

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the matter of )  
 )  
Implementation of Section 309(j) )  
of the Communications Act - )  
Competitive Bidding )  
 )  
Amendment of the Commission's )  
Cellular PCS Cross-Ownership Rule )  
 )  
Implementation of Section 3(n) and 332 )  
of the Communications Act )  
Regulatory Treatment of Mobile Services )

PP Docket No. 93-175

GN Docket No. 90-314

GN Docket No. 93-252

COMMENTS OF BET HOLDINGS, INC.

BET HOLDINGS, INC.

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## SUMMARY

Assuring minority participation in the PCS auction process has been a concern of both Congress and the Commission since Congress gave the Commission the authority to auction spectrum in the 1993 Budget Act. In passing the Budget Act Congress was concerned that the use of auctions would exacerbate the traditional problem of the under-representation of minorities in the communications field. Congress therefore directed the Commission to ensure that minorities are "not in any way excluded from the competitive bidding process."

The Commission set aside two blocks of broadband PCS spectrum, the C Block of 30 MHz and the F Block of 10 MHz, to implement the statutory mandate. Following extensive comment and careful review, the Commission also adopted regulations to promote minority participation in the auctions that include minority bidding credits, installment payment plans at low interest rates and beneficial terms, specific corporate structures that facilitate access to capital, and a minority-owned business exception to the affiliation rules.

Under the Commission's proposed rules issued in the Further Notice in response to the Supreme Court's recent decision in Adarand, BET Holdings, Inc. ("BHI") will be excluded from participating in the C Block auction. All of BHI's effort and expense to prepare for the auction will be wasted, and BHI, along with several other similarly situated minority-owned businesses, will be denied the opportunity to bid to be PCS licensees.

Despite what the Commission characterizes as a "strong" record detailing the necessity for giving minorities enhanced opportunities to participate in the broadband auctions, the proposed rules in the Further Notice dilute minority participation in the C Block auction by offering all small businesses the same auction incentives previously reserved to minority and female-owned small businesses. Further, the Commission proposes to eliminate entirely the minority-owned business exception to the affiliation rules, an exception the Commission previously found necessary to ensure that minority bidders had sufficient access to capital. Contrary to Congress's mandate that the Commission ensure that minorities not be excluded from the competitive bidding process, these proposed rule changes, if adopted, would decrease the chances that minorities will be successful bidders in the C Block auction and would exclude some particularly qualified minority-owned businesses, such as BHI, from the auction altogether.

BHI believes that, once the Commission examines its own record, the Commission will determine that its current C Block auction rules are constitutional under Adarand. If, however, the Commission determines that a modification of the current rules is required, BHI proposes that the Commission modify its rules to preserve the ability of minority-owned businesses to participate in the C Block auction. Principally, the Commission must ensure that minority-owned businesses such as BHI that justifiably

relied on the Commission's C Block auction rules in developing their business plans are able to participate in the auction.

The affiliation rule modifications proposed by BHI model the affiliation rule exception currently available to small business consortiums. Specifically, the rule modification proposed by BHI would not attribute the assets and revenues of affiliates of minority-owned applicants to the applicants if those affiliates individually would qualify for the C Block auction. Alternatively, the rule modification could exclude the assets and revenues of affiliates of minority-owned businesses from attribution if the revenues of the affiliates averaged over two years is under the C Block auction cap (\$125 million). Use of either of these modifications would further tailor the minority-owned business exception to the affiliation rules. Alternatively, these modifications could be adopted and made available to all bidders. Any of these solutions would be narrowly tailored to address discrimination in the capital markets while allowing potential bidders that had legitimately relied on the Commission's C Block auction rules the opportunity to participate in the C Block auction.

