

In Re 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

Adopted: October 21, 1997

Released: October 28, 1997

By the Commission: Commissioner Ness concurring and issuing a separate statement.

#### I. INTRODUCTION

1. By this Order, we find Mercury PCS II, LLC ("Mercury"), a participant in the Commission's Broadband Personal Communications Services (PCS) D, E and F block auction, apparently violated Section 1.2105(c) by placing trailing numbers at the end of its bids that disclosed its bidding strategy in a reflexive manner that specifically invited collusive behavior. As explained below, we herein impose a forfeiture in the amount of \$650,000.

#### II. BACKGROUND

2. The Commission's broadband PCS D, E, and F block auction commenced on August 26, 1996 and closed on January 14, 1997 after 276 rounds of simultaneous, multi-round bidding. Each block consisted of 493 Basic Trading Area ("BTA") licenses for ten megahertz of spectrum. Licenses were numbered between 1 and 493 in each of the three blocks being auctioned. A total of 1,479 licenses were auctioned.<sup>1</sup> During the auction, bidders placed bids remotely, either electronically via computer access to the Commission's wide area network, or via telephone to the Commission's telephonic bid operator. Bidders were able to view all bids placed during a given round at the close of that round. These round results were available for viewing and downloading electronically within minutes of the close of each round. After a bid was received on a license, a bid increment was applied to the high bid to set a minimum acceptable bid for the following round. The minimum acceptable bid was then rounded to the nearest \$100 if under \$10,000 and the nearest \$1,000 if over \$10,000. Bidders were allowed to bid any whole dollar amount above the minimum acceptable bid.

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<sup>1</sup> Seven licenses were ultimately not sold. (BTA numbers 060, 155, 166, 199, 228, 233 and 301).

3. Pursuant to the Commission's rules, all participants in the auction were required to submit by July 29, 1996 an FCC Form 175. FCC Form 175 requires, among other things, a participant to identify the markets and frequency block/channels for which it intends to place bids and to identify the names of the participant's authorized bidders.<sup>2</sup> FCC Form 175 also contains a certification in which the auction participant certifies under penalty of perjury, that "it has not entered into and will not enter into any explicit or implicit agreements or understandings of any kind with parties not identified in [its] application regarding the amount to be bid, bidding strategies or the particular license on which the applicant or other parties will or will not bid."<sup>3</sup>

4. Mercury timely filed its FCC Form 175. In the form, Mercury indicated that it intended to bid for all frequency block/channels in the broadband PCS D, E, and F blocks. Mercury also identified Jerry M. Sullivan, Jr.; E. B. Martin, Jr.; and L. Susan Banes as authorized bidders for the company. William M. Mounger, II, an owner and the sole manager of the company, executed the certification on behalf of Mercury. Mercury certified in the affirmative that it had not and would not enter into any explicit or implicit agreement or understandings of any kind with parties not identified in its application regarding the amount to be bid, bidding strategies or the particular license on which it would or would not bid.

5. On November 26, 1996, during the auction, another bidder, High Plains Wireless L.P. ("High Plains") filed an Emergency Motion for Disqualification ("Emergency Motion") with the Commission alleging that Mercury was engaging in bidding behavior that communicated its bidding strategy to other bidders by placing "trailing number bids" while bidding for the F block licenses in the Amarillo, Texas and Lubbock, Texas markets. Specifically, High Plains argued that Mercury had incorporated the Amarillo and Lubbock BTA market numbers (namely, 264 for Lubbock and 013 for Amarillo) into the last three digits of some of its bids in order to send a "signal" to High Plains, which was also bidding in these markets.<sup>4</sup> Mercury and High Plains were not members of a bidding consortium or other joint bidding arrangement identified pursuant to Section 1.2105(a)(2)(viii) of the Commission's Rules. High Plains contended that Mercury's bid signals were intended to warn High Plains that if it did not cease bidding for the Lubbock, Texas F block broadband PCS license, Mercury would retaliate by outbidding High Plains for the Amarillo, Texas F block broadband PCS license. High Plains indicated that once it ceased bidding for the Lubbock, Texas F block license, Mercury, in turn, ceased bidding for the Amarillo, Texas F block license. High Plains alleged that Mercury's bidding practice violated the Commission's anti-collusion rule set forth in Section 1.2105 of the Commission's Rules, 47 C.F.R. § 1.2105(c).

