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

**AUG 16 1995**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

In the Matter of:  
  
Amendment of the Commission's  
Rules to Establish New  
Personal Communications  
Services

~~CONFIDENTIAL~~  
GEN Dkt No. 90-314

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**COMMENTS OF SPRINT TELECOMMUNICATIONS VENTURE  
ON THE PACIFIC BELL SAFEGUARDS PLAN**

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## SUMMARY

The Plan of Non-Structural Safeguards Against Cross-Subsidy and Discrimination ("Plan") submitted by Pacific Bell and its affiliates fails to provide adequate assurances to the Commission or competitors that Pacific Bell will not abuse its local exchange monopoly to discriminate against competitors or otherwise undermine competition in Commercial Mobile Radio Services ("CMRS"). Accordingly, the Sprint Telecommunications Venture ("STV") believes that the public interest and standards of fair competition require that the Commission reject the Plan and order additional safeguards to be placed on local exchange carriers ("LECs") before allowing them to offer personal communications services ("PCS") in their local exchange areas.

Pacific Bell's vague and incomplete Plan completely fails, in several key ways, to demonstrate that Pacific Bell will not engage in cross-subsidization of its PCS services and will implement sufficient measures to ensure that non-affiliated PCS providers are treated in a nondiscriminatory fashion. For example, Pacific Bell ignores its obligations to provide non-affiliated PCS providers with comparable interconnection, collocation opportunities and nondiscriminatory access to customer marketing information. Instead, the Plan makes cryptic references to joint marketing and collocation of facilities with Pacific Bell's

affiliated PCS providers, while remaining silent about the arrangements it will provide for non-affiliated PCS competitors.

As important, many key issues concerning safeguards on LEC involvement in PCS remain unresolved by the Commission. STV contends that the Commission's failure to specify all necessary safeguards for LEC provision of PCS invited Pacific Bell's unresponsive filing, and it urges the Commission to resolve these outstanding issues before ruling on specific LEC safeguards plans.

Pacific Bell's Plan does not express a clear commitment to comply with the Commission's Part 32 and Part 64 accounting safeguards concerning transactions with LEC affiliates. The Commission should reiterate that Part 64 accounting safeguards apply to all LEC transactions with PCS affiliates. The Commission also should expand the scope of those accounting safeguards to forestall any Pacific Bell efforts at circumvention and to prevent other anti-competitive mischief. Among additional steps, the Commission should require: filing of all PCS-related contracts between members of the Pacific Bell family; detailed separation of PCS-related costs from other telephony costs; and instructions for LEC independent auditors to focus on this issue in their audits of LEC affiliate transactions.

Finally, the Commission should ignore Pacific Bell's assertion that California state regulations provide adequate safeguards to prevent it from cross-subsidization or discrimination against non-affiliated PCS providers. Upon examination, it becomes clear that the California regulations at issue are unlikely to provide any such assurance. In fact, contrary to Pacific Bell's suggestion, California's affiliate reporting requirements do not even apply to transactions between a utility and its wholly-owned subsidiaries and thus, place no additional obligations on Pacific Bell or its PCS subsidiaries.

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Pursuant to the Public Notice issued by the Federal Communications Commission ("Commission" or "FCC") on July 26, 1995,<sup>1</sup> the Sprint Telecommunications Venture ("STV") files these comments in opposition to the Plan of Non-Structural Safeguards Against Cross-Subsidy and Discrimination ("Plan") submitted by Pacific Bell, Nevada Bell, Pacific Bell Mobile Services ("PBMS") and Pacific Telesis Mobile Services ("PTMS") (collectively, "Pacific Bell") on July 10, 1995. STV believes the Commission should reject the Plan because it does not provide the necessary assurance that no discrimination or cross-subsidization will

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<sup>1</sup> "Carriers File Plan For Non-Structural Safeguards To Prevent PCS Cross-Subsidies and Discrimination," FCC Public Notice, DA 95-1655 (July 26, 1995).

occur as a result of the offering of integrated monopoly local exchange services and personal communications services ("PCS"). In the alternative, the Commission should impose additional conditions on Pacific Bell to ensure that it cannot take advantage of its local monopoly power to discriminate against non-affiliated PCS providers in its exchange territories.

