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Supreme Court of Texas.  
In re Southwestern Bell Telephone Company, L.P., Relator.  
No. 05-0511.

March 22, 2006

Appearances:  
Christopher Malish (argued), Foster Malish Blair & Cowan, Austin, TX, for real parties in interest.  
Mike A. Hatchell (argued), Locke Liddell & Sapp, LLP, Austin, TX, for respondent.

Before:  
  
Don R. Willett, Wallace B. Jefferson, Nathan L. Hecht, Dale Wainwright, Scott A. Brister, David M. Medina, Paul W. Green, Phil Johnson, Harriet O'Neill

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PROCEEDINGS

JUSTICE: Please be seated. The court is ready to hear argument in 05-0511 In re Southwestern Bell Telephone Company, L.P.

COURT ATTENDANT: May it please the Court. Mr. Mike Hatchell will present argument for the respondent. He's reserved five minutes for rebuttal.

ORAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF THE RESPONDENT

MR. HATCHELL: May it please the Court. This original mandamus action asks a very simple question: "Should mandamus issue to require the district court to abate the cause of action while the PUC resolves issues related to the underlying contract between the parties?" Because of the prior in arbitration in asking for an indictment, the court has not called upon to decide perhaps to move our tricking question in this case as whether or not exclusive jurisdiction in mysterious form what I call "super duper exclusive jurisdiction" applies to the process. We are asking the court to apply what I call "either shoot out exclusive jurisdiction light" or perhaps "a heavy version or an excessive version of primary jurisdiction" because what we are asking the court is, is to plan it out after that was held in both Subaru v. Nissan and that is

there is at least a piece of this plan and actually we think the largest piece that is within the briefs this exclusive jurisdiction requiring the court to abate, to give the PUC time to decide the issue and then remand its findings to the court for mandatory appearance to put if they may be. So if the court accepts the plan and that is the doctrine which is in play, the issue before the court is quite simple. Is there a part of the claims in this dispute which is within the PUC's jurisdiction even though the claims have labels draped on them like unjust enrichment, fraud, DTPA and violation of the Texas anti-trust laws.

JUSTICE O'NEILL: But it seems to me the main issue is whether the AccuTel-Mega-Arb rate applies here.

MR. HATCHELL: Well, that can be ...

JUSTICE O'NEILL: Well, -

MR. HATCHELL: What's, what's your argument?

JUSTICE O'NEIL: - well, but the, the parties dispute that and the argument is that the PUC should be able to determine whether that rate was intended to have a broader effect or the Mega-Arb was intended to have a broader effect. Were the PUC to determine that the AccuTel-Mega-Arb rate did not apply then what would be left that would be exclusively within the PUC's jurisdiction -

MR. HATCHELL: Who owns that?

JUSTICE O'NEILL: - if we need that.

MR. HATCHELL: Once they decide which I think the mere illusion of judgment is that the rates in our contract are proper then that would be the end of that jurisdiction.

JUSTICE O'NEILL: Okay, then that be done in a trial court to determine whether the, the breaks for-- the pays were logically or correctly broken up between electronic and manual process.

MR. HATCHELL: That's correct, your Honor, and I, and I think, when you look at their claims, you will see that that, that really is going to be very well for the trial court to do. And just let for example, the unjust enrichment now, their, their pleadings in the case and, and that is cross in court and they going to think intentionally so they-- that they begin with the statement that this is a suit for damages related to overcharge. The charges were only made under the contract. Now, their claim for unjust enrichment says, "We used our position to quote instruct turns." Well, that of course, that claim is unavailable if there is a valid and enforceable written contract that covers the settlement. So that's clearly at the core of the unjust enrichment though. And any trust claim says that SBC has forced customers to pay more than legally or rents. That brings it right back to your Honor's question: Was the Mega-Arb and the AccuTel arbitrary used? Did they set there that have to be in these contracts even though the PUC approved the contracts with different rates? So that brings the case full circle. Under their DTPA claim which is very vaguely pleaded that ends up with say-- stating that the DTPA was valid because there was a misrepresentation about the nature of the doctrine but that cannot be add to. If we have correctly interpreted and in applying the contract. Their fraud claim says that we induced plaintiffs into signing agreements that called for the CLEX to pay substantially higher amounts than the appropriate rates. Well, again that bring for the judge's question that: What is the appropriate rate that should have been in this contract? It would have been, of course, it's, it's the negotiated rate between the parties that's within the contract. So every claim that they have in this case comes full circle back to the interpretation of the contract and the meaning of the contract to be

