

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held at its office in Jefferson City
on the 1st day of November, 1996

In the Matter of Southwestern Bell Telephone)
Company's Tariff Designed to Add a) Case No. TT-96-247
Usage-Sensitive Billing Option)
for Auto Redial and Call Return.)

ORDER APPROVING USAGE-SENSITIVE BILLING OPTION TARIFF

Procedural History On January 17, 1996, Southwestern Bell Telephone Company (SWBT) submitted proposed tariff sheets to add an automatic usage-sensitive billing rate for two optional features. These features are Auto Redial and Call Return. The proposed tariff sheets reflected an effective date of March 1, 1996. SWBT requested expedited approval effective February 21, 1996, and this case was docketed to address that request. On February 2, 1996, the Office of the Public Counsel (Public Counsel) filed a Motion To Suspend.

On February 21, 1996, the Telecommunications Department Staff of the Public Service Commission (Staff) filed its memorandum in which it recommended the Commission suspend the proposed tariff. The Commission suspended the tariff sheets, tariff file no. 9600446, for a period of 120 days, until June 29, 1996. The Commission also scheduled a prehearing conference for this case for March 19, 1996, and established a deadline for applications to intervene of not later than March 18, 1996. No applications to intervene were received and the prehearing conference was convened on March 19, 1996.

On May 16, 1996, SWBT, Public Counsel and the Staff jointly filed a document captioned "Stipulation Of Facts." The parties used this filing to set forth the facts to this case. The parties further made it clear that the facts surrounding this case were undisputed and that the disposition of this case would be dependent upon the resolution of certain legal issues. On June 4, 1996, the Commission issued an Order Regarding Case Status which inquired as to the purpose of the "Stipulation Of Facts." This order directed the parties to file with the Commission a statement as to the posture of this case and a proposed procedural schedule for the resolution of this case not later than June 14, 1996.

On June 11, 1996, the parties filed a document captioned "Status Of Case And Proposed Briefing Schedule" in which the parties advised the Commission that they did not believe a hearing would be necessary in this docket. The parties suggested that the evidentiary record was complete with the filing of the Stipulation Of Facts on May 16, 1996, and the parties would be prepared to argue this case on briefs in lieu of having the Commission convene an evidentiary hearing. Inasmuch as the original Order Suspending Tariff provided for a suspension of the effective date until June 29, 1996 and in light of the fact that the parties' proposed briefing schedule provided for briefs to be filed as late as July 3, 1996, , 1996, issued an Order Further Suspending Tariff in this case. That order invoked the additional suspension as provided for in Section 392.230(3) and extended this tariff for an additional six months such that the effective date was extended from June 29, 1996 to December 29, 1996. Pursuant to the proposed procedural schedule, the parties to this case filed initial briefs on June 19, 1996, and with the filing of the initial briefs, all parties waived the necessity of filing a reply brief in this case.

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.

Pursuant to the Stipulation Of Facts provided by the parties and the Commission's review of the entirety of the record, the Commission finds that the services to be made universally available by SWBT to its customers are Call Return and Auto Redial.

Call Return

Call Return is an existing SWBT service which allows a subscriber to dial *69 to return the last incoming call which that subscriber received. If the number to which the subscriber is trying to return a call is busy, this feature continues redialing that telephone number for a maximum of 30 minutes. When the number is free, the customer's telephone will ring with a distinctive ring. If a customer wishes to deactivate this service until further notice, the customer may do so by dialing *89. Under the current tariff for Call Return service, SWBT customers may subscribe to Call Return and will pay a flat monthly rate of \$3.50 for residential service and \$4 for business service.

The suspended tariff which was filed in this case proposes a new billing option which would allow customers the option of being charged on a per-activation basis. Each time a customer activated the Call Return function, that customer would be charged a \$.50 charge; providing, however, that the maximum a customer may be charged for this service is \$4 per month as a cap on the per-activation charges.

