

Decision 90 05 038 MAY 4 1990

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Bell (U 1001 C), a corporation, to amend General Order 96-A.)	Application 90-03-008 (Filed March 7, 1990)
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)	
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(See Appendix A for appearances.)

**INTERIM OPINION GRANTING A PROVISIONAL
WAIVER OF EXISTING CONDITIONS OF
SECTION X:B. OF GENERAL ORDER 96-A**

Background

For more than 20 years prior to August 24, 1988, General Order (GO) 96-A contained a section (Section X.B.) which then allowed all electric, gas, telephone, and water utilities to contract with government agencies, at other than regularly filed tariff rates, without prior Commission approval. The specific language in GO 96-A was as follows:

"B. Governmental Agencies. Notwithstanding the provisions contained in subsection A hereof, a public utility of a class specified herein may, if it so desires, in addition to the classes of service specified as applicable to them in Section 529 of the Public Utilities Code (applicable to telecommunications utilities) furnish service at free or reduced rates or under conditions otherwise departing from its filed tariff schedules to the United States and to its departments and to the State of California and its political subdivisions and municipal corporations, including the departments thereof, and to public fairs and celebrations. The utility shall promptly advise the Commission thereof by Advice Letter and, where a contract has been entered into, submit four copies of such contract and Advice Letter for filing. The Commission may, in an appropriate proceeding in the exercise of its jurisdiction, determine the reasonableness of

such service at free or reduced rates or under conditions departing from its filed tariff schedules. This subsection shall not be construed as applicable to contracts for resale service."

Then, by Decision (D.) 88-08-059 on August 24, 1988 the Commission adopted a settlement agreement reached by many of the parties in Phase I of Investigation 87-11-033, for the new economic regulatory framework for certain local exchange telephone companies (LECs), which would allow limited downward pricing flexibility for certain of their services. As a part of the settlement the parties also agreed to a modification of Section X.B. of GO 96-A which would, thereafter, exclude telecommunications utilities, except under emergency conditions, from the provision which exempts government contracts from preapprovals by the Commission, and allows service under such contracts to be at free or reduced rates.

The current version of GO 96-A, Section X.B. states:

"B. Governmental Agencies. Notwithstanding the provisions contained in subsection A hereof, a public utility of a class specified herein, except telecommunications utilities may, if it so desires, furnish service at free or reduced rates or under conditions otherwise departing from its filed tariff schedules to the United States and to its departments and to the State of California and its political subdivisions and municipal corporations, including the departments thereof, and to public fairs and celebrations. The utility shall promptly advise the Commission thereof by Advice Letter and, where a contract has been entered into, submit four copies of such contract and Advice Letter for filing. The Commission may, in an appropriate proceeding in the exercise of its jurisdiction, determine the reasonableness of such service at free or reduced rates or under conditions departing from its filed tariff schedules. This subsection shall not be construed as applicable to contracts for resale service." (Bolding added.)

This change was made due to concerns that competitive telecommunications services could otherwise be offered at free or reduced rates, and such pricing might be anticompetitive.

Pacific Bell now asserts, and the Department of Defense/Federal Executive Agencies (DOD/FEA) contend, that the current provisions of GO 96-A would preclude LECs from bidding consideration for most federal government contracts because the Commission's preapproval requirement is counter to federal procurement law which requires that each bidder be bound by the conditions of the contract when signed.

Initial review of this issue led the parties to the settlement to believe that federal procurement rules could be modified in order to assure that government and private party contracts could and should be treated the same. However, at subsequent workshops held in February and April 1989, it became clear that DOD/FEA, as well as other governmental agencies including the State of California, were precluded from amending their rules and laws to create an exception for local exchange carriers to bid on projects because of the preapproval requirement contained in amended GO 96-A.

Recently, Pacific Bell noted the opportunity to bid on several large governmental contracts. However, with the current preapproval requirement of GO 96-A its bids would likely be rejected. Accordingly, on March 7, 1990 Pacific Bell filed Application 90-03-008 seeking an amendment to GO 96-A to eliminate the preapproval requirement for government contracts.

AT&T Communications of California, (AT&T-C), DOD/FEA, and GTE California Incorporated (GTEC) support the application. McCaw Cellular Communications, Inc. (McCaw) protests any change which would affect operations of cellular or radio telephone utilities. The California Cable Television Association (CCTA) protests the application asserting lack for sufficient safeguards in the Pacific Bell proposal. Limited protests were also filed by GTE Mobilnet of

Santa Barbara Limited Partnership (GTEM-SB), and MCI Communications Incorporated (MCI).

