

through submission of written data, views, or arguments. . . .  
."25/ The Commission did not meet the standard for adequate notice in adopting the SBA's "affiliate" rules. There was, in fact, only a fleeting reference to the SBA affiliation rules in the Notice of Proposed Rulemaking that allegedly presented the issue for consideration.<sup>26/</sup> Moreover, that reference focused entirely on the meaning of "size" in the proposed definition of "small businesses." There was no suggestion that the proposed application of these rules would expand to encompass other designated entities.

Indeed, the Commission implicitly recognized that it did not provide notice to the participants in this proceeding until it adopted its Second Report and Order.<sup>27/</sup> This failure to give proper notice is a violation of established agency procedure. Moreover, the comments received in response to the Commission's inquiry were not notice for the adoption of the SBA's affiliation rules. Absent proper notice and comment, the SBA's affiliate rules cannot be adopted in this proceeding by the Commission.

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25/ 5 U.S.C. §553(b)(3) and (c) (1988).

26/ See Notice, 8 FCC Rcd at 7647 n. 51.

27/ See Fifth Report and Order at ¶ 202 (noting that the SBA's affiliation rules were "referenced" in the Second Report and Order).

**B. The SBA's Affiliation Provisions Unnecessarily Add to the Complexity of the Broadband PCS Auction Rules.**

The affiliate rules have made complex auction eligibility and participation rules even more complex. Corporations must not only consider their ownership structure, they must also consider their affiliate interests. BHI respectfully submits that the Commission simplify its auction rules, to encourage designated entity participation, instead of supplementing its regulations with ever-increasing levels of complexity. Potential bidders already find it difficult, if not impossible, to tailor their pre-existing business relationships, bidding strategies and ownership structures to the Commission's complex eligibility and attribution rules.

Moreover, instead of providing notice and soliciting comments, the Commission adopted the Rules in a piece-meal fashion without detailed consideration or explanation. No rationale or context was provided to the participants in the docket for the rules "referenced" in the Second Report and Order, or "borrow[ed]" for the Fifth Report and Order.<sup>28/</sup> This approach to rulemaking invites confusion and potentially a tremendous number of post-auction challenges as parties petition against designated entity ownership structures using the untested FCC/SBA

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<sup>28/</sup> See Fifth Report and Order at ¶ 202.

hybrid version affiliation standard as a basis for attacking designated entity legal qualifications.

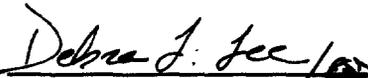
V. CONCLUSION

For the foregoing reasons, BHI requests that the Commission implement the following modifications of the treatment of designated entities as established in the Fifth Report and Order: (1) adjust the cumulative bidding credit scheme so that all minority-owned firms are treated similarly, (2) increase the bidding credit for all minority-owned entities to at least 40 percent; (3) modify the eligibility rules for the entrepreneur's blocks to provide greater opportunity to existing minority-owned entities; (4) modify the entrepreneur's block eligibility rules to accommodate designated entity economic growth; and (5) refrain from applying the SBA affiliate rules. These

remedies will ensure that the Commission provides meaningful opportunities for minority-owned firms to participate in providing broadband PCS services to the public.

Respectfully submitted,

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