If a customer does not want this service to remain activated on a particular access line, that customer may contact SWBT to request that the Call Return service be removed. SWBT will neither charge to remove the service from a customer's access line, nor charge to initially add it to all customers' lines. SWBT has alleged that the charges for the Call Return service exceed its incremental costs.

In its February 2, 1996 Motion To Suspend, the Public Counsel voiced its concern as to whether the present blocking system for Caller ID would work on the Call Return system. Public Counsel has asserted that blocking is necessary to assure protection from unwanted return calls. SWBT responded to that question in the first instance by making clear the fact that Call Return is an existing tariffed service which is already available to SWBT customers pursuant to PSC approval. The tariff filing in this case would merely offer an alternative billing option for the preexisting service.

As to the technology question raised, SWBT made clear that although blocking would not prevent the customer from being able to call back the last number dialed, no information would be passed to the customer activating the Call Return services. In other words, Call Return technology stores only the telephone number of the last incoming call and provides no specific information directly to the Call Return customer. However, SWBT did stipulate that a Call Return customer could receive information about the calling party if the call returned generated a toll charge wherein the phone number called would be reflected on the calling party's telephone bill at the end of the next billing cycle. In any service where call detail is available, the customer may later see the telephone number of the calling person when Call Return is activated on the call detail page. These services include Local Measured Service, Metropolitan Calling Area, Out-State Calling Area, Maximizer 800, Home 800, and Plexar Station Message Detail Recording.

SWBT noted in the Stipulation Of Facts that for certain types of switches software is available which would recognize calls as "private" where customers have dialed *67 prior to placing their call. With this technology the Call Return customer is not able to return the call of the party dialing *67 but would be routed to a recorded announcement. However, SWBT has not purchased the software activation nor paid the right-to-use charges to the switch vendors which would allow the central office switches to recognize calls that have been marked private (*67). Therefore, callers (including nonpublished and nonlisted) that act by dialing *67 cannot prevent the Call Return customer from dialing *69 and calling back the customer who originally placed the call. In order to implement this technology, 126 central offices would have to be updated and SWBT would have to pay right-to-use charges to switch vendors at an approximate cost of \$1.1 million.

Auto Redial

The second dialing feature proposed by this tariff is the Auto Redial feature. This, too, is an existing SWBT service which is offered under a tariff previously approved by the PSC. Auto Redial is an existing service which allows a subscriber to redial automatically the last telephone number that the subscriber dialed by dialing *66. Whether the customer accesses this service by paying a flat monthly rate or by using it on a per-activation basis (pursuant to this proposed tariff), Auto Redial will continue redialing the last telephone number dialed for up to 30 minutes. If the line becomes free, the caller will be notified by a distinctive ring.

Again, this feature may be deactivated by the customer by dialing *86. Under the currently effective tariffs, subscribers pay a flat monthly rate of \$3 for residential use and \$4 for business use.

The suspended tariff in this case would introduce a new billing option for Auto Redial which would allow customers the option of being charged on a per-activation basis. The suspended tariff filing makes no other changes to the existing service. The billing change would bill customer a \$.50 charge per activation, with a maximum monthly fee of \$4 as the cap on per-activation usage. SWBT has asserted that the charge for Auto Redial exceeds its incremental costs.

As with Call Return, SWBT proposes to equip each SWBT access telephone line with the technical capability and the ability for the customer to activate Auto Redial at no installation charge to the customer. If a customer does not want a particular access line to remain equipped with the technical capability to activate Auto Redial, that the Auto Redial service be removed. Customers will neither be charged when SWBT equips its customer telephone lines to access this service, nor be charged in the event a customer contacts SWBT to request that a service be removed.

Customer Notice

Prior to the promotion of these two new billing option services, customers will be advised via a bill message that the Call Return and Auto Redial features have been added to their residential and business lines alike, and that they will have the ability to use Call Return and Auto Redial without charge for 30 days. Customers who already subscribe to the flat-rated monthly service will not be included in the promotion. A second customer notification will be sent via bill message during the month of free promotion informing customers that the free promotional service period will end at the end of the month and that customers will be charged for all future activations of the Call Return and Auto Redial service. SWBT provided the Commission a copy of the proposed bill messages.

SWBT also indicated its intent to revise its directories to include wording which would explain Call Return and Auto Redial. SWBT has made it clear that it will emphasize in its notices and advertisements for Auto Redial that the customer will not be charged if the customer uses an auto redial button on the customer's telephone which is designed to provide this same service by virtue of the customer's own equipment.

Staff has agreed that the bill messages proposed by SWBT and the directory wording are sufficient to protect consumers. Staff no longer opposed the tariff as of the filing of the Stipulation Of Facts on May 16, 1996.

Privacy Consideration

Public Counsel continues to oppose the approval of this tariff for numerous reasons. Public Counsel first notes that pursuant to this tariff the monopoly customers are forced to have their telephone readied for instantaneous use of custom calling features even if the customer may have the capability to have the services removed, it does fall upon the customer to take that action in order to eliminate the services and to keep visitors, family or others from activating the service and incurring charges. Inasmuch as this may constitute a negative option contract, it is opposed by the Public Counsel.

As a second consideration, the Public Counsel opposes the tariff as an invasion of privacy. Public Counsel argues that the Call Return service does not respect any customer blocking of the calling number. The Call Return feature is designed to call back the caller's number even if the number had been designated private or anonymous by per-line or per-call blocking. In spite of per-line blocking, used by law enforcement agencies, domestic abuse shelters and their employees, customers may receive returned calls by virtue of an approval of this tariff. In addition, the actual number may be transmitted for certain returned toll calls or other services where the subscriber receives a call detail. Public Counsel emphasized that the call blocking system specifically designed to provide privacy and protection is compromised by the unblocked Call Return feature.

Moreover, Public Counsel cites *In re Rules and Policies Regarding Caller Number Identification Service--Caller ID*, CC Docket No. 91-281, where the Federal Communications Commission (FCC) issued an order on May 5, 1995, providing that automatic call return must be disabled whenever a caller requests privacy. The FCC, on October 30, 1995 and upon the

application of certain local exchange companies, delayed the effectiveness of the blocking as applied to Call Return until January 1, 1997. However, the FCC also made it clear that it was not preempting any local jurisdiction from requiring return call blocking prior to that date. Public Counsel asserts that the public has a reasonable expectation that dialing *67 will provide privacy. Public Counsel argues that this tariff defeats and compromises that rec Counsel argues that the Commission should direct SWBT to activate blocking of Call Return as a condition of the approval of this tariff.

The Commission finds that the proposed tariff changes are pricing modifications to a preexisting service and as such, the proposed tariff does not raise privacy or security concerns which have not previously been addressed by this Commission. The Staff recognized this in its brief, stating that the Commission had already addressed this issue in its Report And Order in *In re Southwestern Bell Tel. Co. Tariff Introducing "Caller ID Service," a New Service*, 2 MPSC3d 125 (1993). Staff has accurately noted that the Commission's reasoning in that case applies equally to the facts of this case, which involves a service which has been offered for approximately six years. Staff also notes in its brief that the record does not reflect any complaints or problems over privacy concerns with Call Return during this period.

Negative Option Contract Issue

On March 19, 1996 at the prehearing conference, the Administrative Law Judge (ALJ) to whom this case is assigned raised the Commission's concern as to whether the proposed service might constitute a negative option contract. At that time the ALJ identified Section 407.200, R.S. Mo. (1994), which states that where unsolicited merchandise is delivered to the person for whom it is intended, such person has a right to deem it to be a gift. Both the statute and the Code of State Regulations (15 CSR 60-8.060) regard services as "merchandise." The Commission raised this issue *sua sponte* and posed the question as to whether this service would constitute a negative option contract. If so, does Commission approval of the tariff supersede the prohibitions found in Chapter 407? It is well known and often stated that once approved by the Commission, a tariff becomes state law. See *Southwestern Bell Yellow Pages, Inc. v. Wilkins*, 920 S.W.2d 544 (Mo. App. E.D. 1996).