sued on as the proper rates are concerned. Your Honor, with that and essentially truth, I do say the court, I don't believe, has to go this far. That a very strong case could be made that super-duper exclusive jurisdiction class in this case but we have not prayed for that and whether or not the court wishes to ride on that and I don't think we'd get verdict that's substantial.

JUSTICE: Any questions? Thank you, Mr. Hatchell. The court is now ready to hear from the both party.

COURT ATTENDANT: May it please the Court. Mr. Christopher Malish will present arguments for the other parties.

ORAL ARGUMENT OF CHRISTOPHER MALISH ON BEHALF OF THE PETITIONER

MR. MALISH: May it please the Court. My name is Christopher Malish and we're here because my clients are the victims of an SBC swindle in which they're being charged for human labor supposedly necessary to complete service ordering when in fact SBC employees do not perform any

JUSTICE O'NEILL: But I thought -

MR. MALISH: - accumulation.

JUSTICE O'NEILL: - I thought, your claims depend upon whether the Mega-Arb-AccuTel right applies, didn't they?

MR. MALISH: In fact, what the Mega-, what the Mega-Arb did was it set the rate. This is the, this is the situation in which the PUC actually examined what went into the price that ought to be paid for these various different things. And in the Mega-Arb, you may see specifically Chairman Wood on looking records said that electronics service holding like the kind of my clients were doing should be no more than 258.

JUSTICE O'NEILL: What-- that-- again, so the answer to my questions would have to be "yes" because their whole argument hinges on whether that Mega-Arb rate was in your contract.

MR. MALISH: No, it doesn't because what happens is the Mega-Arb rate is the rate that PUC says is the appropriate rate.

JUSTICE O'NEILL: But -

MR. MALISH: And ...

JUSTICE O'NEILL: - that's the question, that they say that it doesn't apply to this contract. You say, it does. If it doesn't apply to this contract, your clients are different. Correct?

MR. MALISH: Well, right. Our claims are, our claims are not contract claim. Our claims are ...

JUSTICE O'NEILL: But they depend upon that 258 rate applied.

MR. MALISH: They depend upon the, the fact that the PUC has established that as what the correct rate should be.

JUSTICE O'NEILL: And that's an issue in the case as to whether that's actually what the PUC did. Should it be up to PUC to make that determination in the first instance?

MR. MALISH: Well, that's a bit of a circular argument because that is what the-- that, that was the whole purpose of the Mega-Arb. The purpose of the Mega-Arb was to look at all the various different input and decide what the rate should be. Now, ...

JUSTICE O'NEILL: But they say, it wasn't. I mean, that's, that's the heart of the dispute here.

MR. MALISH: That's ...

JUSTICE O'NEILL: And that's the heart of the preliminary dispute. Why would the PUC be the first one to take a credit then?

MR. MALISH: Well, because the Mega-Arb speaks for itself about what it was supposed to do. And if there's a question about what the Mega-Arb was supposed to do is resolved in the AccuTel case. Others of PUC has already looked at this. The PUC has already said what it has to say on this subject. It says, "This is what the rate for this electronic service ordering function should be." AccuTel comes back and says, "Yes, that is what the rate for this function should be." Now, what we have here is a situation where we have a contract. The contract is one that was in theory at least negotiated between the parties. Part of what happened in this negotiation was the fact that SBC says, "This contract contains rates that were taken from the Mega-Arb and therefore, what's in here is something that the PUC has said should be the rate." Now, as they go through life, our client's transition from processing orders manually. And if you take a look at the visual aide that provided, it tangles you an explanation of what the different things are we-- we're arguing about. At the top is what happens when SBC does this for retail customer. It takes the information retail customer. SBC's employee enters the information to a database or a computer program, transmits it into a computer which actually does all the service ordering processes. When my client first started doing business with SBC, they were involved in a situation where they didn't have that technology set up yet. So what they were doing is they would get the information from their end users and they would transmit it at either by fax or by telephone call to SBC. So what was happening was that SBC is enforced or in fact, still doing more or less the same thing they were doing in-- on a retail job because they were taking information, they are creating the order and they will transmit again. At the bottom, we have what happens would-- which-- what is the subject to this dispute which is what happens when my clients, not SBC's employees, take all the information, create the order and transmit it to the computer to be electronically executed without any involvement by SBC employees. And the only thing that SBC actually provides in this instance, your electronic portal, a gateway, a kind of like an ATM machine. You know, they're not running in late or even though they're charging as delay due. And the fact to the matter is that in this bottom scenario, we actually pay for access to that computer. So we pay a price to be able to do this electronically. So we're paying the price as it turns out to process the order electronically. We're paying our people to do the labor, to collect the information and transmit it. And we're having to pay SBC for SBC personnel labor that it claims is being-- that is providing but in fact, it's not.

