

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

In re

PACTEL CELLULAR File No. 216MS0031

Station KNKA236 in the Domestic Public
Cellular Radio Telecommunications Service
serving Market 18B, San Diego, California

ORDER

Adopted: June 13, 1994; Released: June 30, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. PacTel Cellular (PacTel) is the licensee of the captioned station in the Domestic Public Cellular Radio Telecommunications Service, on frequency Block B (nonwireline). In February 1991, the Mobile Services Division (MSD) granted developmental authorization to PacTel to conduct field tests using experimental radio equipment. The authorization was to expire on February 6, 1992, and PacTel was to file a report about its field tests at the close of the developmental period. PacTel filed the required report on June 10, 1992. On July 20, 1992, PacTel submitted a request for Special Temporary Authority to continue tests initiated under the previously granted and expired developmental authorization and also filed an application to continue testing. On July 27, 1992, the MSD granted PacTel a one-year developmental authorization but the following day set aside the grant when it appeared that developmental testing had continued past the expiration date. The MSD directed PacTel to provide the Commission with details surrounding the unauthorized developmental testing and steps PacTel would take to prevent a recurrence. PacTel provided its explanations on August 3, 1992, and as a result, the MSD granted PacTel a one-year developmental authorization through August 3, 1993. In addition, on February 2, 1993, the Commission released a Notice of Apparent Liability (NAL) against PacTel in the amount of \$34,000 for apparent violations of Section 301 of the Communications Act and Sections 22.3 and 22.406(a) of the Commission's Rules. *PacTel Cellular*, 8 FCC Rcd 742 (1993).

2. The Commission and PacTel have reached an agreement which would terminate the Commission's NAL proceeding. The terms and conditions of this agreement are contained in the attached Consent Decree.

3. We have reviewed the terms of the Consent Decree and evaluated the circumstances of this case. We believe that the public interest would be served by approving the Consent Decree, the terms of which are incorporated herein by reference. In this regard, we conclude that, based on the facts before us, even if the allegations were true, we find no substantial and material questions of fact regarding PacTel's basic qualifications to be a licensee. The Consent

Decree does not affect the potential relevance of these facts to PacTel's renewal expectancy. See Consent Decree, para. 10.

4. Accordingly, IT IS ORDERED that the Consent Decree attached to this Order IS ADOPTED and that the Secretary shall sign such Consent Decree on behalf of the Commission.

5. IT IS FURTHER ORDERED that the Commission's Notice of Apparent Liability initiated February 2, 1993, IS RESCINDED.

6. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Attachment

CONSENT DECREE

I. INTRODUCTION

1. This is a Consent Decree (the "Decree") between the Federal Communications Commission ("Commission") and PacTel Cellular ("PacTel").

2. Under the terms of this Consent Decree, PacTel agrees to make a voluntary payment totalling \$34,000 for deposit into the United States Treasury, and the Commission agrees to terminate its investigation into the matters alleged in this proceeding.

II. BACKGROUND

3. On February 6, 1991, the Mobile Services Division (MSD) granted developmental authorization to PacTel to conduct field tests using experimental radio equipment operating on cellular frequency Block B. The authorization was for a period of one year, expiring on February 6, 1992. PacTel's developmental authorization required PacTel to file a report with the Commission containing the information required by Section 22.406(a) of the Commission's Rules at the close of the developmental period. PacTel filed the required report on June 10, 1992.

4. On July 20, 1992, PacTel submitted a request for Special Temporary Authority (STA) to continue tests which were initiated under the previously granted and expired developmental authorization. In its STA request, PacTel indicated that it had continued testing after the February 6, 1992 expiration of its developmental authorization. On July 21, 1992, PacTel filed an application for developmental authority to continue testing, and the MSD granted PacTel a one-year developmental authorization on July 27, 1992.

5. On July 28, 1992, the MSD set aside its July 27th action granting the one-year developmental application. The MSD requested that PacTel provide the Commission

with details of the circumstances surrounding the unauthorized continuing developmental testing, as well as the steps PacTel would take to prevent a recurrence.

