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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)))	PP Docket No. 93-253

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PETITION FOR RECONSIDERATION AND CLARIFICATION

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SUMMARY

BET Holdings, Inc. ("BHI") requests that the Commission modify its broadband PCS bidding credit eligibility rules to provide greater opportunities for successful minority and women-owned entities to participate in the broadband PCS auctions. Specifically, BHI urges the Commission to provide at least a 40 percent bidding credit to all minority and women-owned entities, regardless of size. Providing cumulative benefits to "small" minority and women-owned businesses (1) is contrary to the plain language of the Budget Act and Congressional intent; (2) is arbitrary and capricious; (3) unlawfully disadvantages successful minority and women-owned entities; and (4) encourages investor partnering with smaller, inexperienced companies with few resources, increasing the potential creation of designated entity "fronts."

BHI also requests that the Commission increase the attribution standard for publicly traded "minority and women-owned entities" from 15 percent to 25 percent to reflect significant barriers to entry that inhibit minorities and women from successfully participating in the telecommunications marketplace. As recognized in the cellular attribution rules, specific provision must be made for these companies if they are to be equipped with the financial and technical resources necessary to bid successfully against majority-owned companies in the entrepreneurs' blocks.

Moreover, the Commission must confirm that its rules permit single-person Control Groups. Providing for a single-person Control Group would be consistent with the Commission's policies and would provide maximum opportunity for minorities and women-owned entities to participate in the broadband PCS auctions. Furthermore, the Commission should confirm that the 50.1 percent voting stock requirement and the 25 percent total equity requirement of Section 24.709(c) do not apply to members of the Control Group for purposes of determining the attribution of personal net worth.

In addition, BHI urges the Commission to modify its entrepreneur's block eligibility rules to accommodate designated entity economic growth. It is contrary to Congressional intent and the Commission's policy goals to deny minority and female-owned businesses the full benefit of bidding credits and installment payments simply because they are successful.

Finally BHI believes that the Commission's affiliate Rules were not promulgated in accordance with the Administrative Procedure Act ("APA") and are overly-restrictive. The Commission cannot "borrow" the Small Business Administration's ("SBA") affiliation rules for defining "minority and women-owned entities" without proper notice and comment as required under the APA. Moreover, the

affiliation provisions unnecessarily add to the complexity of the PCS auction rules and thereby make it more difficult for potential bidders to tailor their pre-existing business relationships, bidding strategies and ownership structures to conform to the Commission's designated entity eligibility rules.

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PETITION FOR RECONSIDERATION AND CLARIFICATION

BET Holdings, Inc. ("BHI") hereby submits its Petition for Reconsideration and Clarification of the Federal Communications Commission's ("Commission") Fifth Report and Order in the Competitive Bidding Rulemaking proceeding for broadband Personal Communications Services ("PCS").[1/] Unless the Commission modifies the designated entity rules established in the Fifth Report and Order, the participation of credible designated entities who have built successful businesses in broadband PCS auctions will be jeopardized.

Specifically, BHI requests that the Commission (1) modify the bidding credit eligibility classifications so that all minority-owned entities[2/] receive the same credit, regardless of size; (2) modify the bidding eligibility rules for the "entrepreneur's blocks" to provide greater

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1/ See Fifth Report and Order, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, FCC 94-178 (adopted June 29, 1994; released July 15, 1994) ("Fifth Report and Order").

2/ Throughout this petition, BHI uses "minority-owned entities" as synonymous with minority and women-owned entities as used in the Budget Act of 1993.

opportunity for participation by minority-owned businesses; (3) modify its "entrepreneur's block" eligibility rules to accommodate designated entity economic growth; and (4) refrain from applying the "affiliate rules" that are overly complex and promulgated in contravention of the Administrative Procedure Act ("APA").

I. THE BIDDING CREDIT ELIGIBILITY CLASSIFICATION MUST BE MODIFIED TO AVOID DISCRIMINATION AGAINST SUCCESSFUL MINORITY-OWNED ENTITIES.

A. Providing Cumulative Benefits to Small Minority-Owned Businesses is Contrary to the Plain Language of the Budget Act and Congressional Intent.

