

Decision 89 05 024

MAY 10 1989

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Comtech Mobile Telephone Company )  
 U-4024-C, Mobile Cellular )  
 Communications, Inc., Quality )  
 Cellular, Inc. Tenneson )  
 Communications, Inc. DBA Celluland )  
 of San Francisco, Richcourt )  
 Enterprises Corporation DBA )  
 Celluland of Santa Clara, Minmark )  
 Corporation DBA Celluland of Palo )  
 Alto, Pacific Aerie Corp. DBA )  
 Celluland of Walnut Creek, T.C.C.L. )  
 Communications, Inc. DBA Mobileland, )  
 Bridge Radio Services, Inc., )  
 Cellular Telephone Systems, Inc. )  
 DBA Cellutel, Advanced Communications )  
 Center of Concord, Redwood Cellular )  
 Communications, Inc. U-4062-C, )

Complainants,

vs.

Bay Area Cellular Telephone Company )  
 U-3007-C & San Jose Real Estate )  
 Board, )

Defendants.

Case 89-03-016  
 (Filed March 13, 1989)

(See Appendix A for list of appearances.)

OPINION

Summary

This opinion finds that Bay Area Cellular Telephone Company (U-3007-C) (BACTC) through a series of business transactions with the San Jose Real Estate Board (SJREB) commencing on or about January 1989, and accepted by SJREB on February 27 and 28, 1989, violated Public Utilities (P.U.) Code § 532 by waiving certain regularly filed rates and charges and ultimately offering wholesale cellular services to individual SJREB members via a group billing arrangement. We order BACTC to:

1. Cease and desist from further expansion of services to any additional SJREB members, until the status of wholesale versus retail customers and appropriate rate structures and definitions of those services can be resolved in our ongoing cellular Investigation (I.) 83-11-040; and
2. Bill SJREB for all services heretofore provided in strict accordance with its wholesale tariff schedule.

We admonish SJREB not to apply any additional rates or charges to those billed by BACTC when apportioning those charges to individual members, without first obtaining a certificate of public convenience and necessity (CPCN) as a Cellular Reseller from this Commission.

The violations in question relate to waiver of a \$15 activation fee, and provision of 120 free minutes of use to all or part of 219 or more customers who signed up for the BACTC/SJREB wholesale service on or before March 10, 1989.

In addition, SJREB proposes to commence billing a \$60 annual (\$5 per month) service charge to those members who become part of the group of cellular phone users after June 1, 1989. This charge has no tariff basis and thus may not be imposed on selected cellular phone users by SJREB without causing SJREB to become a cellular reseller subject to the jurisdiction of this Commission.

Background

On March 13, 1989 Comtech Mobile Telephone Company (U-4024-C) a reseller of cellular phone service, together with two other resellers and 10 agents of one of the two resellers<sup>1</sup> (Comtech et. al.) (complainants) filed a complaint and request for a cease and desist order against BACTC and SJREB claiming that

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1 Appendix A, hereto, contains a list of the utilities and agents who together are the complainants herein.

BACTC entered into a bulk service agreement with SJREB to resell service to its membership of over 6,000, in violation of its Wholesale Tariff Schedule 4-T. Complainants contend that SJREB at BACTC's direction and with its cooperation is functioning as a reseller of cellular telephone services and SJREB has no reseller authority from the Commission, and has not sought such authority.

Complainants also assert that BACTC is operating in violation of its Wholesale Tariff Schedule by:

1. Offering 120<sup>2</sup> minutes of free peak usage for each new subscriber furnished by SJREB;
2. Waiving a one-time \$15.00 activation charge for each new SJREB subscriber; and
3. Not requiring either a letter of credit or a deposit of SJREB as it regularly required of certificated resellers.

Complainants seek immediate relief from BACTC's actions which they claim are clearly in violation of its filed tariffs, P.U. Code § 451 and § 453 and the Commission's cellular telephone service resale policy. The relief sought includes an immediate cease and desist order, penalties of \$500-\$2,000 per offense as provided for in P.U. Code § 2107 and § 2108, and such other and further relief as the Commission deems just and proper. Complainants contend that each subscriber activated, or signed up, under these terms represents a separate violation subject to these fines.

In view of the then apparent urgency of the request for an immediate cease and desist order, the Assigned ALJ on March 23, 1989 issued a ruling shortening the time to file answers to the complaint to April 5, 1989.

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2 At the 38¢ per minute wholesale peak rate this offer represents an incentive of \$45.60 per customer.

Defendants BACTC and SJREB filed answers to the complaint on April 5, 1989 and Motions to Dismiss the complaint on April 6, 1989. The evidentiary hearings on the request for an immediate cease and desist order were held on April 12 and 14, 1989 and those matters requiring prompt resolution were submitted pending receipt of concurrent briefs from all parties on April 21, 1989.

Following the hearing, the parties agreed that complainants would have until April 27, 1989, to file their opposition to defendants' Motions to Dismiss. In reaching this agreement, counsel for complainants agreed not to review BACTC's brief prior to filing complainants' opposition to BACTC's Motion to Dismiss.

On April 28, 1989, one day after the previously agreed date, complainants filed their opposition to the motions for dismissal of the complaint, stating therein that BACTC and SJREB extended that date to April 28, 1989 at complainants' request. Thus, the record for dealing with the request for a cease and desist order was fully submitted on April 28, 1989.

#### The Hearing Record

Two days of hearing were held on April 12 and 14, 1989 at which testimony was received from seven witnesses. Forty exhibits were identified and 38 exhibits were received in evidence.

