

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)

REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

BET Holdings, Inc. ("BHI") hereby submits its reply to Oppositions to Petitions for Reconsideration of the Fifth Report and Order, filed September 9, 1994 in the above-referenced docket.^{1/} BHI limits its comments to issues that are critical to the successful participation of minority and women-owned entities in the broadband Personal Communications Services ("PCS") auctions.

I. THE COMMISSION'S ATTRIBUTION RULES MUST BE MODIFIED TO PROVIDE MINORITY AND WOMEN-OWNED ENTITIES THE ABILITY TO PARTICIPATE SUCCESSFULLY IN BROADBAND PCS.

BHI supports the Commission's efforts to disseminate PCS licenses among a wide variety of applicants, including minority groups and women, through the use of the Entrepreneur's Block bidding structure.^{2/} Nevertheless, if minority and women-owned entities are to be financially able to acquire PCS licenses and build

^{1/} See Fifth Report and Order, Competitive Bidding, PP Docket No. 93-253, FCC 94-178 (adopted June 29, 1994, released July 15, 1994).

^{2/} The Commission should reject any suggestion to eliminate the Entrepreneurs' Blocks as detrimental to successful designated entity participation in PCS. Accord Opposition to Petition for Reconsideration and Clarification of Columbia PCS, Inc. at 2; Comments on Petitions for Reconsideration of Omnipoint Communications, Inc. at 11-12.

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out competitive PCS systems, the Commission's attribution rules must permit investors to hold higher levels of passive equity in the PCS applicant. As discussed in BHI's Petition for Reconsideration and Comments on Petitions for Reconsideration, the Commission should attribute revenues, assets and personal net worth only of those shareholders that own more than 25 percent of the voting stock in a PCS applicant.^{3/} Moreover, BHI reiterates its request that the Commission clarify that the 50.1 percent voting stock requirement and the 25 percent total equity requirement of Section 24.709(b) do not apply to members of the applicant's Control Group for purposes of determining the attribution of personal net worth.^{4/}

In regard to Entrepreneurs' Block bidding, BHI also supports the Commission's intent to determine eligibility to bid on Entrepreneurs' Block licenses based on the financial figures of the two years preceding the short form application filing date. Now that the date for the filing of broadband PCS applications is established, Vanguard Cellular Systems, Inc.'s ("Vanguard") concerns regarding eligibility uncertainty are adequately addressed.^{5/} In addition, determining eligibility based on the most recent financial data available more accurately reflects the eligibility status of the PCS applicant. Basing the eligibility determination on the two years preceding September 23, 1993, as suggested by Vanguard, will not identify

^{3/} See Opposition to Petitions for Reconsideration of Omnipoint Communications, Inc. at 2-3; Opposition and Comments of Pacific Bell Mobile Services at 13-14.

^{4/} See BHI Petition for Reconsideration and Clarification at 16.

^{5/} See Comments of Vanguard Cellular Systems, Inc. at 5.

sufficiently those companies that satisfy the Commission's Entrepreneurs' Block bidding requirements at the time of the short form filing.

II. THE COMMISSION'S RULES MUST PROVIDE MINORITY AND WOMEN-OWNED ENTITIES SIGNIFICANT FLEXIBILITY IN STRUCTURING THEIR PCS OPERATIONS.

BHI opposes any attempt to limit the ability of PCS minority and women-owned entities to enter into management contracts with certain types of companies. DCR Communications, Inc. ("DCR") recommends, for instance, that cellular carriers not be permitted to enter into management agreements with designated entities, arguing that these alliances will detrimentally impact the development of competition in the delivery of PCS.^{6/} Assuming that control of the PCS license is not transferred to the contracting party, no additional restrictions on the ability of designated entities to structure their ownership and PCS system management is necessary.^{7/} The rules, as currently drafted, provide sufficient safeguards for ensuring that non-designated entities do not circumvent Commission policies and gain effective control of an Entrepreneurs' Block license.^{8/}

^{6/} See DCR's Comments on Petition of Reconsideration at 6-7.