#### **STATEMENT OF INTEREST**

STV is a joint venture formed among subsidiaries of Sprint, Cox Enterprises, Inc. ("Cox"), Tele-Communications, Inc. ("TCI") and Comcast Corporation ("Comcast") to provide competitive local telephony services on a nationwide basis. WirelessCo, L.P. ("WirelessCo") is the PCS component of STV and was awarded licenses to provide PCS services in 29 Major Trading Area ("MTA") markets as a result of the Commission's broadband PCS auction for A and B frequency blocks. WirelessCo holds the A block 30 MHz license for the San Francisco-Oakland-San Jose MTA. While PTMS holds the B block 30 MHz license for that market. Thus, STV and PTMS will be direct competitors in the delivery of PCS services in that market.<sup>2</sup>

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<sup>2</sup> In addition, WirelessCo intends to affiliate with Cox Cable Communications, Inc., a subsidiary of Cox. Cox Cable Communications, Inc. holds the A block PCS license in the Los Angeles MTA. PTMS holds the B block license in that market.

## BACKGROUND

In the fall of 1993, when the Commission first adopted regulations to govern PCS, it determined that local exchange carriers ("LECs") would be eligible to participate in the provision of PCS services, so long as they complied with certain procedural safeguards.<sup>3</sup> The Commission noted that making LECs eligible for PCS licenses within their service areas:

could provide an incentive for LECs to discriminate against PCS competitors requesting interconnection, and could lead to cross-subsidizing PCS operations from expenditures ostensibly made to serve rate-regulated wireline customers.<sup>4</sup>

The Commission further stated that "[c]ommencement of service by LECs...would be contingent on the LEC implementing an acceptable plan for non-structural safeguards against discrimination and cross-subsidization."<sup>5</sup> No other details were provided concerning what would constitute an "acceptable plan."

On May 12, 1995, WirelessCo filed a petition to deny or condition PTMS' application for a broadband PCS license in the San Francisco MTA. That petition argued that

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3 Amendment of the Commission's Rules to Establish New PCS, GN Dkt. No. 90-314, Second Report and Order, 8 FCC Rcd 7700, 7747-51 (1993) ("PCS Second Report and Order").

4 Id. at 7747.

5 Id. at 7748, n. 96. See also Plan at 1, n.1.

in the absence of meaningful safeguards, Pacific Bell could use its monopoly power as the incumbent LEC to impede competition in the provision of new PCS services. Over these objections, the Commission on July 23, 1995 granted Pacific Bell's PCS licenses in both the Northern and Southern California MTAs. In its order, the Commission indicated that WirelessCo's concerns regarding the need for safeguards addressing potential LEC abuses would be addressed in a later proceeding.<sup>6</sup>

Despite the fact that several of the issues raised by WirelessCo and others concerning appropriate safeguards on LEC provision of PCS services remain unresolved by the Commission,<sup>7</sup> Pacific Bell submitted its Plan on July 10, 1995 and now seeks Commission approval so that it can begin PCS operations. As the discussion below demonstrates, the Plan proposed by Pacific Bell utterly fails to provide

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6 Application of PTMS for a License to Provide Broadband PCS Service On Block B in the San Francisco-Oakland-San Jose MTA, DA 95-1414 (June 23, 1995) (holding that to the extent WirelessCo questions application of Parts 64 and 32 to LECs whose affiliates provide PCS, those concerns will be dealt with in reconsideration of the Second CMRS Report and Order). See also Application of PTMS for License to Provide Broadband PCS Service On Block B in the Los Angeles-San Diego MTA, Order, DA 95-1413 (June 23, 1995) (same re: Cox's concerns).

7 See, e.g., Section I.B., supra; Implementation of Sections 3(n) and 332 of the Communications Act, GN Dkt. No. 93-252, Second Report and Order, 9 FCC Rcd, 1411, 1492 ("CMRS Second Report and Order").

adequate safeguards against the risk of discrimination and cross-subsidization and should be rejected.

