

Decision 90-03-073 March 28, 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CENTEX TELEMAGEMENT, INC.,

Complainant,

v.

PACIFIC BELL,

Defendant.

Case 87-09-005  
(Filed September 4, 1987)

Blumenfeld, Cohen & Waltzkin, by Jeffrey Blumenfeld, Attorney at Law, and Graham & James, by Martin A. Mattes, Attorney at Law, for Centex Telemagement, Inc., complainant.  
Ronald R. McClain, Attorney at Law, for Pacific Bell, defendant.

O P I N I O N

Centex Telemagement, Inc. (Centex) filed this complaint alleging that Pacific Bell's (Pacific) refusal to provide the tariffed high capacity digital (HICAP) services and foreign exchange (FEX) services Centex had ordered violates §§ 451, 453, 454, 455, 489, and 491 of the Public Utilities (PU) Code. Centex seeks the following relief: (i) that Pacific be ordered to immediately fill all outstanding Centex orders for HICAP service and FEX service; (ii) that Pacific be enjoined from continuing to refuse to furnish these services; (iii) that Pacific be enjoined from terminating these services as now provided to Centex; (iv) that Pacific be enjoined from threatening to impose or from imposing FEX mileage rates on the HICAP services ordered by Centex; and (v) that Pacific refund all money Centex placed in the Commission's disputed billing account, which now exceeds \$400,000.

HICAP is a dedicated point-to-point private line channel service suitable for the transmission of digital signals at a speed

of up to 1.544 mbps (Schedule Cal. PUC No. B9.1.1B.1). Foreign exchange is a connection providing dial tone which is used to provide service in an exchange or district area other than the exchange or district area in which the customer is located (Schedule No. A2.1.1).

Pacific answered, denied all the material allegations in the complaint, and asserted that it had erred in providing the service configuration Centex originally ordered, that it corrected the error and backbilled accordingly. On October 28, 1988, Centex filed a motion for summary judgment, which was denied by the presiding administrative law judge (ALJ) May 15, 1989. Public hearing was held in July 1989 when the matter was submitted subject to the filing of briefs. ✓

Centex's Evidence

Centex is a telecommunications management services company. Typically, Centex's clients are small to medium-sized businesses that individually lack the resources to maintain on-staff telecommunications managers such as those employed by larger firms. Through the management services it provides, Centex enables its clients to obtain, among other advantages, many of the telecommunications cost efficiencies otherwise available only to larger firms.

In the spring of 1985, Centex recognized that the substantial volumes of telecommunications traffic generated by its clients between Pacific central offices (COs) might support services which were more efficient than the FEX services then being used. Centex approached Pacific to determine which tariffed Pacific facilities and services would most efficiently handle this traffic. In response to Centex's inquiries, Pacific recommended a combination of HICAP service and business exchange (1MB) service. Pacific recommended that Centex order HICAP service to transport traffic between Pacific COs and that Centex order 1MBs to obtain dial tone in the foreign exchange.

Following Pacific's recommendations, in June 1985, Centex placed orders for two HICAP services between Pacific COs in Santa Clara (where they were to be connected to the Pacific Centrex service used by Centex clients) and Pacific COs in San Francisco (where they were to be connected to Pacific 1MB services) to deliver the traffic into the exchange network. Pacific initially accepted these orders as submitted. Shortly thereafter, however, Pacific advised Centex that while it would continue to supply the HICAP services Centex had ordered, it would require Centex to order FEX service (i.e., 1MBs at the rate of \$19.50 per line) instead of the measured business exchange service lines (i.e., 1MBs at the rate of \$8.25 per line) which Centex had already ordered.

Thus, the combination of Pacific services which Centex ultimately received was: (i) Centrex exchange service lines from the end user's premises to the Centrex switch in the end user's CO (i.e., Exchange 1); (ii) HICAP service from the CO in Exchange 1 to the CO in Exchange 2; and (iii) FEX service in Exchange 2 to obtain dial tone in that exchange. Pacific assessed and Centex paid all of the appropriate charges specified in the HICAP service tariff, including both monthly recurring HICAP line charges as well as distance-sensitive HICAP mileage charges measured between COs. No FEX service mileage charges were assessed. The HICAP mileage charge was \$.87 per mile, while the FEX mileage charge was \$6.40 per mile.

From September 1985 through June 1986, Centex placed and Pacific routinely filled additional orders for HICAP and dial tone services. Each month Centex received from Pacific and paid separate bills for the tariffed charges for the HICAP and the FEX services being provided.

In late August 1986, Pacific informed Centex that no further orders for this combination of HICAP and FEX would be filled. Pacific claimed that it was taking this action out of concern that the failure to assess FEX mileage charges on the

CO-to-CO HICAP services provided to Centex "'may be' a violation of the FEX tariff." Pacific stated that it would not fill any additional orders for HICAP and FEX service until it had resolved these tariff concerns.

In the fall of 1986, Pacific notified Centex that it would resolve its tariff concerns by filing appropriate tariff modifications. At the same time, Pacific notified the California Public Utilities Commission (CPUC) staff of its intention to file such tariff modifications. Although Centex did not believe that such modifications were required, it continued to discuss with Pacific the timing of this filing. More than six months later, Pacific sent a letter to Centex stating that Pacific had decided not to file a revised tariff. The letter explained that Pacific had concluded that such a filing was "not in Pacific's best economic interest." Centex has continued to submit orders for HICAP/FEX services. Pacific has not filled any of those orders.

On September 2, 1987, Pacific advised Centex that effective October 1, 1987, Pacific would commence assessing FEX mileage charges on Centex's HICAP service. It was, however, not until May 1, 1988 that Pacific first sent Centex a bill which imposed such charges. The difference in billing the FEX mileage charges rather than the HICAP mileage charges is approximately \$20,000 per month.

#### Pacific's Evidence

Pacific does not dispute the sequence of events that led to Centex's obtaining HICAP/FEX service, but contends that the service provided to Centex was unauthorized by Pacific's tariffs and was provided in error.

In February 1986, Pacific's HICAP and FEX product managers were asked about the appropriateness of the two services being offered in combination with each other to Centex and other customers. The questions were raised because some Pacific employees were of the opinion that HICAP and FEX were two unique

tariff offerings which had been combined without tariff authorization. Pacific's FEX manager and HICAP manager met to discuss the issues. They concluded that the HICAP/FEX service offered to Centex (and others) was a hybrid service which was not a service that Pacific's tariffs authorized. The service was also priced so that it did not include all applicable rates and charges because the FEX interoffice mileage of \$6.40 per mile was not charged. Instead, HICAP interoffice mileage was charged at \$.87 per equivalent channel mile. They noted that demand for the hybrid service appeared to be met by Pacific's existing FEX service, and customers were attempting to create a less costly surrogate by substituting the HICAP interoffice mileage rate for the FEX mileage rate. There were nine customers taking the HICAP/FEX service. Pacific decided to begin an initial screen.

An initial screen is one of the processes Pacific uses to evaluate new products. The initial screen calls for evaluating customer demand, looking at market attractiveness for the product, conducting financial analyses, and investigating the bypass aspects of the proposed service. Some time in late March or early April 1986, the initial screen process was started. The preliminary results of the initial screen did not support offering the HICAP/FEX hybrid as a new product. These results led to two actions. First, Pacific issued a letter to the field emphasizing that only services authorized by Pacific's tariffs were to be sold. Second, Pacific began a provisional tariff process which would authorize Pacific to serve the existing HICAP/FEX customers. A provisional tariff would also permit a continuing evaluation of customer demand, tracking of the bypass issue, and a more in-depth look at the cross-elasticities of the HICAP/FEX hybrid with Pacific's existing products.

The provisional tariff process began in October 1986 and was not concluded until early 1987, when it was decided not to file for a tariff revision with the PUC. Pacific then offered each

HICAP/FEX service customer three options: they could pay the authorized FEX rate in which case Pacific would provision their service normally; they could disconnect the service altogether; or, they could pay the full rates for both services, as a means of insuring HICAP provisioning. All HICAP/FEX customers accepted one of the three options except Centex.

