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October 12, 1995

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OFFICE OF SECRETARY

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

RE: GEN Docket 90-314, Pacific Bell PCS Nonstructural Safeguards Plan

Dear Mr. Caton:

On September 12, 1995, Pacific Bell and BellSouth filed Reply Comments on the comments filed in response to Pacific Bell's nonstructural safeguards "plan" for Pacific Bell's provision of personal communications service ("PCS") in southern California.^{1/} Both submissions are rife with inaccuracies and misstatements, especially in their discussions of the comments filed by Cox Enterprises, Inc. ("Cox") on Pacific Bell's PCS "plan."^{2/} These replies do nothing to alter the conclusion that Pacific Bell's nonstructural safeguards "plan" is completely inadequate to protect captive telephone ratepayers and potential local competitors

1/ Amendment of the Commission's Rules to Establish New Personal Communications Services, Reply Comments of Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Telesis Mobile Services, GEN Docket No. 90-314 (filed September 12, 1995) ("Pacific Bell Reply Comments"); Amendment of the Commission's Rules to Establish New Personal Communications Services, Reply Comments of BellSouth, GEN Docket No. 90-314 (filed September 12, 1995) ("BellSouth Reply Comments").

2/ Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Telesis Mobile Services' Plan of Non-Structural Safeguards Against Cross-Subsidy and Discrimination, Comments of Cox Enterprises, Inc., GEN Docket No. 90-314 (filed August 16, 1995) ("Cox Comments"). In the interest of a complete record in this proceeding, to the extent the FCC deems it necessary, Cox requests a waiver to file this additional pleading under 47 C.F.R. § 1.45(c).

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from predatory behavior stemming from Pacific Bell's provision of PCS. In its haste to have the Commission rubber-stamp its entry into PCS, Pacific Bell avoids the fundamental questions Cox has raised. Pacific Bell ignores the serious question of whether the regulations designed to oversee the development of the enhanced services market sufficiently address LEC incentives in this vastly different market. More is required than the rote application of regulatory tools that are simply inadequate to the task of promoting local loop competition.

Predictably, Pacific Bell treats every issue as settled. For example, Pacific Bell states boldly that "the rules with respect to our safeguards plan are final."^{3/} Obviously Pacific Bell hopes that the Commission will ignore its repeated promises in numerous proceedings to review and establish meaningful safeguards for LEC provision of PCS.^{4/} As Cox detailed in its Comments, the Commission has yet to determine the proper mix of competitive safeguards for commercial mobile radio services ("CMRS") providers,^{5/} decide the scope of fundamental reform of LEC-CMRS interconnection,^{6/} or even affirmatively rule that the Part 64 accounting rules apply to PCS.^{7/} All of these issues are important and have direct bearing on the sufficiency of any PCS nonstructural safeguards "plan." The Commission must not buckle under Pacific Bell's pressure to approve a safeguards "plan" that fails to address Pacific Bell's obvious motive and intention to utilize its PCS operations to forestall competition to Pacific Bell's local exchange monopoly.

Pacific Bell asserts that accounting standards alone provide sufficient safeguards for LEC provision of a new service.^{8/} Of course, this has never been the Commission's view.

^{3/} Pacific Bell Reply Comments at 5.

^{4/} See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd 1411, 1493 (1994) ("... 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. . . . [W]e defer this issue [of competitive safeguards] to a separate proceeding. . . .").

^{5/} Cox Comments at 10.

^{6/} Cox Comments at 11.

^{7/} Cox Comments at 9.

^{8/} Pacific Bell's assertion that the PCS accounting rules are "detailed and well-established" is incredible. Pacific Bell Reply Comments at 23. The Commission presumptively

(continued...)

