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Decision 97-10-025 October 9, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

MCI Telecommunications Corporation
(U 5001 C) and AT&T Communications,
Inc. of California, Inc. (U 5002 C),

Complainants,

v.

Pacific Bell (U 1001 C) and MFS
Intelenet of California, Inc.
(U 5397 T),

Defendants.

ORIGINAL

Case 96-02-014
(Filed February 2, 1996)

O P I N I O N

Summary

MCI Telecommunications Corporation (MCI) and AT&T of California, Inc. (AT&T-C) (Pacific and AT&T-C, complainants) have shown that the implementation of an agreement between Pacific Bell (Pacific) and MFS Intelenet of California, Inc. (MFS) (Pacific and MFS, defendants) is in violation of applicable tariff restrictions under Pacific's joint-user tariff.

Procedural Background

Complainants filed a complaint on February 26, 1996, alleging that an agreement between defendants effectively permitted MFS to aggregate resold toll traffic in a manner that Pacific refuses to permit complainants to obtain. Pacific and MFS filed answers on March 15, 1996. A prehearing conference was held on April 11, 1996. On March 25, 1997, the parties stipulated to the only facts that appeared to be in dispute, and the assigned administrative law judge ordered the matter submitted on the opening concurrent briefs filed April 11, 1997, and the concurrent reply briefs filed May 2, 1997.

MFS filed a motion on July 30, 1997, after the matter had been submitted, to permit comments on the draft decision scheduled to be considered by the Commission at its August 1, 1997 meeting. The draft decision was held, and, on September 2, 1997, the assigned Commissioner issued a ruling inviting comments on factual, legal, or technical errors in the draft decision. Complainants, Pacific, and MFS filed comments and reply comments within the times directed by the assigned Commissioner's ruling.

On September 22, 1997, Business Telemanagement, Inc. filed a petition to intervene for the purpose, initially, of permitting it to file comments on the draft decision. Rule 53 of the Rules of Practice and Procedure requires a petition to intervene in a complaint proceeding, such as this case, to be filed and served not less than 5 days before the date that the proceeding is called for hearing. After the matter has been submitted on the briefs is too late, and Business Telemanagement Inc.'s petition to intervene is denied.

Discussion

All of the parties are telephone corporations, as defined in Public Utilities (PU) Code Section 234(a), and each holds one or more certificates of public convenience and necessity to provide various classes of telecommunications services in California. As such, they all compete in the market for business telecommunications services, which is the relevant market in this case. Although each has its own switches and other facilities, only Pacific has a significant number of local lines and specialized facilities to provide specialized services such as Centrex. Pacific's Centrex is designed to serve business customers with multiple telephone stations. The service permits business station-to-station dialing and provides a variety of features, such as speed dialing and automatic routing of toll calls to preferred carriers.

Before 1984, AT&T-C and Pacific, or their predecessors-in-interest, were under common control and enjoyed a monopoly on virtually all types of telecommunications services within their California service area. As a result of the antitrust consent decree between the United States Department of Justice and American Telephone and Telegraph Company, which is known as the Modified Final Judgment (*see U.S. v.*

American Tel. & Teleg. Co., 552 F.Supp 131 (D.D.C. 1982), *aff'd* 460 U.S. 1001 (1983)), long-distance (interlocal access and transport area (LATA)¹), services became an increasingly deregulated market in which AT&T-C, MCI, and others competed, but intraLATA toll services (services that originate and terminate within a single LATA), with only limited exceptions, were provided solely by Pacific until we permitted complainants and others to enter that market at the beginning of 1995.

Thus, there was a long period during which we found it necessary to hedge Centrex with restrictions in order to prevent it from being used as a vehicle for intraLATA competition. We continue to restrict resale of Centrex services through the imposition of so-called "use and user" restrictions that prohibit, for example, a reseller of Centrex and Pacific intraLATA toll services from qualifying for applicable discounts based on its aggregate volume; instead, such a reseller may only get the same discount as its end-user customer would qualify for based on that customer's individual volume.² (See *In re order instituting rulemaking on the Commission's own motion into competition for local exchange service*, Rulemaking (R.) 95-04-043, Decision (D.) 96-03-020.) AT&T-C sought, and failed to obtain, the ability to use Centrex to aggregate intraLATA toll traffic for discount calculation purposes. (See *In re application of AT&T Communications of California, Inc.* (1996) D. 96-12-034, mimeo. at 10-12.)