A Pacific witness explained the purpose of the two relevant product categories - switched service and dedicated service. Switched services allow the subscriber to reach or be reached by the world. Exchange services such as 1MB, FEX, WATS, and 800 are in the switched category. Dedicated services are for the interconnection of two or more specific points and allow the customer exclusive use of the facilities. In many cases they include enhanced service parameters such as guarantees of very limited outage time and enhanced transmission quality. Dedicated services would include private line services such as HICAP and Analog. Dedicated service specifically forecloses access to the public switched network. Dedicated services are offered under Pacific's B tariff while switched services are offered under Pacific's A tariff.

The witness said that Pacific's position is not to connect private line services to exchange services unless expressly authorized by tariffs. Pacific's Schedule Cal. PUC B2.5.8.B. states in pertinent part, that "Except as expressly provided in the tariff schedules, the Utility will not permit the customer or authorized user to use the private line facilities or equipment in connection with the central office exchange service lines or toll service lines of the Utility or any other telephone company without the Utility's written consent."

Switched (exchange) services and private line services have unique characteristics and benefits. If the customer desires a combination of those benefits, for example a foreign calling area plus the transmission parameters of HICAP, it has the option of

subscribing to both services and paying all applicable rates for each. However Pacific is not authorized to substitute elements of one service for another.

The witness said that the real demand for HICAP/FEX, as priced to Centex, reflects a desire to pay a lower price for the same service provided by the existing product, FEX. The revenue loss due to charging reduced mileage rates would not be offset by cost savings. This is purely a pricing issue. The pricing structure desired by Centex would replace the FEX mileage rate of \$6.40 per circuit per mile with payment of HICAP mileage at \$.87 per equivalent circuit per mile. The use of HICAP/FEX as a substitute for switched access facilities is nothing more than service bypass, resulting in lower rates for the customer and higher rates for other ratepayers.

Discussion

High Capacity Digital Service is a dedicated private line channel service suitable for the transmission of digital signals at a speed up to 1.544 Mbps. (Schedule Cal. PUC No. B9.1.1.B.1.) (Emphasis added.) HICAP provides two point (closed) dedicated service between two customer premise locations, between a central office and a customer premise location, or between two central offices.

FEX is a two-way connection providing dial tone between the exchange or district area in which the subscriber is physically located, and the exchange serving the area being called. FEX is utilized to provide "service in an exchange or district area other than the exchange or district area in which the customer's primary station is located." (Schedule Cal. PUC No. A1.1.1.) (Emphasis added.)

For central office to central office HICAP service to be useful to the customer, it must be connected to other services. Those other services can be either private line services or exchange services (dial tone). Pacific's tariff states:

"Except as expressly provided in the tariff schedules the Utility will not permit the customer or authorized user to use the private line facilities or equipment in connection with the central office exchange service lines or toll service lines of the Utility or any other telephone company without the Utility's written consent." (Schedule No. B2.5.8.B.)

Neither the HICAP tariff nor the FEX tariff expressly permits the connection of the two services.

Centex agrees that the HICAP tariff does not expressly permit the connection of the two services, but argues that the HICAP tariff does not expressly forbid the connection; therefore it can be made. It contends that in the absence of a list of prohibited services, one must logically assume there are no services which are restricted from connection to HICAP. Centex's logic escapes us. "A customer cannot claim a right to a service on the basis that the tariff does not exclude that manner of service." (Carlin Communications v. Pacific Bell, Decision (D.) 87-12-017.) ✓

The general rule of tariff construction is that a utility that offers Service A and Service B does not, ipso facto, offer Service AB. Service AB, being different than Service A and Service B, is a separate service and, if not in the utility's tariff, cannot be offered. Public utilities must provide service in accord with their filed tariff. (Stanislaus Food Products Co. v. PG&E (1979) 2 CPUC 2d 304.) This rule, however, is subject to statutes which permit the combining of services (e.g., PU Code § 532) or the tariff itself, which can permit combinations. Of course, the tariff can prohibit combinations. Pacific's B2 tariff prohibits certain combinations, such as the two services at issue, "without the utility's written consent."

