

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

GEN Docket No. 90-314

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COMMENTS ON
PACIFIC BELL, NEVADA BELL, PACIFIC BELL MOBILE SERVICES
AND PACIFIC TELESIS MOBILE SERVICES'
PLAN OF NON-STRUCTURAL SAFEGUARDS

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SUMMARY

Nextel Communications, Inc. ("Nextel") opposes approval of the Personal Communications Service ("PCS") non-structural safeguards plan filed by Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Telesis Mobile Services (collectively "PacBell"). PacBell's "Plan" is inadequate to ensure that PacBell does not engage in improper cross-subsidization of its PCS business with revenues from its landline monopoly services, and the Plan does not prevent PacBell from providing competitors with inferior interconnection agreements compared with those provided to PacBell affiliates.

Beginning in August of 1996, Commercial Mobile Radio Service ("CMRS") providers will all be subject to the same Commission regulations. Regulatory parity for similar services is feasible when service providers compete on equal terms, but if one or more competitors have an advantage because of their government-granted monopoly power, regulatory "parity" becomes a sham. At present, nothing in PacBell's Plan prevents PacBell from unreasonably loading the costs of its PCS activities onto its monopoly landline business, thus giving its PCS affiliate an edge over all competitors. Approval of PacBell's Plan could distort competition in the marketplace for wireless services in the greater California region, and would set damaging precedent for growing LEC participation in the wireless industry.

If the Commission wants a competitive CMRS industry it will reject PacBell's Plan and conduct an expedited rulemaking on the necessary safeguards for LEC provision of CMRS. Meaningful safeguards are necessary now.

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AND PACIFIC TELESIS MOBILE SERVICES'
PLAN OF NON-STRUCTURAL SAFEGUARDS

Nextel Communications, Inc. ("Nextel") opposes approval of the plan of non-structural safeguards (the "Plan") filed by Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Telesis Mobile Services (collectively "PacBell") that purports to ensure against cross-subsidization of the Personal Communications Services of PacBell.

I. INTRODUCTION

Nextel is a provider of mobile services that will become a Commercial Mobile Radio Service ("CMRS") provider in August of 1996. Nextel pioneered the concept of combining Specialized Mobile Radio ("SMR") frequencies to offer wide-area mobile service. It currently offers customers a unique combination of dispatch, short messaging and mobile telephone services for the mobile work force in a number of metropolitan areas including the Los Angeles - San Diego Major Trading Area ("MTA") in which PacBell holds a 30 MHz Personal Communications

Service ("PCS") license and is the dominant local exchange carrier ("LEC"). Because Nextel will compete with PacBell's PCS offerings throughout California, it has a major stake in the Commission's imposition of meaningful, enforceable requirements on PacBell's PCS affiliate's relationship with its LEC affiliate.

The Commission has stated that it "can play a positive role in fostering [a] competitive [wireless] environment by examining and establishing the proper mix of safeguards designed to ensure that no CMRS provider gains an unfair competitive advantage resulting from its size or preexisting position in particular CMRS markets."^{1/} Despite this statement, the Commission has failed to establish any meaningful regulations on LEC provision of PCS and CMRS. PacBell has submitted its Plan of non-structural "safeguards" pursuant to one footnote in the Broadband PCS Order -- a meager footnote that contains the only regulatory safeguards specifically applicable to LEC provision of PCS.^{2/}

Taking full advantage of the opportunity, PacBell has presented a plan that allows it to thwart wireless competition

^{1/} Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd 1411, 1493 (1994) ("Second CMRS Report and Order") (emphasis added).

^{2/} Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, 8 FCC Rcd 7700, 7748, n.96 (1993) ("Broadband PCS Order"). ("Commencement of service by LECs under any of these alternatives would be contingent on the LEC implementing an acceptable plan for non-structural safeguards against discrimination and cross-subsidization.")

and maintain its monopoly position in the provision of basic telephony services. If the Commission wants wireless competition to succeed, it must reject PacBell's Plan and set in motion the proceedings necessary to adopt rules sufficiently robust to meet the challenge posed by integrated LEC-PCS offerings.

Further, PacBell's casual presentation of its non-structural "safeguards" Plan for integration of its PCS and landline telephony businesses belies the Plan's significance. PacBell's Plan has enormous competitive implications for the emergence of full competition in the wireless industry because the competitive risks of granting LEC requests to offer various telephony-wireless services on an integrated basis are great, and the rules to protect competition are not well formed.