A separate thread begins with a 1987 decision that adopted guidelines for what were called "multi-tenant or shared-tenant service providers." (*In re Pacific Tel. & Teleg. Co.* (1987) 23 CPUC2d 554.) In that case, we determined that we would not regulate persons or firms that owned or managed a private branch exchange to provide shared telephone service (STS) to tenants in a single building or complex of buildings if several

¹ California, for example, is divided into 10 LATAs of various sizes. InterLATA describes services and functions related to telecommunication originating in one LATA and terminating in another.

² In a separate order, D.97-08-059, we affirmed the continuation of the "use and user" restriction so that Centrex and CentraNet (a corresponding service offered by GTE California) may be

Footnote continued on next page

conditions were met. In relevant part, we permitted the shared telephone service provider to charge what it wished for its management and billing service. The STS provider was required to pass through "all charges for service from the telephone utility or from a long-distance carrier" by direct rebilling on a flow-through or pro-rata basis such charges, "separately stated on the bill." Each tenant-customer must also be a customer of Pacific as a "joint user." The STS provider could place no restrictions on the ability of the tenant-customer to obtain any service from Pacific. The STS provider was prohibited from reselling intraLATA service other than through Pacific or from holding itself out as a provider of intraLATA service. The STS provider could not represent that it offered any services in competition with Pacific. All billing disputes involving the tenant-customers and the STS provider were to be settled with the STS provider, not Pacific.

A joint user is defined in Pacific's tariff, Schedule CAL. P.U.C. No. A5 (the joint-user tariff), as "an arrangement whereby an individual, other than an employee, member or officer of the concern which is the customer or a firm, corporation or association shares in the use of a customer's business telephone service." Such a joint user is "not required to share the same premises as that occupied by a customer." The customer is required to pay a modest monthly fee for each joint user and to deal with any billing or service dispute of any joint user. The shared tenant provider guidelines are incorporated by reference into the joint-user tariff.

The tariff sets forth ten regulations:

1. A joint user may obtain separate telephone service from [Pacific], in addition to or in lieu of the joint user service.
2. Applications for joint user service and for additional service, equipment or facilities in connection therewith, must be made by the customer and the customer is responsible for the payment of all charges incurred thereunder. Any billing or service disputes by joint users shall be taken up with the

resold only to business customers subject to the avoided cost discount and not to residential customers.

customer, not with [Pacific] or the Commission. Only the customer of [Pacific] shall have standing to file billing or service disputes with [Pacific] or the Commission.

3. Regulations that apply to the services and equipment provided on the premises of a customer will also apply to a joint user of these services where furnished to [Pacific's] local loop demarcation point.
4. The rates in D. following, apply in addition to the rates and charges for the facilities and all other service provided. The minimum charge for joint user service shall be the monthly rate, for each joint user location. If the listing is included in the telephone directory, the service shall be paid for until the end of the directory period unless the joint user vacates the premises or "customer location" on which the service is provided or the customer's service is discontinued or the joint user becomes a business service customer in the same exchange and requests discontinuance of joint user service.
5. Joint user service is not furnished in connection with residence telephone service. Business service may be extended to a residence premises, at the applicable Business rates and charges.
6. Unless otherwise specifically provided in the schedules covering foreign exchange services, joint user service is not furnished in connection with foreign exchange service. Joint user service is not furnished in connection with farmer line service.
7. Directory listings will be furnished in connection with joint user service in accordance with the tariff provisions applicable to directory listings.
8. Reserved.
9. Joint User Service is not furnished in connection with Customer-Owned Pay Telephone (COPT) Service.
10. In addition to the preceding regulations, the Shared Tenant Service guidelines set forth in D.97-01-063 dated January 28, 1987, as modified by D.97-05-009 dated May 13, 1987 are applicable.