JUSTICE: Let, let me ask you. Unclear still to which you're trying to, to claim here, what is your inter-connect agreement provide in terms of the price for electronic processing?

MR. MALISH: Well, this is-- this has been an electronic issue.

JUSTICE: Well, it does it or does it not?

MR. MALISH: Because this is an-- this is something that has been in dispute -

JUSTICE: Well,

MR. MALISH: - and it, it has been in litigation and is still currently in litigation at the Fifth Circuit in federal courts.

JUSTICE: So you don't know.

MR. MALISH: So the most recent decision-- this actually-- this was-- this went through the PUC on a similar contracts from Millennium I and Express as SBC has pointed out. There's flip-flopping at the PUC

about whether it's 258 or whether the contract says they can charge the higher amount.

JUSTICE: Well, if you don't know what the agreement provides, why, why would not be appropriate for the, for the PUC to, to look at it and decide and to tell you what it is?

MR. MALISH: Well, the, the PUC has ...

JUSTICE: Why and, and then what-- why is the jury more, more capable of making that determination than the PUC?

MR. MALISH: Well, two-part, two-part answer to your question. First of all, the PUC has obtained and although it flip-flopped on the issue, it's common conclusion in Millennium I, Express that the higher rate is permitted by SBC. And what they're saying is, "Not to test the rate that we set; we, the PUC set or we, the PUC allowed." That just seems to be what is in the contract whether that's consumable, whether that-- whether it was deceptively right that or not, that is what is in there. So the PUC has spoken its piece on that issue.

JUSTICE: Higher than 258, is that what you're trying to say?

MR. MALISH: That's correct. It's, it's, it's 1496 enough depending upon which particular kind of electronic service order is involved. So, so the PUC has said its piece. But the fact that it's in the contract, doesn't mean that there's not a DTPA case. It doesn't mean that there's not an anti-trust case and it doesn't mean that this is a PURA case or an FTA case. It is what we're doing here-- is we're suing on based on the fact that they were building this and they're just claiming.

JUSTICE: [inaudible] can't go to a jury? Can you make it a claim that you're making without knowing what the reasonable rate was supposed to be?

MR. MALISH: Well, that's, that's-- we didn't know what the reasonable rate was supposed to be.

JUSTICE: An agreement, you are into it?

MR. MALISH: I beg your pardon.

JUSTICE: And you're, and you're in on to that agreement?

MR. MARLISH: No, the reasonable rate was set by the PUC and the Mega-Arb and then the AccuTel case. Now, what, what is-- what has happened is that apparently, that rate didn't make it into the contracts that my clients have. So the rate that is in the contract that my clients have, is not one that was set by the PUC. It's one that was quote/unquote, negotiated by, by the parties, by SBC and there is plaintiffs. Now, the reality was that the plaintiff-- you know, the contract language is identical essentially for all of them but, but what is in our contract is not the same rate as the rate that was set by the PUC. So the PUC has already set in the Mega-Arb and in AccuTel what the appropriate rate should be. In other words, if you ask us to make a rate for you, this is what the rate is; it's 258, no more. On the other hand, even though what we're here, and you take a deal with SBC. And you can make a deal to pretty much whatever you want to. And if you, guys, come to an agreement between you, we'll rather stand it. And in this case, looks as, as we rather stand the deal in which you've agreed to pay \$16 or 1496 are enough for something that we've already said should have been 258. But that's what's in the contract. So that's what-- that's been the involvement of the PUC so far. And basically, at that point, they said everything that there is to say for the PUC in a case like this where what we're actually going for is not contract damages or the enforcement of contract but something different. We're going for deceptive trade practices because basically, what's happening here were being dealt for manual labor that's not being done. We're going for unjust enrichment because we're paying for manual labor that

we're not getting or going for anti-trust because the effect of all of these is to artificially raise the price to us to SBC's benefit to drive us out in the market.

