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CALIFORNIA COASTAL COMMISSION
SOUTH CENTRAL COAST AREA
SOUTH CALIFORNIA ST., SUITE 200
NTURA, CA 93001
(805) 641-0142

Request Filed: 8/8/97
Staff: G.T./Ven
Staff Report: 8/22/97
Hearing Date: 9/9/97
Commission Action:

STAFF REPORT: REQUEST FOR RECONSIDERATION

APPLICATION NO.: A-4-VNT-97-068R

APPLICANT: Pacific Bell Mobile Services

PROJECT LOCATION: 3945 Pacific Coast Highway, south of 101 Freeway, Faria Beach, Ventura County

PROJECT DESCRIPTION: Installation of four panel antennas on a 35 ft. monopole, two (4x5ft.) base transceiver station (BTS) cabinets and a temporary palletized (4x2x20ft.) BTS unit.

COMMISSION ACTION AND DATE: Commission denied permit (on appeal from decision of Ventura County approving permit with conditions) on July 9, 1997

PROCEDURAL NOTE:

The Commission's regulations provide that at any time within thirty (30) days following a final vote upon an application for a coastal development permit, the applicant of record may request that the Commission grant a reconsideration of the denial of an application, or of any term or condition of a coastal development permit which has been granted. Cal. Code of Regs., Title 14, Section 13109.2.

The regulations state further that the grounds for reconsideration of a permit action shall be as provided in Coastal Act Section 30627 which states:

> The basis of the request for reconsideration shall be either that there is relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing on the matter or that an error of fact or law has occurred which has the potential of altering the Commission's initial decision.

Section 30627(b)(4) of the Coastal Act also states that the Commission "shall have the discretion to grant or deny requests for reconsideration."

Pacific Bell Mobile Services (hereafter the "applicant" or "Pacific Bell") submitted a request for reconsideration of the Commission's decision stating the grounds within the 30 day period following the final vote as required by Section 13109 of the California Administrative Code (exhibit 1). If a majority of the Commission votes to grant reconsideration, the permit application will be scheduled for the October meeting at which the Commission will consider it as a new application, Cal. Code of Regs., Title 14, Section 13109.5(d).

SUMMARY OF APPLICANT'S CONTENTION:

The request for reconsideration is based on the assertion that "an error of fact or law has occurred" which has the potential of altering the Commission's initial decision. The applicant contends that the development conforms with the certified Local Coastal Program for Ventura County which, pursuant to PRC Section 30604(b) is the Commission's standard of review, and that the Commission's decision to deny the permit based "on the suggestion that the LCP needs additional standards for such telecommunications facilities . . . is not a lawful basis under the statute and regulations to deny a permit which conforms to existing LCP provisions." The applicant also contends that the Commission's action is inconsistent with the federal Telecommunications Act of 1996 and Code of Civil Procedure Section 1094.5

SUMMARY OF STAFF RECOMMENDATION:

The staff recommends that the Commission approve the request for reconsideration.

STAFF RECOMMENDATION:

The staff recommends that the Commission adopt the following resolution:

I. Approval

The Commission hereby approves the request for reconsideration.

II. Findings and Declarations

The Commission hereby finds and declares as follows:

A. Project Description and History

Pacific Bell is requesting reconsideration of the Commission's decision to deny a permit (on appeal from decision of Ventura County approving permit with conditions) for the installation of four panel antennas on a 35 ft. monopole, two 4x5 ft. base transceiver station (BTS) cabinets, and a temporary 4x2x2 ft. palletized BTS unit to be allowed for not longer than six months on the site.

The project site is a 3.61 acre parcel located on the inland side of the old Pacific Coast Highway (also referred to as the Rincon Parkway) along the northern coast of Ventura County. The site is south of the 101 Freeway and above a low bank shouldering the Southern Pacific Railroad tracks which

parallels Pacific Coast Highway on the inland side. It is directly inland of Faria Beach County Park and the Faria Beach residential community both of which are located on the seaward side of the Highway. Old Coast Highway is still used as an alternative to the 101 Freeway by local residents and visitors using the various County and State parks, beaches and campgrounds. There are ample opportunities for lateral and vertical access to the beach in this area either from County "pocket parks" or directly from the highway shoulder to the water.

