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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

DA 96-256

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	
	)	GN Docket No. 90-314
Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Telesis Mobile Services' Plan of Non-Structural Safeguards Against Cross-Subsidy and Discrimination	)	

ORDER

Adopted: February 27, 1996 Released: February 27, 1996

By the Acting Chief, Wireless Telecommunications Bureau:

I. Introduction

1. On July 10, 1995, Pacific Bell, Nevada Bell, Pacific Bell Mobile Services ("PBMS") and Pacific Telesis Mobile Services ("PTMS")(collectively, "PacTel") requested approval of a safeguards plan relating to their provision of broadband Personal Communications Services ("PCS") within local exchange areas served by Pacific Bell and Nevada Bell ("Plan").[1] According to PacTel, its filing is required by the Commission's *Broadband PCS Order*,[2] which states that commencement by local exchange carriers ("LECs")

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[1] On July 26, 1995, interested parties were invited to comment on the Plan. *See* Carriers File Plan For Non-Structural Safeguards To Prevent PCS Cross-Subsidies and Discrimination, FCC Public Notice, DA 95-1655 (July 26, 1995). On August 16, 1995, AirTouch Communications, Inc. ("AirTouch"), Cox Enterprises, Inc. ("Cox"), MCI Telecommunications Corporation ("MCI"), Nextel Communications, Inc. ("Nextel") and Sprint Telecommunications Venture ("Sprint") filed comments. On September 12, 1995, BellSouth Telecommunications, Inc.,("BellSouth") and PacTel filed reply comments.

[2] Amendment of the Commission's Rules to Establish New Personal Communications Services, GN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700 (1993)("*Broadband PCS Order*"), *recon. pending*.

of PCS within their local exchange areas is "contingent on the LEC implementing an acceptable plan for non-structural safeguards against discrimination and cross-subsidization."[3] By this Order we approve PacTel's Plan.

2. Notwithstanding this approval, we note that the portion of the Plan pertaining to the handling of customer proprietary network information ("CPNI") is based on Commission requirements in effect at the time the Plan was filed.[4] Since then, some of those requirements have been superseded by the recently enacted Telecommunications Act of 1996.[5] PacTel must ensure that its Plan complies with all sections of the newly-amended Act, including its CPNI provisions. The CPNI provisions of the Telecommunications Act of 1996 are self-executing. To the extent that the Commission's CPNI requirements in effect prior to its enactment do not conflict, they remain in effect. The Commission intends to clarify the continuing CPNI obligations of telecommunications carriers in a rule making that will be initiated in the near future. Moreover, the Commission plans to initiate a proceeding soon to review existing competitive safeguard policies and rules for commercial mobile radio services to ensure they continue to serve the public interest. PacTel will be required to modify its operations, and amend its Plan, to come into conformance with the new or amended provisions of the Act and the Commission's rules implementing such provisions, if applicable.

II. Summary of PacTel's Plan

3. The main elements of PacTel's Plan are: (1) establishing a separate affiliate for accounting purposes;[6] (2) complying with Parts 32 and 64 of the Commission's rules[7] and amending its Cost Allocation Manuals accordingly;[8] and (3) complying with the Computer III CPNI and network disclosure rules.[9] PacTel states that it does not discriminate in the

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[3] PacTel Plan at 1, citing *Broadband PCS Order* 8 FCC Rcd at 7748 n. 96.

[4] *See* PacTel Reply Comments at 28-30.

[5] Pub. L. No. 104-104, 110 Stat. 56 at __ (1996)(inserting new Section 222 into Title II of the Communications Act).

[6] PacTel Plan at 4.

[7] 47 C.F.R. Parts 32 and 64.

[8] PacTel Plan at 5-6.

