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Federal Communications Commission (F.C.C.)

Letter

MR. ELLIOTT J. GREENWALD, ESQ.

DA 98-644
April 6, 1998

Mr. Elliott J. Greenwald, Esq.
Swidler & Berlin
3000 K Street, N.W.
Suite 300
Washington, DC. 20007-5116

Dear Mr. Greenwald:

This letter ruling denies the "Petition for Reconsideration; Request for Investigation/' filed November 24, 1997, by High Plains Wireless, L.P. (High Plains). High Plains seeks reconsideration of a letter ruling by the Office of General Counsel, Administrative Law Division, that found no basis to High Plains's allegations that Mercury PCS II, LLC (Mercury) violated the Commission's ex parte rules. Letter from John I. Riffer, Assistant General Counsel. Administrative Law Division, to Mr. Elliott J. Greenwald, Esq. (Oct. 24 , 1997).

I. BACKGROUND

The matters raised in High Plains's petition are related to allegations by High Plains that Mercury violated the Commission's auction rules during the course of the D.E. and F block broadband PCS auctions, which began on August 26, 1996, and concluded on January 14, 1997. Mercury was determined to be the high bidder for the Lubbock. Texas, F block license, as well as D.E. and F block licenses in 31 other markets. High Plains, which had been a competing bidder, filed a petition to deny accusing Mercury of violating the anti- collusion rule. 47 C.F.R. § 1.2105(c), by bid-signalling through the use of trailing numbers in its bids relating to the Lubbock and Amarillo, Texas, markets. As a result of High Plains's allegations, the Commission and the Department of Justice initiated investigations.

On August 21, 1997, the Wireless Telecommunications Bureau (Bureau) conditionally granted 23 of Mercury's applications, Mercury PCS II, LLC. DA 97-

1782 (Aug. 21, 1997), recon, granted in part. 12 FCCRcd 18093 (1997), app. for review pending. The Bureau found that the evidence developed in the Commission's investigation indicated that bid-signalling had occurred in nine markets but did not occur in 23 others. It further found that even if Mercury's conduct in the nine markets violated 47 C.F.R. § 1.2105(c) and implicated Mercury's basic character qualifications, denial of the involved applications, loss of the applicable upfront and down payment amounts, or possible forfeitures would provide sufficient deterrence concerning possible future misconduct by Mercury and other applicants. Consequently, the Bureau concluded that there were no substantial and material questions of fact regarding Mercury's qualifications to be a licensee in the 23 uninvolved markets. They were granted conditioned on the outcome of the ongoing investigations. Action on the nine other applications continued to be deferred.

Two additional orders dealt further with Mercury. On October 28, 1997, the Commission issued a Notice of Apparent Liability for Forfeiture proposing a forfeiture against Mercury based on Mercury's conduct in four markets. Mercury PCS II, LLC, 12 FCCRcd 17970, pet. for recon. pending. The Commission found that Mercury's use of reflexive bid signalling by means of trailing bid numbers apparently violated 47 C.F.R. § 1.2105(c). Subsequently, on November 5, the Bureau ruled on petitions for reconsideration by both Mercury and High Plains of its earlier conditional grant of the 23 uninvolved applications. Mercury PCS II, LLC, 12 FCCRcd 18093 (1997), app. for review pending. The Bureau held that, despite Mercury's apparent violations of the anti-collusion rule, no questions existed as to Mercury's qualifications to be a licensee. It found that Mercury had forthrightly admitted its use of trailing numbers, as alleged, and had not attempted to deceive or mislead the Commission or other parties participating in the auction regarding its actions. It also found no reason to doubt Mercury's assertion that Mercury's use of reflexive bid signalling was undertaken in the belief that it was permissible under the Commission's rules or to doubt that Mercury will deal truthfully with the Commission in the future. Accordingly, the nine remaining applications were granted.