In response to th parties briefed the negative option issue in their initial briefs. SWBT has stated that its proposed billing options for Call Return and Auto Redial do not constitute negative option contracts. SWBT notes that it will not bill a customer for unsolicited service under the proposed tariff. Rather, SWBT will merely equip a customer's line with the technical capability to allow that customer to use these services (Auto Redial and Call Return). The customer will receive no telecommunications service nor will the customer be charged unless and until the customer makes a decision to activate the service by dialing *66 or *69. SWBT likens this to the provision of operator service or any toll service wherein the service is available, and the customer is billed only if the customer chooses to use the particular service.

Public Counsel has stated that it does not oppose offering customers a choice of billing options, but it does object to the manner in which the tariff would allow SWBT to deploy these services in the homes and businesses of its customers. Public Counsel notes that the automatic deployment of these services shifts the burden to the customer and requires the customer to take some action to disconnect or deactivate an unwanted service. Public Counsel recognizes this automatic deployment as a variation on the negative option sale. Public Counsel asserts that it may lack ". . . the sinister edge of the pure negative option sale. However, it does have many of the features of that prohibited marketing and sales scheme which violate public policy."

Staff addressed this issue by noting that a negative option contract is one in which the offeror so frames the offer to indicate that the silence of the offeree will constitute an acceptance of the terms of the contract. A familiar example of failed attempts at negative option contracts in the utility environment are those proposed by a number of telephone companies upon the deregulation of inside wire maintenance services. See, *ell Tel. and Tel. Co.*, 755 F. Supp. 1532, 1533-34 (S.D. Fla. 1991); *Mountain States Tel. and Tel. Co. v. District Court*, 778 P.2d 667, 668-70 (Colo. 1989); *Sollenbarger v. Mountain States Tel. and Tel. Co.*, 121 F.R.D. 417, 420-21, 432 (D.N.M. 1988). These cases involved notices sent to customers by the telephone companies stating that the companies would continue to maintain the customers' inside wire,

and charge the customers, unless the customers notified the company otherwise. The courts uniformly held that the customers were not bound to such a negative option.

Staff accurately states that SWBT's tariff is not a negative option contract but rather a standing offer to all of its local exchange customers to provide certain services upon the customer's demand. The billing option at issue provides that the customer may accept the offer by the act of dialing a specified three-key sequence. Staff argues and the Commission agrees that each act of dialing a three-key sequence is a separate decision to incur an additional \$.50 charge until and unless the customer reaches the monthly cap. The form of SWBT's offer of services in this instance is no more objectionable than the terms of the offer of interLATA interexchange service or for the provision of directory information services. Each of these services is provided when the customer dials the appropriate key sequence. The Commission finds that the proposed billing options set forth in the tariff sheets not constitute a negative option contract. SWBT's customers must accept and use the service by undertaking an affirmative act, and will not be billed until that affirmative act is completed.

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

The Commission concludes that the manner in which SWBT proposes to offer the two specific telecommunications services by virtue of this tariff is neither a negative option contract, nor a violation of the provisions of Missouri's Merchandising Practices Act as set out in Section 407.200, R.S. Mo. (1994).

The Commission has jurisdiction over the applicant pursuant to Section 386.010, and the applicant is a public utility subject to Commission jurisdiction pursuant to the provisions of Chapters 386 and 392.

The Commission concludes that these findings of fact are based on competent and substantial evidence that the proposed services and billing arrangements approved by this order are just and reasonable.

IT IS THEREFORE ORDERED:

1. That the tariff filing in this case, file no. 9600446, as submitted by Southwestern Bell Telephone Company is approved for service on and after November 1, 1996.
2. That this order shall become effective on November 1, 1996.

BY THE COMMISSION

Cecil I. Wright
Executive Secretary

(S E A L)

Zobrist, Chm., McClure, Kincheloe,
Crumpton and Drainer, CC., concur.
ALJ: Roberts