## DISCUSSION

### I. **PACIFIC BELL HAS FAILED TO PROVIDE ADEQUATE SAFEGUARDS TO ENSURE NON-DISCRIMINATORY TREATMENT OF NON-AFFILIATED PCS PROVIDERS**

Submission of a plan of non-structural safeguards against cross-subsidy and discrimination is a serious obligation. The purpose of such a plan is to assure the Commission, competitors and consumers that LECs will not use their local monopolies to give unfair advantages in the provision of new services, which serve to reduce competition and add consumer welfare. In several respects, Pacific Bell's plan falls woefully short of achieving this objective.

#### A. **Pacific Bell's Plan Is So Vague Concerning Key Aspects That It Is Not A Serious Safeguards Plan**

Pacific Bell's Plan is virtually devoid of most of the safeguards historically imposed by the Commission and the courts to protect against LEC discriminatory treatment of competing service providers. In its Computer III proceedings, the Commission established numerous non-structural safeguards against discrimination and cross-subsidization by Bell Operating Companies ("BOCs").<sup>8</sup> The

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<sup>8</sup> Computer III Remand Proceedings, CC Dkt. No. 90-623, Notice of Proposed Rule Making and Order, 6 FCC Rcd 174, 179-80 (1990).

non-structural safeguards adopted in Computer III and subsequent decisions provide a minimal checklist of basic elements for inclusion in any BOC safeguards plan. Those include: mandating nondiscriminatory access to interconnection and facilities; banning or conditioning joint marketing and joint billing; network disclosure requirements; restricting BOC use of customer proprietary network information (CPNI) and other information; and establishing accounting safeguards to avoid cross-subsidization.<sup>9</sup>

In addition, the Commission has provided explicit direction concerning a LEC's obligations for CMRS interconnection. Specifically, the Commission has held that a LEC shall:

1. provide reasonable and fair interconnection for all commercial mobile radio services... [of] the type of interconnection reasonably requested by all CMRS providers;
2. establish reasonable charges for interstate interconnection ... [which] should not vary from charges established by LECs for interconnection provided to other mobile radio service providers;
3. not have authority to deny to a CMRS provider any form of interconnection arrangement that the LEC makes available to any other carrier or other customer, unless the LEC meets its burden of demonstrating that the provision of such interconnection arrangement... is not

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9 Id.

technically feasible or is not economically reasonable.<sup>10</sup>

Apart from mouthing its intention to comply with these requirements, Pacific Bell's Plan provides absolutely no basis for the Commission (or anyone else) to assess its compliance with these interconnection requirements. In particular, there is scant detail about how Pacific Bell intends to provide interconnection to its own PCS operation. Nor does the plan provide a ready means of verifying that other PCS providers are receiving comparable treatment. Failure to establish and enforce specific safeguards with regard to LEC interconnection arrangements could seriously impede the deployment of new competing networks.

Second, discriminatory policies that allow collocation only for the monopoly LEC affiliate have been acknowledged by the Commission as a danger to fair competition.<sup>11</sup> Nonetheless, the Plan suggests that Pacific Bell will allow collocation of PCS facilities only for its own PCS affiliates, without providing any assurance that other providers will have such opportunities. The Plan cryptically states that: "PBMS anticipates that it will use

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10 CMRS Second Report and Order at 1497-98.

11 Expanded Interconnection With Local Telephone Company Facilities, CC Dkt. No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994) ("Expanded Interconnection Order") (requiring LECs to provide expanded interconnection through virtual collocation, except where they voluntarily choose to offer physical collocation).

Pacific Bell and Nevada Bell sales channels for some of its marketing activity and will also locate some of its equipment on Pacific Bell and Nevada Bell property."<sup>12</sup> However, Pacific Bell offers no further explanation of its intentions regarding interconnection of its PCS affiliate and concedes no obligation to offer other providers the same interconnection opportunities, be they for physical or virtual collocation.<sup>13</sup>

Pacific Bell's PCS affiliates will have an inherent non-pricing advantage if they physically collocate facilities and maintenance crews at Pacific Bell's end offices without any comparable interconnection being offered to similarly situated providers. The Commission clearly needs to take additional steps to elicit more information from Pacific Bell on this issue and to ensure that all providers have opportunities to locate equipment in the same manner as the LEC affiliate.

