

2010-28461
CAUSE NO. _____

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FILED
Loren Jackson
District Clerk

HARRIS COUNTY HOSPITAL DISTRICT,
Plaintiff,

vs.

SOUTHWESTERN BELL TELEPHONE
COMPANY d/b/a AT&T TEXAS,

Defendant.

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IN THE DISTRICT COURT OF MAY 6 - 2010

Time: _____
By _____
Harris County, Texas
Deputy

HARRIS COUNTY, TEXAS

333 JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, HARRIS COUNTY HOSPITAL DISTRICT, hereinafter called "Plaintiff" or "HCHD", complaining of Defendant, SOUTHWESTERN BELL TELEPHONE COMPANY d/b/a AT&T TEXAS, hereinafter sometimes called "Defendant" or "SWBT", filing this Original Petition and would show the Court and jury as follows:

A. Case Level

1. Plaintiff intends that discovery be conducted under Level 3 of Rule 190 of the Texas Rules of Civil Procedure.

B. Parties

2. Plaintiff Harris County Hospital District is a political subdivision of the State of Texas organized as a hospital district in Harris County, Texas, created under Texas Health & Safety Code §281 Subchapter A and pursuant to Article IX of the Texas Constitution, with its administrative offices located at 2525 Holly Hall Drive, Houston, Texas 77054.

3. Defendant Southwestern Bell Telephone Company d/b/a AT&T Texas ("SWBT") is a Missouri corporation providing telecommunication services within the States of Texas.

SWBT provides a broad variety of services to the public in cities in Texas pursuant to franchises granted by the cities to SWBT and pursuant to certificates of convenience and necessity issued by the Public Utility Commission of Texas (“PUC”), as well as non-regulated services. SWBT’s principal place of business is in Dallas, Texas. SWBT may be served through its registered agent for services of process, Timothy A. Whitley, 6500 West Loop South, Room 5.5, Bellaire, Texas 77401.

C. Jurisdiction and Venue

4. This Court has jurisdiction over the Defendant because Defendant is registered to do business in Texas, and because Defendant’s principal place of business is in Texas. The amount in controversy, exclusive of interest and costs, exceeds the minimum jurisdictional limits of this Court.

5. Venue is proper under Tex. Civ. Prac. & Rem. Code §15.002(a) because all or a substantial part of the events or omissions giving rise to the claim occurred in Harris County, Texas. For venue facts, Plaintiff also relies on all other allegations made in this Petition.

D. Background

6. HCHD consists of several significant hospitals and health care facilities in Harris County, Texas. As part of its operations, HCHD has had extensive telephone services provided by SWBT over the years. HCHD has generally been billed by SWBT and paid by HCHD on a monthly basis. As part of the SWBT bills, there has been an item shown as “municipal charges”, which HCHD paid. HCHD recently learned that during the period from October 1, 1991 through February 2000, all or a portion of those charges were not authorized according to a tariff (“Unauthorized Charges”). In addition, HCHD may have also paid SWBT state and local taxes that were applied to such Unauthorized Charges. HCHD seeks, among other things, recovery of

damages for such payments. HCHD seeks recovery under the following alternative common law causes of action: breach of contract, breach of express warranty, negligence per se, and fraud.

The *Mireles* Class Action

7. Although HCHD just recently learned about its own municipal charge claims, other customers of SWBT raised similar claims in two previous class action lawsuits. The first class action is known as the *Mireles* class action.¹ The *Mireles* case involved issues relating to municipal charges on bills of over 5 million SWBT customers throughout Texas from 1991 through 2000. In *Mireles*, the plaintiffs were generally alleging that SWBT could not collect municipal charges from its customers during these years because SWBT did not have a tariff applicable to the specific type of municipal ordinance at issue. The *Mireles* case was filed in 1998, and in late 1999 SWBT signed a settlement agreement. The settlement was approved by the court in May 2000.

