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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services	)	WT Docket No. 96-162
	)	
Implementation of Section 601(d) of the Telecommunications Act of 1996	)	

SECOND ORDER ON RECONSIDERATION

Adopted: December 30, 1999 **Released:** January 5, 2000

By the Commission:

I. INTRODUCTION

1. On January 2, 1998, Aliant Communications Co. (Aliant), Guam Cellular and Paging, Inc. (Guam Cellular), and the Independent Telephone and Telecommunications Alliance (ITTA) filed separate petitions for reconsideration of the Commission's *LEC-CMRS Safeguards Order*.[1] The Commission denied ITTA's petition in the *First Order on Reconsideration*.[2] In this Order we consider the petitions filed by Aliant and Guam Cellular. For the reasons stated below, we deny the petitions for reconsideration filed by Aliant and Guam Cellular.

II. BACKGROUND

2. In the *LEC-CMRS Safeguards Order*, we reviewed our existing regulatory safeguards for the provision of "broadband CMRS"[3] by incumbent local exchange carriers

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[1] Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162, *Report and Order*, 12 FCC Rcd 15668 (1997) (*LEC-CMRS Safeguards Order*), *appeal pending sub nom.* GTE of the Midwest, Incorporated v. FCC & USA, No. 98-3167 (6th Cir. filed Dec. 12, 1997); *First Order on Reconsideration,* 14 FCC Rcd 11343 (1999).

[2] Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, *First Order on Reconsideration* in WT Docket 96-162, *First Memorandum Opinion and Order* in AAD File No. 98-43, 14 FCC Rcd 11343 (1999).

[3] In this context, we define broadband CMRS as "Domestic Public Cellular Radio Telecommunications Service (Part 22, Subpart H of this chapter), Specialized Mobile Radio Service (Part 90, Subpart S of this chapter),

(LECs) and their affiliates, making several modifications to our rules and procedures. Section 20.20 of the Commission's rules, which was adopted in the *LEC-CMRS Safeguards Order*, requires incumbent LECs to provide in-region broadband CMRS through a separate CMRS affiliate.[4] This separate affiliate must: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with its affiliated LEC that the LEC uses for the provision of local exchange services in the same market; and (3) acquire any services from the affiliated LEC on a compensatory arm's length basis pursuant to our affiliate transactions rules.[5] Title II common carrier services or services, facilities, or network elements provided pursuant to sections 251 and 252 that are acquired from the affiliated LEC must be available to all other carriers, including CMRS providers, on the same terms and conditions.[6] Rural telephone companies are exempt from the separate affiliate requirement.[7] A competing CMRS carrier interconnected with the rural telephone carrier may petition the Commission to remove the exemption where the rural telephone company has engaged in anticompetitive conduct. Mid-sized LECs serving fewer than two percent of the nation's subscriber lines are entitled to petition the Commission for suspension or modification of the separate affiliate requirement.[8] These separate affiliate requirements went into effect on February 11, 1998,[9] and sunset on January 1, 2002.[10]

III. DISCUSSION

A. Aliant Petition

3. Background. In its petition for partial reconsideration, Aliant[11] requests that the

and broadband Personal Communications Services (Part 24, Subpart E of this chapter)." *See* 47 C.F.R. § 20.20.

4 "An incumbent LEC's broadband CMRS service is considered 'in-region' when 10 percent or more of the population covered by the CMRS affiliate's authorized service area, as determined by the 1990 census figures, is within the affiliated incumbent LEC's wireline service area." 47 C.F.R. § 20.20(e).

5 47 C.F.R. § 20.20(a).

6 *See LEC-CMRS Safeguards Order*, 12 FCC Rcd at 15693, ¶ 38.

7 47 C.F.R. § 20.20(d)(1).

8 47 C.F.R. § 20.20(d)(2).

9 *See* 62 Fed. Reg. 63864 (Dec. 3, 1997).

10 *Id.* at 15724, ¶ 99. *See also* 47 C.F.R. § 20.20(f).

11 Subsequent to filing its petition for partial reconsideration, Aliant merged with Alltel Corporation, and Aliant is now a wholly-owned subsidiary of Alltel. *See* Alltel Corporation; Petition for Waiver of Section 61.41 of the Commission's Rules and Application for Transfer of Control, CCB/CPD 99-1, *Memorandum Opinion and Order*, FCC 99-156 (rel. Sep. 3, 1999).