^{7/} BHI does, however, share the Association of Independent Designated Entities' ("AIDE") concern that the rules regarding management contracts, and outstanding broadband PCS attribution issues, be resolved and clarified as soon as possible. See Opposition of the Association of Independent Designated Entities to Petitions for Reconsideration of the Fifth Report and Order at 8.

^{8/} See Opposition and Comments of Pacific Bell Mobile Services at 11-12 (indicating that the Commission's rules should not treat management contracts narrowly, but should permit any general type of agreement that does not arise to the level of de facto control). For these reasons, BHI also specifically opposes DCR Communications, Inc.'s recommendation to forbid cellular entities from investing in
(continued...)

III. THE COMMISSION MUST MODIFY ITS DESIGNATED ENTITY CONTROL GROUP RULES TO PERMIT NON-CONTROLLING INVESTMENT BY NON-DESIGNATED ENTITIES.

BHI urges the Commission to modify its broadband PCS rules to permit Control Group participants to include corporations controlled by minorities and/or women.^{9/} There is no support in the record for a requirement that businesses that are Control Group participants must be 100% owned by minorities and/or women.^{10/} BHI urges the Commission to adopt a simple control test for investors in a PCS applicant's Control Group member. Specifically, BHI recommends that the Commission require that minorities and/or women hold 50.1% of the equity of any Control Group corporate entity. In this context, legal control of the Control Group entity will suffice for ensuring that minorities and/or women are the only groups that control the PCS applicant.^{11/}

IV. MID-AUCTION PARTIAL SETTLEMENTS SHOULD NOT BE PERMITTED.

As discussed by AIDE in its Opposition to Petitions for Reconsideration, BHI also recommends that the Commission reject McCaw Cellular

8/ (...continued)
designated entity PCS applicants. See Comments on Petitions of Reconsideration of the FCC's Fifth Report and Order of DCR Communications, Inc. at 6-7.

9/ See Comments on Petitions for Reconsideration of BHI at 12-14.

10/ See Petition for Clarification of the FCC's Fifth Report and Order by Columbia PCS, Inc. at 2; see also DCR Comments on Petitions of Reconsideration of the FCC's Fifth Report and Order at 5.

11/ Accord DCR Comments on Petitions of Reconsideration of the FCC's Fifth Report and Order at 5; Comments of the United States Telephone Association at 3.

Communications, Inc.'s proposal to permit bidders to form, during the course of the auction, consortia with other bidders that affirmatively have indicated that they have dropped out of the bidding for a particular license or group of licenses.^{12/} Such liberalization of the Commission's anti-collusion rule will invite "wink and nod" deals that will undermine the integrity of the broadband PCS auctions. The Commission has already relaxed its initial anti-collusion rule to permit discussions and agreements among bidders throughout the auction so long as they are not competing for the same licenses.^{13/} No further relaxation to the Commission's anti-collusion rule is necessary or beneficial.

V. THE AFFILIATION RULES MUST BE REVISED IF AN APPROPRIATE LEVEL OF CERTAINTY IS TO BE ACHIEVED IN THE BIDDING PROCESS.

In prior submissions in this docket, BHI stated that the Commission's adoption of the Small Business Administration's ("SBA") affiliation rules was accomplished in violation of the notice and comment provisions of the Administrative Procedure Act ("APA").^{14/} BHI reiterates its opposition to the application of the affiliation rules, as "borrowed" for inclusion in the Fifth Report and Order, on this basis.

^{12/} See AIDE Opposition to Petitions for Reconsideration at 6.

^{13/} See Second Memorandum and Order, Competitive Bidding, PP Docket No. 93-253, FCC 94-215 (adopted August 12, 1994, released August 15, 1994) ("Second Memorandum and Order") at ¶¶ 50-53.

^{14/} Accord AIDE's Opposition to Petitions for Reconsideration of the Fifth Report and Order at 9.

