

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

RLO Binder

Tel-Central of Jefferson City, Missouri, Inc.,)	
)	
Complainant,)	
)	
vs.)	<u>CASE NO. TC-88-42</u>
)	
United Telephone Company of Missouri,)	
)	
Respondent.)	

APPEARANCES: William M. Barvick, Attorney at Law, 231 Madison Street,
Jefferson City, Missouri 65101, for Tel-Central of
Jefferson City, Missouri, Inc.

David K. Knowles, General Attorney and Denton C. Roberts,
Attorney at Law, 5454 West 110th Street, Overland Park,
Kansas 66211, for United Telephone Company of Missouri.

REPORT AND ORDER

Procedural History

On September 4, 1987, Tel-Central of Jefferson City, Missouri, Inc.,
(hereafter Tel-Central or Complainant) filed a complaint against United Telephone
Company of Missouri (hereafter United or Respondent). The crux of Tel-Central's
allegation is that United improperly back-billed Tel-Central for five months of
intrastate out-WATS usage which Complainant alleges it either did not incur, or had
already paid for.

Complainant also alleges that United's April 7, 1987, termination of its
WATS service for nonpayment was improper because all WATS service was cutoff (not
just certain lines incurring the disputed usage), and that insufficient notice was
given under what Tel-Central alleges to be the applicable tariff.

Petitioner's inter and intrastate WATS service was restored on June 19, 1987, after a cash payment to Respondent and the posting of a letter of credit to cover, in part, payment of other disputed charges.

The case was setover to December 5, 6 and 7, 1988, at which time the matter was heard. The parties filed simultaneous initial and reply briefs. On February 10, 1989, this matter was submitted on the record. Tel-Central did not waive the reading of the transcript.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact:

The Complainant, Tel-Central of Jefferson City, Missouri, is a duly certificated provider of intrastate long distance telephone service. Respondent United Telephone Company of Missouri is certificated to provide local exchange and intrastate long distance service. Tel-Central is a customer of United, purchasing an array of services including local exchange service, Feature Group A, B, D and T-1 services and, the subject of this proceeding, intrastate WATS service.

From June, 1984 through February 1986, Complainant paid approximately \$630,000.00 to Respondent for twenty-five, more or less, leased intrastate WATS lines. By letter dated March 17, 1986, United sent back bills to Tel-Central for out-WATS usage which United claims Tel-Central incurred but which (for reasons addressed infra) United failed to discover until long after the normal billing cycle.

"Special bills" (back bills) which were sent to Complainant show the following:

SPECIAL BILLS TO COMPLAINANT

<u>Periods Claimed by United (Use claimed but not Originally Billed)</u>	<u>Initial Date of Special Bill</u>	<u>Amount Claimed</u>
August, 1984-----	March 17, 1986 (Bill: M 3-81)	\$ 837.97
October, 1985----- (WATS line 160-7090)	March 17, 1986 (Bill: M 3-81)	
July, 1985----- August, 1985 September, 1985 (WATS Lines) (160-8116) (160-8138) (160-8194)	March 17, 1986 (Bill No. M-3-22)	\$35,061.38
	Total Claimed	<u>\$35,899.35</u>

After United's delivery of the special bills the parties began and continued an extended exchange of letters and telephone calls regarding not only the instant billing dispute but other disputes as well, references to which are contained in the testimony, several exhibits and in the initial pleadings.

Although the Commission will not address the merits of these ancillary disputes, the record in this case shows that Tel-Central and United have long been in conflict over the accuracy and applicability of various rates and charges. The record further reveals that both parties customarily discussed the merits of disputed charges and on occasion reached accord regarding same. The Commission encourages resolution of billing disputes between telecommunication providers by agreement. Tel-Central has elected to proceed by complaint and by so doing assumes the burden of proof and the risk of nonpersuasion.

In orders dated October 21, 1987 and August 9, 1988, the Commission stated the issues in this matter to be: (1) whether the Respondent properly charged Complainant \$35,899.35 for intrastate WATS service; (2) whether the Respondent properly notified Complainant of its intent to terminate service; and (3) whether Respondent properly terminated Complainant's service. The first issue before the

Commission is whether Complainant has shown that United's late billed charges are improper or unlawful. To decide if Complainant has met this burden, it is necessary to examine the billing process itself.

