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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

B & P PCS, INC.'S EMERGENCY REQUEST FOR WAIVER OF THE COMMISSION'S RULES

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SUMMARY

At this critical juncture in the Commission's historic licensing of PCS, B & P requests a waiver of Sections 24.709(a), 24.720(b)(1) and 24.720(f) of the Commission's rules to permit it to participate in the upcoming C Block auction as a small business. The unique circumstances of B & P's proposed participation in the entrepreneur block auction support this requested relief.

Disseminating Licenses Broadly Pursuant to Section 309(j)

Grant of the waiver will facilitate the dissemination of PCS licenses among a wide variety of applicants and will ensure that minorities are not inadvertently excluded from the competitive bidding process. Having recognized that assigning licenses by auction inherently raises an additional barrier to minority ownership of Commission licenses, Congress expressly mandated that the Commission adopt rules that promote minority participation in the auction process. The Commission's recently proposed rule changes violate this mandate by ignoring record evidence demonstrating that minorities have only limited access to capital and face unique barriers to acquiring capital from traditional non-minority sources. More particularly, the proposed rule change to eliminate the minority exception to the affiliation rules will result in the total exclusion of B & P from the C Block auction, contrary to the very purpose of the rules. Thus, grant of B & P's waiver will address the issue of B & P's limited access to capital in light of the proposed

elimination of the minority affiliation exemption rule and will serve the underlying purpose of the C Block rules.

Legal Restrictions on Access to Capital

Grant of the waiver will appropriately recognize that B & P does not have unrestricted access to BHI's revenues and assets, as presumed by the Commission's affiliation rules. Although Robert Johnson holds a controlling interest in BHI, his ability to draw on BHI's resources is limited by the fact that the company is publicly-owned and traded on the New York Stock Exchange.

Justifiable Detrimental Reliance

Grant of the waiver will acknowledge B & P's and Mr. Johnson's justifiable detrimental reliance on prior PCS rules in structuring their PCS business plans, locating financing and negotiating with strategic investors. Assuming that the minority affiliation exemption is eliminated, B & P will be unable to compete in the C Block auction, regardless of the fact that until only three weeks ago it was unquestionably qualified to bid as a small business. The Commission traditionally has favored the granting of waivers to protect persons who justifiably relied on prior rules to their detriment.

Preserving B & P's Business Plans and Strategic Alliances

In the recently released Further Notice, the Commission recognized that the proposed changes in the PCS rules would potentially disrupt the business plans of potential applicants. Granting this waiver will offer B & P a continued opportunity to

play a significant role in the further deployment and development of PCS and will ensure that it remains an attractive partner for strategic investors.

Historic Commitment to Serving the Disadvantaged

Preserving B & P's business plans and strategic alliances will encourage the availability of wireless telecommunications services to those who historically have been unserved by current industry participants. Mr. Johnson has been instrumental in addressing the needs of disadvantaged communities through his involvement with BHI. He will continue to do so through B & P. Encouraging his participation in the C Block auction will further the Commission's goals of providing telecommunications services to under-served urban or rural areas in furtherance of the national policy to provide universal telecommunications service.

Redress Anomalies in the Rules

Grant of the waiver also will ensure that B & P is not excluded from the competitive bidding process while significantly larger entities, facing no barriers to capital, are permitted to bid. Permitting B & P to bid will redress anomalies in the rules that would permit larger companies and wealthy individuals to participate as small businesses while completely preventing B & P from bidding.

Limited Extent and Duration of the Waiver Request

Finally, grant of this waiver request is appropriate because it is limited in nature and is narrowly tailored to

address unique circumstances. Grant of the waiver will only give B & P an opportunity to bid for broadband PCS licenses, without any guarantee of success, and will only apply to B & P's participation in the upcoming C Block auction. Few companies will be able to proffer similar bases for a grant of an identical waiver, particularly in light of the Commission's efforts to preserve the business plans of many of the companies affected by the Commission's proposed rule changes. Moreover, most of the companies that are ineligible to bid in the C Block auction have already participated in the A and B Block auctions or have formed alliances that would permit their participation in the C Block through non-attributable investments.

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B & P PCS, INC.'S EMERGENCY REQUEST
FOR WAIVER OF THE COMMISSION'S RULES

Pursuant to Sections 1.3 and 24.819 of the Commission's Rules, B & P PCS, Inc. ("B & P") requests a waiver of Sections 24.709(a), 24.720(b)(1) and 24.720(f) of the broadband Personal Communications Services ("PCS") rules to permit B & P to participate in the upcoming C Block auction as a small business. In light of the short-from filing deadline for the C Block auction of July 28, 1995, B & P requests that its waiver request be considered on an expedited basis.

