

**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.)	

**RESPONSE OF SBC MISSOURI AND
MOTION TO MODIFY
ORDER REGARDING COMPLAINT**

COMES NOW Southwestern Bell Telephone, L.P. d/b/a SBC Missouri ("SBC Missouri"), and for its Response to and Motion to Modify the Order Regarding Complaint ("Order") issued by the Missouri Public Service Commission ("Commission") on August 19, 2003, states as follows:

STATEMENT OF DISPUTED AND UNDISPUTED CHARGES

1. The Order required SBC Missouri to file a statement, with supporting calculations, showing the disputed and undisputed amounts that have not been paid by Delta Phones, Inc. ("Delta Phones") to SBC Missouri. In compliance with that direction, SBC Missouri states that, as of August 19, 2003, Delta Phones Missouri has a total amount due of \$1,438,076.06. (Attachment A, Affidavit of Gert Andersen, para. 2). Of that amount, \$1,320,744.95 is past due. (Id.).

2. The amount of the charges which are disputed by Delta Phones is a shifting target, as Delta Phones has dropped some claims and added others. The best source for the amount claimed to be in dispute is Delta Phones' Complaint which asserts that \$554,964.34 was in

dispute as of July 25, 2003. (Delta Phones Complaint at para. 7, 24). Accordingly, there is an undisputed balance of \$883,111.72.

3. Delta Phones was last current in its payments to SBC Missouri in November, 2002. (Attachment A, Andersen Aff., para. 3). Since that time, Delta Phones has incurred the following charges: November, 2002 - \$81,937.65; December, 2002 - \$75,594.84; January, 2003 - \$70,884.14; February, 2003 - \$90,648.35; March, 2003 - \$172,111.29; April, 2003 - \$284,847.06; May, 2003 - \$303,401; June, 2003 - \$232,268.59; July, 2003 - \$170,157.58; August, 2003 - \$153,063.37. (*Id.*). From December 1, 2002 through August 20, 2003, Delta Phones has only made a single payment to SBC Missouri in March, 2003 in the amount of \$154,517.20. (*Id.* at para. 4). Delta Phones has incurred charges of hundreds of thousands of dollars since March, 2003 without any payment whatsoever. (*Id.*).

MOTION TO MODIFY

4. In its Order Regarding Complaint, the Commission prohibited SBC Missouri from terminating service to Delta Phones pending further order from the Commission. SBC Missouri respectfully requests the Commission to modify its Order Regarding Complaint by either (a) eliminating the prohibition against termination of service or (b) conditioning the Order on Delta Phones' compliance with the terms of the Interconnection Agreement, including payment of undisputed charges and placing any disputed charges into escrow. The Order Regarding Complaint should be revised as it is contrary to the provisions of the Interconnection Agreement which cannot be unilaterally changed by the Commission and causes harm to SBC Missouri by exposing it to increased financial harm.

5. If the Commission conditions the restriction against termination of service, Delta Phones should be required to remain current on future bills for service and, within three days, to

pay undisputed charges and to establish appropriate escrow arrangements for any disputed sums. Delta Phones has continued to receive service without making any payments since March, 2003 and without providing assurance of payment through escrow arrangements as is required by the Interconnection Agreement approved by the Commission. Under the Interconnection Agreement, SBC Missouri is entitled to payment for services rendered of the undisputed charges and to adequate assurance of payment for those items allegedly in dispute. (Interconnection Agreement, Attachment D, Sections 9.3 and 10.4.1).¹

6. Delta Phones has engaged in a pattern of refusal to pay for the services rendered to it by Southwestern Bell Telephone, L.P. since M&T Capital acquired an interest in Delta Phones and assumed certain management functions in December, 2002. Delta Phones has disputed charges in every Southwestern Bell state, and each time it has been ordered to make payments as required by the terms of its Interconnection Agreement. In Oklahoma, in Cause No. PUD 2003000392, Delta Phones was ordered to pay \$400,000 into escrow, but dismissed its Complaint rather than comply. (Attachment B, Gilmore Affidavit, para. 4). In Kansas, in Docket No. 04-SWBT-013-COM, Delta Phones was ordered to pay \$352,000 into escrow, and has sought to dismiss its Complaint rather than to comply. (*Id.* at 5). In Arkansas, in Docket No. 03-100-C, Delta Phones was ordered to pay all undisputed charges and to place disputed charges into an escrow account, but has not yet done so. (*Id.* at 6). In Texas, in PUC Docket No. 28041, Delta Phones' Complaint was almost entirely rejected on the merits in an August 15, 2003 Arbitration Award, as the arbitrators found that the vast majority of the Delta Phones' "disputes" lacked substantive merit. (*Id.* at 7). The requirement to escrow disputed charges provides protection to SBC Missouri in that it provides assurance of payment if the dispute is resolved in its favor. That assurance, contained in an Interconnection Agreement approved by the

¹ The Interconnection Agreement has been approved by, and is on file with, the Missouri Commission.