Commission waive the provisions of section 32.27 of the Commission's rules, the affiliate transactions rules,[12] to allow the assets for cellular systems which had been in operation for ten years or more to be transferred from the LEC to a separate affiliate at book value rather than at fair market value.[13] In the petition, Aliant states that it is ready to comply with section 20.20, and had already taken steps to move its CMRS operations to a separate affiliate prior to adoption of the *LEC-CMRS Safeguards Order*.[14] Aliant notes that it requested a waiver of section 32.27 on July 1, 1996 to allow it to transfer its in-region cellular operations to a separate subsidiary at book value rather than at fair market value.[15] Also on November 18, 1996, Aliant filed applications for the *pro forma* assignment of its CMRS licenses to a structurally separate affiliate.[16] Subsequent to release of the *LEC-CMRS Safeguards Order*, the Accounting and Audits Division, Common Carrier Bureau,[17] denied Aliant's request for waiver of section 32.27(c).[18] Aliant requests that the Commission consider the impact of the required accounting treatment of the establishment of a separate CMRS affiliate.[19] Puerto Rico Telephone Company and BellSouth Corporation filed in support of Aliant.[20]

4. Subsequent to filing its petition for partial reconsideration in this proceeding, Aliant filed a petition for reconsideration of the *AAD Order*.[21] On February 11, 1998, the day that the separate affiliate requirement went into effect, Aliant filed a petition for temporary waiver of section 20.20.[22] In that petition, Aliant requested a waiver of the separate CMRS

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12 47 C.F.R. § 32.27.

13 Aliant petition at 1.

14 *Id.* at 4.

15 *Id. See also* Letter from Tony S. Lee, counsel for Aliant, to William F. Caton, FCC, dated July 1, 1996.

16 Aliant petition at 4 (citing FCC File Nos. 0084-CL-AL-97 and 20681-CD-AL-97, filed Nov. 18, 1996)

17 The Accounting and Audits Division has subsequently changed its name to the Accounting Safeguards Division.

18 Aliant Communications Co. Petition for Waiver of Section 32.27(c) of the Commission's Rules, AAD No. 96-131, *Order*, 13 FCC Rcd 10112 (AAD/CCB 1997) (*AAD Order*), *recon.*, 14 FCC Rcd 6231 (CCB 1999).

19 Aliant petition at 5.

20 Puerto Rico Telephone Company comments; BellSouth reply comments.

21 *See* Aliant Communications Co. Files Petition for Reconsideration of Section 32.27 of the Commission's Rules, *Public Notice*, DA 98-657 (rel. Apr. 6, 1998).

22 Petition for Temporary Waiver filed by Aliant Communications Co. in WT Docket No. 96-162 on Feb. 11, 1998 (Aliant Waiver Petition).

affiliate requirement until 60 days after action on its petition for partial reconsideration in this proceeding and action on its reconsideration of the *AAD Order* become final.[23] On January 1, 1999, Aliant consummated its *pro forma* assignment of its cellular operations to a separate subsidiary.[24] On April 6, 1999, the Common Carrier Bureau upheld the *AAD Order,* and denied Aliant's petition for reconsideration. [25]

5. Discussion. The Aliant petition, in essence, requests that the Commission reconsider the *AAD Order* in which Aliant's request for waiver of section 32.27 to allow it to transfer its CMRS assets to a separate subsidiary at book value rather than fair market value was denied. The Common Carrier Bureau has upheld that decision in its reconsideration of the *AAD Order*,[26] and we concur with that decision. We agree with the Common Carrier Bureau that Aliant has failed to demonstrate the special circumstances warranting a waiver of the affiliate transactions rules.[27] When the Commission adopted section 20.20, it was fully cognizant that the separate affiliate transactions rules would apply to the relationship between the LEC and the CMRS affiliate, and that requiring a separate affiliate would impose certain costs on independent LECs, such as Aliant, that had previously not been required to have a separate CMRS affiliate.[28] The Commission found, however, that the costs imposed on independent LECs would not be so significant to outweigh the benefits of the separate affiliate requirement.[29] We also agree with the Common Carrier Bureau that transferring assets at net book value instead of fair market value could result in an improper cross-subsidy and harm competition.[30] Consequently, we deny Aliant's petition for partial reconsideration of the *LEC-CMRS Safeguards Order.*

6. We also dismiss Aliant's petition for temporary waiver. Aliant requests that it be given 60 days from final action on its petition for partial reconsideration in this proceeding and its petition for reconsideration of the *AAD Order* to come into compliance with the separate

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23 *Id.* at 1.

24 *See* letter from Jeanne W. Stockman, counsel for Aliant, to Roger Noel, FCC, in File No. 0884-CL-AL-97, dated Jan. 13, 1999.

25 Aliant Communictions Co. Petition for Waiver of Section 32.27(c) of the Commission's Rules, AAD No. 96-131, *Order on Reconsideration*, 14 FCC Rcd 6231 (CCB 1999) (*CCB Order*).

26 *Id.*

27 *See Id.* at 6234 ¶ 7.

28 *See LEC-CMRS Safeguards Order*, 12 FCC Rcd at 15691 ¶ 33, 15699 ¶ 48.

29 *Id.* at 15699 ¶ 49.

