

Decision 87 12 017 DEC 9 - 1987

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Carlin Communications, Inc. and
Sable Communications of California,
Inc.,

Complainants,

vs.

Pacific Bell, a corporation,
(U 1001 C)

Defendant.

Case 85-01-008
(Filed January 4, 1985)

Pacific Bell, a corporation,
(U 1001 C)

Complainant,

vs.

Carlin Communications, Inc.,
Sable Communications of California,
Inc., and Topaz of California, Inc.,

Defendants.

Case 85-05-075
(Filed May 20, 1985)

Kadison, Pfaelzer, Woodard, Quinn & Rossi,
by Lee Blackman and Joel Bonner, Attorneys
at Law, for complainant and defendant.
Chris Rassmussen and Jan Major, Attorneys at
Law, for Pacific Bell, defendant and
complainant.

OPINION

Case 85-01-008

On January 4, 1985, Carlin Communications, Inc. and Sable
Communications of California, Inc., (Carlin) filed a complaint
against Pacific Bell (Pacific) alleging Pacific proposed to

disconnect Carlin's service pursuant to the provisions of tariff Schedule Cal. P.U.C. No. 36 T, Rule 11.

Carlin requested the initiation of an investigation and a hearing to determine (1) the intent and meaning of Tariff Schedule 173-T as it relates to prerecorded and live communications, (2) the competing hardships of permitting or not permitting live interactive programming under the present tariff and whether Pacific is estopped from asserting that the tariff may be interpreted to disallow such services, (3) the feasibility of amending the tariff specifically to include live interactive programming for those who presently offer such programs, (4) the feasibility of issuing a new tariff to govern live interactive programs without disconnecting existing programs, and (5) the propriety of selective disconnection on the basis of the content of communications rather than the purported problem of live programming. The complaint also requested that discovery be permitted regarding the claim that callers have not been connected to live message providers promptly.

In its answer filed February 11, 1985 Pacific stated it advised Carlin by letters dated December 17, 1984 and December 21, 1984 that Carlin's "live" offerings were in violation of Pacific's filed tariffs and service would be disconnected if such offerings did not cease.

Pacific asserts that Carlin's 976 "live" programs cannot be offered under Tariff 173-T and that the tariff is not ambiguous. It states that Carlin's service would not be disconnected pending a decision by the Commission. Pacific also denies that it has selectively enforced the subject tariff based on message content.

For an affirmative defense Pacific alleges that: (1) all of its actions were taken pursuant to the terms of Schedule Cal. P.U.C. No. 173-T, (2) the complaint fails to set forth and act or acts done or omitted to be done in violation of law as required by

Public Utilities (PU) Code § 1702, (3) Carlin's 976 offering is in violation of Tariff 173-T, (4) issuing a new tariff to govern live interactive programs and amending the tariff to include live interactive programming for presently offered programs would violate PU Code § 453, (5) Carlin voluntarily assumed the risk and expense of proceeding to offer "live" programs even though the tariff clearly does not include such services, (6) the weighing of hardships as requested is not appropriate where a complainant is seeking a declaration as to whether "live" services may be provided under the existing tariff, and (7) Carlin's offering wherein two callers are connected is an intraLATA public utility service for which Carlin does not possess a certificate of public convenience and necessity (CPC&N).

Pacific denied that Carlin is entitled to any relief and requested that the complaint be dismissed.

On April 26, 1985, a prehearing conference was held in Los Angeles. The parties agreed that for discovery purposes Pacific would make three witnesses available for depositions prior to the hearing scheduled for May 9, 1985. It was also agreed that opposing counsel would meet at the conclusion of the scheduled depositions to agree upon the issues, witnesses and documents to be produced.

On May 7, 1985 Carlin filed a request for a continuance of the scheduled May 9 hearing. Carlin alleged that discovery necessary for a fair opportunity to prepare their case could not be completed by that date. At a second prehearing conference held May 7, 1985, the parties agreed that the matter be continued to a date to be set and that Pacific would file a cross complaint against Carlin.