I. Background and Summary

B & P is a Delaware corporation formed by Robert L. Johnson on June 16, 1995 to bid in the entrepreneurs' block auction scheduled to commence on August 29, 1995. Mr. Johnson owns 100% of the stock of the applicant. The control group of B & P consists solely of Mr. Johnson, and B & P has no other officers, directors and attributable stockholders. Mr. Johnson

also holds voting control of BET Holdings, Inc. ("BHI"), a media-related company located in Washington, D.C.

Prior to the Supreme Court's determinations in Adarand Contractors, Inc. v. Pena and the issuance of the Commission's Further Notice of Proposed Rulemaking on June 23, 1995, B & P was eligible to bid in the C Block auction as a small business.[1/] The PCS rules specifically provided that the revenues and assets of an affiliate of a minority member of a PCS applicant's control group would not be attributed to the PCS applicant. The exemption was promulgated based on a record confirming that minority-owned firms have only limited access to capital and face unique barriers to acquiring capital from traditional non-minority sources.[2/] Indeed, the Commission determined that, to raise capital for a new business venture, minorities need the ability to draw upon the financial strength and business experience of successful minorities and minority-owned businesses within their own communities.[3/] Accordingly, the revenues and assets of BHI were not attributed to B & P in determining B & P's eligibility to bid in the entrepreneurs' block as a small business.

1/ See Adarand, 63 U.S.L.W. 4523, 4530 (U.S. June 12, 1995); Further Notice of Proposed Rulemaking, PP Docket No. 93-253, GN Docket No. 90-314, GN Docket No. 93-252 (adopted and released June 23, 1995).

2/ See Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 425-26 (1994) ("Fifth Report and Order").

3/ Id.

Three days before the initial short-form filing deadline, however, Adarand announced that a heightened level of scrutiny would be applied to all federal affirmative action programs that employ racial criteria. Specifically, the Supreme Court determined that all race-conscious preferences implemented by the Federal Government must satisfy a strict scrutiny test under which any imposed race classifications must (1) serve a compelling governmental interest and (2) be narrowly tailored to achieve that interest. In response to Adarand, the Commission released the Further Notice on June 23, 1995 proposing to eliminate all race-based preferences from the broadband PCS rules, including the exemption to the affiliation rules available to members of a PCS applicant's control group that are members of a minority group. The proposals were made principally to prevent any further delay in the commencement of the C Block auction based on anticipated legal challenges to the Commission's entrepreneur block rules.

Assuming that the changes proposed by the Commission in the Further Notice are adopted, B & P will be excluded from participating in the C Block auction. Because Mr. Johnson controls BHI and is a member of B & P's control group, BHI's gross revenues will be attributed to B & P in determining its eligibility to participate in the C Block. This unexpected attribution will place B & P over the gross revenue financial cap established for determining eligibility to participate in the

entrepreneurs' block as a small business. See 47 C.F.R. § 24.709(a); 47 C.F.R. § 720(b)(1).

B & P submits this waiver request to permit B & P to participate in the final auction for 30 MHz of PCS spectrum as a small business entrepreneur. The grant of a waiver to B & P is justified because (1) Congress's goal of disseminating licenses broadly will be furthered; (2) B & P and Mr. Johnson face the same barriers to capital that limit the auction participation of all small businesses; (3) B & P and Mr. Johnson justifiably relied on the Commission's rules to their detriment in planning their participation in the C Block auction; (4) B & P's existing business plans, strategic alliances and financial agreements will be preserved; (5) Mr. Johnson historically has operated his businesses to benefit disadvantaged communities; (6) grant of the waiver will redress anomalies in the Commission's broadband PCS rules; and (7) the waiver is limited in nature and is narrowly tailored to address unique circumstances.

II. Waiver Standards

The Commission's rules provide for grant of waivers when: (1) the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and grant of the waiver is otherwise in the public interest; or (2) the unique facts and circumstances of a particular case render application of the rule inequitable, burdensome or

otherwise contrary to the public interest.[4/] Generally, to obtain a waiver, a party must demonstrate that the application of a particular rule would not be in the public interest in the specific circumstances under consideration.[5/] Moreover, the Commission may approve a waiver request when considerations of hardship, equity or more effective implementation of overall policy dictate that a waiver is warranted.[6/] Because B & P's participation in the upcoming C Block auction as a small business satisfies these standards, a waiver of Sections 24.709(a), 24.720(b)(1) and 24.720(f) of the Commission's C Block PCS rules should be granted.

