11-90

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In Re: The matter of Southwestern Bell Telephone)
Company's Proposed Radio common carrier tariff.) CASE NO. TR-90-144

APPEARANCES: Joseph F. Jedlicka, III, and Paula J. Fulks, Attorneys at Law, 100 North Tucker Boulevard, Room 630, St. Louis, Missouri 63101-1976, for Southwestern Bell Telephone Company.

Richard S. Brownlee, III, Attorney at Law, Hendren and Andrae, 235 East High Street, Jefferson City, Missouri 65102, for CyberTel Cellular Telephone Company.

James F. Mauze', Attorney at Law, Moline, Ottsen, Mauze', Leggat and Shostak, 11 South Meremac, Suite 1010, St. Louis, Missouri 63105, and Karen K. Shinevar, Attorney at Law, 1250 Connecticut Avenue, N.W., Suite 401, Washington, D.C. 20036, for McCaw Cellular Communications, Inc.

Paul A. Boudreau, Attorney at Law, Hawkins, Brydon, Swearengen & England, P.C., 312 East Capitol Avenue, Jefferson City, Missouri 65102-0456, for Contel Cellular Inc., and Mid-Missouri Cellular.

Joni K. Ott, Regulatory Attorney, 100 South Fourth Street, Suite 1200, St. Louis, Missouri 63102, for MCI Telecommunications Corporation.

William M. Barvick, Attorney at Law, 231 Madison Street, Suite 301, Jefferson City, Missouri 65101, for MC Cellular Corporation and Missouri Cellular Association.

Lewis R. Mills, Jr., First Assistant Public Counsel, P. O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

Robert J. Hack, Assistant General Counsel, P. O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Hearing Examiner: Michael F. Pfaff

REPORT AND ORDER

Procedural History

On January 10, 1990, Southwestern Bell Telephone Company (Company or SWB) submitted a proposed tariff applicable to radio common carriers (RCCs) and their interconnections to Company's network. SWB requested an effective date of January 19, 1990 for the tariff designated P.S.C. Mo. No. 39. SWB's proposed tariff would replace in its entirety SWB's existing RCC tariff, in effect since January 1, 1984, as later modified by Case No. TR-86-158 and TR-89-14.

Timely motions to suspend the proposed tariff were filed by CyberTel Cellular Telephone Company (CyberTel), MC Cellular Corporation and Missouri Cellular Association (MC and Mo. Cellular), and Missouri RSA No. 7 Limited Partnership, d/b/a Mid-Missouri Cellular (Mid-Mo Cellular). The Commission issued its order on January 23, 1990, suspending SWB's tariff and establishing an intervention deadline and preliminary procedural schedule. The Commission subsequently suspended the tariff for an additional six months, to the present operation of law date of December 1, 1990.

Interventions were granted to the Missouri Cellular Association, MC Cellular Corporation, CyberTel, MCI Telecommunications, Inc., (MCI), McCaw Cellular Communications, Inc., (McCaw), Contel Cellular and Mid-Missouri Cellular.

Hearings were conducted on the 27th and 28th of August, 1990. The participating parties did not waive the reading of the transcript. Witnesses for the following parties made evidentiary presentations: SWB, McCaw, CyberTel, and the Commission Staff.

Initial and reply briefs were filed by SWB, McCaw, MC and Mo. Cellular, (joint brief), and CyberTel. Mid-Mo Cellular and Contel Cellular filed only an initial brief. MCI, the Office of the Public Counsel and the Commission Staff filed neither an initial nor a reply brief.

Findings of Fact

Introduction

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

At issue in this case is whether SWB's proposed RCC tariff is just and reasonable pursuant to Sections 392.200, 392.220 and 392.230, RSMo. (Supp. 1989). SWB, McCaw and the Commission Staff support the proposed tariff. CyberTel, MC Cellular, the Missouri Cellular Association and Mid-Missouri Cellular oppose it. The Office of the Public Counsel and MCI either take no position on the issues therein outlined, or have reserved a statement of their position. Of the six issues listed in the Hearing Memorandum, Contel Cellular and Mid-Missouri Cellular take positions contrary to the Company on the questions of an appropriate calling scope and rate center for RCCs and the proper rate level for RCC interconnection.

