

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

**COMMENTS ON PETITIONS
FOR RECONSIDERATION AND CLARIFICATION**

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SUMMARY

BET Holdings, Inc. ("BHI") urges the Federal Communications Commission (the "Commission") to modify its broadband Personal Communications Services ("PCS") rules to provide greater opportunities for designated entity participation in the broadband PCS auctions. In addition to specific recommendations regarding the nature and extent of the preferences afforded minority and women-owned entities, BHI requests that the Commission confirm the need for certain prophylactic measures to discourage abuse of the auction process. BHI also urges the Commission to modify its minority and women-owned definitions to ensure an adequate level of designated entity bidding success in the broadband auctions.

Specifically, BHI urges the Commission to:

- Retain the five-year holding and limited transfer period for Entrepreneurs' Block licenses. Without such restrictions, the opportunities for circumventing the Commission's rules are increased as non-designated entities weigh the benefits of sacrificing certain preferences (e.g. bidding credits) in exchange for control of a valuable PCS license.
- Increase the threshold percentage of passive voting equity applied to minority and women-owned applicants. Modifying the 15 percent voting stock threshold to 25 percent will provide designated entity applicants with access to much needed investment capital without implicating the issue of license control.
- Reject proposals to establish arbitrary exceptions to the affiliation rules for particular designated entities. All designated entities share common barriers to entry in a capital intensive

telecommunications industry. All designated entities should be relieved from the disqualifying aspects of the affiliation rules if their successful participation in PCS is to be assured.

- Ensure the participation of minority and women-owned entities by:
 - (1) retaining the Entrepreneurs' Block bidding structure;
 - (2) equalizing and enhancing bidding credit preferences for all minority-owned entities;
 - (3) modifying the Control Group rules to exclude attribution of the assets/revenues of investors with up to 25 percent voting equity; clarifying that a passive investor may hold up to 25 percent of the PCS applicant's total equity; permitting Control Group participants in minority or women-owned entities to include businesses controlled by minorities and/or women;
 - (4) retaining the availability of installment payments to entities with more than \$75 million in revenue;
 - (5) rejecting proposals to further limit the number of Entrepreneurs' Block licenses that a single licensee can obtain.
- Refrain from extending the benefit of bidding credits to rural telephone companies. The benefits already afforded rural telephone companies, such as below market financing support from the Rural Electrification Administration and the Universal Service Fund, more than compensate these companies for the lack of bidding credits.
- Affirm the Entrepreneurs' Blocks' revenue, asset and personal net worth thresholds as set forth in the Fifth Report and Order.

- Confirm the sequence of the broadband PCS auctions. The rationale supporting the established sequence is sound in that it permits auction participants to implement back-up strategies if they are unsuccessful in their bidding for the most valuable licenses.

TABLE OF CONTENTS

	<u>Page</u>	
I.	THE COMMISSION SHOULD RETAIN THE FIVE YEAR HOLDING AND LIMITED TRANSFER PERIOD FOR THE ENTREPRENEURS' BLOCK LICENSES.	2
A.	PCS License Transfer Restrictions Are Necessary	2
B.	Designated Entities Should Not Be Allowed To Transfer 5 MHz of Spectrum After Licensing	3
II.	THE THRESHOLD PERCENTAGE OF "PASSIVE" VOTING EQUITY APPLIED TO MINORITY-OWNED ENTITIES SHOULD BE INCREASED TO 25 PERCENT.	4
III.	THE COMMISSION SHOULD AVOID ESTABLISHING ARBITRARY EXCEPTIONS TO ITS AFFILIATION RULES.	5
IV.	THE COMMISSION'S RULES MUST PROVIDE GREATER OPPORTUNITY FOR DESIGNATED ENTITY PARTICIPATION IN PCS.	7
A.	The Commission Should Retain The Entrepreneurs' Blocks	7
B.	The Commission Should Equalize And Enhance Bidding Credit Preferences For All Minority-Owned Entities	8
C.	The Commission Should Modify The Control Group Rules To Provide for Greater Designated Entity Participation	9
1.	Permit investors to enter into management agreements with PCS applicants	9
2.	Modify The Definition Of Passive Equity To Exclude Attribution of Assets/ Revenues Of Investors With Up To 25 Percent Voting Equity	10