The guidelines referred to in regulation 10 provide as follows:

1. A multi-tenant or shared-tenant service provider (provider) is a person or firm that owns or manages a PBX-type switch and provides telephone service to tenants in a single building or complex of buildings on continuous property. A complex of buildings is on continuous property if the boundary of the involved parcels contains buildings where the tenants or owners contribute to the maintenance of: (a) common areas; and (b) communications facilities that are owned or managed by the provider. Such property may be intersected by a public thoroughfare or right-of-way, if the segments created would be joined in the absence of the thoroughfare or right-of-way. The provider is the customer of the utility.
2. Providers are not subject to CPUC regulation if they operate under these guidelines.
3. The provider may charge for its management and billing services and for use of its facilities in any manner it deems appropriate including flat or measured service charges.
4. All charges for service from the telephone utility or from a long-distance carrier shall be directly rebilled to tenants on a flow-through or prorata basis and shall be separately stated on the bill.
5. Services provided by multi-tenant or shared-tenant services providers are subject to Pacific Bell's schedule Cal. P.U.C. No. 80.5.6.1., the joint-user tariff, and its charges, General Telephone's shared systems listing service tariff, or the joint-user service tariff of other telephone utilities. Therefore, each customer of a provider must be on record with the telephone utility as a joint-user and must pay the monthly joint-user fee, if any.
6. Service may be extended to residential premises located in the specific complex, but business rates will apply to PBX trunks and other facilities.
7. Off-premises extensions may be provided to tenants of a single building or complex of buildings at locations away from that building or complex of buildings.

8. The property owner or manager shall place no restrictions on tenants which desire service directly from the telephone utility in addition to or in lieu of service furnished by the provider.
9. The property owner or manager or provider shall place no impediments on the telephone utility where it furnishes service directly to a tenant. When a telephone utility elects to use inside wiring and related facilities that a provider chooses to make available, the provider should be compensated for their use.
10. The provider shall not resell intrastate long distance service other than at flow-through rates or prorata except as it obtains a certificate of public convenience and necessity from the Commission pursuant to D.84-06-113, files tariffs pursuant thereto, and partitions its switch in such a way that customers of the reseller who are not also customers of the shared services provider do not have access to the intraLATA services that are provided for the purpose of sharing."
11. In no event shall the service provider resell intraLATA service or provide it other than through the local telephone utility.
12. The provider shall be responsible for collection of moneys from tenants and payment of all amounts billed for service, including joint user service, furnished to the building or complex.
13. Any billing disputes by tenants or joint users shall be taken up with the provider not with the utility or the Commission. Only the provider shall have standing to file billing complaints with the utility or the commission.
14. All joint users of the provider shall be hard wired as station users to the shared switch.
15. In no event shall providers hold themselves out as providers of intraLATA services, nor shall they represent that they offer any services in competition with the local utility.
16. IntraLATA or interLATA networking of shared switches is not permitted. IntraLATA private line service between exchanges may be obtained by the joint user directly from the utility and terminated at the joint user's premises for unshared use.

MFS, through its predecessor-in-interest, entered into an agreement with Pacific to obtain Centrex service subject to the joint-user tariff. Since MFS was already regulated by the Commission, many of the guidelines for shared-tenant providers did not apply, and MFS was in a position to permit its end-user customers to use MFS's Centrex facilities provided by Pacific if it abided by those guidelines that still applied (namely, the prohibition on holding out as the customer's telephone company and the requirement for pass-through billing "separately stated"). For each end user, the effect of this arrangement was to relieve MFS of the "use and user" restrictions (particularly those that relate to intraLATA toll aggregation) that apply if the joint-user arrangement were characterized as "resale." As a consequence, MFS was in a position to give its customers better rates for Pacific's intraLATA toll services than those customers could obtain from Pacific directly.

