

NO. 89CV0240

METRO-LINK TELECOM, INC.
DANIEL A. JONES, EDWARD A JANEK AND
C. E. THOMPSON

IN THE DISTRICT COURT

VS

GALVESTON COUNTY, TEXAS

SOUTHWESTERN BELL TELEPHONE
COMPANY, RICHARD E. GREEN
AND GREGORY GATTERSON

56TH JUDICIAL DISTRICT

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the ruling of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No".

Whenever a question requires other than a "Yes" or "No" answer, your answer must be based on a preponderance of the evidence.

INSTRUCTIONS AND DEFINITIONS

The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case.

The term "PRODUCING CAUSE" means an efficient, exciting or contributing cause which in a natural sequence, produced the damages complained of, if any. There may be more than one producing cause.

A corporation is a legal fiction and can act only through its agents. A corporation and its employees are jointly and several liable for tortious acts which the employee directs or participates in during his employment.

"PROXIMATE CAUSE" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

An agreement may be oral or in writing, or it may be partly oral and partly written. In deciding whether the parties reached an agreement, you may consider what they said and did in light of the surrounding circumstances, including any earlier course of dealing. You may not consider the parties' unexpressed thoughts or intentions.

QUESTION NO. 1

Did Southwestern Bell and Metro Link enter into an agreement that Southwestern Bell would provide telecommunications services (including DID services) at agreed rates?

Answer "Yes" or "No"

ANSWER: Yes

If you answered Question No. 1 "Yes", then answer Question No. 2; otherwise do not answer Question No. 2

QUESTION NO. 2

Did Southwestern Bell breach the agreement you have found to exist in your answer to Question No. 1?

Answer "Yes" or "No"

ANSWER:

YES

If you answered Question No. 2 "Yes", then answer Question No. 3; otherwise do not answer Question No. 3.

QUESTION NO. 3

Do you find that the parties to the agreement you have found to exist in response to Question No. 1 agreed that the agreement was to extend so long as Metro Link was in business?

Answer "Yes" or "No"

ANSWER: YES

If you answerd Question No. 3, "No", then answer Question No. 4; otherwise do not answer Question No. 4.

QUESTION NO. 4

What period of time do you find from a preponderance of the evidence given all the facts and circumstances surrounding the agreement in question would be a reasonable term or period of duration for the agreement to exist or extend for?

Answer in months or years or both.

ANSWER: _____

If you answered Question No. 2 "Yes", then answer Question No. 5; otherwise do not answer Question No. 5

QUESTION NO. 5

What sum of money, if any, if paid now in cash would fairly and reasonably compensate Metro-Link for its damages, if any, that resulted from the breach of contract you have found to have occurred?

Instruction: Do not increase or reduce the amount of your answers because of your answer to any other question about damages in this charge. Do not include any amount for interest on past damages if any. Any recovery will be determined by the court when it applies the law to your answers at the time judgment is entered in this case.

Answer in dollars and cents, if any.

- a. Damages in the past: \$ 145,000.00
- b. Damages in the future \$ 0
- c. Reasonable and necessary expenses incurred by Metro-Link before the P.U.C. in Docket No. 7952. \$ 120,000.00

QUESTION NO. 6

Did Southwestern Bell engage in any false, misleading, or deceptive act or practice that was a producing cause of damages to Metro-Link?

"False, misleading, or deceptive act or practice" means any one or more of the following:

- a. representing that services have approval, characteristics, ingredients, uses, benefits, or quantities which they do not have; or
- b. representing that services are or will be of a particular quality if they were of another; or
- c. representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law; or
- d. misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction; or
- e. failing to disclose information concerning services which was known at the time of the transaction, such failure being intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

Answer "Yes" or "No"

ANSWER:

YES

If you answered Question No. 6 "Yes", then answer Question No. 7; otherwise do not answer Question No. 7.

QUESTION NO. 7

What sum of money, if any, if paid now in cash would fairly and reasonably compensate Metro-Link for damages, if any, that resulted from the conduct you found in answer to Question No. 6?

Instruction: Do not increase or reduce the amount of your answers because of your answer to any other question about damages in this charge. Do not include any amount for interest on past damages if any. Any recovery will be determined by the court when it applies the law to your answers at the time judgment is entered in this case.

Answer in dollars and cents, if any.

- a. Damages in the past: \$ 1,450,000.00
- b. Damages in the future: \$ 0
- c. Reasonable and necessary expenses incurred by Metro-Link before the P.U.C. in Docket No. 7952: \$ 120,000.00

If you answered Question No. 6 "Yes", then answer Question No. 8; otherwise do not answer Question No. 8.

QUESTION NO. 8

Do you find from the preponderance of the evidence that the conduct you have found to be a producing cause of Metro Link's damages was committed by Southwestern Bell knowingly?

You are instructed that "knowingly" means actual awareness of the falsity, deception, or unfairness of the conduct, representation, act, practice or condition in question, but actual awareness may be inferred where objective manifestations indicate that Southwestern Bell acted with actual awareness.

Answer "Yes" or "No"

ANSWER: _____

No

If you answered Question No. 8 "Yes", then answer Question No. 9; otherwise do not answer Question No. 9.

QUESTION NO. 9

What sum of money, if any, do you find should be awarded as additional damages?

