## V. Notwithstanding the Foregoing Proposals, in Light of Its Congressional Mandate, the Commission Should Review Its Preference Rules and Retain Them Because They Comply With the Adarand Strict Scrutiny Standard.

The Commission has properly refused to assume that any aspect of its designated entity structure is now unconstitutional simply because the regulatory scheme affords preferences based on race. In its Further Notice, the Commission emphasizes that it has not determined that race or gender-based preferences are inappropriate for spectrum auctions, and the Commission denies that the current C Block auction rules are unconstitutional under Adarand.[31/] As the Commission rightly points out, all that Adarand requires is that the auction rules be evaluated under a stricter constitutional standard than before.[32/] The Commission acknowledges that the "current record for the C [B]lock auction is strong. . . ."[33/] If further fact-finding is required to meet the Adarand standard, the Commission can re-open the record to obtain the additional facts the Commission admits are available.[34/] The Commission cannot, however, ignore the record

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31/ Further Notice at ¶ 11.

32/ Id.

33/ Id. at ¶ 8.

34/ Id. at ¶ 8.

of its earlier findings and its Congressional mandate in a futile attempt to avoid potential litigation.[35]

The Commission is not free to jettison all race-based preferences from its competitive bidding rules. Rather, as the Department of Justice has instructed, the Commission is compelled to review its current preference rules and to make a reasoned determination of whether they meet the strict scrutiny standard set forth in Adarand.

A. The Department of Justice's Memorandum to General Counsels Mandates Careful Review of Current Rules.

The Commission's proposal to rescind all race-based preferences contravenes the guidelines recently issued by the Department of Justice for federal policy makers charged with implementing affirmative action plans. On June 28, 1995 -- five days after the Commission issued its Further Notice -- the Office of Legal Counsel of the Department of Justice issued a memorandum to all general counsels within the Office of the Executive and executive branch agencies that analyzed the implications of Adarand for federal affirmative action programs.[36] The DOJ Memorandum provides guidance to federal agencies in determining whether specific race-based programs meet the strict scrutiny

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35/ It is a basic tenet of administrative law that an agency must consider its whole record when making a decision. See, e.g., Universal Camera Corp. v. National Labor Relations Bd., 340 U.S. 474 (1951).

36/ See Memo from W. Dellinger (Asst. Attorney General) to General Counsels, dated June 28, 1995 ("DOJ Memorandum" or "Memorandum").

test required by Adarand.[37] Contrary to the Commission's proposal in the Further Notice, the Memorandum concludes that "[n]o affirmative action program should be suspended prior to such an evaluation." DOJ Memorandum at 34.

As counsel to the President and the Executive agencies,[38] the Office of Legal Counsel has provided direct, authoritative guidance on the very constitutional questions that the Commission is considering: "Adarand makes it necessary to evaluate federal programs that use race or ethnicity as a basis for decision making to determine if they comport with the strict scrutiny standard. No affirmative action program should be suspended prior to such an evaluation." DOJ Memorandum at 34. Given that the DOJ Memorandum specifically instructs federal agencies not to abandon their affirmative action programs in reaction to the Adarand decision, the Commission should not

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37/ The Memorandum provides a detailed analysis of the Adarand opinion and other Supreme Court and lower court opinions on affirmative action. A three-page questionnaire developed by the Office of Legal Counsel for use in examining the goals and logistics of any affirmative action plan also is appended to the Memorandum to assist agencies in reviewing specific programs. See Appendix to DOJ Memorandum at 35-37. The questionnaire distills from the case law several validating criteria that will assist bodies like the Commission in crafting and defending race-based affirmative action plans.