There are two existing antennas on the site and a third antenna located below and adjacent to the site in the public right-of-way. County CDP/CUP-4775/4776 (March, 1993) permitted the addition of a whip antenna to an existing wooden utility pole, four whip antennas on a new 40 ft. high monopole, an underground equipment center, and a partially underground radio equipment shelter. CDP/CUP-4888 (June, 1995) permitted a monopole with eight panel antennas and 3 microwave dishes, a GPS antenna, and a whip antenna.

The Ventura County Board of Supervisors approved a Coastal Development Permit including a Conditional Use Permit for the proposed project with conditions on March 4, 1997. The County's approval was subsequently appealed to the Coastal Commission and on May 13, 1997 during a scheduled public hearing, the Commission determined that the appeal raised a Substantial Issue regarding conformance with the County of Ventura certified Local Coastal Program (LCP).

When the Commission finds that a Substantial Issue exists relative to conformity to the certified LCP, a full public hearing (de novo) on the merits of the project will be held at the same meeting or at a subsequent meeting. The applicable standard of review for the Commission to consider at the de novo hearing is whether the proposed development conforms with the certified LCP pursuant to Section 30604(b) of the Coastal Act. The Commission held a de novo public hearing on July 9, 1997 and denied the proposed development. The Commission has not yet adopted findings to support its action to deny the project. If the Commission denies Pacific Bell's request for reconsideration, written findings supporting the Commission's decision to deny the proposed development will be scheduled for adoption at the October, 1997 meeting.

B. Grounds for Reconsideration

Pursuant to Section 30627(b)(4) of the Coastal Act, the Commission has the discretion to grant or deny requests for reconsideration. Section 30627(a)(1) states that the Commission shall decide whether to grant reconsideration of any decision to deny an aplication for a coastal development permit. The applicant's request for reconsideration (exhibit 1) requests that the Commission's denial of the permit be reconsidered. Pacific Bell has subsequently submitted additional correspondence on August 27, 1997 in support of its request for reconsideration (exhibit 2).

Section 30627 (b)(3) states in relevant part that a basis for a request for reconsideration shall be that an error of fact or law has occurred which has the potential of altering the initial decision. If the Commission votes to grant reconsideration, it will consider the permit application as a new application at a subsequent hearing.

C. Issues Raised By Pacific Bell Mobile Services

Pacific Bell asserts that the Commission has committed an error of law under the Coastal Act, the federal Telecommunications Act of 1996 and Code of Civil Procedure section 1094.5.

Pacific Bell contends first that the Commission violated section 30604(b) of the Coastal Act. That law provides that the Commission must issue a permit on appeal if it "finds that the proposed development is in conformity with the certified local coastal program." The applicant alleges that substantial evidence showed that the proposed development conforms to the certified LCP. Pacific Bell contends that it "appears that the Commission denied the permit on the suggestion that the LCP needs additional standards for such telecommunication facilities." The applicant argues that "regardless of whether that is true, it is not a lawful basis under the statute and regulations to deny a permit which conforms to existing LCP provisions." Pacific Bell claims "[t]hat the Commission in denying the permit relied on a wholly irrelevant ground, namely, the argument that the County's LCP needed additional standards pertaining to telecommunications facilities, even though PBMS met all LCP standards now in force."

Pacific Bell also argues that the Commission's denial of the permit on appeal violated section 704 of the Telecommunications Act of 1996,(47 U.S.C. Section 332(c)(7).) Pacific Bell asserts that the Commission's action violated the Telecommunications Act in three ways: "it unreasonably discriminates against PBMS and in favor of wireless communications providers who have been granted existing permits in this area"; it prohibits or has the effect of prohibiting PBMS from providing wireless communication services in this area"; and "it is unsupported by substantial evidence and not made in writing".