III. The Standards for Grant of a Waiver Are Met in This Case

B & P requests that the Commission waive Section 24.709(a) and 24.720(b)(1) of the Commission's rules to permit B & P to participate in the C Block auction as a small business. As discussed above, if the Commission eliminates the affiliation exemption as presently proposed (Section 24.720(l)(11)(ii)), B & P will no longer be qualified to bid as a small business in the upcoming entrepreneur block auction. The attribution of BHI's revenues to Mr. Johnson, as the sole member of B & P's

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4/ See 47 C.F.R. § 24.819(a); see also Section 1.3 of the Commission's rules providing that the Commission can waive its rules upon a showing of good cause. 47 C.F.R. § 1.3.

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

6/ See WAIT Radio v. FCC, 418 F.2d 1153, 1158 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

control group, will result in the PCS applicant having revenues and assets in excess of $40 million.[7/]

Grant of a waiver of Sections 24.709(a) and 24.720(b)(1) will serve the public interest as well as the underlying purpose of the Budget Act and the Commission's entrepreneur block rules implementing the Congressional mandate of that Act. Specifically, grant of the waiver will ensure that B & P, as a minority entrepreneur facing discrimination in accessing capital, is able to bid in the C Block auction with the benefits the Commission has found are needed to eliminate the detrimental effects of discrimination in the telecommunications industry. The unique circumstances of B & P's proposed participation in the entrepreneur block support grant of this requested relief.

A. <u>The Underlying Purpose of the Rules to Disseminate Licenses Broadly</u>

Congress made plain in passing the Omnibus Budget Reconciliation Act of 1993 that one of its primary goals in authorizing the Commission to assign licenses by competitive bidding was to disseminate PCS licenses among a wide variety of PCS applicants. 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

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7/ Without the waiver, B & P also will be unable to participate in the C Block auction altogether.

> disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.[8/]

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 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;[9/] 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.[10/]

The minority-owned business exception to the affiliation rules was specifically intended to help minorities obtain access to capital in response to this Congressional mandate.[11/] The exception was based on a strong record that shows

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8/ 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").

9/ See Budget Act § 309(j)(4)(C).

10/ See Budget Act § 309(j)(4)(D).

11/ See Fifth Memorandum Opinion and Order at ¶ 425-26, citing Fifth Report and Order, 9 FCC Rcd 5532, 5574 (1994) ("Fifth

(continued...)

the barriers minorities face when attempting to obtain access to capital, and was specifically included in the auction rules to ensure that the auction process did not disadvantage minority bidders.[12/] Consequently, the minority exception to the affiliation rules was narrowly tailored to meet the Congressional directive that the Commission adopt regulations that ensure that members of minority groups "are not in any way excluded from the competitive bidding process."[13/]

The Adarand decision does not repeal Congress's mandate, nor does it inhibit the Commission's ability to develop policies that specifically benefit members of minority groups.

11/ (...continued)
Report and Order") ("African American business borrowers have difficulty raising capital mainly because they have less equity to invest, they receive fewer loan dollars per dollar of equity investment, and are less likely to have alternative loan sources . . . ."); Id. ("[M]inorities need the ability to draw upon the financial strength and business experience of successful minorities and minority-owned businesses within their communities; they may not have access to any other source of funds on which to draw").

12/ See e.g. Discrimination in Telecommunications, Hearing of the Minority Enterprise, Finance and Urban Development Subcommittee of the House Small Business Committee, 104th Cong., 1st Sess. (May 20, 1994) (testimony of Assistant Secretary of Commerce Larry Irving and FCC Chairman Reed E. Hundt); Small Business Advisory to the FCC Regarding GEN Docket No. 90-314 (September 15, 1993); Fifth Report and Order, 9 FCC Rcd at 5537 ("The record clearly demonstrates that the primary impediment to participation by designated entities is the lack of access to capital .... In this regard, it should be noted that although auction 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.").