In every case where LECs sought to enter new communications markets, the Commission has linked cost accounting with other pro-competitive safeguards designed specifically for the task or modified its rules to be responsive to the particular competitive concerns of that market.^{9/} Standing alone, accounting safeguards do little to address potential competitive discrimination. The Commission's responsibility to promote competition more than justifies insistence on adequate competitive safeguards before Pacific Bell is permitted to commence PCS.^{10/}

8/ (...continued)

determined that PCS should be included in the deregulated class of CMRS services before the broadband PCS auction closed and before it was known that Pacific Bell would obtain PCS licenses in its landline service area. Pacific Bell's recitation of the meetings it had with various Commission staff does nothing to change the simple truth that LEC acquisition of in-region 30 MHz PCS licenses was not discussed in any of the PCS dockets and is not accounted for by the Commission's rules.

9/ See, e.g., Price Cap Performance Review for Local Exchange Carriers; Treatment of Video Dialtone Services Under Price Cap Regulation, Second Report and Order and Third Notice of Proposed Rulemaking, CC Docket No. 94-1 (released September 21, 1995); Reporting Requirements on Video Dialtone Costs and Jurisdictional Separations for Local Exchange Carriers Offering Video Dialtone Service, Memorandum Opinion and Order, DA 95-2026, AAD No. 95-59 (released September 29, 1995) (recent Orders that begin to address the numerous cost accounting issues raised by LEC-provided video dialtone platforms).

10/ BellSouth's contention that the Commission has not, in fact, required LECs to file and receive approval for a PCS non-structural safeguards plan before beginning PCS service is nothing short of outrageous. See BellSouth Reply Comments at 1-3. There is no legal basis for BellSouth's claim that FCC licensees are bound only by the discussion section and ordering clauses of Commission Orders. Indeed, in bold print in the Bidder's Package for the December 5, 1994, PCS auction, is the following language:

VII. BIDDER ALERT

The Terms contained in the Commission's Report and Orders, Public Notices and in the Bidder's Information Packages are not negotiable. Prospective bidders should review these auction documents thoroughly prior to the auction to make certain that they understand all of the provisions and are willing to be bound by all of the Terms before making any bid.

Pacific Bell states that Cox's Comments "indicate little understanding of the [Part 64] accounting rules"^{11/} and ignore Pacific Bell's present intention to treat PCS as a nonregulated service for federal accounting purposes. However, while it is gratifying that Pacific Bell has changed its position and now admits that until proper rules are established Part 64 rules do apply to its PCS business, the Commission has yet to make a similar finding. The Wireless Bureau explicitly declined to rule that even the most minimal safeguards contained in the Part 64 rules apply to Pacific Bell's provision of in-region PCS.^{12/} As an interim measure the Commission must make clear that the Part 64 rules do apply to Pacific Bell until PCS-specific accounting safeguards are developed.

As Cox detailed in its Comments, the Part 64 rules were developed in the Computer III proceeding. That proceeding focused only on the proper regulatory treatment of enhanced services, a group of services that did not compete with the core LEC monopoly.^{13/} Nothing in the Computer III docket discussed the policy issues raised by integrated LEC provision of competitive and non-competitive common carrier services, and nothing in the Computer III docket indicated in any way that the accounting and other regulatory safeguards developed in that docket were intended to govern later services that might not share the same attributes as enhanced services. Blind application of Computer III-type regulation for PCS ignores the central fact that the type of safeguards appropriate for the enhanced services market is vastly different from the safeguards necessary where there is direct competition with the LEC local exchange.^{14/} The opportunities for cross-subsidization and discrimination inherent in integrated LEC-provided PCS are different from the opportunities presented by LEC-provided enhanced services. Indeed, the Commission was very clear that the Computer

10/ (...continued added).

11/ Pacific Bell Reply Comments at 14.

12/ Cox Comments at 28.

13/ Cox Comments at 23.

14/ There is no doubt that Pacific Bell understands the implications of its position. Pacific Bell's own witness (Dr. Robert G. Harris) on September 27, 1995, in I.95-05-047 before the California Public Utilities Commission, testified as follows:

"I think Pacific basically had to go into PCS, into wireless, because it recognizes that wireless is going to become competitive with wireline. And although it will be competing with itself . . . it's better for it to be one of the competitors of itself than only someone else." Tr. at 364.