38/ Among other duties, the Office of Legal Counsel delivers formal opinions of the Attorney General, provides informal legal advice to various agencies in the federal government, and assists the Attorney General in the performance of her function as legal advisor to the President. See 28 C.F.R. § 0.25(a). The Office of Legal Counsel also is responsible for providing opinions to the heads of various organizational units within the Office of the Executive and the Executive Branch. Id. § 0.25(c).

revoke wholesale the few preferences for minority-owned businesses it has adopted, thereby interfering with the ability of minority-owned businesses to participate in the PCS auctions. As the Memorandum points out, an agency is particularly compelled to undertake a reasoned review of its affirmative action programs where, as here, an Act of Congress expressly mandates "the use of racial ... criteria as a basis for decisionmaking." Appendix to DOJ Memorandum at 35. Failing to conduct the thorough review of the rules urged by the DOJ Memorandum would be a dereliction of the Commission's duty to carry out the mandates of Congress. BHI is confident that such an evaluation, as demonstrated in Section III of these comments, will compel the conclusion that the existing rules pass constitutional muster.

B. Any Interest in Holding the Auction Immediately Does Not Support a Decision to Rescind the Rules Prior to Their Review Under the DOJ Memorandum.

Throughout the Further Notice, the Commission emphasizes its goal of initiating the C Block auctions in the near term. The Commission repeatedly states that its proposals will avoid delay in assigning entrepreneur block licenses and thereby will constitute the best means of providing opportunities for the participation of minorities in the competitive bidding process.[39/] The Commission readily concedes that the purpose for the expedited rulemaking and its decision to eliminate the

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39/ See, e.g., Further Notice at ¶ 11.

race-based preferences from its rules is to avoid subsequent judicial challenge that may delay the licensing of PCS.

Although BHI recognizes the importance of minimizing the headstart already enjoyed by incumbent cellular providers and the A and B Block PCS licensees, the Commission cannot abandon its Congressional mandate in the rush to assign the C Block licenses. The rules the commission proposes fail to provide minorities with meaningful opportunities to participate in the competitive bidding process and indeed dilute the remedial measures the Commission found necessary to ensure minority participation. The Commission is obligated by its continuing statutory obligation to consider the impact of Adarand on its designated entity rules and to determine whether the rules can remain intact or must be modified to satisfy relevant Constitutional standards. Policy concerns about rapid PCS licensing cannot override the Commission's statutory mandate.

Further, because the time for challenging the Commission's current rules has passed, the C Block auction will not be delayed by a legal challenge if the Commission simply holds the auction on August 29 under its current rules. Any challenge to the current rules would have to wait until the auction was complete and the licenses awarded. Then, any challenge to the minority preference rules made pursuant to a Petition to Deny would be on an individual license basis. Moreover, by that juncture additional support will likely have been marshalled to demonstrate that the Commission's preference

rules meet the requirements of strict scrutiny and are narrowly tailored to provide minorities with the opportunity to participate in the competitive bidding process. If, however, the Commission changes its rules now, it opens the C Block auction process to a new round of Petitions for Reconsideration, Petitions for Review, and potentially another judicial stay while these issues are being resolved.

## VI. The Race-Based Preferences Available Under the Present PCS Competitive Bidding Rules Satisfy the Strict Scrutiny Test of Adarand and Accomplish Congress's and the Commission's Goal of Remedying Discrimination Against Minorities

### A. The Supreme Court's Ruling in Adarand Does Not Prohibit the Adoption of Race-Based Preferences.

It is important to distinguish between what the Adarand Court actually announced and what it declined to announce. In vacating and remanding the case to the Court of Appeals, the Supreme Court announced that the lower courts had applied the wrong level of scrutiny[40/] to an affirmative action program implemented by the Department of Transportation ("DOT program").[41/] The Court stated that henceforth federal

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40/ The district court and the Tenth Circuit upheld the federal affirmative action program under the standard articulated in Fullilove v. Klutznick, 448 U.S. 448 (1980), and Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). See Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240, 243-44 (D. Colo. 1992), aff'd sub nom. Adarand v. Pena, 16 F.3d 1537, 1544-45 (10th Cir. 1994).

