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Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

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)

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PETITION FOR RECONSIDERATION

BET Holdings, Inc. ("BHI") hereby submits its
Petition for Reconsideration of the Federal Communications
Commission's ("Commission") Order on Reconsideration in the
Competitive Bidding Rulemaking proceeding for broadband
Personal Communications Services ("PCS").^{1/}

I. INTRODUCTION

On reconsideration of the Fifth Report and Order,
the Commission sua sponte amended Section 24.720(1) of the
broadband PCS auction rules to exempt Indian tribes
(including Alaskan Regional or Village Corporations) from
the affiliation rules that determine eligibility to bid for
broadband PCS licenses in the Entrepreneurs' Blocks
(frequency blocks C and F). Specifically, the Commission
provided that the size of a PCS applicant, for purposes of

1/ See Order on Reconsideration, Competitive Bidding, PP
Docket No. 93-253 FCC 94-217 (adopted August 15, 1994,
released August 15, 1994) ("Order"); 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").

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bidding in the Entrepreneurs' Blocks, would be determined "without regard to its affiliation with the tribe, any entity of tribal government, or any other business owned by the tribe."^{2/} Accordingly, any affiliation with any of the thirteen Regional Corporations established by Congress under the Alaska Native Claims Settlement Act ("ANCSA") will not be considered in making Entrepreneur Block eligibility determinations, regardless of the fact that an attributable investor in a PCS applicant may command significant resources through its affiliation with such corporation.^{3/}

In prior submissions in this docket, BHI demonstrated 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").^{4/}

2/ The term "Indian Tribe," defined in 25 U.S.C. § 450b(e) includes "any Indian tribe, band, nation, or other organized groups or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

3/ See Fifth Report and Order at ¶ 203 (noting that only when an investor has an attributable interest in a PCS applicant must the investor's relationship with other persons or outside entities be considered to determine whether the relationships rise to the level of an "affiliation").

4/ See BHI Petition for Reconsideration at 19-20 (filed August 22, 1994). BHI also argued that this approach to rulemaking invites confusion and potentially a tremendous number of post-auction challenges as parties petition

(continued...)

BHI reiterates its opposition to the application of the affiliation rules, as "borrowed" for inclusion in the Fifth Report and Order. Moreover, BHI opposes the Commission's present intent to compound the procedural violation by arbitrarily exempting a specified subset of "minority and women-owned entities" without offering interested parties an opportunity to express their views.

BHI also opposes the Indian tribe affiliation exemption as contrary to statutory authority, arbitrary and capricious and a threat to robust designated entity bidding in the broadband PCS Entrepreneurs' Blocks. Unless all minority and women-owned entities are subject to similar regulatory limitations, some minority and women-owned entities will benefit at the expense of others.

II. DISTINGUISHING AMONG CLASSES OF MINORITY AND WOMEN-OWNED ENTITIES IS BOTH CONTRARY TO STATUTORY AUTHORITY AND ARBITRARY AND CAPRICIOUS

A. The Budget Act Does Not Make, And The Record In This Proceeding Does Not Support, The Adoption of Arbitrary Distinctions Between Minority-Owned Entities.

There is no support in the Budget Act, or in the record in this proceeding for distinctions between Indian

4/ (...continued)
against designated entity ownership structures using the contested FCC/SBA hybrid version affiliation standard as a basis for attacking designated entity legal qualifications. Id. at 21-22.

tribes and other minority entities.^{5/} Although the Commission cites Sections 309(j)(4)(D) and (3)(B) of the Budget Act as support for an affiliation exemption for Indian tribes, a review of the provisions offer no basis to justify the Commission's affiliation exemption determination.^{6/} These provisions direct the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."^{7/} The Budget Act makes no distinction between minority groups. Furthermore, in neither the House Report nor the Conference Report does Congress even hint that Indian tribes are to be treated differently, or that any distinction is to be made among minority groups.^{8/}

Nor is there any support for such a distinction in the record in this proceeding. In justifying its treatment of minorities in the Fifth Report and Order the Commission

^{5/} See BHI Comments on Petitions for Reconsideration at 5-7.

^{6/} See Order at ¶ 6, n. 12.

^{7/} See 47 U.S.C. § 309(j)(4)(D); 47 C.F.R. § 309(j)(3)(B) (indicating that one of the Commission's policy objectives is to "[disseminate] licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women").

^{8/} See House Conf. Rep. No. 103-213 at 483-84; House Report No. 103-111 at 253-54.

cites reports that refer to the discrimination faced by Hispanics and African-Americans.^{9/} The record before the Commission provides no factual predicate for distinguishing Indian tribes or Alaskan Native Corporations for special treatment. No evidence in the record suggests that Indian tribes face more discrimination, nor does the record suggest that Indian tribes face greater barriers in attracting capital. In the absence of a Congressional directive and specific findings in this proceeding, the Commission cannot create advantages available only to Indian tribes.

B. There is No Rational Basis For the Distinction The Commission Makes Between Indian Tribes And Other Minorities.

The Commission has recognized that "[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."^{10/} Moreover, Congress directed the Commission to "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."^{11/} Yet, the Commission has created "super-minorities," comprised of small minority-owned businesses and, most recently, "Indian-

^{9/} Fifth Report and Order at ¶¶ 98-100.

^{10/} Fifth Report and Order at ¶ 132.