II. ALLEGED EX PARTE VIOLATIONS

Shortly before the Bureau released its August 21 order, High Plains sent a letter to Daniel Phythyon, the Acting Chief of the Bureau, accusing Mercury of violating the Commission's ex parte rules. Letter from Elliott J. Greenwald to Dan Phythyon (Aug. 14, 1997). High Plains asserted that on August 13, 1997, its representatives attended a meeting in Phythyon's office, where it was revealed that on or about July 31, 1997, undisclosed communications were made between an undisclosed Commission staff member and an undisclosed Member of Congress or Congressional staff member. High Plains alleged that "[a]s part of this conversation, the Member of Congress or Congressional staff member apparently

requested and received assurances that the above-referenced matter would be resolved on or before August 13, 1997." High Plains contended that the alleged conversation constituted an improper ex parte presentation and that High Plains was entitled to full disclosure of the facts and circumstances related to the conversation and an opportunity to respond.

High Plains's allegations were referred to the Office of General Counsel (OGC) for disposition. See 47 C.F.R. § 1.1214, OGC responded:

> In order to clarify this matter, the Office of General Counsel conducted an inquiry into the relevant facts and circumstances. Commission staff members, including Mr. Phythyon and Chairman Hundt's Chief of Staff, Blair Levin, provided information. They indicate that during the time period in question, Mr. Levin received several inquiries from Congressional Offices as to when action would be taken on the Mercury applications. After learning from the [Bureau] that action was expected by August 13, 1997, he so informed the inquiring Congressional offices. When it appeared that action would not, in fact, take place by August 13, Mr. Levin asked Mr. Phythyon to call a meeting of the parties to inform them that action would not occur by the time given to the Congressional offices. OGC discovered no indication that any discussion of the merits or outcome of this proceeding took place between Commission staff and Congressional offices. Nor did we discover any indication that the Cbngressional Offices requested action by a particular date or stated that the proceeding should be expedited for reasons other than the need to avoid administrative delay. See 47 C.F.R. § 1.1204(a)(11).

OGC concluded that the status inquiries disclosed by its inquiry were permissible under the ex parte rules. See 47 C.F.R. § 1.1202(a).

In its Petition for Reconsideration, [FN1] High Plains accuses Mercury of orchestrating a campaign to influence the Commission by means of improper Congressional pressure. High Plains observes that during the weeks preceding the Bureau's August 21 action, the Chairman's Office received nearly 30 Congressional letters addressing the status of Mercury's applications and that an additional 10 letters were received shortly before the October 28 and November 5 actions. High Plains alleges that Mercury contacted Republican Senators and Members of Congress from southeastern states by means of a letter from a consultant named Joseph G. Riemer III (Riemer), which High Plains contends contains misleading information. Consistent with Riemer's letter, the Congressional letters, in addition to requesting information about the status of Mercury's applications, frequently make several assertions, including that (1) the Commission's failure to act on Mercury's applications unfairly placed Mercury at a competitive disadvantage with respect to applicants whose applications had been granted, and (2) other applicants had received licenses despite being subjects of the Department of Justice investigation.

According to High Plains, the Congressional letters, and presumably the telephone calls to Mr. Levin as well, went beyond mere status inquiries, such as

Mercury could easily make itself. Rather, High Plains contends that the unusually large number of Congressional communications served to "generat[e] sufficient pressure to expedite the proceeding" (Petition at 7), as evidenced by the fact that the Commission and the Bureau acted very shortly after the respective pleading cycles ended. High Plains asserts that attempts to influence the Commission through Congressional pressure are improper.