8. Although the *Mireles* case has been concluded, it did not affect the claims of HCHD because HCHD is a political subdivision of the State of Texas. As a political subdivision, HCHD was not a member of the *Mireles* class. More specifically, representation of HCHD is subject to the requirements of TEXAS HEALTH & SAFETY CODE § 281.056 and other laws of the State of Texas. There was no compliance with Section 281.056 in the *Mireles* case; therefore, HCHD's claims were not prosecuted in *Mireles*, and HCHD is not bound by or subject to the *Mireles* settlement or judgment.

9. In addition, the *Mireles* settlement was tainted by subsequent allegations that the settlement was the product of fraud and collusion. *Mireles* was a case where the plaintiffs were

¹ Cause No. 98-07-3003-E, styled *Jose Mireles and Patricia Genuchi, et al., v. Southwestern Bell Telephone Company*, in the 357th Judicial District Court of Cameron County, Texas.

claiming over \$700 million in overcollections by SWBT. Without having received any discovery from SWBT, the *Mireles* plaintiffs entered into a settlement agreement with SWBT on terms that would ultimately purport to release all municipal charge claims throughout Texas for 5 million SWBT customers, including, claims that were never part of the suit as originally filed. The *Mireles* settlement paid absolutely nothing to any class members – no money, property, service credits, or coupons. Instead, the settlement was a purported *cy pres* settlement with an alleged value of \$10 million, out of which \$2 million was paid to class counsel, \$1.25 million went to SWBT for notice and administrative costs, and the remainder (in the form of service credits and cash) was to go to a SWBT supported agency of the State of Texas, the Telecommunications Infrastructure Fund Board (“TIFB”).²

10. After the settlement was approved by the trial court, a putative class member, Chemject International, Inc., alleged that material false statements and representations were made to the putative class which mislead the class and prevented members from opposing the settlement; Chemject further alleged that these and other false statements and representations mislead the trial court and induced it to approve the settlement.³ For example, Chemject alleged that the following statements contained in the class action settlement notice sent to 5 million SWBT customers in their monthly phone bill envelope, were false and misleading:

“SWBT does not keep any of the municipal fees it collects – all of the money goes to the municipalities;”

² Before there was a final approval of the settlement was and “cy pres” payments were made, TIFB was eliminated by a Proclamation of Texas Governor Rick Perry, and by an Executive Order, a timeline was established for the Texas Workforce Commission to close out all TIFB grants and funding.

³ Chemject also alleged that the elimination of TIFB rendered the settlement void. See *Chemject Int’l, Inc. v. Sw. Bell Tel. Co.*, 2007 WL 177651, 2007 Tex.App. LEXIS 586, (Tex.App.-Corpus Christi Jan. 25, 2007, pet. denied; cert. denied) (mem.op.); *cert. denied*, 128 S.Ct. 1873, 170 L.Ed.2d 745, 76 USLW 3374, 76 USLW 3549, 76 USLW 3554 (2008)

“Class Counsel has conducted sufficient discovery so as to investigate the facts and applicable law regarding the matters raised in the Lawsuit;”

“More importantly, discovery in the Lawsuit revealed that it would be extraordinarily difficult, if not impossible, to identify the specific amounts that individual Settlement Class members might recover even if the Lawsuit were successful;”

“Class Counsel has determined that the amounts that might be recovered by individual Settlement Class members would be quickly consumed by the overall notice and administration costs necessary to facilitate settlement, because the Settlement Class is exceptionally large (it is estimated at more than five million members), and because the amount of possible recovery varies greatly but generally is not a large sum of money;”

“Discovery determined that SWBT cannot independently identify which Class Members suffered what damages;” and

“The Administrative costs associated with trying to identify and then confirm individual recoveries on a case-by-case basis would exhaust any recovery.