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

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.[14/]

While B & P believes that the Commission's current minority-preference auction rules meet the strict scrutiny requirement of Adarand,[15/] the Commission has stated its intent to hold the C Block auction as quickly as possible. If, however, the Commission holds the auction without addressing the issue of B & P's access to capital, that was previously resolved with the minority-owned business exception to the affiliation rules, it will be acting contrary to its Congressional directive and contrary to evidence in the record. Such an action would be arbitrary and capricious and would subject all licenses won at the C Block auction to potential judicial review. The Commission can avoid this possibility and meet its statutory mandate by granting B & P's limited request for waiver.

14/ 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.

15/ Indeed, the Administration has indicated that many federal affirmative action programs can survive the strict scrutiny test laid down by the Supreme Court. See "Clinton Wants Set-Asides to Boost Poor Areas", Washington Post, July 15, 1995 at A1, cl. 1.

Congress expressly recognized that the use of auctions could be particularly harmful to minorities and, therefore, required the Commission to adopt policies to overcome potentially discriminatory aspects of the competitive bidding process and the lack of equivalent access to capital of minorities. B & P believes that these two conditions alone justify grant of its waiver. Moreover, by proposing to eliminate all race-based preferences and "equalizing" the treatment of potential entrepreneur block bidders without consideration of race, the Commission actually widens the gap that Congress sought to close between minority-owned companies and other bidders who face no barriers to accessing capital. As such, the operation of the proposed rules, and in particular their application to B & P, violate the statutory mandate under which the C Block bidding structure was created.

If the Commission eliminates the minority-owned business exception to the affiliation rules without granting this waiver, B & P and Mr. Johnson will be denied their opportunity to be a major player in the PCS market because they missed the A and B Block auctions and will now be barred from the C Block auction. Consequently, contrary to the directives of Congress, the Commission's proposed rules will be reducing the number of potential minority-owned PCS licensees. In particular, denial of this waiver will prevent a member of a minority group, who is the type whose participation should be encouraged, from participating in the C Block auction. This result would directly contradict

Congress's mandate that the Commission ensure that minority-owned businesses "are not in any way excluded from the competitive bidding process."[16/]

By granting the waiver, however, the Commission will encourage the participation of an experienced and successful member of a minority group in the PCS competitive bidding process. Mr. Johnson through B & P will bring a wealth of knowledge, business acumen and management experience to their PCS venture that will serve to make the applicant not only an aggressive bidder in the C Block auction, but a formidable competitor in the delivery of spectrum based services. The fact that B & P's participation would constitute the entry of a non-traditional telecommunications company will further Congress's goal of encouraging new entrants into the telecommunications marketplace, rather than merely benefiting companies that have historically operated in the telecommunications arena.

B. Legal Restrictions to Access to Capital

Pursuant to Sections 24.709(a) and 24.720(b)(1) of the Commission's rules, the revenues and assets of affiliates of a PCS applicant are attributed to it in determining eligibility to bid in the entrepreneurs' block as a small business. The rule presumes that control group members have the ability to tap the revenues and assets of the affiliated companies, based on control

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

of the affiliates, to benefit the PCS applicant.[17] In the case of B & P, however, Mr. Johnson has no such unrestricted access to the revenues and assets of BHI to fund or otherwise support B & P.

Mr. Johnson's stock ownership and voting interests in BHI do not permit him to allocate BHI's capital at will as anticipated by the affiliate attribution rules. Mr. Johnson cannot act unilaterally to fund the PCS applicant with the resources of BHI. Because BHI is a publicly traded company, Mr. Johnson must answer to other investors and company shareholders and he cannot, without authorization, pledge or liquidate the assets of BHI for the benefit of B & P.

Moreover, Mr. Johnson would have to recuse himself from determinations made by BHI with respect to its investment in B & P. Pursuant to the rules of the New York Stock Exchange ("NYSE"), any determinations made by BHI to extend funds or otherwise invest in B & P would have to be approved by an Audit Committee comprised solely of directors independent of management and free from any relationship that would interfere with the exercise of independent judgment as a committee member.[18] The

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17/ See Fifth Report and Order at ¶ 210 ("The affiliation requirement is intended to prevent entities, that for all practical purposes, do not meet these size standards from receiving benefits targeted to small entities"). Affiliation arises from control of an entity or the power to control it. Id. at ¶ 204.

18/ See Section 303.00 of the Rules of the New York Stock Exchange.