JUSTICE: Is there any truth in that particular statement?

JUSTICE O'NEILL: I'm still confused as to understand your-- their charge on too much claim. But where I'm confused is, are they charging too much because they're charging you for manual when they really doing electronically. That's one of the charge claim.

MR. MALISH: Correct.

JUSTICE O'NEILL: But the other is that they're charging the, the extended rate as opposed to the AccuTel-Mega-Arb rate. And how do does depend upon each other or did anything?

MR. MALISH: Not really. The heart of the problem is that in context of this deformation of these contracts, SBC says, "We're going to be charging you and this, this contract contains the rate that has been set by the PUC." If that were true, the rate would be the 258 that was set by the PUC in the Mega-Arb. When we actually start ordering electronically, what's happened is SBC says, "Well, it doesn't matter what's in the Mega-Arb." In this contract, you're being charged the manual rate because that's what you agreed to. And frankly, you cannot read that contract and come to that conclusion very easily. It's just not-- it's not claiming there and it's counterintuitive. But that something is currently on appeal -

JUSTICE O'NEILL: So that would give us ...

MR. MALISH: - absolutely and actually says but we don't-- we just don't want to go there because it's not necessary for us to go there.

JUSTICE O'NEILL: So if the jury were to agree with you, then that would be contrary to decision of the PUC in another matter?

MR. MALISH: Not at all.

JUSTICE O'NEILL: Why would that not be contrary to Millennium I?

MR. MALISH: Because we're not asking the jury to tell us what the contract means. We're asking the jury to tell us: Did SBC behave fraudulently? Was SBC deceptive in its trade practices? That's different.

JUSTICE: If you're paying what you agreed to pay, how is that a deceptive trade practice?

MR. MALISH: Well, there's a dispute whether we agreed to pay that amount.

JUSTICE: I understand that you don't want to go there so if-- but if the answer to that is, "yes, that's what you pay," then how is our deceptive trade practice? has there fraud? has there anything?

MR. MALISH: The fraud arises from the fact that SBC is saying that this higher, the other amount is something that you agreed to -

JUSTICE: Right.

MR. MALISH: - which we didn't.

JUSTICE: I understand that but you don't want to go there. So let's assume that you did.

MR. MALISH: Well, assuming we went there, the question would be-- I guess, you're asking me, "What is the-- what does the contract say?"

JUSTICE: No, I'm saying-- you said, we don't have to consider what it says. We can-- we're entitled to go forward without knowing what it says and-- all right. But if it's-- if you agreed to it, we don't want to resolve that issue but hypothetically, if you agreed to it, then how do you have the case on it?

MR. MALISH: If we had agreed to it, the question becomes, "Under what circumstances did we agree to it?"

JUSTICE: Okay. So when they have it in that trust claim but it's

hard to know why he have a deceptive trade line.

MR. MALISH: Well, that arises from, that arises from the fraud that is involved in representing that. This contract has terms in it that if it doesn't-- in other words, that this contract has the PUC ordered price for this event when it doesn't.

JUSTICE: But if it does-- I mean, it seems to me you're saying, "We don't have to decide that but let's assume that it doesn't." Well, let's assume that it does.

MR. MALISH: Well, if we were to assume that it does, then that would-- then we would also have a breach of contract case because they would not have been charging us the lower price. Right? The question as I understand you asked it to me was, "Let us assume that the contract had the lower price in it, the 258 for the electronic function." And if that were in the contract, then what we would have in addition to whatever other things we would have, we would also have a contract claim because we have been charged the higher price instead of the lower price that it is in the contract.