It might be thought that this case presents the perfect application for the well-known "duck test" originally proposed by the labor leader Walter Reuther. (See David Pickering, Alan Issacs and Elizabeth Martin (eds.) *Brewer's Dictionary of 20th-Century Phrase and Fable* (1992) 166 ("If it looks like a duck, walks like a duck and quacks like a duck, it's a duck.")) The economic reality has been that MFS has been reselling bundled Centrex and intraLATA toll services rather than managing communications for joint users. But the facts do not require the duck test. MFS fails to meet the requirements imposed by the joint-user tariff in two ways: First, it holds itself out as the provider of services in competition with Pacific; and second, it does not separately state Pacific's charges in its bills.³

MFS argues that it is something called a "shared service provider as distinct from a reseller" and that what it does is to manage Pacific's services as the agent of the end-user. We are uncertain whether this distinction has any legal significance. (See PU Code

³ MFS terms these "ambiguous and hitherto undefined provisions" of "arguably inapplicable guidelines." They may be ambiguous, and this case will clarify them, and they may be inappropriate, in which case the joint user tariff perhaps should be amended in some other

Footnote continued on next page

§ 234(a) (defining telephone corporation to include a person "managing any telephone line for compensation".) However, the uncontested facts demonstrate that MFS does not act as an agent.

The "MFS Shared Local Service Customer Agreement" is what the parties agree is the contractual vehicle by which MFS furnishes service to its end-user customers. It obligates the end-user customer to pay MFS certain charges, including a "management fee" and obligates MFS to act as "communications manager" for local service lines for which MFS "acts as customer of record." MFS is thus clearly managing a telephone line for compensation and, if it is providing such services to any part of the public, it is a public utility, as well.

The same form of agreement, moreover, shows that something less than an agency is created. "An agent is one who represents another, called the principal, in dealings with third persons." (Civil Code § 2295.) By terms of the joint-user tariff, however, no economic relationship between the end-user customer and Pacific occurs with respect to the Centrex lines. The only relationship between the end-user customer and Pacific is established by a "Listing or Joint User Service Application," and that is solely concerned with directory listing matters. In addition, MFS reserves the right to displace Pacific by providing MFS's own services to the end user, thus eliminating any possibility of a third person. An agent does not have the degree of control over a transaction with a principal to be able to substitute itself for the third party that the principal hired the agent to deal with. It is clear that MFS does not act as an agent for the end-user customer, but as a principal toward the end-user customer, to whom MFS, not Pacific, is the provider of telecommunications services.

MFS cites the form of its monthly bills for "managed services which are services provided by the local telephone company, but which are managed on behalf of the customer by MFS Intelenet, Inc., acting as the customer's authorized agent." Calling the

proceeding to modify or delete them, but the provisions nonetheless still govern MFS's rights and obligations under its agreement with Pacific.

arrangement an agency does not change the reality; Pacific is under no obligation to deal with the end-user customer for any aspect of the Centrex service that Pacific provides to MFS and MFS provides to the end-user customer. The exclusive relationship between the end-user customer and Pacific deals solely with directory listing matters.

Given that MFS is holding itself out as the provider, despite efforts to make its role appear to be that of a mere agent, the next question is whether it is also holding itself out in competition to Pacific as a provider of any services.

Complainants point to a sample MFS bill, which MFS argues does not show "holding out." The 61-page bill for an anonymous customer's March 1996 service is mainly taken up with the call detail supporting the current charges of approximately \$1,000. It asks that payment be made to MFS. It "covers all of the telephone services that MFS" provides to the customer. It calls MFS "your communications provider." A page entitled "How to use your MFS Intelenet Management Report" contains the following paragraph:

For customers located in California, [and a few other states]... this consolidated billing statement contains charges to the customer for (1) communications and ancillary enhanced services provided by MFS Intelenet, Inc.; and (2) managed services which are services provided by the local telephone company, but which are managed on behalf of the customer by MFS Intelenet, Inc., acting as the customers authorized agent. Charges for managed services include the direct charges levied by the local telephone company, plus management fees which may be imposed by MFS Intelenet, Inc. Billing statements for customers located in California, [and a few other states] ... include charges for managed services reflected in the following billing categories: (1) other charges; and (2) local zone outbound calling service.