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<sup>2</sup> See 47 C.F.R. § 1.2105(a)(2).

<sup>3</sup> See FCC Form 175, at Certification (4); see also 47 C.F.R. § 1.2105(a)(2)(ix).

<sup>4</sup> See Paragraph 11, *infra*, for details of the bids placed by Mercury and High Plains in the Amarillo, Texas and Lubbock, Texas markets.

6. In its December 6, 1996 Opposition to High Plain's Emergency Motion, Mercury denied any violation of the Commission's Rules. Mercury maintained that the use of trailing numbers bids constituted nothing more than gamesmanship, *i.e.*, "letting competitors know what is important to you so that they don't respond destructively."<sup>5</sup> Mercury further alleged that bid signaling was a "common practice" used by many other participants in the D, E, and F block auction.<sup>6</sup> Moreover, in its response, Mercury maintained that bid signaling does not violate the Commission's Rules, arguing that its bidding behavior represents nothing more than "aggressive competition for licenses."<sup>7</sup>

7. On September 10, 1997, the Enforcement Division of the Wireless Telecommunications Bureau issued a letter of inquiry pursuant to Section 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 308(b), asking Mercury to respond to a series of questions relating to their bidding activity during the PCS D, E and F block auction. The letter of inquiry requested that, among other things, Mercury describe, in detail, its use of various types of bid signalling including its use of "trailing digit" bid signaling, retaliatory bidding, and bid withdrawals during the auction as well as the reactions it got to those actions from other bidders.

8. Mercury responded to the Bureau's inquiry with a number of arguments. Although Mercury admitted to making bids with trailing numbers,<sup>8</sup> it maintained that its use of trailing numbers did not constitute a communication of bidding strategy. Mercury claimed that there were various reasons for using a "Trailing Number" bid strategy such as confusing other bidders, facilitating internal tracking of bids, trapping other bidders into having their eligibility reduced and letting "the other [bidders] know that it would be expensive to continue to bid on a particular market."<sup>9</sup> Mercury specifically denied that it ever used a Trailing Number bid strategy to signal any bidder that, if the other bidder stayed out of Market "X", Mercury would stay out of Market "Y", or to convey any information regarding what it would do or refrain from doing, or any other aspect of its bidding strategy.<sup>10</sup>

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<sup>5</sup> See Mercury's Opposition to High Plains' Emergency Motion for Disqualification ("Mercury's Opposition"), at 7, n. 11.

<sup>6</sup> See Mercury's Opposition, at 7; *see also*, Letter dated September 17, 1997, from Mercury submitted in response to the Bureau's letter of inquiry ("Mercury's Response"), at 2.

<sup>7</sup> *See, e.g.*, Mercury's Response, at 3; *see also*, Mercury's Petition for Reconsideration, dated September 22, 1997, at 2.

<sup>8</sup> Mercury defined trailing number bids as "those bids that ended with numbers corresponding to the identification numbers of licenses being auctioned." Mercury's Response, at 1.

<sup>9</sup> Mercury Response, at 1.

<sup>10</sup> *See* Mercury's Response, at 2.

