

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of United Telephone Company of)
Missouri's Complaint Against Southwestern Bell)
Telephone Company for Failure to Pay United Its)
Terminating Access for Cellular-Originated Calls)
Which Are Terminated in United's Territory.)
)

Case No. TC-96-112

REPORT AND ORDER

Issue Date: April 11, 1997

Effective Date: April 22, 1997

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APPEARANCES

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Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company (the "Small Telephone Company Group").

Craig S. Johnson, Andereck, Evans, Milne, Peace & Baumhoer, L.L.C., 301 East McCarty Street, Post Office Box 1438, Jefferson City, Missouri 65102-1438, for: Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial Inc., Northeast Missouri Rural Telephone Company, and Peace Valley Telephone Company (the "Mid-Missouri Group of Telephone Companies").

Thomas E. Pulliam and James F. Mauzé, Ottsen, Mauzé, Leggat & Belz, L.C., 112 South Hanley Road, St. Louis, Missouri 63105-3418, for Ameritech Mobile Communications, Inc.

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Michael F. Dandino, Senior Public Counsel, and Douglas E. Micheel, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Roger W. Steiner, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

ADMINISTRATIVE

LAW JUDGE: L. Anne Wickliffe, Deputy Chief.

REPORT AND ORDER

I. Procedural History

United Telephone Company of Missouri (United) filed a complaint against Southwestern Bell Telephone Company (SWBT) on October 10, 1995, alleging that SWBT refuses to pay terminating access charges due United for cellular-originated toll calls. SWBT filed its answer denying the allegations of the complaint on November 13, 1995. The Mid-Missouri Group of Telephone Companies (Mid Missouri Group) and the Small Telephone Company Group (STCG) were granted intervention on December 19, 1995; Ameritech

Mobile Communications, Inc. (Ameritech) was granted intervention on January 26, 1996; and AT&T Wireless Services, Inc. (AT&T Wireless) was granted participation without intervention on May 13, 1996.

The parties met in prehearing conference on May 14, 1996, and subsequently filed testimony. The Commission conducted an evidentiary hearing on May 21 and 22, 1996.

There were numerous objections to the admission of Exhibit 12, offered by SWBT at the hearing. The objections were taken under advisement, and on June 21, 1996, the Commission issued its order excluding all of Exhibit 12 excepts Tabs A and E. The Commission Staff, United, and SWBT all offered late-filed exhibits that the Commission ruled on in its Order Regarding Late-Filed Exhibits issued on July 10, 1996. The late-filed substitutions for Exhibits 18, 19, and 20 were received into the record; late-filed Exhibit 24HC was renumbered as Exhibit 39HC and received without objection; late-filed Exhibits 24, 25, 27, 28, and 29 were received without objection; objections to late-filed Exhibits 26 and 30 were overruled and these exhibits were received into the record; and objections to late-filed Exhibits 31 through 38 were sustained and these exhibits excluded from the record. All excluded exhibits were preserved in the record according to § 536.070(7), RSMo 1994.

The parties submitted initial briefs on July 15, 1996, and reply briefs on August 5, 1996.

II. Background

United filed its complaint against SWBT on October 10, 1995, alleging that SWBT refuses to pay terminating access charges due to United for cellular-originated toll calls. United argues that SWBT should pay access to United at United's tariffed access rate of approximately 13¢ per

minute for all traffic that SWBT terminates in United's exchanges. Since 1990 SWBT has been terminating cellular traffic in United exchanges and not paying United's terminating access charges. SWBT has offered United a "revenue sharing" contract option that would require United to accept less than 4¢ per minute for terminating cellular-originating traffic. United has refused to enter into the revenue sharing agreement and wants to be paid at its tariffed access rate. United alleges that SWBT's actions constitute discriminatory pricing in violation of § 392.220 because SWBT provides access to its cellular customers at rates that are substantially less than those it charges others for the same services provided over the same facilities. It is United's position that SWBT owed United approximately \$2,470,155 through December of 1995. *See* Exhibit 1, Schedule MDH-2. SWBT's witness testified that the amount was approximately \$3,200,000 (Tr. 338-39).