1. HAS PETITIONER SHOWN THE LATE-BILLED CHARGES ARE IMPROPER?

(a) The Mechanics of Measuring and Billing

Complainant's WATS bills from United were generated monthly. Excepting certain fixed charges, the amounts of the bills depend on amounts of use. Line use is measured in minutes and grouped per time of day. United and Tel-Central had in place their own electronic devices, called switches, for measuring WATS line use. Tel-Central's switch essentially measured billable minutes-of-use by a clock which started measuring anytime a WATS line was used. If the line was still in use after 53 seconds, Tel-Central assumed a connection had been made, and the customer had received an answer.

United used an "answer detect" switch, one whose billing clock was activated by the voice of an answering party. To differentiate these switches, Tel-Central's device can be characterized as a "billable minutes" switch; United's as an "actual minutes" switch. The differences between the two are such that neither Complainant nor Respondent expected their respective monthly usage totals to match. The evidence indicates that a billable minutes switch will usually generate a higher recorded line usage than a switch measuring actual minutes. Tel-Central's witness testified that an acceptable industry standard for estimating this difference was 20 percent, viz., that a billable minute switch might aggregate totals up to 20 percent in excess of a voice-activated switch. Notwithstanding this norm, Tel-Central's witness averred that on most monthly WATS billings, United showed line usage "a little bit higher" than did Tel-Central.

Inasmuch as United's monthly minutes-of-use totals were often slightly higher than Tel-Central's, when one might expect them to be as much as 20 percent lower per the industry standard above-mentioned, it is doubtful that this dispute has

its genesis in the different billing clocks used by Tel-Central and United. No evidence was adduced by either party regarding tests for accuracy or calibration of either device. Nor does the record contain evidence that United's device recorded far too much line use in the disputed five months, or that Tel-Central's switch under-recorded line use in that period. In the absence of such evidence, the Commission finds that each recording switch was working properly, albeit recording slightly different events.

United adduced evidence showing that as their Jefferson City switch recorded Tel-Central's intrastate WATS usage it stored same on magnetic tape. The tapes were sent frequently (sometimes daily) to Respondent's Kansas office and were used to generate a monthly summary of Tel-Central's WATS usage, both intra and interstate. The print-out of these summaries, kept on microfiche, are called Tip 933 reports, a large number of which were admitted into evidence. The Tip 933 summaries do not show or contain charges for line usage; they show only line use. A software "TSO" program was then used to convert the time data in the Tip 933 reports into categories necessary for billing, inter and intraLATA, by WATS number(s), and by other factors. The TSO program generated a report which Respondent sent monthly to the Southwestern Bell Telephone Company (hereafter SWB). SWB employees manually inserted these summaries into SWB's data base to determine charges for WATS use under the applicable tariffs and time-of-use. United did not calculate the actual monthly WATS charges for Tel-Central's line use, although they could apparently do so on a limited, manual, basis. SWB made these calculations based on United's reports of Tel-Central's line use; SWB then sent a monthly report back to United called a WATS Settlement Report. The WATS Settlement not only indicated total customer per-line WATS charges but attributed same to either the AT&T, SWB or United Network. On receipt of each monthly WATS Settlement, United manually inserted the data into another data base for computerized billing. The bills were then mailed to its WATS

customers, including Tel-Central. A large number of WATS Settlements were received in evidence to show Tel-Central's WATS account in the months in question.

Significant to the resolution of this complaint is the fact that SWB, not United, computed Tel-Central's WATS charges based on United's recorded line usage. The back bills sent to Tel-Central as well as to other WATS customers were apparently sent as a result of SWB's discovery that some of the line usage attributable to Tel-Central and others was not properly, or fully, reflected by SWB's WATS Settlements. Respondent's position, vis-a-vis SWB, is that: (1) Respondent accurately recorded Tel-Central's WATS per-line usage; (2) Respondent supplied all WATS usage by Tel-Central to SWB each month; (3) SWB rendered some of Tel-Central's monthly usage figures improperly in that SWB failed to count all of Tel-Central's usage given to it by United; (4) Respondent has never claimed any incremental or additional line usage by Tel-Central to account for the back billings. The billings, per Respondent, were for line use originally incurred in the disputed months and never paid for.

Tel-Central contends that it either never incurred the usage or was being billed for usage already paid for. Respondent's detailed line-usage exhibits, WATS settlements and testimony introduced suggests otherwise. One of Respondent's witnesses testified that she found no instances of double-billing, an assertion not contravened by Tel-Central.

Complainant's Exhibit 8 is a traffic study of line use in the months disputed. The Commission finds that the line study carries little weight on the issue of Tel-Central's actual line use.

United avers that Tel-Central, although given opportunities prior to this proceeding, did not audit United's Tip-933 summaries or the monthly WATS settlements from SWB. Referring to the period before this complaint was filed, Tel-Central's witness was asked on direct examination whether United supplied additional information (other than the special bills) to "explain their position". Referring to

the WATS settlement reports, the witness replied "They supplied several stacks of paper that they claimed to be an explanation."

Respondent's witnesses testified that Tel-Central was never "double-billed", that is, billed for the same line use more than once. Nor can the Commission find any creditable evidence that Tel-Central was double-billed. United claims that its recording apparatus, its "switch", cannot record line use unless line use occurs, an assertion which Tel-Central fails to rebut by exhibits or testimony. Although the record in this case is voluminous, it reveals very little of SWB's critical role in determining how much Tel-Central was supposed to pay United for its nondisputed WATS line usage. The record fails to reveal why SWB did not compute charges for all of Tel-Central's WATS line use in the disputed five-month period.

Having considered the evidence regarding back-billed charges, the Commission determines that Tel-Central has not met its burden of proof on this issue. The Complainant has not offered evidence sufficiently probative for the Commission to find in its favor. Tel-Central's evidence on its line-use is neither persuasive nor substantial. It is not supported by a line-by-line, period-by-period analysis of actual recorded usage. United's evidence regarding Tel-Central's line use is more specific and detailed. The billing component of this dispute arises from a belated application of tariff charges to Tel-Central's line use by SWB, not by United. The record is silent on why it took SWB such a long time to attribute charges to Tel-Central's reported usage. SWB was not made a party to this proceeding; nor was discovery sought from SWB.

Lacking evidence on how SWB calculated Tel-Central's charges, and lacking substantial and probative evidence on Tel-Central's line usage, the Commission cannot determine whether Tel-Central was overcharged or not. Complainant has, therefore, failed to prove its allegation that Respondent improperly back-billed Complainant as alleged in its complaint.

(b) The Propriety of Back-Billing

United's first "special bill" was for usage allegedly incurred in August, 1984. Tel-Central was not billed for this usage until March, 1986, nearly 19 months later. United's other back bills were sent five and eight months after the alleged line-use.

Although the Commission cannot find in Complainant's favor on its present allegation of overcharges, the Commission questions whether United or SWB or any telecommunications provider should be permitted to demand payment for services allegedly rendered 18 months before billing. While currently approved tariffs permit such back-billing, and authorize the disconnection of service if a disputed back-bill is not paid, the Commission does not condone an unreasonable application of tariff provisions. Prospectively, the Commission may consider altering telecommunication tariffs by rule or on a case-by-case basis to provide a cut-off period, or time beyond which back-bills cannot be sent. Without such a change, and failing a reasonable tariff interpretation by each provider, there appears to be virtually no limit on how far back a telecommunications provider can go in assessing additional or incremental charges.

In an evolving telecommunications market, one distinguished by technological advances and emerging competition, telecommunication providers should be both able and willing to promptly render bills for services.

2. HAS PETITIONER SHOWN THAT RESPONDENT'S NOTICE TO TERMINATE SERVICE WAS UNLAWFUL OR IMPROPER?

The remaining questions for Commission determination are whether United properly advised Tel-Central of its intent to terminate service and whether United properly terminated such service. The resolution of these questions require an analysis of two tariffs, the first being United's General Access Tariff. (Exhibit 46).

Tel-Central asserts it is this tariff, which contains United's obligations to a broad class of customers, which controls. The access tariff requires, inter-alia, that United give a customer 30 days written notice to disconnect for nonpayment.

United claims that the disconnect policy in the SWB WATS tariff, in which United concurred, applies. The SWB tariff, titled "Schedule of Rates for Wide Area Telecommunications Service" provides at Section 2.7 for the disconnection of WATS service for nonpayment on five(5) days written notice.