Thus, "managed services" (which are the only services that MFS claims are being provided by Pacific) include line items on the sample bill for the following non-zero items:

1. Monthly Line Charges
2. FCC mandated monthly access fee

3. Pacific Bell Joint User Fee

4. Local Zone Outbound Calling Services

However, everything else is an MFS charge, including other outbound calling services (service area, intrastate, interstate, and international). MFS uses the term "service area" in its marketing materials to refer to the ten intraLATA areas of California. Therefore, it is reasonable to assume that it is using the same term in the same way in its billing statements. We cannot agree with MFS's contention that its form of billing statement is silent in this respect. A customer would have no reason to believe from reading the bill that MFS was *not* providing intraLATA services. While it is properly certificated to do so on its own account, MFS may not do so under the joint-user tariff. We conclude that MFS is holding itself out as providing intraLATA services, in violation of the joint-user tariff requirements.

Undisputed marketing materials of MFS are even clearer on this point: "Want to place FREE calls within your service area? Pacific Bell charges up to 11¢ a minute for these calls. Sign up for MFS service today and we will pay for all your service area calls for 3 months. This is a savings of 17% or more off your monthly phone bill for 3 months!" MFS offers two defenses: (1) intraLATA toll service competition is now permitted in California; and (2) until recently, MFS purchased all of its intraLATA toll service for its joint-use customer from Pacific and therefore did not compete with Pacific with respect to those services. Neither defense avails. The joint-user tariff controls what MFS could do with Centrex service independently of what MFS could do as a holder of a certificate of public convenience and necessity. The fact that MFS may have obtained the intraLATA toll services from Pacific does not mean that it cannot be providing them in competition with Pacific. The marketing materials, from the end-user perspective, could not have been clearer: If intraLATA toll calls are purchased during a 3-month period from Pacific, the cost could be up to 11¢ a minute, but if they are purchased from MFS, they are free. If that is not holding out in competition with Pacific, we do not know what would be.

Complainants ask for one of two forms of relief, and state that they are indifferent which form the Commission orders. Either we should order defendants to

abide by the "separate statement" and "no holding out" requirements of the joint-user tariff or we should order Pacific to offer to Complainants the ability to offer services subject to the joint-user tariff without the "separate statement" and "no holding out" restrictions on the grounds that Pacific has waived such restrictions for MFS.

We must reject the second alternative out of hand. A public utility cannot waive a tariff requirement. It may apply to have the tariff changed, but it is the essence of a tariff that all of its terms and conditions apply to each and every customer whose relationship with the utility falls under a tariff.

Nor do we have much choice as to the first alternative. Until shown that its terms and conditions are shown to be in violation of law, or until amended or superseded, the joint-user tariff governs the manner in which MFS may furnish Centrex service to its end-user customers.

Findings of Fact

1. Complainants filed the complaint on February 26, 1996.
2. Pacific and MFS filed answers on March 15, 1996.
3. A prehearing conference was held April 11, 1996.
4. On March 25, 1997, the parties stipulated to the only facts that appeared to be in dispute.
5. Concurrent opening briefs were filed April 11, 1997, and concurrent reply briefs were filed May 2, 1997.
6. All of the parties are telephone corporations, and each holds one or more certificates of public convenience and necessity to provide various classes of telecommunications services in California.
7. A joint user is defined in Pacific's tariff, Schedule CAL. P.U.C. No. A5, as "an arrangement whereby an individual, other than an employee, member or officer of the concern which is the customer or a firm, corporation or association shares in the use of a customer's business telephone service." Such a joint user is "not required to share the same premises as that occupied by a customer." The customer is required to pay a

modest monthly fee for each joint user and to deal with any billing or service dispute of any joint user.

8. The shared tenant provider guidelines are incorporated by reference into the joint-user tariff.

9. The shared tenant provider guidelines provide that all charges for service from the telephone utility or from a long-distance carrier shall be directly rebilled to tenants on a flow-through or pro-rata basis and shall be separately stated on the bill.