41/ Under the DOT program, prime contractors receive additional compensation from the government when they subcontract with (continued...)

affirmative action programs that employ racial criteria as a basis for decision making are subject to strict scrutiny. Under this test, racial classifications imposed by the government, whether for benign or malignant purposes, must (i) serve a compelling governmental interest and (ii) be narrowly tailored to achieve that interest. Id. at 4530. The Court in Adarand, however, did not suggest that the race and gender-conscious PCS rules would fail under strict scrutiny. In fact, the Adarand Court declined to invalidate even the DOT program at issue there and instead remanded the case to the Tenth Circuit to evaluate the objectives and means adopted by the DOT under strict scrutiny. Id. at 4533. By contrast, the Commission in its Further Notice proposes to forego any reasoned evaluation of the C Block preference rules, purportedly, for the sake of avoiding litigation. The Commission's proposal is made in the face of its apparent belief that its C Block preferences are constitutional: "[W]e do not concede that our C Block auction rules themselves are unconstitutional in the wake of Adarand."[42/]

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41/ (...continued)
companies certified as small businesses controlled by "socially and economically disadvantaged" individuals. Minorities and women are presumed under the program to be socially and economically disadvantaged. Adarand, 63 U.S.L.W. at 4524. This presumption, however, may be rebutted if a third party presents evidence to the certifying authority that a subcontractor is not socially or economically disadvantaged. Id. at 4525.

42/ Further Notice at ¶ 11.

B. The Race-Based Preferences Contained in the PCS Rules Serve a Compelling Governmental Interest.

To survive strict scrutiny, racial classifications enacted by the government must serve a compelling governmental interest.[43/] The Supreme Court consistently has recognized that creating racial classifications for the purpose of remedying current discrimination or the lingering effects of past discrimination serves such an interest.[44/] For instance, where the government identifies its own discriminatory practices or the discriminatory practices of private actors within its jurisdiction, the enactment of remedial legislation is wholly permissible.[45/] Thus, while Congress is free to enact racial classifications to remedy the persistent impediments faced by minorities in the telecommunications industry, as it has done in

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43/ Adarand, 63 U.S.L.W. at 6530.

44/ Id. at 4533 ("When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases."); United States v. Paradise, 480 U.S. 149, 185 (1987) (upholding the use of race-based preferences in the hiring and promotion of black state troopers as serving a compelling governmental interest to correct historic discrimination against blacks within the Department of Public Safety); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) ("We have recognized, however, that in order to remedy the effects of prior discrimination, it may be necessary to take race into account.").

45/ Croson, 488 U.S. at 487-88 (discussing Congress's plenary powers under Section 5 of the Fourteenth Amendment to remedy the lingering effects of state-sponsored discrimination); Fullilove v. Klutznick, 448 U.S. 448, 475 (1980) (discussing Congress's power under the Commerce Clause and the Spending Powers to remedy private discrimination in the construction and procurement industries).

Section 309(j) of the Budget Act, strict scrutiny requires the government to identify the source of the discrimination it seeks to remedy.[46]

In the Budget Act of 1993, Congress sought to deal with the effects of discrimination against minorities and women by the private lending markets. Knowing that these effects would be exacerbated by the adoption of auctions as the means of disseminating licenses, Congress directed the Commission to develop PCS rules to ensure that licenses would nevertheless be disseminated to women and minorities. Congress's mandate to the Commission was 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."[47]

Just one year earlier, Congress had passed the Small Business Credit and Business Opportunity Enhancement Act of 1992, § 331(a)(3) Pub. L. 102-366, Sept. 4, 1992, in which it specifically found that, because of their race and gender, minorities and women face extraordinary obstacles to accessing

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46/ See, e.g., Croson, 488 U.S. at 504 (holding that a governmental body "must identify that discrimination, public or private, with some specificity" before enacting race-conscious measures); Wygant, 476 U.S. at 277 (invalidating the school board's voluntary, remedial affirmative action policy that protected black teachers from lay offs because the board failed to offer "sufficient evidence to justify the conclusion that there has been prior discrimination."); cf. Hammon v. Barry, 813 F.2d 412, 426 (D.C. Cir. 1987) (holding that the District of Columbia failed "beyond dispute" to establish a factual predicate for its affirmative action program for hiring and promotions in the city's fire department).

