

Exhibit No.:  
Issue:  
Witness: Gerard J. Howe  
Sponsoring Party: Big River Telephone  
Company, LLC  
Type of Exhibit: Surrebuttal Testimony  
Case No.: TC-2007-0085

BIG RIVER TELEPHONE COMPANY, LLC

SURREBUTTAL TESTIMONY

OF

GERARD J. HOWE

TC-2007-0085

August 27, 2007

STATE OF Missouri )  
 )  
COUNTY OF St. Louis Co ) SS.

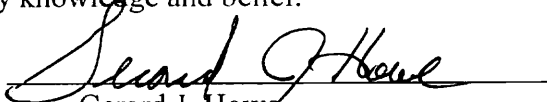
BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

BIG RIVER TELEPHONE )  
COMPANY, LLC, )  
 )  
Complainant, )  
 )  
V. ) Case No. TC-2007-0085  
 )  
SOUTHWESTERN BELL )  
TELEPHONE, L.P. D/B/A )  
AT&T MISSOURI, )  
 )  
Respondent. )

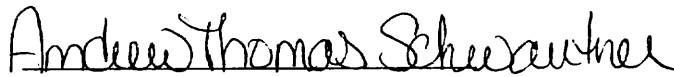
**AFFIDAVIT OF GERARD J. HOWE**

COMES NOW Gerard J. Howe, of lawful age, sound of mind and being first duly sworn, deposes and states:

1. My name is Gerard J. Howe. I am the CEO for Big River Telephone Company, LLC.
2. Attached hereto and made a part hereof for all purposes is my Surrebuttal Testimony in the above-referenced case.
3. I hereby swear and affirm that my statements contained in the attached testimony are true and correct to the best of my knowledge and belief.

  
Gerard J. Howe

SUBSCRIBED AND SWORN to before me, a Notary Public, this 24<sup>th</sup> day of August, 2007.

  
Notary Public

My Commission Expires: 5/31/2010  
(SEAL)

ANDREW THOMAS SCHWANTNER  
Notary Public - Notary Seal  
STATE OF MISSOURI  
Jefferson County  
Commission #06893876  
My Commission Expires 5 / 31 / 2010

**PRE-FILED SURREBUTTAL TESTIMONY  
OF  
GERARD J. HOWE**

1    **Q.     Please state your name.**

2    A.     Gerard J. Howe.

3    **Q.     Are you the same Gerard J. Howe who submitted direct testimony in this case?**

4    A.     Yes.

5    **Q.     What is the purpose of your surrebuttal testimony?**

6    A.     I am responding to various statements made in rebuttal testimony by AT&T and Staff  
7           witnesses.

8    **Q.     On Page 3 of his testimony, Mr. McKinnie states in a summary that Big River's**  
9           **Complaint concerns the application of the FCC's TRRO transition rates. Is that**  
10          **accurate?**

11   A.     Only partly so. The FCC's TRRO Transition Rates, as incorporated into the  
12           Commission-approved interconnection agreement, only resolve the issues through  
13           March 11, 2006. Thereafter, the 271 rates approved by the Commission in the  
14           agreement apply, subject to resolution of the federal court proceedings described in my  
15           direct testimony.

16   **Q.     Do you have any other comments regarding Mr. McKinnie's testimony?**

17   A.     Mr. McKinnie does not consider all pertinent facts in his testimony. First, he fails to

1 address the fact that the Commission-approved interconnection agreement was already  
2 in effect and applied to Big River's provision of service to all its customers prior to Big  
3 River and AT&T entering into the LWC. He does not take into account the fact that the  
4 parties did not make an amendment to the interconnection agreement, as would be  
5 required by the agreement, or submit any such amendment to the Commission for  
6 approval, as would be required by Commission rules and orders, as well as federal law,  
7 and the agreement itself, in order to revise the interconnection agreement.

8 Second, he does not mention that Big River only needed to enter into the LWC because  
9 of federal court action that initially only interrupted Big River's right to obtain  
10 switching at Commission-approved 271 rates for new customers under the  
11 interconnection agreement, and that only well after entry into the LWC did the federal  
12 court address existing customers.