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| In the matter of   | ) |                      |
|  | ) |                      |
| Implementation of Section 309(j)<br>of the Communications Act -<br>Competitive Bidding                         | ) | PP Docket No. 93-253 |
|  | ) |                      |
| Amendment of the Commission's<br>Cellular PCS Cross-Ownership Rule   | ) | GN Docket No. 90-314 |
|  | ) |                      |
| Implementation of Section 3(n) and 332<br>of the Communications Act<br>Regulatory Treatment of Mobile Services | ) | GN Docket No. 93-252 |

**COMMENTS OF BET HOLDINGS, INC.**

On June 23, 1995, the Commission released a Further Notice of Proposed Rulemaking addressing the Supreme Court's recent decision in Adarand Constructors, Inc. v. Peña, 63 U.S.L.W. 4523 (U.S. June 12, 1995).<sup>1/</sup> The Commission proposes to eliminate all race-based preferences for designated entities in the C Block PCS auction in response to the Supreme Court's determination that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."<sup>2/</sup> Ironically, the Commission proposes to eliminate race-based

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1/ See Further Notice of Proposed Rulemaking, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Amendment of the Commission's Cellular PCS Cross-Ownership Rule, and Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, PP Docket No. 93-253, GN Docket No. 90-314, GN Docket No. 93-252 (adopted June 23, 1995, released June 23, 1995) (hereafter "Further Notice").

2/ See Adarand, 63 U.S.L.W. 4523, 4530 (U.S. June 12, 1995).

preferences despite its apparent belief that (1) the existing designated entity preference rules are not unconstitutional and (2) the "current record [supporting the constitutionality of] the C Block auction is strong."<sup>3/</sup> The Commission proposes to dismantle a constitutional affirmative action program adopted after extensive comments and reasoned review and supported by substantial evidence, purportedly to hasten commencement of the C Block auction, despite (1) the Commission's recognition that the adoption of auctions as a means of disseminating licenses threatens to impose on minority-owned businesses yet another barrier to participation in the telecommunications industry by raising the cost of entry into spectrum-based services,<sup>4/</sup> and (2) the express mandate of Congress that the Commission "ensure that businesses owned by members of minority groups ... are not in any way excluded from the competitive bidding process."<sup>5/</sup> In fact, as BET Holdings, Inc. ("BHI") demonstrates below, the Commission is correct in concluding that its current race-based preferences readily withstand strict scrutiny and thus must be retained if the Commission is to meet its Congressional mandate.

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3/ Further Notice at ¶ 8.

4/ See Fifth Report and Order, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 5532, 5537 (1994) at ¶ 10 ("It should be noted that although auctions have many beneficial aspects, they threaten to erect another barrier to participation by small businesses and businesses owned by minorities and women by raising the cost of entry into spectrum-based services.").

5/ H.R. Rep. No. 111, 103d Cong. 2d Sess. 255 (1993), reprinted in 1993 U.S.C.A.A.N. 378, 582.

Even if the Commission were correct in concluding that it should modify its rules in response to Adarand, it would not be appropriate to adopt the proposals set forth in the Further Notice because they would actually result in the exclusion of certain minorities from the auction process, in direct contravention of Congress's directive that minority businesses "not in any way be excluded" and the Commission's stated goal of having minority-owned businesses "enter, compete and ultimately succeed in the broadband PCS market."<sup>6/</sup> If the rules are to be modified at all, they must be changed in a manner consistent with both the dictates of Congress to encourage the participation of minority-owned entities and the Commission's prior findings respecting the specific mechanisms needed to assure minority participation. Accordingly, BHI sets forth below alternative rule changes that satisfy Congress's goal and fit the Commission's record while comporting with the Constitutional standards articulated in Adarand.

