

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Enhanced TeleManagement, Inc.,)	
)	
Complainant,)	
)	
v.)	
)	
Northwestern Bell Telephone Company)	File No. E-89-183
)	
and)	
)	
Pacific Northwest Bell Telephone Company,)	File No. E-89-184
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

Adopted: November 21, 1996;

Released December 2, 1996

By the Commission:

I. INTRODUCTION

1. This order addresses the Application for Review ("Application") filed by Enhanced TeleManagement, Inc. ("ETM") seeking reversal of a Common Carrier Bureau order (the "Bureau Order")¹ denying ETM's complaint in the above-captioned proceeding. For the reasons given below, we deny the Application for Review.

¹ Enhanced TeleManagement, Inc. v. Northwestern Bell Telephone Co. and Pacific Northwest Bell Telephone Co., 8 FCC Rcd 4188 (1993).

II. BACKGROUND

2. ETM is a CENTREX-based reseller of interexchange telephone service.² To provide its resold long distance services, ETM subscribes to conventional CENTREX service, along with certain additional enhancements for long distance call routing, from defendants Northwestern Bell Telephone Co. ("NWB") and Pacific Northwest Bell Telephone Co. ("PNB"), now US West Co. ("USWC").³ Customers obtain ETM's resold long distance services by subscribing to long distance services of various interexchange carriers. These long distance services are terminated at the defendants' CENTREX switches that serve ETM's resale customers by using dedicated special access facilities.⁴ CENTREX has features similar to a private branch exchange ("PBX") because both are capable of switching calls among numerous telephone stations. They differ because a PBX performs its switching function at the customer's locations while CENTREX's switching functions are performed at the LEC central office. Therefore, CENTREX service requires a separate loop, that is, a separate "station" line, between the LEC central office and each of the subscriber's stations (i.e. telephone sets); a PBX requires relatively fewer LEC-supplied loops and consequently relatively fewer trunks because many of the switching functions that occur at the CENTREX switch are internal to the PBX installed at the customer's location.

3. As part of ETM's resale service configuration, ETM requested defendants to terminate CENTREX station lines at ETM's customers' locations. These lines, in turn, were interconnected through the defendants' serving CENTREX offices with the IXCs' lines providing the interstate telecommunications services that ETM resold. Although ETM was charged the EUCL charge and did not pay CCL charges, ETM states in its application that "it was apparent to ETM that [the] defendants sought to collect both" the end user common line ("EUCL") charge⁵

² CENTREX is a multiline business service provided by local exchange carriers ("LECs") such as the defendants. It enables a subscriber both to communicate within its organization and to access the public switched network.

³ During the course of this proceeding, in a corporate reorganization, defendants Northwestern Bell Telephone Co. and Pacific Northwest Bell Telephone Co. were merged into a company, Mountain States Telephone and Telegraph Co., that was subsequently renamed US West Co. We will refer to them henceforth as defendants or US West Co., as the context requires. See Bureau Order, 8 FCC Rcd 4188 at n. 1.

⁴ Bureau Order, 8 FCC Rcd at 4188.

⁵ The Commission's rules define the EUCL charge as:

A charge that is expressed in dollars and cents per line per month shall be assessed upon end users that subscribe to local exchange telephone service, Centrex or semi-public coin telephone service to the extent they do not pay carrier common line charges. Such charge shall be assessed for each line between the premises of an end user and a Class 5 office that is or may be used for local exchange service transmissions.

and the nonpremium switched access charges, including the carrier common line ("CCL") component.⁶ Because CENTREX is line-intensive, ETM's costs therefore were higher than the costs of competing interexchange carriers ("IXCs") and competing non-CENTREX based resellers, whose customers typically subscribe to local exchange service through which they are able to access the reseller's switch.⁷ We note that in the more common resale configuration, where the non-CENTREX based reseller uses switched access furnished by the local exchange carrier to originate or terminate interstate resold traffic, the cost of the local loop utilized by the reseller's customer is borne by the reseller's customer. Thus, the cost of exchange access is borne in part by the reseller's customer, through payment of the EUCL charge, and in part by the reseller, through payment of the CCL charge and other switched access rate elements, as appropriate. In ETM's case, as stated, the defendants sought to charge ETM, as reseller, both the EUCL and the CCL charges.