The seven witnesses were all called by complainants to present evidence regarding their knowledge of the offering of wholesale service by BACTC to members of the SJREB. Of the seven witnesses, the first was an employee of the SJREB, the next three were employees of BACTC, and the last three were employees of certain of the complainants, namely, Redwood Cellular Communications, Inc. (U-4062-C), Celluland of San Francisco and Santa Clara, and Comtech Mobile Telephone Company (U-4024-C) respectively.

Because of the nature of the questions to be posed to witnesses employed by SJREB and BACTC, Counsel for complainants

requested, pursuant to § 777 of the Evidence Code, that those witnesses be sequestered outside the hearing room until each had testified and been excused in their proper order, so that those witnesses could not hear the testimony of other witnesses prior to presenting their own testimony. That request was granted.

Carolyn Heikka, an assistant to the Chief Executive Officer of the SJREB, testified as to its involvement in the development of this lower cost cellular phone service for its members. She confirmed that she studied the cost impact to SJREB of establishing the cellular program, including the benefits that would result from sales of cellular telephone equipment by SJREB's member services center.

She stated that SJREB marks up the cost of products sold by the member services center by 15 to 35%. She also disclosed that "affiliated members" of SJREB could buy products from the member services center, but that cellular phone service was only being offered to "members" of the Board.

She then testified that, after receiving a proposal from BACTC during the first week of January 1989, on January 30, 1989 she sent a letter to BACTC confirming SJREB's interest in BACTC's offer to provide wholesale cellular service to SJREB. However, in that same letter she advised BACTC that the SJREB Board would first have to approve the entire proposal before it could be implemented, and its next meeting would be held on February 27, 1989. (Exhibit (Exh.) 3.)

Thereafter, Ms. Heikka testified that:

1. SJREB surveyed its membership to determine interest in the cellular offer of BACTC.
2. The survey revealed a significant interest in the service, and 200 or more of SJREB's members were already taking cellular service.
3. The SJREB Board approved the implementation of the cellular program with BACTC on February 28, 1989. (Exh. 8.)

4. Board approval included a \$60 annual fee to be assessed to members who opted to take cellular service.
5. The \$60 annual fee would be waived for cellular service initiated prior to June 1, 1989.
6. There would be a \$15 activation fee, but that fee would be waived if the member was already a user of Cellular One or PacTel Mobilenet service and converted to the SJREB/BACTC cellular service prior to March 18, 1989. (Exh. 9.)
7. For new subscribers to SJREB/BACTC cellular service, 120 minutes of free air time would be provided, if service was applied for prior to March 18, 1989.
8. For any service problem such as poor reception, the member (user) would call BACTC for resolution. (Tr. 97.)
9. For any additional cellular-related services, the member would call SJREB member services center. (Tr. 97.)
10. For any billing problem, the member would call SJREB member services center. (Tr. 98.)

Under cross examination by counsel for SJREB, Keikka explained that:

1. The SJREB Cellular Club program has never been offered to the public in general. (Tr. 122.)
2. That she did not know of any realtor or non-resident realtor member who joined the

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3 This improper waiver of a BACTC tariff charge was withdrawn and the offer was corrected in a flyer issued on March 10, 1989. BACTC has charged this fee to the SJREB for all numbers activated and SJREB has paid the fees charged, Transcript (Tr.) page (p.) 99.

SJREB expressly to receive cellular phone services. (Tr. 122.)

3. That the dues for SJREB 1989 membership were \$381 for a realtor member and \$250 for a non-resident realtor member. The non-resident realtor member would also be required to be a dues paying member of the California Association of Realtors, the National Association of Realtors, and pay the fees or dues of his/her home board. (Tr. 124.)

Next, Susannah F. Robins, Marketing Strategy Manager for BACTC, was called by complainants' counsel to testify regarding her knowledge of BACTC's wholesale tariffs. Robins testified to her understanding that BACTC's wholesale tariff schedules apply in their entirety to resellers and bulk users alike. (Tr. 136.) She also testified that:

1. She was made aware of the fact that the wholesale tariff had only the term reseller in it, relative to a promotional offer that was intended for bulk users as well. (Tr. 140-141.)
2. Pacific Gas and Electric Company (PG&E) is the only other bulk user of BACTC's cellular services.
3. BACTC has a policy of not discriminating against any customer in favor of another customer.
4. Customers ordering over 50 cellular telephone members are entitled to be served from BACTC's wholesale tariff schedule if their credit is good or they make an appropriate deposit and if they agree to receive one bill for all charges incurred on all phones. (Tr. 148.)
5. BACTC never waived or offered the waiver of the \$15 activation fee. (Tr. 178.)
6. BACTC does not market cellular radio equipment to its bulk users.

7. BACTC does not pay SJREB any form of concession for adding customers to its cellular telephone system. (Tr. 193.)

Under cross-examination by counsel for BACTC, Robins explained that:

1. BACTC has charged and will charge a \$15 service activation fee for every member user's cellular telephone to the SJREB wholesale service. (Tr. 195.)
2. Effective after March 16, 1989 no new SJREB member user will obtain 120 free minutes of air time use when commencing service. (Tr. 195.)
3. SJREB met the minimum requirement of at least 50 members using the service and thus qualified as a wholesale customer under the BACTC wholesale tariff. (Tr. 195.)

Next, Donald Harris, President and Chief Executive Officer of BACTC, was called by Comtech to testify as to his knowledge of the wholesale service arrangements with SJREB. Harris testified that BACTC uses 15 agents to market its retail service. He also testified that:

1. Customers of his agents were confused about the offer of wholesale service to SJREB, and that confusion "reflects the confusion that now exists in the cellular market place." (Tr. 203.)
2. He has placed a temporary moratorium on new offerings of wholesale service as a result of the complaint that resulted from BACTC's offer of wholesale service to SJREB and the abuses that were later directed to that wholesale customer. (Tr. 205.)

