IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MERCURY PCS II, L.L.C., Defendant.	CIVIL ACTION NO. 98 2751 Filed: November 10, 1998

COMPETITIVE IMPACT STATEMENT

The United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THIS PROCEEDING

On November 10, 1998, the United States filed a civil antitrust complaint alleging that the defendant, Mercury PCS II, L.L.C. ("Mercury"), had violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Mercury participated in an auction (the "DEF auction") of broadband radio spectrum licenses for personal communication services ("PCS") that was conducted by the Federal Communications Commission ("FCC") between August 1996 and January 1997. The Complaint alleges that during the DEF auction Mercury submitted bids that ended with three-digit numerical codes to communicate with rival bidders and that, through the use of these coded bids, Mercury and one of its rivals reached an agreement to refrain from bidding against one another. As a

consequence of this agreement, the complaint alleges Mercury and its competitor paid less for certain PCS licenses, resulting in a loss of revenue to the Treasury of the United States.

On November 10, 1998, the United States and Mercury filed a Stipulation and Order in which they consented to the entry of a proposed Final Judgment that provides the relief that the United States seeks in the Complaint. Under the proposed Final Judgment, Mercury would be enjoined from submitting coded bids in future FCC auctions and entering into any agreement related to bidding for FCC licenses that violates Section 1 of the Sherman Act, 15 U.S.C. § 1.

The United States and Mercury have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify, or enforce its provisions and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Background of the PCS Auctions

In 1993, Congress enacted legislation enabling the FCC to auction licenses for radio spectrum that could be used to provide PCS. Based on a wireless, digital technology, PCS offers an alternative to current traditional telephone services.

The FCC designated six bands of broadband radio spectrum for PCS: A, B, C, D, E and F. The A, B and C bands occupy 30 MHZ each, while the D, E and F licenses are 10 MHZ each. The FCC divided the country into 51 geographic areas called Market Trading Areas ("MTAs"), which were each allotted A and B licenses. The FCC subdivided the MTAs into 493 smaller geographic units called Basic Trading Areas ("BTAs"), which were each allotted C, D, E, and F

licenses. Each BTA was assigned a number from 1 to 493.

The authorizing legislation required the FCC to adopt rules ensuring competitive auctions, and the FCC considered numerous auction formats for PCS, ultimately adopting a simultaneous, multiple-round, open format. Under this format, numerous licenses were offered in a single auction, staged over several rounds, with all licenses remaining open for bidding until the auction closed. Auction participants could observe all of the bidding activity in each round. The auction ended only when a round passed in which no bidder submitted a bid on any license.

To keep the auction moving forward, the FCC imposed eligibility limits and activity rules. The FCC gave each license a population value called "MHZ-pops." Each bidder made down payments to the FCC, with the size of the payment entitling it to bid for a certain amount of MHZ-pops. A participant could bid on any combination of licenses as long as the combined MHZ-pops of those licenses did not exceed the MHZ-pops to which the bidder's down payment entitled it (eligibility). Bidders also had to be "active" in each round (bid or have the high bid from the prior round) on licenses representing a set percentage of their MHZ-pops; otherwise, the FCC reduced their eligibility for the next round. As the auction proceeded, the bidders had to bid an increasing percentage of their MHZ-pops until in the final stages they had to bid nearly all of their eligibility.

Each round in the auction began with a bid submission period during which participants submitted bids electronically or by telephone for any of the licenses in which they were interested. After each bid submission period, the FCC published electronically to all bidders the results for each license, including the name of each company bidding, the amount of each bid, and the time each bid was submitted. The high bidder for a license in a round became the "standing high"

bidder for that license with a tie going to the earliest bidder.

A bid withdrawal period then followed. During this period, bidders were permitted to withdraw their standing high bids from any market, subject to a withdrawal penalty specified by the FCC. The FCC then published the results. The bid submission and withdrawal periods comprised an auction round.

At the beginning of an auction, the FCC generally held one round per day. As the auction progressed, the FCC increased the number of rounds held in a single day, providing a period of time between rounds for auction participants to analyze the bidding from the prior round and to plan for the next round.

One goal of the FCC was to ensure the efficient allocation of licenses, that is, that the licenses would go to the bidders who valued them most highly. The simultaneous, multiple-round format of the PCS auctions helped achieve this goal in several ways. It allowed bidders to pursue different license aggregation strategies and change their strategies as the auction proceeded. In addition, it allowed auction participants to observe the value that other bidders placed on the licenses and use that information to refine their own assessment of license values. This was particularly useful given that the technology used for PCS was new and bidders were uncertain about both the costs of providing the services and the prospective revenues. Ultimately, because the licenses were awarded to the highest bidders, the PCS auction format allowed the marketplace to determine the most efficient allocation of licenses.