An example of a misrepresentation that Chemject alleged was made to the trial court by class counsel at the hearing that approved the *Mireles* class action settlement is:

“Through our discovery of the case, we determined that the phone company is not keeping this money. They are not profiting from this process. In fact, there was evidence to suggest that maybe they’ve overpaid the amount of taxes, not kept some of this money;” and

Chemject also alleged that a similar misrepresentation was made by class counsel to the court of appeals. When one of the Justices asked the “So Southwestern Bell didn’t keep any of the money that they collected?” the *Mireles* class counsel responded:

“Not a single penny Your Honor. It was a pure pass-through tax. It was, in fact, our municipalities taxing us in a way that they didn’t want to go directly to us, and it was money provided to them.

In response to the foregoing statements, Chemject generally alleged, among other things, that: (1) sufficient discovery was not conducted by Class Counsel, since there was no discovery received from SWBT before the settlement agreement was signed; (2) SWBT did collect

millions of dollars in municipal fees that it did not pay the municipalities; (3) SWBT has electronic records that would allow identification of the specific members who suffered damages and the specific amounts that they might recover, for most, if not all, of the time periods at issue; and (4) the amount of possible recovery was very large, and substantially exceeded the administration costs of the case. Ultimately, however, Chemject's attempts to set aside the *Mireles* settlement were rejected by the trial and appellate courts, primarily on jurisdictional grounds and by concluding that Chemject's fraud allegations were in the nature of intrinsic fraud, not extrinsic fraud which is required for a bill of review.⁴ In any event, HCHD was not a member of the *Mireles* class action and is not bound by any of its settlement terms or the final judgment in that case.

The STA Class Action

11. The other class action that raises some of the same types of municipal charge claims against SWBT as HCHD raises herein was filed in May 2000 by Marketing On Hold, Inc. d/b/a Southwestern Tariff Analyst ("STA"). The *STA* class action is currently pending before the Texas Supreme Court on SWBT's interlocutory appeal of the trial court's certification of the class.⁵ The *STA* class action was carved out of the *Mireles* class action settlement by a Rule 11 agreement approved by the *Mireles* court.

⁴ Cause No. 98-07-3003-E, *Jose Mireles, et al. v. Southwestern Bell Telephone Company*, in the 357th Judicial District Court of Cameron County, Texas; Cause No. 2004-05-2337-E in the 357th District Court of Cameron County, Texas; see *Chemject Int'l, Inc. v. Sw. Bell Tel. Co.*, supra.

⁵ On February 19, 2010, the Texas Supreme Court reversed the trial court and court of appeals and de-certified the class; STA has filed a motion for rehearing which is pending. See Cause No. 2000-05-001931-B, *Marketing On Hold, Inc. d/b/a Southwestern Tariff Analyst, et al. v. Southwestern Bell Telephone Company*, pending in the 138th Judicial District Court of Cameron County, Texas; Case No. 05-0748, *Southwestern Bell Telephone Company v. Marketing on Hold, Inc. d/b/a Southwest Tariff Analyst*, in the Supreme Court of Texas; see *Southwestern Bell Telephone Company v. Marketing On Hold, Inc.*, 170 S.W.3d 814 (Tex. App. – Corpus Christi 2005, review granted).

12. By way of background, STA is in the business of auditing telephone bills and records, and then making recommendations to its customers about ways to reduce their telephone bills and/or obtain refunds for overbillings. In the course of this business, STA determined that many of its customers had been billed by SWBT for items that were not authorized under SWBT's franchise agreements with municipalities throughout Texas. These franchise agreements were typically approved by the municipalities as ordinances. Generally, these agreements/ordinances only allowed SWBT to apply a municipal charge to a customer service charge if done according to tariff and all of the following conditions are met: the customer service charge is (1) billed through CRIS, (2) a recurring charge, (3) a local exchange access element, (4) provided within the municipality, and (5) a EUCL charge as imposed by the FCC. In the *STA* class action, STA claimed that the customer service charges made by SWBT for Digital Loop Service, SmartTrunk service, and Hotel/Motel measured service, did not satisfy all of the conditions of the franchise agreements/ordinances. As of the filing of this petition, the status of the *STA* case is that the Texas Supreme Court reversed the court of appeals and trial court's certification, and decertified the class;⁶ however, a motion for rehearing was filed by STA which is currently pending. Although HCHD was listed as a putative class member by SWBT in the *STA* case, the requirements of TEXAS HEALTH & SAFETY CODE § 281.056 were not satisfied.

