

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.)	

**COMPLAINANT’S RESPONSE TO MOTION TO DISMISS,
AND REPLY TO ANSWER AND AFFIRMATIVE DEFENSES**

Comes now Complainant, Delta Phones, Inc. (“DPI”), by its attorneys Newman, Comley & Ruth P.C., and in response to Respondent’s motion to dismiss, answer and affirmative defenses submits the following to the Commission:

PRELIMINARY

As part of its Motion to Dismiss, Answer and Affirmative Defenses, Southwestern Bell Telephone Company, L.P. (SBC) included a section titled “BACKGROUND.” Much of the text in this section is improper and should be stricken.

In the opening paragraph, SBC refers to the complaint as “outrageous.” Although SBC may be outraged that one of its customers would question its policies and procedures and then complain about them, SBC’s use of hyperbole in the pleading is improper, if not scandalous, and should be stricken.

The paragraphs of the “BACKGROUND” section are unnumbered and do not refer to any paragraphs of the complaint. As a consequence, they do not direct complainant or the

Commission to the allegations in the complaint SBC is admitting, denying or refuting. It is unclear what portions of the section are a precis of SBC's answer and what portions are a precis of the motion to dismiss. The subject matter of the "BACKGROUND" section is replete with opinions and legal conclusions. These would be inappropriate in an answer.

SBC purports to supply a history of complaints filed by DPI in other jurisdictions. SBC does not connect this account to its motion to dismiss or its answer. The matter is surplusage and irrelevant and should be stricken.

RESPONSE TO MOTION TO DISMISS

1. In paragraphs 1 – 8 of its Motion to Dismiss, SBC contends that DPI has failed to comply with the dispute resolution procedures of the interconnection agreement and on this ground asks the Commission to dismiss the complaint. In paragraph 9 of its Motion to Dismiss, SBC argues that the Commission lacks jurisdiction to alter the interconnection agreement between the parties and must enforce them, and in enforcing them must dismiss the complaint. There is no merit to the motion to dismiss.

2. The gravamen of DPI's complaint concerns SBC's misuse of its superior power in the market, and its position as the favored party in a contract of adhesion, to overbill DPI, among other things, in contravention of the terms of the agreement itself and its implied conditions of good faith and fair dealing. In such a setting the dispute resolution process, and its escrow provisions, when interpreted unilaterally by SBC, fail as means to settle differences, but become blunt instruments by which to cripple competition.

3. SBC's motion to dismiss asks the Commission to conclude without proof that DPI has failed to comply with the agreement, and then dismiss the complaint. DPI would also prefer for the Commission to conclude without proof that SBC has failed to comply with the agreement.

Clearly, the interpretation of the agreement is a matter at issue and only after adequate hearing can the Commission render a decision. SBC's bare contention that DPI has not complied with the agreement cannot be a ground for dismissal. Enforcement of the interconnection agreement is the basis for the complaint itself. SBC's Motion to Dismiss should be denied.

REPLY TO AFFIRMATIVE DEFENSES

In reply to SBC's affirmative defenses, DPI states the following to the Commission:

1. DPI denies each and every allegation and denies each and every matter of defense set forth in Paragraphs 1 through 5 of SBC's "AFFIRMATIVE DEFENSES."

WHEREFORE, having responded to SBC's motion to dismiss and setting out its reply to SBC's affirmative defenses, DPI respectfully reasserts the allegations of its complaint and prays for the relief set forth therein.

Respectfully submitted,

NEWMAN, COMLEY & RUTH P.C.

By: /s/ Mark W. Comley
Mark W. Comley #28847
Cathleen A. Martin #45682
601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102-0537
(573) 634-2266
(573) 636-3306 FAX

Attorneys for Delta Phones, Inc.

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 5th day of September, 2003, to General Counsel's Office at gencounsel@psc.state.mo.us; Office of Public Counsel at opcservice@ded.state.mo.us; and Anthony K. Conroy, Southwestern Bell Telephone Company, at anthony.conroy@sbc.com.

/s/ Mark W. Comley