Although SWBT can identify whether originating traffic it carries is landline or cellular, United does not presently have the capability to identify the traffic source. Pursuant to the PTC Plan, SWBT as primary toll carrier is responsible for reporting usage. Cellular and landline traffic are terminated in exactly the same way and over the same facilities. *See* Exhibit 16, WSM SCH-2. United pays tariffed terminating access charges to other LECS when it terminates cellular traffic in their exchanges; United gets full compensation for cellular calls from everyone except SWBT.

SWBT has contracted with cellular carriers to provide end-to-end intraLATA termination at a rate of approximately \$.04/minute. United's terminating CCL charge is \$.13/minute. SWBT admitted at the hearing that SWBT provides end-to-end service to cellular carriers and has been paying

nothing to United for terminating the calls in United exchanges. SWBT also admitted that United is entitled to compensation and that SWBT has put money into a reserve fund for that purpose. However, SWBT argues that the cellular carriers are, like interexchange carriers (IXCs), United's customers for terminating access, and United should seek payment from them instead of from SWBT. SWBT also argues that United is not entitled to its full terminating access charge because its access tariff, Mo. P.S.C. No. 26, does not specifically refer to cellular traffic.

SWBT wants United to enter into a proposed "revenue sharing" agreement. United has refused the revenue sharing agreement because of the low level of compensation it would receive for termination. SWBT's proffered agreement would result in United receiving approximately 27 percent of its access revenue. Alternatively, SWBT proposed that United make its own deals with the cellular carriers. However, since the cellulars are receiving end-to-end termination, there is no incentive for them to make a separate agreement with United. United also pointed out that United is unable to segregate the cellular-originating traffic from SWBT's other traffic; only SWBT can actually identify the cellular traffic.

SWBT suggests meet point billing between United and the cellular carriers as a resolution of the problem, but witnesses for United and the STCG testified that a number of problems would have to be resolved before meet point billing could be put into effect.

The Staff of the Missouri Public Service Commission, Office of the Public Counsel, the Mid-Missouri Group of Telephone Companies, and the Small Telephone Company Group, all support United's position that SWBT should have been compensating United in accordance with its access tariff.

Ameritech Mobile Communications, Inc. and AT&T Wireless Services, Inc. concede that United should be compensated for terminating cellular traffic in its exchanges. These parties contend that SWBT has been United's customer for these services since 1990 and that the cellular providers should not be held responsible for any monies the Commission might find due to United for access charges incurred in the past.

SWBT argues that if the Commission determines United must be paid access for terminating cellular calls, the result would be discriminatory pricing by United. SWBT bases its allegation on the fact that United has entered into contracts with cellular providers in which United does not directly charge the cellular provider its tariffed access rate. United's witness, Mr. Harper, testified that the company is involved in contracts with cellular providers that are directly interconnected with United. Mr. Harper testified that under these contracts United charges a "blended rate" based on a formula that takes into account United's access rates, as well as the access rates of the other LECs where United may terminate cellular-originating calls. SWBT, for instance, has a tariffed rate for access of approximately 4 cents per minute. United compensates SWBT and other LECs for terminating cellular traffic at the LEC's tariffed access rate.

It is United's position that United sets the rates for cellular providers at a level that allows the company to recover the access charges it must pay for terminating the cellular calls in various exchanges, including its own exchanges. Mr. Harper stated that the blended rate is lower than United's tariffed access rate of approximately 13 cents per minute because charging 13 cents per minute for each termination under a cellular contract would result in United recovering far more than the

actual costs of terminating the traffic. Since access charges vary from LEC to LEC, United argues that it actually recovers the same amount of revenue in the long run that it would recover by applying its access tariff.

III. Discussion

A. Rate of Compensation for Termination of Cellular-originating Traffic

There is no dispute that since 1990 SWBT has been terminating cellular traffic in United exchanges and not paying United's terminating access charges. SWBT has offered United a "revenue sharing" contract option that would require United to accept lower access fees for cellular than landline terminating access charges, but United has refused to enter into the revenue sharing agreement. United wants to be paid at its tariffed rate. The parties agree that although SWBT can discriminate among the types of traffic it is terminating in United exchanges, United does not have the capability to do so. All parties agree that United should be compensated for the termination of this traffic. What remains in dispute is the question of the rate at which United should be compensated for the termination of cellular-originating traffic.

This Commission does not regulate cellular telecommunications rates. In this case, United is not seeking compensation for providing cellular service to end users, or for providing services to cellular providers. United seeks compensation for traffic that is terminated by SWBT in United exchanges. The traffic originates from cellular, rather than land-based lines, but is passed through to United exchanges without being identified as cellular-originating. SWBT is the only party in a

position to identify this traffic as cellular and the only party with the ability to block the termination of this traffic.

SWBT must either pay the going rate for terminating traffic in United exchanges, i.e., United's tariffed access rate, or negotiate arrangements to segregate certain traffic and apply a different rate to its termination. SWBT is not entitled to impose unilaterally upon United a lower contract rate for terminating traffic that is indistinguishable from landline-originating access traffic.

SWBT is United's customer for the termination of this cellular-originating traffic because SWBT alone has the ability to pass or to block the traffic. SWBT has offered to cellular carriers an end-to-end service at a low rate that leaves these carriers with no need to contract with United in order to terminate calls for their end-user customers. SWBT was aware of United's terminating access rates when it instituted its cellular tariff and offered service at \$.04 per minute. It is SWBT's responsibility to charge rates for its services adequate to cover its costs, and one of its costs is the access charges it must pay to terminate traffic in the exchanges of other LECs.

If meet point billing between United and the cellular carriers were to become a viable option, numerous technical problems must be overcome. Even if the problems were overcome, meet point billing only resolves the problem on a prospective basis. The issue of what SWBT should have paid United since 1990 is not affected by considerations of whether meet point billing would have been effective or could be effective in the future.

B. Discriminatory Pricing

Discriminatory pricing of telecommunications services is prohibited by § 392.220. The Commission has reviewed the record and has some concern that United could be practicing discriminatory pricing in that cellular providers with a direct contract with United may be paying a smaller portion of United's tariffed access charges than customers who are not parties to a private contract. The Commission also is concerned that SWBT may be engaged in discriminatory pricing when it provides access to its cellular customers at rates that are substantially less than those it charges others for the same services provided over the same facilities. However, the record in this case is not sufficient for the Commission to make a determination on this point. In addition, it is not clear whether the Commission would have primary jurisdiction over any dispute involving rates for carrying cellular traffic.

C. The Doctrine of Laches

SWBT argues that the doctrine of laches should apply to prevent United from recovering the compensation it seeks. There is no dispute that this situation has existed since 1990 without resolution and without United previously filing for relief. The purpose of the equitable doctrine of laches is to prevent unfairness that might result from the prosecution of stale claims. *Empiregas, Inc. of Palmyra*, 833 S.W.2d 449, 451 (Mo. App. 1992). However, laches consists of more than mere delay: the delay must be unreasonable, unexplained, and must be shown to have caused damage and prejudice. *Id.*

Setting aside for the moment the question of the reasonableness of the six-year delay, the facts fail to satisfy the requirement that the delay be unexplained and prejudicial. The testimony was that United

approached SWBT, asking for payment pursuant to its access tariff, and was refused by SWBT. The parties, however, continued over the years to discuss the issue and SWBT proposed resolution by means of a revenue sharing agreement. United's witness explained that United hoped to settle the issue with SWBT without resort to a complaint filing. SWBT has shown no facts that would support a finding of prejudice. In fact, SWBT's witness testified that the company has deposited funds during this period into a holding account in order to pay United its access fees should it be ordered to do so.

