DOW, LOHNES & ALBERTSON
ATTORNEYS AT LAW
1255 TWENTY-THIRD STREET
WASHINGTON, D.C. 20037-1194

ORIGINAL

LEONARD JERVEY KENNEDY
DIRECT DIAL NO.
857-2505

TELEPHONE (202) 857-2500
FACSIMILE (202) 857-2900

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

July 25, 1995

Ms. Regina Keeney
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: **Request for De minimis Waiver of Section 24.720(f) of the Commission's Rules**
PP Docket No. 93-253
GN Docket No. 90-314
GN Docket No. 93-252

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Dear Ms. Keeney:

R & S PCS, Inc. ("R & S") hereby requests a de minimis waiver of Section 24.720(f) of the Commission's broadband PCS auction rules to permit the company to participate in the upcoming C Block PCS auction. R & S, a Delaware corporation, like B & P PCS, Inc. ("B & P") is wholly owned by Robert L. Johnson and has the same affiliated entities. Accordingly, R & S also requests that its eligibility and small business status for the C Block auction be based on the 1993, 1992 and 1991 financial statements of its affiliates.

Specifically, R & S requests confirmation that, in demonstrating compliance with the Commission's entrepreneur block and small business financial caps, it may aggregate Mile Hi's calendar year figures for 1991, 1992 and 1993 with BET Holdings, Inc.'s ("BHI") fiscal-year figures for 1991, 1992 and 1993, or, alternatively, that R & S may aggregate Mile Hi's calendar-year figures with BHI's estimated calendar-year figures for those same years. The basis for this request is set forth in the attached Waiver Request submitted by B & P on July 20, 1995. R & S is similarly situated with B & P and, in fact, is a mirror image of the company. Accordingly, not unlike B & P, R & S also is arbitrarily disadvantaged by the fact that one of its affiliates, BHI, prepares its financial statements on a fiscal-year basis ending on July 31. R & S requests a waiver identical

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to that requested by B & P on July 20, 1995. A copy of B & P's Waiver Request, therefore, is submitted herewith in support of R & S's Waiver Request.

Respectfully submitted,

R & S PCS, INC.

By: Leonard J. Kennedy
Richard S. Denning

Its Attorneys

Attachment

DOW, LOHNES & ALBERTSON

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Ms. Regina Keeney
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Wireless Telecommunications Bureau
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Re: **Request for *De minimis* Waiver of Section 24.720(f) of the Commission's Rules**
PP Docket No. 93-253
GN Docket No. 90-314
GN Docket No. 93-252

Dear Ms. Keeney:

On July 18, 1995, the Federal Communications Commission (the "Commission") released the Sixth Report and Order in the Personal Communications Services competitive bidding docket clarifying, in part, the measurement of "gross revenues" under Section 24.720(f) of the Rules.[1] Specifically, the Commission confirmed that, pursuant to Section 24.720(f) of the broadband PCS rules, the relevant years for determining compliance with the entrepreneur block eligibility requirements and small business definition are 1993, 1992 and 1991 for companies whose financial statements are prepared on a calendar-year basis.[2] For

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1/ See Sixth Report and Order, PP Docket No 93-253, GN Docket No. 90-314, GN Docket No. 93-252 at ¶ 56 (adopted and released July 18, 1995).

2/ Section 24.720(f) of the Commission's rules provides:

> Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g. cost of goods sold), as evidenced by audited financial statements for the relevant number of calendar years preceding January 1, 1994, or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form application (FCC Form 175). See 47 C.F.R. § 24.720(f).

companies preparing their financial statements on a fiscal- year basis, however, the rule provides that the relevant years for determining eligibility are the most recent fiscal years preceding the filing of the short form application.

The Commission explained that the distinction in the rule was made when the C Block applications were to be filed in early 1995.[3] However, based on the delay of the short-form filing date, the Commission recognized that the rule's distinction between calendar years and fiscal years may result in undue hardship to certain PCS applicants, due to an applicant's, or its affiliate's, particular accounting practices. Accordingly, the Commission delegated authority to the Wireless Telecommunications Bureau (the "Bureau") to entertain waiver requests.[4]

Pursuant to the Bureau's delegated authority, and Sections 24.819 and 1.3 of the Commission's rules, B & P PCS, Inc. ("B & P") hereby requests a de minimis waiver of Section 24.720(f) to consider BET Holdings, Inc.'s ("BHI") financial statements for fiscal years 1991, 1992 and 1993 in determining B & P's ability to bid in the C Block auctions as a small business. Grant of this waiver would permit B & P to aggregate BHI's gross revenues and total assets, as reported on a fiscal-year basis, with the 1991, 1992 and 1993 calendar-year gross revenues of Mile Hi Cable Partners, L.P. ("Mile Hi"), a company affiliated company with B & P. In the alternative, B & P requests that the Commission grant it a waiver to aggregate BHI's estimated calendar-year gross revenues for 1991, 1992 and 1993, with Mile Hi's calendar-year figures in those years to determine B & P's C Block auction eligibility and bidding status.