Without appropriate safeguards constraining abuse of the local exchange bottleneck, however, a LEC-affiliated CMRS provider has the incentive and ability to subsidize or reduce its costs artificially through its relations with the LEC's landline monopoly services. While the Section 208 complaint process is available to remedy obvious, egregious wrongs, the complaint process provides too little relief too late to protect businesses attempting to compete with the powerful LECs.

A general rulemaking is needed to address the many competitive issues raised by expanding LEC participation in the wireless industry. For example, Southwestern Bell recently filed a declaratory ruling request asking for permission to integrate

out-of-region cellular and landline businesses.^{3/} As Nextel stated in Comments filed on Southwestern Bell's request, the request has complex ramifications for other BOC-related wireless ventures and for the development of competition in wireless markets generally.^{4/} PacBell's proposal poses equally significant broad policy questions that can only be resolved in a rulemaking proceeding. The Commission must not allow LECs to ignore existing rules, as Southwestern Bell proposes, or adopt self-serving regulations. Neither approach promotes the public interest in competition on the merits pursuant to rules adopted after notice and comment.

II. EXISTING NON-STRUCTURAL SAFEGUARDS WERE NOT DESIGNED TO GOVERN LEC PROVISION OF COMMON CARRIER SERVICES

PacBell's proposed "safeguards" are non-structural safeguards. Non-structural safeguards, including the cost allocation rules found in Parts 32 and 64 of the Commission's rules,^{5/} were designed to detect and deter discrimination against the enhanced services provider competitors of BOCs providing enhanced services on an integrated basis. These rules were not, however, designed to address an industry that possesses

^{3/} See Wireless Telecommunications Bureau Seeks Comment on Southwestern Bell Mobile System's Request for Declaratory Ruling on Provision of "Out-of-Region" Competitive Landline Local Exchange Service by a Cellular Affiliate, Public Notice, DA 95-1454 (released June 29, 1995).

^{4/} See Comments of Nextel Communications, Inc., CWD-95-5, filed July 17, 1995 at ii.

^{5/} 47 C.F.R. Parts 32 and 64.

the technical and economic characteristics of the wireless industry, potentially competes with the LECs' core monopoly business, and relies upon the LECs for access to its customers.

PacBell's proposed application of rules that were not designed to govern this multi-billion dollar industry has vast implications for the industry's competitive future. Use of Computer III^{6/} rules without modification to reflect the differences between wireless and enhanced services, as PacBell proposes, will allow competitive distortions in the marketplace and harm competition with PacBell's affiliates.^{7/}

Competition will be harmed because PacBell's non-structural "safeguards" Plan is inadequate to govern LEC integration of 30 MHz PCS licenses and landline facilities throughout PacBell's region. Furthermore, PacBell's proposed interconnection arrangements are inherently discriminatory, and PacBell's proposed non-structural safeguards are inadequate to either detect or deter cross-subsidization.

6/ See, e.g. In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Notice of Proposed Rulemaking, CC Docket No. 95-20, FCC 95-48 (adopted February 7, 1995, released February 21, 1995) ("Computer III").

7/ Before the Commission adopts a rule it must examine the relevant data and articulate a satisfactory explanation for its action based upon the record. See People of the State of California v. FCC, 905 F.2d 1217, 1230 (9th Cir. 1990).

A. Discriminatory Interconnection

Interconnection with the public switched network is an essential component in the successful establishment and growth of CMRS offerings.^{8/} Rules to govern interconnection service provided by LECs to PCS and CMRS providers have been promised,^{9/} but no specific rules have been forthcoming. Currently, the only interconnection requirements applicable to PacBell are the general requirements that it must provide the type of interconnection reasonably requested by all CMRS providers under a system of mutual compensation, reasonable charges, and equal access.^{10/} PacBell's Plan, however falls short of these minimal standards.

PacBell's Plan proposes to offer competing wireless carriers five types of interconnection pursuant to general intrastate tariffs. These standard packages may or not be responsive to the needs of individual CMRS providers, and should not be portrayed as the types of interconnection "we currently offer." While PacBell says that all CMRS providers will have access to the same interconnection agreements available to its affiliates, "equal access" to a plan that does not meet a provider's needs is not the federal standard. The Plan also

8/ Second CMRS Report and Order, 9 FCC Rcd at 1499.

9/ See In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rule Making and Notice of Inquiry, 9 FCC Rcd 5408 (1994) ("Interconnection Notice").