4. In its complaint, ETM asked the Commission to find that defendants had unlawfully charged ETM the EUCL charge for the CENTREX service that ETM uses to resell interexchange telecommunication services. Conceding that the CCL charge might be appropriate, ETM asked that USWC be required to refund the difference between the EUCL charges that it actually paid and the CCL and relevant switched access charges that defendants allegedly should have been required to collect in lieu of the EUCL charge within the two-year statute of limitations period prior to ETM's complaint. The Common Carrier Bureau ("Bureau") denied the requested relief, holding that ETM's customers' premises were ETM's premises for purposes of determining whether ETM should be assessed the EUCL charges for interstate access.⁸ ETM argues that the Bureau erred in denying its complaint.

5. In its Order, the Bureau found that ETM's customers use CENTREX services, the local exchange switch, and other local exchange services provided under CENTREX to make and receive long distance calls.⁹ In such instances, for access charge purposes, CENTREX is treated much the same as a customer-premises PBX. The Bureau found no basis for a different rule and different rates when a reseller obtains the services for premises that the reseller designates as its own, whether in a single location or several dispersed locations. In such circumstances, the criterion for treating a "carrier" as an "end user" in Section 69.2(m) of the Commission's rules applies and the reseller is deemed an end user.¹⁰ Accordingly, the Bureau concluded that ETM

⁶ Application at 6.

⁷ Application at 2.

⁸ Bureau Order, 8 FCC Rcd at 4190.

⁹ Id. at 4188.

¹⁰ The Commission's rules contain the following definition of an "end user":

any customer of an interstate or foreign telecommunications service that is not a carrier except that ... a person or entity that offers telecommunications services

failed to establish that defendants violated Section 201(b) of the Act¹¹ by imposing EUCL charges for the CENTREX station lines at issue.¹²

III. CONTENTIONS ON REVIEW

6. ETM contends first that the Commission has no policy barring CENTREX-based resellers from requesting the relevant components of switched access service and paying the corresponding nonpremium charges for such switched access elements.¹³ ETM argues that Part 69 of the Commission's access charge rules expressly prescribes that all interexchange carriers shall pay the relevant carrier's carrier charges, unless all of a carrier's transmissions originate on the premises of the carrier.¹⁴ Second, according to ETM, the Commission has never ruled that long distance traffic originated over CENTREX lines is all "on premises" traffic like "hotel" traffic, and that, to the contrary, the Commission's rulings preclude such a finding.¹⁵ Further, ETM contends that under the proper interpretation of the ruling in CC Docket No. 86-1,¹⁶ ETM was no longer required to pay the EUCL charge; rather the appropriate charge for the access service it obtained from defendants was the CCL charge.¹⁷ Third, ETM calls into question as erroneous the Bureau's factual finding that all of ETM's resold transmissions originated on ETM's premises. ETM states that although it did not appear in the record, during part of the period covered by the complaint, ETM offered both direct connect and remote access long distance capability. In other words, a customer could, under the latter option, complete a long distance call through ETM's resold CENTREX services while at a location other than the

exclusively as a reseller shall be deemed to be an "end user" if all resale transmissions offered by such reseller originate on the premises of such reseller.

47 C.F.R. § 69.2(m).

¹¹ 47 U.S.C. § 201(b). This section states in pertinent part: "[a]ll charges, practices, classifications, regulations for and in conjunction with such [interstate or foreign tele-] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

¹² Bureau Order, 8 FCC Rcd at 4190.

¹³ Application at 2.

¹⁴ Application at 2 (citing 47 C.F.R. §§ 69.2(m), 69.5(b)). Section 69.5(b) states: "[c]arrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."

¹⁵ Application at 2-3. While ETM asserts that the Commission's "rulings" preclude the Bureau's finding, ETM cites no specific case or ruling in support of its assertion.

¹⁶ Matter of WATS-Related and Other Amendments of Part 69 of the Commission's Rules, Report and Order, CC Docket 86-1, FCC 86-115 (rel. Mar. 21, 1986).

Id.

customer's. ETM therefore argues that, as a factual matter, when such remote access capability was offered, not all resale transmissions originated exclusively on the customer's (or ETM's) premises. Fourth, ETM argues that the Bureau exceeded its delegated authority "in promulgating an expanded policy and/or new rule while preempting the Commission from adopting others."¹⁸ ETM also contends that it was prejudiced because the Bureau issued its order based on what ETM characterizes as a "legal analysis" -- the Bureau's conclusion that ETM's resold transmissions originated exclusively from ETM's own premises -- that ETM did not raise and had no opportunity to argue.