You are instructed that "additional damages" means an amount which you may, in your discretion, award as an example to others and as a penalty or by way of punishment or as compensation for the inconvenience and expense of litigation, except attorneys' fees and court costs, in addition to any amount which may have been found by you as actual damages.

Answer in dollars and cents, if any.

\$ _____

If you answered Question No.6 "Yes", then answer Question No. 10; otherwise do not answer Question No. 10

QUESTION NO. 10

By what date should Metro Link, in the exercise of reasonable diligence, have discovered all the acts or practices you found in answer to Question 6?

Answer with a date in the blank below.

ANSWER: Dec 8, 1986 LETTER DELIVERY DATE

QUESTION NO. 11

Do you find that Southwestern Bell violated a duty of good faith and fair dealing in its relationship with Metro Link?

Instruction: You are instructed that the duty of good faith and fair dealing means that Southwestern Bell had a duty to be honest in fact and to observe reasonable commercial standards of fair dealing in the trade.

Answer "Yes" or "No"

ANSWER: _____

YES

If you answered Question No.11 "Yes", then answer Question No. 12; otherwise do not answer Question No. 12.

QUESTION NO. 12

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Metro Link for any damages that were proximately caused by Southwestern Bell's failure to act fairly and in good faith?

Instruction: Do not increase or reduce the amount of your answers because of your answer to any other question about damages in this charge. Do not include any amount for interest on past damages if any. Any recovery will be determined by the court when it applies to the law to your answers at the time judgment is entered in this case.

Answer in dollars and cents, if any.

- a. Damages in the past: \$ 1,450,000.00
- b. Damages in the future: \$ 0
- c. Reasonable and necessary expenses incurred by Metro-Link before the P.U.C. in Docket No. 7952: \$ 120,000.00

If you answered Question No.11 "Yes", then answer Question No. 13; otherwise do not answer Question No. 13.

QUESTION NO. 13

Did Southwestern Bell act with malice in its dealings with Metro Link?

"Malice" means 1) conduct that is specifically intended to cause substantial harm, or 2) conduct that is carried out with flagrant disregard for the rights of others and with actual awareness that it will, in reasonable probability, cause substantial harm.

Answer "Yes" or "No"

ANSWER: _____

YES

If you answered Question No. 13 "Yes" then answer Question No. 14; otherwise do not answer Question No. 14.

QUESTION NO. 14

What sum of money, if any, should be assessed against Southwestern Bell and awarded to Metro Link as exemplary damages?

"Exemplary damages" means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages.

Answer in dollars and cents, if any.

ANSWER: \$ 50,000.00

QUESTION NO. 15

Did Southwestern Bell monopolize or attempt to monopolize a relevant market of Metro Link by denying reasonable access to an essential facility?

A relevant market is the geographical area in which Metro Link and Southwestern Bell compete and the type of service for which they compete.

A monopoly exists when one has 1) the power to control prices or exclude competition in a relevant market, and 2) willfully maintains that power as distinguished from maintaining the power by growth or development as a consequence of a superior product, superior business skill or as a result of historical accident.

An attempt to monopolize occurs when 1) a party intends to monopolize a relevant market, 2) engages in exclusionary or restrictive conduct to further that intent, and 3) there is a dangerous probability that the intended monopoly will be achieved in the relevant market.

Conduct is exclusionary or restrictive when its benefits depend on eliminating or crippling competition so as to enable the actor to reap the benefits of monopoly power in the aftermath.

Southwestern Bell's DID numbers and DID trunks are "facilities". Denial of reasonable access to an essential facility occurs when 1) a monopolist controls a facility that competitors need and cannot reasonably or practically duplicate, and 2) the monopolist denies reasonable access to the facility though it would be feasible to provide reasonable access.

You may consider the effect of regulation of P.U.C. in determining whether Southwestern Bell wilfully misused its monopoly power.

Answer "Yes" or "No"

ANSWER: _____

YES

If you answered Question No. 15 "Yes" then answer Question No. 16; otherwise do not answer Question No. 16.

QUESTION NO. 16

Was Southwestern Bell's conduct inquired into in Question No. 15 willful or flagrant?

Answer "Yes" or "No"

ANSWER: _____

YES

If you answered Question No. 15 "Yes", then answer Question No. 17; otherwise do not answer Question No. 17.

QUESTION NO. 17

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Metro Link for any damages that were proximately caused by Southwestern Bell's monopoly or attempted monopoly?

Instruction: Do not increase or reduce the amount of your answers because of your answer to any other question about damages in this charge. Do not include any amount for interest on past damages if any. Any recovery will be determined by the court when it applies the law to your answers at the time judgment is entered in this case.

Answer in dollars and cents, if any.

- a. Damages in the past: \$ ~~145,000.00~~⁴⁵⁰ \$ 1,450,000.00
- b. Damages in the future \$ 0
- c. Reasonable and necessary expenses incurred by Metro-Link before the P.U.C. in Docket No. 7952. \$ 120,000.00

QUESTION NO. 18

What is a reasonable fee for the necessary services of Metro Link's attorneys in this case, stated in dollars and cents?

Answer in dollars and cents, if any.

ANSWER: \$ 1,000,000.00


After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror:

1. to preside during your deliberations,
2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,
3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,
4. to vote on the questions,
5. to write your answers to the questions in the spaces provided, and
6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.



Judge Presiding