10/ Second CMRS Report and Order, 9 FCC Rcd at 1498.

provides no means by which federal regulators, state regulators, or competitors can verify that PacBell is not either overcompensating its PCS affiliate for traffic terminated on the affiliate's PCS network, or undercompensating itself for PCS traffic that is terminated on the PacBell landline network.

Further, PacBell's Plan violates expanded interconnection principles. For example, PacBell claims that allowing only its PCS affiliate to have physical collocation of its facilities and maintenance crews at PacBell end offices does not give it any "pricing advantage" over other CMRS providers because their interconnection at a remote serving wire center is "distance insensitive." This claim is misleading: it is axiomatic under expanded interconnection that interconnectors are entitled to the same type, nature and scope of interconnection as similarly situated interconnectors.^{11/} Consequently, all interconnectors should have access to the same interconnection options available to PacBell affiliates, including any options on physical collocation.

Absent meaningful regulatory oversight, the unsupervised interconnection arrangements between PacBell and its PCS affiliates pose a serious competitive threat to non-LEC affiliated wireless networks. As the Commission has observed, "LECs have some incentive to delay or impose barriers to the

^{11/} See Expanded Interconnection With Local Telephone Company Facilities, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994).

development of competition from new CMRS services, such as PCS."^{12/} The Commission must ensure that interconnection is not a barrier to wireless competition by enacting rules that protect wireless providers from LEC discrimination. The rules should require complete equality between the LEC-affiliate and other CMRS providers, including affiliates of the LEC, for all aspects of interconnection both physical and financial. Additionally, to ensure that LECs comply, they should be required to file full reports on all affiliate interconnection arrangements on a periodic basis.

B. Cross-Subsidization

While some ambiguity still surrounds the status of PacBell's PCS offering for federal accounting purposes,^{13/} specific rules must be adopted now to minimize cross-subsidization by PacBell. Without expanded cost allocation and affiliate transaction rules, and required disclosure of the scope of PacBell's PCS affiliate activities, cross-subsidization is inevitable.

^{12/} Interconnection Notice, 9 FCC Rcd at 5456.

^{13/} See Application of Pacific Telesis Mobile Services for a License to Provide Broadband PCS Service on Block B in the Los Angeles - San Diego Major Trading Area (M002), Order, File No. 00002-CW-L-95, DA 95-1413 (released June 23, 1995) (Application for Review pending) at 7 ("The applicability of Parts 64 and 32 to CMRS services (including PCS) is an issue that has been raised expressly in petitions for reconsideration of the Second CMRS Report and Order, which is under current consideration by the Commission. . . . We therefore conclude that that proceeding is the proper forum for resolving this issue.")

For example, under the Part 64 cost-allocation rules, PacBell is required to classify any costs that are not directly assignable to regulated or non-regulated accounts as joint and common costs.^{14/} Classifying costs as joint and common costs is troubling, however, because PacBell has already shown a propensity to allocate the overwhelming majority of any common costs to its regulated landline telephony base. In its application to provide video dialtone service in California, PacBell proposed to allocate 85 percent of common system costs to its basic landline telephony network.^{15/} Without rules preventing this prospect, PacBell could conceivably propose a similar plan for allocation of PCS and landline costs, with the effect of reducing the "costs" of its PCS affiliate to such a low level that other CMRS networks will be unable to compete because of PacBell's artificial, non-economic advantage.

The Plan is also deficient in that it identifies legal, management, personnel and systems operation staff resources that PacBell will devote to its PCS affiliate, but fails to allocate any direct or joint and common costs associated with them to PCS.

^{14/} See 47 C.F.R. § 64.901(b)(3).

^{15/} See, e.g., Letter to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, from Alan J. Gardner, Vice President, Regulatory & Legal Affairs, California Cable Television Association, (re: Pacific Bell's January 13, 1995 Response to the Commission's Second and Third Data Requests of November 21, 1994 and December 9, 1994, File Nos. W-P-C 6913, 6914, 6915, and 6916, Applications of Pacific Bell for Authority Under Section 214(a) of the Communications Act to Construct Video Dialtone Facilities) filed January 20, 1995 at 3.

Absent further disclosure categorizing the activities of PacBell's staff as either PCS-related or telephony-related, there is no way of knowing whether PacBell is engaging in improper cross-subsidization.^{16/}

Computer III non-structural cost allocation rules were designed to separate a LEC's basic and enhanced services by allocating basic telephony costs into a regulated account and enhanced services into a non-regulated account. Use of a regulated/non-regulated dichotomy is problematic, however, for PacBell's PCS offerings. If PCS is a regulated service the rules do not apply. If it is a non-regulated service, the rules do apply but are not relevant because the costs relate to wireless networks and services, rather than the enhanced services for which the rules were designed.