Last, Pacific Bell claims that the Commission's actions violated the Coastal Act and Code of Civil Procedure Section 1094.5 in that the Commission lacked substantial evidence to support its decision; and that the Commission failed to render a written decision with findings.

Pacific Bell has raised substantially the same arguments in a suit filed in United States District Court for the Northern District of California. (Pacific Telesis Mobile v. California Coastal Commission, Case No. C 97 - 02945 WHO). The suit was filed in federal district court pursuant to Section 704 of the Telecommunications Act. (47 U.S.C., Section 332 (c)(7)(B)(v).)

D. Analysis

The issues presented in Pacific Bell's request for reconsideration concerning the consistency of the proposed project with the LCP, the lack of standards in the LCP relating to telecommunications facilities, and the nondiscrimination requirements of federal law, were generally addressed in the course of the July hearing on this project. In part because many of the arguments against the project were not raised until after the oral presentations were made to the Commission by the staff and Pacific Bell, however, Pacific Bell's specific views on these issues were not fully discussed. For instance, while there was a dialogue between the staff and the Commission concerning the lack of standards in the LCP for telecommunications facilities, Pacific Bell did not

testify as to its position that this lack of standards would not provide grounds for denying its project consistent with either the Coastal Act or the Telecommunications Act.

Where an applicant for reconsideration meets the threshold requirement of alleging potential errors of fact or law that have the potential for altering the Commission's decision, the Commission has discretion to grant reconsideration. In this situation, a second hearing on Pacific Bell's application would allow the Commission to more fully consider the claim that the applicant's project is consistent with the existing requirements of the LCP and should therefore be approved. A de novo hearing would also provide the Commission with the opportunity to consider positions taken by Pacific Bell relating to the requirements of federal law, including the prohibition on unreasonable discrimination between the providers of wireless communication services and the necessity for written findings demonstrating the Commission's decision is supported by substantial evidence. Thus, reconsideration appears warranted to provide the Commission with an adequate opportunity to more fully consider the claims raised by Pacific Bell regarding the consistency of its project with state and federal law.

E. Conclusion

Pacific Bell's request for reconsideration is granted. A de nove hearing on the project will be scheduled and heard at the Commission's October, 1997 meeting.

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Pillsbury

Madison & Sutro LLP

ATTORNEYS AT LAW
235 MONTGOMERY STREET
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE: (415) 983-1000 FAX: (415) 983-1200
MAILING ADDRESS: P.O. BOX 7880
SAN FRANCISCO, CALIFORNIA 94120-7880
internet: pillsburylaw.com

Writer's direct dial number / email:
(415) 983-1496 Telephone
(415) 983-1200 Facsimile

EXHIBIT NO. 1
APPLICATION NO.
A-4-VNT-97-068R

August 8, 1997

HAND-DELIVERED

Mr. Peter M. Douglas
Executive Director
California Coastal Commission
45 Fremont Street, #2000
San Francisco, CA 94105

Re: Request by Pacific Bell Mobile Services for Reconsideration of Coastal Commission's Denial of Conditional Use Permit 4950 (July 9, 1997) (Appeal No. A-4-VNT-97-068)

Dear Mr. Douglas:

This letter is a request for reconsideration submitted on behalf of Pacific Bell Mobile Services ("PBMS") in respect to the Coastal Commission's action on July 9, 1997, denying PBMS' application for Conditional Use Permit ("CUP") No. 4950 for a telecommunications facility in Ventura County. This request is submitted pursuant to section 30627 of the California Coastal Act (Pub. Res. Code § 30627) and section 13109.1 et seq. of the Commission's regulations (14 Cal. Code Regs. § 13109.1 et seq.). This request is submitted on the ground that "an error of fact or law has occurred" which has the potential of altering the Commission's initial decision (§ 30627).

