ORIGINAL

DOW, LOHNES & ALBERTSON
ATTORNEYS AT LAW
1255 TWENTY-THIRD STREET
WASHINGTON, D.C. 20037-1194

EX PARTE OR LATE FILED

LEONARD JERVEY KENNEDY
DIRECT DIAL NO.
857-2505

TELEPHONE (202) 857-2500
FACSIMILE (202) 857-2900

October 24, 1994

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FEDERAL COMMUNICATIONS COMMISSION

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Dr. Robert M. Pepper
Mr. Donald H. Gips
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Letter - Request For Erratum
PP Docket No. 93-253

Dear Dr. Pepper and Mr. Gips:

On October 19, 1994, the Federal Communications Commission (the "Commission") revised its broadband Personal Communications Services ("PCS") consortium and collusion policies to permit ownership changes in a consortium during the course of an auction, even if control of the consortium changes as a result. Specifically, the Commission provided that certain consortium 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.[1/]

In modifying the competitive bidding rules, the Fourth Order emphasized that:

> members that are removed from a consortium may not subsequently bid individually or become involved with another bidder in bidding on any license for which the consortium had applied."[2/]

1/ See Fourth Memorandum Opinion and Order, Competitive Bidding, PP Docket No. 93-253 at ¶ 57 (adopted and released October 19, 1994) (hereafter "Fourth Order"). The Commission modified its rules pursuant to recommendations made by Comcast Corporation ("Comcast") in an ex parte letter filed October 7, 1994 (see attached).

2/ Id.

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Comcast seeks clarification of this statement and revised Rule Section 24.822 to the extent it suggests that those who have dropped out of a consortium bidding for a license in a particular market, e.g. the Oklahoma MTA, may not continue to bid as a member of its previously-formed consortium on remaining licenses identified in the consortium's short-form application.

Comcast urges the Commission to clarify that consortium members who drop out of the bidding in a specific market can 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. As suggested above, and consistent with the Order's statement in ¶ 57, withdrawing members of the consortium would not be permitted to re-partner with another bidder or to bid individually on licenses previously identified by the consortium, subsequent to their withdrawal.

Because this interpretation is consistent with Comcast's October 7 letter, cited by the Order as the basis for its statement, Comcast requests that the rule be conformed to reflect both the Commission's statement and Comcast's original request for clarification. The Commission should release an erratum or clarification to Section 24.822 of its Rules to provide as follows (changes to rule emphasized):

> (b) In broadband PCS, applicants will be permitted to amend their Form 175 applications to make minor amendments to correct minor errors or defects such as typographical errors. Applicants will also be permitted to amend FCC Form 175 to make changes to the information required by § 24.813(a) (such as ownership changes or changes in the identifications of parties to bidding consortia), provided such changes do not result in a change in control of the applicant and do not involve another applicant (or parties in interest to an applicant) who has applied for licenses in any of the same geographic license areas as the applicant, except to the extent provided by subsection (c) of this Section. Amendments which change control of the applicant, except as provided by subsection (c) of this Section, will be considered major amendments. An FCC Form 175 which is amended by a major amendment will be considered newly filed and cannot be resubmitted after applicable filing deadlines. See also Section 1.2105 of this Chapter.

(c) Any ownership changes or changes in the identification of parties to bidding consortia will not be considered major amendments to FCC Form 175 if consortia members withdraw from bidding on particular licenses while remaining members continue to bid, regardless of any change in ownership that might occur. Members that withdraw from a consortium may not subsequently bid individually or become involved with another bidder on bidding on any license for which the consortium has applied. Nevertheless, they are permitted to continue bidding jointly on licenses, from which they have not withdrawn, previously identified in the consortium's FCC Form 175.

As Comcast stated in its October 7 letter that formed the basis for the Commission's revision, modifying the rule to add this provision will clarify the options available to consortia members to alter their bidding strategies during the course of the PCS auctions without risk of collusion.

Respectfully submitted,

COMCAST CORPORATION

Leonard J. Kennedy

Its Attorney

cc: The Honorable Reed E. Hundt
The Honorable James H. Quello
The Honorable Andrew C. Barrett
The Honorable Rachelle B. Chong
The Honorable Susan Ness
Regina Keeney, Esq.
Rosalind K. Allen, Esq.