Given the uncertainty regarding whether PCS is a "non-regulated" service for purposes of the accounting rules, the Commission must not rely on the existing non-structural accounting system to assure that PacBell does not cross-subsidize. Rather than attempting to fit a "square peg into a round hole" by forcing PacBell's PCS services into artificial regulated/non-regulated categories, the Commission should require

^{16/} The Commission has conditioned approval of a carrier's non-structural safeguards plan on its compliance with further disclosure of joint and common costs and justification of any use of different cost allocators for regulated and non-regulated subaccounts. See Comsat Mobile Communications; Permanent Cost Allocation Manual for the Separation of Jurisdictional and Nonjurisdictional Costs, Memorandum Opinion and Order, AAD 94-24 (Com. Car. Bur. released July 13, 1995).

PacBell both to comply with expanded cost allocation and affiliate transaction rules and to disclose the scope of its PCS affiliates' activities, including the activities of related PacBell affiliates or subsidiaries involved in PCS construction, operation and management. PacBell has already located its PCS activities in separate subsidiaries, so disclosure of these subsidiaries' finances will present no additional burden.^{17/}

The Commission has acknowledged the necessity of establishing competitive safeguards for LEC provision of PCS and CMRS.^{18/} LECs should not, however, be permitted to substitute plans of their choosing for rules adopted through a notice and comment rulemaking proceeding. Never before has the Commission adopted non-structural safeguards without first engaging in a reasoned analysis of what safeguards are required. CMRS is no different.^{19/} An expedited rulemaking on the appropriate

^{17/} Until the Commission's LEC-CMRS safeguards rules are established, PacBell should be required to keep complete financial records of all PCS activities so that costs incurred during the pendency of the rulemaking proceeding can be allocated according to the new rules.

^{18/} "[I]f LECs are permitted to supply PCS within their service territories, they may have incentives to discriminate against competitors requesting interconnection as well as to cross-subsidize PCS provision from expenditures ostensibly made to serve rate-regulated wireline customers." Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd 5676, 5705 (1992).

^{19/} The courts have said that "[w]e do not dispute that the FCC has the authority to rethink its . . . policies in light of changed circumstances. It must, however, provide reasoned explanations for its policy changes." People of the State of California v. FCC, 905 F.2d at 1237

safeguards for LEC provision of CMRS on an integrated basis with landline facilities is essential.

III. PACBELL'S PLAN IS SERIOUSLY INADEQUATE, AND APPROVAL OF THE PLAN WOULD SET DAMAGING PRECEDENT

Approval of PacBell's Plan is not an isolated regulatory action. The Commission must consider the potential effect of PacBell's integrated PCS and landline telephony offerings on wireless competitors and on the public interest. Doubtless PacBell's acquisition of a 30 MHz PCS license throughout its local exchange markets may not have been anticipated when the Broadband PCS Order was adopted. Before PacBell constructs a seamless integrated wireless-landline network, this Commission must adopt rules adequate to the scope of the challenge presented.

Existing Commission rules require LECs to provide cellular service through a structurally separate subsidiary and impose structural separation requirements and affiliate transaction rules.^{20/} In deciding not to impose structural separation requirements on LEC PCS offerings, the Commission relied in part on the fact that LECs with cellular affiliates

^{20/} Section 22.903 of the Commission's rules requires certain LECs (including PacBell) to provide cellular service through a separate corporation that: maintains its own books of account; has separate officers; employs separate operating, marketing, installation and maintenance personnel; and uses separate computer and transmission facilities to provide cellular service. See 47 C.F.R. § 22.903(b). In addition, the LEC cellular subsidiary "may not own any facilities for the provision of landline telephone service." 47 C.F.R. § 22.903(a).

would be restricted from owning PCS licenses other than 10 MHz Basic Trading Area ("BTA") licenses in areas where there was significant overlap between their cellular interests and PCS.^{21/} LEC ownership of these BTA licenses would, at most, comprise a wireless loop extension on the landline network.

