the Privacy Act. Requests should be addressed to the System Manager and should clearly and concisely describe the precise information being contested, the reasons for contesting it, and the proposed amendment or correction proposed to the information. In addition, as described above under ''RECORD ACCESS PROCEDURES,'' an alternative procedure is available to a person who has been denied the *transfer* of, or permit for, a firearm or explosives because of information in the NICS, by which the individual may seek the correction of erroneous data in the system. The procedures are further described at 28 CFR, part 25, subpart A.

RECORD SOURCE CATEGORIES:

Information contained in the NICS is obtained from local, State, Federal, and international records.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

The Attorney General has exempted this system from subsections (c)(3) and (4); (d); (e)(1); (2), and (3) (e)(4)(G) and (H); (e)(5) and (8); and (g) of the Privacy Act, pursuant to 5 U.S.C. 552a(j)(2). In addition, the Attorney General has exempted his system from subsections (c)(3), (d), (e)(1), and (e)(4)(G) and (H) of the Privacy Act, pursuant to 5 U.S.C. 552a (k)(2) and (k)(3). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553 (b), (c), and (e), and have been published in the **Federal Register**.

[FR Doc. 98–31503 Filed 11–24–98; 8:45 am]

BILLING CODE 4410–12–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Omnipoint Corp.; United States v. 21st Century Bidding Corp.; United States v. Mercury PCS II, L.L.C.; Proposed Final Judgments and Competitive Impact Statements

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. Section 16 (b) through (h), that a proposed Final Judgment, Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in each of the following civil actions: *United States* v. *Omnipoint Corporation,* Civil Action No. 1:98CV02750; *United States* v. *21st Century Bidding Corp.;* Civil Action No. 1:98CV02752, and *United States* v. *Mercury PCS II, L.L.C.,* Civil Action No. 1:98CV02751. The proposed Final Judgments are subject to approval by the Court after expiration of the statutory 60-day public comment period and compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h).

On November 10, 1998, the United States filed separate Complaints against each defendant that allege that defendants used coded bids during a Federal Communications Commission auction of radio spectrum licenses for personal communications services. The Complaints further allege that, through the use of these coded bids, defendants reached agreements to stop bidding against one another in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The proposal Final Judgments, filed the same time as the Complaints, prohibit defendants from entering into anticompetitive agreements and from using coded bids in future FCC auctions.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Written comments should be directed to Roger W. Fones, Chief, Transportation, Energy, and Agriculture Section, Antitrust Division, 325 Seventh Street, NW., Suite 500, Washington, DC 20530 (telephone: (202) 307–6351).

Copies of the Complaint, Stipulation and Order, proposed Final Judgment, and Competitive Impact Statement are available for inspection in Room 215 of the U.S. Department of Justice, Antitrust Division, 325 Seventh Street, NW., Washington, DC 20530 (telephone: (202) 514–2481), and at the office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Rebecca P. Dick,

Director of Civil Non-Merger Enforcement.

Stipulation and Order

It is hereby *stipulated* by and between the undersigned parties, by their respective attorneys, as follows:

1. The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the District of Columbia.

2. The parties stipulate that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedure and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceedings, provided that plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court.

3. The defendant shall abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment by the Court and shall, from the date of the signing of this Stipulation by the parties, comply with all the terms and provisions of the proposed Final Judgment as though they were in full force and effect as an order of the Court.

4. In the event that plaintiff withdraws its consent, as provided in paragraph 2 above, then the parties are released from all further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceedings.

5. The parties request that the Court acknowledge the terms of this stipulation by entering the Order in this Stipulation and Order.

Respectfully submitted,

For Plaintiff United States of America:

Jill A. Ptacek,

J. Richard Doidge,

Attorneys, Antitrust Division, U.S. Department of Justice, 325 Seventh Street, N.W., Washington, D.C. 20004, (202) 307–0468.

For Defendant Omnipoint Corporation:

Michael F. Brockmeyer, Esq.,

Piper & Marbury L.L.P. Charles Center South, 36 South Charles Street, Baltimore, MD 21201–3018, (410) 576–1890.

Order

It is *so ordered, this* _____ day of _____, 1998.

United States District Court Judge

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:

Michael F. Brockmeyer, Esquire, Piper & Marbury L.L.P., 36 South Charles Street, Baltimore, MD 21201–3018

Jill Ptacek,

Antitrust Division, U.S. Department of Justice, 325 Seventh Street, N.W., Suite 500, Washington, D.C. 20530, (202) 307–6607, (202) 616–2441 (Fax).