JUSTICE: Actually, I know that you don't want to do that but I'm saying what if you agreed to the higher price?

MR. MALISH: But we didn't.

JUSTICE: Yeah. I know that's your position.

MR. MALISH: If, if we had agreed to the higher price, unknown to us somehow, the question is how did we get manipulated into agreement to that because if there's, if there is deceptive conduct involved, it's something more. It's something other than a breach of contract. So that's basically the, the, the driving or, or their answer which not behind contexts truly enforced. For example, ...

JUSTICE O'NEILL: So that can-- I guess, we're back to our original question. In order to get to the tort claims, you got to resolve which price applies.

MR. MALISH: Well, we, we are assuming and SBC is saying that the higher price applies that's in the contract. If they find, we're not going to argue with you about that. That maybe in the contract and that's also what the PUC has said in, in a, in a-- Express and Millennium I. That in a contract almost too identical to this one, the price is at 1496, okay. We're not going to contest that. What we're saying is that, notwithstanding that, what you've got here is a situation where it was fraudulently induced; that it was fraud to say that the correct price was 1496 when in fact the correct price that was set back in 1997 in the Mega-Arb was 258.

JUSTICE O'NEILL: But again, that-- the presumption the underlying that argument is that the Mega-Arb price was the appropriate price for this contracts.

MR. MALISH: You're right. That is the assumption but that is what the purpose of the Mega-Arb was for. And that is also something that the PUC come back and reaffirmed in the AccuTel case. We said, "Yes, we looked at this and the appropriate charge in this instance for this item which is a unit-- was called a unit is 258." So the PUC has examined this not once but twice. So in order to exercise they're special expertise, they've said, "Yes, for this electronic function, it should be 258." Two times they've said that already. So we don't need to defer to them to say the same thing again. Now, what they're saying is it doesn't-- that's not the question, the question is: What's in the contract? But again, we're not here on breach of contract question. They have to get to-- you know, surgically excise that and understand that the, the, the causes of action that we have chosen to bring which were a lot to do are only breach of-- excuse me, not breach of contract

but tort claims, anti-trust claims and DJK claims. So under, under Smith versus Baldwin, you know, the fact to the matter is that these kinds of claims aren't exclusive, breachfully exclusive DTPA or contract. You can eliminate one and choose to go with just the other. We're the masters of our pleading. We're the masters of the kinds of things that we wish to pursue. The PUC has already exercised all of its expertise in this issue, there's nothing new for to look at. It's looked at essentially the same contract language and make a determination on that. Let's look at the issue of what this item actually on the cost. And two times now has said, "What it should be?" All times, in a holding that was directly applied to SBC because this, this-- both these issues are only for SBC, they're not for GGE or arise in their some other ally. It's simply what SBC is allowed to charge for this item so PUC's expertise has already been drawn upon in order to get the ...

JUSTICE: Why did they, why did they want to do it again?

MR. MALISH: Well, they want to do it again because they want to prevent this case from blowing the trial for as long as possible. I mean, we're already been through two removals and remands. We've been through two appeals to the Thirteenth District and now we're here before this Court.

JUSTICE: And they want to do that recalls?

MR. MALISH: Because the longer that they can string this out, the more likely it is that my clients are going to go bankrupt just because the whole, the whole field in which my clients operate are constricting and more, and more then they're going out of business. About five years ago, there was 300 somewhat companies like this, I believe, in Texas and now, we're down to about a third of that. I know that this in the record but, but that's a practical ...

JUSTICE: Does doesn't do with competition in the markets just that were extremely long but yet this is extremely -

MR. MALISH: Right

JUSTICE: - that revolved ...

MR. MALISH: Right. For example, both Millennium I and Express, the companies that, that cases that they're relying upon, are out of business right now.

JUSTICE O'NEILL: Won't you get this question resolved quicker about the PUC than you will go into the jury for bargaining?

MR. MALISH: Not likely. I mean, the PUC took more, more than a year-- maybe almost two years, for example to do the Express case.

JUSTICE: And trials in Cameron County take along?

MR. MALISH: I beg your pardon.

JUSTICE: And trials in Cameron County take along?

MR. MALISH: To ask to conduct a trial? This trial would probably take about a week in order to conduct. Now, it was basically ready-- if you'll allow me to finish.