NYSE has determined that the Audit Committee is particularly well suited to address related party transactions that may arise within a company authorized to trade on the exchange.[19] Consequently, Mr. Johnson would be unable to dictate BHI's decision whether to lend funds, or otherwise provide capital, to B & P inasmuch as only BHI's disinterested directors would be permitted to make decisions, in the best interests of BHI's shareholders, regarding BHI's involvement in B & P.

The Commission has already recognized that limitations on the ability of PCS applicants to access the financial resources of their affiliates can form the basis of excluding the affiliates' revenues and assets from aggregation and attribution. For instance, the Commission's proposed rules continue to provide an affiliation exemption to Indian Tribes and Alaska Regional Village Corporations because of restrictions on their ability to manage and dispose of their substantial properties.[20] Under the Alaska Native Claims Settlement Act, the stock held by Native Corporations cannot be sold, pledged, mortgaged, or otherwise encumbered. Similarly, Indian Tribes cannot use their land holdings as collateral for purposes of raising capital. These legal restraints provided the basis for the retention of the affiliation exemption as applied to these entities.[21]

19/ See NYSE Rule 307.00.

20/ See Further Notice at ¶ 43.

21/ The Commission recognizes a similar affiliation attribution (continued...)

B & P and Mr. Johnson are similarly limited in their ability to access the assets of BHI. Although Mr. Johnson holds a controlling interest in BHI, his ability to draw on BHI's resources is limited by the fact that the company is publicly-owned and traded on the NYSE. As required by law, any investment determinations made by BHI in regard to B & P must be made by BHI's disinterested independent board members. Mr. Johnson, therefore, is legally restricted in his ability to draw on BHI for capital.

Moreover, given these obligations and in furtherance of Mr. Johnson's desire to participate through B & P as a small business, Mr. Johnson and his wife, Sheila C. Johnson, will certify in B & P's short-form application that they will recuse themselves from any BHI board vote involving an investment by BHI in B & P and will not use their voting interests in BHI to determine the nature and extent of BHI's financial investment, if any, in B & P's during the PCS auction process. This will ensure that the purpose of the affiliation attribution rule is served by

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21/ (...continued)
exemption for publicly traded companies with widely dispersed voting power. See Fifth Memorandum Opinion and Order at ¶ 73-74 ("A small corporation that has dispersed voting stock ownership and no controlling affiliates will therefore not be required to aggregate with its own revenues and assets the revenues and assets of management and shareholders for purposes of entrepreneur block eligibility or small business status"). Accordingly, when unrestricted control is not held by an entity or individual, the Commission has concluded that attribution of revenues and assets is inappropriate.

limiting participation in the C Block auction to companies of limited size and access to capital.

C. Justifiable Detrimental Reliance

B & P should be permitted to bid in the C Block auction as small business, by grant of a waiver of Section 24.709(a), based on Mr. Johnson's justifiable reliance on the affiliation exemption in planning his participation in PCS. Until the Commission proposed to eliminate the affiliation exemption, Mr. Johnson was eligible to bid as a small business and structured his PCS entity, sought financing and negotiated with strategic investors on that basis.

Public reliance on government rules militates in favor of grant of this waiver. Because participation in the C Block auction represents a unique opportunity to enter the PCS market, and because Mr. Johnson has relied on the Commission's rules that allow B & P to participate in the C Block auction as a small business, equity dictates that B & P be permitted to participate in the auctions as a small business should the minority affiliation exemption be eliminated. The Commission has previously determined that justifiable detrimental reliance on prior rules will support a limited waiver of revised rules that work a particular and substantial hardship.

The Commission's policy in favor of granting waivers and grandfathering existing interests to protect persons who justifiably relied on prior rules stems from the general presumption that new rules and regulations must be applied

prospectively. See MCI Telecommunications Corp. v. FCC, 10 F.3d 842, 846 (D.C. Cir. 1993). This doctrine is deeply rooted in the Commission's jurisprudence and has formed the basis of waiver grants and grandfathering provisions when equity so dictates. See Landgraf v. USI Film Products, 114 S. Ct. 1483, 1497 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").

In Teleport Communications Group, 8 FCC Rcd 2578 (Apr. 6, 1993) ("Teleport"), for example, the Commission granted Teleport Communications Group ("TCG") a limited waiver of a newly promulgated rule that prohibited a practice described as "ratcheting." Ratcheting had previously been permitted and involved the carriage of switched access traffic over interconnectors' facilities connected to special access expanded interconnection offerings. TCG requested a Declaratory Ruling arguing that the recently promulgated prohibition should not implicate how TCG currently interconnected with NYNEX switched services based on the fact that TCG had relied on prior rules to negotiate and contract with the NYNEX telephone companies.