III regime was not intended to apply to basic common carrier services such as PCS.^{15/} And while some forms of Computer III safeguards may provide guidance to the Commission's efforts in determining ground rules for PCS-LEC integration, the notion that a single set of all purpose accounting regulations represents adequate protection for all services and under all circumstances is plainly wrong.

Pacific Bell's attempt to have it both ways by creating a PCS subsidiary that is separate for some purposes but not for others does not address Cox's concern. Pacific Bell claims that because its PCS will be provided by a "separate" subsidiary there will be no joint and common costs between PCS and regulated telephony service.^{16/} Pacific Bell stopped short, however, of creating a "separate subsidiary" for regulatory purposes. Pacific Bell's choice of corporate structures was developed to give Pacific Bell the best of both worlds: a "separate" subsidiary to present to the Commission as the "solution" to thorny integration problems and an integrated subsidiary to take advantage of cost savings and cost shifting. The creation of a "separate" subsidiary does not resolve the issue of Pacific Bell's regulated company investments intended to benefit its PCS subsidiary. Current Commission cost accounting rules do not address the broad reaching potential for cross-subsidy inherent in Pacific Bell's proposed approach.

Pacific Bell also takes up the now familiar LEC refrain that price caps are the magic wand that eliminates a LEC's ability to cross-subsidize. It claims that because it is using a separate subsidiary to provide PCS service, its PCS costs are not subject to the price cap calculation.^{17/} Pacific Bell's statement merely begs the question of what is a PCS cost. Decisions on the construction and configuration of the price cap-governed basic local loop will be influenced by Pacific Bell's PCS plans, and the costs of those decisions will be passed to local telephone ratepayers even if Pacific Bell cannot raise its basic local rates. The Commission's price cap regime is premised on ever greater LEC efficiencies, and nothing in the current regulatory scheme prevents Pacific Bell from offsetting those efficiencies with increased PCS costs. BellSouth, in its Reply Comments, also attempts to dismiss the price caps issue, and attaches an ex parte letter that purports to show that Cox's views on price caps, particularly as applied to video dialtone, are "utterly fallacious."^{18/} BellSouth's Reply

15/ Third Computer Inquiry, Report and Order, 104 FCC 2d 958, 1101 (1986).

16/ Pacific Bell Reply Comments at 16.

17/ Pacific Bell Reply Comments at 22.

18/ BellSouth Reply Comments at 6. BellSouth rebukes Cox's accounting experts from starting from the premise that LEC video dialtone systems are not profitable, and states that

(continued...)

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Comments are nothing more than yet another example of a LEC attempt to discredit a conflicting point-of-view on the efficacy of price caps, and should be ignored by the Commission.

Pacific Bell attempts to make little of the potentially most significant competitive issue related to LEC-PCS competitive safeguards: interconnection. Pacific Bell asserts that rules in this area are set, and states that "to the extent that PCS licensees have [need for] additional interconnection arrangements, PB will negotiate with them."^{19/} As Cox and other potential local loop competitors have found, however, it is next to impossible to negotiate with a party when that party has monopoly control over the pricing of access to essential service components. Pricing of interconnection will by large measure determine whether non-LEC PCS providers can succeed. Pacific Bell has every incentive to delay competitors from challenging its core monopoly business and has already displayed a plain lack of intent to agree to mutual compensation methods including those with growing support such as bill and keep.^{20/}

^{18/} (...continued)

this factual premise fatally flaws Cox's analysis. However, Cox and other parties have conclusively shown that LEC video dialtone systems are unprofitable, as the recent LEC tariff filings repeatedly bear out. See, e.g., U S West Communications, Inc., Tariff F.C.C. No. 5, Market Trial of Basic Video Dialtone Service in Omaha Nebraska, Order, Transmittal Nos. 657 and 665, DA 95-1892 (released August 30, 1995) (Order approving US West video dialtone tariff despite lack of cost information); Application of the Southern New England Telephone Company for Approval to Conduct a Dial Tone Transport and Switching Market Trial, Decision, Docket No. 95-03-10, Department of Public Utility Control, State of Connecticut (released June 30, 1995) (Decision of the Connecticut Public Utilities Commission finding the cost allocation methods in SNET's market trial tariff to be inadequate to support a commercial offering).

