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August 18, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Dr. Robert M. Pepper
Mr. Donald H. Gips
Office of Plans and Policy
Federal Communications Commission
1919 M Street, NW - Room 822
Washington, D.C. 20554

Re: Ex Parte Letter
PP Docket No. 93-253
GEN Docket No. 90-314

Dear Dr. Pepper and Mr. Gips:

BET Holdings, Inc. ("BET"), by its attorneys, hereby submits this letter to request that the Commission issue an erratum clarifying that women and minority-owned publicly traded companies qualify for bidding credits and installment payments.

Pursuant to the Commission's Rules, eligibility to bid in the two entrepreneur's blocks is limited to companies that, together with their affiliates and investors, had gross revenues of less than $125 million in each of the last two years and have total assets of less than $500 million at the time their short-form applications are filed. For purposes of determining the specific eligibility of publicly traded companies, the Commission will not attribute the gross revenues or assets of any shareholder that owns up to 25% of the company's equity, even if that equity is represented by up to 15% of the voting stock. This specific exception to the general attribution rules was intended to reflect the fact that publicly held companies have little control over the ownership of their stock.[1]

In adopting rules to encourage the participation of publicly traded companies in Personal Communications Services ("PCS"), the Commission stated that the "exception for publicly

1/ The general rule provides for attribution if an investor holds 25% or more of the company's passive equity, including 5% or more of the voting stock.

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held companies is only applicable for purposes of assessing eligibility to bid in the entrepreneur's blocks and for the general installment payment option."[2] Because this statement could be interpreted to restrict publicly traded companies owned by minorities and women from eligibility for bidding credits and other preferences afforded all other minority and women-owned entities under the Commission's Rules, BET believes it is erroneous.

BET's view is consistent with the findings of the Commission regarding the need for these preferences. For instance, in the Fifth Report and Order the Commission explicitly determined that "publicly traded companies owned by women and minorities that qualify to bid in blocks C & F require additional measures, such as bidding credits and installment payments to be able to participate successfully."[3] BET requests, therefore, that the statement contained in paragraph 163 of the Fifth Report and Order be conformed to this finding. Specifically, BET requests that the Commission clarify that paragraph 163 does 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-controlled companies.

Given the ineffectiveness of the Commission's designated entity policies in providing minority and women-owned businesses opportunities for involvement in the nationwide narrowband auctions, BET urges the Commission to clarify its Rules in accordance with the request in this letter and the attached recommendations. Adoption of BET's proposals will ensure that Congress' explicit directive to foster diverse, minority participation in the development of spectrum-based technologies and the provision of innovative telecommunications services is accomplished.

Respectfully submitted,

BET Holdings, Inc.

Leonard J Kennedy/lhp

Leonard J. Kennedy
Its Attorney

2/ See Fifth Report and Order at ¶ 163 and n. 141.

3/ See Fifth Report and Order at ¶ 191.

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APPLICATION OF PCS ELIGIBILITY RULES TO DESIGNATED ENTITIES

ISSUE 1: Identifying a Control Group that Consists Entirely of Members of Minority Groups.

PROPOSED CLARIFICATION:

- The Commission should clarify the definition of "members of minority groups." While Section 24.720(i) of the Rules provides that the term "members of minority groups" <u>includes</u> individuals of certain ancestry, it does not expressly <u>exclude</u> entities or other individuals from the definition. The Commission should clarify Section 24.720(i) to provide that a corporation satisfying certain ownership and control tests is a member of a minority group. For this purpose, we suggest that a corporation meeting the definition of "a business owned by members of minority groups," as set forth in Section 24.720(c) of the Rules, would itself constitute a member of a minority group.

ISSUE 2: Information to be Included in Organisational Documents.

- The definition of Control Group in Section 24.720(k) requires that the applicant's organizational documents provide the Control Group with certain specific economic and voting rights.

- Read literally, the rule requires that the necessary economic and voting rights be afforded specifically to the individuals and entities that are intended to make up the Control Group. However, economic and voting rights with respect to a corporation generally reside in ownership of the corporation's shares, independent of the owner's identity.

PROPOSED CLARIFICATION:

- A sound interpretation would require only that (a) the applicant's organizational documents, read in light of applicable corporation and partnership statutes, grant

the required rights to the owners of certain amounts of the applicant's equity and (b) the individuals and entities that are intended to constitute the Control Group own at least that amount of the applicant's equity. Because this is not a literal reading of the definition as currently drafted, the Commission should clarify its intent.

