

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Delta Phones, Inc.,)	
)	
Complainant,)	
)	
v.)	Case No. TC-2004-0064
)	
Southwestern Bell Telephone Company, L.P.,)	
d/b/a Southwestern Bell Telephone Company,)	
)	
Respondent.)	

**SBC MISSOURI'S RESPONSE IN OPPOSITION TO MOTION
FOR ISSUANCE OF AMENDED NOTICE OF COMPLAINT**

COMES NOW Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (SBC Missouri), and for its Response In Opposition to Delta Phones, Inc.'s (Delta's) Motion for Issuance of Amended Notice of Complaint, states to the Missouri Public Service Commission (Commission) as follows:

1. Delta filed its Complaint in this case on July 25, 2003. In a nutshell, Delta's Complaint is nothing more than an attempt by Delta to continue its chronic and unjustified practice of failing to make payments to SBC Missouri as required by the Commission-approved interconnection agreement between SBC Missouri and Delta. As of the date of Delta's Complaint, Delta owes SBC Missouri over \$1.3 million, and Delta has stopped paying SBC Missouri anything for the unbundled network elements (UNEs) and resold services SBC Missouri is continuing, for the time being, to provide to Delta.

2. In its Complaint, Delta alleged various billing errors relating to SBC Missouri's provision of resold services and UNEs to Delta. Delta did not seek any immediate relief, or ask the Commission to act on an expedited basis, regarding the billing disputes it alleges in its

Complaint. On July 28, 2003, the Commission issued its standard Notice of Complaint, directing SBC Missouri to file a response to Delta's Complaint within 30 days (i.e., on or before August 27, 2003).

3. In its July 31, 2003 Motion, Delta requests that the Commission issue an "amended" Notice of Complaint, containing the following language:

[p]ursuant to 4 CSR 240-33.110, pending the resolution of this complaint, Respondent shall not discontinue service to Complainant on the basis of the issues that are the subject matter of this complaint.¹

Delta requests that the Commission issue this Amended Notice of Complaint, including the quoted provision, as a "reminder" to SBC Missouri that "it shall not discontinue services to Delta Phones."²

4. The Commission should deny Delta's request for the Commission to issue an Amended Notice of Complaint. Chapter 33 of Commission's rules is not applicable to Delta's Complaint, and Delta's request is nothing more than a disguised demand for injunctive relief, and an attempt by Delta to avoid the very clear provisions regarding Delta's on-going failure to pay for services provided to Delta by SBC Missouri, and otherwise comply with the relevant provisions contained in the Commission-approved SBC Missouri/Delta interconnection agreement.

5. Commission Rule 4 CSR 240-33.110 – the only rule cited by Delta in its Motion for Issuance of Amended Notice of Complaint – is not applicable to Delta's Complaint and provides no basis for the Commission to grant the relief requested by Delta. Rule 33.110 provides as follows:

¹ Delta Motion, par. 2.

² Id., par. 5.

4 CSR 240-33.110 Commission Complaint Procedures

PURPOSE: This rule sets forth the procedures to be followed in filing formal or informal complaints with the commission regarding matters covered in this chapter.

(1) Any customer aggrieved by a violation of any rules in this chapter or the Public Service Commission laws of Missouri relating to telecommunications companies may file an informal or formal complaint under 4 CSR 240-2.070.

(2) If a telecommunications company and a customer fail to resolve a matter in dispute, the telecommunications company shall advise the customer of his/her right to file an informal or formal complaint with the commission under 4 CSR 240-2.070.

(3) Pending the resolution of a complaint filed with the commission, the subject matter of such complaint shall not constitute a basis for discontinuance.

This rule establishes the procedures to be followed when a residential end user customer files an informal or formal complaint with the Commission. Subsection (1) of this rule provides that any “customer” aggrieved by a violation of any rules in Chapter 33 of the Commission’s rules may file either an informal or formal complaint.

6. Chapter 33 of the Commission’s rules is not applicable to Delta or its Complaint. First, as described in the “purpose” section of rule 33.110, the provisions of this rule apply only to “matters covered in this chapter.” Nowhere in Delta’s Complaint does Delta allege a violation of any rule contained in Chapter 33, nor could Delta allege any such violation. The rules contained in Chapter 33 address service and billing practices for residential customers, not CLECs such as Delta to which SBC Missouri provides wholesale services. For example, rule 33.040 addresses “Billing and Payment Standards for Residential Customers.” Rule 33.050 addresses “Deposits and Guarantees of Payment for Residential Customers.” Rule 33.060 addresses “Residential Customer Inquiries,” and rule 33.070 addresses “Discontinuance of Service to Residential Customers.” Rule 33.080 relates to “Disputes by Residential

Customers,” and rule 33.090 addresses “Settlement Agreements with Residential Customers.”

Delta does not allege a violation of any rule contained in Chapter 33 of the Commission’s rules, and therefore Rule 33.110, upon which Delta relies in its Motion, is not applicable to its Complaint.