Moreover, the Plan's passing reference to interconnection rates for PCS providers cannot possibly assure the Commission that PCS providers will receive nondiscriminatory interconnection as the Commission has mandated. The Plan merely states that its "rates for interconnection...do not contain any distance

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<sup>12</sup> Plan at 7. (emphasis added).

<sup>13</sup> See Expanded Interconnection Order.

sensitivity."<sup>14</sup> Such intentionally vague statements must be rejected as a wholly inadequate explanation of how Pacific Bell intends to offer non-discriminatory interconnection rates.<sup>15</sup>

Other statements in the Plan suggesting significant joint marketing efforts between Pacific Bell's telephony and PCS sales personnel are also troubling because joint marketing of monopoly local exchange services and PCS has not been specifically authorized by the Commission. Nonetheless, Pacific Bell suggests that an integrated marketing approach constitutes an important element of its Plan to introduce PCS services.<sup>16</sup> Given the extent of Pacific Bell's expenditures and commitment to PCS operations, abuses of local monopoly power in the marketing area are predictable.<sup>17</sup> For example, absent FCC

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14 Plan at 10.

15 Similar problems exist with Pacific Bell's proposals with regard to non-discriminatory provision of information to non-affiliated PCS providers. See Equal Access and Interconnection Obligations Pertaining to CMRS, CC Dkt. No. 94-54, Notice of Proposed Rule Making and Notice of Inquiry, 9 FCC Rcd 5408, 5445-46, (1994) (LECs required to furnish certain information about interexchange carriers "in an impartial manner.") See also Telephone Company-Cable Television Cross-Ownership Rules, Fourth Further Notice of Proposed Rule Making, 10 FCC Rcd 4617, 4634-35 (1995); Telephone Company - Cable Television Cross-ownership Rules, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 244, 257-58 (1994), appeal pending sub nom. Mankato Citizens Tel. Co. v. FCC, No. 92-1404 (D.C. Cir. filed Sept. 9, 1992).

16 Plan at 7.

17 PTMS bid \$202,150,000 for the PCS license in the San Francisco MTA and \$493,500,000 for the PCS license in the Los Angeles MTA.

restrictions, Pacific Bell could, by virtue of its local monopoly on interexchange services, market its PCS services to new local exchange customers without mentioning the options available from other providers.

In a recent MFJ waiver proceeding involving the provision of interlata mobile services by BOCs, the Department of Justice and the United States District Court for the District of Columbia found that "safeguards are necessary to protect against the possibility of discrimination and cross-subsidization."<sup>18</sup> The court set the following specific conditions on the sales forces of Regional Companies:

f. The "wireless exchange sales force" must be separated from the interexchange sales force;

g. The long distance sales force can sell wireless exchange service only under certain conditions:

(1) "The long distance sales force shall be a distinct group of individuals, with separate managers, from the wireless exchange sales force and from any sales force that sells products or services of the Regional Company's local telephone exchange companies.

(2) "The long distance sales force shall receive any list of the Regional Company's Wireless Exchange Service customers on the same terms, and at the same time, as that list is received by competing interexchange carriers. Regional Company Wireless Exchange

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<sup>18</sup> United States v. Western Electric Co., Inc., 1995 Trade Regulation Reports 74,472 (Apr. 28, 1995).

Systems shall at quarterly intervals provide all long distance carriers with listings identifying the names and addresses of all Wireless Exchange Service subscribers, regardless of the sales force by which the subscriber was obtained.

(3) "The long distance sales force shall advise actual or prospective subscribers of their right to presubscribe to competing inter-exchange carriers.

(4) "The long distance sales force shall not receive any information about the identity of the Regional Company's Wireless Exchange System's customers' interexchange carrier or the wireless customers' cellular or long distance usage, unless the customer is already a customer of the Regional Company's inter-exchange service.