B & P requests this waiver on the grounds that the operation of the Commission's rules would arbitrarily disadvantage B & P because one of B & P's affiliates, BHI, prepares its financial statements on a fiscal-year basis. Moreover, because the Commission's rules do not address the issue of how aggregation of revenues would occur when some affiliates are on a calendar-year basis and some are on a fiscal-year basis, a waiver is required to provide certainty prior to the auction.[5]

3/ See Sixth Report and Order at ¶ 57.

4/ Id.

5/ Under one interpretation of the Commission's affiliation and aggregation rules B & P would be qualified to bid in the C Block

(continued...)

Without the waiver, B & P possibly would face the hardship of being excluded from participation in the upcoming C Block auctions based on BHI's decision to account for its revenues and assets on a fiscal-year basis ending July 31 and a gap in the Commission's rules. Because BHI prepares its financial statements on the basis of fiscal years ending July 31, the Commission's rules would require that B & P's eligibility to bid and bidding status be determined by BHI's revenues in fiscal years 1994, 1993 and 1992, despite the fact that B & P and Mile Hi account for their revenues on a calendar-year basis. In turn, the affiliation rules might be interpreted to require that B & P aggregate BHI's 1994 fiscal-year gross revenues with Mile Hi's 1993 calendar-year gross revenues to determine B & P's bidding eligibility and status. Adoption of this reading of the Rules would disadvantage B & P because this aggregation would result in accumulated gross revenues for B & P for 1994 that exceed the entrepreneur block revenues cap by approximately $3 million. Accordingly, absent a waiver and because of the perfectly legitimate, but inconsistent, reporting periods of B & P and BHI, B & P would be excluded from participating in the C Block auction.

If BHI's financial statements had been prepared on a calendar-year basis, B & P would be qualified to bid in the C Block auctions as a small business. Pursuant to the Commission's rules, the relevant years for determining bidding eligibility of companies preparing their financial statements on a calendar-year basis are 1991, 1992 and 1993. If Mile Hi's calendar-year revenue figures and BHI's estimated calendar-year revenue

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5/ (...continued)
auction, without need for grant of a waiver request. Under the Commission's rules, BHI's 1994 fiscal year gross revenues are counted. The Commission's rules, however, do not count 1994 financials for companies that prepare their financial statements on a calendar-year basis, and thus the calendar year 1994 gross revenues for a company would not be used in determining compliance with the entrepreneur block or small business financial limits. See 47 C.F.R. § 24.720(f). Thus, BHI's fiscal year 1994 gross revenues, which fall well below the financial cap, would be considered without reference to Mile Hi's calendar year 1994 gross revenues and B & P would meet the applicable revenue caps. Nevertheless, because the rules do not expressly state the method for aggregating the revenues and assets of affiliates that have different accounting methods, B & P, in an abundance of caution, requests this waiver.

figures[6] are aggregated, B & P would meet the conditions of the Commission's affiliation exemption rules. Similarly, if BHI's fiscal-year figures for 1991, 1992 and 1993 are aggregated with Mile Hi's calendar-year figures for 1991, 1992 and 1993, B & P would meet the conditions of the Commission's affiliation exemption rules.

B & P submits that the public interest would be served by grant of this waiver request. There is no rational basis for disqualifying B & P from participating in the C Block auction simply because BHI has adopted a fiscal-year method of accounting. The effect of the Commission's rule would be to permit companies to bid, whose present revenues exceed B & P's attributable revenues, while barring B & P's intended participation simply because BHI accounts for its revenues on a fiscal year that concludes on July 31. For example, a calendar-year basis company that had revenues of $120 million in 1993, but that had acquired a business during 1994 that generated an additional $50 million in annual revenue, would be permitted to participate in the C Block auction notwithstanding the fact that its $170 million in annual gross revenues far exceeds B & P's annual gross revenues.

Excluding B & P from the auction also would undermine the Commission's goal of providing firms of limited size a meaningful opportunity to participate in the competitive bidding process. BHI's choice of an accounting method should not prevent B & P from meeting the Commission's financial caps when similarly situated companies, that have adopted a different accounting method, would be permitted to compete for C Block licenses. Considering B & P's eligibility to bid based on the same years considered for companies that operate on a calendar-year basis will fairly resolve the uncertainty in the rule without disadvantaging the public while simultaneously increasing the number of bidders by one.

Accordingly, B & P requests that its entrepreneur block eligibility and small business status be determined on the 1993, 1992 and 1991 financial statements of its affiliates. Specifically, B & P requests confirmation that it may aggregate Mile Hi's calendar-year figures for 1991, 1992 and 1993 with BHI's fiscal-year figures for 1991, 1992 or 1993, or, alternatively, that B & P may aggregate Mile Hi's calendar-year figures with BHI's estimated calendar-year figures for those same years. Granting this de minimis waiver will prevent the

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6/ BHI's gross revenues for each of the calendar years 1991, 1992 and 1993 can be extrapolated from BHI's audited fiscal year financial statements for the corresponding periods.

unintentional disqualification of a company based solely upon the particular, long-established accounting practices of one of its affiliates.[7]

Respectfully submitted,

B & P PCS, INC.

By: Leonard J. Kennedy
Richard S. Denning

Its Attorneys

7/ BHI has prepared its financial statements on a fiscal-year basis since 1980, approximately 15 years before the adoption of Section 24.720(f).