In response to TCG's request, the Commission determined that because TCG had entered into contracts and invested resources in reliance on the rule before it was modified, a limited waiver was in the public interest. The Commission reasoned that

> [a]pplying the ratcheting provisions to arrangements that either existed prior to the adoption of the policy, or that are necessary to fulfill a contractual obligation to a customer entered into before the adoption of the policy, would disrupt pre-existing undertakings . . . [which] were made in reliance on NYNEX's interpretation of its own tariffs.

Teleport at ¶ 11. The Commission granted TCG a limited waiver because of its justifiable reliance on the Commission's previous rule allowing ratcheting.

In a similar decision, the Commission permitted a waiver that had been overturned to remain in effect for a transitional twelve-month period so as not to disturb the expectations of interested parties who relied on the rule to their detriment. In NYNEX Telephone Companies, a waiver granted to NYNEX by the Common Carrier Bureau permitting NYNEX to offer a new service on a bundled basis was subsequently overturned by the Commission.[22/] Following this determination, the Commission ordered NYNEX to withdraw the service or revise its offering to provide service on an unbundled basis and in compliance with the Commission's network disclosure requirements. At the time the waiver was overturned, new customers had placed orders for the service, pursuant to NYNEX's tariff.

The Commission granted the twelve-month transition period "[t]o protect existing customers against unreasonable

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22/ See NYNEX Telephone Companies, 9 FCC Rcd 1608 (Mar. 22, 1994)

disruptions to their services," finding that "existing customers would suffer disruption in their businesses if this service were to be withdrawn precipitously."[23] Explaining its decision, the Commission stated:

> New customers whose orders were not filled as of the release of our Review Order placed their orders in good faith and in reliance on NYNEX's effective tariff [granted by the FCC]. These customers had a reasonable expectation that their business needs would be met by becoming [NYNEX] customers. We are modifying the interim provisions of the Review Order to provide equitable treatment for these new customers. We also find it reasonable to extend the waiver provisions to customers that placed orders after the stay [of the Review Order] and before the released of this order. Given that the court's stay of our [Review Order] had the effect of reinstating the Bureau's waiver order in its entirety, these customers also placed orders in good faith reliance on NYNEX's tariff and a . . . reasonable expectation that their orders would be met. Thus, in a balancing the potential harm to those customers and the public interest in a pro-competitive [] marketplace, we find it reasonable to remove the restriction and also permit [] customers . . . to order circuits subject to the conditions of the waiver during the interim period established in the Review Order.[24]

Ultimately, the Commission reasoned that these customers "ha[d] undoubtedly made business plans based on these expectation . . . with good faith reliance on NYNEX's tariff and a reasonable expectation that their orders would be met." NYNEX at ¶ 16. Thus, for purposes of granting a waiver, the Commission considered whether the customer exercised reasonable good faith reliance on previously existing Commission policies.

23/ Id. at 7, 11.

24/ Id. at ¶ 16-17 (emphasis added).

The necessity of protecting the expectations of companies acting in reliance on the Commission's rules has also been illustrated by the Commission's willingness to grandfather existing interests when it changes its rules or regulations. For example, when the Commission modified its cable franchising rules more than 20 years ago, it ruled that if a cable system had made a significant investment or entered into a binding contractual agreement prior to the rule change, its inconsistent franchise would be grandfathered. CATV of Rockford, Inc. 38 F.C.C.2d 10, 15 (1972). Moreover, most recently, the Commission included a grandfather clause in its order prohibiting the bundling of 800 numbers. The Commission reasoned that the grandfather clause was necessary to "protect the expectancy interests of customers . . . and . . . to avoid causing these customers undue disruption." Competition in the Interstate Interexchange Marketplace, 7 FCC Rcd 2677, 2682 (Apr. 17, 1992).

Mr. Johnson and B & P, in good faith, reasonably relied on the Commission's previously existing rules and procedures in negotiating strategic alliances and financial arrangements and establishing their business plans for C Block participation. Mr. Johnson has been making plans to participate in the PCS C Block auction since the passage of the Budget Act in 1993. He has been actively involved in the Commission's rulemakings since that time, and has devoted considerable time and resources to finding a strategic partner in anticipation of participation in the C Block auction. For example, Mr. Johnson has personally met with