Centex next argues that under its B2 tariff, Pacific has discretion to allow the service combination HICAP/FEX by consenting in writing, and that by accepting the written service orders



submitted by Centex and by billing Centex for the service, Pacific has consented in writing.

Pacific responds that the written consent under the B2 tariff must be the consent of a Pacific officer. [At the hearing, Pacific's witness said that the consent must be that of an officer plus the CPUC. This interpretation seems to have been dropped from Pacific's brief.] Pacific argues that under Centex's theory, there would be no limit to those who could alter Pacific's tariffs. Any of Pacific's 60,000 employees could amend Pacific's private line tariff by simply taking it upon themselves to offer a user a certain service. If Pacific's tariffs could be changed as simply as Centex contends, the regulatory process, in Pacific's opinion, would be vitiated.

We agree that as a general proposition a utility can only offer the services it sets forth in its tariff (unless the Commission consents to a deviation) at the rates in its tariffs. No employee can waive the tariff. Mistakes, of course, do happen, and when discovered must be corrected. (Empire West v. So. Calif. Gas Co. (1974) 12 C. 3d 805, 809-10.) Under the facts of this case, however, the way Pacific's tariff is written, any employee authorized to take an order for service who, in good faith, writes the order to permit the connection of private line facilities with exchange service has bound the utility. The tariff refers to "the utility's written consent" not an officer's written consent. Centex is permitted to rely on Pacific's tariff. It is clear, it is not ambiguous. Consent, once given, may be withdrawn. There is no contract between the parties to provide service indefinitely. Whether the initial service was provided by mistake or by a policy decision later changed, Pacific has the right to withdraw its consent. The evidence shows that Pacific withdrew its consent effective October 1, 1987.

On September 2, 1987, Pacific informed Centex by letter that it would begin billing Centex for FEX service. On May 1,

1988, Pacific sent Centex a bill for FEX mileage services rendered since October 1, 1987. Between September 1987 and May 1988 Pacific had billed, and Centex had paid, for services without the FEX mileage charges. Centex asserts that Pacific's tariff rule governing the rendering and payment of bills forbids the inclusion on a bill of "any previously unbilled charge for exchange service furnished prior to three months immediately preceding the date of the bill." (Schedule Cal. PUC No. A2, Rule No. 9, Section 2.1.9.I.1.) Pacific claims that the September 1987 letter was a bill so the May 1, 1988 statement did not violate the tariff rule.

Pacific's letter of September 2, 1987 was not a bill. It was a statement that Pacific was going to increase its charges to Centex commencing October 1, 1987. The added FEX charges set forth on the May 1, 1988 bill are valid only for service furnished prior to three months immediately preceding May 1. Unbilled charges occurring prior to February 1, 1988 are waived.

We are somewhat concerned by the tariff provision at issue in this matter. It is not obvious why customers should be limited in how they may combine the use of tariffed utility services lawfully purchased. As we move into a more competitive era for local exchange services, it is especially important for customers and competitors to have nondiscriminatory access to network services to use in creative or innovative ways. In particular, it is not appropriate for a local exchange utility to use tariff rules to hinder a competitor without good cause. We are also unsure how this tariff provision relates to the unbundling principle we promulgated as policy in D.89-10-031.

Any specific findings on this issue are beyond the scope of this proceeding and its record. We have no basis here for concluding that Pacific's tariff provision is inappropriate in its context or present application. We intend only to signal a concern

that parties should consider as the extent of intraLATA competition changes and local exchange utility services and tariffs change accordingly.

Findings of Fact

1. From September 1985 through June 1986, Centex placed and Pacific filled orders for HICAP/FEX service. Each month Centex received from Pacific and paid bills for tariffed charges for the HICAP and FEX services being provided.

2. Pacific's acceptance of Centex's orders and its billings to Centex were "written consent" within the meaning of Pacific's Schedule No. B2.5.8.B.

3. In late August 1986 Pacific refused to fill new Centex orders for HICAP/FEX service.

4. On September 2, 1987 Pacific advised Centex that effective October 1, 1987, Pacific would commence assessing FEX mileage charges on Centex's HICAP/FEX service.