On May 20, 1985 Pacific filed Case (C.) 85-05-075 against Carlin (the complaint was amended to include Topaz of California, Inc., an affiliate of Carlin) in which it requested: (1) compliance with Tariff A 9.5.2 (formerly Tariff 173-T), (2) compliance with the tariff limiting maximum message length to 180 seconds, using equipment which automatically disconnects after playing a full message cycle, and providing continuous uninterrupted recordings or interactive programs, (3) an order requiring Carlin to cease and desist from offering any 976 service in violation of Decision (D.) 84-06-113, (4) an order requiring Carlin to cease and desist from offering 976-IAS service where equipment disconnects when there is no matching caller before a message or announcement is provided to the caller, (5) a refund to any 976 caller for the cost of calls billed by Pacific which were disconnected because of the inability to match callers, and (6) an order requiring Carlin to publish notice in all media in which Carlin advertises that their 976 callers may be entitled to a refund.

By Administrative Law Judge's ruling dated June 7, 1985, C.85-01-008 and C.85-05-075 were consolidated.

Carlin answered the Pacific complaint on June 13, 1985 stating that Pacific's 976-IAS service is provided under Tariff A-9.5.2.¹ and denied that its service violated any tariff of Pacific. Carlin alleged that Tariff 173-T is no longer applicable to its service and denied that its offering violates any such tariff. Carlin denied that the prerecorded announcements exceed the maximum permitted message length or that its equipment does not automatically disconnect after playing a full cycle. Carlin alleged it provides continuous uninterrupted automatic recorded

1 On August 8, 1983, to be effective September 9, 1983, Pacific filed Tariff Schedule 173-T, Advice Letter 14603. On August 23, 1985, Pacific filed revised Tariff Schedule A-9.5.2 to supercede Tariff Schedule 173-T.

announcement service and continuous uninterrupted interactive program service and denied that the tariff requires that interactive programs consist only of continuous uninterrupted recordings.

Carlin denied that it engaged in any misleading advertising. It alleged that all ads warn callers of possible disconnection if there is no matching caller and that each caller accesses a prerecorded announcement prior to connection or disconnection. It denied not connecting callers to the 976 San Francisco service after a call has been completed by Pacific.

For affirmative defenses, Carlin stated that Pacific failed to state a cause of action, that Carlin is not a public utility subject to the Commission's jurisdiction, and that the Commission has no jurisdiction over the subject matter of Pacific's complaint.

Finally, Carlin alleged Pacific is estopped and barred by the doctrine of laches and unclean hands from the relief sought because Pacific suggested live programs, assisted in the administrative and technical logistics of developing such programs, provided unique equipment for such programs, and provided installation of lines especially adapted for such programming.

On June 13, 1985 Carlin filed a document titled Motion to Specify Issues. For C-85-01-008, Carlin believes the issues are: (1) whether the language of Tariff A 9.2, taken as a whole, is ambiguous as to whether live as well as recorded interactive programs are permitted, (2) whether, in Tariff A 9.5.2., the word "prerecorded" in the phrase "prerecorded announcements or interactive programs" modifies only the word "announcements" and not the word "programs", (3) whether the persons who drafted Tariff A-9.5.2 intended the tariff to permit live as well as recorded interactive programs, (4) whether live interactive programs can be provided through the 976 IAS system without significant technical

difficulties, (5) whether Pacific knowingly permits 976 IAS providers other than Carlin to offer live interactive programs, (6) whether Pacific has threatened to disconnect only Carlin, and not other 976 IAS providers, for offering live interactive programs, (7) whether Pacific has discriminated illegally against Carlin in favor of other 976 IAS providers, (8) whether Pacific must file a new tariff if it wishes to change the terms of or resolve ambiguities in Tariff A-9.5.2.