13. SWBT essentially admitted that HCHD did not participate in the *Mireles* or *STA* class actions, when it stated in Defendant's Response to Plaintiff's Motion for Class Certification filed in the *STA* case, at page 30, as follow:

⁶ On February 11, 2010, HCHD joined with STA in filing a federal district court lawsuit in Austin, Texas, against the Justices of the Texas Supreme Court, asking the federal court to declare that the Justices' three year delay after oral argument was a deprivation of constitutional due process. The Texas Supreme Court issued its opinion eight days later. HCHD subsequently dismissed itself from the federal lawsuit.

Finally, a substantial number of state agencies are part of the putative class, but these agencies could not even participate in the class action without first securing permission to sue [through] the Texas Attorney General's Office. In the absence of securing such permission, state agencies are forbidden to file suit.

Since HCHD's right to sue is governed by HEALTH & SAFETY CODE § 281.056, the Texas Attorney General's permission is not required; however, the HCHD Board's approval is required and HCHD must also be represented by the Harris County attorney, neither of which occurred in the *STA* case or the *Mireles* case.⁷ Therefore, neither the *STA* case nor the *Mireles* case can have any preclusive effect on any of HCHD's claims being made herein.⁸

E. Factual Allegations

14. SWBT provides telephone service subject to a regulatory scheme established by the laws and ordinances of the State of Texas. SWBT is permitted to charge subscribers only those charges which are included in a tariff approved by the Public Utilities Commission of Texas ("PUC").

15. One of SWBT's costs of providing regulated telephone service is the payment SWBT makes to a municipality for the use of that municipality's rights-of-way. Each municipality may charge SWBT for the use of the municipality's rights-of-way. SWBT's payment to municipalities for the use of the rights-of-way is generally referred to as a "franchise fee." The compensation and other conditions of using the municipality's right of way are recited in a franchise fee ordinance adopted by each municipality.

16. Prior to 1978, SWBT sought to recover the cost of franchise fees by including the franchise fee cost as part of the rates that SWBT charged its subscribers for telephone service. In

⁷ Although HCHD might have found it preferable to be a member of the *STA* class under other circumstances, the likelihood of further delay (the *STA* case is already nearly ten years old, seven years of which has been the certification appeal) and the uncertainty resulting from the Texas Supreme Court's recent de-certification and opinion, makes it necessary for HCHD to file its own suit now rather than wait to see what happens in the *STA* case.

⁸ Notably, TEX. CIV. P. & REM. CODE §16.061 exempts HCHD's claims from any limitation period.

1978, SWBT proposed to the PUC a new method for attempting to recover the franchise fee cost. This proposed method would charge customers a pro rata share of any franchise fees that are based upon a percentage of SWBT's gross receipts received for telephone service in a particular municipality. This proposed tariff was approved by the PUC and implemented by SWBT.

Specifically, the tariff provided, in pertinent part, as follows:

There shall be added to the customer's bill for service, an additional charge equal to the pro rata share of any occupation, franchise, business, license, excise privilege or other similar charge or tax, now or hereafter imposed upon the gross receipts or revenue of the Telephone Company by any municipal taxing body or municipal authority whether by statute, ordinance, law or otherwise, and whether presently due or to hereafter become due.

The charge applicable to each customer will appear separately on the customer's regular monthly bill and shall be determined on a basis equal to the tax levied by each municipal taxing body or municipal authority.

The amount of charge to the customer shall be computed by dividing the tax expressed as a percentage by 100% minus the tax expressed as a percentage and multiplying the decimal thus obtained by the customer's service charges to which such tax applies as reflected by the following formula:

$$\frac{\text{Tax \%}}{100\% - \text{Tax \%}} \times \text{Service Charges Subject to Tax} = \text{Amount of Charge to Customer}$$

The amount of charge to the customer will be rounded to the nearest cent.