I. Background

At issue in the Further Notice are four race-based preferences. The relevant race-based preferences identified in the Further Notice include (1) specific corporate structures that facilitate access to capital, (2) enhanced bidding credits, (3)

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<sup>6/</sup> Fifth Memorandum Opinion and Order, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 10 FCC Rcd 403, 405 (1994) ("Fifth Memorandum Opinion and Order") at ¶ 4.

special installment payment plans, and (4) relaxed affiliation and attribution rules. Prior to the Adarand decision, the Commission found that these preferences were necessary to assure that minorities would not be excluded from the PCS auctions and to encourage minority involvement in the provision of spectrum-based services to the public.<sup>7/</sup>

In the Further Notice, the Commission does not attempt to determine whether these preferences meet the Constitutional standard established in Adarand. While the Commission does "not concede that [the] C Block auction rules themselves are unconstitutional,"<sup>8/</sup> nevertheless, the Commission has proposed eliminating all race-based preferences from its competitive bidding rules for the C Block auction. The Commission proposes that (1) the 50.1/49.9 percent equity structure be made available to all entrepreneur block applicants; (2) the availability of lower interest rates and beneficial payment terms be based solely on financial size; (3) the 25% bidding credit be made available to small businesses only; and (4) the exception to the affiliation rules that excludes the gross revenues and assets of affiliates controlled by minority investors who are members of an applicant's control group be eliminated. The Commission proposes

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7/ Id. at 414, ¶ 13 ("To satisfy Congress' directive, we established the entrepreneur's blocks in conjunction with a package of benefits that are narrowly tailored to provide significant opportunities to designated entities and those entrepreneurs that lack access to capital.").

8/ Further Notice at ¶ 11.

expanding the availability of three of the four raced-based preferences to other participants in the C Block auction with the expectation that members of minority groups will be incidentally advantaged. The Commission, however, also proposes to eliminate the affiliation exemption used in determining a minority applicant's compliance with the entrepreneur block and small business eligibility rules.

II. Congress Has Given the Commission an Express Mandate That Remains Unchanged by Adarand.

Pursuant to the Budget Act of 1993, Congress expressly directed the Commission to promulgate rules that:

promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.<sup>2/</sup>

Congress also provided that, consistent with the public interest, convenience and necessity, the purposes of the Communications Act, and the characteristics of the proposed service, the Commission should:

- (1) prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas; (ii) economic opportunity for a wide variety of applicants, including small

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<sup>2/</sup> Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, Title VI, § 6002(2), 107 Stat. 312, 388, § 309(j)(3)(B) (1993) ("hereafter Budget Act").

businesses, rural telephone companies, and businesses owned by members of minority groups and women; and (iii) investment in and rapid deployment of new technologies and services;<sup>10/</sup> and

- (2) 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, and for such purposes, consider the use of tax certificates, bidding preferences, and other procedures.<sup>11/</sup>

The Adarand decision does not repeal this Congressional mandate, nor does it inhibit the Commission's ability to develop policies that specifically benefit members of minority groups. Indeed, as the Commission has recognized, Adarand does not invalidate the race-based preferences adopted by the Commission for the broadband PCS auctions. Adarand merely establishes the legal standard for determining whether a proposed federal regulatory regime satisfies fundamental Constitutional requirements.<sup>12/</sup>

Further, the Commission, as an Executive Branch agency, has only those powers given to it by Congress. The Commission has no authority to substitute its own judgement for that of Congress, and therefore any rules adopted pursuant to the Further Notice must still satisfy Congress's directive that the

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10/ See Budget Act § 309(j)(4)(C).

11/ See Budget Act § 309(j)(4)(D).

12/ In Adarand, the Court did not find that the preferences at issue were unconstitutional. Rather, it remanded the case with instructions to the Court of Appeals to review the preferences under the strict-scrutiny standard. 63 U.S.L.W. at 4533.

Commission fashion its rules to disseminate licenses among a wide variety of applicants and to ensure that minorities are not in any way excluded from the auction process.

III. The Commission Cannot Summarily Eliminate the Minority-Owned Business Exception to the Affiliation Rules Because Doing So Would Result in the Exclusion of Particularly Qualified Minorities From Participation in PCS.