For C-85-05-075, Carlin believes the issues are: (1) whether Pacific's amended complaint fails to state a claim because Carlin is not a public utility, (2) whether the Commission has jurisdiction over the complaint because Carlin is not a public utility, (3) whether Carlin's 976 IAS services differ significantly from intra-LATA public utility services, (4) whether Carlin may provide interactive programs without obtaining a CPC&N, (5) whether Carlin has complied with the provisions in Tariff A-9.5.2 relating to the duration of 976 IAS calls, (6) whether Tariff A-9.5.2, Original Sheet 305, Paragraph k, applies only to prerecorded announcements and not to interactive programs, (7) whether Tariff A-9.5.2, Original Sheet 309, Paragraph a, applies only to prerecorded announcements and not to interactive programs, and (8) whether advertisements by Carlin for live interactive programs adequately disclose the nature and cost of the programs.

Carlin believes the issues in both cases are: (1) whether Pacific represented to Carlin that Tariff A-9.5.2 would permit live interactive programs, (2) whether Pacific sold special equipment to Carlin and installed it to provide live interactive programs, (3) whether Carlin invested substantial sums in reasonable reliance on Pacific's representations that Tariff A-9.5.2 would permit live interactive programs, and on Pacific's failure to object to live programs when Carlin had the necessary

equipment installed, (4) whether Pacific is estopped as a matter of administrative law from denying that Tariff A-9.5.2 permits live interactive programs, (5) whether Pacific is equitably estopped from denying that Tariff A-9.5.2 permits live interactive programs, (6) whether Pacific is barred by the equitable doctrine of laches from denying that Tariff A-9.5.2 permits live interactive programs, and (7) whether Pacific is barred by the equitable doctrine of unclean hands from denying that Tariff A-9.5.2 permits live interactive programs.

On July 9, 1985 Pacific filed a response to Carlin's Motion to Specify Issues. Pacific states that PU Code § 707, clearly gives the Commission the power to entertain the complaint filed by Carlin and that the position taken by Carlin is spurious. Pacific argued that the tariff definition of interactive program is clear and unambiguous and that the provisions of the tariff control the relationship between the utility and its customers and as such must be applied in accordance with the literal meaning of the words used. Pacific states that the tariff definition of interactive cannot be modified by actions of current or former Pacific employees or by establishing that no technical problems exist.

Pacific states that it is not selectively enforcing the requirement that interactive programs involve communication between the caller's phone and 976 customer equipment, as suggested by Carlin, on the basis of the message content. Pacific distinguishes between 976 providers such as those providing stock market quotes where the operator is only available if the caller needs assistance and the "live" services provided by Carlin wherein the live conversation is the primary means of communication.

Pacific states that Carlin's attempt to put on evidence that tariff 173-T should be amended and applied prospectively to limit future users, would violate PU Code § 543, which provides

that no public utility shall, as to rates, charges, services, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person. Pacific states that the fact that Carlin may have spent thousands of dollars in developing its live services is not determinative of whether the live services are permissible and should not be the basis for grandfathering such unauthorized services.

Pacific stated that the issues, as enumerated by Carlin, are irrelevant or immaterial to the issues in the case. Pacific responded to the specific issues enumerated by Carlin as follows:

- "1. Whether the language of Tariff A-9.5.2, taken as a whole, is ambiguous as to whether live as well as recorded interactive programs are permitted." (The tariff is unambiguous and there is no room for construction.)
- "3. Whether the persons who drafted Tariff A-9.5.2 intended the tariff to permit live as well as recorded interactive programs." (The intent of the drafters is irrelevant.)
- "4. Whether live interactive programs can be provided through the 976 IAS system without significant technical difficulties." (Unauthorized 976 services are not permissible merely because they may be technically feasible.)
- "9. Whether Pacific Bell's Amended Complaint fails to state a claim because neither Carlin, Sable nor Topaz is a public utility." (PU Code § 1707 grants the Commission jurisdiction over complaints filed by public utilities.)
- "10. Whether the Public Utilities Commission lacks jurisdiction over the Amended Complaint because neither Carlin, Sable nor Topaz is a public utility." (PU Code § 1707 grants the Commission jurisdiction over complaints filed by public utilities.)