3.	Clarify that a passive investor can hold up to 25 percent of the applicant's total equity	11
4.	Allow Control Group participants in minority-owned entities to include businesses controlled by minorities and/or women	12
D.	Retain the availability of installment payments to entities with more than \$75 million in revenue.	14
E.	The Commission should not limit the number of Entrepreneurs' Block licenses that can be purchased by a single entity according to population coverage.	15
V.	BIDDING CREDITS NEED NOT BE AFFORDED TO RURAL TELEPHONE COMPANIES TO FACILITATE THEIR PARTICIPATION IN BROADBAND PCS.	15
VI.	THE COMMISSION SHOULD AFFIRM THE ENTREPRENEURS' BLOCKS' REVENUE, ASSET AND NET WORTH THRESHOLDS SET FORTH IN THE FIFTH REPORT AND ORDER.	17
VII.	THE COMMISSION SHOULD AFFIRM THE SEQUENCE OF THE PCS AUCTIONS.	18
VIII.	CONCLUSION	19

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**COMMENTS ON PETITIONS
FOR RECONSIDERATION AND CLARIFICATION**

BET Holdings, Inc. ("BHI") hereby submits its Comments regarding various Petitions submitted 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/}

Specifically, BHI requests that the Commission 1) retain the five-year holding and limited transfer period for the Entrepreneurs' Block licenses; 2) increase the threshold percentage of passive voting equity applied to minority or women-owned applicants; 3) refuse to establish arbitrary exceptions to the affiliation rules for Indian Tribes; 4) modify its rules to provide greater opportunity for designated entity participation in PCS; 5) deny proposals seeking to expand the availability of bidding credit preferences to rural telephone companies; 6) affirm the

^{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").

Entrepreneurs' Block revenue, assets and net worth thresholds; and 7) affirm the sequence of the PCS auctions.

I. THE COMMISSION SHOULD RETAIN THE FIVE YEAR HOLDING AND LIMITED TRANSFER PERIOD FOR THE ENTREPRENEURS' BLOCK LICENSES.

A. PCS License Transfer Restrictions Are Necessary

In establishing the Entrepreneurs' Blocks, the Commission recognized that the goal of affording designated entities an opportunity to provide PCS services would not be served if parties taking advantage of bidding in the Entrepreneurs' Blocks immediately assign or transfer control of the licenses to other entities.^{2/} BHI supports the Commission's decision to prohibit Entrepreneurs' Block licensees from voluntarily assigning or transferring control of their licenses for a three-year period. Moreover, BHI believes that limiting the ability of licensees to assign or transfer control of their authorizations to entities qualified to bid in the Entrepreneurs' Blocks, for the following two years, ensures long-term designated entity participation in PCS. BHI strongly opposes the suggestion made by the Association of Independent Designated Entities ("AIDE") that safeguards against license flipping are unnecessary.^{3/} Recovery of bidding credits and installment

2/ See Fifth Report and Order at ¶ 128.

3/ See AIDE Petition for Reconsideration filed August 22, 1994 at 17.

payments alone will not provide adequate safeguards for ensuring that designated entities retain de jure and de facto control over their licenses. Without these transfer restrictions, the opportunities for circumventing the Commission's rules are increased as non-designated entities weigh the benefits of sacrificing certain preferences (e.g., bidding credits) in exchange for acquiring control of valuable PCS spectrum.

B. Designated Entities Should Not Be Allowed To Transfer 5 MHz of Spectrum After Licensing

BHI also opposes the Cellular Telecommunications Industry Association's ("CTIA") suggestion that designated entities be permitted to transfer 5 MHz of spectrum immediately after license grant, or within one year after beginning service.^{4/} CTIA's suggestion is tied to its proposal submitted in GEN Docket No. 90-314 that incumbent wireless firms be permitted to acquire up to 40 MHz of spectrum immediately. Without commenting on CTIA's original proposal in the related docket, BHI urges the Commission to retain the present restrictions on immediate spectrum transfer.^{5/}

4/ See CTIA Petition for Reconsideration at 2.

5/ It is arguable whether CTIA should be raising this issue at all in the present proceeding given the fact that the cellular eligibility rules for PCS are being reconsidered in Docket No. 90-314.

Absent a strict prohibition of transfer or assignment, the Commission risks encouraging abusive behavior that undermines the Congressional objective of providing designated entities the opportunity to participate in the delivery of spectrum-based services. Successful designated entity bidders who obtain a given amount of spectrum should not be permitted to transfer frequencies in the after-market in hopes of achieving a "quick profit." Permitting such transactions would defeat the Commission's policy of ensuring designated entity participation in PCS. Moreover, adopting CTIA's self-serving proposal will only benefit entrenched cellular providers who already enjoy significant competitive advantages over emerging PCS service providers.

II. THE THRESHOLD PERCENTAGE OF "PASSIVE" VOTING EQUITY APPLIED TO MINORITY-OWNED ENTITIES SHOULD BE INCREASED TO 25 PERCENT.^{6/}

As BHI demonstrated in its Petition for Reconsideration, the Commission should attribute net worth and revenues of shareholders only if they own more than 25 percent of the voting stock, not 15 percent as currently provided under the rules. The current rules deprive minority-owned entities of needed capital because they

^{6/} Throughout this petition, BHI uses minority-owned entities as synonymous with minority and women-owned entities as used in the Omnibus Budget Reconciliation Act of 1993.

discourage entities with net worth and revenue above the Commission's standards from making non-controlling investments in designated entity applicants that are in dire need of investment capital. Accordingly, BHI supports CTIA's argument that "investors will have little incentive to invest in an entrepreneur if they have no ability to protect their investment."^{7/} Moreover, as CTIA points out, other federal agencies use the 25 percent threshold to determine unwarranted interest and control.^{8/} There is, therefore, no reason to suggest that a 25 percent voting interest threshold attribution rule would result in a significantly greater risk of control transfers than a 15 percent interest.

III. THE COMMISSION SHOULD AVOID ESTABLISHING ARBITRARY EXCEPTIONS TO ITS AFFILIATION RULES.

The Commission must not establish arbitrary exceptions to its affiliation rules. The arguments proposed by Cook Inlet Region, Inc. ("CIRI"), do not support special treatment of Indian tribes (including Alaskan corporations). CIRI's argument boils down to this: Indian tribes are poor and disadvantaged entities with limited access to capital. This fact alone, however, does not justify treating Indian

^{7/} CTIA Petition for Reconsideration at 6 citing Order on Reconsideration, Competitive Bidding, Docket 93-253, FCC 94-217 at ¶ 10 (adopted August 15, 1994, released August 15, 1994).

^{8/} See CTIA Petition for Reconsideration at 7.

tribes any differently than other designated entities which are under-represented among telecommunications providers and have inadequate access to capital.^{9/} The distinctions advanced by CIRI should not be adopted by the Commission as a basis for applying widely divergent broadband PCS affiliate rules to particular classes of minority or women-owned entities.

BHI fully supports the argument advanced by MasTec, Inc. ("MasTec") in this regard. The Commission has not distinguished among minorities by giving special treatment to any particular minority class. To do so now would create imbalanced bidding power in the Entrepreneurs' Blocks in favor of Indian tribes, creating disadvantages for other minorities, and skewing the results of the PCS auctions.^{10/} All designated entities share common barriers to entry in the capital intensive telecommunications industry. Accordingly, all designated entities should be relieved from the disqualifying aspects of the affiliation rules if their successful participation in PCS is to be assured.