7. USWC argues that ETM's contention that the Bureau issued a decision based on a legal analysis that ETM had no opportunity to address is "in theory" well taken. USWC dismisses as "far-fetched" ETM's statement that its service configuration resembles special access more than end-user loops.¹⁹ The real thrust of ETM's argument, according to USWC, is that ETM has configured itself as an "utterly unique" creature within the FCC's regulatory structure, and seeks utterly unique regulatory treatment.²⁰ USWC contends that the cost of its CENTREX station loops is assigned for recovery through the EUCL charge and the CCL charge, and that its interstate tariffs are developed based on the assumption that full recovery for the CENTREX loops will occur by assessment of these charges. Accordingly, USWC continues to believe that the Bureau was correct in finding that the proper measure of interstate charges to be paid by ETM would be composed of both elements, the EUCL charge and the CCL charge. USWC agrees with ETM's premise that some anomalies exist with respect to the treatment of CENTREX-based resellers under the access charge structure, but suggests that these anomalies would be best addressed by initiating a rulemaking proceeding.²¹ There, a decision as to how to charge carrier common line charges properly to CENTREX-based resellers, or to treat their loops as special access service, could be made after notice and comment.²²

IV. DISCUSSION

8. The primary issue raised in the Application is whether the Bureau correctly found that ETM was an entity offering telecommunications services exclusively as a reseller originating all such resale transmissions from its premises, and thus was liable for payment of the EUCL charge. On this issue, the crux of ETM's argument is that the Bureau erroneously interpreted

¹⁸ Application at 20.

¹⁹ USWC Reply at 3.

²⁰ Id.

²¹ At least some aspects of this issue were pending in CC Docket No. 87-530, which the Commission terminated without issuing any substantive rule(s). See Matter of Amendment of Part 69 of the Commission's Rules Relating to Private Networks and Private Line Users of the Local Exchange, Notice of Proposed Rulemaking, 2 FCC Rcd 7441 (1987).

²² USWC Reply at 4.

Section 69.2(m) of the Commission's rules in finding that ETM was an entity offering telecommunications services exclusively as a reseller originating all such resale transmissions from its premises and thus was an "end user" for purposes of assessing the EUCL charge for the CENTREX station lines that ETM used to resell interstate interexchange services. ETM claims that resold transmissions using these services did not originate on its premises. USWC argues that the cost of the CENTREX station lines that are purchased by ETM and resold to its customers pass through the separations process.²³ The interstate portion of these costs is then assigned to the EUCL and CCL charges for recovery. USWC states that it developed its tariffs on the assumption that it will fully recover the interstate portion of the cost of its CENTREX station lines through payment of the EUCL and the CCL charge, as found by the Bureau. Accordingly, USWC contends that the proper measure of interstate charges to be paid by ETM consists of both the EUCL and CCL charges.

9. Section 69.2(m) states that an entity offering telecommunications services exclusively as a reseller and originating all such resale transmissions from its premises is to be treated as an end user.²⁴ We disagree that the Bureau has made an erroneous or impermissible interpretation in finding that ETM is an entity offering telecommunications services exclusively as a reseller and originating all such resale transmissions from its premises and, therefore, is an end user. ETM argues that the criterion in Section 69.2(m) for treating a "carrier" as an "end user" was included in the Commission's rules to shield entities, such as hotels, that offer telecommunications services exclusively as a reseller from their premises from payment of carrier common line charges. ETM, however, has cited no persuasive authority for the proposition that this provision is properly confined solely to resellers such as hotels. In CC Docket No. 86-1, the Commission clarified that the term "premises" in Section 69.2(m) was not to be narrowly construed.²⁵ The Commission found that the term covered the office park or campus-type locations with separated buildings of resellers such as shared tenant service providers. In so clarifying, however, the Commission did not, as ETM argues, establish any outer limits to what type of location or locations constituted a "single premises" for purposes of applying the Section

²³ The term "separations process" refers to the regulatory and accounting methodology by which the total cost of providing local exchange service is allocated between the intrastate and the interstate jurisdictions for purposes of LEC cost recovery.

²⁴ 47 C.F.R. § 69.2(m) reads:

End User means any customer of any interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an "end user" when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an "end user" if all resale transmissions offered by such reseller originate on the premises of such reseller.

