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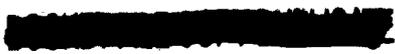
**APR 24 1995**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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



**PETITION FOR WAIVER**

Pursuant to 47 C.F.R. § 24.819(a), BET Holdings, Inc. ("BHI") hereby requests a waiver of Sections 711(b) and 712(b) of the Federal Communications Commission's (the "Commission") Rules to ensure the meaningful participation of minorities in the broadband Personal Communications Services ("PCS") auctions. Specifically, BHI requests:

(1) a limited waiver of the bidding credit rules (Section 712(b)) to afford BHI a twenty-five percent (25%) bidding credit in the C Block competitive bidding process; and (2) a limited waiver of the Commission's installment payment rules (Section 711(b)) to provide BHI the same installment payment terms provided to "small" minority-owned entities.

Because the current structure of the C Block preferences affords enhanced incentives to small minority- and female-owned bidders, BHI is disadvantaged in its efforts to attract capital necessary to bid on PCS licenses. Without grant of the requested waivers, BHI will be forced to compete with non-minority bidders who face no barriers to accessing capital, and small minority- and female-owned bidders who are backed by wealthy strategic investors, are afforded higher bidding credits in the competitive bidding process and are extended financing on more favorable terms. Under these rules, BHI will be unable to compete successfully for PCS licenses.

BHI requests these waivers to ensure that it is not disadvantaged in its efforts to participate in the C Block auction. Moreover, grant of the waivers will ensure that the

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competitive bidding rules adopted by the Commission accomplish their Congressionally mandated purpose.<sup>1/</sup>

I. **GOOD CAUSE EXISTS FOR GRANT OF A WAIVER TO BHI.**

Section 1.3 of the Commission's rules provides that the Commission may waive its rules upon a showing of good cause.<sup>2/</sup> Good cause is demonstrated in circumstances when the rules are inconsistent with the public interest.<sup>3/</sup> Moreover, the Commission may approve a waiver request when considerations of hardship, equity or more effective implementation of overall policy on an individual basis dictate that a waiver is warranted.<sup>4/</sup> As discussed below, good cause exists for granting BHI's request.

BHI is a diverse communications corporation engaged in cable programming, magazine publishing, and other media-related enterprises. BHI has demonstrated an ability to compete and succeed, despite the financial barriers it faces as a minority-controlled company. Indeed, BHI believes that its communications-related experience and understanding of the opportunities and risks inherent in the communications field make it

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1/ BHI filed a Petition for Reconsideration with the Commission requesting modification of certain competitive bidding rules also referenced in this waiver request. BHI files this waiver request, however, to ensure that the Commission is afforded sufficient time to consider the issues raised, should the filing date for the short form applications be set soon after the issues on reconsideration are resolved.

2/ See 47 C.F.R. § 1.3.

3/ See Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990).

4/ See WAIT Radio v. FCC, 418 F.2d 1153, 1158 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972); see also 47 C.F.R. § 24.819(a) (providing for waiver of the Commission's rules when (a) the underlying purpose of the rule will not be served by its application and grant of the waiver is otherwise in the public interest; or (b) the unique facts of a particular case renders application of the rule inequitable, burdensome or otherwise contrary to the public interest).

uniquely suited to provide wireless services. As an established minority company, BHI offers the possibility of long-term minority participation in the implementation and development of new PCS telecommunications technologies.

BHI fully satisfies the financial eligibility guidelines established for participation in the entrepreneurs' block auction. BHI cannot, however, be designated as a "small" minority business because its average gross revenues over the past three years exceed \$40 million.<sup>5/</sup> Thus, while it is well-positioned to ensure long-term minority involvement in the delivery of PCS services to the public, the distinctions made among minority- and female-owned entities under the Commission's Rules directly prevent BHI from participating effectively in the C block auction.