13 He notes that the LWC has an "entire agreement" clause, but does not acknowledge the  
14 clause is false on its face given the existence and continued effectiveness of the  
15 interconnection agreement (which also contains such a clause). He does not take into  
16 account the fact that Big River notified AT&T in writing that it was entering into the  
17 LWC solely as to new customers and that AT&T accepted the agreement on those  
18 terms rather than declining to sign. He also ignores the inescapable ambiguity created  
19 by the dual existence of the interconnection agreement and the LWC, which makes

1 evidence such as my letter (schedule H-11) relevant and determinative.

2 I understand that Mr. McKinnie is not an attorney. He also was not party to any of the  
3 dealings between AT&T and Big River. It is my request that Staff withdraw this  
4 incomplete testimony, as it offers no new facts and it does not provide an admissible  
5 legal opinion. It is not Staff's purview to resolve this matter, as that task falls upon the  
6 Commission. Testimony that offers incomplete summaries of other testimonies and  
7 then picks a side is not appropriate in my opinion.

8 **Q. Is Mr. McKinnie's conclusion and recommendation valid?**

9 A. No. I don't wish to be harsh, as I do not doubt his desire to be fair. But he has not  
10 completely or correctly analyzed the situation. Big River filed this complaint to get  
11 resolution on this issue and never in my wildest dreams did I anticipate that the  
12 Commission's staff would neglect an agreement approved by this Commission and  
13 instead cite a non-approved agreement that contradicts the approved agreement, to  
14 purportedly be an agreement in its entirety.

15 **Q. AT&T witness Niziolek (p.2) describes Big River's position in this case as an**  
16 **"inaccurate assumption". Is that a correct statement?**

17 A. No. Our case is based on facts and law, and an interconnection agreement that Big  
18 River negotiated, and then, arbitrated before this Commission. Ms Niziolek was not  
19 party to the negotiations or arbitration proceedings that culminated in the AT&T – Big  
20 River Interconnection Agreement, so she may perceive our contractual rights to be an  
21 “inaccurate assumption”, but we know them to be what they are, contractual rights

1           pursuant to an agreement approved by this Commission which we seek to enforce.

2   **Q.   Ms. Niziolek states (p. 2) that the Commission cannot provide relief to Big River**  
3   **because of the federal court rulings. Is that correct?**

4   A.   No. Regardless of the outcome of the federal court proceedings, we are entitled to relief  
5       in order to have the correct rates apply through March 11, 2006. Beyond that, assuming  
6       the 8th Circuit rules in our favor (it has not yet ruled), we will also be entitled to further  
7       relief.

8   **Q.   She also states (p. 2 and 9), as does Mr. White (p. 6), that the LWC precludes the**  
9   **Commission from granting relief. Is that correct?**

10   A.   No, as explained in my direct testimony and in my foregoing response to Mr.  
11       McKinnie's testimony, that is not correct. Again, neither Mr. White nor Ms. Niziolek  
12       were party to the discussions or arbitration proceedings in regard to the AT&T-Big  
13       River Interconnection Agreement. Moreover, upon review of the testimony of both Mr.  
14       White and Ms Niziolek, you will find that neither gives any weight to the contents of  
15       the Commission-approved interconnection agreement between AT&T and Big River.  
16       Instead both rely solely on the language of the LWC.

17       I don't know if it is lack of understanding of the Commission-approved agreement that  
18       has lead to their erroneous conclusions that Big River is not entitled to relief and  
19       enforcement of that agreement, but they certainly don't reconcile their claims that the  
20       LWC is the 'entire agreement between the AT&T ILECs and the CLEC' with the

1 existence and applicability of the Commission-approved agreement.

2 **Q. Earlier you mentioned that the Commission-approved interconnection agreement**  
3 **contains a similar clause with regard to the entirety of the agreement between the**  
4 **parties. Can you shed light on that specific clause and its pertinence to this case?**

5 **A.** Yes. The Commission-approved agreement between Big River and AT&T contains a  
6 section 39 entitled 'Complete Terms'. It states:

7 This Agreement constitutes the entire agreement between the parties  
8 concerning the subject matter hereof and supersedes any prior arrangements,  
9 representations, statements, negotiations, understandings, proposals or  
10 undertakings, oral or written, with respect to the subject matter expressly set  
11 forth herein.