Final Judgment

Plaintiff, United States of America, filed its Complaint on November 10,

1998. Plaintiff and the Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law. This Final Judgment shall not be evidence against or an admission by any party with respect to any issue of fact or law. Therefore, before the taking of any testimony, without trial or adjudication of any issue of fact or law herein, and upon consent of the parties, it is hereby *ordered, adjudged, and decreed,* as follows:

I. Jurisdiction

This Court has jurisdiction of the subject matter of this action and of each of the parties consenting hereto. Venue is proper in the District of Columbia. The Complaint states a claim upon which relief may be granted against the defendant under Section 1 of the Sherman Act, 15 U.S.C. 1.

II. Definitions

As used herein, the term:

(A) ''Defendant'' means Omnipoint Corporation, its successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, directors, officers, managers, agents, and employees.

(B) ''Document'' means all ''writings and recordings'' as that phrase is defined in Rule 1001(1) of the Federal Rules of Evidence.

(C) ''FCC'' means the Federal Communications Commission.

(D) ''License-identifying information'' means any number, letter, code or description that designates a license or that links licenses.

(E) ''Person'' means any natural person, corporation, firm, company, sole proprietorship, partnership, association, institution, governmental unit, public trust, or other legal entity.

III. Applicability

(A) This Final Judgment applies to the Defendant, to its successors, and assigns, and to all other persons in active concert or participation with any of them who shall have received actual notice of the Final Judgment by personal service or otherwise.

(B) Nothing herein contained shall suggest that any portion of this Final Judgment is or has been created for the benefit of any third party and nothing herein shall be construed to provide any rights to any third party.

IV. Prohibited Conduct

The Defendant is enjoined and restrained from:

(A) Entering into any agreement with any other license applicant to fix, establish, suppress or maintain the price for any license to be awarded by the FCC in an auction, or to allocate any such licenses amongst competitors, provided, however, that nothing in this provision shall prohibit the Defendant from participating in any bidding consortium, teaming arrangement or other joint venture authorized under the rules and regulations of the FCC pertaining to future auctions, and disclosed to the FCC.

(B) In the course of any auction conducted pursuant to the rules and regulations of the FCC, offering any price to the FCC for the lease, purchase, or right to use any FCC-awarded license, that includes within that price any license-identifying information, unless the inclusion of such information is required by the FCC.

V. Compliance Program

The Defendant is ordered to maintain an antitrust compliance program, which shall include the following:

(A) Designating, within 30 days of entry of this Final Judgment, an Antitrust Compliance Officer with responsibility for accomplishing the antitrust compliance program and with the purpose of achieving compliance with this Final Judgment. The Antitrust Compliance Officer shall, on a continuing basis, supervise the review of the current and proposed activities of the Defendant to ensure that it complies with this Final Judgment.

(B) The Antitrust Compliance Officer shall be responsible for:

(1) Distributing within 60 days of the entry of this Final Judgment, a copy of this Final Judgment to (a) all officers and directors of the Defendant, and (b) to all employees who have any responsibility for formulating, proposing, recommending, establishing, approving, implementing or submitting the Defendant's prices in FCC-conducted license auctions;

(2) Distributing in a timely manner a copy of this Final Judgment to any officer, director or employee who succeeds to a position described in Section V (B)(1);

(3) Obtaining from each present or future officer, director or employee designated in Section V(B)(1), within 60 days of entry of this Final Judgment or of the person's succession to a designated position, a written certification that he or she: (1) Has read, understands, and agrees to abide by the terms of this Final Judgment; and (2) has been advised and understands that his or her failure to comply with this Final Judgment may result in conviction for criminal contempt of court;

(4) Maintaining a record of persons to whom the Final Judgment has been distributed and from whom, pursuant to Section V(B)(3), the certification has been obtained; and

(5) Reporting to the Plaintiff any violation of the Final Judgment.

VI. Certification

Within 75 days after the entry of this Final Judgment, the Defendant shall certify to the Plaintiff whether it has complied with Sections V (B)(1) and (B)(3) above.

VII. Plaintiff Access

(A) To determine or secure compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Plaintiff shall, upon written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(1) Access during the Defendant's office hours to inspect and copy all documents in the possession or under the control of the Defendant, who may have counsel present, relating to any matters contained in this Final Judgment, and

(2) Subject to the reasonable convenience of the Defendant and without restraint or interference from it, to interview officers, employees or agents of the Defendant, who may have counsel present, regarding such matters.

(B) Upon the written request of the Assistant Attorney General in charge of the Antitrust Division made to the Defendant's principal office, the Defendant shall submit such written reports, under oath if requested, relating to any matters contained in this Final Judgment as may be reasonably requested, subject to any legally recognized privilege.

(C) No information or documents obtained by the means provided in Section VII shall be divulged by the Plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(D) If at the time information or documents are furnished by the Defendant to Plaintiff, the Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil

Procedure, and Defendant marks each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then 10 days' notice shall be given by Plaintiff to the Defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Defendant is not a party.

VIII. Further Elements of the Final Judgment

(A) This Final Judgment shall expire ten years from the date of its entry.