^{11/} See H.R. Rep. No. 103-11 at 255 (emphasis added).

owned" minority businesses, thereby effectively locking out presumably less deserving women and minority groups. These distinctions simply cannot withstand serious scrutiny.

All minorities are under-represented in the telecommunications industry.^{12/} The reasons for this lack of ownership and participation are the financial and social barriers all minorities face in obtaining sufficient capital to enter the telecommunications marketplace.^{13/} While there is more than ample support for this proposition in the record, there is no support for the determination that Indian tribes, or any other subset of minorities or women, require preferences that are not available to other minorities.

III. APPLYING DIVERGENT AFFILIATION RULES TO CLASSES OF MINORITY AND WOMEN-OWNED ENTITIES WILL UNDERMINE THE COMMISSION'S POLICIES TO ENCOURAGE BROAD PCS PARTICIPATION BY MINORITY AND WOMEN-OWNED ENTITIES.

Application of the Indian tribe affiliation exemption will hinder the participation of other designated entities competing for valuable PCS spectrum. For example, this arbitrary distinction between minority and women-owned entities will create imbalanced bidding power in the

^{12/} See Small Business Advisory to the FCC, GEN Docket No. 90-314, Sept. 15, 1993; U.S. Census, 1987 Economic Censuses, Survey of Minority-Owned Business Enterprises -- Summary (August 1991) at Tables 1, 10.

^{13/} See Fifth Report and Order at ¶¶ 98-110.

Entrepreneurs' Blocks, in favor of Indian tribes, and will thereby skew the results of the PCS auctions.

The direct impact of the affiliation exemption will be to provide certain classes of designated entities, e.g. Indian-owned businesses, with greater resources for bidding on Entrepreneur Block licenses. Thus, these companies will be better able to compete successfully for broadband PCS spectrum, regardless of the fact that their minority group counterparts have suffered similar injustices and discrimination and have faced identical barriers to entry. Those who value the Entrepreneurs' Block licenses the most will not necessarily obtain a license simply because the Commission has chosen to favor arbitrarily a particular minority group.

In adopting the Indian tribe affiliation exemption rule, the Commission specifically stated that Indian tribes and Alaskan Native Corporations "are unique aggregations of very limited capital of historically disadvantaged people."^{14/} Accordingly, based on this assumption, and the fact that a "limited potential number of broadband PCS applicants" would benefit from the exemption, the Commission concluded that the exemption would not present any unfair advantage to other eligible applicants.^{15/} This characterization, however, is simply incorrect.

^{14/} See Order at ¶ 6 (emphasis added).

^{15/} See Order at ¶ 7.

Indian tribes and Alaskan Native Corporations, though they may be owned by stockholders who traditionally have faced economic hardship for decades, possess considerable holdings that include diverse amalgamations of businesses and assets.^{16/} As recognized by Margaret Brown, Vice President for Cook Inlet Region, Inc. ("Cook Inlet"), the thirteen regional Alaska Native corporations command "significant aggregate capital resources," and therefore have amassed considerable assets since their creation by the Alaska Native Claims Settlement Act in 1971.^{17/} Cook Inlet, for instance, showed total assets of \$608,689,200 and net income of \$23,446,403 for 1992, a 38% increase in profits over the previous year.^{18/}

Given the financial resources and access to financial markets available to PCS applicants affiliated with these corporations, the Commission cannot rationally assume that the impact of the affiliation exemption will be minor. PCS applicants affiliated with any of these Alaska Native corporations will be afforded vast tangible

^{16/} For example, Cook Inlet's primary lines of business traditionally have been natural resource development, real estate and radio and television broadcasting.

^{17/} See Congressional Testimony of Margaret Brown, Senior Vice President, Cook Inlet Region, Inc., before the Subcommittee on Minority Enterprise, Finance and Urban Development, House of Representatives, May 20, 1994.

^{18/} See Business Dateline, Alaska Journal of Commerce, May 10, 1993. BHI has not been able to obtain more current financial information regarding Cook Inlet than that included in its 1992 Annual Report.

advantages in the bidding process that are denied to other minority and women-owned entities.^{19/} Consequently, BHI opposes the modification of the affiliate rules as applied to minority groups and women bidding in the Entrepreneurs' Blocks. If the affiliate rules are to apply at all, they must apply to all minority and women-owned entities equally. Any favoritism shown by the Commission to particular minority groups will reduce the ability of qualified designated entities to participate successfully in the broadband auctions.

IV. CONCLUSION

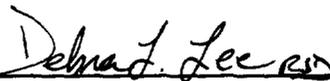
As was previously argued in its Petition for Reconsideration of the Fifth Report and Order, BHI urges the Commission to refrain from applying the SBA's affiliation rules in determining eligibility to bid in the Entrepreneurs' Block. If the affiliation rules are to be applied, however, BHI urges the Commission to strike the "affiliate exemption" for Indian tribes from its rules. There is no statutory or record support for making such arbitrary distinctions among similarly situated minority and women-owned entities. Only uniform treatment of minority and women-owned entities will ensure that the Commission

^{19/} Moreover, wholesale exemption of Indian Tribes and Alaskan Native Corporations encourages fronting of PCS designated entity applicants -- a practice that the Commission has repeatedly sought to eradicate.

provides meaningful opportunities for all such designated entities to participate in providing broadband PCS services to the public.

Respectfully submitted,

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