

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,	)	
	)	
	)	
Plaintiff,	)	
	)	Civil Case No. 98-2751(PLF)
v.	)	
	)	
MERCURY PCS II, L.L.C.,	)	
	)	
	)	
Defendant.	)	
	)	

**PLAINTIFF’S RESPONSE TO PUBLIC COMMENT**

**I.  
Background**

Pursuant to section 2(d) of the Antitrust Procedures and Penalties Act (the “APPA”), 15 U.S.C.A. § 16 (d), the United States files this response to the single public comment received regarding the proposed Final Judgment submitted for entry in this case.

Plaintiff filed a civil antitrust complaint on November 10, 1998, alleging that Mercury PCS II, L.L.C. (“Mercury”) violated Section 1 of the Sherman Act, 15 U.S.C. § 1. In its complaint, the plaintiff alleged that the defendant used coded bids during a Federal Communications Commission (“FCC”) auction of radio spectrum licenses for personal communication services. The complaint further alleges that, through the use of these coded bids, the defendant reached an agreement to stop bidding against another bidder in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

The proposed Final Judgment, filed the same time as the complaint, prohibits Mercury from entering into anticompetitive agreements and from using coded bids in future FCC auctions. A competitive impact statement (“CIS”) filed by the United States describes the complaint, the proposed Final Judgment, and the remedies available to private litigants who may have been injured by the alleged violation. The plaintiff and the defendant have stipulated that the proposed Final Judgment may be entered after compliance with the APPA.

The APPA requires a sixty-day period for the submission of public comments on the proposed Final Judgment following publication of the proposed Final Judgment in the Federal Register. 15 U.S.C. § 16(b). The proposed Final Judgment was published in the Federal Register on November 25, 1998; the comment period terminated on January 25, 1999. The United States received only one comment, from High Plains Wireless, L.P. (“High Plains”).<sup>1</sup>

## II.

### **Response to the Public Comment**

In its comment, High Plains states that the factual descriptions in the complaint and CIS do not distinguish between the conduct of Mercury and High Plains -- the two parties to the alleged illegal agreement. High Plains claims it was a “victim of Mercury’s scheme” and notes that High Plains notified the FCC about Mercury’s use of BTA numbers in its bids for the Amarillo and Lubbock licenses shortly after it detected the message contained within Mercury’s bids. High Plains requests that the plaintiff amend the complaint and CIS to reflect its role as a

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<sup>1</sup> The comment is attached. The United States plans to publish promptly the comment and this response in the Federal Register. The United States will provide the Court with a certificate of compliance with the requirements of the Tunney Act and file a motion for entry of the Final Judgment once publication takes place.

victim and a whistle blower. High Plains' comment does not address the adequacy of the proposed Final Judgment.

The complaint properly alleges an illegal agreement between High Plains and Mercury -- indeed High Plains does not dispute the allegations that establish the agreement.<sup>2</sup> And the complaint already distinguishes in a fundamental way between Mercury and High Plains -- only Mercury is named as a defendant. The complaint also reflects the different conduct engaged in by each party; it alleges that Mercury actively solicited the agreement through repeated use of BTA numbers, while High Plains eventually assented to Mercury's offer by ceasing to bid in a market Mercury wanted. That High Plains immediately complained to the FCC about Mercury's use of BTA numbers is a matter of public record.<sup>3</sup> It is, however, irrelevant to the complaint against Mercury and for that reason was not included.

The sole concern of this Tunney Act proceeding is with the adequacy of the relief obtained to address the offense charged in the complaint. After careful consideration of the comment, the plaintiff concludes that High Plains' comment does not change its determination that entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the complaint and is in the public interest. The relief obtained as to Mercury is fully adequate to address the complaint against that firm. The plaintiff will

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<sup>2</sup> See United States v. Mercury PCS II, LLC (Civil Case No. 98-2751(PLF)), ¶¶ 19-21 (D.D.C.)(Complaint, filed November 10, 1998).

<sup>3</sup> See, e.g., Notice of Apparent Liability for Forfeiture, FCC 97-388 (Rel. October 28, 1997).

move the Court to enter the proposed Final Judgment after the public comment and this Response have been published in the Federal Register, as 15 U.S.C. § 16(d) requires.

Dated this 9th day of March, 1999.

Respectfully submitted,

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“/s/”

Jill Ptacek  
J. Richard Doidge  
U.S. Department of Justice  
Antitrust Division  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have caused a copy of the foregoing Plaintiff's Response to Public Comments, as well as the attached copy of the public comment received from Jonathon P. Graham on behalf of High Plains Wireless, L.P., to be served on counsel for the defendant by first class mail, postage prepaid, at the addresses set forth below:

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

3/9/99

\_\_\_\_\_  
Date

"/s/"

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Jill Ptacek