(B) Jurisdiction is retained by this Court for the purpose of enabling the parties to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

(C) Entry of this Final Judgment is in the public interest.

Dated: _____.

_____

United States District Judge

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, Omnipoint Corporation (''Omnipoint''), had violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Omnipoint, through its affiliate Omnipoint PCS Entrepreneurs Two, Inc., 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 Omnipoint submitted bids that ended with three-digit numerical codes to communicate with rival bidders and that, through the use of these coded bids, Omnipoint and one of its rivals reached an agreement to refrain from bidding against one another. As a consequence of this agreement, the complaint alleges Omnipoint 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 Omnipoint 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, Omnipoint 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 Omnipoint 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.

Nothwithstanding 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 is 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, Omnipoint 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, Omnipoint used the codes to better explain the real purpose of certain bids it made—to reach an agreement with a rival. In particular, Omnipoint used the BTA end codes to link the bidding of licenses in two (or more) specific BTA markets, highlight the licenses Omnipoint wanted, and convey to the competing bidders' offers to agree with Omnipoint not to bid against each other for the linked licenses.

Sometimes Omnipoint 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, Omnipoint 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).''

Ominipoint's use of the BTA end codes did not serve any legitimate purpose of the auction. Omnipoint'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 167 to 172, Omnipoint reached an agreement with NextWave Telecom, Inc. (''NextWave'') to allocate between them the F-band licenses for Toledo, OH (BTA #444), Salisbury, MD (BTA #398), and Lancaster, PA (BTA #240). Omnipoint agreed to stop bidding for the Salisbury and Lancaster-F licenses in exchange for NextWave's agreement not to bid for the Toledo-F license. (The bidding for the Toledo, Salisbury, and Lancaster-F licenses between rounds 167 and 172 is depicted in the table attached as Appendix A to this Competitive Impact Statement.)

Prior to round 167, Omnipoint had the high bid in Salisbury-F and had bid intermittently in earlier rounds for the F license in Lancaster and Toledo. NextWave had the standing high bids for the Lancaster and Toledo-F licenses. In round 167, NextWave placed the high bid for Salisbury-F. Omnipoint bid for Toledo-F in round 168. NextWave won back the Toledo license in round 169.

In round 170, Omnipoint placed bids for the Toledo, Salisbury and Lancaster-F licenses. Omnipoint's bids for Salisbury and Lancaster licenses ended in ''444''—the BTA number for Toledo. Omnipoint withdrew its Salisbury and Lancaster bids that same round, only to bid again for the two licenses in round 171, this time for lower prices than it had bid in round 170. Ominpoint's use of the BTA end codes established a link between the Salisbury and Lancaster-F licenses and the Toledo-F license.

NextWave saw the BTA end codes and understood that Omnipoint proposed to stop bidding in Salisbury and Lancaster in exchange for NextWave ceasing to bid for the Toledo-F license. In round 171, NextWave bid back over Omnipoint for the Salisbury and Lancaster-F licenses. NextWave accepted Omnipoint's offer and stopped bidding for Toledo-F even though it was willing to pay more for the Toledo-F license than Omnipoint's standing high bid for that license. Observing that NextWave had stopped bidding for Toledo-F, Omnipoint then stopped bidding for Salisbury-F and Lancaster-F.

Omnipoint's purpose for using the BTA end codes was to link the Salisbury, Lancaster and Toledo-F licenses, highlight the bids as retaliatory, and communicate an offer to stop bidding for Salisbury and Lancaster if NextWave stopped bidding for Toledo-F. Omnipoint believed that the Salisbury and Lancaster licenses were important to NextWave. The Salisbury and Lancaster licenses complemented the licenses that NextWave was holding in the Philadelphia and Washington, D.C. areas.

As a consequence of Omnipoint's agreement with NextWave, competition for the Toledo-F license was suppressed and the Treasury received less revenue for the Toledo-F license. It was in NextWave's economic self-interest to bid more for the Toledo-F license than Omnipoint'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 Omnipoint 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 Omnipoint 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 Omnipoint 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 Omnipoint from using BTA end codes or any similar signaling mechanism to solicit anticompetitive agreements in future FCC auctions. The proposed Final Judgment would enjoin Omnipoint 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 a license or that links licenses.'' (Section II(D)).

The proposed Final Judgment would further require Omnipoint to establish and maintain an antitrust compliance program (Section V). It would also provide that the United States may obtain information from Omnipoint 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 Omnipoint. In this case, the injured person is the United States.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Omnipoint 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 evalaute 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 Omnipoint. In the view of the Department of Justice, undertaking the 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 of 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 compliant 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 that 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

[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.

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 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]

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: _____.

Respectfully submitted,

Jill A. Ptacek

J. Richard Doidge,

Attorneys, Transportation, Energy, and U.S. Department of Justice, Antitrust Division, Transportation, Energy, and Agriculture Section, 325 7th Street, Suite 500, Washington, D.C. 20530, (202) 307–6351.