As demonstrated below,<sup>13/</sup> the Commission has an obligation to review its current preference rules under the strict scrutiny standard and retain them if they comply with that standard. However, even if the Commission were to decide to modify its rules notwithstanding their constitutionality, the proposal in the Further Notice to eliminate the minority-owned business exception to the affiliation rules must be rejected. Elimination of this exception would result in the total exclusion of a number of particularly qualified minority enterprises from any participation in the C Block auction. The A and B Block auction has already taken place; if they are not permitted to participate in the C Block auction, these minority companies will be precluded from meaningful participation in PCS, in contravention of Congress's mandate that the Commission ensure that minority-owned businesses "are not in any way excluded from the competitive bidding process."<sup>14/</sup>

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113/ See infra at Section V.

14/ H.R. Rep. No. 111 at 255.

Based on the auction structure established by the Commission, which to a large extent has already been implemented, the C Block auction is the only remaining broadband auction for 30 MHz licenses in which minorities can participate. Most minority-owned businesses, knowing that they could not effectively compete with the well-financed coalitions of the largest telephone and cable companies in the world, did not even attempt to bid in the A and B Block auction. Indeed, the Commission has conceded that the auction process itself makes it more difficult for minority-owned businesses to obtain spectrum licenses.<sup>15/</sup> Thus, most minority-owned businesses looked to the C Block auction, the last auction for 30 Mhz blocks of spectrum, as their only realistic means of entering the PCS market and competing with both cellular and A and B Block licensees. Now, however, if the Commission were to eliminate the minority-owned business exception to the affiliation rules, some minority-owned businesses would be barred from the C Block auction and, because they have missed the A and B Block auction in reliance on the Commission's auction structure, would permanently be denied an opportunity to bid to hold 30 MHz PCS licenses.<sup>16/</sup> This result

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15/ See Fifth Report and Order at 5537, ¶ 10 ("[I]t should be noted that although auctions have many beneficial aspects, they threaten to erect another barrier to participation by . . . businesses owned by minorities . . . by raising the cost of entry into spectrum-based services.").

16/ Cf. Affidavit of Robert L. Johnson, dated July 7, 1995 ("Johnson Affidavit"), attached hereto as Exhibit 1, at ¶ 5.

would be in direct conflict with both Congress's directive and the Commission's stated goals.

A. BHI Has Relied on the Commission's C Block Auction Rules in Making Its Plans to Enter the PCS Market.

BHI has been making plans to participate in the PCS C Block auction since the passage of the Budget Act in 1993. BHI has been actively involved in the Commission's rule makings since that time, and has devoted considerable time and resources to finding a strategic partner in anticipation of active participation in the C Block auction. For example, the President of BHI and other senior executives have personally met with potential strategic investors and financiers, some of whom were interested in partnering with BHI because of both BHI's established leadership in the telecommunications industry and the measures adopted by the Commission to remove traditional barriers to minority investment. In reliance on the minority business exception to the affiliation rules, BHI was able to reach a tentative agreement with a major investor to bid jointly in the C Block auction. Now, however, if the Commission adopts its proposed rules and eliminates the minority-owned business exception to the affiliation rules, BHI and other similarly situated minority-owned businesses will be unable to participate in the PCS C Block auction. Having justifiably relied on the current rules in arranging corporate affairs and negotiating investments and financial arrangements, BHI now faces the possibility of being barred from bidding to compete in the most

significant development in the area of telecommunications in the modern era. Further, BHI's investment of time and money in preparing for the C Block auction cannot be used for any other purpose because the C Block is the last block of 30 MHz PCS spectrum to be auctioned.

If the Commission eliminates the exception to the affiliation rules and holds the C Block auction without addressing the specific capital formation problems that the minority-owned business exception was designed to address, it will be acting contrary to Congress' mandate and the Commission's record in this proceeding. Such action would be arbitrary and capricious and would subject all licenses won at the C Block auction to judicial review. As set forth below, the Commission can avoid such an arbitrary result either by retaining its current auction rules or by structuring its revised rules so that BHI and other similarly situated potential bidders are not denied the opportunity to participate in the C Block auction.