17. Although SWBT's proposed tariff formula characterized the franchise fee charge as a "tax," subsequent Attorney General Opinions and case authority plainly state that a franchise fee is not a "tax," rather, it is essentially a form of rent paid to the municipality for the use of its rights of way.

18. The PUC approved SWBT's proposal in Docket No. 1704, August 14, 1978. At the time that the tariff was approved, the franchise fees that SWBT was charged by the municipalities were generally pursuant to an ordinance or franchise agreement, which stated the

fee as a percentage of SWBT's gross receipts or revenues from the rendition of local exchange telephone transmissions service. The PUC's approval of the tariff authorized SWBT to recover these costs by charging its customers within each municipality having such an ordinance or agreement, a pro rata share of the franchise fee, stated separately on the customer's bill in accordance with the terms and conditions of the tariff.

19. Litigation ensued between municipalities and SWBT wherein municipalities challenged SWBT on the amounts being included in and excluded from gross receipts. As part of the resolution of that litigation, SWBT proposed, and most municipalities enacted, specified annual payment ordinances (also called "SAP" ordinances), wherein SWBT would pay each such municipality a specified annual payment as a franchise fee, rather than a franchise fee based upon a percentage of gross receipts.

20. Beginning by at least 1991 and continuing thereafter, Texas cities enacted ordinances that imposed an "Annual Charge" (a stated minimum annual dollar amount) upon the Gross Receipts of SWBT. The ordinances became effective upon "acceptance" by SWBT. The "Annual Charge" ordinance contains the following language or language similar thereto:

"The TELEPHONE COMPANY will, according to tariff, bill such Annual Charge to the customers billed the customer service charges included within the term "Gross Receipts," as defined herein. Gross Receipts, for purposes of the Annual Charge, shall include only customer service charges billed through the TELEPHONE Company's Customer Records Information System ("CRIS") for the recurring charges for the local exchange access rate element specified in the TELEPHONE Company's tariffs filed with the PUC for any TELEPHONE COMPANY services provided within the CITY which are also subject to an interstate end user common line ("EUCL") charge as imposed by the federal communications commission ("FCC")."

For example, in Harris County alone, the following municipalities adopted a SAP ordinance from 1991 to 1995: Bunker Hill Village (Ordinance No. 99-231); Deer Park (Ordinance

Nos. 2276 & 2301 & 2607 & 2276 & 2631); Hedwig Village (Ordinance Nos. 459, 441, 374); Houston (Ordinance No. 91-1169); Hudson (Ordinance Nos. 1997-02, 1992-4); Hunters Creek Village (Ordinance Nos. 538, 485); Jersey Village (Ordinance No. 92-22); La Porte (Ordinance Nos. 97-2208, 1834); Pasadena (Ordinance No. 93-82); Piney Point Village (Ordinance Nos. 838, 837, 816, 745); Seabrook (Ordinance Nos. 92-26); Shoreacres (Ordinance Nos. 99-05, 98-16, 97-17, 92-15); South Houston (Ordinance No. 95-006, 942-4-92); Southside Place (Ordinance No.160-A, 160); Spring Valley (Ordinance Nos. 99-20, 99-19, 98-24, 97-35, 97-05, 96-32, 95-16, 94-17, 44); Tomball (Ordinance Nos. 99-13, 99-11, 99-15, 99-03, 98-25, 98-16, 97-13, 96-16, 95-07A, 92-10); Webster (Ordinance No. 95-21); West University Place (Ordinance No. 1446). Throughout Texas, over 400 Texas municipalities adopted SAP ordinances from 1991 to 1995.

21. Generally, in addition to the requirement that a municipal charge billed to a customer must be according to tariff, all of the following conditions must also be satisfied before a “municipal charge” may be applied to a SWBT customer’s service charge:

- (1) The customer service charge must be billed through CRIS;
- (2) The customer service charge must be a recurring charge;
- (3) The customer service charge must be a local exchange access element;
- (4) The customer service charge must be provided within the city; and
- (5) The customer service charge must be subject to a EUCL charge as imposed by the FCC.