RCC interconnections to SWB's network are presently governed by a tariff approved in 1984, in Cases No. TR-83-253 and TR-83-288, as later modified by Case Nos. TR-86-158 and TR-89-14. The rates now in effect require a flat monthly charge for interconnection and for an RCC's use of dedicated telephone numbers from SWB.

The evidence in this case establishes, and the Commission finds, that under the existing rate structure RCCs are securing interconnection services from SWB for cellular mobile service at less than cost. The proposed tariff will also determine interconnection charges for paging companies. The Commission finds that SWB's proposal will result in generally lower costs to paging companies than under the existing tariff.

The issues in this case are very similar to issues raised in Commission Case No. TC-86-158[1], a docket which combined SWB's then proposed RCC tariff and complaint actions by CyberTel and Midwest Cellular.

The RCC specific cost study ordered in the aforementioned case was completed in January, 1989. The Commission Staff, CyberTel, McCaw and SWB Mobile Systems participated in the study. SWB now advances it to support part of its proposed RCC tariff.

As noted, the issues in this case are largely the same as in Case No. TC-86-158. One exception is the effect the proposed tariff may have on Missouri's emerging rural cellular network, a subject discussed infra.

In condensed form, the issues as stated in the Hearing Memorandum are:

1. At what level, and under what rate structure and principle should RCC interconnections be priced?

2. Is SWB's definition of calling scope and rate center appropriate for RCCs?

3. Should RCCs be reimbursed, or have an option for same, for terminating SWB's land to mobile calls?

4. Does SWB's RCC specific cost study comply with the Commission's previous orders?

Notwithstanding that the first three issues are similar to those previously decided, the Commission is not strictly bound by the principles of stare decisis, res judicata or collateral estoppel. *State ex rel. Churchill Truck Lines, Inc., v.*

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[1]CyberTel Cellular Telephone Company, Complainant, vs. Southwestern Bell Telephone Company, Respondent.

Midwest Cellular Telephone Company, Complainant, vs. Southwestern Bell Telephone Company, Respondent.

In the matter of the application of Southwestern Bell Telephone Company for approval of a new Radio Common Carrier Interconnection Service Tariff. *29 Mo. P.S.C. (N.S.) 202.* Commission Case Nos. TC-86-158, TC-87-39 and TR-87-58, consolidated as Case No. TC-86-158.

Public Service Commission of the State Of Missouri, 734 S.W.2d 586, 593 (Mo. App. W.D. 1987). The Commission therefore rejects SWB's assertion that "the law of the case" applies to this proceeding. Nor is there a sufficient identity of parties or issues to invoke the doctrine; thus, the Commission's past rulings do not mandate a specific result in this case. However, given the Commission's past order that SWB perform an RCC-specific cost study, and, according to SWB, McCaw and Staff, SWB's compliance with that order and proper use of the study in this case, the Commission cannot consider every issue herein as if encountering it for the first time.

Three of the four issues above-stated derive solely from the proposed tariff. The last issue, regarding the RCC-specific cost study, requires an examination of the cost study and the Commission's past orders regarding same. Thus, the proposed tariff charges, classifications, and arguments in connection therewith provide a ready framework for the consideration of the issues, as well as demonstrating the structure of the tariff itself.

SWB's proposed tariff governs the cost and manner in which RCCs "interconnect" to SWB's "land-based" system. Mobile or cellular telephones, whether used to receive or initiate calls, operate only on radio waves. SWB's system operates primarily over wire networks, a land-based technology. Interconnection describes the mechanism by which vehicular radio messages can be sent to a telephone on "land", and by which a land generated message can be sent to a cellular or mobile telephone. The owner of a mobile telephone cannot contact a SWB customer on "land" without some kind of interconnection to SWB's system; neither can a SWB customer contact a mobile phone subscriber absent an interconnection. Company's proposed tariff seeks compensation from the RCCs for their use of, and interconnection with, SWB's wire network.