PacBell, however, has chosen to spin off its in-region cellular holdings so it could bid in the 30 MHz MTA broadband PCS auction. PacBell also recognized that its PCS licenses would take on additional value if they were essentially unregulated by the Commission, and has consistently pushed the Commission to limit the regulations and reporting requirements applicable to LEC provision of PCS.^{22/} PacBell is entering PCS to protect its core monopoly business from competition, and has every incentive to keep other CMRS providers at as great a disadvantage as possible.^{23/}

21/ Broadband PCS Order, 8 FCC Rcd at 7751. ("We also conclude, based on the record, that the cellular-PCS policies indicated above are adequate to ensure that LECs do not behave in an anticompetitive manner.")

22/ For example, PacBell filed a Petition for Clarification or Reconsideration of the Second CMRS Report and Order, asking the Commission to declare that the accounting rules in Parts 32 and 64 do not apply to PCS. See Petition for Clarification or Reconsideration of Pacific Bell filed in GEN Docket No. 93-252 (filed May 19, 1994). This Petition is still outstanding.

23/ See, e.g., "Wireless Warrior PacTel Finds It Pays to Advertise," San Francisco Business Times, October 14, 1994, quoting Michael Killen, Telecommunications Analyst ("If PacTel fails to win the [PCS] license, it could lose about 20% of its market to wireless providers PacTel's whole strategy for the future can be blown away if they fail to get Los Angeles. Pacific Telesis positioned itself like no other company to get burned").

PacBell is not alone in its push to dominate both the wireless and landline industries. As discussed earlier, Southwestern Bell filed a declaratory ruling request asking for permission to integrate out-of-region cellular and landline businesses. If PacBell's Plan is approved with the minimal safeguards proposed by PacBell, or if Southwestern Bell's declaratory ruling is granted, these actions will be an obvious prelude to additional LEC requests for full-scale integration of landline and wireless services and further requests for interLATA interexchange service integration. For example, other PCS licensees such as PCS PRIMECO, L.P., a partnership of subsidiaries of NYNEX Corporation, Bell Atlantic, U S West, Inc. and AirTouch Communications, Inc., would also be candidates for requests to integrate their holdings.

As shown by the PacBell and Southwestern Bell filings, the LECs have ambitious plans for offering additional integrated services. Consequently, any integration plan approved for PacBell must address and remedy the competitive harms that are likely to occur. Before the Commission approves PacBell's Plan and receives an avalanche of "me too" integration requests, it must recognize that action on PacBell's Plan will have precedential value affecting the entire wireless industry.

Both Congress and the Commission have made a commitment to a competitive CMRS industry,^{24/} but the public interest benefits of increased competition will not occur if CMRS providers are denied an opportunity to compete with the LECs and their affiliates on equal terms. Rules must be established quickly to prevent improper LEC cross-subsidization and discriminatory interconnection agreements.

The Commission can no longer wait to conduct the rulemakings it has promised on competitive safeguards for CMRS. California is too large and too important a market for the Commission to ignore. Consequently, the Commission must fulfill its promise and establish meaningful rules now, or risk permanent harm to the national wireless industry.

IV. CONCLUSION

PCS and the greater CMRS industry can provide real competition for local exchange carrier services for the first time if the LECs are restrained from abusing their market power. Regulatory parity for similar services is only feasible if all service providers compete on equal terms. Because PacBell's Plan does not ensure that PacBell's PCS affiliates will compete on equal terms with other CMRS providers, PacBell's Plan must be

^{24/} "[T]he intent of Congress is that, 'consistent with the public interest, similar services are accorded similar regulatory treatment,'" Second CMRS Report and Order, 9 FCC Rcd at 1418; "We believe the actions we take in this Order establish a symmetrical regulatory structure that will promote competition in the mobile services marketplace and will thus serve the interests of consumers while also benefiting the national economy," Id.

rejected. Then, before PacBell submits a new Plan, the Commission must conduct an expedited rulemaking to establish meaningful safeguards for LEC provision of PCS and CMRS. Failing to do so will do serious harm to emerging wireless competition.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.

A handwritten signature in black ink, reading "Robert S. Foosaner/yk". The signature is written in a cursive style with a horizontal line underneath.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "COMMENTS ON PACIFIC BELL, NEVADA BELL, PACIFIC BELL MOBILE SERVICES AND PACIFIC TELESIS MOBILE SERVICES' PLAN OF NON-STRUCTURAL SAFEGUARDS" was sent via first-class U.S. mail, postage prepaid, or by hand delivery, this 16th day of August, 1995, to the following:

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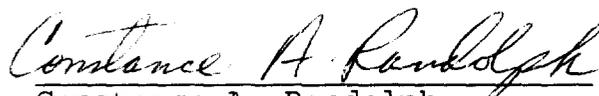
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