9. Mercury maintained that signaling bids generally are "a means through which bidders employed strategies designed to influence the perception by others of that bidder's submission."<sup>11</sup> According to Mercury, this conduct reflects "the same type of bluffing, puffing and threatening as would occur in any auction setting."<sup>12</sup>

10. Following the auction, High Plains filed a Petition to Deny Mercury its D, E and F block licenses.<sup>13</sup> Mercury filed its own Petition to Deny against High Plains that included much of the same argument offered in response to the Bureau's request.<sup>14</sup> In addition Mercury argued that it takes two parties to "collude".<sup>15</sup>

11. Mercury ultimately was the high bidder for 32 BTA licenses.<sup>16</sup> Evidence obtained through the Commission's investigation of this matter indicates that Mercury used trailing number signaling in connection with at least four of the markets it had won, including: Lubbock, Texas (F block); Eagle Pass, Texas (D block); McComb, Mississippi (F block); and San Angelo, Texas (F block).<sup>17</sup> As seen below, Mercury incorporated BTA market numbers into the last three digits of at least 13 bids to signal to competing bidders Mercury's interest in certain markets:

- Mercury's bids placed for: Lubbock, Texas (BTA market number 264) and Amarillo, Texas (BTA market number 013):  
--BTA 264(F block); round 117; Mercury's bid \$1,375,013  
--BTA 013(F block); round 121; Mercury's bid \$1,615,264

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<sup>11</sup> See Mercury's Response, at 2. Mercury defines signaling bids to include trailing number bids, jump bids, retaliatory bids and bid withdrawal activities.

<sup>12</sup> *Id.*

<sup>13</sup> In Re Applications of Mercury PCS II, LLC For Authority to Acquire Various Licenses in the Broadband PCS Auction for Frequency Blocks D, E and F, Petition to Deny (March 21, 1997).

<sup>14</sup> In Re Application of High Plains Wireless, L.P. for Personal Communications Service Licenses to Operate in Block F in the Amarillo, Texas BTA and in Block D in the Lubbock, Texas BTA, Petition to Deny (March 21, 1997). In the petition, Mercury claimed that High Plains had abused the Commission's process by filing pleadings in the captioned markets designed to intimidate Mercury.

<sup>15</sup> *Id.* at 6.

<sup>16</sup> See Appendix A, listing the 32 markets in which Mercury was determined the high bidder.

<sup>17</sup> The Bureau withheld Mercury's licenses in nine markets. See *Mercury PCS II, LLC For Authority to Construct and Operate Broadband PCS Systems on Frequency Blocks D, E, and F, Memorandum Opinion and Order*, (released August 21, 1997)(Wireless Telecommunications Bureau). The Bureau's investigation had indicated that Mercury engaged in reflexive bid signaling in five markets in addition to the four noted above. These markets include: Ft. Walton Beach (F block), Pensacola, Florida (F block), Panama City, Florida (F block), Dothan, Alabama (F block) and Tallahassee, Florida (F block). The bid signals in these markets are not the subject of this Notice of Apparent Liability for Forfeiture.

- BTA 264(F block); round 123; Mercury's bid \$1,922,013
  - BTA 013(F block); round 125; Mercury's bid \$1,866,264
  - BTA 264(F block); round 127; Mercury's bid \$2,326,013
  - Mercury won the Lubbock (F block) license (BTA market 013);
- Mercury's bids placed for: Eagle Pass, Texas (BTA market number 121); San Angelo, Texas (BTA market number 400); and Victoria, Texas (BTA market number 456):
    - BTA 400(F block); round 159; Mercury's bid \$343,121;
    - BTA 121(F block); round 161; Mercury's bid \$275,400;
    - and
    - BTA 400(F block); round 161; Mercury's bid \$415,456;
    - BTA 456(F block); round 163; Mercury's bid \$125,400;
    - BTA 400(F block); round 165; Mercury's bid \$503,456;
    - Mercury won the Eagle Pass (D block) and San Angelo (F block) licenses (Mercury apparently switched from the BTA 121 F block license when the price exceeded the BTA 121 D block license);
- Mercury's bids placed for: McComb, Mississippi (BTA market number 269) and Lake Charles, Louisiana (BTA market number 238):
    - BTA 238(F block); round 64; Mercury's bid \$442,269
    - BTA 269(F block); round 66; Mercury's bid \$372,238
    - BTA 238(F block); round 68; Mercury's bid \$512,269
    - Mercury won the McComb block license.