In an effort to meet the congressionally mandated goals of promoting economic opportunity and competition by disseminating licenses among a diverse group of licensees, the Commission adopted bidding credits to offset the problems faced by women and minority-owned firms in obtaining access to capital.[3/] Women and minority-owned firms will receive a 15 percent payment discount that is applied against the amount they bid on licenses, while small firms owned by women or minorities will receive a 25 percent

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3/ As the Commission explained, "the bidding credit will function as a discount on the bid price a firm will actually have to pay to obtain a license and, thus, will address directly . . . financing obstacles..." Fifth Report and Order, at ¶ 132.

bidding credit.[4] Fifth Report and Order at ¶ 132. Thus, successful well-qualified minority-owned firms, such as BHI, will receive less of a bidding credit than smaller minority-owned firms. There is no rational basis for the Commission's decision. Furthermore, if the differential is not eliminated, it will have the perverse effect of denying access to capital to more successful minority-owned firms. Simply put, the additional 10 percent bidding credit and enhanced installment payment plan is a powerful magnet that will cause potential partners to seek out small minority-owned firms and individuals because the value of the cumulative enhancements outweighs the benefits brought to the table, such as the ability to raise capital and to provide managerial and business expertise, by firms such as BHI.

While the Commission acknowledged the need to provide special assistance to small businesses, it found that in comparison to small business, "funding problems are even more severe for minority and women-owned businesses." Fifth Report and Order, at ¶ 98. Indeed, in both the Budget Act and its legislative history, Congress directed the Commission to promote "economic opportunity ... [for] a wide

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4/ To qualify as a small business, the applicant, including attributable investors and affiliates, must cumulatively have less than $40 million in gross revenues, and no individual attributable investor or affiliate may have $40 million or more in personal net worth.

variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[5/] Each enumerated group is eligible for preferential treatment in the assignment of radio spectrum. The Commission was not directed to provide effective preferences only for "small" minority-owned business, or in any way limit the availability of minority preferences according to a pre-determined revenue cap.[6/] To limit effective bidding credits, or other preferences, to "small" minority-owned business, would contradict the explicit and unambiguous directive of Congress.[7/]

The measures adopted for minority-owned entities are necessary to achieve the Congressional objective of ensuring minority participation in spectrum-based services. The SBAC Report affords more than sufficient evidence of minority under-representation in telecommunications

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5/ See Budget Act, P.L. 103-66, § 6002, Sections 309(j)(3)(B) and (4)(C).

6/ See e.g. House Report No. 103-111 at 255 ("the Commission should adopt regulations ... to ensure that businesses owned by members of minority groups and women are not in any way excluded from the competitive bidding process")(emphasis added).

7/ Given the explicit mandate of the Budget Act, the Commission lacks the legal authority to withhold these benefits, e.g. write classes of designated entities out of its rules. See ACLU v. FCC, 823 F.2d 1554 (1987).

ownership.[8] That report's conclusions are confirmed by other sources. The U.S. Census' Survey of Minority-Owned Business Enterprises, for example, reveals that only 6.34 percent of the firms in the communications category are minority-owned, and those firms represent a minuscule 1.52 percent of sales and receipts in the industry.[9] Minorities are thus substantially under-represented in the telecommunications industry, supporting the Commission's adoption of remedial measures to facilitate their fuller participation.[10]

Indeed, as the Commission recognized, "[a]bsent such measures targeted specifically to women and minorities, it would be virtually impossible to assure that these groups achieve any meaningful measure of opportunity for actual participation in the provision of broadband PCS." Fifth Report and Order at ¶ 132. This finding is in stark contrast to one line regarding a supposedly "reasonable

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8/ See FCC Small Business Advisory Committee to the Federal Communications Commission Regarding GEN Docket No. 90-314, September 15, 1993. As the Commission recognizes, the preferences depend on a Congressional mandate. See Notice of Proposed Rulemaking, 8 FCC Rcd 7635, 7646 and n. 48 (1993) (hereafter "Notice"), quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 568 (1990).