[9] *See* Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571, 7602-04, 7610-12 (1991), *aff'd sub nom.* California v. FCC, 39 F.3d 919, 930-31 (9th Cir. 1994).

provision of interconnection.[10] PacTel asserts that interconnection will be governed by its intrastate interconnection tariff currently pending before the California Public Utilities Commission.[11] While that tariff is pending, and interconnection is being provided on a contract basis, PacTel states that it will voluntarily make PBMS's contract with Pacific Bell available to third party competitors upon request under a non-disclosure agreement.[12]

III. Pleadings

4. Commenters have raised five issues with respect to PacTel's Plan. First, they argue that PacTel's Plan cannot be approved because the Commission has not established the minimum safeguards necessary to ensure that in-region LEC PCS operations do not inhibit competition. *See* AirTouch Comments at 3; Cox Comments at 6; MCI Comments at 2-3; Nextel Comments at 3; Sprint Comments at 13-14. Second, they argue that PBMS should be in a structurally separate subsidiary from Pacific Bell. *See* AirTouch Comments at 5; Cox Comments at 4, 9; Nextel Comments at 12-13; Sprint Comments at 9-12. Third, they argue that PacTel's Plan will not prevent cross-subsidies. *See* Cox Comments at 22, 30; Nextel Comments at 5; Sprint Comments at 16-17. Fourth, they argue that PacTel's Plan does not ensure that PBMS will not receive more favorable interconnection arrangements than other competing CMRS providers. *See* Cox Comments at 37; Nextel Comments at 8; Sprint Comments at 8. Fifth, MCI argues that PacTel has not shown that PTMS, the licensee-entity, actually will exercise control and supervision over the licensed system. *See* MCI Comments at 1-2.

5. In response to the first three of these claims, PacTel essentially repeats the argument that in the *Broadband PCS Order* the Commission determined: (1) the minimum safeguards that LECs must meet before they can offer PCS; (2) that LECs do not have to offer PCS through structurally separate subsidiaries; and (3) that no additional accounting safeguards are necessary to prevent cross-subsidies. *See, e.g.*, PacTel Reply Comments at 5, 12. PacTel argues that it has demonstrated that its Plan complies with the Commission's existing competitive safeguard rules and policies, and that the commenters' claims that the Commission should impose additional or different safeguards on PacTel are nothing more than "untimely petitions for reconsideration" of the PCS proceeding. *Id.* at 6. PacTel notes that in addition to complying with federal safeguards it also must comply with state affiliate transaction rules. *Id.* at 18. With respect to the issue of interconnection, PacTel asserts that the commenters have not shown that any interconnection policy described in its Plan violates federal requirements or fails to meet competing PCS providers' interconnection needs. *Id.* at 31, 33, 41. Finally, PacTel argues that MCI's claim regarding PTMS' exercise of control

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[10] PacTel Plan at 9.

[11] *Id.* at 7.

[12] PacTel Reply Comments at 34.

and supervision over the license system has no bearing on whether PacTel's Plan protects against cross-subsidy and discrimination. *Id.* at 42-43.

6. BellSouth argues that PacTel was not required to file a safeguards plan. BellSouth observes that the language in the *Broadband PCS Order* pursuant to which PacTel filed its Plan appears only in a footnote to the part of that order summarizing the Commission's tentative conclusions in a prior Notice of Proposed Rule Making. Moreover, BellSouth contends that nothing in the discussion section or ordering clauses of the *Broadband PCS Order*, or any of the rules adopted therein, require PacTel or any other LEC to file a safeguards plan.[13] BellSouth asserts, therefore, that language describing the contents of a safeguards plan that appears in a footnote has no force or effect.

IV. Discussion

7. The Commission determined in the *Broadband PCS Order* that a LEC, including a Bell Operating Company ("BOC"), may provide PCS on an integrated basis with its wireline operations without establishing a structurally separate subsidiary.[14] The Commission also declined to impose additional cost-accounting rules on LECs that provide PCS service other than those rules already contained in Parts 32 and 64 of the Commission's rules.[15] Further, the Commission stated that LECs may not initiate in-region PCS operations until they implement an acceptable plan for non-structural safeguards against discrimination and cross-subsidization.[16] Commenters in this proceeding who argue that existing safeguard rules and policies are inadequate, or that the Commission should adopt additional safeguards, raise issues that are properly before the Commission in the context of a rule making. This proceeding is limited to a determination by the Bureau of whether the Plan complies with existing rules. The relevant issue before the Bureau is, therefore, whether PacTel has shown how it will comply with the Commission's existing safeguards.