47/ H.R. Rep. No. 111, 1993, U.S.C.A.A.N. at 255.

venture capital.[48] Subsequent to the passage of the Budget Act, the Finance and Urban Development Subcommittee of the House Small Business Committee held hearings that yielded substantial evidence of the racial discrimination that inhibits minority opportunity in the telecommunications market.[49] And, in the course of developing its PCS rules, the Commission assembled voluminous evidence of racial discrimination in the private lending markets.[50]

Perhaps the most telling evidence that minorities are likely to be left behind in the PCS revolution because of discrimination in the capital markets may be seen in the results

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48/ Small Business Credit and Business Opportunity Enhancement Act of 1992, §§ 112(4), 331(a)(4), Pub. L. 102-366.

As explained in the DOJ Memorandum, at 32-33, Congress need not undertake new studies or hold new hearings to create a new legislative record each time it takes action to remedy discrimination in some area of the national economy. Rather, Congress may rely on its prior findings of discrimination to support affirmative action programs. Congress's recent findings of pervasive discrimination encountered by women and minorities in obtaining venture capital provide abundant support for the PCS rules.

49/ See Discrimination in Telecommunications; Hearing of the Minority Enterprise, Finance and Urban Development Subcommittee of the House Small Business Committee, 104th Cong., 1st Session (May 20, 1994) (testimony of Assistant Secretary of Commerce Larry Irvy and FCC Chairman Reed E. Hundt).

50/ Small Business Advisory to the FCC Regarding GEN Docket No. 90-314, Sept. 15, 1993; Fifth Report and Order, 9 FCC Rcd at 5537, ¶ 10 ("The record clearly demonstrates that the primary impediment to participation by designated entities is lack of access to capital. . . . In this regard, it should be noted that although auctions may 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.").

of the narrowband auctions in which minorities had the opportunity to obtain PCS licenses using bidding credits. In the nationwide narrowband auctions, despite the availability of a 25% bidding credit on certain licenses, not a single minority-owned firm was awarded a PCS license.[51/] The Commission felt compelled to increase the bidding credit to 40% to ensure that minorities and women would have a meaningful opportunity to participate in the subsequent narrowband regional auctions.[52/]

Congress' findings of crippling discrimination in the capital markets are further entitled to considerable deference.[53/] On the present record, there is ample evidence of past and present discrimination to support the race-based preferences adopted by the Commission in the C Block auction rules.

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51/ See "Bidding Battle for Airwaves Goes Sky High," Washington Post, A1, July 30, 1994. See also Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Narrowband PCS and Amendment of the Commission's Rules to Establish New Narrowband Personal Communication Services, 10 FCC Rcd 175, 178 (1994) at ¶ 4 ("Third Memorandum").

52/ Further Notice, Separate Statement of Commissioner Andrew C. Barrett, at 2 (released June 27, 1995) (hereinafter "Separate Statement"); Third Memorandum at 201, ¶ 58.

53/ Adarand, 63 U.S.L.W. at 4531 (findings of discrimination made by Congress and administrative agencies are entitled to considerable deference); Croson, 497 U.S. at 490 (O'Connor, J., plurality) (Congress may identify and address society-wide discrimination in ways that states and localities may not); Fullilove, 448 U.S. at 502-03 (Powell, J.) (Congress may paint with a broad brush in the areas of social and economic policy and is free to act upon institutional experience gained in related fields of legislation).

### C. The Race-Based Preferences in the Rules Are Narrowly Tailored to Remedy the Effects of Discrimination Against Minority-Owned Businesses.