12 It further states that:

13 Neither Party will be bound by an amendment, modification or additional  
14 term unless it is reduced to writing signed by an authorized representative of  
15 the party sought to be bound. The rates, terms and conditions contained in  
16 the amendment shall become effective upon approval of such amendment by  
17 the Commission.

18 In fairly plain English, it says that neither party will be bound by any changes to the  
19 terms of the Commission-approved agreement unless reduced to writing, signed by an  
20 authorized representative and approved by the Commission.

21 In my discussions with Mr. White and Ms. Josephson in negotiating the LWC, I was

1 fully aware of that language and confident that the LWC would not supersede the terms  
2 of the Commission-approved agreement because we agreed it would not and there was  
3 never any discussion of any Commission approval, which would have been required to  
4 override the terms of the Commission-approved agreement.

5 As I have testified, Ms. Josephson, Mr. White and I discussed the continued use of  
6 unbundled switching pursuant to the Commission-approved agreement, and the  
7 continued application of the terms and rates as they pertain to unbundled switching as  
8 they are laid out in that agreement for our embedded base of customers. If we had  
9 contemplated mutually agreeing to change the prevailing terms and rates as Ms.  
10 Josephson and Mr. White suggest, I cannot understand how those changes would take  
11 effect without specific Commission approval of such modifications to our Commission-  
12 approved agreement, a matter of which we never discussed and they never raised.  
13 Again, I don't understand how Mr. White, as the AT&T negotiator, reconciles his back  
14 door attempt to now argue for a complete overhaul of the terms and rates for unbundled  
15 switching without the required Commission approval.

16 **Q. Ms. Niziolek discusses the TRRO on page 4. Do you have any comment?**

17 A. Yes. She concedes our rights under the TRRO to continued access to switching as a  
18 UNE through March 11, 2006. However, she ignores that fact when she discusses the  
19 impact of the federal court proceedings at pages 8-9. At pages 10-12, she again  
20 concedes our rights and concedes those rights are confirmed in the interconnection



1 agreement. But she nonetheless pretends our rights do not exist when she states her  
2 inaccurate and non-legal conclusions.

3 **Q. Ms. Niziolek discusses the post-M2A arbitration and interconnection agreement**  
4 **on pages 5-6. Do you have any comments?**

5 A. She concedes the Commission ordered that AT&T continue to provide Big River with  
6 switching after March 11, 2006, pursuant to Section 271.

7 **Q. Does any AT&T witness discuss the fact that the LWC cannot amend the parties'**  
8 **pre-existing interconnection agreement?**

9 A. No. They ignore the fact that the LWC cannot amend or override an approved  
10 interconnection agreement. They do not in any way address the need to reconcile the  
11 two agreements.

12 **Q. On page 15, Ms. Niziolek mentions your February 13, 2006 letter. Ms. Josephson**  
13 **talks about it at pages 7-8. Do you have any comments?**

14 A. Yes, I can't believe Ms. Josephson goes into an explanation of the clerical  
15 responsibilities of the "Contract Processing" department and then opines that "the letter  
16 was not copied to anyone at AT&T, including me". What makes the latter statement  
17 more unbelievable is that in the next sentence of her testimony she acknowledges that  
18 "Mr. Howe sent me a copy of the letter within an e-mail regarding an unrelated  
19 subject", a copy of which is included in my Schedule H-12. Her description of the  
20 involvement of the 'Contract Processing' department is made all the more irrelevant by  
21 the fact that I sent her a copy of the letter, told her it was sent with the LWC, and

1 reiterated the concerns that we had regarding 271 switching. Her position is further  
2 undermined by the fact that the LWC was later executed by Rebecca Sparks of AT&T,  
3 who as an Executive Director, has more responsibility than either Mr. Josephson or Mr.  
4 White, hardly the clerical role that Ms. Josephson attributes to "Contract Processing".  
5 Why hadn't Ms. Josephson contacted Ms Sparks regarding my letter given her  
6 supposed disagreement with our stated position?