To date, BHI has been unable to attract financing because it is not a "small" minority-owned company, eligible for enhanced preferences under the Commission's rules. Yet, BHI continues to face documented barriers to accessing capital as a minority-owned business.<sup>6/</sup> Under WAIT Radio, the Commission may consider this type of hardship and inequity faced by BHI resulting from a strict observance of Sections 24.711 and 24.712. Moreover, as both Congress and the Commission have recognized, it is in the public interest to promote the participation and long-term involvement of minority entities in the provision of PCS services to the public. Accordingly, there is good cause for the Commission to grant a waiver of Sections 24.711 and 24.712 to BHI.

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<sup>5/</sup> Under the Commission's rules, a minority-owned entity is eligible for a 25% bidding credit if it holds less than \$500 million in assets and has average gross revenues that are not more than \$40 million for the preceding three-year calendar years. See 47 C.F.R. § 24.720(b).

<sup>6/</sup> See supra n.7 and accompanying text and p.8.

II. GRANTING BHI A WAIVER IS NECESSARY IF BHI IS TO HAVE ANY MEANINGFUL OPPORTUNITY TO PARTICIPATE IN THE PCS AUCTIONS.

A. The Reduced Bidding Credit Places BHI At An Unfair Disadvantage for Purposes of Attracting Strategic Investors

Pursuant to the Commission's rules, bidding credits and other preferences, such as installment payments, are available to minority- and women-owned entities participating in the C Block auctions because of the significant barriers they face in obtaining capital to purchase PCS licenses and build-out their PCS systems.<sup>7/</sup> The bidding credit functions as a discount on the price paid for PCS licenses and eases the financial burdens imposed on companies already disadvantaged in the capital marketplace.<sup>8/</sup>

Under Section 712 of the Commission's Rules, unsuccessful bidders in the A & B Blocks have an incentive to partner with "small" minority- and women-owned entities to benefit from the more favorable bidding credits offered to these entities, making BHI a less attractive partner in a proposed PCS business venture. As such, BHI has been unable to identify a strategic investor and has faced resistance in even initiating discussions with certain potential partners because of the added benefits under Sections 712(b) of partnering with smaller minority- and women-owned companies.

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<sup>7/</sup> Small Business Credit and Business Opportunity Enhancement Act of 1992, Sections 112 and 331, Public Law No. 102-336, September 4, 1992 (Congress found that businesses owned by minorities have extraordinary difficulties in obtaining capital); The Minority Telecommunications Ownership Tax Act of 1983, H.R. 2331, 98th Congress, 1st Session, March 24, 1983. In both Acts, Congress found that businesses owned by minorities have extraordinary difficulties in obtaining capital.

<sup>8/</sup> As the Commission explained, "the bidding credit will function as a discount on the bid price a firm will actually have to pay to obtain a license and, thus, will address directly . . . financing obstacles. . ." Fifth Report and Order, Competitive Bidding, PP Docket No. 93-253 at ¶ 132 (adopted June 29, 1994).

The A & B Block auctions illustrate the significant, and potentially disqualifying, capital costs of acquiring broadband PCS licenses.<sup>9/</sup> Although the bids in the C Block auctions may be less than the winning bids in the A & B Block auctions, it is anticipated that the costs of obtaining a C Block license will remain high.

In light of the intensive capital needs of potential PCS service providers, the additional 10 percent bidding credit is a powerful magnet inciting potential partners to seek out small minority- and women-owned firms.<sup>10/</sup> This differential has the perverse and unintended effect of denying access to capital to BHI, a highly-qualified and successful minority-owned firm. BHI requests a waiver of Section 24.712 and a bidding credit of 25% so it can participate meaningfully in the C Block auction.

**B. Unequal Distribution of Other Auction Preferences Unfairly Penalizes BHI**

In addition to a 25% bidding credit, small minority- and women-owned companies are permitted to pay for their licenses pursuant to an installment payment plan that requires interest-only payments during the first six years of the license period.<sup>11/</sup> As with the bidding

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<sup>9/</sup> Even companies with significant experience in wireless communications and considerable resources to dedicate to a PCS venture found the bid prices for broadband PCS licenses to be too high to justify continued bidding for the A & B Block licenses. See Wall Street Journal, March 7, 1995, at B5, col. 3 ("Craig McCaw Has Withdrawn From Auction").