DOW, LOHNES & ALBERTSON
ATTORNEYS AT LAW
1255 TWENTY-THIRD STREET
WASHINGTON, D.C. 20037-1194

LEONARD JERVEY KENNEDY
DIRECT DIAL NO.
857-2505

TELEPHONE (202) 857-2500
FACSIMILE (202) 857-2900

October 7, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Letter
PP Docket No. 93-253

Dear Mr. Caton:

Comcast Corporation ("Comcast"), by its attorneys, hereby requests that the Federal Communications Commission (the "Commission") revise or clarify its current anti-collusion rule to permit a consortium member or members to continue bidding on a specific license after all other associated consortium members withdraw from the bidding process as to such license.[1/]

The current anti-collusion rules force bidders to elect at the short-term application stage either an individual or joint consortia filing strategy. As a result, the Commission may be foreclosing bidders from availing themselves of bidding options that are otherwise not at odds with the Commission's anti-collusion rules and will advance other stated Commission goals. As described below, modifying the anti-collusion rule to permit consortia to "fold" in a particular market but permit a former consortia member to continue bidding: (1) will offer bidders greater flexibility to alter their bidding strategies during the course of the auction; (2) will not facilitate collusive or otherwise anti-competitive behavior; (3) will place licenses in the hands of parties that value the spectrum the most; and (4) will maximize the revenues realized from allocating valuable radio spectrum through competitive bidding.

On reconsideration of its generic auction rules, the Commission revised its general anti-collusion prohibition to permit bidders who have not filed short form applications for any of the same licenses to engage in discussions and enter into

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1/ See 47 C.F.R. § 1.2105(c) (1994).

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bidding consortia or joint bidding arrangements during the course of the auction.[2/] The Commission determined that the initial prohibition against communications and arrangements among all bidders, after the short form applications are filed, was excessively broad because it would prevent useful arrangements among bidders that would have no effect on the competitiveness of bidding.[3/]

The Commission, however, has not addressed a circumstance in which a consortium may find that it is outbid for, or otherwise no longer desires to pursue, a particular market, while a particular member of that consortium may believe that the particular license is not over-valued in the auction. Under the current rules, if a resulting change in consortium ownership would be a change in "control" of the applicant, it would not be permitted. In this instance, however, there does not appear to be a logical distinction between allowing minor changes but disallowing major changes in ownership.

For example, if a consortium consists of ten members with equal interests that have been properly identified on the PCS applicant's short form application, circumstances may arise where one member of the consortium wishes to continue bidding on a specific PCS license while the remaining members no longer wish to participate because they do not collectively value the license to the level to which it has been bid. The Commission's rules should provide that individual consortium members may continue to bid for the license, even if the withdrawal of one or more consortium members effectively transfers control of the consortium's application for that market, so long as the consortium ownership change notification is filed as provided in the rules. Alternatively, the Commission could permit both major and minor ownership changes to occur during the course of the auction process and utilize the required long form process as a means to allow the identification of the remaining members of a consortium in a particular market.

2/ See Second Memorandum and Order, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, FCC 94-215 (adopted August 15, 1994, released August 15, 1994) at ¶ 51.

3/ The collusion rules also have been relaxed to permit modifications to an applicant's ownership during the course of the auction so long as no change of control of any PCS applicant takes place. See Second Memorandum and Order at 51.

Since the parties in a consortium are required to be identified in the short-form application, the public will have been fully apprised of the identity of the remaining bidders. Further, the public remains apprised of the make-up of each bidder as a result of the consortium's continuing notification responsibilities. This situation differs significantly from that governed by the Commission's rules regarding the addition of new members when a transfer of control occurs. When a new (e.g. post-short form filing) entity joins a consortium and assumes control, other bidders are not apprised of the bidder's true ownership and participation status prior to the commencement of the PCS auctions.[4/]