- "18. Whether Pacific Bell represented to Carlin and Sable that Tariff A-9.5.2 would permit live interactive programs." (Pacific cannot by contract, conduct, estoppel or waiver alter tariff provisions.)
- "19. Whether Pacific Bell sold special equipment to Carlin and Sable and installed it to provide live interactive programs." (Pacific is prohibited by the FCC from selling equipment except through a separate subsidiary.)
- "20. Whether Carlin and Sable invested substantial sums in reasonable reliance on Pacific Bell's representations that Tariff A-9.5.2 would permit live interactive programs, and on Pacific Bell's failure to object to live programs when Carlin and Sable had the necessary equipment installed." (Investment of substantial sums does not render and unauthorized service permissible.)
- "21. Whether Pacific Bell is estopped as a matter of administrative law from denying that Tariff A-9.5.2 permits live interactive programs." (See #18 above.)
- "22. Whether Pacific Bell is equitably estopped from denying that Tariff A-9.5.2 permits live interactive programs." (See #18 above.)
- "23. Whether Pacific Bell is barred by the equitable doctrine of laches from denying that Tariff A-9.5.2 permits live interactive programs." (See #18 above.)
- "24. Whether Pacific Bell is barred by the equitable doctrine of unclean hands from denying that Tariff A-9.5.2 permits live programs." (See #18 above.)

Pacific urges that the issues be limited to the meaning and definition of interactive programs as used in the tariff.

On July 2, 1985 a third prehearing conference was held in Los Angeles where the parties agreed to taking depositions of Pacific and Carlin witnesses.

On September 26, 1985, evidentiary hearings were set to begin on October 30, 1985 in Los Angeles. By stipulation the parties agreed that the hearing scheduled to begin October 1, 1985 should be removed from the calendar.

On October 21, 1985, Carlin filed a Motion to Dismiss Case 85-05-075 and Motion for Summary Judgement in Case 85-01-008. The document stated that the motion was based on the pleadings and papers on file, the depositions conducted and documents produced, and the Memorandum of Points and Authorities and Declaration of Counsel filed concurrently with the Motion for Summary Judgement. Carlin requested that the matter be heard as expeditiously as possible. Oral argument on the motion was held on November 1, 1985 in Los Angeles.

Carlin argued that the tariff restricts free speech to the extent that it requires providers to transmit only recorded messages, prevents callers from conversing with one another, and permits disconnection for exceeding the prescribed time limit and is therefore unconstitutional and that the tariff discriminates on message content. Pacific responded that the live program offered by Carlin is not within the tariff, that Pacific cannot be required to devote private property to a use not intended, that the Commission can establish the terms and conditions under which 976 services are provided, that the first amendment does not prohibit reasonable time, place and manner regulations, and there are sufficient alternative means other than 976 for live services.

On December 31, 1986, the assigned administrative law judge issued a ruling wherein he stated that the pleadings filed to date had clearly set forth the positions of the parties, that the issue to be resolved is the interpretation of Pacific's tariff with respect to "live" messages and that neither a hearing nor further oral argument would elicit any probative evidence or add to the record. The ruling stated that a decision would be made based on

ORDER

IT IS ORDERED that:

1. The program termination date of March 31, 1987 as set forth in D.86-09-025, shall remain unchanged.
2. Pacific Bell (Pacific) shall, on a timely basis, honor fully, with interest, all valid claims for refunds presented to it under the program prior to March 31, 1987.
3. On or before March 31, 1988, Pacific shall provide to the Commission Advisory and Compliance Division a report setting forth Pacific's compliance with Ordering Paragraph 2 above, and the date that such compliance was achieved.
4. The ordering paragraphs set forth in Decisions 87620, 86-05-071, and 86-09-025 dated July 19, 1977, May 26, 1986, and September 4, 1986 respectively, except as modified by Commission decision, will continue to apply to Pacific until all program requirements under those orders are fully complied with.
5. Except for the changes and clarifications set forth above, the petition for modification of Decision 86-09-025 is denied. ✓

This order is effective today.

Dated December 9, 1987, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

A-9.5.2. It defines 976 IAS as "service and facilities for customer provided prerecorded announcements or interactive programs. This service enables a Caller, for a charge, to dial a 976 telephone number and receive a 976 IAS customer's recorded announcement or interactive program."