<sup>10/</sup> The financial benefits offered "small" minority-owned entities are significant in comparison to those afforded BHI. For instance, if a license is awarded for \$10 million dollars, small minority-owned firms will be permitted to discount the bid price by \$2,500,000. Slightly larger minority-owned entities, that face similar discrimination in lending markets, will only be able to discount the price by \$1,500,000 - a sizable \$1 million difference. The more favorable installment payment terms compound the distinctions made among minority-owned entities.

<sup>11/</sup> Minority-owned companies that fall outside the \$40 million financial cap are permitted to pay only interest for the first three years of the license term. See 47 C.F.R. § 24.711(b).

credit, this unequal distribution of preferences among minority-owned companies directly limits BHI's financial opportunities in the C Block. Strategic investors are encouraged to partner with small minority-owned entities to benefit from an installment payment plan that offers more favorable financing terms and translates into significant cost savings over the term of the license. Section 711(b) of the Commission's Rules, therefore, further disadvantages BHI by discouraging partnerships with marginally larger minority-owned companies.

Without the ability to attract strategic investors, larger minority-owned firms also are deprived of intangible benefits freely afforded to smaller minority- and women-owned entities under the Commission's rules. For instance, because these smaller entities are more attractive investment vehicles for experienced telecommunications service providers, smaller minority- and women-owned entities will benefit disproportionately from their partners' brandnames and established goodwill.<sup>12/</sup> Marginally larger minority-owned companies, however, will not be afforded the same benefits and will be forced to compete with "small" companies using the brandnames of the nation's largest telecommunications service providers. Unless BHI is granted its requested relief, it will find it impossible to compete with smaller minority- and women-owned companies financially backed by these large strategic investors.

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<sup>12/</sup> A and B Block licensees are already implementing plans to utilize nationwide wireless brandnames based on established consumer brand recognition. It can be anticipated that C Block licensees will pursue similar market penetration strategies.

III. GRANTING BHI'S REQUEST IS IN THE PUBLIC INTEREST AS IT WILL ACCOMPLISH CONGRESS' MANDATE TO DISSEMINATE LICENSES AMONG A WIDE VARIETY OF PCS APPLICANTS.

A. The Purpose of the Entrepreneur's Block Is To Create New Diverse Entrants And BHI Is Such A New Entrant

In the Omnibus Budget Reconciliation Act of 1993, Congress charged the Commission with promoting economic opportunity and competition by disseminating PCS licenses among a diverse group of licensees. Specifically, Congress directed the Commission to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies and businesses owned by minorities and women."<sup>13/</sup>

Nothing in the legislation suggests that Congress intended to favor small minority entrants over larger minority entrants.<sup>14/</sup> By creating such a distinction among entrepreneurial block participants, the Commission virtually ensures that a minority entrant with gross revenues in excess of \$40 million will be disadvantaged, if not completely shut out of the bidding process, by having to compete with other bidders who are able to attract large strategic investors. Granting BHI's waiver is in the public interest because it will accomplish the Commission's policy goals by ensuring that a qualified, new, non-traditional minority entity is offered a realistic opportunity to participate in the PCS auctions.

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<sup>13/</sup> See Budget Act, P.L. 103-66, § 6002 Sections 309(j)(3)(B) and (4)(C).

<sup>14/</sup> See e.g. House Report No. 103-111 at 255 ("the Commission should adopt regulations . . . to ensure that businesses owned by members of minority groups . . . are not in any way excluded from the competitive bidding process") (emphasis added).

B. Documented Evidence of the Under-representation of Minorities in the Telecommunication Industry Supports Grant of BHI's Waiver Request

The SBAC Report affords more than sufficient evidence of minority under-representation in telecommunications ownership. SBAC Report at 3.<sup>15/</sup> Also, a study commissioned by the Commerce Department's Minority Business Development Agency in 1991 found that only one half of one percent of the telecommunications firms in the country were minority owned.<sup>16/</sup> Minorities are thus substantially under-represented in the telecommunications industry, supporting the Commission's adoption of remedial measures to facilitate their fuller participation.