SWB's proposed tariff makes available, at different rates, three types of RCC interconnection, Type 1, Type 2A and Type 2B. Regardless of the interconnection type chosen, there are only four possible general categories of calls. These are:

(1) calling from a mobile phone to a land phone inside the "local calling scope" - Company proposes usage sensitive rate per RCC cost specific study;

(2) Calling from a mobile to a land phone <u>outside</u> the local calling scope - Company proposes same switched access charges that interexchange carriers pay;

(3) calling from a land to a mobile phone <u>inside</u> the local calling scope - Company proposes flat rate call, same as general tariff; and

(4) calling from a land to a mobile phone <u>outside</u> the local calling scope - Company proposes land customer pay toll charges.

Interconnection is not generally required for mobile-to-mobile calling. As a result, and because the Commission has no jurisdiction over such calling, SWB's tariff does not address mobile-to-mobile calling.

Four of the five primary charges to RCCs in SWB's proposed tariff are shown above. The fifth, which is not contested, involves SWB's nonrecurring charge to RCCs for their use of dedicated telephone number groups. In Case No. TC-86-158, the Commission faulted SWB for, inter alia, employing a recurring monthly charge for numbers. By this filing, SWB has complied with the Commission's previous order. The specific features of the types of interconnection in SWB's proposed tariff which require charges to RCCs are as follows:

A. <u>Mobile To Land Calling Inside The Local Calling Scope.</u>

SWB's proposed rate for this aspect of RCC interconnection is supported, in part, by the Commission ordered RCC specific cost study in Case No. TC-86-158. As shown below, SWB now proposes a different rate for each type of interconnection.[2] The rates below displayed also separate usage and facility rates, a change prompted during this proceeding by CyberTel.

Mileage Band	Proposed Usage Rate	Proposed Facility Rate	Proposed Combined Rate
		TYPE 1	
0-1	$0.0172	$0.0028	$0.02
Over 1-25	0.0222	0.0028	0.025
Over 25-50	0.0272	0.0028	0.03
Over 50+	0.0372	0.0028	0.04
		TYPE 2A	
0-1	$0.014	$0.002	$0.016
Over 1-25	0.016	0.002	0.018
Over 25-50	0.018	0.002	0.02
Over 50+	0.023	0.002	0.025
		TYPE 2B	
	$0.01	NA	$0.01

Except for Type 2B, the rates above shown contain usage sensitive and distance factors as well as levels of contribution ranging from 8.5 to 28.2 percent. CyberTel and Missouri Cellular maintain that there should be no contribution in rates to RCCs. CyberTel's witness also stated that the contribution levels were higher than 8.5 to 28.2 percent. The Commission finds that the range of contribution in this section of SWB's tariff is as claimed by SWB and the Commission Staff. The range is 8.5 percent to 28.2 percent. CyberTel and Missouri Cellular hold that SWB's rate should recover only its proven costs and authorized rate of return. They claim, in effect, that RCCs either provide "basic service" or that RCC interconnections are "basic service" under the Commission decision *In the matter of the cost of service*

[2] Source: Rebuttal Schedule No. 1, SWB witness Bailey.

study of Southwestern Bell Telephone Company, 21 Mo. P.S.C. (N.S.) 397, (May 27, 1977) in Commission Case No. 18,309.

The Commission finds that RCCs do not provide basic service. Basic service is that class of residential and business services which has been priced at residual levels to assure availability and promote universal service. SWB's local loop exists primarily to serve this market. Additional services, such as customer owned coin telephones, shared tenant services, and interconnections for mobile telephones and interexchange carriers are not basic service. Instead, providers of these services resell basic service and need access to the local loop to do so. Local exchange companies such as SWB are the only providers of basic local service.

The Commission also finds that a local exchange company's interconnections with RCCs are not basic services. The Commission's expressed policy in Case No. 18,309, to keep basic business and residential telephone service priced at a residual level, has direct application to RCCs. As purveyors of nonbasic service, they must contribute to the common and shared costs of SWB.

Except McCaw, the RCCs fault SWB's cost study because it failed to study any aspect of land to mobile calling. In its Order Denying Applications For Rehearing in Case No. TC-86-158, issued on May 17, 1988, (not reported) the Commission reaffirmed its previously stated position that SWB did not have to compensate RCCs for terminating SWB's calls on an RCC's mobile system. As a result, the Commission saw no need for SWB to study that aspect of land to mobile calling.