9/ CIRI Petition for Reconsideration at 2.

10/ See MasTec Petition for Reconsideration at ¶¶ 11-12.

IV. THE COMMISSION'S RULES MUST PROVIDE GREATER OPPORTUNITY FOR DESIGNATED ENTITY PARTICIPATION IN PCS.

A. The Commission Should Retain The Entrepreneurs' Blocks

The Commission must reject GTE Service Corporation's ("GTE") proposal to eliminate the Entrepreneurs' Blocks.^{11/} Based on the narrowband PCS auctions held in July, it is evident that permitting designated entities to "pair up" with large investors and bid on all spectrum blocks will not ensure their participation.^{12/} There is no support for GTE's argument that an elimination of the Entrepreneurs' Blocks will result in the full participation of designated entities in the PCS auctions, as well as their long term involvement in the industry. On the contrary, GTE's proposal will only permit large entities, such as GTE, to bid for and obtain more radio spectrum. Moreover, small businesses can already bid on all blocks, and pair up with large investors for non-Entrepreneurs' Block bidding.^{13/} Thus, the elimination of

11/ See GTE Corporation Petition for Partial Reconsideration at 9 & 10.

12/ Designated entities in the narrowband nationwide auctions were not constrained by the strict SBA affiliation rules and attribution rules in seeking investment from large companies. They nevertheless were unable to attract sufficient capital to prevail in direct bidding against telecommunications industry incumbents.

13/ See Fifth Report and Order at ¶ 38.

the Entrepreneurs' Blocks provides no advantage to small entities. GTE's proposal should be rejected.

B. The Commission Should Equalize And Enhance Bidding Credit Preferences For All Minority-Owned Entities

As BHI demonstrated in its Petition, all minority and women-owned entities should receive equal treatment under the Commission's Rules, without regard to entity size.^{14/} Any modification in the Commission's Rules that results in unequal treatment among minority-owned and "small" minority-owned companies would create a basis for statutory and constitutional challenge, which would only further delay these proceedings. The Commission must not, therefore, adopt any proposal which would lead to further discriminatory treatment among particular minority-owned entities.^{15/}

Although BHI opposes "enhanced" bidding credits for "small" minority-owned business, BHI supports reconsideration of the amount of the bidding credit afforded minority-owned entities. In light of the fact that designated entities were unable to obtain any national licenses in the narrowband PCS auctions, BHI urges the

14/ See BET Holdings, Inc. Petition for Reconsideration and Clarification filed August 22, 1994 at 2-9.

15/ See Roland A. Hernandez Petition for Reconsideration at 3-4 (proposing disparate treatment for minority and women-owned entities and "small" minority and women-owned entities).

Commission to modify its bidding credit preference to ensure adequate opportunities for designated entity participation in the broadband PCS auctions. Simply put, the 15 percent bidding credit afforded women and minority-owned entities is inadequate given the tremendous barriers faced by these particular entities, and the considerable amount of capital that will be required to obtain and build-out a broadband PCS license. The Commission will have to "step up" its measures to encourage the participation of successful minority and women-owned businesses if it is to meet the Congressional goal of diversifying spectrum licensees. BHI supports those parties who have proposed a bidding credit of at least 40 percent.^{16/}

C. The Commission Should Modify The Control Group Rules To Provide for Greater Designated Entity Participation

1. Permit investors to enter into management agreements with PCS applicants

BHI supports the Commission's decision to permit investors to enter into management agreements with PCS applicants.^{17/} As the National Association of Black Owned Broadcasters, Inc. ("NABOB") points out, such agreements will allow designated entities to benefit from the expertise

^{16/} See e.g. National Paging and Personal Communications Association Petition for Reconsideration at 3 (proposing bidding credit of 50 percent).