The "narrowly-tailored" prong of the strict scrutiny test has been described as requiring an exact fit between the means selected and the goal sought to be achieved through racial classification.[54/] It further has been interpreted as requiring that the goal sought to be achieved through race-based measures could not be achieved through less restrictive alternatives.[55/] In the context of the four race-based preferences continued in the C Block rules, the narrow-tailoring requirement is met because the scope of the remedy neither exceeds nor falls short of curing the identified harm.[56/]

There are four race-based preferences continued in the present C Block auction rules: (1) the 50.1/49.9 percent "control group" option; (2) the minority-owned business exception to the affiliation rules; (3) a lower interest rate and better terms on installment payments; and (4) enhanced bidding credits.[57/] Each one of these preferences is designed to achieve Congress's and the Commission's goal of remedying the

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54/ Adarand, 63 U.S.L.W. at 4530; Wygant, 476 U.S. at 279-80.

55/ Croson, 488 U.S. at 507; Wygant, 476 U.S. at 279 n.6.

56/ Commissioner Andrew C. Barrett echoed this sentiment in his Separate Statement that followed the Further Notice: "The rules that have been crafted for the designated entity community went to the heart of many of the problems that have left minorities, women and small businesses on the sidelines in the thriving telecommunications marketplace." Separate Statement at 1.

57/ Further Notice at ¶ 6.

specific, documented barriers encountered by minority-owned businesses in entering the telecommunications industry.

In the Fifth Report and Order and the Fifth Memorandum Opinion and Order, the Commission documented specific policy rationales for each of its preferences. First, the Commission designed the 50.1/49.9 percent "control group" option to permit minority applicants to have a single large investor that can hold up to 25% of the voting interests and up to 49.9% of the equity interests in the applicant.[58/] The Commission found that this option would allow minorities to attract the capital necessary to permit them to enter the telecommunications industry from which minorities have historically been excluded.[59/]

Second, the Commission designed the minority-owned business exception to the affiliation rules to allow successful minorities -- whose access to capital is also impaired -- to be members of a PCS applicant's control group, thus bringing their management skills and financial resources to bear on the applicant's PCS operations. The Commission found that by making such an exception it was directly addressing the past and present discrimination minorities have encountered and are encountering in accessing traditional sources of capital:

> To raise capital for a new business venture . . . minorities need the ability to draw upon the financial strength and business experience of successful

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58/ See Fifth Memorandum Opinion and Order, 10 FCC Rcd at 452-53, ¶ 89.

59/ See Fifth Report and Order, 9 FCC Rcd at 5539, ¶ 14.

> minorities and minority-owned businesses within their own communities . . . . Moreover, this exception permits minority applicants to pool their resources with other minority-owned businesses and draw on the expertise of those who have faced similar barriers to raising capital in the past. We therefore conclude that further tailoring of our affiliation rules to the specific capital formation problems of minorities is necessary to avoid eliminating a traditional sources of capital for minority businesses . . . the minority community itself.[60]

Third, the Commission found that installment payments generally, and installment payments at a lower interest rate in particular, were indispensable to the full participation of small businesses owned by minorities in the C Block auctions.[61] The Commission extended the lower interest rate preference specifically to small businesses owned by minorities to assist them in overcoming obstacles not encountered by other firms. Indeed, the Commission described the lower interest rate preference as "narrowly tailored to the needs of various designated entities, as reflected in the record of this proceeding."[62]

Finally, the Commission concluded that bidding credits were "necessary to ensure that . . . minority-owned businesses have opportunities to participate in the provision of [spectrum-based] services."[63] The Commission stated that the bidding

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60/ See Fifth Memorandum Opinion and Order, 10 FCC Rcd at 425-26, ¶¶ 40-41 (emphasis added).

61/ Fifth Report and Order, 9 FCC Rcd at 5591-94, ¶¶ 135-40.

62/ Id. at ¶ 140.

