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December 12, 2002

VIA ELECTRONIC FILING (ECFS) AND E-MAIL

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex parte* of PacWest Telecomm., Inc.: In re Application of SBC Communications, Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in California (WC Docket No. 02-306)

Dear Secretary Dortch:

PacWest Telecomm., Inc., by its undersigned attorneys, files this *ex parte* in the above docket in order to address certain questions raised in meetings with Commissioners on November 18 and 19, 2002, and to discuss several important issues that clearly demonstrate why the Commission must deny Pacific Bell Telephone Company's ("Pacific Bell") Section 271 application to provide in-region interLATA services in California. Specifically, the Commission must deny this application because, as determined by the California Public Utilities Commission ("CPUC") decision,[1] Pacific Bell failed to satisfy two of the checklist requirements -- *i.e.,* items 11 and 14 -- required under Section 271(c)(2)(B) of the Telecommunications Act of 1934, as

[1] *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks*, Decision Granting Pacific Bell Company's Renewed Motion of an Order that it Has Substantially Satisfied the Requirements of the 14-Point Checklist in § 271 of the Telecommunications Act of 1996 and Denying that it Has Satisfied 709.2 of the Public Utilities Code, Decision 02-09-050 (CPUC September 19, 2002) ("CPUC Decision").

amended (the "Act"), a deficiency this Commission has recognized as fatal in prior Section 271 decisions.[2] Second, under the public interest standard which the Commission must independently apply under Section 271(d)(3)(C), the Commission should also conclude that based on the record presented by the CPUC, the grant of the application does not serve the "public interest, convenience, and necessity."

A. Pacific Bell's Failure to Comply With the Section 271 Checklist Precludes the Commission From Granting the Application

1. Pacific Bell Failed to Satisfy Checklist Item 11

It is clear, both under the explicit language of Section 271 of the Act, and as recognized by the Commission in prior decisions approving or rejecting such Section 271 applications, that an application cannot be granted where the applicant has failed to fully satisfy one or more checklist items.[3] First, Congress as made clear under Section 271(d)(3)(A)(i), the "Commission shall ***not*** issue a written determination approving or denying the authorization requested in the application . . . unless it finds that -- (i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A), has ***fully implemented*** the competitive checklist in subsection (c)(2)(B)."[4]

As this Commission recognized in prior Section 271 decisions, a regional Bell operating company's failure to satisfy even "an individual item of the competitive checklist constitutes

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[2] *See Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region InterLATA Services in Louisiana,* Memorandum Opinion and Order, 13 FCC Rcd. 20599, ¶ 50 (rel. October 13, 1998) ("BellSouth Order"). *See also In re Application SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance; Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, at ¶ 418 (rel. June 30, 2000) ("SBC Texas Order") (a strong public interest showing "cannot overcome a failure to demonstrate compliance with one or more checklist items.")

[3] BellSouth Order at ¶ 50.

[4] 47 U.S.C. § 271(d)(3)(A)(i) (emphasis added).

independent grounds for denying . . . [an] application."[5] Furthermore, the Commission may not attempt in any way to limit the list of checklist required to obtain in-region interLATA authority. This is because under 271(d)(4) of the Act, the "Commission may not, by rule or otherwise, ***limit*** or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)."[6]

As made clear by the CPUC, Pacific Bell failed to meet checklist item 11, number portability, and checklist item 14, resale.[7] Before the CPUC would agree to "verify to the Federal Communications Commission (FCC), Pacific's compliance with Number Portability, Checklist Item 11 . . . [it] direct[s] Pacific to implement and verify a mechanized enhancement to the Number Portability Administration Center (NPAC) check . . . by the end of September 2002."[8]

Pacific Bell's evidence of its belated attempt to comply with checklist item 11, after it filed the California application with the Commission, should not be taken into account by the Commission. As the Commission stated in its prior Section 271 decisions, "a BOC's section 271 application must be complete ***on the day it is filed***."[9] Therefore, under this procedural rule by the Commission -- which is intended to allow parties, including commenters, the Attorney

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5 BellSouth Order at ¶ 50.