The record reveals that Tel-Central received at least six (6) days written notice, but not the longer notice required by United's general access tariff.

The Commission finds that of the two, the SWB WATS tariff is the more specific and relates more closely to the issue at hand than does United's General Access Tariff. WATS use and billing between telecommunication providers is a specialized undertaking.

Notwithstanding the applicability of the SWB tariff, the Commission notes that the parties spent over a year arguing about this, and other, billing disputes. Tel-Central twice presented checks to United with restrictive endorsements, to "finish" all pending disputes by paying, according to United, less than the sum(s) due. United returned the checks. The Commission finds in the parties' previous dealings evidence that Tel-Central had actual notice that its WATS service was in peril.

3. HAS PETITIONER SHOWN THAT RESPONDENT'S DISCONNECTION OF ITS SERVICE WAS IMPROPER?

The final question before the Commission is whether Tel-Central's service was "properly terminated". Tel-Central asserts that it was improper for United to disconnect all WATS service, since the billing dispute concerned only a few OUT-WATS lines. The record shows that United's notice to disconnect speaks to "WATS service", not just certain WATS lines. The long exchange of correspondence between the

parties, while identifying individual WATS lines, did so to specify which lines incurred usage, not which lines were at risk of being disconnected. It is unreasonable to interpret this correspondence as a promise that only certain lines might, at some future point, be disconnected. Were it otherwise, and only certain lines could be disconnected, Complainant (or anyone similarly situated) could simply reprogram its WATS system to "skip" the disconnected lines, and continue its WATS operations indefinitely with the lines remaining.

The Commission finds that the Complainant has failed to sustain its burden of proof on the questions of tariff applicability and whether the disconnection of Tel-Central's WATS service was proper.

Conclusions of Law

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

Complainant Tel-Central of Jefferson City, Missouri, Inc., is a Missouri corporation duly certificated by this Commission to provide intrastate long distance telephone service.

Respondent United Telephone Company of Missouri is a Missouri corporation duly certificated by this Commission to provide local telephone exchange service and intrastate long distance service.

The Commission has jurisdiction to entertain this complaint by virtue of Section 386.330, RSMo 1988.

Tel-Central, as the moving party, has the burden of proof and assumes the risk of nonpersuasion.

Respondent United, is required by Section 392.200, RSMo 1986 to collect the duly approved tariff rates for service incurred.

Complainant Tel-Central has failed to meet its burden of proof in that Tel-Central did not adduce sufficient evidence on the amount of its actual intrastate

OUT-WATS line usage incurred, or the charges therefor, in the five (5) month period under consideration.

The Commission further concludes that Respondent's termination of Petitioner's WATS service for nonpayment was made pursuant to the proper tariff. The Southwestern Bell Telephone Company WATS tariff, P.S.C. Mo. No. 27, in which Respondent concurred, more specifically addresses the rights and obligations of WATS providers and customers than does Respondent's general access tariff. In any event, the record supports a conclusion that Tel-Central had actual notice of the billing dispute and the possible result if Tel-Central refused payment.

The Commission further concludes that it was not unlawful under the WATS tariff for United to disconnect all WATS lines being used by Tel-Central. To decide otherwise, especially when only four or five of Tel-Central's twenty-five lines incurred the disputed usage, would defeat the purpose of a disconnect, permit continued use of services dedicated to the public without recompense and discourage the resolution of billing disputes.

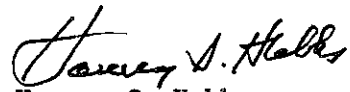
For the reasons set out in the Findings of Fact, in these conclusions, and pursuant to Section 386.330(3), RSMo 1988, the Commission has determined the complaint should be dismissed.

It is, therefore,

ORDERED: 1. That the Complaint filed by Tel-Central of Jefferson City, Missouri, Inc., on September 4, 1987, against United Telephone Company of Missouri be, and hereby is, dismissed.

ORDERED: 2. That this Report and Order shall become effective on the 12th day of June, 1989.

BY THE COMMISSION


Harvey G. Hubbs
Secretary

(S E A L)

Steinmeier, Chm., Mueller, Hendren,
and Fischer, CC., Concur. Certify
compliance with the provisions of
Section 536.080, RSMo, 1986.
Rauch, C., Absent.

Dated at Jefferson City, Missouri,
this 12th day of May, 1989.