^{17/} See Fifth Report and Order at n. 135.

of larger telecommunications companies.^{18/} So long as the Control Group continues to "control" the PCS applicant (e.g., no transfer of control is precipitated by any provision of the management agreement), such agreements should be permitted as beneficial to the public interest.

2. Modify The Definition Of Passive Equity To Exclude Attribution Of Assets/ Revenues Of Investors With Up To 25 Percent Voting Equity

As BHI argued in its Petition, the Commission should modify its definition of "passive equity" to exclude from the applicant's assets/revenues calculations those assets/revenues of investors outside the Control Group holding up to 25 percent voting equity.^{19/} Women and minority-owned entities require higher attribution ceilings if their participation in the broadband PCS auction process is to be encouraged and increased. As suggested by Omnipoint Communications, Inc., a slight increase in the attribution ceiling would maximize financing opportunities for these entities but would not jeopardize designated entity control over the PCS license.^{20/} As support for a rise in the ceiling above the 15 percent threshold, Omnipoint cites the Financial Accounting Standards Bureau's

18/ See NABOB Petition for Reconsideration at 7-8.

19/ See BHI Petition for Reconsideration and Clarification at 12-15.

20/ See Omnipoint Communications, Inc. Petition for Clarification and Reconsideration at 10.

view that an investment of slightly above 15 percent of the voting stock of the investee "should lead to a presumption that an investor does not have the ability to exercise significant influence."^{21/} BHI supports Omnipoint's proposal that the 15 percent ceiling be increased to recognize the barriers to entry and capital requirements of PCS designated entity participants.

3. Clarify that a passive investor can hold up to 25 percent of the applicant's total equity

BHI also supports Pacific Bell Mobile Services' ("PBMS") proposal that the Commission clarify that a passive investor can hold up to 25 percent of the applicant's total equity.^{22/} Paragraph 115 of Fifth Report and Order states that "[w]here the applicant has a control group, the gross revenues, total assets and personal net worth of any other investor are not considered unless the investor holds 25 percent or more of the applicant's passive equity..." Paragraph 158 states "the gross revenues, total assets, personal net worth, and affiliations of any investor in the applicant are not considered as long as the investor holds less than 25% of the applicant's passive equity." Paragraph 162 states "the gross revenues, total assets and net worth

^{21/} Accounting Standards, Original Pronouncements, Financial Accounting Standards Board, APB Opinion No. 18, ¶ 17 (1987).

^{22/} See PBMS Petition for Reconsideration at 7.

of all investors holding 25 percent or more of the company's passive equity...will be attributed..." However, the Commission Rule Section 24.709(b)(4)(i) states: "[t]he gross revenues, total assets and personal net worth of a person that holds an interest in the applicant (or licensee) shall not be considered for purposes of determining financial eligibility so long as ...such person holds no more than 25 percent of the applicant's (or licensee's) passive equity..." The Commission must clarify this ambiguity in the rules.^{23/}

4. Allow Control Group participants in minority-owned entities to include businesses controlled by minorities and/or women

As currently drafted, 47 CFR § 24.720(c)(i) unnecessarily restricts a broad range of minority-controlled companies from participating as members of the Control Group of a minority-owned PCS applicant simply because they include non-minority stockholders, and are unable to segregate "eligible" from "ineligible" owners and reorganize to comply with the Commission's Rules. There is no support in the record for a requirement that businesses that are Control Group participants must be 100 percent owned by minorities or women. For this reason BHI supports Eatelcorp, Inc.'s ("Eatelcorp") suggestion that the

^{23/} BHI previously raised this issue in an ex parte submission filed with the Commission on August 18, 1994.