In addition to its claim that there was no tariff upon which SAP ordinance municipal charges to customers could be based, HCHD also alleges that SWBT applied “municipal charges” to certain customer service charges relating to Digital Loop Service and SmartTrunk service to which

HCHD subscribed, although Digital Loop Service and SmartTrunk service did not satisfy all of the required conditions described above under the applicable municipal ordinances, including, without limitation, City of Houston Ordinance No. 91-1169.

22. In 1997, Texas municipalities began adopting a “fee per line” ordinance, in place of the SAP ordinance. The “fee per line” ordinance did not base the municipal charge on any reference to “gross receipts,” or a specified annual payment. The municipal charge was based upon a set fee per each access line in each municipality. For example, the City of Houston’s fee per line Ordinance No. 98-593, adopted in 1998, the initial monthly rate for a residential access line was \$1.34, and \$4.55 for a non-residential access line.

23. SWBT did not file a new tariff with the PUC, or amend the existing tariff, to enable it to collect a municipal charge from its customers pursuant to a “SAP” ordinance, “flat-fee” ordinance, or “fee per line” ordinance. SAP ordinances, “flat-fee” ordinances and “fee per line” ordinances are not ordinances that state the franchise fee as a percentage of SWBT’s gross receipts or revenues. The above-described tariff approved in Docket 1704 does not apply to SAP ordinances, “flat-fee” ordinances or “fee per line” ordinances. Without authorization, SWBT based the “municipal charges” upon the franchise fees paid to municipalities having SAP ordinances or “fee per line” ordinances. SWBT collected the “municipal charge” from its customers without authorization. Further, it collected more in so-called “municipal charges” from its customers, than it paid to municipalities as franchise fees.

24. HCHD subscribed to SWBT services in the State of Texas, during the period from 1991 through February 2000.⁹ SWBT sent HCHD statements for service. One mandatory

⁹ Effective on or about March 1, 2000, all SAP ordinances, flat-fee and “fee per line” ordinances were terminated by SWBT, pursuant to Tex. Loc. Gov’t. Code §283.054. In its notice letter to municipalities, SWBT acknowledged that from and after that date, SWBT would operate under Chapter 283 of the Texas Local Government Code, Public

component of the statement is a billing for the “municipal charge.” Another component of the statement is a line item described on the statement as “state and local taxes.” HCHD cannot independently verify, or independently determine, the customer service charges on which the “municipal charge” is being applied and the rate applied to such customer service charges, nor can HCHD independently verify, or independently determine, whether state and local taxes were applied thereto. SWBT has concealed certain details and facts relating to the Unauthorized Charges.

25. HCHD relied on SWBT’s billing statements as being true and correct. From 1991 through February 2000, HCHD was charged “municipal charges” and paid to SWBT “municipal charges” that were purportedly based upon franchise fees paid to municipalities having SAP ordinances, “flat-fee” or “fee per line” ordinances, although (a) there was no tariff authorizing all or part of those charges to SWBT’s customers, and (b) all or part of those charges did not satisfy the terms and conditions of the ordinances. As mentioned above, HCHD may have also been charged and paid the state and local taxes that SWBT applies to “municipal charges,” which also would have been unauthorized.

26. In addition to HCHD, other federal, state and local political subdivisions, departments and governmental agencies, which were SWBT customers, were also charged the unlawful fees, including, without limitation, those listed on Exhibit 1 attached hereto.

27. SWBT’s act or omissions as stated in this petition are a violation of certain laws, tariffs, rules and/or regulations governing SWBT, including, but not limited to, §§ 53.002, 53.004(a) and (b) of the Public Utility Regulatory Act (“PURA”), and 16 TAC §26.27(a)(3)(B)

Utility Commission rules implementing Chapter 283, and other state and federal laws, as applicable. SWBT submitted, and the PUC approved, a new tariff provision for municipal fees, effective June 1, 2000, in order to comply with the “fee per line” structure of Chapter 283.