Under cross-examination by counsel for BACTC, Harris testified that:

1. All wholesale customers of BACTC undergo the same credit evaluation process and none of the wholesale customers were required to post a deposit. (Tr. 222.)



2. The moratorium on the wholesale tariff schedule is only on marketing. If a potential customer requested the service, that customer would be served. (Tr. 223.)

Next, Debbie Ortiz, representative of Redwood Cellular Communications, Inc. (Redwood), was called to testify by counsel for Comtech. Ms. Ortiz explained that when Redwood sought service from BACTC as a reseller under the wholesale tariff it was required to post a deposit, or a letter of credit. She also explained that:

1. BACTC held that letter of credit for one year and one month. (Tr. 231.)
2. Redwood operates primarily in Santa Rosa, Napa, and Solano Counties, and it lost seven of its retail customers to the SJREB. (Tr. 231.)

On cross-examination by counsel for BACTC, Ortiz admitted that Redwood had considered offering a corporate plan to SJREB, but that it would be a no-profit proposal. Redwood is currently considering the possibility of offering an enhanced service at a modest margin over its wholesale cost, but meanwhile Redwood has chosen to participate in this complaint. (Tr. 236-237.)

Next, counsel for Comtech called Graham Tenneson, owner of Celluland of San Francisco and part owner of Celluland of Santa Clara, to testify. Celluland is an agent for PacTel Mobile Services (PacTel) and according to Tenneson, he receives \$350 for each activation he performs, plus 5% of each monthly bill as a residual. (Tr. 241.)

Tenneson also explained that:

1. PacTel Mobile services has lost 133 customers as a result of the SJREB arrangement of wholesale service for its members. (Tr. 242.)
2. The definition of the term "loss of customer" means a customer and member of SJREB has deactivated and switched to the SJREB plan. (Tr. 243.)

3. The reason for the loss of these customers was that the best offer that PacTel could provide was retail rates of \$45/month and 45¢/minute, while SJREB is providing service at rates about 25% less.

Under cross-examination by counsel for SJREB, Tennessee stated that PacTel requires written notice of deactivation of its service, and it calls each customer to determine the reason for deactivation. (Tr. 251.)

Lastly, counsel for Comtech called Steve Muir, General Manager of Comtech, to testify regarding the loss of retail customers to SJREB. Muir stated that he had lost 44 customers as a result of the arrangement between SJREB and BACTC. (Tr. 252.) Muir then testified that:

1. When the subscribers cancelled their service Comtech would ask them about the cancellation. The subscribers stated they were disconnecting their service so they could take advantage of the SJREB offer. (Tr. 252.)
2. Comtech purchases service from BACTC at the same wholesale tariff rate as SJREB. (Tr. 252.)
3. In an effort to keep from losing more subscribers to SJREB, he filed a tariff to pass through the wholesale rates to SJREB. Muir added that CPUC staff advised him that his proposed tariff was in violation of CPUC rules and accordingly he was planning to withdraw the filing. (Tr. 255.)
4. Without a wholesale tariff Comtech cannot compete in price with SJREB. (Tr. 255.)

At the conclusion of the second day of hearing, the parties agreed to submission of the cease and desist issue upon receipt of concurrent briefs not to exceed 15 pages, to be filed on or before April 21, 1989.

Waiver of Rule 77

On the last day of the hearing all parties agreed to waive whatever rights they might have under Rule 77 of the Commission's Rules of Practice and Procedure to file comments on the ALJ's proposed decision in this proceeding, as reflected in Appendix B.

Motions to Dismiss the Complaint

BACTC and SJREB both filed timely motions to dismiss the complaint, on April 6, 1989.

BACTC argues that SJREB qualifies as a bulk user in BACTC's wholesale tariff schedule, and regards any attack on BACTC's long standing wholesale tariff as unwarranted, untimely, and unsupported. BACTC asserts that any minor departures from the literal terms of its wholesale tariff schedule were only temporary in nature and have been corrected.

SJREB contends in its motion that complainants have failed to allege sufficient facts that SJREB violated any provision of law or Commission rule warranting issuance of a cease and desist order. It further contends that SJREB is a non-profit mutual benefit association, and the primary purpose of the cellular telephone service was to aid SJREB members who wish to effectively carry out their professional responsibilities in real estate.

SJREB also argues that it is not a public utility telephone corporation as set forth in P.U. Code §§ 216 and 234, and therefore is not subject to the jurisdiction of this Commission.

Organizations, such as the SJREB with over 6,000 members,<sup>4</sup> are certainly able to purchase cellular telephone service in bulk from wholesale providers pursuant to D.84-04-014 issued April 4, 1984.

As to the 120 minutes of free air time offered to new subscribers, SJREB contends that any reseller is entitled to extend that offer. SJREB claims that it has paid the \$15 per subscriber activation fee for those members who converted from another service and all new subscribers also paid the fee. As to the \$60 membership fee in the Cellular Club, that fee has not yet been imposed, but is scheduled to begin on June 1, 1989.

SJREB claims its cellular telephone service is not materially different from the transportation service offered by San Fernando Valley-Northrup Association of Passengers, Inc., D.91780, (1980) 3 Cal. P.U.C. 2D 666 (Northrup). In the Northrup case the employees of Northrup Corporation formed a corporation which was restricted only to employees of Northrup. Each employee was required to buy 50 shares in the corporation to cover costs of the initial start up of passenger service. Additionally, each passenger paid \$17 per week for operating and other expenses. Thereafter at the end of the fiscal year, any remaining funds were distributed to all shareholder/riders on an equal basis.

In that proceeding the Commission found that there was no offering of service to the public because of the necessary pre-conditions to receiving service.

