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Federal Communications Commission  
Washington, D.C. 20554

OEC 14 1994

In Reply Refer To  
1700A17330-08

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, at ¶ 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.<sup>1</sup> *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

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<sup>1</sup> 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).