The background to this request is as follows. On November 21, 1996, the Ventura County Planning Commission adopted Resolution 96-20 approving PBMS' application for CUP 4950 for a telecommunications facility located near Faria Beach in Ventura County. On March 4, 1997, the Ventura County Board of Supervisors denied an appeal of the Planning Commission's decision and upheld the grant of the permit. On March 24, 1997, an appeal of the County's action was filed with the Coastal Commission. Although the Coastal

Commission staff recommended a finding of "no substantial issue" on the appeal, on May 13, 1997, the Coastal Commission voted to hear the appeal. On July 9, 1997, the Coastal Commission granted the appeal and overturned the permit, even though Coastal Commission staff had recommended approval, and testimony from County officials and others demonstrated that the issuance of the permit was in conformity with the County's Local Coastal Program ("LCP").

The governing provision pertaining to this appeal is Coastal Act section 30603(a)(4). An appeal under this section is limited to an allegation that "the development does not conform to the certified local coastal program." § 30603b(1). Under section 30604(b), the permit shall be issued if the Coastal Commission on appeal "finds that the proposed development is in conformity with the certified local coastal program."

In this case, the record shows that PBMS' development conforms to the County's LCP. It appears the Coastal Commission denied the permit on the suggestion that the LCP needs additional standards for such telecommunications facilities. Regardless of whether that is true, it is not a lawful basis under the statute and regulations to deny a permit which conforms to existing LCP provisions.

We submit that the Coastal Commission, in denying the permit, has committed an error of law in a number of respects, including the following:

- That substantial evidence showed the proposed development was in conformity with the LCP and met all applicable standards and policies contained in the LCP, entitling PBMS to the issuance of the permit.

- That the Commission in denying the permit relied on a wholly irrelevant ground, namely, the argument that the County's LCP needed additional standards pertaining to telecommunications facilities, even though PBMS met all LCP standards now in force.

- That the Commission's action was taken in violation of section 704 of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7), in numerous respects, including that it unreasonably discriminates against PBMS and in favor of wireless communications providers who have been granted existing permits in this area; it prohibits or has the effect of prohibiting PBMS from providing wireless communication services in this area; and it is unsupported by substantial evidence and not made in writing.

- That the Commission's actions were taken in violation of the Coastal Act and Code of Civil Procedure section 1094.5, in that the Commission applied an erroneous standard on appeal of a coastal development permit; that the Commission lacked substantial evidence to support its decision; and that the Commission failed to render a written decision with findings.

We request that the Coastal Commission determine PBMS' request for reconsideration at the earliest possible time. Concurrent with this request, PBMS is filing a legal action under section 704 in accordance with the short 30-day statute of limitations provided in the Telecommunications Act. Delay in hearing this request would be inconsistent with section 704, which prohibits unreasonable delay and requires expedited judicial review. We note that during the pendency of these proceedings, PBMS is effectively prohibited from providing adequate and competitive wireless services in the affected area, whereas its competitors are free to do so.

Very truly yours,

Ronald E. Van Buskirk

cc: Ralph Faust, Esq.

Pillsbury
Madison &
Sutro LLP

ATTORNEYS AT LAW
235 MONTGOMERY STREET
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE: (415) 983-1000 FAX: (415) 983-1200
MAILING ADDRESS: P.O. BOX 7880
SAN FRANCISCO, CALIFORNIA 94120-7880
Internet: pillsburylaw.com

Writer's direct dial number / email:
(415) 983-6368

EXHIBIT NO. 2
APPLICATION NO.
A-4-VNT-97-068R

August 27, 1997

BY FACSIMILE

Mr. Peter Douglas
Executive Director
California Coastal Commission
45 Fremont Street
Suite 2000
San Francisco, CA 94105

Re: Request for Reconsideration of Coastal Commission Denial of CUP 4950 (July 9, 1997)

Dear Mr. Douglas:

This letter is submitted in support of Pacific Bell Mobile Service's ("PBMS") request for reconsideration of the California Coastal Commission's decision denying CUP 4950 (filed August 8, 1997). Section 30627 of the Coastal Act authorizes an applicant for a coastal development permit to request reconsideration of a permit denial where "an error of fact or law has occurred which has the potential of altering the initial decision." We believe the Coastal Commission's denial of CUP 4950 constitutes an "error of law" under both the federal Telecommunications Act of 1996 as well as the Coastal Act. We believe the following analysis of the Telecommunications Act of 1996 and the Coastal Act has "the potential of altering the initial decision" and therefore satisfies the requirement for requesting reconsideration. We respectfully request that PBMS' request for reconsideration be granted.

1. Background.

On April 23, 1996, PBMS filed with Ventura County an application for conditional use permit, CUP 4950, for a personal communications system ("PCS") facility. The site is located on approximately 210 square feet of parcel number 060-380-140 at 3945 Pacific Coast Highway, at Pitas Point in Northern Ventura County. This location is within the Coastal Open Space ("COS") zone in Ventura County. The proposed facility consists of a 35-foot

monopole, four panel antennas, two base transceiver station ("BTS") cabinets (four feet by five feet in size) and one "temporary during construction" palletized BTS unit (approximately 4 feet by 5 feet by 20 feet).

The communications facility is essential for PBMS to provide adequate PCS coverage for the Highway 101/Route 1 corridor. Three of PBMS' competitors have communications facility located in the immediate vicinity of the site proposed by CUP 4950 and are already providing coverage of this corridor.

Ventura County's certified local coastal program ("LCP") authorizes the placement of communications facilities in the COS zone if a CUP is approved pursuant to applicable standards. See Article 4, Ventura County's Ordinance for the Coastal Zone (the "Coastal Zoning Ordinance"). The definition of "communications facilities" in Article 2 of the Coastal Zoning Ordinance "includes such uses as radio and television antennas, radar stations, and microwave towers."

On October 30, 1996, the Ventura County Planning Division issued a Negative Declaration for the project, finding it "could not have a significant effect on the environment." As part of its analysis, the staff reviewed the cumulative impact of the project and concluded that the cumulative impact would be either "no effect" or "less than significant effect."

The Ventura County Planning Staff, in its report for the Planning Commission meeting of November 21, 1996, recommended approval of CUP 4950, finding the project to be consistent with the certified LCP. On November 21, 1996 the Planning Commission approved the project. As a condition of approval, the Planning Commission required PBMS to screen the antennas with 35-foot trees and to install trees around the entire site, not only PBMS' facility.

An appeal of the approval was filed with the Board of Supervisors on December 2, 1996. The Planning Division staff report to the Board recommended denial of the appeal and approval of CUP 4950. The Board followed the staff recommendation and denied the appeal on March 4, 1997. The Board also amended the conditions of approval to require that the trees used to screen the antennas "be of sufficient height to provide the maximum feasible view blockage from nearby residences" and that the trees "surround the entire site except for areas which would block antenna transmissions."

On March 24, 1997, Mr. William Stratton filed an appeal of the Board of Supervisor's decision (Appeal Number A-4-VNT-97-068), which appeal is the subject of this request for reconsideration. A hearing was set for May 13, 1997 to determine whether the appeal raised a "substantial issue." On April 7, 1997, the Ventura County Planning Division staff submitted a letter to the Coastal Commission arguing that the appeal failed to set forth any "case

whatsoever to show that the proposed development does not conform to the standards set forth in the County's certified LCP" and therefore failed to raise a substantial issue. The Coastal Commission staff report for that hearing provided a detailed analysis of the issue and, like the Ventura County staff, recommended that the Commission determine "no substantial issue" was raised by the appeal, because "the project as submitted is consistent with the standards set forth in the certified local coastal program and the public access policies of the Coastal Act." However, on May 13, 1997, the Coastal Commission determined that the appeal raised a substantial issue and set a hearing for July 9, 1997.

The staff report prepared for the hearing on the merits of the appeal recommended approval of CUP 4950. The staff report set forth the legal standard on appeal provided for by the Coastal Act, as well as the limitations imposed on the Coastal Commission's authority by section 704 of the Federal Telecommunications Act of 1996. The report analyzed each of the standards of the Coastal Zoning Ordinance and the certified Land Use Plan ("LUP") applicable to CUP 4950 and concluded that the project was consistent with all such standards.

At the July 9, 1997 hearing, the Ventura County Planning Division staff and the Coastal Commission staff again recommended approval of the project. PBMS, through its representative, presented evidence supporting the project and opposing the appeal including an analysis of the radio frequency emissions from the proposed facility which demonstrated that such emissions would be substantially lower than permitted by federal regulations. The appellant and members of the public spoke in opposition to the project. The opposition was largely based on an allegation that Ventura County's certified LCP lacked policies applicable to such facilities. The opponents also asserted that the County had not analyzed the cumulative impact of the project despite evidence in the record directly to the contrary. Finally, opponents expressed generalized concerns about visual impacts.

At the close of the consideration of the appeal, the Coastal Commission voted 8-4 to deny the permit. At this time, the Commission has not issued written findings supporting its decision.

2. <u>The Coastal Commission's denial of CUP 4950 violates the Telecommunications Act of 1996.</u>

The Telecommunications Act of 1996 (hereinafter the "Telecommunications Act") was enacted to promote rapid deployment and competition in the telecommunications industry.[1]

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1 The preamble to the Joint Conference Report describes the purpose of the Telecommunications Act as follows:

(continued...)

Section 704 of the Telecommunications Act addresses the siting of personal wireless communications facilities. This provision originated in the House of Representatives where the Committee on Commerce found that,

> current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network.[2]

Although the House bill originally provided that the FCC would establish uniform national policies on facilities siting, the Conference Committee ultimately took the approach of imposing substantive federal limitations on zoning authority.

Section 704 of the Telecommunications Act limits state and local authority as follows:

> (i) The regulation of the placement, construction and modification of personal wireless service facilities by any State or local government or instrumentality thereof--
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
>
> (ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly

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1(...continued)

> [To] provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunication and information technologies and services to all Americans by opening all telecommunications markets to competition. . .

See H.R. Conf. Rep. No. 104-458, at 1(1996).

2 H.R. Rep. No. 104-204, at 94 (1995).

filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effect of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.[3]

We are concerned that the denial of CUP 4950 may violate section 704 in several respects. First, the decision was not supported by substantial evidence and was not "in writing." Second, the decision was based on an inappropriate legal standard. Third, the decision constitutes a de facto moratorium on the issuance of permits for personal communications systems facilities contrary to the restriction on "prohibitions" in the Telecommunications Act. Fourth, the denial constitutes unreasonable discrimination against PBMS. Each of these concerns is described in more detail below.[4]

A. The denial of CUP 4950 was not supported by "substantial evidence" and was not "in writing."

Section 332(c)(7)(B)(iii) requires decisions of state agencies denying a request to construct a personal wireless facility to be "in writing and supported by substantial evidence." Although the Telecommunications Act does not define "substantial evidence," federal courts construing the Telecommunications Act have consistently ruled that substantial evidence requires "more than a mere scintilla" of supporting evidence and that there must be evidence

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3 42 U.S.C. § 332(c)(7)(B)(i)-(iv) (emphasis added).

4 Section 704 also imposes a strict 30-day time limit for suits challenging a violation of the Act and requires expedited judicial review. Section 332(c)(7)(B)(v). Accordingly, PBMS was required to file a legal action to protect its rights and will be required to proceed expeditiously with that action unless reconsideration is granted.

that a "reasonable mind might accept as adequate to support [the] conclusion."[5] The decisions of "intermediate tribunals" are part of the evidence to be weighed.[6] Additionally, "generalized concerns" and opposition by the community at large to a personal wireless facility, standing alone, do not constitute "substantial evidence" to support a denial.[7] As to the "in writing" requirement, the written decision must set forth the underlying rationale so that the reviewing court can "determine if the denial comports with the requirements of the statute."[8]

Here, the sole question on appeal was whether CUP 4950 was consistent with the standards and policies of Ventura County's certified LCP. Section 30604(b), governing this appeal, reads as follows:

> After certification of the local coastal program, a coastal development permit shall be issued if the issuing agency or the commission on appeal finds that the proposed development is in conformity with the certified local coastal program.[9]

We believe the evidence presented to the Coastal Commission at the July 9, 1997 hearing on the appeal strongly supported approval of the permit. Ventura County's certified LCP expressly authorized the placement of "communications facilities" in the COS zone subject to satisfying the standards for conditional use permits set forth in the Coastal Zoning

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5 Bellsouth Mobility Inc. v. Gwinnet County, 944 F. Supp. 923, 928 (N.D. Ga. 1996); Western PCS II Corporation v. Extraterritorial Zoning Authority, 957 F. Supp. 1230 (D. N.M., 1997); Illinois RSA No. 3, Inc. v. County of Peoria, 963 F. Supp. 732, 744 (C.D. Ill. 1997).

6 Illinois RSA, 963 F. Supp. at 744.

7 See Illinois RSA, 963 F. Supp. at 745; Western PCS, 957 F. Supp. at 1236; Bellsouth, 944 F. Supp. at 928.

8 Western PCS, 957 F. Supp. at 1236.

9 Coastal Act, Pub. Res. Code § 30604(b) (emphasis added). The regulations promulgated pursuant to this section provide, "[t]he standard of review for any appealable development shall be whether or not the development meets the requirements of Public Resources Code Sections 30604(b) and (c)." Cal. Code Regs. tit. 14, § 13119. Section 30604(c) is not applicable here, as the project is not "between the nearest public road and the sea or the shoreline of any body of water located in the coastal zone".

Ordinance.[10] The facility proposed by CUP 4950 falls within the definition of "communications facilities." Additionally, the staff and governing zoning agencies in Ventura County and the Coastal Commission staff, after analysis, all concluded that CUP 4950 satisfied all applicable standards and was consistent with the policies of the LCP.

Neither the appellant nor any of the opponents of the project presented "substantial evidence" that CUP 4950 did not meet the standards of the LCP. Appellant's primary argument was not that the project did not meet the standards, but rather that the standards themselves (in his view) were insufficient. This argument, as discussed more fully below, is irrelevant to the issue which was before the Coastal Commission. Appellant also asserted that a cumulative impact analysis was not conducted, but that assertion was unfounded and directly contradicted by evidence. Appellant also asserted the project did not satisfy the requirements for public works facilities. Again, the evidence in the record, consisting of Ventura County's Planning Commission and Board of Supervisor's approvals of CUP 4950 and the two Coastal Commission staff reports analyzing this issue and reaching the opposite conclusion, contradicts this assertion.

Finally, as to the "in writing" requirement, at this time no written statement of the Commission's findings has been issued.

B. The denial of CUP 4950 was based on an erroneous standard.

The standard governing appeals of coastal development permits under the Coastal Act is limited to the issue of whether the project conforms with the certified LCP.[11] The language of the Coastal Act is mandatory, requiring issuance of a coastal development permit where it is determined that the project conforms to the certified LCP.[12] As previously discussed, we believe CUP 4950 met that standard.

The appellant, in his appeal papers and in statements made at the July 9, 1997 hearing, asserted that the Coastal Commission should deny the appeal on the ground that Ventura County's LCP did not contain sufficiently detailed standards governing the project proposed by CUP 4950. Not only was this argument misleading--as the LCP did it fact contain standards governing the project--but it was legally erroneous as it misrepresented the standard to be applied to the appeal. By focusing on the (purported) lack of standards in the certified LCP, the decision to deny was based on an irrelevant factor.