6 *See e.g., In re Application of Verizon Virginia, Inc., Verizon Long Distance Virginia, Inc., Verizon Enterprise Solutions Virginia Inc., Verizon Global Networks Inc., and Verizon Select Services of Virginia Inc., for Authorization to Provide In-Region, InterLATA Services in Virginia*, Memorandum Opinion and Order, WC Docket No. 02-214, at ¶ 195 (rel. October 30, 2002) (emphasis added).

7 CPUC Decision at 3.

8 *Id.*

9 *In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan,* Memorandum Opinion and Order, CC Docket No. 97-137, ¶ 50 (rel. August 19, 1997) ("Ameritech Michigan Order"); *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA 01-734, at 3, 5 (rel. March 23, 2001) ("Updated Filing Requirements") ("The Commission expects that a section 271 application, ***as originally filed***, will include all of the factual evidence on which the applicant would have the Commission rely in making its findings") (emphasis added).

General and state commissions to adequately evaluate the record[10] -- Pacific Bell failed to provide the CPUC or other commenters adequate time to evaluate and comment on Pacific Bell's supplemental evidence on its alleged compliance with checklist item 11.

Pacific Bell filed its supplemental evidence alleging that it complies with checklist item 11 on November 1, 2002, six weeks after the filing deadline for its Section 271 application and only three days before the reply comment deadline for the application.[11] The CPUC never had a chance to review the new evidence presented by Pacific Bell or to take into account any comments by CLECs impacted by Pacific Bell's operations. Thus, the CPUC has never concluded that Pacific Bell satisfied checklist item 11. The Commission, on its own, should not reach such a conclusion absent a consistent finding by the CPUC. It is Pacific Bell's obligation to make such a favorable showing first before the CPUC, the fact finder for Section 271 checklist compliance, and the application should be denied for Pacific Bell's failure to satisfy this item at the time it was filed.

2. Pacific Bell Failed to Satisfy Checklist Item 14

The CPUC also held that Pacific Bell failed to satisfy checklist item 14, resale, because it "has erected unreasonable barriers to entry in California's Digital Subscriber Line market by both not complying with its resale obligation with respect to advanced services pursuant to § 251(c)(4)(a) and by offering restrictive conditions in the SBC Advanced Solutions, Inc. (ASI)-

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[10] *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Rhode Island*, Memorandum Opinion and Order, CC Docket No. 01-324, at ¶ 7 (rel. February 22, 2002) ("Verizon Rhode Island Order").

[11] E. Smith Reply Affidavit 8-9 and Attachment A (filed Nov. 1. 2002) ("Supplemental Notice of Compliance").

CLEC agreements in contravention of §251(c)(4)(B)."[12] As of today, these issues have not been resolved to the CPUC's satisfaction. Therefore, as discussed above, Pacific Bell's failure to comply with this checklist item as of the date of the application precludes the Commission from granting its Section 271 application. This is because any supplemental evidence presented by Pacific Bell purporting to comport compliance with this item must be disregarded in light of the fact the CPUC has not been able to review such data as part of the 271 proceeding.

B. Under the Section 271(d)(3)(C) Public Interest Standard, the Commission Must Deny Pacific Bell's Section 271 Application

1. Factors Relevant to the Commission's Public Interest Analysis

Under Section 271(d)(3)(C) of the Act, the Commission must evaluate -- as an independent factor from the 14 point checklist -- whether Pacific Bell's application is consistent with the "public interest, convenience, and necessity."[13] As the Commission explicitly recognized in the Ameritech Michigan Order, "Congress did not repeal the MFJ in order to allow checklist compliance alone to be sufficient to obtain in-region, interLATA authority."[14] The Commission went further and stated that it will "identify certain issues and make certain inquiries for the benefit of future applicants and commenting parties . . . relating to the meaning and scope of the public interest inquiry mandated [in Section 271(d)(3)(C)] by Congress."[15] The FCC described the following illustrative list of factors it could consider in applying the public interest standard:

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12 CPUC Order at 3.