### III. DISCUSSION

12. Given the Commission's reliance upon auctions as a primary licensing tool, the protection of the integrity of the auction process is of paramount importance. Consequently, we are concerned about bidding practices that can have the effect of compromising the integrity of the auction process. This is particularly true with regard to behavior that violates the anti-collusion rule in Section 1.2105(c) of the Commission's Rules.

13. Section 1.2105(c) of the Commission's Rules states in pertinent part:

[A]ll applicants are prohibited from cooperating, collaborating, discussing, or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the high bidder makes the required down payment, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application

pursuant to Section 1.2105(a)(2)(viii).

47 C.F.R. § 1.2105(c)(1). [Emphasis added.] The purpose of the anti-collusion rule is to preserve the integrity and competitiveness of the auction process.<sup>18</sup> The Commission specifically ruled that Section 1.2105(c) was applicable to broadband PCS auctions, finding that "nowhere [is the anti-collusion rule] more necessary than with respect to broadband PCS auctions, where we expect bidder interest to be high and the incentives to collude to be great."<sup>19</sup>

14. Thus, the Commission has expressly "prohibited bidders from discussing the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application."<sup>20</sup> The Commission has further stressed that any bidder found in violation of the anti-collusion rule faces potential sanctions of license revocation or forfeiture and may be prohibited from participating in future auctions.<sup>21</sup>

15. On December 20, 1996, after receiving a formal complaint concerning the use of bid signaling during the auction, the Commission issued, via the bidding software, a further announcement to all auction participants regarding this subject.<sup>22</sup> The announcement noted that the Commission had received a complaint that the use of trailing digit bidding violated the anti-collusion rules. It went on to say that "[w]e have reached no determination on the merits of this argument. However, we invite all bidders to review the anti-collusion rule . . . and assess whether they are complying with the letter and spirit of the rule."<sup>23</sup> Bureau investigation of these allegations showed that trailing digit activities by Mercury stopped subsequent to this bidder announcement.

16. Based on the record before us, we conclude that Mercury apparently violated our anti-collusion rule in the PCS auction through its use of trailing digits to engage in "reflexive

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<sup>18</sup> See *Implementation of Section 309(j) of the Communications Act-Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2386-87 (1994) ("*Second Report and Order*") (anti-collusion rule adopted).

<sup>19</sup> *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, 5570-71 (1994) ("*Fifth Report and Order*") (making Section 1.2105(c) applicable to broadband PCS auctions).

<sup>20</sup> *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Fourth Report and Order, 9 FCC Rcd 6858, 6866 (1994) ("*Fourth Report and Order*"); see also *Fifth Report and Order*, 9 FCC Rcd at 5570-71.

<sup>21</sup> *Fifth Report and Order*, 9 FCC Rcd 5532, 5570-71 (1994).

<sup>22</sup> See Commission Announcement No. 47 of the D/E/F block Auction, entitled "Signaling Bids," dated 12/20/96, time 13:00:27.

<sup>23</sup> *Id.*

bid signaling". Reflexive bid signaling (through the use of trailing numbers) involves a bidder placing a bid in one market (market A) in which the final three digits of the bid (the trailing numbers) reflect the three-digit BTA number of a second market (market B) that it was targeting or a competing bidder was targeting. Then, within a short number of rounds, the bidder places a bid in the second market (market B) in which the final three digits of the bid reflect the BTA number of the first market (market A). These reflexive bids communicate different messages depending on the context of the bids. The signaling bidder could be communicating to competing bidders that they should stop bidding for the signaling bidder's targeted markets in exchange for which the signaling bidder would stop bidding in the competing bidder's targeted market. The reflexive bids could also communicate that a competitor's continued bidding in one of the signaling bidder's targeted markets would result in a "bidding war" in which the signaling bidder would continue to drive up the price in the competing bidder's targeted market. Finally, the reflexive bids could inform the competing bidders that both markets are being targeted by the signaling bidder.