(5) "The long distance sales force shall state separately the prices, terms, and rate plans for Wireless Exchange services and inter-exchange telecommunications services."<sup>19</sup>

These safeguards were imposed in an attempt to prevent a duopolist cellular provider from using joint marketing to disadvantage competition in the long distance market. The need for safeguards is even greater when the joint marketing is to be done by a monopoly provider. Thus, a telephone company service representative taking orders (receiving incoming calls) for monopoly local service, for example, should not be permitted to prefer, in any way, its

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<sup>19</sup> Id. at 74,481. See also Applications of Craig O. McCaw and AT&T For Consent to the Transfer of Control Of McCaw Cellular Communications, Inc. and its Subsidiaries, 9 FCC Rcd 5836 (1994).

affiliated wireless company over competitive wireless companies and should not be allowed to jointly market monopoly and competitive services. Likewise, telephone company new customer lists should not be made available to the telephone company's wireless affiliate unless they are made available to other wireless providers at the same time and under the same terms and conditions. Accordingly, the Commission should prohibit the joint marketing of and the flow of information between Pacific Bell, Nevada Bell and PTMS/PBMS so long as Pacific Bell retains local exchange market power.

**B. The Commission's Failure To Identify  
All Necessary Elements To Be  
Included In the Pacific Bell Plan  
Invited A Non-Responsive Filing**

By failing to identify all the necessary elements to be included in a safeguards plan, the Commission opened the way for Pacific Bell to make a submission that fails to assure anyone that it will refrain from exploiting its monopoly in local exchange services. In requiring the submission of a safeguards plan, the Commission acknowledged the importance of ensuring that adequate steps are taken to ensure that new PCS entrants have a fair opportunity to compete with the entrenched LECs and the PCS offerings of their affiliates. It then provided no guidance about the content of such a plan.

Before acting on the Pacific Bell Plan, the Commission must rule on several issues it has identified as important to ensure a fair regulatory environment for PCS competition, but has not yet resolved.<sup>20</sup> For example, the Commission deferred resolution of many of the issues involving safeguards against LEC discriminatory behavior in the CMRS environment to a separate proceeding:

The issues raised by commenters regarding accounting, structural separation, and other safeguards address important questions with regard to steps that should be taken to promote a competitive commercial mobile radio services environment in which the various market participants... have a fair opportunity to compete for new customers and in the development of new services....[T]he issue of regulatory symmetry in the application of these safeguards is an important one. Although we defer this issue to a separate proceeding, we draw attention here to the fact that we recognize the importance of the decisions we must make in examining these issues.<sup>21</sup>

This proceeding was never initiated, nor has the Commission completed its reconsideration of the CMRS Second Report and Order.<sup>22</sup> Finally, the Commission also has remained silent

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20 STV notes that the Pacific Bell Plan is the first safeguards plan submitted concerning provision of PCS by a LEC affiliate. STV's intent in raising these concerns is to ensure that adequate safeguards are established at the outset of the process. It does not intend to unnecessarily delay prompt introduction of PCS by Pacific Bell.

21 CMRS Second Report and Order at 1493 (emphasis supplied).

22 When WirelessCo and Cox' Petitions To Deny were denied by the Commission it ordered that the WirelessCo and Cox (Footnote 22 Continued)

concerning the necessary standards regarding nondiscriminatory treatment of CPNI and network disclosure information that should be applied to Pacific Bell's relationships with both affiliated and nonaffiliated CMRS providers.<sup>23</sup>

Once the Commission has implemented rules that ensure that LECs with PCS affiliates cannot abuse their monopoly power, it then can seek resubmission of a Pacific Bell safeguards plan that conforms to the specific standards established by the FCC. At that time, it will be appropriate to seek public comment on the Plan, and to evaluate both the Plan and responsive comments pursuant to the standards established. To follow any other procedure would be inconsistent with established standards for administrative procedure and could be considered arbitrary and capricious.<sup>24</sup>

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(Footnote 22 Continued)  
submissions be added to the record in the Second CMRS Report and Order Reconsideration.

23 See PCS Second Report and Order at 7750 (NTIA suggested that the Commission "provide guidance to LECs in developing nonstructural safeguards that address nondiscriminatory interconnection and installation practices, network disclosure, customer information, and cross-subsidization issues" but the Commission did not address the recommendation.)

