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Dear Messrs. Epstein and Barker:

This is in response to your letter dated October 20, 1994 regarding the FCC’s Broadband PCS auction beginning on December 5, 1994.

After explaining the background of your inquiry, your first question asks whether the Commission’s rules permit multiple applications by companies A, B, and C, individually, and also by ABCCo, an entity jointly owned by A, B, and C.

Currently, the Commission’s rules permit the filing of multiple applications, as described. The FCC, however, does not intend to make determinations in advance of the auction with respect to whether the ABCCo bidding arrangement complies with applicable antitrust laws. Of course, such arrangements are subject to review by the Department of Justice. In addition, the FCC will thoroughly review the long form applications of all winning bidders to determine whether the grant of such applications would serve the public interest. This review will include an assessment of whether the grant of the applications would adversely affect competition.

Your second question asks whether there is any limitation on the kinds or scope of communications or information which can be shared among A, B, C, and ABCCo. Any discussions between applicants who have applied for licenses in any of the same markets would be subject to the FCC’s auction rules and all applicable antitrust laws. With respect to the FCC’s auction rules, this would mean that “cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other bidders until after the high bidder makes the required down payment” would not be allowed among A, B, C, or among A, B, C, and ABCCo, the consortium they have formed, “unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder’s short-form application...” See Section 1.2105 (c)(1) of the rules; Paragraph 59 of the Fourth Memorandum Opinion and Order in Docket No. 93-253, released October 19, 1994.
With respect to the antitrust laws, the Commission indicated that it "would expect" that discussions with respect to bid prices between any applicants who have applied for licenses in the same geographic market would be prohibited regardless of the Commission’s rules. See Footnote 125 of the Fourth Memorandum Opinion and Order in Docket 93-253. The Commission also has indicated that agreements between two or more actual or potential competitors to submit collusive, non-competitive or rigged bids are per se violations of Section One of the Sherman Act. See Footnote 125 of the Fourth Memorandum Opinion and Order. Similarly, agreements between actual or potential competitors to divide or allocate territories horizontally in order to minimize competition are per se violations of the Sherman Act. and such agreements are anticompetitive regardless of whether the parties split a market in which they both do business or whether they merely reserve one market for one and another for the other. See Footnote 125 of the Fourth Memorandum Opinion and Order.

Your third question asks whether there are any limitations on changing the ownership of ABCCo during the period from October 28 through the course of the auction. As a part of this question, you asked whether there will be any transfer of control limitations affecting ABCCo, given that A, B, and C will each have filed separately, as well as jointly through ABCCo.

There are FCC limitations on changes in ownership of ABCCo if A, B, or C have applied for any of the same licenses and therefore might have bid against ABCCo. There are similar limitations on transfers of control. See Paragraph 52 of the Second Memorandum Opinion and Order in Docket No. 93-253, released August 15, 1994; Section 1.2105 (c) (2) of the rules, as clarified by an erratum issued October 19, 1994; and Paragraphs 56, 57, and 58 of the Fourth Memorandum Opinion and Order.

Your fourth question asks whether A, B, and C would be entitled to get their individual upfront payments back if A, B, and C each choose not to bid individually, but bid only through ABCCo, which will submit its own upfront payment. If A, B, and C choose not to bid individually, their upfront payments will be returned, assuming there are no penalties owed resulting from bid withdrawal or default. See Paragraph 27 of the Second Memorandum Opinion and Order and Section 1.2106 (d) and (e).

I hope this explanation helps clarify your understanding of the Commission’s bidding procedures. Please contact me if you have additional questions.

Sincerely,

William E. Kennard
General Counsel