13 47 U.S.C. § 271(d)(3)(C). *See* Ameritech Michigan Order at ¶ 389.

14 Ameritech Michigan Order at ¶ 385.

15 *Id.*

> (1) the Department of Justice's recommendation concerning the factors the FCC should consider when determining whether the standard has been satisfied; (2) an assessment of whether all procompetitive[16] entry strategies into the local telecommunications markets -- *e.g.*, resale versus facilities-based entry -- are available to new entrants (including data on the nature and extent of actual local competition); (3) ***the effect of the RBOC entry on competition on the long distance market***; (4) evidence that a RBOC is making available, pursuant to contract or otherwise, any individual interconnection arrangement, service, or network element provided under any interconnection agreement to any other requesting telecommunications carrier upon the same rates, terms, and conditions as provided in the agreement; (5) evidence that a RBOC has agreed to performance monitoring (including performance standards and reporting requirements) in its interconnection agreements with new entrants (this would include an evaluation of whether the RBOC has agreed to private and self-executing enforcement mechanisms that are automatically triggered by noncompliance without having the new entrant resort to lengthy regulatory or judicial intervention; (6) ***whether the RBOC has provided new entrants with optional plans for payment of non-recurring charges that would allow new entrants to avoid having to pay single, up-front payments***; (7) whether any state and local laws may constitute barriers to entry into the local telecommunications market, or that are intended to facilitate such entry; and (8) evidence that a RBOC has engaged in discriminatory or other anticompetitive conduct, or ***failed to comply with state and federal telecommunications regulations***.[17]

Therefore, in this decision, the Commission established a comprehensive framework to independently evaluate a RBOC's compliance with the public interest standard, including its compliance with state telecommunications regulations, and, thus, the Commission must apply this standard in evaluating Pacific Bell's application.

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[16] The Commission stated the most probative evidence that all entry strategies were available to new entrants is that they are "actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large)." *Id.* at ¶ 391.

[17] *Id.* at ¶¶ 383, 387-97 (emphasis added).

2. Pacific Bell's Application Failed to Satisfy the Commission's Public Interest Standard

(a) Pacific Bell Failure to Make Available All Entry Strategies in the Local Telecommunications Marketplace

Pacific Bell fails to satisfy the Section 271(d)(3)(C) public interest standard for several reasons, and therefore, the Commission should deny the application on these grounds. Under factor two of the Ameritech Michigan Order above, Pacific Bell refused (often in bad faith as shown by its willful refusal to comply with CPUC decisions) to make available all entry strategies in the local telecommunications marketplace -- *i.e.*, the CPUC concluded that Pacific Bell refused to make advanced services available for resale and placed improper restrictive conditions in the SBC Advanced Solutions, Inc. (ASI)-CLEC agreements in contravention of §251(c)(4)(B).[18]

Furthermore, as the CPUC noted, California has only "technical, not actual local telephone competition" that "has yet to find its way to the residences of the majority of California ratepayers."[19] Therefore, the Commission, as part of its factor two analysis above, should take into account this lack of "actual" local telephone competition in the California market when considering whether to grant Pacific Bell's application. This absence of "actual" competition arises, in large part, because of Pacific Bell's bad faith effort to open its market to competitors and its continued attempts to create barriers to such entry, as discussed in Sections B.2.(d) and (e) below.

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[18] CPUC Decision at 3.

[19] *Id.* at 268 and 3.