APPENDIX A

[Bids for Lancaster-F, Salisbury-F, and Toledo-F in rounds 167 through 172]

Round	Lancaster-F (BTA #240)	Salisbury-F (BTA #398)	Toledo-F (BTA #444)
166	[Standing high bidder as of round 47—NextWave].	[Standing high bidder as of round 11—Omnipoint].	[Standing high bidder as of round 146—NextWave].
167		NextWave 51,000	
168			Omnipoint 1,251,015.
169			NextWave 1,377,001.
170	Omnipoint 513,444	Omnipoint 67,444	Omnipoint 1,515,002.
	Omnipoint Withdrawal	Omnipoint Withdrawal	
171	NextWave 514,000	NextWave 68,000	
	Omnipoint 512,444	Omnipoint 66,444	
172 and thereafter	No further bids	No further bids	No further bids.

Stipulation and Order

It is hereby *stipulated* by and between the undersigned parties, by their respective attorneys, as follows:

1. The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the District of Columbia.

2. The parties stipulate that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedure and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceeding, provided that plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court.

3. The defendant shall abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment by the Court and shall, from the date of the signing of this Stipulation by the parties, comply with all the terms and provisions of the proposed Final Judgment as though they were in full force and effect as an order of the Court.

4. In the event that plaintiff withdraws its consent, as provided in paragraph 2 above, then the parties are released from all further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

5. The parties request that the Court acknowledge the terms of this Stipulation by entering the Order in this Stipulation and Order.

Respectfully submitted,

For Plaintiff United States of America:

Jill A. Ptacek

J. Richard Doidge,

Attorneys, Antitrust Division, U.S. Department of Justice, 325 Seventh Street, N.W., Washington, D.C. 20004, (202) 307–0468.

For Defendant Mercury PCS II, L.L.C.:

Charles A. James, Esq.,

Jones, Day, Reavis & Pogue,

Metropolitan Square, 1450 G Street, N.W., Washington, D.C. 20005, (202) 879–3675.

Order

It is *so ordered*, this _____ day of _____, 1998.

_____

United States District Court Judge

[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).

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

Jill Ptacek,

Antitrust Division, U.S. Department of Justice, 325 Seventh Street, N.W., Suite 500, Washington, D.C. 20530, (202) 307–6607, (202) 616–2441 (Fax).

Final Judgment

Plaintiff, United States of America, filed its Complaint on November 10, 1998. Plaintiff and the Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law. This Final Judgment shall not be evidence against or an admission by any party with respect to any issue of fact or law. Therefore, before the taking of any testimony, without trial or adjudication of any issue of fact or law herein, and upon consent of the parties, it is hereby *ordered, adjudged, and decreed,* as follows:

I. Jurisdiction

This Court has jurisdiction of the subject matter of this action and of each of the parties consenting hereto. Venue is proper in the District of Columbia. The Complaint states a claim upon which relief may be granted against the Defendant under Section 1 of the Sherman Act, 15 U.S.C. § 1.

II. Definitions

As used herein, the term:

(A) ''Defendant'' means Mercury PCS II, L.L.C., its successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, directors, officers, managers, agents, and employees.

(B) ''Document'' means all ''writings and recordings'' as that phrase is defined in Rule 1001(1) of the Federal Rules of Evidence.

(C) ''FCC'' means the Federal Communications Commission.

(D) ''License-identifying information'' means any number, letter, code or description that designates or identifies a license or that links licenses.

(E) ''Person'' means any natural person, corporation, firm, company, sole proprietorship, partnership, association, institution, governmental unit, public trust, or other legal entity.

III. Applicability

(A) This Final Judgment applies to the Defendant, to its successors, and assigns, and to all other persons in active concert or participation with any of them who shall have received actual notice of the Final Judgment by personal service or otherwise.

(B) Nothing herein contained shall suggest that any portion of this Final Judgment is or has been created for the benefit of any third party and nothing herein shall be construed to provide any rights to any third party.

IV. Prohibited Conduct

The Defendant is enjoined and restrained from:

(A) Entering into any agreement with any other license applicant to fix, establish, suppress or maintain the price for any license to be awarded by the FCC in an auction, or to allocate any such licenses amongst competitors, provided, however, that nothing in this provision shall prohibit the Defendant from participating in any bidding consortium, teaming arrangement or other joint venture authorized under the rules and regulations of the FCC pertaining to future auctions, and disclosed to the FCC.

(B) In the course of any auction conducted pursuant to the rules and regulations of the FCC, offering any price to the FCC for the lease, purchase, or right to use any FCC-awarded license, that includes within that price any license-identifying information, unless the inclusion of such information is required by the FCC.

V. Compliance Program

The Defendant is ordered to maintain an antitrust compliance program, which shall include the following:

(A) Designating, within 30 days of entry of this Final Judgment, an Antitrust Compliance Officer with responsibility for accomplishing the antitrust compliance program and with the purpose of achieving compliance with this Final Judgment. The Antitrust Compliance Officer shall, on a continuing basis, supervise the review of the current and proposed activities of the Defendant to ensure that it complies with this Final Judgment.

(B) The Antitrust Compliance Officer shall be responsible for:

(1) Distributing within 60 days of the entry of this Final Judgment, a copy of this Final Judgment to (a) all officers and directors of the Defendant; and (b) to all employees who have any responsibility for formulating, proposing, recommending, establishing, approving, implementing or submitting the Defendant's prices in FCC-conducted license auctions;

(2) Distributing in a timely manner a copy of this Final Judgment to any officer, director or employee who succeeds to a position described in Section V(B)(1);

(3) Obtaining from each present or future officer, director or employee designated in Section V(B)(1), within 60 days of entry of this Final Judgment or of the person's succession to a designated position, a written certification that he or she: (1) has read, understands, and agrees to abide by the terms of this Final Judgment; and (2) has been advised and understands that his or her failure to comply with this Final Judgment may result in conviction for criminal contempt of court;

(4) Maintaining a record of persons to whom the Final Judgment has been distributed and from whom, pursuant to Section VI(B)(3), the certification has been obtained; and

(5) Reporting to the Plaintiff any violation of the Final Judgment.

VI. Certification

Within 75 days after the entry of this Final Judgment, the Defendant shall certify to the Plaintiff whether it has complied with Sections V(B)(1) and (B)(3) above.

VII. Plaintiff Access

(A) To determine or secure compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Plaintiff shall, upon written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(1) Access during the Defendant's office hours to inspect and copy all documents in the possession or under the control of the Defendant, who may have counsel present, relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of the Defendant and without restraint or interference from it, to interview officers, employees or agents of the Defendant, who may have counsel present, regarding such matters.

(B) Upon the written request of the Assistant Attorney General in charge of the Antitrust Division made to the Defendant's principal office, the Defendant shall submit such written reports, under oath if requested, relating to any matters contained in this Final

Judgment as may be reasonably requested, subject to any legally recognized privilege.

(C) No information or documents obtained by the means provided in Section VII shall be divulged by the Plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(D) If at the time information or documents are furnished by the Defendant to Plaintiff, the Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Defendant marks each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then 10 days' notice shall be given by Plaintiff to the Defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Defendant is not a party.

VIII. Further Elements of the Final Judgment

(A) This Final Judgment shall expire ten years from the date of its entry.

(B) Jurisdiction is retained by this Court for the purpose of enabling the parties to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

(C) Entry of this Final Judgment is in the public interest.

Dated: _____.

_____

United States District Judge

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 communications service (''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 of 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 the 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 has 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

[1] 119 Cong. Rec. 24598 (1973); *see also United States* v. *Gillette Co.,* 406 F. Supp. 713, 715 (D.

Continued

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): *s ee 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 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 its 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]

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: November 10, 1998.

Respectfully submitted,

Jill A. Ptacek,

J. Richard Doidge,

Attorneys, U.S. Department of Justice, Antitrust Division, Transportation, Energy, and Agriculture Section, 325 7th Street NW., Suite 500, Washington, DC 20530, (202) 307–6351.

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	[Standing high bidder as of round 68—High Plains].
	Mercury, 1,032,003	
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.

Stipulation and Order

It is hereby *stipulated* by and between the undersigned parties, by their respective attorneys, as follows:

1. The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the District of Columbia.

2. The parties stipulate that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedure and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceedings, provided that plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court.

3. The defendant shall abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment by the Court and shall, from the date of the signing of this Stipulation by the parties, comply with all the terms and provisions of the proposed Final Judgment as though they were in full force and effect as an order of the Court.

4. In the event that plaintiff withdraws its consent, as provided in paragraph 2 above, then the parties are

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.

[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).

released from all further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

5. The parties request that the Court acknowledge the terms of this Stipulation by entering the Order in this Stipulation and Order.

Respectfully submitted,

For Plaintiff, United States of America:

Jill A. Ptacek

J. Richard Doidge,

Attorneys, Antitrust Division, U.S. Department of Justice, 325 Seventh Street, N.W., Washington, D.C. 20004, (202) 307–0468.

For Defendant, 21st Century Bidding Corp.:

Timothy J. O'Rourke, Esq.,

Dow, Lohnes & Albertson, PLLC, 1200 New Hampshire Avenue, N.W., Suite 800, Washington, D.C. 20036, (202) 776–2716.

Order

It is *so ordered*, this _____ day of _____, 1998.

United States District Court Judge

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:

Timothy J. O'Rourke, Esquire, Dow, Lohnes & Albertson, 1200 New Hampshire Avenue, N.W., Suite 800, Washington, D.C. 20036–6802.

Jill Ptacek,

Antitrust Division, U.S. Department of Justice, 325 Seventh Street, N.W., Suite 500, Washington, D.C. 20530, (202) 307–6607, (202) 616–2441 (Fax).

Final Judgment

Plaintiff, United States of America, filed its Complaint on November 10, 1998. Plaintiff and the Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law. This Final Judgment shall not be evidence against or an admission by any party with respect to any issue of fact or law. Therefore, before the taking of any testimony, without trial or adjudication of any issue of fact or law herein, and upon consent of the parties, it is hereby *ordered, adjudged, and decreed,* as follows:

I. Jurisdiction

This Court has jurisdiction of the subject matter of this action and of each of the parties consenting hereto. Venue is proper in the District of Columbia. The Complaint states a claim upon which relief may be granted against the Defendant under Section 1 of the Sherman Act, 15 U.S.C. § 1.

II. Definitions

As used herein, the term:

(A) ''Defendant'' means 21st Century Bidding Corporation, its successors, assigns, subsidiaries, divisions, groups affiliates, partnerships and joint ventures, directors, officers, managers, agents, and employees.

(B) ''Document'' means all ''writings and recordings'' as that phrase is defined in Rule 1001(1) of the Federal Rules of Evidence.

(C) ''FCC'' means the Federal Communications Commission.

(D) ''License-identifying information'' means any number, letter, code or description that designates or identifies a license or that links licenses.

(E) ''Person'' means any natural person, corporation, firm, company, sole proprietorship, partnership, association, institution, governmental unit, public trust, or other legal entity.

III. Applicability

(A) This Final Judgment applies to the Defendant, to its successors, and assigns, and to all other persons in active concert or participation with any of them who shall have received actual notice of the Final Judgment by personal service or otherwise.

(B) Nothing herein contained shall suggest that any portion of this Final Judgment is or has been created for the benefit of any third party and nothing herein shall be construed to provide any rights to any third party.

IV. Prohibited Conduct

The Defendant is enjoined and restrained from:

(A) Entering into any agreement with any other license applicant to fix, establish, suppress or maintain the price for any license to be awarded by the FCC in an auction, or to allocate any such licenses amongst competitors, provided, however, that nothing in this provision shall prohibit the Defendant from participating in any bidding consortium, teaming arrangement or other joint venture authorized under the rules and regulations of the FCC pertaining to future auctions, and disclosed to the FCC.

(B) In the course of any auction conducted pursuant to the rules and regulations of the FCC, offering any price to the FCC for the lease, purchase, or right to use any FCC-awarded license, that includes within that price any license-identifying information, unless the inclusion of such information is required by the FCC.

V. Compliance Program

The Defendant is ordered to maintain an antitrust compliance program, which shall include the following:

(A) Designating, within 30 days of entry of this Final Judgment, an Antitrust Compliance Officer with responsibility for accomplishing the antitrust compliance program and with the purpose of achieving compliance with this Final Judgment. The Antitrust Compliance Officer shall, on a continuing basis, supervise the review of the current and proposed activities of the Defendant to ensure that it complies with this Final Judgment.

(B) The Antitrust Compliance Officer shall be responsible for:

(1) Distributing within 60 days of the entry of this Final Judgment, a copy of this Final Judgment to (a) all officers and directors of the Defendant; and (b) to all employees who have any responsibility for formulating, proposing, recommending, establishing, approving, implementing or submitting the Defendant's prices in FCC-conducted license auctions;

(2) Distributing in a timely manner a copy of this Final Judgment to any officer, director or employee who succeeds to a position described in Section V(B)(1);

(3) Obtaining from each present or future officer, director or employee designated in Section V(B)(1), within 60 days of entry of this Final Judgment or of the person's succession to a designated position, a written certification that he or she: (1) has read, understands, and agrees to abide by the terms of this Final Judgment; and (2) has been advised and understands that his or her failure to comply with this Final Judgment may result in conviction for criminal contempt of court;

(4) Maintaining a record of persons to whom the Final Judgment has been distributed and from whom, pursuant to Section VI(B)(3), the certification has been obtained; and

(5) Reporting to the Plaintiff any violation of the Final Judgment.

VI. Certification

Within 75 days after the entry of this Final Judgment, the Defendant shall certify to the Plaintiff whether it has complied with Sections V (B)(1) and (B)(3) above.

VII. Plaintiff Access

(A) To determine or secure compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Plaintiff shall, upon written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the Defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(1) Access during the Defendant's office hours to inspect and copy all documents in the possession or under the control of the Defendant, who may have counsel present, relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of the Defendant and without restraint or interference from it, to interview officers, employees or agents of the Defendant, who may have counsel present, regarding such matters.

(B) Upon the written request of the Assistant Attorney General in charge of the Antitrust Division made to the Defendant's principal office, the Defendant shall submit such written reports, under oath if requested, relating to any matters contained in this Final Judgment as may be reasonably requested, subject to any legally recognized privilege.

(C) No information or documents obtained by the means provided in Section VII shall be divulged by the Plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(D) If at the time information or documents are furnished by the Defendant to Plaintiff, the Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Defendant marks each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then 10 days' notice shall be given by Plaintiff to the Defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Defendant is not a party.

VIII. Further Elements of the Final Judgment

(A) This Final Judgment shall expire ten years from the date of its entry.

(B) Jurisdiction is retained by this Court for the purpose of enabling the parties to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

(C) Entry of this Final Judgment is in the public interest.

Dated: _____.

_____

United States District Judge

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, 21st Century Bidding Corp. (''21st Century''), had violated Section 1 of the Sherman Act, 15 U.S.C. 1. 21st Century 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 21st Century submitted bids that ended with three-digit numerical codes to communicate with rival bidders and that, through the use of these coded bids, 21st Century and one of its rivals reached an agreement to refrain from bidding against one another. As a consequence of this agreement, the complaint alleges 21st Century 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 21st Century 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, 21st Century 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 21st Century 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 bidder 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 1,479 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 rival. 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, 21st Century 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, 21st Century used the codes to better explain the real purpose of certain bids it made—to reach an agreement with a rival. In particular, 21st Century used the BTA end codes to link the bidding of licenses in two (or more) specific BTA markets, highlight the license 21st Century wanted, and convey to the competing bidders offers to agree with 21st Century not to bid against each other for the linked licenses. By placing bids in one market with the BTA end code of another market, 21st Century sent 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.''

21st Century's use of the BTA end codes did not serve any legitimate purpose of the auction. 21st Century'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 120 to 125, 21st Century reached an agreement with Mercury PCS II, L.L.C. (''Mercury'') to allocate between them the F-band licenses for Indianapolis (BTA #204), Baton Rouge (BTA #32), and Biloxi (BTA #42). 21st Century agreed to stop bidding for the Baton Rouge and Biloxi-F licenses in exchange for Mercury's agreement not to bid for the Indianapolis-F license. (The bidding for the Baton Rouge, Biloxi and Indianapolis-F between rounds 120 and 125 is depicted in the table attached as Appendix A to this Competitive Impact Statement.)

Prior to round 120, 21st Century had been bidding for the Indianapolis-F license and had been the high bidder on that license since round 85. On the other hand, Mercury had been bidding consistently for the Baton Rouge and Biloxi-F licenses and was standing high bidder for both licenses. 21st Century had never bid for licenses in Baton Rouge or Biloxi; Mercury had never bid in Indianapolis.

In round 120, Mercury bid for the first time for the Indianapolis-F license. After 21st Century bid back in round 121, Mercury again bid for Indianapolis-

F. In round 123, 21st Century placed bids for the Baton Rouge and Biloxi-F licenses and attached the Indianapolis BTA end code (''204'') to these bids. 21st Century's purpose for using the BTA end codes was to link the Baton Rouge, Biloxi and Indianapolis-F licenses, highlight the bids as retaliatory, and communicate an offer to stop bidding for Baton Rouge and Biloxi if Mercury stopped bidding for Indianapolis-F.

21st Century believed that the Baton Rouge and Biloxi licenses were important to Mercury. Mercury had been bidding persistently for these licenses since the start of the auction. In addition, Mercury held a number of licenses from the C block in the vicinity and the Baton Rouge and Biloxi-F licenses were contiguous to several other geographic markets where Mercury was the standing high bidder for the F licenses.

Mercury saw the BTA end code and understood that 21st Century proposed to stop bidding for Baton Rouge and Biloxi in exchange for Mercury ceasing to bid for the Indianapolis-F license. In round 124, Mercury bid back over 21st Century for the Baton Rouge and Biloxi-F licenses, attaching the Indianapolis BTA end code to its bids. Mercury's use of the Indianapolis BTA end code in round 124 confirmed that it understood the link between the three licenses. Mercury accepted 21st Century's offer and stopped bidding for Indianapolis-F even though it was willing to pay more for the Indianapolis-F license. Observing that Mercury had stopped bidding for Indianapolis-F, 21st Century stopped bidding for the Baton Rouge and Biloxi-F licenses.

As a consequence of 21st Century's agreement with Mercury, competition for the Indianapolis-F license was suppressed and the Treasury received less revenue for the Indianapolis-F license. It was Mercury's economic self-interest to bid more for the Indianapolis-F license than 21st Century'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 21st Century 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 21st Century 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 21st Century 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 21st Century from using BTA end codes or any similar signaling mechanism to solicit anticompetitive agreements in future FCC auctions. The proposed Final Judgment would enjoin 21st Century 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 21st Century to establish and maintain an antitrust compliance program (Section V). It would also provide that the United States may obtain information from 21st Century 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 59(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 21st Century. In this case, the injured person is the United States.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and 21st Century 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. 5a. Doing so would likely have required a full trial on the merits against 21st Century. In the view of the Department of Justice, undertaking the 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 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]

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.