Notwithstanding these benefits of the auction format, the FCC recognized the risk that "collusive conduct by bidders prior to or during the auction process could undermine the competitiveness of the bidding process." Second Report and Order, FCC 94-61,

¶ 223 (Rel. April 20, 1994). The FCC sought to mitigate the risk of collusion by adopting rules restricting the disclosure of bidding strategies during the auction. The FCC noted, however, that Federal antitrust laws applied to the auctions and it would rely primarily on those laws to deter and punish collusion in the auctions. Second Report and Order, supra at ¶ 225; Second Memorandum Opinion and Order, FCC 94-215, ¶ 50 (Rel. August 15, 1994).

B. Illegal Agreement to Allocate Licenses in the DEF Auction

The auction of the D, E and F licenses for all 493 BTAs began in August 1996. Because there were three bands being auctioned, the DEF auction involved a total of 1479 licenses. Lasting 276 rounds, the auction ended in January 1997.

Prior to the DEF auction, bidders analyzed which licenses (or groups of licenses) would best enable them to provide effective and competitive service, assessed the value they placed on those licenses, and developed strategies to obtain the desired licenses for the lowest possible prices. The bidders also speculated about their rivals' business strategies and attempted to identify the key licenses for those strategies, relying on an array of information, including knowledge of the licenses bidders had acquired in prior auctions.

As the auction proceeded, bidders carefully observed their rivals' actions and often adjusted their own market valuations and business strategies, sometimes based on their assessment of their rivals' objectives. Their rivals' bids, however, did not necessarily reveal their true objectives. An auction participant might bid for a particular license during a particular round for a number of reasons: it may have always wanted the license, but for strategic reasons refrained from bidding until then; it may have changed its business strategy and decided that it now wanted the license; it may have seen an opportunity to acquire an undervalued license; it may have bid simply to

preserve its eligibility to bid on other licenses later in the auction; it may have bid to raise a rival's cost to obtain the license; or it may have bid to send a message to the standing high bidder to refrain from bidding against it for a different license. Thus, the purpose of a particular bid might be procompetitive or anticompetitive.

A bidder's purpose in making a bid might, depending on the circumstances, be ambiguous to its rivals. Where ambiguity remains, it can be difficult to use a bid or bidding pattern alone to send clear messages or invitations to collude. To eliminate or reduce any ambiguity, Mercury sometimes placed bids during the DEF auction in which the final three digits intentionally corresponded to the number for a BTA (a "BTA end code"). Knowing that other bidders could see the bids and hence the BTA end codes, Mercury used the codes to better explain the real purpose of certain bids it made -- to reach an agreement with a rival. In particular, Mercury used the BTA end codes to link the bidding of licenses in two (or more) specific BTA markets, highlight the licenses Mercury wanted, and convey to the competing bidders offers to agree with Mercury not to bid against each other for the linked licenses.

Sometimes Mercury placed bids in one market with the BTA end code of another market to send the message: "I'm bidding for this license because you bid for the one I want (indicated by the BTA code) and I'll stop bidding in your market if you stop bidding in mine." Other times, Mercury used the BTA end codes to tell its rival: "If you don't stop bidding for this license, I will bid for the one you want (indicated by the BTA code)."

Mercury's use of the BTA end codes did not serve any legitimate purpose of the auction. Mercury's purpose for using BTA end codes was to send clear and unmistakable invitations to collude to rival bidders and to reach agreements with those rivals to refrain from bidding against

each other. Such conduct was not authorized by the applicable FCC rules and was inconsistent with the FCC's goal to encourage competitive bidding.

Over the course of rounds 117 to 127, Mercury reached an agreement with High Plains Wireless, L.P. ("High Plains") to allocate between them the F-band licenses for Amarillo (BTA #013) and Lubbock (BTA #264). Mercury agreed to stop bidding for the Amarillo-F license in exchange for High Plains' agreement not to bid for the Lubbock-F license. (The bidding for the Lubbock-F and Amarillo-F licenses between rounds 114 and 127 is depicted in the table attached as Appendix A to this Competitive Impact Statement.)

Prior to round 114, High Plains, Mercury and a third bidder were bidding for the Lubbock-F license. After the third bidder failed to bid for Lubbock-F in rounds 114 through 116, Mercury sought to strike an agreement with the only remaining active bidder on the license -- High Plains. In round 117, Mercury attached the Amarillo BTA end code ("013") to its bid for the Lubbock-F license. By using the BTA end code in round 117, Mercury intended to communicate to High Plains that the bidding for these two licenses was linked and that Mercury would begin bidding for Amarillo-F if High Plains did not stop bidding for Lubbock-F.

Mercury believed that Amarillo was an important license for High Plains. High Plains had placed bids for the Amarillo license in the C auction and had been the standing high bidder for the Amarillo-F license since round 68.

After High Plains continued to bid for Lubbock-F, Mercury placed a bid in round 121 for the Amarillo-F license that ended with the Lubbock BTA end-code ("264"). Mercury's purpose for using the BTA end code was to link the two licenses, highlight the bid as retaliatory, and communicate an offer to stop bidding for Amarillo-F if High Plains stopped bidding for Lubbock-

F. Mercury repeated its offer in subsequent rounds by ending its bids in Lubbock-F and Amarillo-F with BTA end codes. In round 128, High Plains accepted Mercury's offer and stopped bidding for Lubbock-F, even though High Plains had been willing to pay more for the Lubbock-F license. (Lying on the southern border of the Amarillo BTA, the Lubbock BTA presented a natural expansion territory for High Plains.) Observing that High Plains had stopped bidding for Lubbock-F, Mercury stopped bidding for Amarillo-F.

