had violated 47 C.F.R. § 1.2105(c) through its use of

⁵ *Id.*

⁶ Mercury Opposition to Emergency Motion (Dec. 6, 1996) at 7.

⁷ High Plains Petition to Deny (Mar. 21, 1997) (High Plains Petition).

⁸ Mercury Opposition to Petition to Deny (Apr. 8, 1997) (Mercury Opposition).

⁹ Mercury Petition at 4-5.

¹⁰ Mercury Petition at 1-2, 4-5.

¹¹ Applications of Mercury PCS II, LLC, *Memorandum Opinion and Order*, DA 97-1782 (rel. Aug. 21, 1997).

¹² *Id.* at 4.

reflexive bid signaling.¹³ The Commission fined Mercury \$50,000 for each of 13 reflexive bid signals sent, for a total of \$650,000.¹⁴ In a subsequent order addressing Mercury's and High Plains' requests for reconsideration of the partial license grant, the Bureau found that Mercury's rule violation did not disqualify it from becoming a Commission licensee.¹⁵ The Bureau also granted Mercury's remaining nine applications.¹⁶

III. DISCUSSION

6. The Commission's policy on "strike" pleadings is based on the premise that a petitioner that improperly impedes action on an application opens itself to charges of abusing the Commission's processes.¹⁷ In considering alleged strike pleadings, we consider whether a petitioner has filed the pleading for the primary and substantial purpose of delay.¹⁸ In determining the primary purpose behind such a pleading, the Commission considers several factors: (1) statements by the petitioner's principals or officers admitting the obstructive purpose; (2) the withholding of information relevant to disposition of the requested issues; (3) the absence of any reasonable basis for the adverse allegations in the petition; (4) economic motivation indicating a delaying purpose; and (5) other conduct of the petitioner.¹⁹

7. We have carefully reviewed Mercury's allegations and do not find that High Plains' Emergency Motion constitutes a strike pleading. Mercury presents no facts to indicate that High Plains' Emergency Motion was filed for the primary and substantial purpose of delay. Mercury has presented no evidence that High Plains has withheld any information relevant to its allegations of bid signaling, that economic motivation to delay granting Mercury's applications is present, or that any conduct of High Plains evinces a primary intent to delay Mercury's applications.²⁰ Instead, Mercury asserts that the type of bid signaling it

¹³ Applications of Mercury PCS II, LLC, *Notice of Apparent Liability for Forfeiture*, FCC 97-388 (rel. Oct. 28, 1997). Reflexive bid signaling involves a bidder placing a bid in one market, in which the final three digits of the bid reflect the three-digit market number of a second market the bidder or a second bidder is targeting.

¹⁴ *Id.* at 9.

¹⁵ Applications of Mercury PCS II, LLC, *Memorandum Opinion and Order on Reconsideration*, DA 97-2324 (rel. Nov. 5, 1997).

¹⁶ *Id.*

¹⁷ William P. Johnson and Hollis B. Johnson, d/b/a/ Radio Carrollton, Docket No. 19636, *Memorandum Opinion and Order*, 69 F.C.C. 2d 1138, 1149-50 (1978) (*Radio Carrollton*); *clarified*, 69 F.C.C. 2d 424 (1978); *recon. denied*, 72 F.C.C. 2d 264 (1979); *aff'd sub nom. Faulkner Radio, Inc. v. FCC*, No. 79-1749 (D.C. Cir. Oct. 15, 1980); *cert. denied*, 450 U.S. 1041 (1981).

¹⁸ *Radio Carrollton* at 1150.

¹⁹ *Id.* at 1151-1152.

²⁰ *Id.* at 1149-50; *see also* Letter to Ernest T. Sanchez, Esq., DA 95-904 (Apr. 28, 1995) (petitioner must present evidence that primary and substantial delay was purpose of alleged strike pleading); Application of American Mobilphone, Inc., *Order*, 10 FCC Rcd 12297 (1995) (petitioner must show that strike pleading filed for delay or was patently frivolous).

engaged in was commonplace in the PCS auctions and did not violate the Commission's rules.²¹ These assertions do not demonstrate that High Plains' Emergency Motion was frivolous. Not only did the Bureau initiate an investigation into bid signaling based on High Plains' allegations and forward High Plains' motion to DOJ, but the Commission also concluded that Mercury had violated the Commission's rules through the reflexive bid signaling that was the subject of High Plains' Emergency Motion. Thus, the issues raised by High Plains in its Emergency Motion were clearly substantive and serious in nature, and there was a reasonable basis for its Emergency Motion.²² In sum, we find that Mercury has not shown that High Plains abused the Commission's processes.

IV. CONCLUSION

8. Having reviewed the pleadings filed in this matter, we conclude that Mercury has not shown that High Plains abused the Commission's licensing process by filing a frivolous pleading. We further find that there are no substantial and material questions of fact regarding High Plains' qualifications to be a licensee, and that the grant of High Plains' broadband PCS D and F block applications will serve the public interest, convenience, and necessity. Therefore, we deny Mercury's Petition to Deny and grant High Plains' applications for the two markets for which it was the high bidder in the D, E, and F block auction.

V. ORDERING CLAUSES

9. 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 section 24.830(a)(3) of the Commission's rules, 47 C.F.R. § 24.830(a)(3), the Petition to Deny filed on March 21, 1997, by Mercury PCS II, LLC, IS DENIED.

10. 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 sections 1.2109, 24.708, and 24.716 of the Commission's rules, 47 C.F.R. §§ 1.2109, 24.708, and 24.716, the applications of High Plains Wireless, L.P. set forth in the Appendix are GRANTED conditioned on High Plains Wireless, L.P.'s compliance with the payment provisions set forth in the *Public Notice* dated April 28, 1997 granting the broadband PCS D, E, and F block licenses.²³ Grant of these licenses is expressly conditioned on submission of the required payments within 10 business days of the date of this *Memorandum Opinion and Order*.²⁴ Additionally, grant of the F block license is expressly conditioned on timely execution and return by the licensee of all original copies of the note and security agreement in accordance with the instructions provided by the United States Department of Treasury's Birmingham Financial Center. Failure to comply

²¹ Mercury Petition at 7-11.

²² With respect to Mercury's assertion that the type of bid signaling it used was commonplace, we have indicated our disagreement with this argument in our *Memorandum Opinion and Order on Reconsideration* granting Mercury's nine license applications. See Applications of Mercury PCS II, LLC, *Memorandum Opinion and Order on Reconsideration*, DA 97-2324, at 9-10 (rel. Nov. 5, 1997).

²³ *Public Notice*, "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," DA 97-883 (rel. Apr. 28, 1997).

²⁴ *Id.*

with this condition will result in automatic cancellation of the F block license.

11. 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, Chief
Wireless Telecommunications Bureau

APPENDIX

High Plains Wireless, L.P. Applications Subject to Petition to Deny
Broadband PCS D, E, and F Block Auction

<u>Market</u>	<u>Block</u>	<u>File No.</u>	<u>Location</u>
B013	F	00093CWL97	Amarillo, TX
B264	D	01319CWL97	Lubbock, TX