(formerly 16 TAC §26.27(d), formerly 16 TAC §23.45(h), formerly 16 TAC §23.45(g)). SWBT has a duty to comply with the PURA, the PUC's rules and regulations, and the tariffs. PURA prohibits SWBT from charging, demanding or receiving compensation from a person that is unjust, unreasonable, or other than the compensation prescribed by applicable tariff. See PURA sections 52.251, 53.002, 53.003, and 53.004(a).

28. SWBT's failure to pay its obligations to HCHD for collecting the "municipal charges" as described above, is a violation of 16 TAC §26.27(a)(3)(B) (formerly 16 TAC §26.27(d), formerly 16 TAC §23.45(h), formerly 16 TAC §23.45(g)). These obligations accrue interest as set forth in the substantive rules of the Public Utility Commission of Texas ("PUC") including, but not limited to, 16 TAC §26.27(a)(3)(B) (formerly 16 TAC §26.27(d), formerly 16 TAC §23.45(h), formerly 16 TAC §23.45(g)). SWBT has failed and refused to pay the obligations in accordance with the laws, rules and regulations governing SWBT, and continues to fail and refuse to pay the obligations.

F. Causes of action

Count 1 – Breach of Contract

29. Plaintiff realleges and incorporates by reference the allegations made in Paragraphs 1-28 of this petition. This Count is pleaded in the alternative.

30. Plaintiff's application for service became a contract when accepted by SWBT. The relevant terms of each contract are uniform and are governed by the Texas Public Utility Regulatory Act, the terms of SWBT's tariffs approved by the Texas Public Utility Commission ("PUC") and the substantive rules relating thereto. SWBT's acts or omissions described above constitute a material breach of such contracts. Pursuant to 16 TAC §26.27(a)(3)(B) (formerly 16 TAC §26.27(d), formerly 16 TAC §23.45(h), formerly 16 TAC §23.45(g)), SWBT was to refund

the amount of any Unauthorized Charges for the entire period of the overcharge. SWBT's failure or refusal to refund the Unauthorized Charges constitutes a material breach of contract. SWBT's breach of contract caused damages to HCHD. HCHD is entitled to recover damages in an amount equal to the Unauthorized Charges, plus any state and local taxes that may have been applied to such Unauthorized Charges, plus accrued interest.

Count 2 - Breach of Express Warranty for Services

31. Plaintiff realleges and incorporates by reference the allegations made in Paragraphs 1-28 of this petition. This Count is pleaded in the alternative.

32. SWBT expressly represented to its customers by and through their monthly billing statements for telecommunications services that the charges for those services were true and correct and/or legally authorized. The service charge representations formed the basis of bargain for each of the monthly transactions for telecommunications services with SWBT's customers. SWBT breached the warranty created by its monthly representations because the service charges were not true and correct and/or legally authorized. SWBT's breach of express warranty for services caused damages to HCHD. Accordingly, HCHD is entitled to recover damages in an amount equal to the Unauthorized Charges, plus any state and local taxes that may have been applied to such Unauthorized Charges, plus accrued interest.

Count 3 - Negligence Per Se

33. Plaintiff realleges and incorporates by reference the allegations made in Paragraphs 1-28 of this petition. This Count is pleaded in the alternative.

34. Plaintiff would show that SWBT breached its statutory and regulatory duties. SWBT's breach constitutes negligence per se. As the direct and proximate result of SWBT's breach of these duties, SWBT foreseeably and proximately caused damages to HCHD as

described herein. Accordingly, HCHD is entitled to recover damages in an amount equal to the Unauthorized Charges, plus any the state and local taxes that may have been applied to such Unauthorized Charges, plus accrued interest.

Count 4 - Fraud

35. Plaintiff realleges and incorporates by reference the allegations made in Paragraphs 1-28 of this petition. This Count is pleaded in the alternative.

36. Through the acts described above, defendant and its agents and employees knowingly presented and caused to be presented to HCHD false and fraudulent claims, records, and statements in order to obtain payment of unlawful telephone services charges.