^{19/} Pacific Bell Reply Comments at 33.

^{20/} For example, in the local competition docket in California, the California Public Utilities Commission adopted a bill and keep methodology to promote local competition by certified competitive local service providers. Pacific Bell vigorously opposed the adoption of a bill and keep compensation plan. Closely following the CPUC's action, Pacific Bell filed an application for rehearing regarding the plan's adoption. Rather than discussing the merits of bill and keep, Pacific Bell made the procedurally desperate argument that its constitutional rights had been violated. See Application of Pacific Bell (U 1001 C) For Rehearing of Decision No. 95-07-054, Before the Public Utilities Commission of the State of California, R. 95-04-043, I. 95-04-044 (filed August 23, 1995). Pacific Bell recognizes that California's

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As the Commission recognized in its Cellular Interconnection Policy, one-sided negotiations are not negotiations, they are extortion. As anyone with experience in negotiating with LECs can readily confirm, LECs have the means to "negotiate" a competitor out of business. Pacific Bell has the power and the incentive to prevent PCS from developing as a competitive alternative to the local loop in its landline monopoly region absent firm Commission intervention. Refusal to consider mutual compensation postpones the day when PCS can compete for local loop business. This safeguard approval process cannot fail to address the availability of reasonable interconnection such as bill and keep, as a bedrock competitive safeguard.

Other arguments against Cox on issues such as the findings of the NARUC audit and PCS development costs are similarly infirm. No amount of rhetoric can cover up the plain fact that the Commission has not meaningfully addressed the competitive safeguards issues raised by integrated in-region LEC provision of broadband PCS. Pacific Bell's decision to create a "subsidiary" does not solve the problem. The public interest demands that competitive safeguards issues be resolved before Pacific Bell's PCS service begins.

With proper resolve, the Commission can complete the necessary rulemaking cycles to establish obligatory safeguards without impairing Pacific Bell's PCS service plans. Further, as the numerous recent filings by LECs asking for regulatory relief in the wireless field illustrate, the competitive implications of LEC service integration raised by the Pacific

20/ (...continued)

adoption of a mutual compensation plan threatens Pacific Bell's monopoly position, and therefore apparently intends to fight mutual compensation alternatives at all costs.

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Bell PCS plan are not isolated.^{21/} The Commission must deal with these issues in a thorough and comprehensive manner. The Commission cannot punt these serious issues, already too long deferred, into some future proceeding. To do so would be arbitrary and capricious. Action must occur quickly, and Cox urges the Commission to begin.

Respectfully submitted,

Cox Enterprises, Inc.



Werner K. Hartenberger
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Its Attorneys

cc: Attached service list

^{21/} See, e.g., Public Notice, "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 of a BOC," DA-95-1454 (released June 29, 1995) (Request by Southwestern Bell related to providing out-of-region wireline service through its cellular affiliate); Public Notice, "Wireless Telecommunications Bureau Seeks Comment on BellSouth Corporation's Request for Resale Authorization," DA 95-1901 (released August 31, 1995) (Request by BellSouth to waive the cellular structural separation rules to allow BellSouth to resell cellular service on an integrated basis).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Ex Parte Letter" was sent via first-class U.S. mail, postage prepaid, or by hand delivery, this 12th day of October, 1995, to the following:

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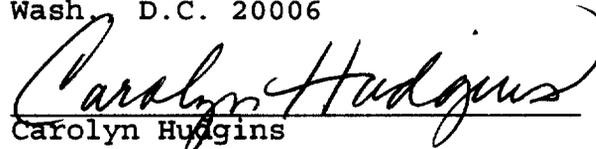
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