**B. Detrimental Reliance Supports Retaining the Minority-Owned Business Exception to the Affiliation Rules.**

Public reliance on government rules militates in favor of retaining these rules. Thus, while the Adarand Court found that the public had not significantly relied on the intermediate level of scrutiny to which race-based preferences had been subjected under prior law, the Court recognized that "detrimental" reliance is a factor to consider when the courts propose changing the law. Adarand, 63 U.S.L.W. at 4532.

Similarly, the Commission cannot simply ignore the fact that BHI and other similarly situated businesses have relied on the current C Block auction rules in formulating elaborate business plans.<sup>17/</sup> Because participation in the C Block auction represents a unique opportunity to enter the PCS market, and because minority businesses have relied on the Commission's current rules that allow them to participate in the auction, equity demands that BHI and those similarly situated be permitted to participate.<sup>18/</sup>

Allowing BHI to participate in the auction by retaining the current minority-owned business exception to the affiliation rules would not subject the auction to challenge under Adarand because the Commission would only be responding to a unique situation in which a very limited group of minority-owned entities had justifiably relied on Commission rules. The Commission would not be enacting any minority preference program of long-standing duration. Indeed, it would not be enacting a

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<sup>17/</sup> BHI understands that the number of similarly situated parties is small.

<sup>18/</sup> In the alternative, BHI respectfully requests that if the Commission adopts its proposed new rules, the Commission waive its rules, including those at 47 C.F.R. § 24.709, to the extent necessary to allow BHI to participate in the C Block auction. See 47 C.F.R. § 1.3 (the Commission may waive its rules upon a showing of good cause). 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).

minority preference program at all -- it would only be allowing minorities to participate in the C Block auction with opportunities approaching those available to non-minorities who do not face discrimination.

IV. Alternatively, the Commission Should Retain the Exception to the Affiliation Rules, Modified Either To Narrow Further Its Application or To Render It Race Neutral.

As demonstrated above, elimination of the minority-owned business exception to the affiliation rules would result in the exclusion of BHI and other similarly situated minority businesses from participation in the C Block auctions. Because this result would be in direct conflict with the Commission's Congressional mandate to ensure that no minorities are excluded from participation, and would result in irreparable injury to BHI as a result of its reliance on the auction structure adopted by the Commission, the exception to the affiliation rules for minority-owned businesses should be retained. Alternatively, the exclusionary effect created by the wholesale elimination of the exception can be avoided by retaining the exception but modifying it to restrict its availability to minority-owned businesses meeting stricter revenue and asset requirements, thus narrowing its application. A similar result also can be achieved by adopting the revised version of the exception identified above with the further modification that it would be available to all potential bidders regardless of race. In either case, the arbitrary results of the proposed elimination of the exception

would be avoided, thus reducing the risk of delay in the auction process as a result of judicial challenges to the Commission's actions.

A. The Commission Should Adopt a Modified Version of the Minority-Owned Business Exception That Would Restrict Its Application.

To address the impermissible exclusion of qualified minorities caused by elimination of the minority-owned business exception to the affiliation rules and any perceived problems under Adarand resulting from retention of the present exception, the Commission need only modify slightly its present affiliation and attribution rules. Specifically, the minority-owned business exception to the affiliation rules could be retained but modified to provide that the exception is available only when the revenues and assets of each of the affiliates of minorities in a control group separately satisfies the entrepreneur block financial caps for gross revenues and total assets. Thus, this modified affiliation rule would not require the aggregation of the revenues and assets of the affiliate companies of minorities in a control group in making the entrepreneur block and small business eligibility determinations so long as each affiliate individually qualified to bid in the entrepreneur block, e.g., each affiliate had gross revenues of less than \$125 million for the past two years and less than \$500 million in total assets as of the short-form filing date. If any one of the affiliates had revenues or held assets in excess of the entrepreneur block financial limits,

the minority-owned PCS applicant would be prohibited from participating in the C Block auctions.