24 See, e.g., Human Resources Management, Inc. v. Weaver, 442 F.Supp. 241, 249 (D.D.C. 1978) (agency must have threshold articulation of the standards or criteria it uses in making determination, otherwise a reviewer has no way of evaluating whether agency action is arbitrary, capricious or otherwise unlawful). See also McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1320 (D.C.Cir. 1988).

**II. PACIFIC BELL'S COMMITMENT TO PROPER ACCOUNTING SAFEGUARDS IS UNCLEAR**

**A. The Commission Should Reiterate That The Affiliate Transaction Rules And Other Accounting Safeguards Apply To LEC Transactions With PCS Affiliates**

In addition to the Plan's woefully inadequate discussion of non-discrimination safeguards, the discussion of accounting safeguards in Pacific Bell's proposed Plan is little better. While Pacific Bell states in its Plan that it will comply with Part 32 and Part 64 accounting procedures,<sup>25</sup> Pacific Bell's prior unwillingness to recognize this requirement makes it necessary for the Commission to reaffirm that the affiliate transaction rules and other accounting safeguards contained in Parts 32 and 64 will apply to Pacific Bell and Nevada Bell's PCS transactions with PTMS and PBMS.

The Commission's affiliate transaction rules require a LEC to charge tariffed rates to its affiliates when a tariff exists, or in the absence of a tariff, to charge the affiliate at fully distributed costs, unless it can demonstrate that a market price exists. Accordingly, separation of costs between the PCS services provided by Pacific Bell and other telephony services is important to avoid cross-subsidization and subversion of the affiliate

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<sup>25</sup> Plan at 6 ("Pacific Bell and Nevada Bell will fully comply with the accounting safeguards in our transactions with PBMS and PTMS.")

transaction rules. Pacific Bell's past filings have been somewhat elusive on this point, suggesting the possibility that Pacific Bell may seek to evade these requirements.<sup>26</sup> Although Pacific Bell's Plan is much better in acknowledging the responsibility to comply with the Part 32 and 64 rules, the Commission should clarify once and for all that PCS is a non-regulated service for purposes of federal accounting rules to which Part 64 accounting procedures apply. Such a restatement will avoid further competitive mischief.

**B. The Commission Should Require  
Additional Accounting Safeguards  
Because Pacific Bell May Structure  
Its Activities To Circumvent The  
Commission's Present Rules**

Even if Pacific Bell literally complies with the Commission's accounting rules, it may be able to structure its activities to cross-subsidize the PCS activities of its affiliates without detection.<sup>27</sup> For example, Pacific Bell's pricing of facilities to its PCS affiliate will likely be done as a "special assembly," allowing Pacific Bell to use "cost" as the basis of providing this service because the service is unique and not otherwise available.<sup>28</sup> Such a

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<sup>26</sup> Compare Pacific Bell Opposition to Petitions to Deny, File No. 00006-CW-L-95 KNLF209, at 10 (May 25, 1995) with Pacific Bell Petition for Clarification or Reconsideration, GN Dkt. No. 93-252 (May 19, 1994).

<sup>27</sup> See Petition of WirelessCo, L.P. to Deny or to Condition PBMS License Grant, File No. 0006-CW-L-95 KNLF209, at 3-6 (May 12, 1995).

<sup>28</sup> Id.; WirelessCo's Reply to Opposition to Condition or Deny License, File No. 00006-CW-L-95 KNLF209, at 3 (June 7, 1995).

"special assembly" would likely be established specifically to PTMS' needs. It may also be done at relatively low "costs." Competitors of PTMS may not desire the same special assembly and will therefore have to individually negotiate prices with Pacific Bell, making it likely that they will face higher per unit prices for similar facilities than will the Pacific Bell affiliates.