The local bus company had objected on the grounds of unfair competition. The Commission responded that public utilities frequently compete with non-regulated enterprises, and if good service is offered at a fair price, they survive. SJREB believes

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<sup>4</sup> As of March 31, 1989 SJREB had 5,493 bona fide realtor members and 856 bona fide non-resident realtor members, yielding a total of 6,349 members who may participate in its cellular telephone club. (Exh. 29.)

that its Cellular Phone Club is comparable to Northrup since it is restricted to member realtors, and as such should not be required to obtain a CPCN.

Comtech's Opposition to Motion to Dismiss

Complainants contend in their opposition to the motions that SJREB is not a bona fide bulk user under BACTC's wholesale tariff, but rather is an uncertificated reseller. Referring to D.84-04-014 issued April 4, 1984, complainants argue that SJREB is a reseller and thus falls under P.U. Code § 216(b) as a public utility telephone corporation.

Complainants further argue that Northrup was a "~~for profit~~" corporation which existed to carry its own commodities, and the riders of the commuter service were the owners of the bus. Unlike Northrup, SJREB owns nothing; it purchases cellular service from BACTC, the owner of the commodity, and in turn resells that service, arguably in an unlawful manner, not in accordance with BACTC's wholesale tariff. Thus the complainants argue that SJREB gives all the appearances of being a reseller, yet claims to be a bona fide bulk user.

Unlike PG&E, BACTC's only other bulk user, SJREB offers service to individual members at a cost to them. PG&E uses cellular service for its own use and does not make it available to individuals as an inducement for the public to become members of PG&E.

Complainants conclude once again that SJREB and BACTC have clearly violated BACTC's existing tariffs by offering:

1. Promotional free usage;
2. Ignoring deposit requirements;
3. Activation fee waivers;
4. Free programming or reprogramming of cellular telephones; and

5. Preferential treatment to SJREB.

Therefore, complainants ask the Commission to deny the motions to dismiss.

Discussion of Motions for Dismissal

SJREB's initial marketing strategies including waivers of activation fees and/or free air-time were not consistent with BACTC's wholesale tariffs. In addition, there is no provision in BACTC's wholesale tariff schedule for SJREB's proposed \$60 per year member fee for cellular service which is scheduled to become effective on June 1, 1989. Therefore, we will deny defendants' motions to dismiss this complaint, primarily due to the lack of strict adherence to BACTC's wholesale tariff schedule during the initial marketing of cellular service by SJREB to its members.

Post Hearing Brief Arguments

Position of Complainants

Complainants argue that BACTC submitted a bulk use proposal to SJREB in January 1989 whereby SJREB could sell cellular equipment to its members at a profit, purchase wholesale cellular telephone service, and in turn, provide wholesale cellular service to all of its members.

Complainants refer to a survey conducted by SJREB which asked about the identity of the provider of the members' current service, and note that the survey results indicated 274 SJREB members had retail cellular service. However, only 65 of the 274 had service provided via BACTC facilities. With this information BACTC could lure away its competitors' retail or resale customers by offering them wholesale cellular service. This wholesale service arrangement with BACTC was subsequently approved by SJREB on February 27 and 28, 1989, as previously described.

Complainants assert that during the initial signup period on March 8-10, 1989, 219 SJREB members took advantage of various illegal promotions as follows:

"On March 8, 1989, 84 SJREB members or applicants for membership signed up for the BACTC wholesale service and the \$15 activation fee was waived for 23 members. See Exhibit 19. On March 9, 1989, 60 SJREB members or applicants for membership signed up for the BACTC wholesale service and 15 received the \$15 activation waiver. Ibid. On March 10, 1989, 75 SJREB members or applicants for membership signed up for the BACTC wholesale service and 18 received the \$15 activation waiver. Similarly, the 120 free minutes of usage were offered to 170 SJREB members signing up between March 8, 1989, and March 16, 1989." (Comtech Br., pp. 5 & 6, footnote omitted.)

While SJREB claims to have later withdrawn the erroneous activation fee waiver and terminated the offer of 120 minutes of free air time, complainants contend that such actions do not remedy the violation of P.U. Code § 532, and the resulting damage to complainants.

As to the eligibility of SJREB members for wholesale service, complainants cite Commission Resolution T-13052 issued March 8, 1989.<sup>5</sup>

Resolution T-13052 dealt with U.S. West Cellular of California, Inc.'s (U.S. West)<sup>6</sup> retail tariff and complainants contend that it is applicable to bulk use. Complainants cite the following language of that resolution in support of their position:

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5 This occurred after the BACTC/SJREB arrangement was accepted on February 27-28, 1989 and the service was being offered contemporaneously on March 8, 1989.

6 U.S. West is a facilities based cellular carrier located in San Diego, California.

"The corporation or association must be legally organized for profit-making purposes.

All units must be in the hands of officers, employees, or eligible members of the entity. Members of an association are only eligible if they themselves are directly engaged in the business of the entity to qualify. Examples of the latter category would be local franchises of national marketing chains, and real estate agents of a single brokerage house.

Thus, the Commission concluded that:

It should be clear from the above that US West does not intend to make bulk rates available to members of so-called affinity groups like AAA, neighborhood associations, senior citizen groups, and similar community organizations. Rather, the offering is confined to for-profit entities, and to persons directly involved in the business of the entity."

Complainants further argue that under Commission policy, a real estate firm could be a bulk user with its employees qualifying for bulk use, but an association of real estate brokers, agents and other persons with interests in the real estate industry (SJREB), like an association of car owner/drivers (AAA), does not qualify as a corporation or other legal entity entitled to bulk user rates. Conversely, complainants assert that an organization like PG&E that does not bill its employees and officers, but allocates bills in departments and is responsible for the entire bill is a bona fide bulk user. Indeed, the Commission underscores this standard by stating:

"End users must be employees, officers or have a similar legal tie to the entity, and must be engaged in "for profit basis" as the entity's main line of business."