Interactive program is defined in the tariff as "a program whereby a Caller through the use of a Touch-Tone pad or similar device can communicate with the 976 IAS customer equipment for the purpose of sending or receiving information." Interactive programming is the caller interacting through the use of the touch tone pad or other terminal device responding to touch tone frequencies. An example of an interactive program would be a request for a stock quotation where the caller activates the request for a specific stock through the touch tone pad.

We agree with Pacific that the tariff is clear and unambiguous. The 976 caller is to receive the information message from the IAS provider's equipment via a recorded message, not from a person responding to an inquiry. There is no reference to live conversation or communication. Since the information is to be sent to or received from this equipment, it strains basic logic and reasoning that this definition includes live conversation and/or communication between two or more persons as Carlin argues.

Further, in defining interactive program the tariff states that: (1) "976 IAS customer provided automatic announcement equipment will be of a design which automatically disconnects after playing out one full cycle of the message"; (2) "the (976) customer will provide continuous uninterrupted automatic recorded announcement or interactive program service"; (3) "the (976) customer assumes all...responsibility for interactive program development"; (4) "each (976) customer must provide the Utility with...(the) message length for each announcement or interactive program"; and (5) the "total length of a message shall never exceed 180 seconds."

If interactive program is defined to include live communication, i.e., communication between two or more 976 callers or a 976 caller and an employee of the IAS provider, items 1-4 in the above paragraph would be a nullity with respect to interactive services. For example, a live conversation involving two or more persons or a multi-party bridged service does not automatically disconnect after playing out one full cycle of the message as is required by the tariff. Nor is there continuous, uninterrupted service as required under the tariff if, as may be the case with multi-party bridged services, one caller must hold on the line until another person calls the 976 number to be connected. Moreover, even if the IP disconnected a live conversation after three minutes, merely disconnecting or interrupting the conversation, does not comply with the tariff provision which requires automatic disconnection at the conclusion of a full cycle of the message.

We conclude that the 976 tariff is clear and unambiguous in defining what constitutes an interactive program. As such it does not include "live" conversation between two or more persons but rather requires the use of a Touch-Tone pad for the purpose of sending or receiving information.

Carlin's position that Pacific's interpretation that the tariff does not allow live programming and therefore violates Carlin's first amendment rights is spurious. The tariff language merely states the type of service that is permissible. It is not a content based regulation. The prohibition against "live" programming applies to all 976 service regardless of the message content. It is not unreasonable or discriminatory since it applies to all 976 programming, nor is there any evidence of discrimination in the way Pacific is enforcing the tariff. For example see Carlin Communications, Inc. v Mountain States Telephone and Telegraph, ___ F. 2d ___ (9th Cir. 1987) where the court held that the principle of non-discrimination does not preclude distinctions based on

reasonable business classifications and that Mountain Bell exercised its business judgement in refusing to carry Carlin's 976 message.

To accept the argument of Carlin would lead to the conclusion that even though a service is not tariffed, i.e., live, if it is technically feasible, a customer has a constitutional right to offer it and any effort on the part of the regulated utility to enforce its approved tariff is an infringement of First Amendment rights of the customer offering the service. We cannot accept such a position.

It must be remembered that the First Amendment does not preclude regulations restricting the time, place or manner of speech so long as they are reasonable and promote a substantial governmental interest. A regulation based on content is subjected to the more exacting compelling state interest test. These principles have been set forth on numerous occasions by the U. S. Supreme Court. (Consolidated Edison v Public Service Commission (1980) 447 U.S. 350, 536, 100 S.Ct. 2326, 65 L. Ed. 2d 319, 327; U.S. v Albertine (1985) 472 U.S. ____ 105 S.Ct. _____, 86 L. Ed 2d 536, 548.) There is no restriction as to content of any 976 message, only time (3 minute duration) and whether live programming is permitted. Unless the 3-minute time restriction is strictly adhered to, due to the number of 976 calls originating and terminating in California there is potential for network overloading causing the tie-up of telephone lines used for essential or emergency public service. With this potential for overloading, we believe there is sufficient reasonable basis and state interest, as provided in the tariff, to limit their duration of 976 calls.