(b) Pacific Bell's Entry Will Harm Competition in the Long Distance Market

Under factor three above, the Commission may take into account "the effect of RBOC entry on competition in the long distance market."[20] The CPUC, as part of its public interest analysis under Section 709.2 of the California Public Utilities Code ("Code"), looked at the very same issue[21] and concluded that it "cannot state unequivocally that we find Pacific's imminent entry into the long distance market in California will primarily enhance the public interest."[22] In order to protect the long distance market and to help facilitate local competition which "has yet to find its way into the residences of the majority of California ratepayers," the CPUC is considering whether to impose stringent conditions on Pacific's entry into the intrastate interexchange market.[23] As part of two separate investigations, the CPUC is studying whether to (1) impose structural separation on Pacific Bell thus separating it into wholesale and retail marketing companies; or (2) select a competitively neutral third party, other than Pacific Bell, to administer primary interexchange carrier ("PIC") changes.[24] With regard to investigation (2), the CPUC was concerned that Pacific Bell might abuse its position as PIC administrator and harm the long distance market through its role of resolving PIC/LPIC disputes and assessing slamming

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20 *See supra* note 17.

21 Under 709.2(c)(4) of the Code, the CPUC must determine whether the "record support[s] the determination that there is no substantial possibility of harm from Pacific's entry into the long distance market." CPUC Decision at 259.

22 *Id.* at 263-4.

23 *Id.* at 4.

24 *Id.*

fees to its competing interexchange carriers.[25] The CPUC was also concerned about its staff's continued reliance on PIC dispute reports provided by Pacific Bell.[26]

The Commission should be mindful of the historic impact of PIC administration on the long distance market. Until PIC administration was made competitively neutral by the divestiture of AT&T and the imposition of equal access requirements, long distance entrants were unable to effectively compete with the incumbent. In the two decades since divestiture, PIC administration has been the function of an entity that was not a long distance carrier – the local incumbent monopoly LEC. However, with 271 approval, that safeguard will be reversed. Once again, a long distance carrier, and competitor, will also be the PIC administrator. As discussed above, the CPUC recognizes these concerns are legitimate, and under Section 271(d)(3)(C), fall within the Commission's public interest standard and duty to prevent harm to the California long distance market. Therefore, the Commission should not grant Pacific Bell's application until the CPUC has completed its investigations as to whether these two structural reforms would effectively prevent market abuses by Pacific Bell.

(c) Pacific Bell's Attempt to Impose Onerous Security Deposit Obligations on its Access Service Customers Violates the Commission's Public Interest Standard

Pacific Bell's proposed interstate access tariff revisions that would impose new, burdensome security deposit obligations on its customers who purchase access services violates factor six of the Commission's public interest test described above.[27] Pacific Bell's proposed tariff revisions, which have been suspended and are currently under investigation by the

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25 *Id.* at 262.

26 *Id.*

27 *See supra* note 17.

Commission,[28] would injure new entrants by requiring them to pay Pacific Bell large up-front security deposits before they can purchase access services.

As PacWest previously stated to the Commission, Pacific Bell's proposed tariff revisions are onerous, unjust and unreasonable and are not needed given that: (1) under the price cap plan adopted in 1990, Pacific Bell is adequately protected from losses from non-payment; (2) Pacific Bell has agreed to assume additional risk in exchange for obtaining pricing flexibility for special access and dedicated transport services; and (3) ARMIS data indicates that the risk of losses from non-payment has not increased substantially since passage of the Telecommunications Act of 1996.[29] In the Ameritech Michigan Order, the Commission recognized that "single, up-front" payments imposed by the incumbent can be a barrier to entry[30] -- a barrier under the control of the incumbent and that gives the incumbent market power. Pacific Bell is attempting to create exactly such a barrier through these proposed security deposit requirements under the guise of protecting itself from customer who are unable to pay their bills. Such tariff revisions provide further evidence that Pacific Bell's Section 271 application -- at the time of its filing -- does not satisfy the public interest test and should be denied.[31]

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28 *Ameritech Operating Companies Tariff FCC No. 2, Transmittal No. 1312, et al.*, Order, WC Docket No. 02-319, DA 02-2577 (rel. Oct. 10, 2002) ("Designation Order").