Commission, cannot be ignored. (Interconnection Agreement, Attachment D, Sections 9.3 and 10.4.1).

7. According to published reports, Delta Phones has also engaged in a practice of refusing to pay BellSouth for services rendered in Tennessee and Kentucky. In Kentucky, the Public Service Commission dismissed Delta Phones' Complaint concerning BellSouth's billing practices for lack of evidence. In Tennessee, Delta Phones has filed to surrender its certificate of authority to provide telephone service rather than pursue its Complaint against BellSouth related to billing issues.

8. The Commission need not reach the substance of the claims advanced by Delta Phones at this time, although, as demonstrated below, those complaints are without merit. But the Commission should unequivocally require Delta Phones to comply with the terms of the its Interconnection Agreement by paying the undisputed amounts and escrowing the disputed amounts so that SBC Missouri is assured of payment if its position is ultimately upheld. It would be wholly inappropriate to permit Delta Phones to continue to increase its debt to SBC Missouri without making payment for undisputed amounts and escrow arrangements for any amounts that it disputes.

9. SBC Missouri will not attempt to address all of the reasons that the various complaints raised by Delta Phones are without merit. That is for a subsequent stage in these proceedings. However, SBC Missouri will address a few portions of the Complaint in order to alleviate any concerns the Commission may have that it is somehow inappropriate to require Delta Phones to pay undisputed amounts and to escrow disputed amounts even though these obligations are clearly and unambiguously required by the terms of the Interconnection Agreement.

10. One of the major disputes raised by Delta Phones involves the alleged failure to provide additional discounts for resold services as required by the terms of the SBC-Ameritech Merger Conditions approved by the FCC. (Delta Phones Complaint, paras. 33-34). Delta Phones claims that it is due \$165,961.86 (30% of its total claim) under this purported “dispute.” (Id.). What Delta Phones fails to explain, however, is that it never qualified to receive any merger discount because it did not execute an amendment to its Resale Agreement.

11. SBC and Ameritech agreed to certain conditions that were designed to enhance local exchange competition in connection with their merger. These conditions are outlined in Appendix C to the FCC Order approving the merger. Paragraph 47 of Appendix C to the SBC-Ameritech Merger Conditions provided for an additional resale discount for a limited period of time, but required any carrier seeking such a discount to enter into an amendment to its Interconnection Agreement to obtain the higher discount. (Attachment B, Gilmore Aff., para. 8). Delta Phones did not enter into an agreement in Missouri to obtain the merger discount for the time period covered by its Complaint. (Id.). Delta Phones now seeks a retroactive application of the merger discount despite its failure to enter into an amendment to accomplish that result. Delta Phones was billed and paid the appropriate resale rate through November, 2002, but subsequently refused to pay for current services on the basis that it should have been provided a merger discount in past periods even though it failed to enter into an agreement to receive that additional discount. SBC Missouri’s refusal to retroactively provide a discount to which Delta Phones was never entitled cannot serve as an appropriate basis to excuse Delta Phones from its requirements to pay for undisputed charges and to escrow any disputed charges.

12. A second major component of Delta Phones’ Complaint involves the alleged failure to provide electronic carrier access billing system (“CABS”) data which purportedly has

damaged Delta Phones in the amount of \$201,525 (36% of the total claim). (Delta Phones Complaint, paras. 40-42). Delta Phones claims that it would have used electronic CABS data to bill interexchange carriers for access on long distance calls to and from Delta Phones' customers served via UNE-P. (Id.). Prior to filing its Complaint, Delta Phones never raised this issue with SBC Missouri, nor did it utilize the dispute resolution process called for by the Interconnection Agreement. (Attachment B, Gilmore Affidavit, para. 9). The claim not only is devoid of substantive merit, it is also unrelated to any claim of inaccurate billing. It does not involve any claim that SBC Missouri's billing for services was inaccurate or improper in any respect; it is instead a claim that Delta Phones may have been able to receive revenues from some other sources (interexchange carriers) had additional records been provided to it. Moreover, the claim lacks any substantive basis as it apparently assumes that the entirety of the Delta Phones' customer base was converted to UNE-P, when the majority of the customers are not served in that fashion. Further, and contrary to its Complaint, records were provided within a reasonable time period after Delta Phones made its request.