10. The shared tenant provider guidelines provide that in no event shall the service provider resell intraLATA service or provide it other than through the local telephone utility.

11. The shared tenant provider guidelines provide that in no event shall providers hold themselves out as providers of intraLATA services, nor shall they represent that they offer any services in competition with the local utility.

12. MFS, through its predecessor-in-interest, entered into an agreement with Pacific to obtain Centrex service subject to the joint-user tariff.

13. The "MFS Shared Local Service Customer Agreement" is the contractual vehicle by which MFS furnishes service to its end-user customers. It obligates the end-user customer to pay MFS certain charges, including a "management fee" and obligates MFS to act as "communications manager" for local service lines for which MFS "acts as customer of record."

14. The only relationship between the end-user customer and Pacific is established by a "Listing or Joint User Service Application," and that is solely concerned with directory listing matters.

15. In the MFS Shared Local Service Customer Agreement, MFS reserves the right to displace Pacific by providing MFS's own services to the end user.

16. MFS's monthly bills include the statement that they include "managed services which are services provided by the local telephone company, but which are managed on behalf of the customer by MFS Intelenet, Inc., acting as the customer's authorized agent."

17. A sample MFS bill states that it "covers all of the telephone services that MFS" provides to the customer. It calls MFS "your communications provider." As defined by the form of bill, "managed services" include line items for monthly line charges, a monthly access fee, a joint user fee, and local zone outbound calling services.

18. Everything else on the sample bill is an MFS charge, including other outbound calling services (service area, intrastate, interstate, and international).

19. MFS uses the term "service area" in its marketing materials to refer to the ten intraLATA areas of California.

20. It is reasonable to assume that MFS is using the term "service area" in the same way in its billing statements as it is in its marketing materials.

21. Undisputed marketing materials of MFS contain the following statement: "Want to place FREE calls within your service area? Pacific Bell charges up to 11¢ a minute for these calls. Sign up for MFS service today and we will pay for all your service area calls for 3 months. This is a savings of 17% or more off your monthly phone bill for 3 months!"

22. MFS's form of bill did not separately state intraLATA toll charges of Pacific.

23. MFS's marketing materials constituted holding out the provision of intraLATA services in competition with Pacific.

Conclusions of Law

1. The MFS Shared Local Service Customer Agreement is not a contract for agency between an end-user customer and MFS that obligates the customer to Pacific as a principal, but is rather a contract between the customer and MFS, on its own account.

2. MFS has failed to directly rebill all charges for service from Pacific to MFS's customers on a flow-through or pro-rata basis and to separately state such charges on its bill.

3. MFS has held itself out as a provider of intraLATA services in connection with Centrex services.

4. MFS has represented that it offers services in competition with Pacific.

5. MFS's failure to directly rebill all charges by Pacific and to separately state such charges on its bill in connection with Centrex services is in violation of the joint-user tariff.

6. MFS's holding itself out as a provider of intraLATA services in connection with Centrex services is in violation of the joint-user tariff.

7. MFS should be prohibited from providing joint user Centrex services to any customer for which it is not acting as an agent, as distinct from principal.

8. MFS should be ordered to directly rebill all charges by Pacific and to separately state such charges on its bill in connection with joint use Centrex services.

9. MFS should be prohibited from holding itself out as a provider of intraLATA services in connection with joint use Centrex services.

O R D E R

THEREFORE, IT IS ORDERED that:

1. MFS Intelenet of California, Inc. (MFS) is prohibited from providing joint user Centrex services obtained from Pacific Bell (Pacific) to any customer for which it is not acting as an agent, as distinct from principal.

2. MFS is ordered to directly rebill all charges by Pacific and to separately state such charges on its bill in connection with joint use Centrex services.

3. MFS is prohibited from holding itself out as a provider of intraLATA services in connection with joint use Centrex services.

C.96-02-014 ALJ/RC1/tcg

4. Case 96-02-014 is closed.

This order is effective today.

Dated October 9, 1997, at San Francisco, California.

Dated August 1, 1997, at San Francisco, California.

P. GREGORY CONLON

President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners