

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Southwestern Bell Telephone Company,)	
)	
Complainant,)	
)	
v.)	
)	<u>Case No. TC-90-65</u>
Hillsboro Answering Service,)	
)	
Respondent.)	
)	

APPEARANCES: Roger K. Toppins, Attorney, Southwestern Bell Telephone Company, 100 North Tucker Boulevard, Room 630, St. Louis, Missouri 63101-1976, for Southwestern Bell Telephone Company.

Richard S. Brownlee, III, Hendren and Andrae, Post Office Box 1069, Jefferson City, Missouri 65102, for Hillsboro Answering Service.

Penny G. Baker, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

HEARING

EXAMINER: Alisa M. Dotson.

REPORT AND ORDER

On September 20, 1989, Southwestern Bell Telephone Company (Complainant) filed a complaint alleging that Hillsboro Answering Service (Respondent) is providing interexchange telecommunications services and reselling Complainant's telecommunication services in violation of Complainant's tariffs and the laws of Missouri. Complainant seeks to have Respondent, if it continues in the activities as alleged, become certified and compensate Complainant through access charges.

On October 27, 1989, Respondent filed its answer to the complaint in which it generally denied Complainant's allegations and asked the Commission to dismiss the complaint. On November 17, 1989, the Commission issued an order setting a hearing and establishing a procedural schedule. On March 21, 1990, the parties filed a joint "Stipulation of Record and Briefing Schedule" submitting the case for decision upon

prefiled testimony, data requests and Respondent witness William P. Outten's deposition. Briefs were filed according to a briefing schedule by Complainant, Respondent and the Commission Staff.

The parties offered exhibits 1-13 in their stipulation and the Commission hereby accepts said exhibits into the record.

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.

Complainant is a Missouri corporation duly authorized to provide telecommunications service within the state of Missouri. Complainant is subject to the Commission's jurisdiction pursuant to Chapters 386 and 392, R.S.Mo. 1986. Respondent is a Missouri corporation, with its principal office in Otto, Missouri.

The subject of the complaint is Respondent's "conferencing service". The parties agree that Staff witness John Van Eschen's description of this service is technically accurate. It is as follows:

If a caller wants to reach a St. Louis number, the caller dials (314) 942-3144 to reach Hillsboro Answering Service's equipment located at 5438 Highway 21 (rear), in Southwestern Bell's Antonia telephone exchange. The caller will then hear a one second beep and can then, using a touch tone phone, dial a distinctive six-digit account code. The caller will hear an acknowledgement tone of four beeps which signals the caller to dial the number that the caller wants to reach. As a slight alternative, after hearing the one second beep, the caller can also dial "O" or simply wait a few seconds to be connected with a Hillsboro attendant.

After the caller has reached Hillsboro Answering Service's equipment, dialed their own account code, and then dialed the called number, Hillsboro Answering Service will activate Southwestern Bell's Three-Way Calling Service. Either Hillsboro Answering Service's equipment or a Hillsboro Answering Service attendant will follow the procedures for activating Three-Way Calling as described in Southwestern Bell's white pages. Hillsboro Answering Service will have to go on-hook for one second, which places the caller on hold. In turn, Southwestern Bell will emit three

rapid tones followed by a dial tone. After receiving these tones, Hillsboro Answering Service will then dial the called number using Southwestern Bell's Special Option Local Metropolitan Exchange Service. Hillsboro Answering Service will go on-hook again to add the original caller and thus establish the conference call.

Van Eschen also described how Respondent uses Complainant's Special Optional Local Metropolitan Exchange Service. This service allows subscribers to pay an optional flat monthly rate for the ability to make an unlimited amount of calls into the St. Louis metropolitan area. Respondent subscribes to this service from the Antonia exchange. Once callers reach Respondent, they can be connected to parties in the St. Louis metropolitan area on the Special Optional Local Metropolitan Exchange Service lines subscribed to by Respondent.

Respondent witness Outten testified it has eight lines and can handle 1500 calls per day. It charges its 500 customers three cents per minute. They are billed each time they accumulate 300 minutes of calling. If Respondent's "conferencing service" was not available, its customers, generally in the Hillsboro, Herculanum, Pevely and Cedar Hill exchanges, would have to reach parties in St. Louis by using the toll service of either Complainant or an interexchange telecommunications company/reseller offering originating toll service from Hillsboro. That interexchange company/reseller would compensate Complainant through payment of access charges. Hillsboro, Herculanum, Pevely and Cedar Hill exchanges all have extended area service into Antonia, and, therefore, callers in these exchanges do not have to pay toll charges to call into the Antonia exchange.

Respondent does not take messages for its customers and is only offering live-person answering service on what it termed an "experimental basis." Respondent does not advertise itself to be a traditional answering service. Its advertisements do not describe or even mention its experimental, live-person answering service. It does not advertise its service as a conference service. It makes no mention of the word "conferencing" or "conference" calls in its promotion, but, instead, advertises

itself to be a "new low cost telephone service to and from St. Louis." Its rates are three cents per minute compared to Complainant's rate of 48 cents for the first minute and 27 cents for every additional minute.

Complainant contends because of the nature of Respondent's service, Respondent is obligated to: (1) obtain a certificate of interexchange authority, and (2) compensate Complainant for the resale of its Three-Way Calling and Special Optional Local Exchange Service features and use of its facilities.

Complainant contends Section 392.410 and Section 392.440, R.S.Mo. 1986, require Respondent to become certificated. Section 392.410 requires an interexchange telecommunications service to obtain a certificate of interexchange authority from the Commission. Section 386.020(19) defines "interexchange telecommunications service" as "telecommunications service between points in two or more exchanges." Telecommunications service is defined by Section 386.020(41)¹ as "the transmission of information by wire. . . ." Complainant argued the Respondent facilitated the transmission of information by wire between exchanges by its "conferencing service."

Respondent contended it does not complete interexchange calls, therefore, it is not an interexchange telecommunications company. Respondent also argued it is not required to become certificated because it is an "answering service" and answering services are exempted from regulatory oversight under Section 386.020(41). Respondent argued it uses Complainant's calling features in the same manner as thousands of other subscribers. It argued Complainant does not have tariffs nor program its network to prohibit its subscribers from using Complainant's calling features to complete interexchange calls.

¹HB 1315, effective July 10, 1990, changes this citation to Section 386.020(44).

The Commission notes while Respondent may not, technically, complete interexchange calls, it certainly enables callers to make interexchange calls by using its facilities to connect with Complainant's facilities. It is Respondent's provision of access to Complainant's facilities that is the pivotal point. By connecting callers to Complainant's facilities, Respondent moves from a user/subscriber of Complainant's Three-Way Calling and Special Optional Local Metropolitan exchange to a provider of a service that enables callers to make interexchange calls. That Respondent charges for this service makes it a reseller.

The Commission is not persuaded by Respondent's argument it is exempted by Section 386.020(41). In the Commission's opinion, the statute exempts the particular "service" of answering phones. It does not exempt the company that offers such a service from regulation for other services. The statute uses the word "service" as a focus on a particular activity of a company. The particular activity at issue here is Respondent's connection of callers to Complainant's facilities through what it calls a conferencing service. The nature of the Respondent's service is the focus of analysis not what it calls itself or any "answering service" Respondent may or may not provide. Moreover, Respondent has admitted to not having traditional answering services. Outten admitted Respondent refuses to take messages and only is "experimenting" with live person answering services.

The Commission finds that Respondent's arguments seek to raise form over substance and would create statutory exceptions to Commission regulation based on semantics alone. Such an effort cannot be countenanced.

The Commission finds Respondent provides interexchange telecommunications services as defined by Section 386.020(19) and is a reseller of telecommunications service as defined by 392.440, RSMo Supp. 1989.

Complainant also argued Respondent should be required to become certificated because it is a reseller under Section 392.440, RSMo Supp. 1989. This

section requires any telecommunications company offering or providing the resale of either local exchange or interexchange telecommunications service must first obtain a certificate of service authority. Section 386.020(33) defines resale of telecommunications service of providing services primarily through the use of services or facilities owned by a separate telecommunications company. It argued that under this section Respondent is reselling telecommunication services, namely Complainant's Three-Way Calling and Special Optional Local Metropolitan exchange to the general public. Complainant asserted that the fact that Respondent charges callers for use of the calling features constitutes resale.