ISSUE 3: Definition of Control Group.

- The definition of Control Group in Section 24.720(k) of the Rules only refers to entities or groups with an interest in the "applicant" or "licensee."

PROPOSED CLARIFICATION:

- The definition of Control Group should be clarified so that any entity can have a Control Group so long as another entity, individual (see ISSUE 4 below), or group controls the specified applicant entity and satisfies the other ownership tests.

ISSUE 4: Restrictive Nature of Control Group Definition.

- Since Section 24.720(k) of the Rules defines a Control Group, in part, as "an entity or group of individuals or entities," a single individual, owning sufficient equity and voting interests in an applicant could not qualify as a Control Group. Application of the Rules, as drafted, could produce a peculiar result in some circumstances, e.g. where a single minority individual owns all of an applicant's stock.

PROPOSED CLARIFICATION:

- The Commission should acknowledge that a single-person Control Group is permissible.

ISSUE 5: Application of Eligibility Test to the Control Group.

- To determine an applicant's eligibility to bid for licenses in frequency blocks C and F, the aggregate assets, revenues, and personal net worth of the applicant and its investors and affiliates must not exceed certain thresholds.

- Presently, the assets, revenues, and personal net worth of an investor in the applicant will be ignored under Section 24.709(b)(4) if the applicant has a "Control Group" and the applicant and investor satisfy one of three sets of conditions.

- The third set of conditions, in Section 24.709(b)(4)(iii) of the Rules, provides that the personal net worth of an individual can be ignored for purposes of determining the applicant's eligibility under Section 24.709(a) if:

  (a) The applicant is a publicly traded corporation;

  (b) The applicant has a Control Group;

  (c) The Control Group owns at least 25% of the applicant's total equity;

  (d) If the applicant is a corporation, the Control Group owns at least 50.1% of the applicant's voting stock;

  (e) The individual whose personal net worth is sought to be ignored holds no more than 25% of the applicant's total equity; and

  (f) The individual whose personal net worth is sought to be ignored owns no more than 15% of the applicant's voting stock.

PROPOSED CLARIFICATION:

- The Commission should clarify that the conditions described in (e) and (f) of Section 24.709(a) do not apply to members of the applicant's Control Group.

- The Commission should clarify Section 24.709(b)(4)(iii) to specify that an individual's assets, revenues, and personal net worth would be ignored if the individual's interest in the applicant is through his or her ownership of a publicly-traded corporation that owns an interest in the applicant, and the publicly traded corporation would satisfy the tests in Section 24.709(b)(4)(iii) if it were the applicant.

ISSUE 6: Ambiguity Regarding Passive Equity.

- The rules make several references to an ownership limit by certain investors of "no more than 25 percent of the applicant's passive equity." The rules occasionally use alternative syntax, such as in Section 24.720(c), which provides that no investor outside the Control Group of a "business owned by members of minority groups" can own "more than 25% passive equity interests."[1/] It appears that the Commission really means to limit the outside investor's ownership to 25% of the applicant's total equity, and to require that all of the outside investor's equity be in the form of "passive equity."

PROPOSED CLARIFICATION:

- The Commission should clarify its Rules to be internally consistent and to limit an outside investor's ownership to 25% of the applicant's total equity, and to require that all of an outside investors' equity be in the form of "passive equity."[2/]

1/ The Fifth Report and Order occasionally paraphrases the Rules (see paragraph 158, for example) by stating that these investors must own "less than 25% of the applicant's passive equity." The language in the Fifth Report and Order further confuses the situation, since "less than 25%" and "not more than 25%" are not synonymous.

2/ The Commission's definition of "Passive Equity" includes non-voting stock and stock that includes no more than five percent of the voting equity. See 47 C.F.R. § 24.720(j).

ISSUE 7: Definition of Gross Revenues.

- Section 24.720(f) defines "gross revenues" as "all income received by an entity ... as evidenced by <u>audited quarterly financial statements</u> for the relevant period." Two specific issues arise in regard to this definition: (1) the only relevant period referred to in the Rules is the calendar year, so quarterly financial statements would never be necessary, and (2) few companies audit their quarterly statements. Maintaining a quarterly auditing requirement is particularly burdensome for companies whose fiscal years do not correspond to calendar quarters.

PROPOSED CLARIFICATION:

- The Commission should eliminate the requirement that gross revenues be evidenced by audited quarterly financial statements except in the case of a <u>bona fide</u> dispute over an applicant's eligibility.