The complaints should be dismissed and Pacific should enforce its 976 tariff consistent with this opinion.

Findings of Fact

1. 976 IAS service is provided by Pacific Bell to subscribers under the terms and conditions set forth in Pacific Bell's filed tariff Schedule Cal. P.U.C. No. A-9.5.2.

2. 976 IAS service is defined as "service and facilities for customer provided prerecorded announcements or interactive programs. The service allows a caller, for a charge, to dial a 976 telephone number and receive a 976 IAS customer's recorded announcement or interactive program.

3. Interactive program is defined in Pacific's tariff Schedule Cal. P.U.C. No. 36 T, Rule 11 as a program whereby a caller through the use of a Touch-Tone pad or similar device can communicate with the 976 IAS customer equipment for the purpose of sending or receiving information.

4. The tariff definitions of 976 IAS and interactive program are clear and unambiguous.

5. The definition of interactive program does not regulate or restrict the content of speech.

6. Live communication or conversation does not involve the caller sending or receiving information from the 976 IAS provider's equipment as required by the tariff definition of interactive program and cannot be offered under the existing tariff.

7. The federal and state constitutional guarantees of freedom of speech and association do not proscribe or limit the exclusion of live services from the tariff definition of interactive services.

8. There is no constitutional right for a 976 IAS provider to offer a service that has not been approved by this Commission.

9. This decision does not preclude Pacific Bell from filing a tariff which will allow providers to offer live services. The Commission does not by this finding direct that such a tariff be filed or suggest that such an offering be a part of Pacific Bell's 976 tariff.

10. The 976 tariff does not create a United States Constitution First Amendment problem.

Conclusions of Law

1. Pacific Bell is required to file with the Commission tariffs covering the terms and conditions under which it renders its services to the public.

2. Pacific Bell's 976 IAS service is provided under the terms and conditions of its filed tariff Schedule Cal. P.U.C. No. A-9.5.2.

3. The tariff definition of interactive program is clear and unambiguous and does not include the offering of live communication or conversation between two or more persons

4. Pacific Bell should not discriminate against 976 IAS providers in the enforcement of the tariff definition of interactive program.

5. The complaints should be dismissed and Pacific Bell should enforce its 976 tariff as discussed in the body of this opinion.

6. There is no First Amendment Constitutional infringement.

ORDER

IT IS ORDERED that:

1. Case (C.) 85-01-008 and C.85-05-075 are dismissed.


2. Pacific Bell shall enforce the terms and conditions of its filed 976 IAS tariff consistent with the views expressed in this opinion.

This order becomes effective 30 days from today.

Dated DEC 9 - 1987, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
C. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

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


Victor Weisser, Executive Director

AB

the oral argument, pleadings and filings to date. Pursuant to the ALJ ruling the parties submitted proposed findings of fact and conclusions of law with supporting arguments.

Discussion

Carlin provides 976 IAS service pursuant to Pacific's tariff Cal. PUC Schedule No. A-9.5.2. The tariff provides that for a share of the revenues, Pacific will provide transportation, billing and collection services for the 976 subscribers, known as information providers (IPs). The IPs determine the content of the information programs and interactive services that are made available to callers.

Carlin offers the following 976 services:

- (1) prerecorded messages, (2) a caller, following a brief prerecorded message, is connected to a Carlin employee for a live conversation, (3) two callers who dial the service at approximately the same time are connected after a brief recorded message, and (4) following a brief prerecorded message, a caller is connected to up to eight other callers.

It is Pacific's position that: (1) "live" 976 programs are clearly not within the tariff definition of interactive programs, (2) a privately owned public utility is not constitutionally required to dedicate its facilities and network to a use for which it was never intended, (3) as a private corporation it has the inherent right to make reasonable rules for the conduct of its business, including the right to define a tariff provision to exclude certain services, but to permit others, (4) there is no state action which justifies application of the First Amendment, and (5) assuming that there is state action, the definition of interactive is content neutral and is a reasonable time, place, and manner regulation.

The 976 IAS is provided in California under the terms and conditions set forth in Pacific's tariff Schedule P.U.C. No.