JUSTICE: I'm sorry, any further questions?

JUSTICE: I won't question about [inaudible]. What issue are you going to submit to the jury when you trial of this case? Why are you going to ask the jury?

MR. MALISH: Well, we're going to ask them: Is SBC's pattern of conduct under these circumstances deceptive? Does SBC's pattern of the conduct amount to anti-trust?

JUSTICE: And you're never going to ask for about what the contract says. If I give you assumption on what the, the proper rate is or what the language this contract specified in writing, you just not want to touch that level. Why did you ask the jury questions



MR. MALISH: Well, we're going to say that the PUC has said in Express that when Millennium I ...

JUSTICE: I know the case involving other-- another case.

MR. MALISH: But, but the contract name which was identical, that's, that's the key thing here.

JUSTICE: Other questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF RESPONDENT

MR. HATCHELL: May it please the Court. And very briefly, Justice O'Neill appoint this verification down of the crucial issue and they ask whether or not either the Mega-Arb rate or the AccuTel [inaudible] would require to be in the contract. The PUC is before this Court in line of this theory agree that contains this statement, "The Commissions of 2002, AccuTel arbitration as well as the dockets setting the initial default prices or inter-connection agreements in the 1996 and 1997, Mega arbitrations does not resolve the questions regarding the price for electronic ordering under the CLEX inter-connection agreements." So the PUC itself has taken the position that there is something left for them to do in so far as interpreting the inter-connection agreements. Justice Yeiko, in the Millenium I case, has written a very elusive discussion on why the Mega-Arb and AccuTel decisions do not affect an individual contract. It's decision focused upon what's in that contract and looked at the language in that contract to determine whether that-- the rates and as-- matched up to various services covered the dispute whether that covered the electronic process that's applied. The argument that, that this is basically a fraud and misconduct case does not include the situation one day for the number that is gone. The fraud allegation at one level says that SBC fail to disclose. That in the contract, I'm handing you, it does not contain proper rates and that there are other rates that we have planned. In other words, we fail to disclose that rate to require to the-- in the contract with ranging back to the position of what is required in the conduct. But there's even another one because the PUC's approval of a contract which is-- and they have been deputized that the federal court communicate to that. To do so-- and it gives-- there's exclusive jurisdiction to do so implies that the rates in the contract are none discriminatory and that can-- and that is also a matter that can be brought before and should be brought to the PUC in a post inter-connection dispute.

JUSTICE: Mr. Malish said that you waited too long to seek mandamus relief.

MR. HATCHELL: Well, your Honor, there's a several answers to that question. Actually, I don't think he says that we waited too long to seek mandamus relief. I think, he says really that we waited too long to have a ruling on our plea and affecting our plea to the jurisdiction. Number one, there is respectable authority that exclusive jurisdiction, exclusive jurisdiction lie as I called it, is not waived and that certainly, makes sense because it's a matter of-- to sent to questions of certain matter of jurisdiction of power of the court to proceed. But secondly, the lengthous timeline in this case simply does not bet, does not be referred. We raised the issue of exclusive jurisdiction from the [inaudible] pleas and what is complaining about is that the trial court didn't get around the ruling of for a couple of

years which is true. But when the trial court got around ruling in it and finally, enter that written order that we get mandamus, we went through the Court of Appeals and up to this Court in a manner of very short probably, about four to six months and much of that time was taken at with the Corpus Cristi Court of Appeals sitting to and-- waiting legitimately to set the issues in the case. Is it very, very bad rule that says that we should be penalized for delay and required to go through the entire process and years later perhaps to ultimately be told, "You got to start all over again." That's just very bad policy to the plan a rover-center type of landuce. And to this case approach get access the overall process you got into the max. I think, your Honor is saying that, "What truly studies from this case is what I intend to do in inner run of the PUC bring this cases assume the court to get mandamus." The system is set up precisely it prevent that.

JUSTICE: Thank you, counsel. That concludes this cause and all causes for the morning.

COURT ATTENDANT: All rise. Oyez, oyez, oyez. The honorable Supreme Court of Texas has submitted the verdict. The case entry proceeded.

2006 WL 5891609 (Tex.)