In addition, this recommendation is consistent with the Commission's desire to adopt flexible anti-collusion rules that prevent anti-competitive behavior and, at the same time, permit bidders the ability to react to the activities of other bidders during the auction process. As noted in both the Second Report and Order and the Second Memorandum Opinion and Order, the Commission's principal concern in establishing an anti-collusion rule was to prevent anti-competitive conduct and to prevent bidders from entering consortia in the eleventh hour, thereby frustrating the efforts of other bidders that value a particular license the most.[5/] Allowing the remaining consortia member or members to continue bidding, however, increases the competitiveness of the auctions and holds no potential for anti-competitive behavior. In fact, accommodating the goals of the consortium's individual members if the consortium is unwilling to continue bidding in a particular market accomplishes the same objective served by the anti-collusion rule: to guarantee a

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4/ Modifying the rule pursuant to Comcast's request would not only complete the Commission's treatment of consortium issues and add symmetry to the Commission's Rules, it would also constitute a logical outgrowth of the rulemaking's inquiry under the Administrative Procedure Act. See Small Reference Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983).

5/ See e.g. Second Report and Order 9 FCC Rcd 2348, 2386-2387 (1994) (indicating that anti-collusion rule prevents parties from agreeing in advance to bidding strategies that divide the market according to their strategic interests and thereby disadvantage other bidders).

competitive bidding environment for the assignment of radio spectrum.[6/]

Similarly, no issues regarding adequacy of disclosure or bidding eligibility are raised in that the parties involved in the consortium have already submitted specific information regarding their ownership, such that all parties participating in the auction are apprised of the interests of all consortium members and the licenses for which they will bid. In addition, the post-auction Petition to Deny phase of the auction process permits interested parties to examine, in detail, the activities of the consortium and any particular party that opts to participate in the PCS auctions once other members have withdrawn.[7/]

Additionally, permitting consortium members to continue bidding after other consortium bidders have withdrawn from the group will result in licenses being assigned to those parties that value the radio spectrum the most. The Commission has expressed repeatedly a desire to establish rules that assign licenses to parties capable and willing to invest and build innovative PCS systems. Providing the flexibility Comcast requests serves to achieve this goal.[8/]

6/ Withdrawing from a cooperative arrangement holds no opportunity for "collusion" because the parties involved are actually deciding not to cooperate in the PCS auctions in regard to specific markets.

7/ Adoption of Comcast's recommendation would not affect the winning bidders' obligation to submit a long-form application identifying those consortium members that continued to participate in the auction and successfully bid on a particular PCS license. Nor would modification of the Commission's anti-collusion rule permit parties ineligible to bid for certain PCS spectrum to circumvent the rules and bid based only on their association with the bidding consortium. Accordingly, cellular providers will still be limited to holding 10 MHz of spectrum in areas where they provide cellular service, providing that their population coverage exceeds the established eligibility threshold.

8/ There in no rational basis for requiring potential PCS applicants to choose between participating in the PCS auctions only as a member of a consortium or only as an individual for all available licenses, at the outset, because parties have no way to predict the auction values for individual markets.

Finally, the public interest will be furthered by maximizing returns to the Treasury as the Commission encourages parties to bid on PCS licenses to the extent they are valued in the marketplace. Restraining the ability of consortium members to compete for spectrum only serves to repress the participation of eligible bidders in the PCS auctions, and leaves money on the table that otherwise would be used to acquire PCS licenses. Comcast's proposal adds an additional bidder to the process, increasing the likelihood of a higher winning bid and plainly advancing one of the auction objectives.

Accordingly, Comcast requests that the Commission modify its rules to permit consortium members to withdraw from a bidding consortia arrangement, and allow surviving members to continue bidding if they believe that their goals are better served by continued participation in the PCS auction for a particular license or group of licenses. Adoption of Comcast's recommendation, as discussed above: (1) will offer bidders greater flexibility to alter their bidding strategies during the course of the auction; (2) will not facilitate collusive or otherwise anti-competitive behavior; (3) will place licenses in the hands of parties that value the spectrum the most; and (4) will maximize the revenues realized from allocating valuable radio spectrum through competitive bidding.

Respectfully submitted,

COMCAST CORPORATION

Leonard Kennedy/LHP

Leonard J. Kennedy

Its Attorney

cc: Chairman Reed E. Hundt
Commissioner James H. Quello
Commissioner Andrew C. Barrett
Commissioner Rachelle B. Chong
Commissioner Susan Ness
Dr. Robert M. Pepper
Mr. Donald H. Gips
Rosalind K. Allen, Esquire
Jonathan V. Cohen, Esquire