9/ U.S. Census, 1987 Economic Censuses, Survey of Minority-Owned Business Enterprises -- Summary (August 1991) at Tables 1, 10.

10/ See "Slow Gains By Minority Broadcasters," N.Y. Times, May 31, 1994 (recognizing only limited participation of minorities in telecommunications industry despite the Commission's prior efforts to encourage diversity).

assumption" that only small firms owned by women and minorities require an enhanced bidding credit. Fifth Report and Order at ¶ 132. There is neither a legislative mandate nor support in the record for the creation of preferences favoring "small" minority-owned businesses.

B. Creation of a Small Minority-Owned Entity Classification Entitled to Cumulative Special Enhancements is Arbitrary and Capricious.

Under Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 463 U.S. 29 (1983) (unreasonable agency action overturned), an agency action is arbitrary and capricious, if the agency "entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." Id. at 43. In the instant proceeding, the Commission offers no support for the position that women or minority-owned companies with greater revenues should be treated differently than minority-owned companies that are considered "small" under the Commission's rules.

The basis for the Commission's cumulative credit rule must be either that women or minority-owned businesses with more than $40 million in gross revenues face less lending discrimination than their smaller counterparts, or that the policies underlying the minority and women-owned entity preferences apply according to the size of the minority concern. Neither of these predicates is supported by the record before the Commission. The evidence cited by

the Commission illustrates undeniably that minorities and women suffer discriminatory treatment in capital markets, regardless of the size of their businesses. Marginally larger companies cannot be treated differently in the preferences afforded for their participation, consistent with the Commission's goals, because the 10 percent advantage translates into many millions of dollars of equity provided by the Government in the auction process.

In fact, this disparate treatment, coupled with small business consortia rules that ignore cumulative revenues and assets of cooperating parties, leads to unsupportable and arbitrary results. The Commission could not have considered this important aspect when it provided for different preferences for minority and women-owned entities based on the size of the concern. For instance, under the Commission's current rules, a minority-owned small business consortia comprised of four $39 million companies would benefit from the 25 percent bidding credit, while BHI, with significantly less assets, would be limited to a 15 percent bidding credit.[11/] Thus, under the operation of the present rules, a firm with less access to capital will be disproportionately disadvantaged, contrary to the Budget Act and Commission policies underlying the designated entity rules. Such a result cannot be what the Commission intends.

11/ Furthermore, there is no limit on the financial assets small businesses or persons can aggregate under this rule.

The cumulative credit rules must be modified to provide all minority and women-owned businesses the same bidding credit preference.

C. The Commission's Rules Unlawfully Disadvantage BHI and Irrationally Encourage Investor Partnering With Smaller, Inexperienced Companies With Few Resources.

The Commission's cumulative 25 percent bidding credit to "small" minority and women-owned corporations unfairly disadvantages some women and minority-owned businesses by funneling investment to inexperienced persons and companies. An investor seeking PCS opportunities is given an added incentive to partner with an inexperienced company, afforded a 25 percent bidding credit, and is discouraged from concluding an agreement with a successful minority-owned entity afforded a bidding credit of only 15 percent.

This result is contrary to the public interest. The Commission's Rules should not direct financial resources away from women and minority-owned entities with established track records. Rather, the Commission's policy should be neutral, encouraging resources to be directed to designated entities with the technical expertise and business acumen to thrive in a rapidly changing and highly competitive environment. In the final analysis, the Commission can best serve by adopting neutral rules that favor neither larger nor smaller minority entities.

The disparate bidding credit scheme also promotes relationships between sophisticated communications investors and small partners with little more than their status as women and minorities to bring to the table. These partnerships are precisely the type of arrangements of which the Commission should be wary. Specifically, the Commission's policies must discourage large companies from creating small "designated entity" companies solely for the purpose of participating in PCS.[12/] Such arrangements contravene the purpose of the Commission's designated entity preferences and undermine any success of providing women and minorities long term, independent participation in the telecommunications industry.

D. The Commission Must Provide All Minority-Owned Entities a Bidding Credit of at Least 40 Percent, Regardless of Their Size.