Respondent contended it is not a reseller. It maintained that its callers are members. Respondent contended its members are authorized users of the services it subscribes to from Complainant. Respondent argued that Complainant's tariffs define a subscriber as the subscriber himself, his family, employees or "authorized users." Therefore, Respondent's members use the calling feature as "authorized users," and this activity cannot constitute reselling, according to Respondent.

The service offered by Respondent is available by a combination of its own facilities and facilities leased from Complainant. Respondent leases facilities from Complainant on a flat-rate monthly basis and in turn sells them to callers for their use on a per minute basis. Respondent offers use of Complainant's facilities to anyone who gives it their name, address and telephone number, in other words, to any member of the general public.

For these reasons, the Commission finds Respondent is a reseller under Section 392.440, RSMo Supp. 1989. Based on its findings that Respondent is a provider of interexchange telecommunications services and a reseller of telecommunications services, the Commission has determined Respondent must obtain a certificate of authority in order to provide service.

As a regulated provider of telecommunications services, Respondent would be subject to Commission oversight to ensure the provision of adequate service at a reasonable charge in a nondiscriminatory manner. In this case, Commission oversight may be particularly crucial because there have been complaints regarding Respondent's service and billing practices. The Commission should be available as a forum for persons with complaints about Respondent's service.

Complainant also argued that Respondent should compensate it for the use of its facilities through access charges. Staff witness Van Eschen and Complainant's witness Rudloff cited Commission cases that require interLATA and intraLATA interexchange toll carriers to pay access charges for use of services or facilities provided by local exchange companies. Respondent denied the resale of Complainant's calling features or that Complainant is entitled to further compensation for the use of its facilities and, therefore, asserted it had no obligation to pay access charges. In In the Matter of the Filing by Southwestern Bell Telephone Company of New Intrastate Tariffs, Rates, Tolls and Charges Applicable to Intrastate Telecommunications Services Furnished with the State of Missouri, 26 Mo. P.S.C. (N.S.) 344 (1983), this Commission approved the implementation of Complainant's access tariff as the method by which interexchange telecommunications companies should compensate Complainant for the use of Complainant's facilities. Based on the Commission's finding that Respondent is an interexchange telecommunications company who uses Complainant's facilities, the Commission determines it must compensate Complainant for use of its facilities through access charges.

Conclusions of Law

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

The Commission has jurisdiction over the complaint pursuant to Section 386.390 and 386.400, RSMo 1986. Section 386.390 allows a complaint to be made by a

corporation or person that sets forth "any act to be done or any act committed by a corporation or person violating any rule or order or decision of the Commission." Section 386.400 states "any corporation, person or public utility has the right to complain on any of the grounds which are allowed to be filed by other persons."

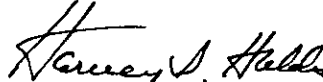
The Complainant based its assertion that Respondent should be required to obtain a certificate of authority and pay it access charges on its allegations that Respondent was a provider of interexchange telecommunications service, a reseller of services owned and controlled by Complainant and a user of facilities owned and controlled by Complainant. The Commission found that Respondent's activity in connecting almost any caller to Complainant's facilities to make interexchange calls through services purchased from Complainant and charging for the service constituted the provision of interexchange telecommunications service and reselling of Complainant's services. The Commission determined Respondent should obtain a certificate of authority and pay Complainant access charges. Therefore, the Commission concludes that Respondent must cease and desist all operation until it obtains a certificate and pay access charges.

IT IS THEREFORE ORDERED:

1. That the complaint filed herein on September 20, 1989 is sustained.
2. That Hillsboro Answering Service cease and desist providing service until it has been granted a certificate of authority by this Commission.
3. That, as discussed herein, Hillsboro Answering Service, if and when it receives a certificate of authority from the Commission, compensate Southwestern Bell Telephone Company for the resale of its services and use of its facilities through access charges and any other applicable tariffs.

4. That this Report and Order shall become effective on the 20th day of July, 1990.

BY THE COMMISSION


Harvey G. Hubbs
Secretary

(S E A L)

Steinmeier, Chm., Mueller, Rauch,
McClure and Letsch-Roderique, CC., Concur.

Dated at Jefferson City, Missouri,
on this 18th day of July, 1990.