BHI also submits that the affiliation rules unnecessarily restrict existing businesses not expressly formed for the purpose of pursuing PCS licenses.^{15/} 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. Inviting additional complexity by importing the SBA's affiliation rules into broadband PCS imposes even greater burdens on potential PCS applicants who must now consider the holdings of "affiliates" in determining their eligibility to bid for Entrepreneurs' Block spectrum.^{16/}

Nevertheless, should the Commission fail to withdraw the application of these rules on reconsideration, BHI requests that it clarify its affiliation rules in regard to their impact on PCS applicants. Specifically, BHI requests clarification that entities holding non-controlling interests in an applicant's affiliate are not attributable to the PCS applicant in determining Entrepreneurs' Block bidding eligibility. Although the Commission provides particular rules that prevent attribution of passive investments in the PCS applicant, it does not indicate that passive investments in a PCS applicant affiliate are not attributable, if they are non-controlling. As stated by Mankato Citizens Telephone Company ("MCTC"), Section 24.709(b)(1) and (b)(4) provide an exemption to the aggregation rule for attributable interests in the PCS applicant; it does not, however, discuss persons or entities that hold interests in the

15/ See BHI Petition for Reconsideration at 21-22; see also Comments and Partial Opposition of Minnesota Equal Access Network Services, Inc. and South Dakota Network, Inc. at 10.

16/ See also MCTC's Partial Opposition to Petitions for Reconsideration at 6.

affiliate(s) of a PCS applicant.^{17/} Such clarification would comport with the Commission's intent to establish important limits on the attribution of revenues, assets and personal net worth in determining Entrepreneurs' Block bidding eligibility.^{18/}

VI. THE COMMISSION HAS FAILED TO SATISFY STATUTORY REQUIREMENTS FOR ESTABLISHING A MODIFIED "SMALL BUSINESS" DEFINITION IN THIS DOCKET.

With respect to the Commission's \$40 million revenue threshold for "small businesses," it has become apparent that the Commission may have failed to satisfy specific statutory requirements for modifying the SBA's small business definition for application in the PCS auctions. Pursuant to Section 632(a) of the Small Business Opportunity and Credit Enhancement Act, the SBA's size standards are to be applied for purposes of all federal legislation and cannot be modified unless specific procedural requirements are met. Specifically, the SBA's size standards for defining "small businesses" can be modified only after the proposed size standard (1) is proposed after an opportunity for public notice and comment; and (2) is approved by the Administrator of the Small Business Administration.^{19/}

Although the Commission proposed adoption of the SBA's small business threshold of net worth not in excess of \$6 million, with an average net

^{17/} See MCTC's Partial Opposition to Petitions for Reconsideration at 5 n.3.

^{18/} BHI opposes, however, MCTC's alternative solution of treating all stockholders in a company in which stock is widely dispersed as a "Control Group," within the meaning of Section 24.709(b)(4), as a limited solution to an important and far-reaching problem. Id. at 4-5.

^{19/} See Small Business Opportunity and Credit Enhancement Act, 15 U.S.C. §632(a)(2) (1992) (amending Section 3(a) of the Small Business Act).

income after Federal income taxes for the two preceding years not in excess of \$2 million, in its initial Notice of Proposed Rulemaking, the Commission did not submit, specifically, the \$40 million gross revenue standard for notice and comment.^{20/} Moreover, the record in this proceeding fails to indicate that official approval of the Administrator was received pursuant to the provisions of the revised Small Business Act. Accordingly, BHI urges the Commission to revisit the adoption of its small business definition and take all necessary steps to comply with statutory requirements for modification of the SBA's definition.^{21/}

VII. CONCLUSION

BHI respectfully requests that the Commission modify its broadband PCS rules in accordance with the recommendations set forth above, and as discussed

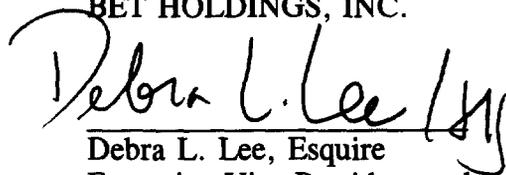
^{20/} See Notice of Proposed Rulemaking, 8 FCC Rcd 7635, 7647 (1993).

^{21/} The impact of Section 632(a) must likewise be considered in light of the Commission's recent decision on reconsideration of the Second Report and Order, 9 FCC Rcd 2348 (1994) (generic auction rules) to define "small businesses" on a service-specific basis. See Second Memorandum and Order, Competitive Bidding, PP Docket No. 93-253, FCC 94-215 (adopted August 12, 1994, released August 15, 1994) ¶¶ 144-45.

in BHI's Petition for Reconsideration and Comments on Petitions for Reconsideration submitted in this docket in response to the Fifth Report and Order.