8. The argument that the Commission contemplated additional safeguard rule makings as a prerequisite to the initiation of integrated in-region operations is not persuasive. No commenter has identified a Commission statement that conditions the initiation of PCS service on such proceedings, and the Bureau is not aware of any such statement. Moreover, pursuant to the *Broadband PCS Order*, and contrary to the assertions of the commenters, PacTel is not presently required to place its PCS operations in a structurally separate subsidiary. Nor is PacTel presently required to comply with any additional cost-accounting safeguards other than those contained in the Commission's rules; and, indeed, PacTel has

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[13] BellSouth Reply Comments at 2-3.

[14] *Broadband PCS Order*, 8 FCC Rcd at 7751.

[15] *Id.*; *see also* 47 C.F.R. §§ 32.27 and 64.902.

[16] *Broadband PCS Order*, 8 FCC Rcd at 7748 n. 96.

demonstrated that it has a Plan in place for compliance with Parts 32 and 64 of those rules. With respect to interconnection, no commenter, on this record, has demonstrated that Pacific Bell is discriminating unreasonably in favor of its PCS affiliate.[17] MCI also has not shown that control of the PCS license within PacTel's corporate structure is relevant to the question of whether PacTel's Plan is adequate within the meaning of the Commission's existing requirements. Thus, this argument does not provide a basis to withhold approval of PacTel's Plan. No party has persuasively argued that PacTel's Plan is inadequate. On this record, we find that PacTel has satisfied the Commission's existing requirements and, accordingly, PacTel is authorized to commence PCS operations.

9. Notwithstanding our approval of PacTel's Plan, the Bureau notes that subsequent to PacTel's filing of its Plan with the Commission, the Telecommunications Act of 1996 was enacted.[18] The Commission has not completed a full review of all aspects of the 1996 Act and how it may affect the introduction of PCS. This Order does not attempt to do so here. Of immediate relevance to the situation posed by PacTel's Plan, however, are the CPNI provisions of the Act.[19] The CPNI provisions of the Telecommunications Act of 1996 are self-executing. To the extent that the Commission's CPNI requirements in effect prior to its enactment do not conflict, they remain in effect. The Commission intends to clarify the continuing CPNI obligations of telecommunications carriers in a rule making that will be initiated in the near future. PacTel also must make sure that its Plan is in compliance with all other aspects of the Act.

10. The other issue raised on this record merits only brief attention. Although BellSouth claims that PacTel was not required to file a safeguards plan, the more relevant observation for present purposes is that PacTel asserts just the opposite. In fact, PacTel relies on the existence of the Commission's statements regarding safeguards plans as evidence that the Commission fully considered the implications of LECs providing PCS in-region.[20]

11. Finally, we note that the United States Court of Appeals for the Sixth Circuit recently questioned the reasonableness of regulations that require BOCs to provide cellular service through a structurally separate subsidiary while permitting them to conduct integrated

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[17] This order does not prejudice any party's right to file a complaint under Section 208 of the Act, 47 U.S.C. § 208, in the event such party believes that Pacific Bell's provision of interconnection violates the Act.

[18] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[19] *Id.* at § 702 , 110 Stat. at __ (inserting new Section 222 into Title II of the Communications Act).

[20] *See* PacTel Reply Comments at 5.

PCS and wireline operations.[21] As a result, the Commission plans to initiate a proceeding in the near future to review its various competitive safeguard policies and rules, including those governing the PacTel Plan. If these rules or policies change, then PacTel will have to modify its Plan and its operations accordingly. In the meantime, however, the public interest is served by approving PacTel's Plan, as discussed in this Order, and allowing it to begin its PCS operations.

V. Ordering Clause

12. Accordingly, IT IS ORDERED, pursuant to Sections 131 and 331 of the Commission's rules, 47 C.F.R. §§ 131, 331, that Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Telesis Mobile Services' Plan of Non-Structural Safeguards Against Cross-Subsidy and Discrimination, as filed July 10, 1995 and amended September 12, 1995, IS APPROVED, and accordingly, PacTel is authorized to commence PCS operations.

FEDERAL COMMUNICATIONS COMMISSION

Michele Farquhar

Michele C. Farquhar
Acting Chief, Wireless Telecommunications Bureau

[21] *See* Cincinnati Bell Telephone Co. v. FCC, Nos. 94-3701/4113 and 95-3023/3238/3315, slip op. at 24-30 (6th Cir. Nov. 9, 1995).