On April 13, 1990, the Commission's Division of Ratepayer Advocates (DRA) and Pacific Bell entered a proposed settlement agreement and stipulation to set aside preapproval of Pacific Bell's governmental contracts with the proviso that Pacific Bell would, thereafter, be under certain penalty risks for rendering contract services to governmental agencies at less than "direct embedded cost".

The assigned administrative law judge (ALJ) had set Tuesday, April 17, 1990 for a prehearing conference (PHC) with respect to the instant application. DRA and representatives of Pacific Bell brought copies of their proposed settlement agreement to the PHC but found that the other parties were not convinced that they should sign the agreement; more importantly, the DOD/FEA felt that the potential penalty terms of the proposed settlement agreement would cause Pacific Bell's bid on any federal contract to be unacceptable. Following considerable discussion, DRA and Pacific Bell agreed to redraft the settlement agreement to be provisional (temporary) in nature to permit Pacific Bell and other telecommunications utilities to bid on two federal contracts¹ on which bidding is due by May 5, and May 7, 1990.

The revised "provisional" settlement agreement was to be timely provided to the active parties at the PHC to obtain their concurrence not later than Monday, April 23, 1990, so that the Commission may consider authorization of that agreement, to allow Pacific Bell and other telecommunications utilities to bid on two federal contracts, at its next scheduled (May 4, 1990) meeting.

1 Internal Revenue Service solicitation, #90-218 and General Services Administration solicitation, #REL-TJ 90-0002.

Pacific Bell and DRA's Provisional Settlement Agreement and Stipulation

On April 19, 1990, DRA transmitted copies of its revised "Provisional Settlement Agreement and Stipulation" (Provisional Agreement)² to the active parties.

The Provisional Agreement is intended to apply only to the two federal contracts described above and not to long-term regulatory safeguards for the LECs, even though DRA asserts that "...the terms of this provisional settlement create a regulatory structure that will support a permanent settlement."

A second PHC is now scheduled for 10 a.m. on May 14, 1990 in San Francisco to consider issues regarding the more permanent review of governmental contracts and what changes may be needed in Section X.B. of GO 96-A, and to which categories of telecommunications utilities the new revisions should apply. Therefore, this order will, by necessity, address only the two federal contract solicitations seeking bid responses by May 5 and 7, 1990 respectively. DRA's Provisional Agreement contains specific concurring language at page 3:

"The parties hereto have agreed that the following provisional settlement agreement and the revised modification to G.O. 96-A, section X.B (attached as Appendix A), is entered into solely for the purpose of allowing PacBell to bid for the two contracts designated in its application herein. The parties also have agreed that Appendix A is a provisional revision of G.O. 96-A and is not intended to apply to any other contracts on which PacBell may submit bids." (Emphasis in original.)

² See Appendix B for details of provisional settlement agreement.

The Provisional Agreement states that it applies only to LECs and expressly excludes cellular telephone companies and radio-telephone utilities. Under the specific terms of the Provisional Agreement the LECs would agree to seven conditions³ which basically require:

1. Each telecommunications utility to follow the reporting requirements for its class of utility with respect to all government contracts.
2. That contract filings by LECs shall be filed within 15 days of execution, and non governmental contracts shall not become effective until approval by resolution of this Commission.
3. Failure to meet complete filing requirements by the due date will result in a penalty. This requirement would be imposed on a case-by-case basis for the two applicable federal contracts.
4. For any contract failing to meet the test of fully allocated embedded costs or direct embedded costs, the responsible LECs will be required to pay a penalty of twice the difference between total projected revenues and total projected costs under the contract.
5. Any LECs that has a requirement to provide a contract at less than direct embedded cost, will submit (except for emergencies or natural disasters) such contract(s) for prior approval by this Commission.
6. LECs to file tracking reports according to tracking plans developed in the Commission Advisory and Compliance Division and DRA contract workshops.

³ The seven conditions are contained in full on pages 4 and 5 of Appendix B.

7. The use of the "Z-factor" mechanism only for Pacific Bell relative to any penalty to be applied under the Provisional Agreement.

Responses to Provisional Agreement⁴

Western Burglar and Fire Alarm Association, Communications Workers of America and Northern Telecom agreed to the Provisional Agreement without opposing or concurring comments.

The California Bankers Clearing House and McCaw agreed to the Provisional Agreement with the understanding that they will participate in the development of any permanent modifications to GO 96-A, yet to be determined in this proceeding.

The California Association of Long Distance Telephone Companies and GTEM-SB continue to object to the overly broad language of GO 96-A which now extends beyond LECs and covers all long distance telephone companies and cellular telephone utilities as well. They also take issue with an agreement that provides relief to Pacific Bell while long distance carriers and cellular telephone utilities remain subject to the GO. GTEM-SB particularly asserts that the "...Commission should, at a minimum, redress what appears to be a disregard for the basic due process rights of GTEM-SB (and all cellular carriers) by clarifying that the initial modification to Section X(B) of G.O. 96-A was not intended to include cellular and radio telephone utilities."

CCTA agreed to the Provisional Agreement solely for the purpose of the two federal contracts which Pacific Bell desires to bid on. However, CCTA does not agree that the language of the Provisional Agreement is appropriate for a permanent agreement. In particular CCTA could not understand why a utility would want to make a showing of below-cost contracting, thereby making itself

⁴ Complete responses were exchanged (served) among the parties and have been placed in the formal file for this proceeding.

subject to a future penalty by the Commission. CCTA then indicated its willingness to seek a final negotiated settlement to address its remaining concerns.

AT&T-C concurred in the Provisional Settlement but found a number of ambiguities which it then discussed with representatives of DRA and Pacific Bell. AT&T-C particularly seeks clarification that the agreement is only applicable to LECs even though as written the term "local exchange carrier" is not specified at all times.

AT&T-C then signed the agreement with the understanding that the Appendix A revision to GO 96-A, Section X.B. will apply to all telecommunications utilities whereas the interim costing and reporting requirements in the agreement apply only to the LECs.

DOD/FEA reiterated that a Government Contract must be unconditional, and noted that the Provisional Agreement still conditions service to governmental agencies upon prior Commission approval. The DOD/FEA suggests that the second sentence of Appendix A to the Provisional Agreement be revised as follows:

"Contracts for service with Governmental Agencies are effective and binding when signed by both parties. However, except for emergency service, if service by telecommunication utilities to Governmental Agencies is at rates which are below cost as defined by applicable Commission rules and regulations such utility may be liable for a penalty determined by Commission rules."

The DOD/FEA then urged that the Commission's regulatory responsibility be exercised directly on the utility and not on the utility's government contracts.

CP National, Citizens Utilities Company of California, Evans Telephone Company, GTE West Coast Incorporated, Kerman Telephone Company, Pinnacles Telephone Company, Sierra Telephone Company, The Siskiyou Telephone Company, and Tuolumne Telephone Company signed the Provisional Agreement despite their disagreement

with the content of the proposed modification to GO 96-A. They jointly opined that the effect of their stipulation is to effect a one-time waiver of existing rules to permit Pacific Bell to bid on two government contracts, and they do not object to a waiver for that limited purpose.

Roseville Telephone Company (Roseville) signed on to the Provisional Agreement with the understanding that it had no legal effect, except for those terms relating to two federal contracts that Pacific Bell had identified with an interest to bid.

Calaveras Telephone Company, California-Oregon Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., Happy Valley Telephone Company, Hornitos Telephone Company, The Ponderosa Telephone Co., The Volcano Telephone Company, and Winterhaven Telephone Company, all signed on to the Provisional Agreement with the same understanding as was expressed by Roseville.

Contel of California, Incorporated, declined to sign the Provisional Agreement, but fully supported an exemption from the preapproval requirements of GO 96-A for the two government contracts referred to in the stipulation, "...subject to whatever post-award review process, and penalties, that Pacific Bell agrees that the Commission may impose on Pacific Bell."

GTEC also declined to sign the Provisional Agreement as presented, but stated that it had no objection to a waiver of preapproval for the two contract bids in question. GTEC's specific concerns were that the signatories to the Provisional Agreement would tentatively be accepting conditions that would apply to other LECs as well and to which it was opposed.

GTEC was specifically opposed to the use of the "Z" factor as a penalty mechanism, and the automatic penalty clause for a revenue shortfall associated with a contract service.

GTEC then recommended changes to the Provisional Agreement consistent with the intent to waive the preapproval rules in GO 96-A with respect to the two pending contracts.

MCI opposes the Provisional Agreement because it believes that it will set the stage for permanent changes to GO 96-A. MCI asks for additional time to comment with an opportunity to work on the terms and provisions of GO 96-A to eliminate its objections.

MCI specifically objects to the establishment of any regulatory atmosphere that would be "favorable to advancing [Pacific Bell's] competitive edge, and not the public interest."

MCI also asserts that the "Z factor" mechanism is ill-suited to serve the purpose of fully compensating all parties for damages resulting from below-cost pricing under the provisional order.

Pacific Bell challenged MCI's protest citing the same language from the Provisional Agreement as is quoted on page 5 of this order and confirming that the Provisional Agreement is not intended to apply to any other contracts than the two discussed therein. Pacific Bell then argued that the allegations made by MCI are beyond the scope of the relief sought, are without merit and should be disregarded.

Lastly, on April 24, 1990, Bay Area Teleport (BAT) wrote to the ALJ, expressing its strong opposition to the Provisional Agreement, because it was not invited to "negotiate appropriate changes to the proposal with Pacific Bell or DRA."

BAT also takes the position that if Pacific Bell was concerned about revealing its prices, terms or conditions to potential competitors as part of the current preapproval process, it could do so under seal, with further opportunity for review after execution of a nondisclosure agreement.

Discussion

Three things are very clear to us regarding the instant proceeding:

1. There is an urgency associated with the need to waive preapproval if Pacific Bell is to be allowed to bid competitively on the two federal contracts in question for

which bids are due on May 5 and May 7, 1990.

2. There is little or no consensus that the conditions, provisions or requirements, especially the penalty mechanism of the Provisional Agreement are fair and reasonable for widespread application in the future, to all LECs.
3. There is a sincere desire among the respondent parties to provide their respective inputs to any provisional or permanent change to GO 96-A which may later apply in any way to them.

In addition, there remains a serious question regarding the need to apply Section X.B. of GO 96-A to all telecommunications utilities, rather than only to the LECs.

These remaining concerns must be dealt with in a procedure that provides the parties with an adequate opportunity to present their factual concerns and suggestions for revising the permanent language in Section X.B. of GO 96-A. Meanwhile there is a need to allow Pacific Bell to bid competitively on the two federal contract solicitations.

Accordingly, we will waive the requirement for preapproval of Pacific Bell's and any other telecommunications utility submittals in response to the two pending federal contract solicitations (IRS #90-218 and REL-TJ #90-0002). In so doing, we will require that any contract submittals to those solicitations made by a California local exchange telephone company be developed with the full understanding that the:

"Contracts for service with Governmental Agencies are effective and binding when signed by both parties. However, except for emergency service, if service by telecommunication utilities to Governmental Agencies is at rate which are below cost as defined by applicable Commission rules and regulations such utility may be liable for a penalty determined by Commission rules."

Further, Pacific Bell will be held at risk for a penalty equal to that agreed to in the Provisional Agreement, or as may later be designated as reasonable and appropriate in the permanent language of Section X.B. of GO 96-A which will apply to specific telecommunications utilities as defined by further order of this Commission in this proceeding.

We note GTEC's concern with regard to denoting a contract related penalty as a "Z factor" under the new regulatory framework we promulgated in D.89-10-031. We agree that such a designation could be interpreted as a modification of D.89-10-031, and we intend no such modification at this time. Because no other party has agreed to this penalty mechanism, we will apply it only to Pacific Bell.

However, we clarify that this penalty would not represent a "Z factor" adjustment, although it might be imposed at the same time as a genuine "Z factor" adjustment for administrative convenience.

Any and all other telecommunications utilities desiring to bid on the two federal contract solicitations described above may do so without prior approval by this Commission, but with the understanding that they too may be at penalty risk for below cost rates for contract service under future revisions of Section X.B. of GO 96-A.

Findings of Fact

1. There is an urgent need to authorize Pacific Bell to respond to two federal contract solicitations (IRS #90-218 and REL-TJ #90-0002) with binding bids, prior to May 5, and 7, 1990 respectively.

2. There is no consensus among the parties to this proceeding, other than DRA and Pacific Bell, that the terms, provisions, and penalties set forth in the Provisional Agreement are reasonable and appropriate for broad application to all California telecommunications utilities.

3. Nearly all parties to this proceeding seek a further opportunity to participate effectively in the development of the reasonable and appropriate language revisions for Section X.B. of GO 96-A.

4. Various interested parties to this proceeding seek a narrowing of the applicability of Section X.B. of GO 96-A to apply only to LECs.

5. There is a need to condition any temporary, provisional or contract specific waiver of the requirement for prior Commission approval of government contracts, pursuant to Section X.B. of GO 96-A, on a proviso that such service not be offered or provided at below cost.

6. Additional participation and input from the interested parties is needed prior to the development of any further revisions to Section X.B. of GO 96-A.

Conclusions of Law

1. Pacific Bell and all other California telecommunications utilities should be granted a contract specific waiver, from the requirement for prior review and approval provisions and requirements for governmental contracts of Section X.B. of GO 96-A, to allow these utilities to provide binding bids in response to federal contract solicitations IRS #90-218 and REL-TJ #90-0002.

2. The waiver discussed above should be granted only with a further understanding that Pacific Bell and the other California telecommunications utilities bear the risk of potential ratemaking adjustments for any services offered and provided at below-cost rates under these specific government contracts.

3. The "Provisional Settlement Agreement and Stipulation": entered into by Pacific Bell and DRA should not be adopted at this time due to the lack of consensus that it is fair and reasonable among other interested parties in this proceeding.

4. No further revision to Section X.B. of GO 96-A should be made without the opportunity for additional comment and

participation in the development of such revisions by the parties to this proceeding.

5. This order should be made effective today so that Pacific Bell and other interested telecommunications utilities may submit timely bids in response to the federal contract solicitations noted in Conclusion of Law 1 above, which are due on May 5 and 7, 1990 respectively.

INTERIM ORDER

IT IS ORDERED that:

1. Pacific Bell and all other California telecommunications utilities are hereby granted a waiver from the existing provisions and requirements of Section X.B. of GO 96-A for the sole and express purpose of responding as they deem appropriate, with binding bids, to two specific federal agency contracts, namely:

1. Internal Revenue Service #90-218.
2. General Services Administration REL-TJ #90-0002.

2. In accepting the above-specific contracting waiver, Pacific Bell and all other participating California telecommunications utilities are hereby placed on notice that they will be bound by future revisions of Section X.B. of GO 96-A as may be determined by further order in this proceeding, regarding penalties for providing any below-cost services under these specific contracts consistent with the following specific language:

"Contracts for service with Governmental Agencies are effective and binding when signed by both parties. However, except for emergency service, if service by telecommunication utilities to Governmental Agencies is at rates which are below cost as defined by applicable Commission rules and regulations such utility may be liable for a penalty determined by Commission rules."

3. Pacific Bell for the interim period, until further revision of Section X.B. of GO 96-A in this proceeding, shall also be subject to the terms, provisions, and requirements of the "Provisional Settlement Agreement and Stipulation" that it executed with DRA on April 19, 1980.

4. Ordering Paragraphs 1, 2, and 3 above are intended to provide a prompt resolution of a GO ambiguity to permit a timely response to a contractual opportunity for telecommunications utilities and shall not be interpreted as setting any precedent for response to any requests for future waivers and/or any suggested permanent revisions to GO 96-A.

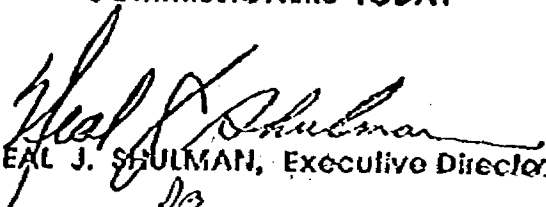
5. All California telecommunications utilities are hereby invited to participate in the further revision of Section X.B. of GO 96-A, as they may deem appropriate, commencing with attendance at the PHC before ALJ Amaroli on Monday, May 14, 1990, at 10:00 a.m., in the Commission Courtroom, State Office Building, 505 Van Ness Avenue, San Francisco, California.

This order is effective today.

Dated MAY 4 1990, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY


NEAL J. SHULMAN, Executive Director

APPENDIX A

LIST OF APPEARANCES

Applicant: Ronald R. Mc Clain, Attorney at Law, for Pacific Bell.

Protestant: Morrison & Foerster, by James M. Tobin, Attorney at Law, for McCaw Cellular Communications, Inc.

Interested Parties: Beck, Young, French & Ackerman, by Jeffrey F. Beck and Sheila A. Burtoco, Attorneys at Law, for CP National, Citizens Utilities Company of California, Evans Telephone Company, GTE West Coast Incorporated, Kerman Telephone Co., Pinnacles Telephone Company, Sierra Telephone Company, Inc., The Siskiyou Telephone Company, and Tuolumne Telephone Company; Cooper, White & Cooper, by E. Garth Black, Alvin H. Pelavin, and Mark P. Schreiber, Attorneys at Law, for Roseville Telephone Company, Calaveras Telephone Company, California-Oregon Telephone Company, Ducor Telephone Company, Foresthill Telephone Co., Happy Valley Telephone Company, Hornitos Telephone Company, The Ponderosa Telephone Company, The Volcano Telephone Company, and Winterhaven Telephone Company; Orrick, Herrington & Sutcliffe, by Robert J. Gloistein, Attorney at Law, for Contel of California, Inc.; Law Offices of Earl Nicholas Selby, by Richard G. Avila, Attorney at Law, for Bay Area Teleport; Randolph Deutsch, Attorney at Law, for AT&T Communications of California, Inc.; John H. Engel, Attorney at Law, for Citizens Utilities Company of California; Steven Hoffer, Attorney at Law, for MCI Telecommunications Corporation; Peter O. Nyce, Jr., Attorney at Law, for the Department of Defense/Federal Executive Agencies; Carrington F. Phillip and Alan J. Gardner, for California Cable Television Association; James D. Squeri and Barbara Snider, Attorneys at Law, for GTE Mobilnet of Santa Barbara; Arthur J. Smithson, for Citizens Utilities Company of California; Kenneth K. Okel and Michael L. Allan, Attorneys at Law, for GTE California Incorporated; and Graham & James, by Martin A. Mattes and Richard L. Goldberg, Attorneys at Law, for themselves.

Public Advisor's Office: Robert T. Fexaru.

Division of Ratepayer Advocates: Rufus G. Thayer, Attorney at Law, and Timothy J. Sullivan.

(END OF APPENDIX A)

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
FRANCISCO, CA 94102-3298

April 19, 1990

To Whom It May Concern:

Attached you will find a copy of the "PROVISIONAL SETTLEMENT AGREEMENT AND STIPULATION" to be filed with ALJ Amaroli in A.90-03-008. This document incorporates the concerns voiced by parties filing comments in this proceeding and by the participants in a prehearing conference held at the Commission on April 17, 1990. DRA holds that this provisional settlement, which applies only to two government contracts for which Pacific Bell wishes to compete, offers a constructive regulatory approach that permits Pacific to compete while all parties work for a permanent resolution of the issues raised in this proceeding.

Although this provisional settlement applies to only two contracts, DRA believes that the G.O. 96-A language included in Appendix A of the attached filing provides a framework within which all telecommunications utilities, subject to Commission rules affecting their segment of the telecommunications industry, will be able to compete for government contracts. DRA notes that this language has benefitted from the constructive comments of attorneys representing interexchange and cellular carriers, as well as an attorney representing the federal government.

The terms affecting Pacific Bell's two contracts during the provisional period are included in bullet format in the body of the settlement agreement. DRA notes that Commission decisions (D.88-08-059 & D.88-09-059 among others) and workshops have both limited the range of services which the LECs are authorized to offer under contract and created a set of safeguards for tracking contract costs and revenues. Indeed, DRA believes that these existing regulatory procedures, to a large extent, have made it possible for DRA to reach a negotiated settlement benefitting ratepayers and promoting fair competition.

DRA believes that the terms of this provisional settlement create a regulatory structure that will support a permanent settlement. Nonetheless, DRA wishes to assure California LECs other than Pacific that many important details remain open to discussion, and DRA desires the constructive input of local exchange carriers in the search for a permanent solution. Finally, DRA wishes to emphasize that it is receptive to a productive dialogue on any issue of particular concern to an LEC.

Please feel free to call the DRA team working on these issues. They include Jack Leutza, Project Manager at 415-557-1272 and Tim Sullivan, Regulatory Specialist at 415-557-0291.

Pacific Bell
April 19, 1990
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Please note that the ALJ prefers a filing on Monday with as many signatures as possible. FAXed signatures are acceptable as long as a hard copy follows. Please FAX the signed copy to the CPUC Legal Division, Attention: Jerry Thayer, (415) 557-1923.

Sincerely,

Helen M. Mickiewicz
Helen M. Mickiewicz
Staff Counsel

HMM:lmz

Enclosure

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)	
of Pacific Bell (U 1001 C), a)	Application 90-03-008
corporation, to amend General)	(Filed March 7, 1990)
Order 96-A)	
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PROVISIONAL SETTLEMENT AGREEMENT AND STIPULATION

Pursuant to Article 13.5 of the Commission's Rules of Practice and Procedure, the Commission's Division of Ratepayer Advocates (DRA) and Pacific Bell (PacBell) hereby propose for agreement by all parties to this proceeding the following provisional stipulation regarding the application of PacBell to amend General Order 96-A filed on March 7, 1990 and agreed to in principle by the parties attending the prehearing conference on April 17, 1990.

BACKGROUND

By Decision No. 88-08-059 issued August 24, 1988 the Commission adopted a settlement reached by many of the parties in Phase I of I.87-11-033, the new economic regulatory framework (NERF) proceeding. The Commission indicated the belief that the settlement would allow limited downward pricing flexibility for local exchange carriers' vertical services, centrex services and high speed digital private line services. The settlement in part modified section X of G.O. 96-A to exclude telecommunications utilities, except under emergency conditions, from the provision which exempts government contracts from pre-approval and allows service under such contracts to be at free or reduced rates.

The Department of Defense/Federal Executive Agencies (DOD/FEA) objected to the foregoing modification of G.O. 96-A. The DOD/FEA argued that the modification would preclude local exchange carriers from consideration for most federal government contracts because the pre-approval requirement would run

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counter to federal procurement law which requires that each party be bound by the conditions of the contract when signed. (D.88-08-059, pp. 69, 70).

The Commission indicated the possibility that federal procurement rules could be modified in order to assure that government and non-government contracts alike are held to the same standards. Accordingly, because the Commission was concerned that competitive telecommunications services could have been offered at free or reduced rates under G.O. 96-A, section X, and because such pricing may be anti-competitive, the section X.B of G.O. 96-A was amended in part, as follows:

"B. Governmental Agencies.

Notwithstanding the provision contained in subsection A hereof, a public utility of a class specified herein, except telecommunications utilities may, if it so desires, furnish service at free or reduced rates or under conditions otherwise departing from it filed tariff schedules to the United States and to its departments and to the State of California and its political subdivisions and municipal corporations, including the departments thereof, and to public fairs and celebrations. (Emphasis added; see D.88-08-059, Appendix A, p.13.)

Subsequently, workshops were held in February and April 1989. It became clear that DOD/FEA as well as other governmental agencies including the state of California, were precluded from amending their rules and laws to create an exception for local exchange carriers (LECs) to bid upon projects because of the pre-approval requirement contained in amended General Order 96-A. Recently, the opportunity has arisen for PacBell to bid on certain governmental projects valued at many millions of dollars. Accordingly, A.90-03-008 was filed seeking an amendment to General Order 96-A removing the pre-approval requirement for contracts for governmental agencies in order to clear the path for PacBell to bid on such multi-million dollar contracts offered by governmental agencies.

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The DOD/FEA has filed in support of the application. McCaw Cellular Communications, Inc. (McCaw) has protested any change which would affect operations of cellular or radio telephone utilities. The California Cable Television Association (CCTA) has protested the application asserting lack of sufficient safeguards in the PacBell proposal. A limited protest was also filed by GTE Mobilnet of Santa Barbara Limited Partnership. GTE California Incorporated (GTE-C), AT&T Communication of California Inc. (AT&T), and MCI Telecommunications Corporation (MCI) also filed responses.

The DRA and representatives of PacBell have engaged in intensive discussions in an attempt to develop an appropriate modification to G.O. 96-A which would remove the pre-approval requirement but still preserve the Commission's policy that contracts be priced at or above fully allocated embedded costs or direct embedded costs for government and non-government contracts alike.

A proposed settlement between the DRA and PacBell was presented at the prehearing conference on April 17, 1990. Various parties took exception to the proposed settlement. Other parties opposed the settlement in principle.

The presiding Administrative Law Judge (ALJ) requested the parties to attempt to reach a provisional agreement which, if approved by the Commission, would allow PacBell to bid for two contracts with branches of the Federal Government (IRS 90-218 and REL-TJ 90-0002). PacBell indicated at the prehearing conference that the deadline for submitting the bids is May 5, 1990.

The parties hereto have agreed that the following provisional settlement agreement and the revised modification to G.O. 96-A, section X.B (attached as Appendix A), is entered into solely for the purpose of allowing PacBell to bid for the two contracts designated in its application herein. The parties also have agreed that Appendix A is a provisional revision of G.O. 96-A and is not intended to apply to any other contracts on which PacBell may submit bids.

A second prehearing conference will be held in the week of May 14, 1990 to assess the possibility of a final settlement among all the parties to this proceeding.

PROVISIONAL SETTLEMENT AGREEMENT AND STIPULATION

Those signing hereby agree and stipulate in principle to provisional revisions to G.O. 96-A as included in Appendix A and to provisional changes in rules concerning Commission review of government contracts as follows:

- o For each telecommunications utility, all government contracts shall follow the filing and reporting requirements specified for that class of telecommunications utility.
- o For local exchange telecommunications utilities, the complete filing package, consistent with the guidelines agreed to by CACD and DRA and currently used by PacBell and other California local exchange telecommunications utilities for filing contracts for pre-approval, shall be filed within 15 days of contract execution or on the first business day following the 14th day of contract execution. The only difference being that while non-government contracts become effective only after Commission approval by resolution, government contracts are effective when signed by both parties. The Commission may conduct a post-approval review of the filing package at any time.
- o Failure to file the complete filing package by the due date will result in a penalty. For the contracts subject to interim relief (IRS 90-218 and REL-TJ 90-0002), penalties will be imposed on a case-by-case basis upon Commission review of circumstances of the filing date violation.

PacBell agrees to propose, but may not recommend, a pre-established schedule of late-filing penalties for use in a permanent settlement agreement and stipulation DRA believes such an automatic schedule of penalties offers a potentially productive avenue for achieving regulatory compliance.

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- o For local exchange telecommunications carriers, initial filings of government contracts must meet the same cost criteria that apply to contracts requiring pre-approval by the Commission. If a California local exchange telecommunications utility shows in its initial filing that a government contract fails to meet direct embedded costs or if a post-approval review of the filing package by the Commission uncovers errors that when corrected, cause a contract to fail to meet fully-allocated embedded costs or direct embedded costs, the California telecommunications utility will be required to pay a penalty equal to two times the difference between total projected revenues and total projected costs. This amount will be distributed to ratepayers through a regulatory mechanism consistent with the regulatory framework under which the company is regulated. Imposing this consequence at the front end of the process will provide an appropriate incentive to ensure proper behavior in the bidding process as well as adherence to cost standards.
- o If a California local exchange telecommunications utility has a requirement to provide a contract below direct embedded cost, the telecommunications utility will submit the contract to the Commission for pre-approval (except in emergency or natural disaster situations) as described in the recommended language for G.O. 96-A, paragraph X.B and as is incorporated in Appendix A.
- o California local exchange telecommunications companies will continue to file tracking reports for government contracts just as they do today, according to the tracking plans developed in conjunction with CACD and DRA and the contract workshops.
- o For this provisional period, any penalty imposed on Pacific Bell only will be distributed through the Z-Factor mechanism developed in Decision 89-10-031. The use of this Z-factor mechanism during the period in which this provisional settlement agreement remains in effect in no way prejudices what the appropriate penalty mechanism will be for Pacific Bell or any other California local exchange telecommunications utility.

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The foregoing agreement is applicable to local exchange carriers (LECs) only and is not intended to be applicable to cellular companies or radio telephone utilities.

APPROVAL OF THE PROVISIONAL SETTLEMENT
IS IN THE PUBLIC INTEREST

Approval of this provisional stipulation and agreement is in the public interest. Approval will expedite the ability of PacBell to bid upon two lucrative governmental contracts in competition with other providers of telecommunications services. This will stimulate a competitive environment for the provision of such services and therefore will further the objectives of the Commission as expressed in its various rulings and decisions in the NERF proceeding, I.87-11-033. Accordingly pursuant to Rule 51.6(c), the parties hereto respectfully request the ALJ to waive application of the Commission's rules governing stipulation and settlements for the provisional stipulation and settlement herein.

RESERVATIONS

If not accepted by the Commission, the terms of this provisional stipulation and settlement agreement shall not be admissible in evidence in this or any other proceeding. Approval of this settlement shall not be precedential. If the Commission approves this stipulation and settlement agreement, but imposes any modifications or conditions thereto, the agreement shall not become effective unless the parties hereto agree in writing to accept the modifications or conditions.

EFFECTIVENESS

This stipulation and settlement agreement shall become effective when the Commission decision approving it is issued.

Revision of G.O. 96-A X.B

B. Notwithstanding the provisions contained in Subsection A hereof, except as provided in the following paragraph, a public utility of a class specified herein, except telecommunications utilities, may, if it so desires, furnish service at free or reduced rates or under conditions otherwise departing from its filed tariff schedule to the United States and to its departments and to the State of California and its political subdivisions and municipal corporations, including the departments thereof, and to public fairs and celebrations. The utility shall promptly advise the Commission thereof by Advice Letter and, where a contract has been entered into, submit four copies of such contract and Advice Letter for filing. The Commission may, in an appropriate proceeding in the exercise of its jurisdiction, determine the reasonableness of such service at free or reduced rates or under conditions departing from its filed tariff schedules. This subsection shall not be construed as applicable to contracts for resale service.

Notwithstanding the paragraph above, telecommunications utilities may provide service to governmental agencies as defined above under conditions departing from tariffed rates consistent with Commission rules governing the costing procedures for each such utility's contracts. Except for emergency service, telecommunications utilities may not provide service to governmental agencies for free or at rates which are below cost as defined by applicable Commission rules and regulations without prior Commission approval. Telecommunications utilities shall promptly advise the Commission of the provision of service to governmental agencies under conditions departing from filed tariff schedules by Advice Letter. Except for emergency service, for contracts offered to government agencies that depart from published tariffs, local exchange telecommunications utilities shall file four copies of the contract and four copies of such Advice Letter within 15 days of contract execution. The failure by a local exchange telecommunications utility to make such a contract and Advice Letter filing within 15 days of contract execution shall result in a penalty determined by Commission rules. The Commission shall review the contract and Advice Letter and take action as determined under Commission rules governing these contracts.

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