63/ Id. at ¶ 130.

credit would function as a discount on the bid price a minority-owned company would actually have to pay to obtain a license and, thus, would "address directly the financing obstacles encountered by [minorities]."[64] In fact, Rep. Mfume, Chairman of the Minority Enterprise, Finance and Urban Development Subcommittee of the House Small Business Committee, stated during a Congressional hearing that discrimination facing minority entrepreneurs is so severe that a bidding credit as high as 72 percent might be needed to secure a meaningful opportunity for minority participation in the PCS auctions.[65]

The narrowly-tailored component of strict scrutiny requires policy makers to examine race-neutral alternatives to race-specific measures. However, in light of the well-documented, discriminatory obstacles impeding access to capital by minorities, race-neutral alternatives would serve only to dilute the remedial force of the existing C Block rules. The net effect of extending the race-based preferences to all small businesses bidding in the C Block auction is to grant a negligible remedy to minorities that merely reinforces the lingering effects of discrimination in the marketplace.

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64/ Id. at ¶ 131 (emphasis added).

65/ See Federal News Service, May 20, 1994, Comments of Congressman Mfume, Before the Finance and Urban Development Subcomm. of the House Small Business Comm. Cf. Paradise, 480 U.S. at 182 (the government conceded that a 3:1 hiring ratio in favor of black applicants would have been permissible to correct the stark racial imbalance within the ranks of the Department of Public Safety as a result of persistent racial discrimination).

Large investors and minority-owned companies have already formed partnerings in reliance on the existing rules.[66] The proposed rules threaten to unravel those partnerings by removing the preferences available to minority-owned companies such as BHI. Without the value-added benefit of heightened bidding credits, for example, large investors would have no more incentive to invest with minority-owned companies than they did prior to commencement of this rulemaking proceeding. Because auction results to date demonstrate that large investors need more, not less, incentives to invest with minority-owned companies, this race-neutral alternative will not satisfy the Commission's statutory mandate. Race-neutral alternatives simply cannot achieve what permissible race-conscious methods can.

The present rules also are sufficiently flexible to pass strict scrutiny. For example, the Commission's rules do not establish rigid racial quotas or specific numerical goals for auction outcomes.[67] They do not guarantee any minority applicant a license. The rules merely provide minorities with enhanced opportunity to compete in the PCS auction process. And the C Block rules are of naturally-limited duration as the rules will apply only to the current PCS auction.

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66/ See Further Notice at ¶ 10. ("We recognize that many of the C Block applicants, including minority- and women-owned businesses, as well as small businesses, have already attracted capital and formed business relationships in anticipation of the C block auction.")

67/ Federal News Serv. (testimony of FCC Chairman Reed Hundt).

Nothing in the present rules impermissibly burdens non-minority PCS license applicants. The PCS preference rules do not operate as a bar to non-minority participation or success in the auctions.[68] In reality, the race-based "preferences" do not operate as preferences at all; they do not guarantee minorities success in the auctions, but merely serve to level the PCS playing field in a way that comports with a presumptively valid enactment of Congress, thus permitting qualified minority applicants to participate in the auctions despite well-documented discrimination in the capital markets. The burden imposed on non-minorities under the rules is at worst incidental and will be sufficiently diffused among the competitors and the public.

## VII. Conclusion

In light of the foregoing, BHI respectfully requests that the Commission retain the C Block auction rules in their present form. Congress has given the Commission an express mandate to ensure that minority-owned companies, like BHI, are not in any way excluded from the PCS competitive-bidding process.

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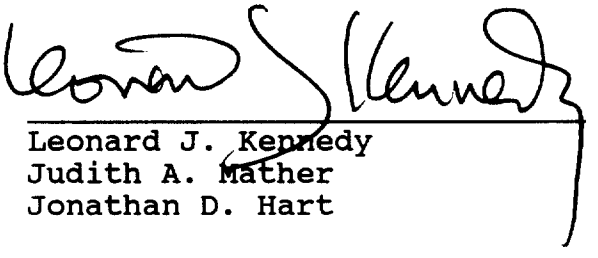
68/ In this respect, the PCS rules are unlike affirmative action programs struck down in other contexts. See Wygant, 476 U.S. at 283-84 (invalidating an affirmative action plan that laid off more tenured non-minority teachers for the purpose of providing minority "role model" teachers to the student body); Croson, 488 U.S. at 510-11 (invalidating municipal affirmative action program that imposed a 30% set aside for minority contractors); Hammon, 813 F.2d 431-32 (invalidating affirmative action program that imposed a 60% quota for hiring black fire fighters).