30 *CCB Order*, 14 FCC Rcd at 6234 ¶ 8.

affiliate requirement.[31] Aliant no longer requires the relief requested because it has subsequently moved its CMRS operations into a separate subsidiary, and thus is in compliance with the rule.[32]

B. Guam Cellular Petition

7. Background. In its petition for partial reconsideration, Guam Cellular requests that the Commission declare that the exemption for rural telephone companies does not apply to Guam Telephone Authority (GTA).[33] Guam Cellular argues that although GTA technically falls within the definition of a rural telephone company, it possesses none of the attributes of a rural telephone company.[34] Guam Cellular argues that Guam is not a rural area, but rather a densely populated island that allows GTA to obtain economies of scale. Guam Cellular also contends that GTA is better positioned to finance its current and future operations than other rural telephone companies.[35] In that regard, Guam Cellular notes that GTA is unique in that it is an agency of the government of Guam, and argues that it has the full faith and credit of the government behind it.[36] Finally, Guam Cellular contends that GTA does not deserve an exemption from the structural separation requirement because of the past and present conduct of GTA, and notes that Guam Cellular filed a complaint about GTA with the Guam Public Utility Commission (Guam PUC).[37]

8. GTA opposes the Guam Cellular Petition. GTA argues that Guam Cellular's petition is procedurally defective because removal of the exemption for a rural telephone company, such as GTA, should be pursued through a petition filed pursuant to section 20.20(d)(1)[38] rather than through a petition for reconsideration.[39] In response to Guam Cellular's arguments, GTA argues that it fits squarely within the definition of "rural telephone company" adopted by Congress and used in the Commission's rules, and that population density is not a

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31 Aliant Waiver Petition at 1.

32 *See* letter from Jeanne W. Stockman, counsel for Aliant, to Roger Noel, FCC, in File No. 0884-CL-AL-97, dated Jan. 13, 1999.

33 Guam Cellular Petition at 1.

34 *Id.* at 4.

35 *Id.*

36 *Id.* at 3.

37 *Id.* at 5.

38 47 C.F.R. § 20.20(d)(1).

39 GTA Opposition at 2-3 (citing *LEC-CMRS Safeguards Order*, 12 FCC Rcd at 15709-10 ¶ 71).

criterion of that definition.[40] GTA also contends that it does not enjoy a surfeit of financial resources due to being an agency of the government of Guam, and has one of the lowest revenues per access line of LECs.[41] Finally, GTA argues that it has not acted anticompetitively, and notes that the Guam PUC has dismissed Guam Cellular's complaint against GTA.[42]

9. Discussion. We deny Guam Cellular's petition. A petition for reconsideration of a rulemaking is not the appropriate means for challenging the exemption from the structural separations requirement for a particular LEC. In adopting the *LEC-CMRS Safeguards Order* we set out the procedure to remove the exemption: "A competing carrier, interconnected with the rural carrier, however, may petition the Commission to remove the exemption, or the Commission may do so on its own motion, where the rural carrier has engaged in anticompetitive conduct, such as discrimination."[43] In challenging the application of the exemption for rural telephone companies to GTA, Guam Cellular should have filed a petition for removal pursuant to section 20.20(d)(1) rather than a petition for reconsideration of the *LEC-CMRS Safeguards Order*. We therefore deny the petition on procedural grounds.

10. Even presuming that the Guam Cellular petition was not procedurally defective, we deny it on substantive grounds. As we discussed above, the Commission will remove a rural telephone company's exemption from the separate affiliate requirement upon a showing that the LEC has acted anticompetitively. Guam Cellular's argument relating to anticompetitive conduct by GTA consists of one paragraph where Guam Cellular states that it has a pending complaint against GTA before the Guam PUC, that Guam Cellular is having difficulty in negotiating an interconnection agreement with GTA, and that GTA was found to act anticompetitively against interexchange carriers in 1992.[44] GTA argues that it has not acted anticompetitively, and refutes Guam Cellular charges. First, it states that the *IT&E Order* cited by Guam Cellular was decided in 1992, and since then GTA has undertaken a compliance program that was completed in July 1997.[45] Second, GTA notes that Guam PUC dismissed the complaint filed by Guam Cellular.[46] Finally, GTA contends that although the interconnection negotiations were slow to start, progress

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40 *Id.* at 6.

41 GTA Opposition at 4-5.

42 *Id.* at 3 n. 3, 6-8.

43 *LEC-CMRS Safeguards Order*, 12 FCC Rcd at 15709 ¶ 71. *See also* 47 C.F.R. § 20.20(d)(1).

44 Guam Cellular petition at 5 (citing IT&E Overseas Inc. and PCI Communications, Inc., *Memorandum Opinion and Order*, 7 FCC Rcd 4023, 4025-26 (1992) (*IT&E Order*).

45 GTA opposition at 6-7.

46 *Id.* at 7.

has been made.[47]

11. Based the record in this proceeding, we can not find that Guam Cellular has demonstrated that GTA has acted anticompetitively. We therefore will not remove its exemption from the separate affiliate requirement.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that pursuant to sections 1, 2, 4, 201, 202, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, and 405, the Petition for Reconsideration in WT Docket No. 96-162 filed by Aliant Communications, Co. is DENIED.

13. IT IS FURTHER ORDERED that pursuant to sections 1, 2, 4, 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, and 202, the Petition for Temporary Waiver filed by Aliant Communications Co. is DISMISSED.

14. IT IS FURTHER ORDERED that pursuant to sections 1, 2, 4, 201, 202, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, and 405, the Petition for Reconsideration in WT Docket No. 96-162 filed by Guam Cellular and Paging, Inc. is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

[47] *Id.*