5. The September 2, 1987 notification was a withdrawal by Pacific of the previously given written consent to combine the HICAP and FEX tariffs in the manner theretofore offered to Centex.

6. On May 1, 1988 Pacific first sent Centex a bill which imposed FEX mileage charges for the period beginning October 1, 1987.

7. Pacific's tariff provides that Pacific may not backbill for any previously unbilled charge for exchange service furnished prior to three months immediately preceding the date of the bill.

8. Pacific may backbill Centex only for FEX exchange service furnished during the months of February, March, and April 1988.

9. Because there is money on deposit with the Commission and because the backbilled amount may be subject to dispute, we will keep this proceeding open for a limited time to determine the correct amount. However, all money on deposit for disputed bills issued by Pacific on or after May 1, 1988 shall be immediately disbursed to Pacific. The disputed amount for service rendered

prior to May 1, 1988 shall be disbursed as follows: Should the parties agree on the amount, the Executive Director shall disburse the money on deposit with the Commission in accordance with the agreement, without further order. Should the parties disagree, the matter will be submitted to the presiding ALJ for disposition.

Conclusions of Law

1. Centex is not entitled to the type of HICAP/FEX service which it ordered, unless Pacific gives its written consent.
2. Pacific may backbill for services rendered for three months prior to May 1, 1988.
3. Centex may recover its money on deposit less Pacific's backbill and less the amounts deposited to cover disputed bills for service rendered after April 30, 1988, which shall be paid to Pacific.

O R D E R

IT IS ORDERED that:

1. Except as provided in this order, the relief requested by Centex Telemanagement, Inc. is denied.
2. Pacific Bell may backbill Centex for services rendered for three months prior to May 1, 1988.
3. The Executive Director shall forthwith pay to Pacific all money deposited with the Commission for disputed bills issued for service rendered after April 30, 1988. The balance of the money on deposit shall be disbursed in accordance with ordering paragraphs 4 and 5.
4. Should the parties agree on the amount of the backbill, the Executive Director shall disburse the money on deposit in accordance with the agreement, without further order.
5. Should the parties disagree on the amount of the backbill the matter shall be submitted to the presiding ALJ for disposition.

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Conclusions of Law

1. Centex is not entitled to the type of HICAP/PEX service which it ordered, unless Pacific gives its written consent.
2. Pacific may backbill for services rendered for three months prior to May 1, 1988.
3. Centex may recover its money on deposit less Pacific's backbill and less the amounts deposited to cover disputed bills for service rendered after April 30, 1988, which shall be paid to Pacific.

O R D E R

IT IS ORDERED that:

1. Except as provided in this order, the relief requested by Centex Telemanagement, Inc. (Centex) is denied.
2. Pacific Bell (Pacific) may backbill Centex for services rendered for 3 months prior to May 1, 1988.
3. The Executive Director shall forthwith pay to Pacific all money deposited with the Commission for disputed bills issued for service rendered after April 30, 1988. The balance of the money on deposit shall be disbursed in accordance with Ordering Paragraphs 4 and 5.
4. Should the parties agree on the amount of the backbill, the Executive Director shall disburse the money on deposit in accordance with the agreement, without further order.
5. Should the parties disagree on the amount of the backbill the matter shall be submitted to the presiding administrative law judge (ALJ) for disposition.

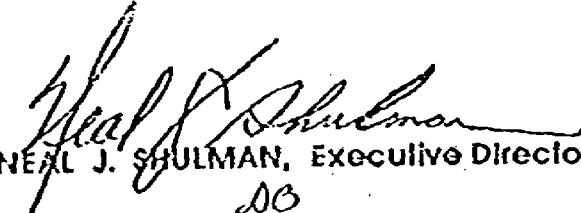
6. This proceeding will be closed 180 days from the effective date of this order unless specifically held open by ALJ ruling on a showing of good cause.

This order is effective today.

Dated MAR 28 1990, at San Francisco, California.

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

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

  
NEAL J. SHULMAN, Executive Director  
DB