Complainants state that they do not care if BACTC provides wholesale cellular service to SJREB, for use solely by its officers and employees. However, to offer that same service to



independent real estate brokers, agents, honorary members, and affiliates comprises retail service and SJREB should not be permitted to do so without a CPCN and an appropriate retail tariff.

Finally, complainants renewed their request that any cease and desist order ultimately issued, also require SJREB members to convert to a retail tariff and take service from a retail cellular provider.

Position of BACTC

In its brief, BACTC argues that complainants have failed to carry the heavy burden of persuasion and proof needed by law to obtain a cease and desist order, and no other relief is warranted.

BACTC asserts that three basic issues were raised by complainants:

- "1. Whether the Board has been acting as a cellular reseller without a certificate of public convenience and necessity ("CPC&N") from the Commission;
- "2. Whether the Board is a bona fide bulk user under BACTC's wholesale tariff; and,
- "3. Whether BACTC has violated the terms of its wholesale tariffs related to the Board's bulk use program." (BACTC Brief (Br.), p. 2.)

BACTC claims that SJREB has not acted as a reseller, that it is a bona fide bulk user, and except for minor errors upon initial implementation of the wholesale service to the SJREB, there were no continuing tariff violations. Absent continuing or intentional violations, the relief and penalties requested by complainants are unwarranted.

BACTC further argues that the Commission must weigh the merits of the cease and desist motion by the following factors:

- "(1) The Complainants must have made a strong showing that they are likely to prevail on the merits of their complaint; (2) The Complainants must demonstrate that without a cease and desist order, they will be irreparably harmed;

(3) The issuance of the cease and desist order must not substantially harm other parties interested in the proceeding; and (4) The cease and desist order must further the public interest. Moreover, the Complainants seeking injunctive relief bear a heavy burden of proof to make a substantial case on the merits." (BACTC Br., p. 3.)

BACTC cites Richfield Oil Company v. Public Utilities Commission (1960) 54 C 2d 419, 425, wherein the question of dedication of property or services to public use was deemed a prerequisite for becoming a public utility subject to the jurisdiction of this Commission. BACTC alleges that SJREB has never held out its property or services to the public on equal terms.<sup>7</sup>

As to its offer of service to SJREB, BACTC relied on D.84-04-014 "which explicitly allows a 'Large Organization' to purchase from a carrier's wholesale tariff for its own use." (D.84-04-014, p. 58a mimeo.)

BACTC concludes by requesting that the Commission reject the request for a cease and desist order, dismiss the complaint with prejudice and dismiss SJREB as a defendant in this proceeding.  
Position of SJREB

In its brief SJREB notes that it has "purchased over 200 lines from BACTC," as contrasted to the minimum required 50 access lines for a bona fide large individual user. SJREB also notes that it had over 400 member/users of that service at the time of the hearing. SJREB also asserts that D.84-04-014 at page 58a (mimeo) "unquestionably authorizes purchases by large organizations of Cellular Service in 'bulk' at wholesale rates."

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<sup>7</sup> BACTC also cites Allen v. Railroad Commission (1918) 179 Cal 68 and California Community Television v. General Telephone Company (1972) 73 Cal PUC 507 for support on the question of dedication of property or service to public use.

SJREB argues that it is neither a public utility nor a telephone corporation since it does not furnish service to the general public and does not own or control utility property. Also SJREB claims that it neither makes a profit from, nor will it profit by, providing phone service to its members.

As to its proposed \$60 per year fee to its "Cellular Phone Club" members, SJREB contends that this fee is subject only to the internal control of the SJREB Board of Directors and cannot be regulated by the Commission.

On the reasonableness of imposing a cease and desist order "to preserve the status quo," SJREB opines that to do so would force its members to incur the cost and inconvenience of obtaining service from other sources, and when the matter is finally resolved and SJREB is allowed to resume the Cellular Phone Club, those same individual would once again need to change their phones back to receive service as a member of SJREB at additional time and expense.

SJREB asserts that the issuance of a cease and desist order would be anti-competitive, contrary to the free enterprise system in the United States and would harm the public interest and Realtor Members of SJREB who can now provide better service to the public by using the cellular phone service provided to them through their membership in the Cellular Phone Club.

Thereafter, SJREB summarizes its argument that it:

1. Is a bona fide large organization customer of BACTC and is legally buying cellular phone service at the wholesale rate under BACTC's wholesale tariff;
2. Is providing such service only to its bona fide Realtor Members who join a Cellular Phone Club and agree to pay a Cellular Phone Club fee of \$60.00 if they apply for membership, on, or after June 1, 1989;
3. Has not offered its phone service to the public nor does it receive any compensation

or profit from providing the service to its Realtor Members; and

4. Is not a public utility, telephone corporation or reseller of phone services subject to Commission jurisdiction.

Lastly, SJREB maintains that Comtech has failed to establish the necessary elements to support a cease and desist order.

#### Discussion of Request for a Cease and Desist Order

It is clear from the record herein that current cellular resellers' retail rates as compared to the wholesale rates of the facilities based cellular telephone utilities require a careful analysis on a generic basis, as we have recognized in I.88-11-040 issued November 23, 1988.

To that end, we direct the parties herein to present proposals in I.88-11-040 for the longer term resolution of their concerns while advancing the cellular telephone market in a more harmonious environment. The problem seems to be one of rate structures and the fact that wholesalers do not provide their resellers with a level playing field in selling cellular services to large users of bulk cellular services. This complaint proceeding is not the proper forum for resolving these generic rate disputes and we will not do so herein.