Commission modify its Rules to provide that Control Group participants in minority and women-owned entities may include businesses which are not 100 percent owned by minorities and women.^{24/}

The restriction on Control Group participants hampers the ability of companies controlled by minorities to join with passive non-minority investors to increase their financial strength and technical knowledge. This result contradicts the Commission's intent to encourage minority participation in the broadband PCS auctions. The restrictions also impose unnecessary organizational costs on existing entities which, if they are to participate in a PCS applicant's Control Group, must restructure to segregate out non-eligible investors. The Budget Act speaks of the need to further women and minority control over licenses, it does not mandate 100 percent ownership.^{25/}

The 100 percent ownership requirement inhibits participation of successful minority-owned businesses, and fosters the establishment of entities for the sole purpose

^{24/} See Eatelcorp Petition for Reconsideration at 5-7. BHI, however, opposes Columbia PCS, Inc.'s 75% equity and 100% voting interest thresholds as too restrictive given the Commission's repeated findings that lower thresholds are more effective and do not threaten a designated entity's ability to control an enterprise. See Columbia PCS, Inc. Petition for Clarification at 2-3.

^{25/} See Communications Act of 1934, 47 U.S.C. § 309(j)(4)(D) (as revised by the Omnibus Budget Reconciliation Act of 1993).

of taking advantage of the Commission's designated entity preferences. Accordingly, 47 CFR § 24.720(c)(i) should be modified to allow existing minority controlled businesses to fully participate in the broadband PCS auctions.

- D. Retain the availability of installment payments to entities with more than \$75 million in revenue.

The Commission should reject the proposal of the Small Business PCS Association ("SBPCS") to limit the availability of installment payments preferences to entities with less than \$75 million in revenue.^{26/} As the Commission has recognized, "companies owned by women or minorities, which face additional problems accessing capital," require the benefits afforded by installment payments, even if their revenues exceed \$75 million.^{27/} If anything, based on the record before it, the Commission should expand the benefits available to entities that have historically been excluded from meaningful participation because of discriminatory lending practices. BHI urges the Commission to retain its standards for installment payment eligibility.

^{26/} See SBPCS Petition for Reconsideration at 5-6.

^{27/} See Fifth Report and Order at ¶ 137.

- E. The Commission should not limit the number of Entrepreneurs' Block licenses that can be purchased by a single entity according to population coverage.

The Commission should also reject the SBPCS' proposal to limit the number of Entrepreneurs' Block licenses that can be purchased by a single entity to cover no more than 10 percent of the national population.^{28/} There is no rationale to support limiting Entrepreneurs' Block licensees in a way that other licensees are not limited. The Fifth Report and Order already limits the number of Entrepreneurs' Block licenses that can be obtained by any one entity to 10 percent of the total Entrepreneurs' Block licenses.^{29/} Any further limitation would hamper the ability of bidders to effectuate aggregation strategies that include large numbers of licenses and extensive geographic coverage. In addition, such limitations would threaten the ability of designated entities to mature into successful PCS service providers. Accordingly, the limits, as suggested by SBPCS, must be rejected.

- V. BIDDING CREDITS NEED NOT BE AFFORDED TO RURAL TELEPHONE COMPANIES TO FACILITATE THEIR PARTICIPATION IN BROADBAND PCS.

In the Commission's Rules, the bidding credit preferences were tied to the discriminatory market barriers

28/ See SBPCS Petition for Reconsideration at 4.

29/ See Fifth Report and Order at ¶ 170.

faced by minority-owned entities.^{30/} These are not the same challenges faced by rural telephone companies. BHI urges the Commission to reject the proposal of Minnesota Equal Access Network Services, Inc. and South Dakota Network, Inc. (jointly "MEANS/SDN") to provide bidding credits to rural telephone companies.^{31/}

Pursuant to the Budget Act, the Commission is authorized to vary the mix of preferences afforded small businesses, women and minorities, and rural telephone companies. BHI supports the Commission's determination not to provide rural telephone companies with bidding credits. The benefits already afforded rural telephone companies, such as below market financing support from the Rural Electrification Administration and the Universal Service Fund, more than compensate these companies for the lack of bidding credits.^{32/} Accordingly, unlike the barriers to

30/ See Fifth Report and Order at ¶ 132.