This modified affiliation rule would be fully consistent with the Commission's policy objectives; the rule would aggregate and attribute the revenues and assets of entities controlled by members of a control group of a C Block applicant only if the affiliates themselves are large.<sup>19/</sup> In fact, the Commission has already adopted a similar rule for small business consortia. Under the Commission's rules, small businesses can unite and participate in the C Block auctions as a single entity, even if their combined revenues and assets exceed the small business and entrepreneur block financial limits, so long as each member of the consortium qualifies as a small business.<sup>20/</sup>

In the small business context, each individual member of the consortium has a direct interest in committing all available resources to the PCS applicant.<sup>21/</sup> Affiliates, however, do not, in most cases, hold a direct financial interest

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<sup>19/</sup> Like the present rule, the modified rule would continue to exclude the revenues and assets of affiliates regardless of the basis of the affiliation. For example, an affiliation created through common management would not be considered in determining compliance with the entrepreneur or small business financial caps if the affiliation arose from a member of the control group's directorship of another entity, so long as the affiliate satisfied the financial eligibility requirements of the entrepreneur block.

<sup>20/</sup> See 47 C.F.R. § 24.709(b).

<sup>21/</sup> Under the Commission's rules, small businesses are defined as entities that have average annual gross revenues for the preceding three years of not more than \$40 million. 47 C.F.R. § 24.720(b)(1).

in the applicant and therefore would not be obliged or motivated to provide the same type of financial support available to applicants owned by members of a small business consortium. Accordingly, this modified rule, would address the need for greater access to capital by minority-owned businesses while creating less disadvantage for other bidders in the auction than the current small business consortium rule.<sup>22/</sup>

Further support for this modified affiliation rule is found in the Commission's tentative conclusion to retain the exception to the affiliation rules for applicants associated with Indian tribes and Alaska Regional or Village Corporations.<sup>23/</sup> When it first conferred the affiliation exception on persons associated with Indian tribes and Alaska Native Corporations, the Commission identified the need to overcome historic and pervasive barriers faced by all minorities in the telecommunications industry as one of its primary justifications for the exception.<sup>24/</sup> Thus, adopting the proposed modified exception rule results in a consistent Commission policy that no minority

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<sup>22/</sup> Indeed, if this minimal accommodation of retaining a modified version of the rule is not made, the proposed competitive bidding rules will have the perverse effect of permitting a non-minority small business consortium, composed of five \$39 million companies, to participate in the C Block auctions and receive the maximum benefits available to entrepreneur block bidders, while totally excluding a minority individual's participation in the same auction solely because of his/her disqualifying affiliations.

<sup>23/</sup> Further Notice at ¶¶ 17, 20.

<sup>24/</sup> Order on Reconsideration, PP Docket No. 93-253, FCC 94-217, ¶ 6 (adopted and released Aug. 15, 1994).

group, Native American or African American, be in any way excluded from participating in the auction process.<sup>25/</sup>

Essentially the same result can be achieved through an alternative modification of the minority-owned business exception to the affiliation rules under which the revenues and assets of affiliates of minorities in a PCS applicant's control group would be excluded if the average revenues of the affiliates over the past two years fall below the entrepreneur block revenue cap.<sup>26/</sup> For example, if a minority member of the applicant's control group has two affiliates that had gross revenues in the prior two years of \$100 million and \$130 million, respectively, the affiliates' revenues would not be aggregated for purposes of determining compliance with the entrepreneur block or small business caps. The Commission would look to their average revenue over the preceding two years of \$115 million instead.<sup>27/</sup> This option has the benefits of: (i) aggregating the revenues and assets of affiliates only when the affiliates are "large" (ii) preserving the affiliation exclusion for the use of minority applicants and (iii) providing for the limited growth of small

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**25/** Absent such relief, the Commission's proposed singling out of Indian tribes and Alaska Regional or Village Corporations for special treatment runs afoul of the Equal Protection Clause of the U.S. Constitution.

