

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

Big River Telephone Company, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. TC-2007-0085
	)	
Southwestern Bell Telephone Company,	)	
d/b/a AT&T Missouri,	)	
	)	
Respondent.	)	

**AT&T MISSOURI’S RESPONSE TO ORDER DIRECTING FILING**

Southwestern Bell Telephone Company, d/b/a AT&T Missouri (“AT&T Missouri”), hereby submits this Response to the Commission’s July 2, 2008, Order Directing Filing (“Order”). In its Order, the Commission referenced the June 20 Opinion handed down by the Eighth Circuit Court of Appeals. In its opinion, the Court “join[ed] those federal courts which have concluded the FCC has exclusive jurisdiction over § 271” and ruled that the Commission had exceeded its authority in concluding otherwise in the 2005 post-M2A arbitration case.” *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission*, Consolidated Case No. 06-3701, Op. at 11 (8<sup>th</sup> Cir., June 20, 2008). The Commission’s order stated that if any party disagrees with the Commission’s intention not to “move this case forward” pending the filing of any petition for rehearing with the Eighth Circuit, that party should “file a pleading so stating their reason for disagreement.” Order, at 2.

AT&T Missouri agrees that proceeding to schedule an evidentiary hearing in this complaint case would be unproductive. More importantly, however, AT&T Missouri maintains that the Commission should dismiss Big River’s complaint for the same reasons as AT&T

Missouri advanced at the outset of this case.<sup>1</sup> While AT&T Missouri need not here re-argue all of them, it remains important to note that the September 14, 2006, Declaratory Judgment and Permanent Injunction of the District Court, directed to both Big River and the Commission and subsequently affirmed by the Eighth Circuit, have never been stayed. Instead, they became effective and binding upon the parties by operation of law on September 14, 2006.<sup>2</sup> Moreover, in the absence of a stay (which has never been sought, much less granted), they remain effective, and consequently, must be obeyed.<sup>3</sup>

The Commission's July 1, 2008, Petition for Rehearing of the Eighth Circuit's Opinion does not change the fact that Big River's complaint should be dismissed. While the petition seeks to pit the Eighth Circuit's ruling against a recent (and distinguishable) ruling by the Eleventh Circuit,<sup>4</sup> for purposes of this particular complaint case, it is enough to note that the Eleventh Circuit specifically ruled that incumbent LECs such as AT&T Missouri "are permitted to charge market rates for Section 271 elements."<sup>5</sup> Therefore, even were the Eighth Circuit to grant a rehearing based on the Eleventh Circuit's ruling, that ruling offers no support for Big River's attempt here to obtain via Section 271, as the Eleventh Circuit put it, "cost-based facilities mandated under the original UNE platform."<sup>6</sup>

Big River claims that there are issues presented in this case that remain unaffected by the judicial proceedings.<sup>7</sup> AT&T disagrees, both for the reasons stated here and those stated earlier.

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<sup>1</sup> AT&T Missouri's Motion to Dismiss Complaint, September 26, 2006; AT&T Missouri's Combined Reply in Support of its Motion to Dismiss Complaint and Response in Opposition to Big River's and Staff's Motions for Stay, October 20, 2006.

<sup>2</sup> Fed. R. Civ. P. 58, 65(d).

<sup>3</sup> *Stone v. City and County of San Francisco*, 145 F.R.D. 553, 559 (N.D. Cal. 1993), *citing*, *Hovey v. McDonald*, 109 U.S. 150, 157 (1883) and 9 James W. Moore et al., *Moore's Federal Practice*, Section 208.03 (2d ed. 1992).

<sup>4</sup> *NuVox Communications, Inc. v. BellSouth Communications, Inc.*, Case No. 07-13028, 2008 U.S. App. LEXIS 12765 (11<sup>th</sup> Cir., June 18, 2008).

<sup>5</sup> *Id.*, at \*12.

<sup>6</sup> *Id.*

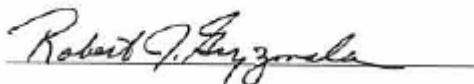
<sup>7</sup> Big River's Response to Order Directing Filing, July 9, 2008, p. 1.

As AT&T Missouri has explained, even the portion of Big River's complaint resting on the brief "pre-March 11" period in 2006 (i.e., from January 1, 2006 through March 11, 2006) is foreclosed and should be dismissed, because Big River's claim regarding this short period is no less grounded on its since discredited Section 271 theory as is its post-March 11 claim.<sup>8</sup>

In sum, the Commission should proceed to dismiss the complaint. In all events, should the Commission decline to do so at this time, and instead decide to await the Eighth Circuit's resolution of the Commission's Petition for Rehearing, it should rule on AT&T Missouri's motion to dismiss thereafter, before it takes any other action.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

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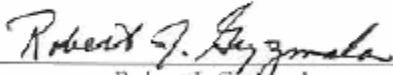
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<sup>8</sup> AT&T Missouri's Combined Reply in Support of its Motion to Dismiss Complaint and Response in Opposition to Big River's and Staff's Motions for Stay, October 20, 2006, pp. 5-6.

## **CERTIFICATE OF SERVICE**

Copies of this document were served on the following parties by e-mail on July 10, 2008.

  
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