31/ See MEANS/SDN Petition for Partial Reconsideration at 4-7.

32/ Moreover, rural telephone companies are afforded the additional benefit of (a) forming bidding consortia consisting entirely of rural telephone companies and partitioning the licenses among consortia participants and/or (b) entering into post-auction negotiations to obtain partitioned broadband PCS licenses. No other designated entity is afforded these options.

entry faced by women and minorities, rural telephone companies do not face limited access to capital.^{33/}

VI. THE COMMISSION SHOULD AFFIRM THE ENTREPRENEURS' BLOCKS' REVENUE, ASSET AND NET WORTH THRESHOLDS SET FORTH IN THE FIFTH REPORT AND ORDER.

The Commission should affirm its decision to limit eligibility to bid in the Entrepreneurs' Blocks to those companies with less than \$125 million in gross revenues over the last two years.^{34/} Accordingly, the Commission should reject the proposal by National Paging and Personal Communications Associations ("NPPCA") to decrease this financial cap to \$75 million in gross revenues and with total assets under \$250 million.^{35/}

NPPCA argues that the current caps are so broad that too many companies are eligible to bid in the Entrepreneurs' Blocks. The result, they argue, is that mid-to-large-size companies will not compete in Blocks A, B, D and E, but will bid against smaller companies in the Entrepreneurs' Blocks.^{36/} NPPCA's proposal, however, effectively squeezes out mid-sized companies. "Mid-sized"

^{33/} BHI also supports the Commission's requirement that partitioned licenses be "reasonably related to the rural telephone company's wireline service area." See contra Hicks & Ragland Engineering Company, Inc. Petition for Reconsideration at 2.

^{34/} See Fifth Report and Order at ¶ 156.

^{35/} See NPPCA Petition for Reconsideration at 6-7.

^{36/} Id. at 6-7.

minority entities, such as BHI, simply are not in a position to outbid telecommunications giants. To lump "mid-to-large-size" entities together will deny mid-sized entities any chance to obtain a PCS license. Moreover, established designated entities are likely to be in a better position to provide PCS service as compared to small start-up companies. Accordingly, BHI supports the balance the Commission has struck with regard to its eligibility caps.

VII. THE COMMISSION SHOULD AFFIRM THE SEQUENCE OF THE PCS AUCTIONS.

BHI supports the Commission's decision to auction the 30 MHz MTA's first (A and B), the Entrepreneurs' Blocks second (C and F), and the 10 MHz licenses third (D, E, and F). The Commission's rationale for this sequence of auctioning is sound in that the sequencing permits auction participants to implement back-up strategies if they are unsuccessful in their bids for the most valuable PCS spectrum. Moreover, non-designated entities which are unsuccessful in acquiring licenses on blocks A and B are presented with an additional opportunity to partner with, and make investments in, designated entities.

Finally, auctioning the 30 MHz MTA licenses in the first round will produce valuable price information for designated entities who will be contemplating the value of

their own target licenses. Contrary to NPPCA's assertions,^{37/} any market advantages afforded successful A and B block bidders from entering the market before the designated entities will be more than offset by the availability of price information, and the accessibility of capital made available to designated entities by frustrated early bidders.

VIII. CONCLUSION

In conclusion, for all of the above stated reasons, BHI urges the Commission to 1) retain the five-year holding and limited transfer period for the Entrepreneurs' Block licenses; 2) increase the threshold percentage of passive voting equity applied to minority or women-owned applicants; 3) refuse to establish arbitrary exceptions to the affiliation rules for Indian Tribes; 4) modify its rules to provide greater opportunity for Designated Entity participation in PCS; 5) deny bidding credit preferences to rural telephone companies; 6) affirm the Entrepreneurs' Block revenue, assets and personal net worth thresholds; and

37/ NPPCA Petition for Reconsideration at 7-8.