**26/** The \$500 million total assets limitation would remain unchanged.

**27/** Again, the Commission has previously adopted this averaging method in determining whether a PCS applicant is a "small business." See 47 C.F.R. § 24.720(b)(1).

companies that may only recently have become successful (to the extent their current revenues exceed \$125 million).<sup>28/</sup>

- B. Alternatively, the Commission Should Adopt the Revised Version of the Minority-Owned Business Exception Further Modified To Make It Race Neutral.

An alternative race-neutral means of addressing the impermissible exclusion of certain qualified minorities caused by elimination of the minority-owned business exception also is available. Specifically, the Commission can adopt the revised version of the exception described above with the further modification that it would no longer apply only to minorities.

Pursuant to this modified rule, the Commission would not require the aggregation of the revenues and assets of an applicant's affiliated companies in making the entrepreneur block and small business eligibility determinations so long as each affiliate individually qualified to bid in the entrepreneur block, e.g., each affiliate had gross revenues of less than \$125 million for the past two years and holds less than \$500 million in total assets as of the short-form filing date. If any one of the affiliates earned revenues or holds assets in excess of the entrepreneur block financial limits, the PCS applicant would be

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<sup>28/</sup> The availability of the affiliation exception could be further limited to bidding on the top 100 most populous Basic Trading Areas ("BTAs"). Because these markets are likely to command the highest prices at auction, the need for capital is particularly acute. See generally Fifth Memorandum Opinion and Order, 10 FCC Rcd at 459 (recognizing that the top markets will be the most competitive wireless communications markets in the country and that substantial capital expenditures will be required to compete in these markets).

prohibited from participating in the C Block auction. Consistent with the Commission's policy objectives, this rule would aggregate and attribute the revenues and assets of affiliates of members of the control group of a C Block applicant only if the affiliates themselves are large.<sup>29/</sup>

In another available approach, the alternative described above in which the revenues and assets of affiliates of minorities in PCS applicant's control group would be excluded only if the average revenues of the affiliates over the past two years fall below the entrepreneur block revenue cap could be modified to make it applicable to all members of a PCS applicant control group regardless of race.<sup>30/</sup> Again, this option has the benefit of: (i) aggregating the revenues and assets of affiliates only when the affiliates are "large," (ii) preserving a modified version of the affiliation exception which will allow the otherwise excluded minority applicants to participate in the C Block auction and (iii) providing for the limited growth of small companies that may only recently have become successful (to the extent their current revenues exceed \$125 million).

These modified versions of the exception to the affiliation rules would promote the participation of minorities in the PCS auctions in the absence of race-based preferences.

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<sup>29/</sup> Like the prior proposal in Section V. A., above, the rule would continue to exclude the revenues and assets of affiliates, regardless of the basis of the affiliation.

<sup>30/</sup> The \$500 million total assets requirement would remain unchanged.

Indeed, these proposed rule modifications would provide all entities that are under-represented in the telecommunications industry with similar opportunities to participate successfully in the PCS auctions without resort to race or gender-based preferences. The rules would encourage the diverse participation of business men and women who have historically built successful companies and have acquired the expertise necessary to create and manage a successful PCS business. At the same time, the size-based limitations incorporated in the affiliate exclusion rule would prevent individuals who control large companies from establishing new corporations for the sole purpose of participating in the competitive bidding process.

Adoption of these modified rules also would achieve the Commission's related policy objectives set forth in the Further Notice. The business plans, strategic alliances and financial arrangements of prospective minority applicants would be preserved. Perhaps most importantly, experienced and successful minority-owned individuals, who justifiably relied on the affiliation exclusion, would not be barred from participating in the C Block auction altogether. Accordingly, the modified affiliation exception would balance the need to proceed with the C Block auction with the apparent perceived need to modify the rules to satisfy Adarand, while meeting Congress's directive to ensure that minorities are not in any way excluded from the PCS auctions.