There can be little doubt that succeeding in the auction of broadband PCS licenses will cost millions, perhaps hundreds of millions of dollars. Given the experience with the narrowband PCS auction, unless substantial changes in the scope of preferences are made available to designated entities, they will be relegated to the sidelines as majority companies in the Entrepreneur's Block, and affiliates of major telecommunications providers,

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12/ See e.g. "Big Firms Take Business Slated For Minorities," N.Y. Times, August 11, 1994 (noting trend of large brokerage companies taking advantage of "set-aside" programs).

bid up prices for C and F block licenses.[13/] The 25 percent bidding credit available to women and minority entities in the narrowband PCS auction did not advantage those designated entities. It is also irrefutable that designated entities simply do not have access to the amount of capital available to established telecommunications providers. If the Commission expects to comply with the Congressional mandate to reverse the exclusion of women and minorities from participation in the telecommunications industry, then it must provide a meaningful opportunity to designated entities.

Providing successful minority businesses a 15 percent bidding credit, when a 25 percent bidding credit has already been demonstrated as insufficient, is contrary to experience and in contravention of legislative intent. All women and minority-owned business, regardless of size, must be given at least a 40 percent bidding credit.[14/] The

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13/ The nationwide narrowband PCS winning bids ranged from $37-million to $80-million dollars per license, and the winners included the largest paging and cellular communications companies in the country: Paging Network, Inc.; McCaw Cellular Communications, Inc.; Mobile Telecommunications Technology Corp.; AirTouch Paging; Pagemart II, Inc.; and BellSouth Wireless. None of the auctioned licenses went to small business or firms owned by women or minorities. See "Bidding Battle for Airwaves Goes Sky High," Washington Post, A1, July 30, 1994.

14/ Representative Mfume suggested that a bidding credit of 72 percent may be necessary to permit designated entities to compete with companies with tremendous cash flows. See Federal News Service, May 20, 1994, Comments of Rep. Mfume,

(continued...)

necessity of raising the bidding credit to 40 percent was recently recognized in the reconsideration of the rules governing the regional narrowband auctions.[15/] Significantly, the costs of license procurement associated with broadband PCS licenses will far surpass the costs incurred for successful narrowband auction participation.

As stated above, there is no support for a two-tier structure of bidding credits based on a revenue cap. Congress directed the Commission to create, through a variety of mechanisms, a way for women and minorities to gain a foothold in the telecommunications industry. The narrowband PCS auction shows how difficult achievement of this goal may be. The Commission must not shrink from that goal now, however. If a 25 percent bidding credit did not create any diversity in the group of corporations controlling the spectrum, a 15 percent bidding credit will surely have no impact. The Commission must provide meaningful opportunities, not further roadblocks, to

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14/ (...continued)
Before the Finance and Urban Development Subcommittee of the House Small Business Committee; SUBJECT: Discrimination in Telecommunications; CHAIRED by Rep. Kweisi Mfume (D-MD); WITNESSES: Reed Hundt, FCC Chairman.

15/ See Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, PP Docket No. 93-253, GEN Docket No. 90-314 and ET Docket No. 92-100, FCC 94-219, at ¶ 87 (adopted August 16, 1994, released August 17, 1994).

successful women and minority-owned firms interested in providing PCS service.[16/]

II. THE ELIGIBILITY RULES FOR THE ENTREPRENEUR'S BLOCKS ARE UNDER-INCLUSIVE AND MUST BE MODIFIED TO PROVIDE GREATER OPPORTUNITY FOR PARTICIPATION BY MINORITY-OWNED BUSINESSES.

A. The Commission's Attribution Standard Should Be Modified for Publicly Traded Minority and Women-Owned Entities.

The Commission has adopted a complex set of rules to determine eligibility for women and minority owned business. See Fifth Report and Order at ¶ 116. While these rules may be sensible for a start-up entity able to arrange its ownership structure to comply with the Commission's eligibility requirements, the rules unfairly limit an existing corporation's participation in the PCS Broadband auctions.