As a consequence of Mercury's agreement with High Plains, competition for the Lubbock-F license was suppressed and the Treasury received less revenue for the Lubbock-F license. It was in High Plains' economic self-interest to bid more for the Lubbock-F license than Mercury's winning bid and, but for the illegal agreement, it would have done so.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The provisions of the proposed Final Judgment are designed to ensure that Mercury does not enter into anticompetitive agreements when participating in future FCC auctions. The decree supplements any prohibitions on bidding conduct set forth in the FCC's auction rules, and the defendant may violate the decree even if its conduct does not violate an agency statute or rule.

The proposed Final Judgment would enjoin Mercury from entering into an agreement with another license applicant to fix, establish, suppress or maintain the price of a license to be awarded by the FCC or to allocate any such licenses among competitors (Section IV(A)). The proposed Final Judgment would not prevent Mercury from entering into any joint-venture or similar agreements regarding licenses to be awarded by the FCC that are both disclosed to the FCC and authorized under the FCC's rules and regulations. (Section IV(A)). However, such bidding arrangements would still be subject to scrutiny under the antitrust laws.

The proposed Final Judgment would also prevent Mercury from using BTA end codes or any similar signaling mechanism to solicit anticompetitive agreements in future FCC auctions. The proposed Final Judgment would enjoin Mercury from submitting bids that contain "license-identifying information" in future FCC auctions, unless the inclusion of such information is required by the FCC (Section IV(B)). License-identifying information is defined as "any number, letter, code or description that designates or identifies a license or that links licenses." (Section II (D)).

The proposed Final Judgment would further require Mercury to establish and maintain an antitrust compliance program (Section V). It would also provide that the United States may obtain information from Mercury concerning possible violations of the Final Judgment (Section VII).

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against Mercury. In this case, the injured person is the United States.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Mercury have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the responses of the United States will be filed with the Court and published in the Federal Register. Written comments should be submitted to:

Roger W. Fones, Chief
Transportation, Energy & Agriculture Section
Antitrust Division
United States Department of Justice
325 Seventh Street, N.W., Suite 500
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment. The proposed Final Judgment would expire ten (10) years from the date of its entry.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, seeking damages in this case pursuant to Section 4A of the Clayton Act, 15 U.S.C. § 15a. Doing so would likely have required a full trial on the merits against Mercury. In the view of the Department of Justice, such a trial would involve substantial cost and the risk associated with such a trial is not warranted, considering that the proposed Final Judgment provides full injunctive relief for the violations of the Sherman Act set forth in the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court may consider:

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). As the Court of Appeals for the District of Columbia Circuit recently held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may

positively harm third parties. See United States v. Microsoft, 56 F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[1] Rather, absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances. United States v. Mid-America Dairymen, Inc., 1977-1 Trade Case. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988), quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981); see also, Microsoft, 56 F.3d 1448 (D.C. Cir. 1995). Precedent requires that

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is 'within the reaches of the

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[1] 119 Cong. Rec. 24598 (1973); see also United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in 1974 U.S.C.C.A.N. 6535, 6538.

public interest.' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[2]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted)."[3]

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[2] United States v. Bechtel, 648 F.2d at 666 (internal citations omitted) (emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716; see also United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983).

[3] United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting Gillette, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

VIII. DETERMINATIVE MATERIALS AND DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: 1/10/98

Respectfully submitted,

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APPENDIX A

Bids for Lubbock-F And Amarillo-F In Rounds 114 Through 127

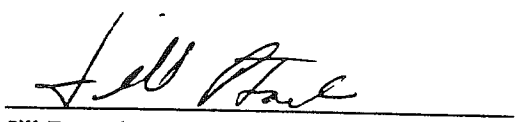
Round	**Lubbock-F (BTA #264)**	**Amarillo-F (BTA #013)**
114	High Plains 1,033,105 Mercury 1,032,003	[Standing high bidder as of round 68 -- High Plains]
115	Mercury 1,136,000	
116	High Plains 1,250,100	
117	Mercury 1,375,**013**	
118	High Plains 1,513,100	
119	Mercury 1,664,000	
120	High Plains 1,830,101	
121		Mercury 1,615,**264**
122		High Plains 1,777,101
123	Mercury 1,922,**013**	
124	High Plains 2,114,100	
125		Mercury 1,866,**264**
126		High Plains 2,053,100
127	Mercury 2,326,**013**	
Round 128 (and thereafter)	High Plains Never Bids Again	Mercury Never Bids Again

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Complaint, Competitive Impact Statement and proposed Final Judgment to be served on counsel for the defendant in this matter in the manner set forth below:

By first class mail, postage prepaid, and by facsimile:

Charles A. James, Esquire
Jones, Day, Reavis & Pogue
Metropolitan Square
1450 G Street
Washington, D.C. 20005



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