Nor did the Commission require the Company to study RCC-specific costs associated with mobile to land calling outside SWB's local calling scope (LCS). In Case No. TC-86-158 the Commission determined that toll charges were an appropriate way to rate such calls; as a result, a cost study was not needed. As shown infra, SWB now proposes access charges[3] for mobile to land calling outside the local calling scope, instead of toll charges.

CyberTel's mobile to land calling in the St. Louis LCS accounts for nearly 95 percent of its use of SWB's network. This suggests that the study focused on a significant aspect of RCC traffic. The usage sensitive part of SWB's proposed rate would cost CyberTel 1.8 cents a minute. CyberTel's customer charge is 50 cents a minute, a factor which the Commission has considered in weighing CyberTel's claim that the proposed tariff will inhibit RCC development by adversely affecting rates.

CyberTel and the Missouri Cellular Association also criticize SWB's cost study because it failed to include rural service areas (RSAs). SWB and McCaw claim otherwise, stating that the study used data available at the time, which included some elements of non-urban calling. The Commission finds that Missouri's RSAs were not sufficiently developed at the time of SWB's study to comprise a meaningful component thereof. The evidence in this proceeding clearly points to an emerging rural cellular network. Nevertheless, rural cellular service has yet to come to most of Missouri. The larger question is whether the proposed tariff is inimical to the development of Missouri's rural cellular industry, a point addressed infra.

Regarding SWB's RCC cost specific study, the Commission finds that it complies with the Commission's order in Case No. TC-86-158. The study cannot be expected to include rural RCC rate data which did not then exist and which, as the instant record discloses, does not yet exist.

The question of what comprises a local calling scope (LCS), and whether it is appropriate for SWB to rate any RCC interconnections on the basis of an LCS, was before the Commission in the preceding case. The Commission then found that toll

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[3]All following references to "access rates" or "access charges" refer to SWB's current intrastate switched access service tariff.

charges were proper when RCC calls traveled from an end office in one SWB exchange to an end office in a different exchange.

Excepting McCaw, the RCCs in this case uniformly object to the use of SWB's local calling scope to rate, or price, any interconnection with SWB. The RCCs aver that the cellular geographic service area (CGSA), secured from the Federal Communications Commission (FCC), should define an RCC's local calling scope, not one of SWB's exchanges or end offices. The statewide rural service areas (RSAs) recently awarded to various RCCs illustrate the calling scope issue. RSAs typically embrace larger geographic areas than metropolitan service areas (MSAs) and often cross LATA boundaries. For example, RSA Number 514, while centering in Jefferson City, Missouri, overlaps all of Missouri's LATAs. RSA Number 522, in southeastern Missouri, covers all or a portion of 40 counties and up to 30 SWB exchanges. Each such area, according to all cellular intervenors except McCaw, should be their "local calling scope" within which their customers should be permitted to call or be called without paying full access or toll charges.

The Commission does not agree. CGSAs, MSAs and RSAs are creations of the FCC. By so doing, the FCC has not determined whether any communities of interest exist within either an MSA or an RSA. Nor has the FCC determined how RCCs should compensate local exchange carriers for interconnection. This function has been expressly reserved for the states. *Indianapolis Telephone Company v. Indiana Bell Telephone Company*, File No. E-85-5, Memorandum Opinion And Order at Sections 5-7 (May 18, 1987).

The Commission finds that SWB's definition of local calling scope and rate center in Section 4.2 of its proposed tariff is an appropriate mechanism by which to charge RCCs for their use of SWB's system. The fact that MSAs and RSAs embrace a much larger service area than local exchanges does not justify eliminating the local exchange as a rating center. To do so only for RCC interconnection could create a favored class of caller, one who could make and receive long distance calls at less than either toll or access rates which now apply to land to land calling.

The calling scope issue has been considerably affected by this Commission's approval and implementation of extended area service (EAS), community optional service (COS) and other company-specific extra-exchange dialing plans. Flat-rate calling across metropolitan exchange boundaries, or an option to do so, is becoming the rule rather than the exception. The RCCs and their subscribers have benefitted from no-toll calling from the outset; they will continue to do so as the Commission processes hundreds of pending COS applications, most of which come from Missouri's non-urban areas. As a result, the expressed concerns of the cellular carriers regarding SWB's "restrictive" local calling scope is overstated. The advent of flat-rate extra-exchange dialing has, in a manner of speaking, dramatically increased the "scope" of a significant number of SWB's end offices. With every such increase, RCCs and their subscribers benefit in the same manner as do customers without cellular telephones.

B. Mobile To Land Calling Outside The Local Calling Scope.

In Case No. TC-86-158 the Commission, although disapproving SWB's tariff, stated that this type of call could properly be rated as a toll call. By now proposing to apply the generally less expensive access rate, SWB treats RCC interexchange traffic in the same manner, and under the same tariff, as traffic generated by interexchange and local exchange carriers.

As noted, the objecting RCCs do not want to pay any access (or toll) charge which arises from SWB's definition of local calling scope. The Commission has addressed this subject, *supra*. Some of the cellular carriers also object to paying contribution in the form of carrier common line (CCL), which is one component of SWB's access charge. RCCs view this component of the access charge as an unnecessary subsidy to maintain basic service. The Commission Staff and McCaw feel otherwise, and support the full application of SWB's access tariff to RCCs, which initiate calls to SWB's system in the same manner as interexchange carriers. The Commission finds that eliminating CCL for RCCs, while preserving it for interexchange and local exchange carriers, would unfairly discriminate against the latter and, depending on what RCCs may elect to charge subscribers, could create a favored class among those initiating long distance calls. By proposing to rate this specie of call in the same manner as an interexchange call, SWB does, as the RCC's allege, ignore the fact that such calls are, or could be, made from an automobile. It is this aspect of SWB's proposed tariff which seems to aggravate the RCCs the most; the failure to recognize the "mobile" aspect of the RCCs collective enterprise.

The Commission finds that SWB's tariff is specifically designed for RCCs; it prices and makes available three types of RCC interconnection, with separate tariff charges for each. SWB is under no mandate to devise an RCC tariff which gives full credence to the RCC's position that "mobile" calling is fundamentally or generically different than non-mobile calling. Nor should SWB propose an RCC rate which requires less contribution than is required from interexchange or local exchange interconnection.

CyberTel objects to paying contribution only to the extent it fails to tie to SWB's "actual costs". The Commission has spoken on this subject above, and in Case No. TC-86-158; no new or different evidence has been adduced in this case to warrant a different view. RCCs are as responsible for the CCL component of the access charge as an interexchange carrier.

C. Land to Mobile Calling - Inside Local Calling Scope:

SWB proposes to rate these calls, which presently account for a small but growing percentage of cellular traffic, on a flat-rate basis for Type 1, 2A and 2B connections. The RCC's actual rate would be less than SWB's local measured service rate. Intervenors CyberTel, Mid-Missouri Cellular and the Missouri Cellular

Association take issue with this aspect of SWB's proposal. Each feels that SWB should reimburse them, or provide a credit or other option for terminating SWB's traffic on the cellular mobile system. McCaw and the Commission Staff support the proposed tariff; Contel Cellular, Public Counsel and MCI take no position on the question of payment to RCCs for terminating traffic. Again, this is an issue which the Commission addressed in the preceding case. The Commission finds that no evidence has been adduced in this case to support a finding that SWB should pay or give credits to RCCs for terminating land generated traffic. RCCs are not co-carriers, and do not qualify for payments by SWB. The benefits to an RCC for terminating traffic from SWB outweigh, in the Commission's view, the benefits to SWB. In addition, SWB's added costs would either be absorbed by SWB or be surcharged to those SWB customers who use the RCC network, a possible inhibiting influence on cellular use. The Commission, therefore, finds this issue in favor of SWB.

D. Land To Mobile Calling Outside Local Calling Scope.

SWB proposes that all calling in this category be rated as toll traffic. With the exception of McCaw, the RCCs again object to SWB's use of a local calling scope to determine toll charges. The Commission's findings regarding LCS in A, supra, also apply here; SWB's definition and use of the LCS for rating purposes is just and reasonable. As structured, the proposed tariff imposes the same toll rate on a land to mobile call as a land to land call outside the LCS. To do otherwise would discriminate in favor of the cellular user and, over time, may adversely affect land to land toll rates. These are distance sensitive rates, and depend not on the location of a cellular telephone but on the distance between the RCCs chosen rating center and the land exchange from which the call is made. As a result, the toll charge is determined by the distance it travels over SWB's network. The RCCs instead propose that calls within their CGSAs be toll free, an assertion which the Commission has addressed, supra.

CyberTel proposes a tariff design which would give CyberTel an option to pay access charges on land to mobile calling. CyberTel proposes that it should have an "option" to pay cost-based access charges (without CCL) on these calls rather than SWB charging toll to the land user. Other than noting that the "option" is dependent on CyberTel's system and the area to be served, the Commission finds little in CyberTel's proposal to specify when, and under what circumstances, CyberTel proposes to pay access charges in lieu of SWB's customers paying toll.

Toll charges for this class of call are $0.19 a minute; originating access charges are $0.026 a minute. SWB would lose revenue under CyberTel's proposal, but CyberTel claims that less expensive rates will "stimulate" land to mobile calling to the point where SWB will not suffer unduly. The Commission finds that, per SWB's evidence, the "stimulation" required would be an unlikely 630 percent increase over the present use in this type of originating land to mobile calling. Nor is there any guarantee, unless it springs from the nature of competition itself, that a lower rate to CyberTel will translate into a lower rate for CyberTel's subscribers. CyberTel's proposal is self-serving, and transparently so. The Commission finds this issue in favor of SWB.

The Commission also finds that pursuant to SWB's sworn statements herein, SWB will neither propose nor support any increase in Type 1, Type 2 or Type 2B radio common carrier interconnection rates for a period of thirty-six (36) months from the effective date of this Report and Order.

The Commission finds that SWB has discharged its burden to establish that the proposed tariff is just and reasonable pursuant to the statutes above cited.

Conclusions of Law

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

Southwestern Bell Telephone Company is a telephone corporation subject to the jurisdiction of this Commission pursuant to Chapters 386 and 392, RSMo Supp. 1989.

Pursuant to Section 392.200, RSMo (Supp. 1989), every telecommunications company shall furnish such instrumentalities and facilities as shall be adequate and it shall not make or give an undue or unreasonable preference to any corporation or subject any corporation to an undue or unnecessary prejudice in any respect.

Pursuant to Section 392.220, RSMo (Supp. 1989), no telecommunications company shall charge a different compensation for any service rendered than the charge appropriate to such service as specified in its schedule on file and in effect at that time.

Pursuant to Section 392.230 (6), RSMo (Supp. 1989), the burden of proof to show the reasonableness of the proposed increase in Southwestern Bell Telephone Company's RCC interconnection rate is on Southwestern Bell Telephone Company.

The Commission, having made findings of fact in support of SWB's proposed tariff, hereby concludes that SWB has discharged its burden of proof as required by law, and that the rates, charges and classifications contained in SWB's proposed RCC interconnection tariff are, pursuant to the statutes above cited, just and reasonable.

IT IS THEREFORE ORDERED:

1. That the proposed radio common carrier tariff submitted by Southwestern Bell Telephone Company is hereby rejected and Southwestern Bell Telephone Company is authorized to file in lieu thereof tariffs which reflect the findings and conclusions in this Report and Order, including the proposed terminating usage rates as shown on Schedule No. 1, rebuttal testimony of W. Bailey, and at page 7 of this Report and Order. That said tariff will be approved for service rendered on and after December 1, 1990.

2. That this Report and Order shall become effective on December 3, 1990.

BY THE COMMISSION

Brent Stewart DR

Brent Stewart
Interim Executive Secretary

(S E A L)

Steinmeier, Chm., Mueller, Rauch,
McClure and Letsch-Roderique, CC.,
and certify compliance with the
provisions of Section 536.080,
RSMo 1986.

Dated at Jefferson City, Missouri,
on this 21st day of November, 1990.