However, there is a real need to address the immediate problems and concerns raised by complainants, to bring about some degree of tranquility while still retaining a viable cellular market. We will do so as follows:

#### Request for a Cease and Desist Order on BACTC's Service to SJREB

Relative to the request for a cease and desist order, we do note the migration of nearly 200 subscribers from three

complainant resellers to SJREB's newly offered wholesale Cellular Telephone Club in less than two weeks' time. At retail monthly service charges of \$45, this migration represents a combined loss of nearly \$9,000 per month in gross revenues for the three resellers without consideration of any air time usage.

We did not readily find a figure in the record representing the net loss of business each month to these resellers for the difference between wholesale and retail service charges; nor did we find a figure representing the average air time used by each subscriber multiplied by the number of subscribers lost and again multiplied by the differential between the retail air time rate of 45¢ per minute and the wholesale cost of that air time to the resellers. Nonetheless, the inference we glean from the record is that the loss to the resellers is significant.

It is also clear that few persons would continue to subscribe to the higher cost (retail) service when a lower cost (wholesale) offering is made available to them as has been the case for members of SJREB. This is especially true when the service offered is essentially of the same quality and reliability.

The net overall effect we note is that substantial harm has occurred to certain complainants. However, the degree of harm sustained by complainants to date does not appear to be sufficient to warrant the immediate withdrawal of the now existing wholesale service to members of SJREB who have already converted to the wholesale service from BACTC, when weighed against the harm of discontinuing BACTC cellular service to 400+ SJREB numbers and the associated reactivation and/or reprogramming and other costs and delays.

Therefore, rather than ordering immediate withdrawal, we will direct BACTC to cease activating any new numbers for any SJREB members who are not currently subscribing to cellular telephone service effective at noon today, and grandfather BACTC's wholesale cellular telephone service to those SJREB members who are

currently subscribing to the service. Under this approach, any and all current members of SJREB who are being served under BACTC's wholesale rates may continue to receive that service until they choose to terminate or leave the BACTC system. If these subscribing members leave the BACTC system, they will not be reactivated under the current wholesale rates.

This denial of any further expansion of wholesale cellular telephone services to members of SJREB is intended to remain in effect until BACTC revises its tariff schedules in accordance with any future order which issues from our generic cellular investigation I.88-11-040 authorizing such tariff revisions.

Is SJREB a "Large Organization" as Contemplated  
by D.84-04-014 or a "Reseller"

We believe that under the conditions that existed on April 4, 1984, with the cellular industry in its infancy and the Commission eager to assist in its development, the term "large organization" was left somewhat open to definition. We note little discussion of that specific term in D.84-04-014 except that it not limit cellular development, e.g.:

"It is not intended that the requirement that a reseller be a certificated utility preclude large organizations from purchasing cellular service in bulk blocks at the wholesale rate for their own use. Nor is it intended that such a requirement create obstacles that will deter those presently or about to be engaged in the provision, operation, and/or maintenance of CPE cellular equipment from expanding their cellular involvement to encompass operations as a reseller." (D.84-04-014, p. 58a, mimeo.)

By any common definition an organization which has 6,349 members is a large organization.

The more relevant question would be, "Is SJREB more precisely a 'Reseller,' since the service is not necessarily for the use of the organization but rather for the exclusive use of the

member subscriber and under his/her ownership and control in his/her own property (person, home, business, or motor vehicle)?

Again, the D-84-04-014 term "large organization" does not set forth any restrictions specific to the instant situation. Therefore, until the generic solutions to the wholesale/retail rate issue are resolved and more specific definitions are attached to the term "large organizations" as used herein, the existing SJREB service will remain on a wholesale basis.

This understanding will apply so long as SJREB does not deviate from payment of the regular tariff rates and charges, or add other charges to the services it contracts with and receives from BACTC for its use and the use of its members. Specifically, SJREB may not impose the \$60 annual Cellular Club membership fee.

Meanwhile despite the "grandfathered" arrangement we adopt in today's order relative to BACTC/SJREB, it is practical for BACTC to limit the marketing of other new wholesale service, to those large organizations who purchase 50 cellular lines or more of cellular telephone services, and who use those services exclusively for the organizations' own business on the organizations' own property or its leased or rental property.

Again, times were different in 1984 when cellular service had not developed significantly. Today, with many resellers and their agents in business, the definition of "large organization" is more critical and we will seek to clarify that term for future service in I.88-11-040, with input from many parties, including those involved in this dispute.

#### Tariff Violations by BACTC/SJREB

The offer of a waiver of the \$15 activation fee and/or 120 minutes of free air time to members of SJREB were both clear violations of the BACTC tariff. In addition, as incentives to take service, they have different dollar values. The 120 minutes of free air time at the 38¢ per minute wholesale rate represents an incentive of \$45.60 contrasted to waiver of a \$15 activation fee. The practical effect of this arrangement was that migrating

customers received a \$15 activation fee waiver, whereas new customers received 120 free minutes worth \$45.60. No rational basis has been demonstrated for this disparate treatment of customers.

BACTC has no basis by which to waive the \$15 activation fee, per access number requested, as set forth in Tariff Schedule 4-T, Sheet 4, or to pass on to any non-reseller the 120 minutes of free air time promotional incentive contained in its 6th Revised Cal. P.U.C. Sheet 9 of its Tariff Schedule 4-T.

Since the free air time incentive is for "any Reseller" and SJREB is not currently a reseller, we will direct BACTC to backbill SJREB for all free air time provided to it from the inception of wholesale service to it, until the date of this order.

BACTC asserts that it never intentionally waived any activation fees and has subsequently billed SJREB for all such activations of access numbers; therefore there is no need for further action by this Commission regarding that tariff violation, occasioned by improper communications.