7 The facts regarding this sequence of events are these:

- 8 i) I sent my explanatory letter along with the executed signature page to AT&T on  
9 the 13<sup>th</sup> of February to Contract Processing **as required by AT&T**, see Howe  
10 Direct, Schedule H-11. The signature page had only my signature at that point  
11 in time. See Schedule H-14.
- 12 ii) I sent a copy of my explanatory letter to Ms. Josephson in my email to her on  
13 the 14<sup>th</sup> of February, see Howe Direct Schedule H-12.
- 14 iii) Ms. Rebecca Sparks, Executive Director-Regulatory, executed the LWC on  
15 behalf of AT&T on February 15<sup>th</sup>, see page 2 of Howe Direct Schedule H-11.
- 16 iv) Ms. Josephson did not communicate any disagreements or concerns regarding  
17 my explanatory letter and the position stated therein to Big River, nor does it  
18 appear that she advised Ms. Sparks not to execute the LWC because of any  
19 ambiguities or misunderstandings. It was not until March 10, 2006 that AT&T  
20 responded to my February 13 letter (again confirming they had received it). See  
21 Schedule H-12.

1        There can be only one explanation for Ms. Josephson's lack of a response to Big River  
2        and her apparent lack of intervention with Ms. Sparks' execution of the LWC; the  
3        parties agreed as to what we had discussed, which was laid out in my explanatory letter  
4        and subsequent emails regarding the handling of unbundled switch ports for our  
5        embedded base of customers. This was not a clerical error as suggested by Ms.  
6        Josephson, or an erroneous assumption as Ms. Niziolek would lead one to believe, this  
7        is simply an effort by AT&T to back out of its commitments in a manner that  
8        significantly and unjustifiably enriches AT&T.

9        If AT&T did not agree with my letter, which stated the terms under which I was  
10       tendering a signature page for the LWC, then AT&T should not have subsequently  
11       signed the LWC. Further, my letter confirmed my discussions with AT&T personnel,  
12       not any assumption on my part (see Niziolek p. 18).

13    **Q.    Have you reviewed Ms. Josephson's and Mr. White's testimony regarding your**  
14       **various conversations and communications with them?**

15    A.    Yes.

16    **Q.    Does their testimony cause you to revise any of your direct testimony?**

17    A.    No. I have accurately described our discussions. They do not. I specifically recall the  
18       conversations that I describe in my direct testimony, including at page 13. AT&T's  
19       representatives provided specific assurances to us and now pretend they did not.

1   **Q.   Ms. Josephson stated that no one from Big River ever contacted her about the**  
2       **options available to Big River as indicated in AT&T's letter of March 10, 2006. Is**  
3       **that accurate?**

4   A.   It's accurate that we didn't have any further discussions. What is not accurate is that  
5       we were presented with options. As Ms. Kemp clearly states in her letter, to the extent  
6       that any desired changes required the processing of orders on the existing base of  
7       customers, such activity was in AT&T's opinion precluded by the Court's injunction.  
8       Ms. Kemp, in an email sent a few hours after the initial email on the 10<sup>th</sup> of March,  
9       confirmed that we did not have to do anything to continue to serve our customers. And,  
10      as I had pointed out earlier to AT&T, all of our customers were in AT&T's system and  
11      were being billed at the proper rates. Given those two conditions, we saw no need to  
12      pursue any changes.

13   **Q.   Did Ms. Josephson and Mr. White ever tell you prior to execution of the LWC**  
14       **that the LWC would apply to your existing base of customers, as they allege in**  
15       **their testimony? (Joseph p. 6, White, p. 4-5).**

16   A.   No. To the contrary, as I have testified they assured me that the LWC would not apply  
17       to our existing base of customers. As I said in my direct testimony, Ms. Josephson and  
18       Mr. White had assured me that if some of our embedded base were inadvertently  
19       converted to LWC billing terms, it would be unintentional and that it would be  
20       immediately corrected. As he testifies, Mr. Schwantner has the same recollection of  
21       that conversation.

1    **Q.     Do you have any final comments?**

2    A.     My direct testimony, together with that of other Big River witnesses, proves our case. I  
3           have responded herein to certain parts of the rebuttal testimony of other witnesses to  
4           help the Commission understand our case. I have not responded to every statement  
5           made by the other witnesses, but Big River's direct testimony already controverts it and  
6           we concede nothing by means of limiting the scope of our surrebuttal.  
7           And only one final thing, where is the testimony of Ms. Sparks who executed the  
8           LWC?

9    **Q.     Does that conclude your surrebuttal testimony?**

10   A.     Yes.