37. Through the acts described above and otherwise, defendant and its agents and employees knowingly made, used, and/or caused to be made or used false records and statements in order to get such false and fraudulent claims paid and approved by HCHD.

38. Through the acts described above and otherwise, defendant and its agents and employees knowingly made, used, and caused to be made or used false records and statements to conceal, avoid, and/or decrease defendant's obligation to repay money to HCHD that defendant improperly and/or fraudulently received. Defendant also failed to disclose to HCHD material facts that would have resulted in substantial repayments by them to HCHD.

39. HCHD, unaware of the falsity of the records, statements, and claims made or submitted by defendant and its agents and employees, paid defendant for claims that would not be paid if the truth were known.

40. HCHD, unaware of the falsity of the records, statements, and claims submitted by defendant--or of its failure to disclose material facts which would have reduced HCHD's obligations--has not received funds that would have been recovered otherwise.

41. By reason of defendant's false records, statements, claims, and omissions, HCHD has been damaged and is entitled to recover the unlawful municipal fees that SWBT charged it.

42. Defendant's acts and/or omissions as alleged above were grossly negligent, intentional, and aggravated by that kind of willfulness and wantonness for which the law allows the imposition of exemplary damages. Defendant's acts were intentional, willful, wanton, and without justification or excuse and were done with gross indifference to the rights of Plaintiff, and the intention of doing substantial injury or harm to Plaintiff. These act and/or omissions by Defendant appear to be a pattern, practice and/or scheme to defraud customers. At the time the causes of action described herein accrued, (1) certain employees of Defendant were responsible for the acts and omissions described herein and these employees were in a managerial capacity for said Defendant and were acting within the course and scope of their employment, as a manager of said Defendant; or (2) Defendant authorized the doing and the manner of the act or omission; or (3) Defendant or a manager of Defendant ratified or approved the act or omission. Defendant's acts or omissions described herein are such an entire want of care as to establish that the acts or omissions were the result of actual conscious indifference to the rights, safety and welfare of Plaintiff. In this connection, Plaintiff will show that as a result of Defendant's conduct, Plaintiff has suffered damages in an amount equal to the Unauthorized Charges, plus any the state and local taxes that may have been applied to such Unauthorized Charges, plus accrued interest. Plaintiff has also suffered, among other things, losses of time and other expenses, including attorneys' fees incurred in the investigation and prosecution of this action. Accordingly, Plaintiff seeks the recovery of its damages and exemplary damages.

43. Plaintiff further alleges that because Defendant knew that the representations described above were false at the time they were made, and were intended to cause substantial

injury and harm to Plaintiff, the representations were fraudulent and malicious and constitute conduct for which the law allows the imposition of exemplary damages. In this connection, Plaintiff will show that he has incurred significant expenses, including attorney's fees, in the investigation and prosecution of this action. By reason of which Plaintiff is entitled to recover exemplary damages and attorney's fees, as a measure of same for which Plaintiff now sues. Accordingly, Plaintiff requests that exemplary damages be awarded against Defendant in a sum within the jurisdictional limits of the Court.

Attorneys' Fees, Costs & Expenses

44. HCHD is also entitled to recover reasonable attorneys' fees, costs and expenses pursuant to TEX. CIV. P. & REM. C. §38.001.

G. Jury Demand

45. Plaintiff demands a trial by jury on all issues.

PRAYER

WHEREFORE, plaintiff HCHD prays that defendant Southwestern Bell Telephone Company d/b/a AT&T Texas be cited to appear and answer herein, and that upon final trial of this cause, judgment be entered in favor of Harris County Hospital District against Southwestern Bell Telephone Company d/b/a AT&T Texas as requested above, for actual, consequential, incidental, direct, special, general, out-of-pocket, economic, and compensatory damages as described above, punitive/exemplary damages, statutory damages, attorney's fees and costs, costs of court, prejudgment interest at the highest lawful rate, post judgment interest at the highest lawful rate, and all other relief, at law and in equity, to which it may show itself justly entitled.

Respectfully submitted,

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