17. In our view, Mercury's use of reflexive bid signaling with the use of trailing bid numbers during the PCS auction not only violated the plain language of our anti-collusion rule, which prohibits disclosure of bidding strategy, but also violated the spirit and intent of our rule by disclosing its bidding strategy in a manner that explicitly invited other auction participants to cooperate and collaborate on their bidding in specific markets. Mercury's very specific bid signals, coded within its bid and apparently aimed at particular markets had the potential to affect other auction participant's bidding strategy with a substantial likelihood of influencing the outcome of the auction.<sup>24</sup> In fact, the record indicates that this was precisely the effect in the Lubbock market.<sup>25</sup>

18. Mercury denies that its use of trailing digit bids to engage in reflexive bid signalling violated our rules. Specifically, Mercury denies that it ever signalled or in any way communicated that "if another party ceased bidding on a market in which it had an interest, Mercury would cease bidding in a market of interest to the other bidder."<sup>26</sup> Instead it alleges that it "utilized the final three digits of its bids to: (a) gain separation from other bidders above and beyond minimum bid increments; (b) to avoid the so-called "fat finger" bid problem; and (c) to misdirect, bluff, threaten, and posture in relation to other bidders."<sup>27</sup>

19. After full review of the record, we conclude that the evidence is to the contrary. In particular, we find it significant that the trailing bid digits were targeted to

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<sup>24</sup> Although Mercury argues that it never communicated with any other bidder regarding any meaning to be attributed to the trailing number variations, we do not believe it is necessary to have such direct communication in order to find an apparent violation of the rule.

<sup>25</sup> See Paragraph 9, *supra*.

<sup>26</sup> Mercury Response, at 2.

<sup>27</sup> Mercury's Response, at 7 (footnote omitted).

specific markets in a reflexive manner and that when High Plains ceased bidding in the Lubbock market, Mercury ceased bidding in the Amarillo market. Although the intent in using trailing digit bids may be arguably ambiguous, the existence of the act and the negative results on the auction process are plainly evident.

20. Mercury asserts that if the Commission finds that Mercury's conduct violated the Commission's rules it must make the same finding vis-a-vis all of the other carriers identified as taking the same action.<sup>28</sup> Mercury further asserts that it has a listing of over 400 markets and associated PCS licenses won by other bidders "who unquestionably utilized bid signalling techniques that were identical to, or the functional equivalent of, those utilized by Mercury."<sup>29</sup> It appears that some of the bidding techniques that Mercury considers to be "functionally equivalent" are (i) retaliatory bidding;<sup>30</sup> (ii) jump bidding;<sup>31</sup> and (iii) bid withdrawals.<sup>32 33</sup>

21. In the three sets of markets listed at issue here, Mercury inserted specific information about its bidding strategy into the text of the bid itself. We believe Mercury's goal was to entice another bidder into a non-verbal agreement that would benefit both. By contrast, none of the other bidding techniques (jump bidding, bid withdrawal activities signalling or retaliatory bidding) involve such direct and specifically targeted offers of collusion. The other bidding techniques warn or punish competing bidders for undesired behavior, but there is no attempted meeting of the minds. For example, in the case of jump bidding, a bidder may be signalling to the class of bidders as a whole that a particular market is important to it. However, there is no *quid pro quo* offered. Similarly, in the case of retaliatory bidding, a bidder may punish another bidder for the second bidder's conduct in a market targeted by the first bidder, but the action occurs after the fact; there is no specific prospective offer to enter into a mutual agreement with regard to particular markets. Although some of these other bidding techniques may have had a similar general purpose to

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<sup>28</sup> Mercury's Response, at 15.