III. DISCUSSION

Reconsideration is denied. As an initial matter, High Plains's petition for reconsideration attempts to rely on facts and circumstances that were not presented in its original August 14 complaint. High Plains based its original complaint only on the communications related to the August 13 meeting in Daniel Phythyon's office, which OGC determined were permissible status inquiries. The complaint was not based on the Congressional letters and High Plains has provided no new evidence relating to the telephone calls oar any basis to reconsider the OGC's evaluation of them. Under 47 C.F.R. § 1.106(c), **a** petition for reconsideration that relies on facts or circumstances not previously presented must demonstrate that the facts and circumstances are new or newly discovered. Although High Plains asserts that it did not receive many of the letters until after August 14 and thus did not know "the full extent of Mercury's illicit solicitation campaign" (Reply at 4), it appears that High Plains **was** aware of at least some of the Congressional letters at the time it filed its complaint. Despite the procedural questions raised by High Plain's failure to include the Congressional letters in its complaint, however, the merits of the petition will be considered because of the public interest in ensuring the fairness of the Commission's processes. 47 C.F.R. § 1.106(c)(2).

High Plains has failed to demonstrate that the Congressional inquiries reflected **a** significant violation of the Commission's ex parte rules. Mercury asserts that the Congressional letters were served on High Plains (Opposition at 6) and thus did not constitute "ex parte" presentations under 47 C.F.R. § 1.1202(b)(1), which would violate the rules. It appears that the letters were in fact served, although not **always** in a timely manner. In this regard, High Plains notes (Reply at 4, 6 n. 12), that OGC has previously admonished Mercury to ensure that such letters **are served** in a timely manner. See Letter from John I. Riffer, Assistant **General** Counsel, Administrative Law Division, to Mr. Thomas Gutierrez, Esq. **(Sept.** 19, 1997). However, in so doing, OGC observed that although service was not always timely. Mercury had informed the Commission "that Mercury had in fact previously explained to the Congressional offices of the need to make service and thereby undertook to effectuate service.../ Id. Thus, it appears that any lack of timeliness of service does--not reflect an intent on the part of Mercury to deprive High Plains of fair notice of the presentations made. In light of the foregoing, any violation of the rules

relating to timeliness of service appears to be a minor one. The precedent cited by High Plains involving the appropriateness of sanctions in response to egregious violations of the rules does not warrant a sanction for the technical deficiencies presented here. See Elkhart Telephone Co., 11 FCCRcd 1165 (1995); Pepper Schultz, 4 FCCRcd 6393 (Rev.Bd.1989), rev. denied, 5 FCCRcd 3273 (1990); Stearns County Broadcasting Company, Inc., 104 FCC2d 688 (Rev.Bd.1986).

Irrespective of the ex parte rules, it is also true that, as the courts have long held, an administrative action that reflects an improper intrusion by Congress into administrative decision-making deprives the parties of due process in adjudicatory matters. See Pillsbury Co. v. FTC, 354 F.2d 952, 963-65 (5th Cir.1966). Even assuming arguendo, however, that Congressional pressure may have motivated the Commission to accelerate its deliberations in this case, that does not implicate the concerns described in Pillsbury and its progeny. As the court explained in ATX, Inc. v. U.S. Department of Transportation, 41 F.3d 1522, 1527 (D.C.Cir.1994): "We are concerned when congressional influence shapes the agency's determination of the merits. [Footnote omitted.]" None of the Congressional letters address the merits of whether Mercury's conduct violated the Commissions rules or whether Mercury was qualified to be a licensee. A fair reading of the letters indicates that they address the timing of the Commission's consideration of Mercury's applications and not the merits. There is no support for High Plains's contention that the letters communicated the message that "dire political consequences may result if the Commission did not take rapid action in Mercury's favor." Reply at 7 (emphasis added). On the contrary several of the letters expressly stated that the writers, while seeking expeditious action on Mercury's applications, "fully support the Commission and the Department [of Justice] efforts to conduct unfettered investigations into the auction process/ See, e.g., Letter from [Senators] Trent Lott and Thad Cochran to the Honorable Reed Hundt (Jul. 17, 1997). The letters therefore did not taint the decision-making process, **and** there is no basis for further action because of the submission of these letters.

Accordingly, High Plains's "Petition for Reconsideration: Request for Investigation," filed November 24, 1997, is denied.

Sincerely yours,

Christopher J. **Wright**
General Counsel
1998 WL 155971 (F.C.C.)
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