Indeed, as the Commission recognized, "[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."<sup>17/</sup> The Commission's conclusions were recently confirmed by the "Glass Ceiling Report," which indicated that women, African-Americans, Asians and Pacific Islanders are proportionately under-represented in the communications industry.<sup>18/</sup> BHI's participation in

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15/ See Small Business Advisory to the FCC, Gen Docket No. 90-314, Sept. 15, 1993. As the Commission recognizes, the preferences depend on a Congressional mandate. Notice of Proposed Rulemaking, 8 FCC Rcd 7635 at n. 48 (1993) ("Notice"), quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 568 (1990).

16/ See Fifth Report and Order at ¶ 107.

17/ See Fifth Report and Order at ¶ 132.

18/ See Good for Business, Federal Glass Ceiling Commission at 161 (March 1995).

the auctions is fully consistent with the Commission's efforts to fulfill Congress' mandate in the Budget Act authorizing auctions for the assignment of radio spectrum.<sup>19/</sup>

C. The \$40 Million Gross Revenue Cap For "Small" Businesses is Arbitrary and Capricious.

As applied to minority and women-owned entities, the \$40 million gross revenue cap for determining eligibility for enhanced preferences does not accurately reflect the ability of minority and women-owned entities to access capital. In a context where all minority-owned entities experience significant discrimination in the lending markets, the artificial distinctions adopted by the Commission between minority-owned and "small" minority-owned companies are arbitrary and capricious. Minority-owned companies with less than \$40 million dollars in revenue can have greater access to capital than slightly larger minority companies, based on the nature of their assets and the level of their earnings. In these circumstances, smaller companies are benefitted to BHI's detriment even though Congress' mandate was to encourage the participation of all minority-owned entities in the PCS auctions. By granting BHI's waiver request, the Commission will ensure that BHI's participation in the C Block auction is not inhibited by arbitrary distinctions that are unsupported by the record and that prevent achievement of Congress' diversity goals.

Finally, the small business consortia rules that fail to recognize cumulative revenues and assets of cooperating parties, coupled with the disparate treatment of BHI, fortify BHI's inability to compete with small minority- and women-owned companies in the C Block

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<sup>19/</sup> As stated above, granting BHI's request would be wholly consistent with Congress' intent not to exclude, in any way, minority-owned businesses from PCS auction participation. Congress explicitly recognized that minorities faced discriminatory treatment in financial markets regardless of their size. BHI, a marginally larger company, cannot be treated differently in the preferences afforded for its participation consistent with the Commission's goals.

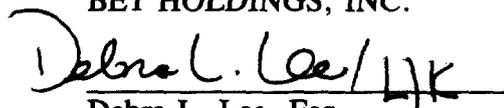
auctions. Under the Commission's current rules, for instance, a minority-owned small business consortia comprised of four \$39 million companies would benefit from the 25% bidding credit, while limiting BHI, with significantly less assets, to a 15% bidding credit.<sup>20/</sup> Thus, under the operation of the present rules, BHI, a firm with less access to capital, is disproportionately disadvantaged, contrary to the Budget Act and Commission policies underlying the designated entity rules. Such a result cannot be what the Commission intends.

#### IV. CONCLUSION

For the foregoing reasons, BHI requests that the Commission grant this request for a waiver of Sections 24.711 and 712, and provide it the same level of bidding credit and installment payment preferences afforded to "small" minority- and women-owned entities. Providing BHI with the wherewithal to compete aggressively in the PCS auctions will ensure that a marginally larger, minority-owned entrepreneurial PCS applicant is not disadvantaged in its efforts to provide broadband PCS services to the public.

Respectively submitted,

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<sup>20/</sup> There is no limit on the financial assets small businesses or persons can aggregate under this rule.