The existing C Block auction rules accomplish exactly this purpose in a manner consistent with the Supreme Court's decision in Adarand. As the Commission acknowledges, there is nothing in Adarand that casts doubt on the constitutionality of the present rules.

However, if the Commission is resolved to eliminate the race-based measures of the C Block rules, BHI respectfully requests that the Commission do so in a manner that does not wholly exclude minority-owned companies, like BHI, from participating in the C Block auction. If the existing rules must be changed, BHI believes that the alternatives proposed in these Comments offer the best hope of ensuring the timely commencement of the C Block auction in a manner consistent with the 1993 Budget Act and the Adarand decision.

Respectfully submitted,

BET HOLDINGS, INC.



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July 7, 1995

EXHIBIT 1

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

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

**AFFIDAVIT OF ROBERT L. JOHNSON**

City of Washington )
) ss:
District of Columbia )

I, Robert L. Johnson, being first duly sworn, depose and say as follows:

1. I am providing this affidavit in support of the Comments of BET Holdings, Inc. ("BHI") in the above-referenced proceeding.

2. I am the President and Chief Executive Officer of BHI. I am making this affidavit upon personal knowledge of the facts stated herein.

3. BHI is one of a small number of successful minority-owned communications businesses in the United States. BHI has long been an advocate of government policies designed to diversify control of media interests and to remedy the historic under-representation of minorities in the communications marketplace.

4. As President and Chief Executive Officer, I am responsible for daily executive level decision-making for BHI. For the past two (2) years, I have directed BHI's initiative to enter the emerging wireless telecommunications market through the provision of Personal Communications Services ("PCS").

5. As I considered various alternatives for entry into the PCS market, it was my understanding that the Commission recognized that businesses owned by minorities had historically been excluded from providing spectrum-based services due to lack of access to capital and lending discrimination and that the institution of auctions as a means of disseminating licenses threatened to erect an additional barrier to minority participation by raising the cost of entry into the industry. It was my further understanding that the Commission had designed the C Block auction rules specifically to lessen these barriers to minority participation in the PCS marketplace. After considering the financial resources that would have been required to compete in the A and B Block auctions against coalitions of some of the world's largest and wealthiest telecommunications companies, and after studying the alternatives created by the C Block auction, BHI decided to forego opportunities to form alliances to participate in the A and B block auctions and, in reliance on the rules promulgated by the Commission to encourage minority participation in the C Block auction, elected to concentrate its efforts exclusively on the C Block auction.

6. 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. BHI has informed the Commission of its interest in participating in C Block auction through numerous pleadings BHI has filed in this proceeding.

7. In preparation for the C Block auction, I personally met with several potential investors and financiers in the capital markets, some of whom were interested in partnering with BHI because of both BHI's established leadership in the telecommunications industry and the race-based measures adopted by the Commission to remove traditional barriers to minority investment.

8. In reliance on the minority business exception to the affiliation rules, BHI was able to arrange suitable corporate affairs and form a tentative partnership with a major investor to bid in the C Block auction.

9. The Commission's proposal to eliminate the minority business exception to the affiliation rules will exclude BHI from participation in the C Block auction. Having relied on the continued availability of the C Block auction, BHI is now in the position of being excluded from the C Block auction and will be denied the opportunity to be a major competitor in the PCS market. The C Block auction is the last auction for 30 MHz

blocks of PCS spectrum. I understand that a small number of other minority-owned businesses are similarly situated in that elimination of the minority-owned business exception to the affiliation rules will result in their exclusion from the C Block auction.

Further affiant sayeth not.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the content of the foregoing paper is true.

Robert L. Johnson
President
BET Holdings, Inc.

SWORN AND SUBSCRIBED TO BEFORE
ME this 7th day of July 1995.

Notary Public

My commission expires: KAREN M. AUSTIN
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires January 14, 1998