Similarly, as Pacific Bell and its subsidiaries plan their wireless networks, they will likely plan a network that minimizes new construction by PTMS and maximizes the use of existing Pacific Bell network construction and sites. Such arrangements also can work to defeat the Commission's Part 64 affiliate transaction rules.<sup>29</sup>

The risk of competitive mischief is especially great where, as here, Pacific Bell is establishing multiple wireless subsidiaries. PTMS will hold the PCS licenses, but has contracted out its substantive functions to PBMS which will handle all management, network and sales issues involving PCS services. At the very least, this corporate structure will make it difficult to determine who is doing what for whom and justifies a requirement that contracts for wireless transactions between members of the Pacific Bell family be filed with the Commission. To avoid confusion,

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29 Id.

the Commission could also require Pacific Bell to undertake more detailed separation of its PCS-related costs from its other telephony costs. Because Pacific Bell has already spun off a separate subsidiary for "corporate" purposes of minimizing shareholder risk,<sup>30</sup> such a solution would not be unreasonably costly for Pacific Bell. Finally, the Commission should require that independent auditors certify in their annual attestation letter that Pacific Bell is allocating properly all PCS related costs to nonregulated accounts.<sup>31</sup>

**III. THE COMMISSION CANNOT RELY ON STATE REGULATIONS TO PROVIDE ADEQUATE SAFEGUARDS**

Pacific Bell points to two California state proceedings as evidence that state safeguards can effectively protect against cross-subsidization between affiliates and discriminatory treatment of non-affiliated PCS providers.<sup>32</sup> The Commission cannot, however, have confidence that the state regulations cited by Pacific Bell will provide the necessary protections, or even those claimed by Pacific Bell.

While it is true that the California Public Utilities Commission ("CPUC") granted a Pacific Bell

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30 Plan at 4.

31 See 47 C.F.R. § 64.904.

32 Plan at 7-8.

petition to permit the tariffing of interconnection agreements between local exchange companies and CMRS providers in lieu requiring individual contracts,<sup>33</sup> effective tariffs are not in place and are unlikely to be in the near future. Draft tariffs have been submitted and the CPUC will review these filings in its "Open Access and Network Architecture Development" proceeding<sup>34</sup> which is, as Pacific Bell notes, a complex proceeding addressing a wide variety of telecommunications issues and is not limited to wireless services. The interconnection tariff issue was incorporated into this docket nearly one year ago, however, and there is no indication that the CPUC intends to consider the CMRS interconnection tariffs in the near future.

When granting Pacific Bell's petition to permit the filing of CMRS interconnection tariffs, the CPUC noted that "requiring that interconnection be governed by tariff reduces the risk that the LECs will favor their own affiliates with respect to this 'bottleneck' function."<sup>35</sup> The CPUC explained that the likelihood that new PCS

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33 Decision 94-04-086 (Apr. 20, 1994).

34 Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services, R.93-04-003 (Apr. 13, 1994), Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, I.93-04-002 (Apr. 13, 1994).

35 Investigation on the Commission's Own Motion into the Regulation of Cellular Radiotelephone Utilities, Order Granting Petition of Pacific Bell, Decision 94-04-085, mimeo at 7 (Apr. 20, 1994).

providers could be affiliated with a LEC warranted deviation from its earlier decision to permit interconnection via individual contracts that are cost-supported rather than generally available contracts.<sup>36</sup>

While publicly available tariffs could provide certain benefits, the CPUC recognized that tariffs, standing alone, cannot provide complete protection against anticompetitive behavior. That is, the CPUC has found that simply requiring the LEC to charge the same interconnection rate to its affiliate and an unaffiliated wholesale carrier does not alone lead to cost-based pricing, as "revenue from the LEC affiliate may flow from one arm of a holding company to another."<sup>37</sup> Thus, this strengthens the case for strong federal safeguards.

In addition, Pacific Bell points to the California affiliate reporting requirements adopted by its Rulemaking 92-06-008 as an additional competitive safeguard. Pacific Bell correctly states that these requirements are rigorous. It fails to note, however, that the regulations do not require reporting of any transactions between a telephone company and its subsidiaries over which the CPUC asserts

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36 Id. at 7-8.

37 Investigation on the Commission's Own Motion into the Regulation of Cellular Radiotelephone Utilities, Decision 90-06-025, mimeo at 64 (June 6, 1990).