Respectfully submitted,

BET HOLDINGS, INC.

A handwritten signature in black ink that reads "Debra L. Lee" followed by a stylized flourish.

Debra L. Lee, Esquire
Executive Vice President and
General Counsel

Maurita K. Coley, Esquire
Senior Vice President -
Legal Affairs
Black Entertainment Television
1232 31st Street, N.W.
Washington, D.C. 20007

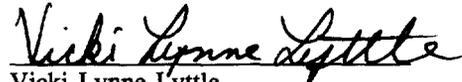
Of Counsel

Leonard J. Kennedy, Esquire
Richard S. Denning, Esquire
DOW, LOHNES & ALBERTSON
1255 23rd Street, N.W.
Washington, D.C. 20037
(202) 857-2500

September 22, 1994

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, hereby certify that on this 22nd day of September, 1994, I caused a copy of the foregoing Reply to Oppositions to Petitions for Reconsideration to be served by first-class mail, postage prepaid, to the parties included on the attached service list.


Vicki Lynne Lyttle

Counsel/Address	Organization
<p>William J. Franklin 1919 Pennsylvania Avenue, N.W. Suite 300 Washington, D.C. 20006-3404</p>	<p>Association of Independent Designated Entities</p>
<p>John A. Malloy General Counsel Columbia PCS, Inc. 201 N. Union St., Suite 410 Alexandria, VA 22314</p>	<p>Columbia PCS, Inc.</p>
<p>Daniel C. Riker President & CEO DCR Communications, Inc. 2715 M Street, N.W., Suite 150 Washington, D.C. 20007</p>	<p>DCR Communications, Inc.</p>
<p>Christopher Dettmar Encompass, Inc. Two Ravinia Drive Suite 1205 Atlanta, GA 30346</p>	<p>Encompass, Inc.</p>
<p>Benjamin H. Dickens, Jr. Blooston, Mordkofsky, Jackson & Dickens 2120 L Street, N.W., Suite 300 Washington, D.C. 20037</p>	<p>Mankato Citizens Telephone Company</p>
<p>Karsten Amlie Leibowitz & Associates, P.A. Sunbank International Center One Southeast Third Avenue Suite 1450 Miami, FL 33131-1715</p>	<p>MasTec, Inc.</p>
<p>Cathleen A. Massey McCaw Cellular Communications, Inc. 1150 Connecticut Avenue, N.W. Fourth Floor Washington, D.C. 20036</p>	<p>McCaw Cellular Communications, Inc.</p>
<p>Benjamin H. Dickens, Jr. Blooston, Mordkofsky, Jackson & Dickens 2120 L Street, N.W., Suite 300 Washington, D.C. 20037</p>	<p>Minnesota Equal Access Network Services, Inc. and South Dakota Network, Inc.</p>
<p>Mark J. Tauber Piper & Marbury 1200 19th Street, N.W. Seventh Floor Washington, D.C. 20036</p>	<p>Omnipoint Communications, Inc.</p>

Counsel/Address	Organization
<p>James L. Wurtz Pacific Bell Mobile Services 1275 Pennsylvania Avenue, N.W. Washington, D.C. 20004</p>	<p>Pacific Bell Mobile Services</p>
<p>Mark J. Golden Acting President Personal Communications Industry Association 1019 Nineteenth Street, N.W. Suite 1100 Washington, D.C. 20036</p>	<p>The Personal Communications Industry Association</p>
<p>George Y. Wheeler Koteen & Naftalin 1150 Connecticut Avenue, N.W. Suite 1000 Washington, D.C. 20036</p>	<p>Telephone and Data Systems, Inc.</p>
<p>Mary McDermott Vice President and General Counsel United States Telephone Association 1401 H Street, N.W., Suite 600 Washington, D.C. 20005</p>	<p>United States Telephone Association</p>
<p>Raymond B. Grochowski Latham & Watkins 1001 Pennsylvania Avenue, N.W. Washington, D.C. 20004</p>	<p>Vanguard Cellular Systems, Inc.</p>