#### Findings of Fact

1. D.84-04-014, issued April 4, 1984, permitted "large organizations" to receive cellular telephone services at wholesale rates and charges from facilities based providers; and that policy was fitting for a cellular industry which was still in its infancy.

2. D.84-04-014 did not specifically restrict the definition of "large organizations" to businesses, corporations or other specific entities; however, with the current development of the cellular industry today, we are currently reexamining the very question of wholesale and retail rates, and their applications, in I.88-11-040.

3. It may be necessary to redefine the term "large organization" for use in permitting wholesale cellular service in the current environment and for the future in I.88-11-040.



4. SJREB on, or after February 28, 1989 offered to extend the wholesale cellular services it then obtained from BACTC to its members for their own use.

5. There is evidence that during the first two weeks of the wholesale offering of BACTC cellular telephone service to individual SJREB members by SJREB, various tariff violations occurred both as to activation fees for access service and allowances of free air time.

6. BACTC has subsequently clarified its communications to SJREB regarding the impropriety of giving waivers of activation fees and corrected all prior billings to it to include those charges.

7. BACTC has not sought repayment for the 120 free minutes of air time per access number previously provided to SJREB as a promotion of new service, but which is only to be allowed to "Resellers" under BACTC's tariff, and thus remains in violation of P.U. Code § 532.

8. SJREB has no authority to add any additional rates or charges to cellular services to its user members without jeopardizing its posture as a "large organization" bulk wholesale user.

9. SJREB's initial non-tariff based offering of BACTC wholesale cellular telephone service to SJREB members caused significant migration of service from resellers to BACTC.

10. The migration of cellular telephone service subscribers from resellers to BACTC caused significant revenue loss to the resellers, but the harm was not demonstrated to be sufficient enough to warrant return of those subscribers to the resellers' retail operations.

11. It is necessary to preserve the status quo to maintain reasonable tranquility between the wholesale operations of BACTC and the retail operations of competing resellers and their agents until disposition of certain underlying issues occurs in our

generic cellular investigation (I.88-11-040), especially in view of the potential 6,000 plus SJREB member market, that, except for about 400-500 cellular users, remains largely untapped.

12. A freezing of BACTC's current level of wholesale service to members of SJREB will help to establish more tranquil relations between BACTC and resellers and their agents operating in BACTC's service area until these issues are addressed and resolved in I.88-11-040.

Conclusions of Law

1. BACTC should be precluded from expanding its wholesale cellular telephone services to the remaining unserved members of SJREB pending a further refinement of the determination of "large organizations" as that term applies to bulk users in the current cellular environment in I.88-11-040.

2. BACTC should be required to backbill SJREB for any and all free minutes of air time use previously offered to promote connections of new access numbers to the BACTC/SJREB cellular service in violation of its tariffs and P.U. Code § 532.

3. BACTC should be required to render all future bills to SJREB for cellular services rendered, strictly in accordance with its filed tariffs.

4. SJREB, in apportioning BACTC's bills to its member users should not be permitted to add any additional rates or charges beyond those set forth in BACTC's wholesale tariff schedule, without first seeking and obtaining a CPCN as a reseller from this Commission.

5. Complainants have failed to demonstrate sufficient harm to require further relief from this Commission in this proceeding and no further relief should be granted.

6. So long as the provisions of this order are carried out SJREB and its currently served Cellular Club member users should be accorded wholesale rates by BACTC.

7. Nothing in this order should preclude BACTC, SJREB or the complainants from seeking further generic changes to the wholesale/retail provisions of cellular service, or the appropriate definitions thereof, for the future in I.88-11-040.

8. Nothing in this order precludes this Commission from further revisions to the wholesale/retail provisions of cellular service by the facilities based carriers, resellers, or their agents in the future.

9. Except as specifically granted herein, all other relief sought by complainants should be denied.

10. This complaint proceeding should be closed, and any further generic concerns of the parties should be raised in I.88-04-040.

ORDER

IT IS ORDERED that:

1. Bay Area Cellular Telephone Company (BACTC) shall cease and desist from further expanding its wholesale cellular telephone services to additional San Jose Real Estate Board (SJREB) members unless and until the status of wholesale versus retail customers and appropriate rate structures and definitions are resolved in our Cellular Investigation (I.88-11-040).

2. The provisions of Ordering Paragraph 1 above shall apply at 12:00 noon today; any and all applications for new or additional wholesale service from SJREB members received thereafter shall be denied and returned unfilled. ✓

3. Any currently effective BACTC wholesale cellular service to a member of SJREB, which is withdrawn or terminated after 12:00 noon today, shall not be reinstated at wholesale rates and charges. ✓

4. BACTC shall, within 10 days, backbill SJREB for all previously allowed free minutes of air time use which may have been granted anytime after acceptance by it of BACTC's wholesale

cellular service on or after February 27, 1989 to the date of this order.

5. BACTC shall bill SJREB for all cellular services in strict accordance with its tariff schedules on file with this Commission.

6. All existing cellular services furnished by BACTC to SJREB or its members of record effective at 12 noon today shall continue to be provided under BACTC's wholesale tariff schedule.

7. In the event that SJREB wishes to bill its member users of cellular service for any additional specific rates or charges for these services, over and above those of BACTC, it should first seek CPCN authority as a reseller of cellular services from this Commission.

8. The parties may pursue generic changes for the offering of cellular service, not specifically addressed or resolved in this order, in I.88-04-040.

9. The Director of the Commission Advisory and Compliance Division shall promptly inform BACTC of the provisions of Ordering Paragraphs 1, 2, 3, and 6 by telephone, or FAX machine if such facilities are available at BACTC, to allow for prompt adherence to these cease and desist requirements.

10. Except as ordered here, all other relief sought by complainants is denied. ✓

11. This proceeding is closed.

This order is effective at 12:00 noon today.