²⁵ WATS-Related and Other Amendments of Part 69 of the Commission's Rules, Report and Order. CC Docket No. 86-1, FCC 86-115, 59 RR 2d 1418, 1436 (1986) ("WATS Order"). See also C.F. Communications Corp. v. Century Telephone Co. of Wisc., 8 FCC Rcd 7334, application for review denied, 10 FCC Rcd 9775 (1995).

69.2(m) reference to an entity offering telecommunications services exclusively as a reseller and originating all such resale transmissions from its premises.²⁶

10. According to the description of ETM's resale configuration appearing in the record, ETM places an order for CENTREX station lines, specifying that they are to be terminated on its customers' premises. ETM's resold interstate services are then originated or terminated over these CENTREX station lines. There is no indication in the record that ETM's customers pay USWC directly for these CENTREX station lines.

11. Given these facts, ETM is directly analogous to the hotel-type entity offering telecommunications services exclusively as a reseller and originating all such resale transmissions from its premises in the most important respect. As with the hotel, ETM, rather than the calling customer, is the entity that has a direct relationship with the LEC, and from whom it is logical to collect the EUCL charge. In the case of the hotel, it is the transiency of the hotel guest who places a call that makes it impracticable to collect the EUCL charge from the calling party. In the case of ETM, it is ETM's service configuration and the nature of its business relationships with the LEC and its own resale customers that makes collection of the EUCL from the calling party impracticable.

12. We find ETM's objection that the Bureau's decision was based on a "theory" that it had no opportunity to rebut to be without merit. In its answer, USWC asserted that it provided CENTREX service to ETM pursuant to its intrastate tariff and charged the EUCL charge pursuant to sections 69.104 (a) and (d) of the Commission's rules. Section 69.104 (a) provides that the EUCL charge shall be assessed on each line between the [CENTREX] end user's premises and a class 5 office that is, or may be, used for local exchange service transmissions.²⁷ In its initial pleadings, ETM was thus on notice that ownership of the premises was at issue and had every opportunity to address any relevant legal analysis and neglected or chose not to address the pertinent analysis of the scope of the rule at issue that was later used by the Bureau. Moreover, ETM has not attempted to rebut the Bureau's analysis in its application for review. We have rejected those arguments here.

13. ETM's argument that the Bureau Order preempts the Commission's rulemaking authority also is without merit. Our review of the record confirms that the Bureau did nothing more than apply existing precedent consistently to the specific facts and specific parties of the instant case and did not create any mandatory policy of general applicability. More importantly, CC Docket No. 87-530, the then-pending rulemaking proceeding cited by ETM as allegedly being preempted, which dealt in part with access charge treatment of CENTREX, has been terminated

²⁶ WATS Order, 59 RR 2d at 1436.

²⁷ 47 C.F.R. § 69.104 (a).

without promulgation of any substantive rules.²⁸ The Bureau's order in this case had no effect on our disposition in that docket.

14. ETM is correct in stating that the Commission has no policy barring CENTREX-based resellers from requesting the relevant components of switched access service and paying the corresponding nonpremium charges for such switched access elements. We disagree, however, with ETM's conclusion that the lack of a Commission policy barring a specific service offering requires that the Commission mandate that a LEC provide a customer with such service offering. Moreover, ETM's assertion that it had the right to request and be billed for only the non-premium CCL charges and "relevant switched access rate components"²⁹ in lieu of the EUCL charge is not relevant here because ETM's resale configuration was not composed solely of common line facilities and unbundled switched access rate elements, but rather, of CENTREX, an integral end user service configuration that ETM had adopted for originating and terminating resold long distance traffic.

V. CONCLUSION

15. For the reasons stated above, we conclude that the Bureau did not err in finding that ETM was properly assessed EUCL charges that for the CENTREX lines used in providing the resold long distance telecommunications services at issue here. We therefore deny ETM's Application for Review.

VI. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 5(c) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c) and 208, that the Application for Review filed by ETM on July 21, 1993 IS DENIED.

17. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

²⁸ Matter of Amendment of Part 69 of the Commission's Rules Relating to Private Networks and Private Line Users of the Local Exchange, Report and Order, CC Docket No. 87-530, 10 FCC Rcd 12130 (1995) (order terminating proceeding).

See Application at 23.