For publicly traded companies already in existence, compliance with the Commission's passive equity rules and thresholds may be difficult, even when minority individuals are in control. Unlike start-up companies, existing publicly traded companies may already have non-controlling stockholders whose ownership exceeds the

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16/ Should the Commission modify its Rules in accordance with these proposals and adopt at least a 40% bidding credit for minority-owned entities, BHI also urges that small businesses be provided a 20% bidding credit. No additional, disproportionate benefit should be afforded to "small" minority-owned businesses.

Commission's passive equity thresholds. These companies also operate subject to exchange rules, federal and state laws and contractual obligations that prevent the Control Group from unilaterally reducing the amount of voting stock owned by non-controlling stockholders. These pre-existing obligations may impose restrictions on publicly traded companies that impair their ability to conform to the eligibility standards for participation in the PCS auctions under the Commission's Rules.

The Commission has already recognized that publicly traded companies face distinct problems of being unable in many circumstances to control who owns their stock or to effect significant rearrangements to comply with every aspect of the Commission's attribution and affiliation standards.[17/] Accordingly, the Commission's Rules must reflect these impediments to the participation of publicly traded "minority and women-owned entities."[18/]

17/ See Fifth Report and Order at ¶ 163.

18/ On August 18, 1994, BHI submitted an ex parte letter to the Commission requesting an erratum regarding the application of the publicly traded company attribution exception. Specifically, BHI requested that the Commission clarify that its Rules do not preclude application of the attribution exception in defining publicly traded "minority and women-owned entities" and determining the availability of bidding credits and enhanced installment payment preferences otherwise available to minority-owned companies. To the extent the Commission does not resolve the issue pursuant to that request, BHI urges the Commission to make its position clear on reconsideration.

The cellular attribution rules also specifically reflect the fact that minority and women-owned companies are restrained by obstacles that do not limit the participation of other, majority-owned and controlled, companies.[19/] On reconsideration, for example, the Commission increased the cellular eligibility attribution threshold from 20 percent to 40 percent for minority and women-owned firms to ensure that they are equally equipped to compete for valuable PCS licenses and are financially able to provide state-of-the-art, innovative services to their customers. The rationale for this change was to "encourage entities with attributable cellular interests to make non-controlling investments in businesses owned by minorities and/or women" thus furthering Congressional objectives.[20/]

Likewise, in respect to the entrepreneur's block eligibility rules, the Commission must provide greater flexibility to women and minority-owned corporations that are publicly traded. At a minimum, for these designated entities, the Commission should attribute net worth and revenues only if shareholders own more than 25 percent of

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19/ See 47 C.F.R. § 24. 204(d)(2)(v).

20/ Memorandum Opinion and Order, GEN Docket No. 90-314, RM-7140, RM-7175, RM-7618, FCC 94-144, at ¶ 127 (adopted June 9, 1994; released June 13, 1994); 47 C.F.R. § 24.204(d).

the voting stock, not 15 percent as currently provided.[21] As was recognized by the Commission's reconsideration of a uniform cellular attribution standard, women and minority-owned firms require higher attribution ceilings if their participation in the auction process is to be encouraged and increased.

B. The Commission Must Clarify its Control Group Rules.

Section 24.720(k) of the Rules defines a Control Group, in part, as "an entity or group of individuals or entities."[22] Read literally, a single individual could not constitute an applicant's Control Group, even though he or she personally owns sufficient equity and voting interest to qualify. Application of the Rules as drafted, therefore, would produce a result the Commission could not have intended.

For example, when a single minority individual owns all of an applicant's stock, the individual could not constitute the "Control Group" of the applicant. In such instances, it would be irrational for the Commission to require the individual to dilute his ownership to create an

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21/ In the alternative, the Commission should adopt this rule on a one-time basis for minority-controlled firms in existence on the date the rules took effect, i.e. August 22, 1994.

22/ See Fifth Report and Order, Appendix B, Rule 24.720(k).

artificial Control Group merely to satisfy the restrictive language of the Rule.

To avoid these results, the Commission should clarify that a single-person Control Group is permissible. Providing for a single individual Control Group would be consistent with the Commission's policies and would provide maximum opportunity for minorities and women-owned entities to participate in the broadband PCS auctions. Moreover, the Commission should also confirm that the 50.1 percent voting stock requirement and the 25 percent total equity requirement of Section 24.709(c) do not apply to members of the applicant's Control Group for purposes of determining the attribution of personal net worth. Applying these thresholds to a Control Group will unduly limit the ability of minority and women-owned entities to participate in PCS. So long as the definition of "minority and women-owned entities" is satisfied by the applicant, and the Control Group "controls" the applicant, no additional restrictions on the identity and equity structure of the Control Group are necessary to guard against the implementation of designated entity "fronts."

III. THE COMMISSION MUST MODIFY ITS ENTREPRENEUR'S BLOCK ELIGIBILITY RULES TO ACCOMMODATE DESIGNATED ENTITY ECONOMIC GROWTH.

The "Five-Year Holding Rule" prevents a designated entity bidding in the entrepreneurs' blocks from exceeding during the first five years of the license period the financial caps set out in the eligibility rules, i.e. "the applicant, including attributable investors and affiliates, must cumulatively have less than $125 million in gross revenues and less than $500 million in total assets. No individual attributable investor or affiliate may have $100 million or more in personal net worth."[23/] Fifth Report and Order at ¶¶ 115, 128, 167. The Commission threatens to "force divestiture of such improper interests or, in appropriate cases, issue forfeitures or revoke licenses" if its financial caps are exceeded. Id. at ¶ 168. These rules could penalize minority-owned entities for their success in business.

The application of strict financial caps going forward over a five-year period unduly inhibits the growth of minority and female-owned companies by withdrawing preferences that have been determined to be necessary for their participation in the telecommunications industry. A designated entity that meets the financial caps at the time

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23/ The rule requires clarification if for no other reason than because a designated entity whose assets when totaled with the value of its licenses could easily exceed $500 million.

it files its short-form application may, only a few years after receiving its license, exceed its entry-level position, but be in no better position to survive a discriminatory lending market. Thus, while it has succeeded at its business, it is no longer eligible to protect or build upon its success through the mechanisms the Congress and the Commission determined were necessary to its very survival. It is contrary to Congressional intent and the Commission's policy goals to deny female and minority-owned businesses the full benefit of bidding credits and installment payments simply because they are successful.

In addition, the Commission's rules unfairly limit the partnership opportunities that may be necessary for the survival of designated entities.[24/] In addition to those preferences necessary to offset marketplace discrimination, designated entities require the flexibility to acquire other entities and enlist the participation of additional investors, so long as such changes do not constitute a change of control, or contravene the Commission's equity requirements for minority and women-owned businesses. For example, if a qualified designated entity has the opportunity to double in size in the future by acquiring

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24/ The Commission's Rules provide only specific methods by which minority and women-owned entities will be permitted to grow, e.g. through equity investment by non-attributable (passive) investors, debt financing, revenue from operations, business development or expanded service. See Fifth Report and Order at ¶ 167.

another business or PCS license, it should be not be denied this opportunity as the price of continuing to operate as a designated entity. Restricting minority and women-owned entity growth permits these companies only to make limited contributions and inhibits their ability to have a significant and positive long-term impact on the under-representation of minorities in the telecommunications marketplace.

IV. THE COMMISSION'S AFFILIATE RULES WERE NOT PROMULGATED IN ACCORDANCE WITH THE ADMINISTRATIVE PROCEDURE ACT AND ARE OVERLY RESTRICTIVE.

A. The Commission Did Not Afford Parties Meaningful Opportunities to Comment on the Small Business Administration's Affiliate Rules.

Whether a business qualifies as a "designated entity" is determined in large measure by the size of the concern. The Commission has determined that the size of the entity may in turn be determined by the business' "affiliates." Without notice to the participants in this proceeding, the Commission adopted the Small Business Administration's affiliation rules. The adoption of these rules occurred without notice and in violation of the APA.

The APA requires an agency to notify the public of proposed rules by (1) disclosing "either the terms or substance of the proposed rule or a description of the subjects and issues involved;" and (2) giving "interested persons an opportunity to participate in the rulemaking