

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Southwestern Bell Telephone)
Company's Tariff Filing to Initiate Residential) **Case No. TT-2002-472**
Customer Winback Promotion) **Tariff No. 200200831**

In the Matter of Southwestern Bell Telephone)
Company's Tariff Filing to Extend Business) **Case No. TT-2002-473**
Customer Winback Promotions) **Tariff No. 200200828**

DISSENTING OPINION OF COMMISSIONER STEVE GAW

I must respectfully dissent from the majority in this case. In a previous case I expressed uncertainty as to whether a winback tariff was on its own harmful to competition. While I still believe that efforts to bring customers back to a company may not be harmful to competition in some cases, I am concerned that the majority renders the statute against discriminating among customers virtually meaningless. §392.200 states in pertinent part:

2. No telecommunications company shall directly or indirectly or by any special rate, rebate, drawback or other device or method charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered with respect to telecommunications in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect to telecommunications under the same or substantially the same circumstances and conditions. Promotions programs for telecommunications services may be offered by telecommunications companies for periods of time so long as the offer is otherwise consistent with the provisions of this chapter and approved by the commission. Neither this subsection nor subsection 3 of this section shall be construed to prohibit an economy rate telephone service offering. This section and section 392.220 to the contrary notwithstanding, the commission is authorized to approve tariffs filed by local exchange telecommunications companies which elect to provide reduced charges for residential telecommunications connection services pursuant to the lifeline connection assistance plan as promulgated by the federal communications commission. Eligible subscribers for such connection services shall be those as defined by participating local exchange telecommunications company tariffs.

3. No telecommunications company shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever except that telecommunications messages may be classified into such classes as are just and reasonable, and different rates may be charged for the different classes of messages.
4. (1) No telecommunications company may define a telecommunications service as a different telecommunications service based on the geographic area or other market segmentation within which such telecommunications service is offered or provided, unless the telecommunications company makes application and files a tariff or tariffs which propose relief from this subsection. Any such tariff shall be subject to the provisions of sections 392.220 and 392.230 and in any hearing thereon the burden shall be on the telecommunications company to show, by clear and convincing evidence, that the definition of such service based on the geographic area or other market within which such service is offered is reasonably necessary to promote the public interest and the purposes and policies of this chapter. ...

The statute sends a clear message to the PSC. Discrimination should not be allowed unless it falls within an exception. This is a continuation of the theme, expressed in other parts of the act, that the benefits of competition should be available to everyone.

Given this, it should be the burden of the company offering a discriminatory tariff to show that its tariff meets an exception to the ban of such tariffs under §392.200. In this case the majority opinion glosses over the question of whether the tariffs are promotional programs,¹ and concludes that the burden is on complaining parties to show that the program is harmful to competition. The opinion then proceeds to discuss §392.200.3 RSMo. 2000. The opinion suggests that any promotional program is by its nature discriminatory, but that a promotional program under subsection 2 should be approved "so long as the offer is otherwise consistent with the provisions of this chapter and approved by the Commission." The test, concludes the majority, is whether SWBT tariffs give an unreasonable preference or advantage. The opinion then simply concludes that the "preferences" are not undue or unreasonable since they are similar to those used in the

¹ There is at least a question of whether a program of one year in length qualifies as "promotional", Case No. TT-97-473.

long distance market. The opinion completely ignores the difference in the development of the long distance market to the local market. It conveniently "forgets" previous findings of this Commission that the local markets while "open" to competition are not yet competitive in most areas of the state (unlike the long distance market) and need more nurturing and oversight to fully develop. This is not an apple to apples comparison. In short, the majority grinds up apples and tells us it has made orange juice.

There is no question that the proposed tariffs are discriminatory. The benefits of the tariff are available only to a particular class. SWBT's testimony reduced the statute against discrimination to the ridiculous:

Commissioner Gaw: Let me ask you this question. Do you think it would be appropriate for a telephone company to offer a particular promotional that would only apply to residents – residential users who lived in houses painted red?

Mr. Hughes: I think that would depend – and I'm trying to come up with an example for you while I'm answering this. I think that would depend, Commissioner, on whether or not there was one house painted red in the state or if we thought there was one on every block or every city or in every exchange or whatever, but – and the reason I say that is if you – if someone – here's an example of one that I don't think would be acceptable under the statute, okay, and that is in your scenario with a house that's painted red.

If there is a promotion that is defined so what I'll call narrowly that there are only a small, and when I say small, I mean a handful of customers or maybe only one customer, I think that could be something that the Commission should look at. But if it's generally available, then I'm not sure.

But, Commissioner, and I can't recall the exact citation in the statute, but there are some provisions to price below, as an example, below an exchange level as well in the statute.

So I think the statute is very broad in the guidance that it gives as far as interpretation on allowing the marketplace to work in a competitive environment. And you may be familiar – I can't right at my fingertips point to that cite in the statute, but you may be familiar with it.²

Continuing later in the testimony of Counsel:

Mr. Curtis: And I was surprised to hear you say that classes can be created on virtually any basis and discounts awarded under that statute. Is that generally what you were suggesting?

Mr. Hughes: I believe the statute is very broad, yes.

² See Volume 4 of Transcript, pages 392 and 393.

Mr. Curtis: And you maybe drew the line at customers who had red houses because there might be just a very small number of those red houses?

Mr. Hughes: That's what I stated.

Mr. Curtis: But you – if we could posit that within a – within Southwestern Bell's exchanges brick houses constitute 35 percent of the homes, that would be a large enough group that clearly a discount could be given to all Southwestern Bell customers who had brick houses, is that correct?

Mr. Hughes: That's correct.

Mr. Curtis: Okay. Let me ask this further. Could you also say that households in which you can produce one family member who has red hair would be entitled to a discount under your theory?

Mr. Hughes: I guess, theoretically only, I can do that, but – yes.

Mr. Curtis: You could do that?

Mr. Hughes: I think you could.³

By agreeing with SWBT (under SWBT's interpretation the prohibition against discrimination in telecommunications tariffs is meaningless), this Commission pronounces that Missouri law against discrimination among telecommunications customers is a mirage.

Analysis should first be made to determine whether the tariffs were truly "promotions". Although the parties did not raise this issue, I am concerned that the length of the tariffs might be too long to qualify as a promotion. If the tariffs are found to be promotions, then the company should show to the Commission that the discrimination is consistent with the purposes of the telecommunications act, including that it meets the purposes of Chapter 392 found in §392.185. No such analysis of the discrimination is made by the majority.

One company dominates the marketplace in Missouri. SWBT has 88% of the local customer business in Missouri while the remainder divides 12% among them. The exact percentages possessed by each CLEC are not yet disclosed. In this environment, by targeting CLEC customers who have left Bell, Bell is attacking a particularly vulnerable group of "niche competitors" rather than participating in healthy robust competition. If this marketplace were truly competitive, all carriers would be more likely to offer promotions

³ See Volume 4 of Transcript, pages 405 and 406.

open to everyone. Wal-Mart and Sears don't make a habit of excluding customers from their sales promotions. The availability of promotions to all customers is the kind of benefit envisioned by the 1996 Act.

This Commission has an obligation to promote the growth of competition in this state until a different direction is provided by the Legislature. It is unclear today that the grand experiment of 1996 will succeed. Recent financial failings of major telecommunication companies and continued dominance of local market shares by incumbents certainly do not give confidence. However, until that different direction is given, the Commission must nurture the development of competition and ensure that all receive its benefits. That means that a discriminatory tariff must be found not to create undue or unreasonable advantage or preference. A promotion that is inconsistent with the purpose and intent of the Act, should not be allowed. In this case the waiver of the reconnection fee is not much of a concern and in fact, approval after proper and thorough analysis might be appropriate. But I must dissent from a broad order that gives no analysis as to whether these tariffs are healthy for the local telecommunications markets, places no burden on the company to demonstrate the same, and provides little protection for consumers from discriminatory calling plans in a fragile and underdeveloped state of competition. Our policies should encourage pricing plans that offer reduced rates for everyone. That is the spirit of competition promoted in the Telecommunications Act, but that is not the spirit of the majority opinion.

Respectfully submitted,



Steve Gaw, Commissioner

Dated at Jefferson City, Missouri,
on this 11th day of December, 2002.