7. Moreover, even if Delta had alleged a violation of some particular aspect of Chapter 33, it would not be entitled to the relief it seeks here. Delta is not a “customer” of SBC Missouri, as “customer” is defined in Chapter 33. Rule 33.020(8) defines “Customer” as “any individual that accepts financial and other responsibilities in exchange for telecommunications service.” Delta is not an “individual,” and thus does not meet the requirements of Chapter 33. As Delta specifically alleges in paragraph 1 of its Complaint, Delta is a Louisiana corporation. Delta may qualify to file a Complaint under Commission rule 2.070 (addressing “Complaints”), because that rule specifically provides that “any person or public utility” may file a Complaint with the Commission, and, in addition to the fact that Delta is clearly a “public utility,” rule 2.010(12) defines “person” to include a “corporation.” The more limited definition of “Customer” set forth in Commission rule 33.020(8) makes it clear that for purposes of Chapter 33, “Customer” refers only to residential end users, and not to a wholesale customer that is a corporation.

8. In short, Delta’s Complaint does not fall under Chapter 33. Delta’s Complaint involves a billing dispute Delta has with SBC Missouri relating to wholesale services provided to Delta by SBC Missouri, which is governed by very clear provisions contained in the parties’ comprehensive interconnection agreement approved by the Commission on December 20, 2002.³ Section 8 of the General Terms and Conditions of that interconnection agreement addresses

³ See, Case No. IA-2003-0182. Prior to the Commission approving the comprehensive interconnection agreement between SBC Missouri and Delta in December, 2002, Delta had a Commission-approved resale agreement with SBC Missouri.

“BILLING AND PAYMENT OF CHARGES,” Section 9 addresses “NONPAYMENT AND PROCEDURES FOR DISCONNECTION,” and Section 10 addresses “DISPUTE RESOLUTION.” There can be no disagreement that these sections of the parties’ interconnection agreement, approved by the Commission in December, 2002, are applicable to Delta’s Complaint. Delta cannot and has not cited any provision in its interconnection agreement which would support its Motion for Amended Notice of Complaint.

9. Unlike Delta, SBC has complied with and will continue to comply with all applicable provisions contained in the Commission-approved SBC Missouri/Delta interconnection agreement. Pursuant to Section 8.4, Delta was required to provide written notice of any amounts it disputed prior to the “Bill Due Date,” pay all undisputed amounts, and place all disputed amounts into an appropriate escrow account, as defined in Section 8.4 of the interconnection agreement. Delta has not provided timely notice of any disputed amounts, has not paid undisputed amounts billed since March 21, 2003, and has not paid any amounts it now disputes into an appropriate escrow account, all as required by the express provisions contained in the parties’ interconnection agreement. In fact, Delta has not made a payment to SBC since March, 2003.

10. Under Section 9 of the SBC Missouri/Delta interconnection agreement (“NONPAYMENT AND PROCEDURES FOR DISCONNECTION”), Delta’s failure to comply with the billing and payment requirements of Section 8 “shall be grounds for disconnection of Interconnection, Resale Services, Network Elements... furnished under this Agreement.” See, Section 9.2. This section requires SBC Missouri to notify Delta of pending disconnection of services for unpaid charges. In its Complaint, Delta acknowledges that SBC Missouri provided such a notice on June 16, 2003.

11. To date, Delta has not paid SBC Missouri for any of the amounts it has been billed since March 21, 2003, nor has Delta established an appropriate escrow account, as required by the parties' interconnection agreement. As a result, the charges billed to Delta since March 21, 2003, do not meet the definition of "Disputed Amounts" pursuant to Section 9.3 of the parties' interconnection.

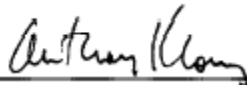
12. Section 9.7 of the Commission-approved SBC Missouri/Delta interconnection agreement clearly describes the consequences of Delta's failure to comply with the payment obligations contained in the parties' interconnection agreement. SBC Missouri intends to continue exercising its rights under the Commission-approved interconnection agreement between SBC Missouri and Delta, and specifically Section 9.7 thereto.

13. The interconnection agreement between Delta and SBC Missouri approved by the Commission governs the rights and duties of both parties. SBC Missouri is entitled to the protections afforded to it under the agreement, including the right to receive payment of undisputed sums and the placement into escrow of disputed sums so that SBC Missouri can be assured of ultimate payment if its position is upheld. The number of companies which have experienced financial difficulties and have failed to pay SBC Missouri sums due to it demonstrate the necessity of such provisions in interconnection agreements. Delta has continued to ignore its responsibilities under the interconnection agreement and has refused to pay undisputed sums or to place disputed sums into escrow. In short, Delta is not entitled to the relief it seeks either under Chapter 33 or under the provisions of the interconnection agreement between Delta and SBC Missouri.

WHEREFORE, SBC Missouri respectfully requests that the Commission deny Delta's Motion for Issuance of Amended Notice of Complaints, for the reasons described herein.

Respectfully submitted,

Southwestern Bell Telephone, L.P.,
d/b/a SBC Missouri

By: 

PAUL G. LANE #27011
LEO J. BUB #34326
ANTHONY K. CONROY #35199
MIMI B. MACDONALD #37606
Attorneys for SBC Missouri
One SBC Center, Room 3516
St. Louis, Missouri 63101
314-235-6060 (Telephone)
314-247-0014 (Facsimile)
anthony.conroy@sbccom.com

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served on all counsel of record by electronic mail on August 6, 2003.



Anthony K. Conroy

Mark W. Comley
Cathleen A. Martin
Newman, Comley & Ruth P.C.
601 Monroe Street, Suite 301
Post Office Box 537
Jefferson City, Missouri 65102-0537

Mark Poston
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

John B. Coffman
Office Of The Public Counsel
P. O. Box 7800
Jefferson City, Mo 65102