13. The third major component of Delta Phones' claim is that SBC Missouri continued to submit bills for service to customers that Delta Phones had ordered to be disconnected. (Delta Phones Complaint, paras. 27-28). Delta Phones claims \$172,170.40 (31% of the total claim) is at issue.

14. A similar claim was advanced by Delta Phones in Texas. The Texas arbitrators found that Delta Phones' billing disputes, including the allegation that SBC Texas continued to bill after service had been disconnected, "lack credibility and merit." (PUC Docket No. 28041, Arbitration Award, p. 27, August 15, 2003). Specifically, the arbitrators determined that Delta Phones had failed (a) to account for prorated credit issued by SBC Texas where service had been

disconnected and (b) to demonstrate due diligence in assuring that a disputed disconnection was not subsequently reestablished for service by Delta Phones. (Id. at p. 26). SBC Missouri has reviewed Delta Phones' claims in Missouri and has determined they are equally without merit.

15. As demonstrated above, more than 97% of Delta Phones' Complaint lacks substantive credibility. While the Commission need not make a final determination as to the validity of the Complaint at this time, this situation underscores the need to require Delta Phones to comply with the terms of its Interconnection Agreement by paying the undisputed amounts and placing any disputed amounts into a proper escrow arrangement. The procedures required by the Interconnection Agreement to resolve disputes are there for the mutual protection of the parties; it would be entirely improper to permit Delta Phones to have the right to proceed to dispute resolution without complying with the terms requiring payment of undisputed charges and adequate assurance of payment of charges which are disputed.

16. The Order Regarding Complaint cites Section 392.200 RSMo 2000 as authority for the Order prohibiting disconnection until further Order of the Commission. But the statute cited in the Order provides no basis to preclude SBC Missouri from protecting itself from further financial loss by disconnecting service to Delta Phones. The relationship between SBC Missouri and Delta Phones is governed by the provisions of the Telecommunications Act of 1996, not Missouri law. The parties entered into an Interconnection Agreement pursuant to Sections 251-252 of the federal Act. This Commission approved that Interconnection Agreement pursuant to Section 252(e) of the federal Act. The provisions of the Interconnection Agreement, which the Commission approved, unequivocally require payment of undisputed charges and escrow arrangements for any disputed charges and permit SBC Missouri to disconnect service for failure to comply with the terms of the Interconnection Agreement. (Interconnection Agreement,

Attachment D, Sections 9.3 and 10.4.1). Nothing in Section 392.200 purports to override federal law or the Interconnection Agreement approved by the Commission. Moreover, nothing in Section 392.200 purports to allow any telecommunications company to refuse to pay for service rendered under an interconnection agreement. The provisions of the Interconnection Agreement require payment of undisputed charges and escrow arrangements for disputed charges and these provisions may not be unilaterally modified by the Commission.

17. The Order Regarding Complaint appears to base its decision prohibiting disconnection in order to “protect the interest of those customers who might be harmed as a result of this complaint.” (Order at p. 2). The majority of Delta Phones’ customers, however, are served via resale and the Commission’s Snap-Back Rule (4 CSR 240-32.120) provides that service to these end users will be continued for a period of 30 days after the carrier’s service is disconnected. For those customers served via UNE-P, SBC Missouri is not capable of identifying all of those customers accurately, but could provide service to those customers on the same basis as under the Snap-Back Rule if ordered by the Commission and if Delta Phones provides a list of its UNE-P customers, names, addresses and telephone numbers.


18. SBC Missouri is incurring substantial financial detriment in continuing to provide service to Delta Phones for services for which no payment has been received since March, 2003. The claims advanced by Delta Phones lack substantive merit, but in any event the Interconnection Agreement unequivocally requires Delta Phones to pay the undisputed amounts and to escrow funds sufficient to cover the amounts allegedly in dispute. The Commission should modify its Order regarding Complaint by either eliminating the restriction on terminating service or conditioning that restriction on Delta Phones’ compliance with the terms of its

Interconnection Agreement, and payment of undisputed charges with escrow arrangements for any disputed amounts within three days.

WHEREFORE, for all the foregoing reasons, SBC Missouri respectfully requests the Commission to modify its Order Regarding Complaint by eliminating the restriction on terminating service or conditioning that restriction on Delta Phones' compliance with the terms of the Interconnection Agreement and payment of undisputed charges with escrow arrangements for any disputed amounts within three days.

Respectfully submitted,

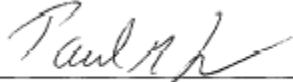
SOUTHWESTERN BELL TELEPHONE, L.P.
D/B/A SBC MISSOURI

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served on all counsel of record by electronic mail on August 26, 2003.



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