29 *See* PacWest's Opposition to Direct Case, WC Docket No. 02-319, at summary 1 (filed Nov. 14, 2002).

30 *See supra* note 17.

31 Although the Commission can separately address Pacific Bell's proposed tariff revisions in WC Docket No. 02-319, Pacific Bell's Section 271 application (including any failure to satisfy the public interest standard) are to be evaluated at the time the application was filed. Therefore, Pacific Bell's tariff proposal, unmodified as of the filing date of its 271 application, is contrary to the public interest and should be considered as a factor in this proceeding.

(d) Pacific Bell Engaged in Discriminatory and Other Anticompetitive Conduct and Did Not Comply With State Law

In breach of Commission public interest factor eight above,[32] Pacific Bell has engaged in "discriminatory or other anticompetitive conduct" and did not comply with state telecommunications regulations through its failure to satisfy the public interest test in Section 709.2 of the Code.[33] Section 709.2 requires the CPUC "make four essential determinations prior to 'authorizing or directing competition' in the intrastate interLATA market. These determinations include:

> 1) that competitors have fair, nondiscriminatory access to exchanges; 2) that there is no anticompetitive behavior by the local exchange telephone corporation, including use of subscriber contacts generated by the provision of local exchange telephone service; 3) that there is no improper cross-subsidization of interexchange telecommunications service; and 4) that there is 'no substantial possibility of harm' to the competitive intrastate telecommunications markets."[34]

The CPUC held that "the record does not support . . . making the determination that Pacific has manifested no anticompetitive behavior, has established no improper cross-subsidization, or poses no substantial possibility of harm to the competitive interexchange telecommunications markets."[35] Overall, the CPUC concluded that it "cannot state unequivocally that we find Pacific's imminent entry into the long distance market in California will primarily enhance the public interest."[36] Based on these conclusions, it is clear that Pacific Bell failed to satisfy a key California telecommunications regulation -- the section 709.2 Code

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32 *See* supra note 17.

33 CPUC Decision at 3.

34 *Id.* at 246.

35 *Id.*

36 *Id.* at 4.

public interest requirement -- and its Section 271 application should be denied for failure to satisfy the Commission's public interest test which requires that Pacific Bell comply with such state telecommunications requirement.[37]

(e) Pacific Bell Engaged in Discriminatory and Anticompetitive Conduct in the Local Exchange Marketplace

In two separate incidents, Pacific Bell recently engaged in "discriminatory and anticompetitive conduct" in violation of state telecommunications regulations and in breach of factor eight of the Commission's public interest test above.[38] In the first incident, Pacific Bell improperly attempted to unilaterally impose, via an advice letter filed with the CPUC, unauthorized revisions to its existing interconnection agreements with competitive local exchange carriers ("CLECs") in California. This incident occurred in October 2002 when Pacific Bell filed an advice letter with the CPUC for the purpose of adopting interim UNE port rates required by a CPUC decision. However, rather than following the explicit directions of the CPUC by submitting an amendment that contained only the required rate changes to its interconnection agreements with CLECs, Pacific Bell instead included extraneous language in the advice letter that modified CLECs' rights in the "reservation of rights" section that was totally unrelated to the required rate revisions. This "reservation of rights" clause was intended to expand Pacific Bell's authority to modify or invalidate its existing interconnection agreements, at its sole discretion, if it determined a change in law occurred. The new reservation of rights clause bore no relation to the UNE port rates that were authorized by the CPUC and was in

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[37] In fact, Pacific Bell admitted in a brief filed with the CPUC that "the four general provisions of § 709.2 parallel, and, in SBC Pacific Bell's view, are subsumed by the more detailed provisions of the [Telecommunications] Act [of 1996]." *SBC Pacific Bell Telephone Company Response to Issues Raised in the Assigned Commissioners Ruling Concerning Public Utilities Code § 709.2*, CPUC Docket No. R.93-04-003, at 17-18 (CPUC October 15, 2002).

[38] *See supra* note 17.

violation of the CPUC's UNE rate decision which limited Pacific Bell's amendments "to substituting the port rates adopted in today's order."[39] However, because Pacific Bell took such action, CLECs were forced to challenge such amendment before the CPUC, at additional time and expense, and could not, therefore, obtain the lower rates required by the CPUC.

The second incident arose from Pacific Bell's actions in this very Section 271 proceeding and should greatly concern the Commission because it demonstrates a common behavior of the company -- *i.e.*, to purportedly show the Commission it is attempting to work with competitors on an issue, but then when implementing a proposal, to include an additional unrelated matters that put its competitors in a worse position. For example, several competitors commented that Pacific Bell's DS-1 and DS-3 loop rates in California were extremely high and not related to Pacific Bell's costs. To address this concern and smooth approval of its Section 271 application before the Commission, Pacific Bell made an offer to: (1) treat its current rates as interim, and then true-up the rates when the CPUC sets the final rates in the 2001/2002 Relook Process; and (2) lower its DS-3 loop rate on such an interim basis to $573.20.[40]

However, upon closer scrutiny, Pacific Bell placed extremely burdensome and unrelated conditions on the offer so that other CLECs would be forced to waive substantial rights in order to benefit from this rate reduction. First, in order to obtain these interim rates, CLECs must sign an interconnection amendment that would inappropriately preempt state law by allowing Pacific Bell to terminate providing DS-3 loops to CLECs, if the Commission removes DS-3 loops from

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[39] *Joint Application of AT&T Communications of California, Inc. and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Switching in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050*, Interim Opinion Applying Pacific Bell Telephone Company Interim Switching Discounts to All Port Types, D.02-09-052 (CPUC September 19, 2002).

[40] *See Brief in Support of Application by SBC for Provision of In-Region, InterLATA Services in California*, WC Docket No. 02-0306, at 33 (filed September 20, 2002).

the list of UNEs, regardless of whether the CPUC makes a separate finding that such DS-3 loops should be made available.[41] Secondly, Pacific Bell's proposed amendment would impose significant conversion charges to change such DS-3s to special access circuits even though the CLEC did not initiate this conversion.[42] Pacific Bell's attempt to renegotiate these non-rate provisions in the CLECs' interconnection agreements, as part of its attempt to resolve another issue, is inappropriate and provides further evidence of Pacific Bell's anticompetitive behavior.

These incidents by Pacific Bell exemplify the company's all-too-often failure to comply with state and federal telecommunications regulations in violation of factor eight of the Commission's public interest test. Even in those situations where the CPUC explicitly directed Pacific Bell not to include any extraneous language in amendments to its interconnection agreements, as in the first example above, the company still included such unrelated, anticompetitive language. These actions by Pacific Bell provide strong evidence that its anticompetitive behavior is contrary to the public interest and that its Section 271 application should be denied.

C. Conclusion

The Commission must deny Pacific Bell's application, based upon the explicit language of Section 271(d)(3)(A)(i) and prior Commission decisions, because Pacific Bell failed to satisfy two of the Section 271 checklist items at the time the application was filed. Before such application can be granted, the CPUC must make a further finding that Pacific Bell has "fully implemented" these two remaining items. As of this time, it has not. Furthermore, under Section 271(d)(3)(C), Pacific Bell has failed to demonstrate that grant of its application would further the

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[41] *Id.*

public interest, convenience, and necessity both under the multi-factor analysis provided for in prior Commission decisions and as determined by the CPUC, and the application should also be denied on these grounds.

Sincerely yours,

Richard M. Rindler
Kevin D. Minsky

Counsel for PacWest Telecomm., Inc.

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Chris Libertelli
Matt Brill
Jonathan Goldstein
Dan Gonzales
Eric Einhorn

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[42] *Id.*