D. The Doctrine of Equitable Estoppel

SWBT argues that United's claim should be barred by the doctrine of equitable estoppel. In order for the doctrine of equitable estoppel to apply, Missouri law requires a showing of: 1) "an admission, statement, or act inconsistent with the claim asserted and sued upon"; 2) "action by the other party on the faith of such admission, statement or act"; and 3) "injury to such other party, resulting from allowing the first party to contradict or repudiate the admission, statement, or act." *Mississippi-Fox River Drainage District #2 v. Plenge*, 735 S.W.2d 748, 754 (Mo. App. 1987). SWBT attempts to invoke this doctrine by apparently relying upon its own statement to United that SWBT would not compensate United in accordance with its access tariff. SWBT has not alleged any statement or act by United upon which SWBT has relied to its detriment. SWBT's argument seems to be that United's awareness of SWBT's refusal to pay access rates and failure to file a complaint are the acts that have resulted in prejudice. But SWBT's claim must fail for lack of injury in that SWBT has kept funds available in order to pay United its access fees should it be ordered to do so.

E. Prayer for Damages

United's prayer that the Commission find that SWBT's conduct has damaged United in the amount of \$1,837,583 falls outside the Commission's jurisdiction. Although the Commission has exclusive jurisdiction to establish rates, it is an administrative body and not a court, and has no power to determine damages or award pecuniary relief. *Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666, 668-669 (Mo. 1950); *Wilshire Constr. Co. v. Union Electric Co.*, 463 S.W.2d 903, 905 (Mo. 1971).

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, finds as follows:

1. Since 1990 SWBT has been terminating cellular traffic in United exchanges and has not compensated United for terminating the traffic.
2. In the absence of some other consensual method of payment, termination of this traffic must be paid for under United's access tariff, Mo. P.S.C. No. 26.
3. United is not obligated to sign a revenue sharing agreement with SWBT, and SWBT is not relieved of its duty to pay for the termination of cellular traffic by virtue of having offered a revenue sharing agreement.
4. For the purposes of the termination of cellular traffic under SWBT's Cellular Interconnection Tariff, P.S.C. Mo. No. 40, SWBT is the customer of United.

5. The Commission will not impose meet point billing as a method of compensation for the termination of cellular traffic in United's exchanges by SWBT.
6. The doctrine of laches is inapplicable to United's claim against SWBT.
7. The doctrine of equitable estoppel is inapplicable to United's claim against SWBT.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission has jurisdiction over the operations of, and the rates charged by, United Telephone Company of Missouri and Southwestern Bell Telephone Company pursuant to Chapters 386 and 392 of the Revised Statutes of Missouri. Complaint cases are governed by § 386.390. The Commission may grant relief in a complaint case when the complainant demonstrates that the Respondent has done, or omitted to do, anything in violation of statute or Commission order.

The burden of proof is on the complainant to show that the respondent has acted, or failed to act, in violation of statute or Commission order. The Commission found that SWBT has terminated cellular originated traffic in United exchanges without compensating United for the termination and that SWBT should have compensated United in accordance with its access tariff. Accordingly, the Commission concludes that SWBT has acted in violation of Commission order and state law.

The Commission's jurisdiction is limited by statute and it does not have jurisdiction to declare and award monetary damages. ***Straube v. Bowling Green Gas Co.***, 227 S.W.2d 666 (Mo. 1950). Therefore, the

Commission concludes that it cannot declare the amount due and owing to United.

IT IS THEREFORE ORDERED:

1. That rates for traffic terminating in the exchanges of United Telephone Company of Missouri are governed by United's approved access tariff, Mo. P.S.C. No. 26.

2. That this Report And Order shall become effective on April 22, 1997.

BY THE COMMISSION



**Cecil I. Wright
Executive Secretary**

(S E A L)

Zobrist, Chm., Crumpton and Drainer, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 1994. McClure, C., absent.

Dated at Jefferson City, Missouri, on this 11th day of April, 1997.