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10 Coastal Zoning Ordinance art. 4.

11 Pub. Res. Code § 30604(b); Cal. Code Regs. tit. 14, § 13119.

12 Pub. Res. Code § 30604(b).

C. The denial of CUP 4950 constitutes a prohibition or has the effect of prohibiting the provision of personal wireless services.

Under section 332(c)(7)(B)(i)(II) of the Telecommunications Act, an agency may not prohibit or take actions that have the "effect of prohibiting," the provision of personal wireless services. The Conference Committee Report explains Congress' concern in imposing this restraint: "[i]t is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis."[13]

The denial of CUP 4950 prohibits or has the effect of prohibiting the provision of personal wireless services by PBMS in Ventura County. The July 9 decision, in effect, disables Ventura County from approving any other personal wireless facility in the coastal zone until additional standards have been drafted and approved as part of the certified LCP by the Coastal Commission. As a result, the Coastal Commission action is tantamount to a "de facto" moratorium on the approval and processing of such facilities. This "de facto" moratorium is not limited in duration. An open ended ban on such facilities is contrary to section 332(c)(7)(B)(i)(II) of the Telecommunications Act, which requires that decisions be made on a case-by-case basis rather than by legislative prohibitions.

D. The denial of CUP 4950 unreasonably discriminates among providers of functionally equivalent services.

Under section 332(c)(7)(B)(i)(I), an agency may not "unreasonably discriminate among providers of functionally equivalent services." The decision to deny a permit for a personal wireless facility, such as CUP 4950, where other carriers have been granted permits under the same zoning standards constitutes discrimination under the Telecommunications Act.[14]

In the Western PCS case, Western sought a permit to erect an antenna facility to provide PCS coverage of the I-25 corridor.[15] Two of its competitors already had uninterrupted coverage of that corridor.[16] In ruling that the permit denial constituted

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13 Conference Committee Report at 208 (emphasis added).

14 See Western PCS, 957 F. Supp. at 1237-38.

15 Id.

16 Id.

thereby reduces its ability to compete, by requiring it to find an alternative site.[18]

Three cellular companies, all competitors of PBMS, have cell sites located in the immediate vicinity of CUP 4950. These sites are located in the same land use zone as CUP 4950 and were subject to review under the same standards in Ventura's certified LCP. As a result of the Coastal Commission's decision, PBMS has been denied coverage of Highway 101/Route 1 corridor in the vicinity of Faria Beach, yet its competitors are providing such service.

3. The denial of CUP 4950 also violates state law.

A. The Coastal Commission failed to proceed in the manner required by the Coastal Act.

As discussed above, the standard on appeal was whether the development is in conformity with the certified LCP.[19] The Coastal Commission failed to apply this standard in its July 9, 1997 denial. Rather, the Commission denied the permit on the ground that the certified LCP did not contain sufficient standards governing personal wireless facilities. In so doing, we believe the legal requirements of the Coastal Act were misapplied. Where an applicant for a permit has met all conditions precedent to the right to receive a permit, it constitutes legal error to deny the permit.[20]

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17 Id. at 1237.

18 Id. at 1237-38.

19 Pub. Res. Code § 30604(b).

20 See Grabic v. City of Rancho Palos Verdes, 73 Cal. App. 3d 183 (1977).

B. The decision was not supported by substantial evidence.

For the reasons discussed above, the denial of CUP 4950 was not supported by substantial evidence and therefore should be reconsidered.[21]

4. Conclusion.

For the foregoing reasons, we respectfully request that the Coastal Commission reconsider its July 9, 1997 decision and grant PBMS' permit application.

Yours very truly,

Kristen M. Bamford

cc: Ralph Faust, Esq.
Dorothy Dickey, Esq.

James P. Tuthill, Esq.

21 Code Civ. Proc. § 1094.5(b).