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

<sup>30</sup> "Retaliatory bidding" occurs when one bidder places a bid against a second bidder in another market because the second bidder was bidding in a market targeted by the first bidder, purportedly to punish the first bidder.

<sup>31</sup> In cases of "jump bidding" a bidder increases an existing bid more than necessary, purportedly to demonstrate keen interest in a specific market.

<sup>32</sup> "Strategic bid withdrawal" is a technique in which a bidder submits then quickly withdraws a bid, sometimes in the same round, to signal bidding intentions. "For example, a company that bids, withdraws and then rebids at the same level may be signalling to competitors that it has targeted that market and wants the competition to either withdraw from or cease bidding." Bowermaster and Sullivan, *Bid Signaling Pervasive in Auctions*, MSNBC (On Air)(1997), at 1- 2.

<sup>33</sup> Mercury's Response, at 2.



Mercury's use of reflexive trailing number bids, *i.e.*, to send a "signal" about bidders' intentions, we believe that it is appropriate to draw a distinction between Mercury's use of "reflexive bid signaling" and these other bidding techniques.<sup>34</sup> For these reasons, we believe that Mercury's conduct is particularly offensive to the integrity of our auctions processes and is prohibited by Section 1.2105(c) of the Commission's Rules, 47 C.F.R. § 1.2105(c).

22. We emphasize that this decision applies narrowly to the specific facts pending now before us. This Notice of Apparent Liability for Forfeiture is not intended to encompass other bidding practices and behavior not addressed here.

23. Under Section 503(b) of the Act, a forfeiture can be imposed against any person who willfully or repeatedly fails to comply with any rule of the Commission. For purposes of Section 503(b), the term "willful" means that the violator knew it was taking the action in question, regardless of whether there was an intent to violate the Rules.<sup>35</sup> The misconduct in question was both willful and repeated and, therefore, warrants the imposition of a forfeiture penalty under Section 503(b) of the Act.

24. Mercury's decision to use trailing number bids was clearly purposeful. It admitted that it intentionally inserted the market numbers into its bids which in turn had the effect of conveying information to other bidders. Additionally, Mercury's action was repeated because it placed a multitude of bid signals during the auction. Considering the circumstances presented, a forfeiture in the amount of \$50,000 for each bid signal placed by Mercury in the auction is appropriate. Thus, having determined that Mercury apparently placed 13 illegal bid signals, we find Mercury apparently liable for a forfeiture in the total amount of \$650,000. At this time we see no downward adjustment factors present under these circumstances.

#### IV. CONCLUSION

25. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, Mercury PCS II, LLC IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of six hundred fifty thousand dollars (\$650,000) for its willful and repeated violation of Section 1.2105(c), 47 C.F.R. §§ 1.2105(c). The amount specified was determined after

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<sup>34</sup> We recognize that the language in our anti-collusion rule that prohibits disclosure of bidding strategy could be interpreted to prohibit any of these other types of bidding activities and, at the most extreme, even the act of bidding itself. However, this was clearly not the intent of our anti-collusion rule. We intend to examine and are considering changes to the anti-collusion rule in a pending proceeding. Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, WT Docket No. 97-82, FCC 97-60 (rel. Feb. 28, 1997) ("*Part 1 Proceeding*").

<sup>35</sup> See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

consideration of the factors set forth in Section 503(b)(2)(D) of the Communications Act of 1934.

26. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3), that within 30 days of the release of this Notice, Mercury PCS II, LLC SHALL PAY the full amount of the proposed forfeiture OR SHALL FILE a response showing why the proposed forfeiture should not be imposed or should be reduced.

27. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482. The payment should note the File Number of the above-captioned proceeding. Payment by credit is acceptable and may be made by completing and submitting an FCC Remittance Advice (FCC Form 159) to Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482.

28. IT IS FURTHER ORDERED that a copy of this Notice SHALL BE SENT to Mercury PCS II, LLC by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary