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Federal Communications Commission
Washington, D.C. 20554

OEC 14 1994

In Reply Refer To
 1700A1/7330-08

Leonard J. Kennedy, Esquire
 Dow, Lohnes and Alberston
 1255 23rd Street, N.W.
 Washington, D.C. 20037-1 194

Dear Mr. Kennedy:

This will serve as a response to **your** October 24, 1994 letter on behalf of your **client, Comcast Corporation** (Comcast). **Comcast seeks clarification of the** Commission's **decision to allow** consortium members to **withdraw from bidding consortia** as described in paragraph **57 of the Fourth Memorandum Opinion and Order (Fourth MO&O)**, PP Docket No. **93-253**, FCC No. **94-264 (released Oct. 19, 1994)**.

Specifically, you observe that in the **Fourth MO&O**, **the** Commission modified its competitive bidding **rules** for broadband PCS **to provide that investors** may "drop out" of a consortium if other members of the consortium **wish to continue** to bid, irrespective of any change in consortium control that might **result, provided** that **the** ownership changes are reported to the Commission. Additionally, you note **that** the **Fourth MO&O** provides that "members that are removed from a **consortium** may not subsequently bid individually or become involved **with another** bidder in bidding on my licenses for which the consortium **had applied.**" **See Fourth MO&O**, FCC No. **94-264**, a! ¶ 57. You seek clarification of this statement **to the extent it suggests that** those who **have** dropped **out of** a consortium bidding for a license in a particular **market**, **may not** continue to bid **as** a member of its **previously-formed consortium on remaining** licenses **identified in the consortium's Form 175 (short-form application)**. You **ask that consortium** members that drop **out of** the bidding in a specific market be **allowed to remain in** the consortium to bid **on** other **licenses** in other markets, assuming the **licenses were previously identified** as target markets on the consortium's short-form application. You **indicate** that withdrawing members of **the** consortium **would not be permitted to re-partner with** another bidder or to bid individually on licenses for which the **consortium** has applied

In the **Fourth MO&O**, **the** Commission recognized **that** when members of a consortium drop out of the bidding, the remaining consortium members should be able **to continue bidding** on licenses. All such changes in consortium **ownership** must be reflected in **an**

unended short-form submitted by the applicant.¹ The Fourth MO&O does not, however, discuss the narrow issue of whether we will permit a consortium member to withdraw from the consortium only in a particular market or markets, but otherwise remain in the consortium for purposes of bidding on all other markets specified on the short-form. The Fourth MO&O only contemplated the situation where there was a global change in the composition of the consortium. In such instances, we wanted to ensure that the surviving members of the consortium could continue to bid. See, e.g., Letter to Gary M. Epstein, Latham and Watkins, from William E. Kennard, FCC General Counsel, October 25, 1994.

Our rules would not preclude a consortium from negotiating a private agreement with its members to assign their interests in particular licenses to other consortium members after the auction. Thus, for example, a consortium member could agree that if the consortium's bidding exceeds a certain level in particular markets, it will assign its interest in those licenses to other consortium members if the licenses are won at auction. There are several provisos, however, to such an arrangement. First, the existence of all such agreements must be disclosed by the consortium on an original or amended short-form submitted by the applicant, and a request to transfer or assign the license would have to be filed in conjunction with the Form 600 (long-form) application as well. Second, any transfer or assignment of licenses that would result from such agreements would be subject to FCC approval. Finally, all such agreements remain subject to existing antitrust laws, which would, for example, prohibit agreements between competitors to divide or allocate territories horizontally in order to minimize competition. See Fourth MO&O, FCC 94-264, at ¶ 59 and note 125.

I hope that this response is helpful. Please contact Kathleen O'Brien Ham at (202) 418-0636 if you have further questions.

Sincerely,

Rosalind K. Allen

Rosalind K. Allen
Acting Chief
Commercial Radio Division
Wireless Telecommunications Bureau

¹ We recently clarified that an "applicant" includes all holders of attributable interests in the applicant. Thus, a party with a five percent or greater interest in an applicant as well as officers and directors of the applicant are deemed an "applicant" for such purposes. See Memorandum Opinion and Order, PP Docket No. 93-253, FCC 94-295 (released Nov 17, 1994).