Dated MAY 10 1989, 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.

  
Victor Webster, Executive Director

APPENDIX A

List of Appearances

Complainants: Peter A. Casciato, Attorney at Law, for Comtech Mobile Telephone Company, Mobile Cellular Communications, Inc., Quality Cellular, Inc., Tenneson Communications, Inc., Richcourt Enterprises Corporation, Minmark Corporation, Pacific Aerie Corporation, T.C.C.L. Communications, Inc., Bridge Radio Services, Inc., Cellular Telephone Systems, Inc., Advanced Communications Center of Concord, and Redwood Cellular Communications, Inc.

Defendants: Graham & James, by Martin A. Mattes and Rochelle B. Chong, Attorneys at Law, for Bay Area Cellular Telephone Company; and Warren Prescott, Attorney at Law, for San Jose Real Estate Board.

(END OF APPENDIX A)

APPENDIX B

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The following complainants are resellers of cellular telephone service:

1. Comtech Mobile Telephone Company (U-4024-C)  
3525 Breakwater Avenue  
Hayward, CA 94545  
(415) 732-1100
2. Redwood Cellular Communications, Inc. (U-4062-C)  
1184 Yulupa Avenue  
Box 1511  
Santa Rosa, CA 95402  
(707) 544-5885

The following complainants, are agents of PacTel Mobile Services (PTMS) a certificated reseller and an affiliate of PacTel Cellular:

3. Mobile Cellular Communications, Inc.  
777 East San Bruno Avenue  
San Bruno, CA 94066  
(415) 873-7747
4. Quality Cellular Incorporated  
3390 de la Cruz Boulevard  
Santa Clara, CA 95054  
(408) 980-0380
5. T.C.C.L. Communications, Inc.  
DBA Mobileland  
46755 Fremont Blvd.  
Fremont, CA  
(408) 279-5263
6. Bridge Radio Services, Inc.  
1371 South Bascom Ave.  
San Jose, CA 95128  
(408) 288-8500
7. Cellular Telephone Systems, Inc.  
DBA Cellutel  
592 Weddell Dr., Suite 7  
Sunnyvale, CA 94089  
(408) 734-5000

APPENDIX B

Page 2

8. Advanced Communications Center of Concord  
2190 Meridian Park Blvd.  
Suite P  
Concord, CA 94520  
(415) 682-3434
9. Tenneson Communications, Inc.  
DBA Celluland of San Francisco  
580 Folsom Street  
San Francisco, CA 94105  
(415) 882-9626
10. Richcourt Enterprises, Inc.  
DBA Celluland of Santa Clara  
3170 El Camino Real  
Santa Clara, CA 95051  
(408) 554-0221
11. Minmark Corporation  
DBA Celluland of Palo Alto  
2001 El Camino Real  
Palo Alto, CA  
(415) 323-2000
12. Pacific Aerie Corporation  
DBA Celluland of Walnut Creek  
2560 N. Main Street  
Walnut Creek, CA 94596  
(415) 932-0444

(END OF APPENDIX B)



APPENDIX C

Admitted:  
California  
District of Columbia  
New York  
Oregon

Law Offices  
of  
PETER A. CASCIATO  
A Professional Corporation

750 Battery Street  
Suite 240  
San Francisco, CA 94111  
Telephone: (415) 772-2725  
Telecopier: (415) 772-2727

April 21, 1989

Martin Mattes  
Graham & James  
One Maritime Plaza  
Third Floor  
San Francisco CA 94111

Warren Prescott  
Offices of Herman Mager  
1570 The Alameda  
Suite 210  
San Jose CA 95126

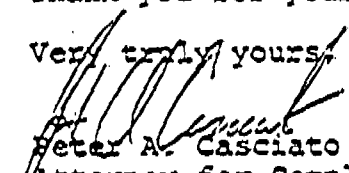
Re: Comtech et al. v. BACTC et al. C89-03-016

Dear Marty & Warren:

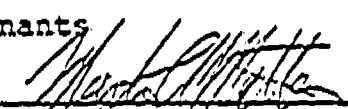
As we agreed on the last day of hearing on the Cease and Desist Order Request, all parties waive whatever rights they might have under Rule of Practice and Procedure 77 and under Article 19 (initial change: the, the, 46m) to file Comments on the Commission's proposed decision in the above-captioned matter. To signify your agreement, please execute this letter at the appropriate line and return the letter to me for filing with the Commission.


Thank you for your cooperation in this matter.

Very truly yours,

  
Peter A. Casciato  
Attorney for Complainants

Accepted & Agreed:

  
Martin Mattes  
Attorney for BACTC

  
Herman J. Mager  
Attorney for SJREB

cc: Hon. George Amaroli  
Administrative Law Judge

PAC:ko

(END OF APPENDIX C)

member subscriber and under his/her ownership and control in his/her own property (person, home, business, or motor vehicle)?

Again, the D.84-04-014 term "large organization" does not set forth any restrictions specific to the instant situation. Therefore, until the generic solutions to the wholesale/retail rate issue are resolved and more specific definitions are attached to the term "large organizations" as used herein, the existing SJREB service will remain on a wholesale basis.

This understanding will apply so long as SJREB does not deviate from payment of the regular tariff rates and charges, or add other charges to the services it contracts with and receives from BACTC for its use and the use of its members.

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7. Nothing in this order should preclude BACTC, SJREB or the complainants from seeking further generic changes to the wholesale/retail provisions of cellular service, or the appropriate definitions thereof, for the future in I.88-11-040.

8. Nothing in this order precludes this Commission from further revisions to the wholesale/retail provisions of cellular service by the facilities based carriers, resellers, or their agents in the future.

9. Except as specifically granted herein, all other relief sought by complainants should be denied.

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ORDER

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