For Plaintiff United States of America.

Dated: November 10, 1998.

Respectfully submitted,

Jill A. Ptacek,

J. Richard Doidge,

Attorneys, U.S. Department of Justice, Antitrust Division, Transportation, Energy, and Agriculture Section, 325 7th Street, Suite 500, Washington, D.C. 20530, (202) 307–6351.

APPENDIX A

[Bids for Baton Rouge-F, Biloxi-F, and Indianapolis-F in rounds 120 through 125]

Round	Baton Rouge-F (BTA #032)	Biloxi-F (BTA #042)	Indianapolis-F (BTA #204)
119	[Standing high bidder as of round 69—Mercury].	[Standing high bidder as of round 96—Mercury].	[Standing high bidder as of round 85—21st Century].
120			Mercury 2,582,000.
121			21st Cent. 2,850,021.
122			Mercury 3,135,123.
123	21st Cent. 3,990,204	21st Cent. 1,650,204	
124	Mercury 4,389,204	Mercury 1,815,204	
125			21st Cent. 3,300,545.
126 and thereafter	No further bids	No further bids	No further bids.

[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.

[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), *affid 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).

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DEPARTMENT OF JUSTICE

Antitrust Division

International Competition Policy Advisory Committee (ICPAC); Notice of Meeting

The International Competition Policy Advisory Committee (the ''Advisory Committee'') will hold its third meeting on December 16, 1998. The Advisory Committee was established by the Department of Justice to provide advice regarding issues relating to international competition policy; specifically, how best to cooperate with foreign authorities to eliminate international anticompetitive cartel agreements, how best to coordinate United States' and foreign antitrust enforcement efforts in the review of multijurisdictional mergers, and how best to address issues that interface international trade and competition policy concerns. The meeting will be held at The Carnegie Endowment for International Peace, Root Conference Room, 1779 Massachusetts Avenue, N.W., Washington, D.C. 20036 and will begin at 10:00 a.m. EST and end at approximately 4:00 p.m. The agenda for the meeting will be as follows:

1. Enforcement Cooperation
2. Multijurisdictional Merger Review
3. Trade and Competition Policy Interface Issues
4. Work Program: Next Steps

Attendance is open to the interested public, limited by the availability of space. Persons needing special assistance, such as sign language interpretation or other special accommodations, should notify the contact person listed below as soon as possible. Members of the public may submit written statements by mail, electronic mail, or facsimile at any time before or after the meeting to the contact person listed below for consideration by the Advisory Committee. All written submissions will be included in the public record of the Advisory Committee. Oral statements from the public will not be solicited or accepted at this meeting. For further information contact: Merit Janow, c/o Eric J. Weiner, U.S. Department of Justice, Antitrust Division, 601 D Street, N.W., Room 10011, Washington, D.C. 20530, Telephone: (202) 616–2578, Facsimile: (202) 514–4508, Electronic mail: icpac.atr@usdoj.gov.

Merit E. Janow,

Executive Director, International Competition Policy Advisory Committee.

[FR Doc. 98–31504 Filed 11–24–98; 8:45 am]
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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 98–55; Exemption Application No. D–10379, et al.]

Grant of Individual Exemptions; John Taylor Fertilizers Company

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

John Taylor Fertilizers Company, Profit Sharing Plan (the Plan), Sacramento, California

[Prohibited Transaction Exemption 98–55; Exemption Application No. D–10379]

Exemption

The restrictions of sections 406(a), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale by the Plan of an undivided 16.28% interest (Leasehold Interest) in a certain leasehold of a professional office complex located in Sacramento, California, to John Taylor Fertilizers Company, a party in interest with respect to the Plan, provided that the following conditions are satisfied:

(A) All terms of the transaction are at least as favorable to the Plan as those which the Plan could obtain in an arm's-length transaction with an unrelated party;

(B) The sale is a one-time transaction for cash;

(C) The Plan pays no commissions or other expenses relating to the sale;

(D) The purchase price is the greater of: (1) the fair market value of the Leasehold Interest as determined by a qualified, independent appraiser, or (2) the original acquisition cost, plus all costs attributable to holding the Leasehold Interest through the date of the sale; and

(E) The Plan receives rental income due and owing to the Plan through the date of the sale.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice of Proposed Exemption published on September 16, 1998 at 63 FR 49612.

FOR FURTHER INFORMATION CONTACT: Janet L. Schmidt of the Department, telephone (202) 219–8883 (This is not a toll-free number.)