6. By letter dated August 3, 1992, PacTel explained that the individuals responsible for conducting the tests did not terminate testing despite being notified by other PacTel employees of the expiration of the developmental authorization. Those responsible individuals also did not advise other PacTel employees that the tests were continuing. In addition, the program coordinator for PacTel's test project had left the employ of PacTel in June 1992. PacTel stated that it had instituted two procedures to prevent a recurrence of unauthorized testing. First, PacTel put in place procedures that would provide PacTel management with more advance notice when a developmental authorization nears expiration in order to take appropriate action. Second, the individuals responsible for testing were instructed not to test equipment without an effective developmental authorization from the Commission.

7. As a result of PacTel's August 3rd response, the MSD on August 4 granted PacTel a one-year developmental authorization through August 3, 1993. In addition, on February 2, 1993, the Commission released a Notice of Apparent Liability (NAL) for Forfeiture against PacTel. *PacTel Cellular*, 8 FCC Rcd 742 (1993). The NAL found that PacTel's actions apparently violated Section 301 of the Communications Act and Sections 22.3 and 22.406(a) of the Commission's Rules. The NAL set forth a forfeiture in the amount of \$34,000. On July 7, 1993, the MSD granted PacTel an additional one-year developmental authorization through August 3, 1994.

III. DEFINITIONS

8. For the purposes of this Decree, the following definitions apply:

- (a) "PacTel" means PacTel Cellular or any of its successors in interest.
- (b) "Order" means an order of the Commission adopting the terms and conditions of this Decree.
- (c) "Final Order" means an Order of the Commission that is no longer appealable or subject to administrative or judicial reconsideration, review, appeal, or stay.

IV. AGREEMENT

9. PacTel admits the jurisdiction of the Commission over it, and the subject matter of this action for purposes of this Decree and the Order adopting this Decree.

10. PacTel waives any rights it may have to judicial review, appeal, or rights otherwise to challenge or contest the validity of any Order adopting this Decree. PacTel agrees that upon signing by PacTel and the Commission, the provisions of this Decree shall be incorporated by reference in the Order formally adopting this Decree.

11. This Decree is for purposes of settlement only, and its signing does not constitute an admission by PacTel of any violation of law, rules, or policy.

12. In consideration for the Commission's agreement to terminate the NAL proceeding in accordance with the terms of this Decree, PacTel hereby agrees to the following terms, conditions, and procedures, which the parties be-

lieve will facilitate a fair and expeditious resolution of the NAL proceeding in a manner that would serve the public interest:

(a) PacTel will make a voluntary payment to the United States Treasury, without further protest or recourse, in the amount of \$34,000, within five days after the Order adopting this Decree is released. Payment may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, to Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

(b) PacTel agrees that the contribution of \$34,000 to the United States Treasury may not be claimed as a tax deduction.

(c) The failure of PacTel to comply with these terms will be considered a failure of compliance with this Decree.

13. In light of the covenants and representations contained in this Decree, and in express reliance thereon, and in order to conserve Commission resources and avoid litigation costs, the Commission agrees to terminate its Notice of Apparent Liability proceeding against PacTel. Such termination is without a finding by the Commission of wrongdoing by PacTel. Further, the Commission agrees that it will not institute, on its own motion, any proceedings against PacTel based upon the information obtained during the investigation up to the date of this Consent Decree. In addition, in the absence of additional facts, the Commission agrees that the allegations and other circumstances involved in this proceeding will not be used against PacTel with respect to its basic qualifications to be a licensee in any current or future proceeding.

14. PacTel agrees that any violation of the Order or this Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

15. The parties further agree that the effectiveness of this Consent Decree is expressly contingent upon termination of the NAL proceeding, issuance of an Order as described herein, and PacTel's compliance with the terms, conditions, and procedures set forth in paragraph 12. If this Decree is not signed by the Commission and PacTel, or is otherwise rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any fashion in a legal proceeding.

16. If the Commission, or the United States on behalf of the Commission, brings an action in any United States District Court to enforce the terms of the Order incorporating the terms of this Decree, PacTel agrees that it will not contest the validity of the Order, will waive any statutory right to a trial *de novo*, and will consent to a judgment incorporating the terms of this Decree.

FEDERAL COMMUNICATIONS COMMISSION

By: _____
William F. Caton, Acting Secretary

PACTEL CELLULAR

By: _____