

**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 RENEWED MOTION TO DISMISS COMPLAINT

Southwestern Bell Telephone Company, d/b/a AT&T Missouri ("AT&T Missouri") hereby renews its Motion to Dismiss filed September 26, 2006. The appeal related to this proceeding has now concluded. The United States Supreme Court has determined to leave intact the June, 2008, opinion of the United States Court of Appeals for the Eighth Circuit. That opinion leaves no doubt that Big River cannot prevail on its complaint. Thus, the complaint should be dismissed.

1. On September 26, 2006, AT&T Missouri moved to dismiss Big River's complaint alleging that AT&T Missouri violated the terms of its interconnection agreement with Big River, and in particular, that portion of the agreement which was predicated upon the Commission's having purported to exercise authority pursuant to Section 271 of the federal Telecommunications Act. AT&T Missouri's motion relied on the Declaratory Judgment and Permanent Injunction, and Memorandum and Order, entered on September 14, 2006, by the federal District Court for the Eastern District of Missouri in *Southwestern Bell Telephone, L.P. dba SBC Missouri v. The Missouri Public Service Commission, et al.*, 461 F. Supp. 1055 (E.D. Mo. 2006). In essence, AT&T Missouri argued that under the Court's decision, the Commission lacked authority under Section 271 of the federal Telecommunications Act to grant Big River

any of the relief sought by its complaint. However, an appeal from the Court's decision was then taken and, prompted by Big River and Staff, Commission declined to rule on AT&T Missouri's motion.

2. On June 20, 2008, the Eighth Circuit Court of Appeals affirmed the District Court's ruling. In its opinion, the Eighth Circuit (as had the district court below) "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*, 530 F. 3d 676, 683 (8th Cir. 2008).

3. Shortly thereafter, the Commission, noting that the appeal "was the genesis of Big River's and Staff's motions to stay these proceedings[,]""¹ again indicated its intention to not take any action in this case until there was complete disposition of the appeal.

4, On January 12, 2009, the United States Supreme Court denied the Commission's petition for writ of certiorari regarding the Eighth Circuit's opinion in *Southwestern Bell*.²

5. All of Big River's avenues of appeal from the case that was the genesis of Big River's and Staff's motions to stay this case have now been exhausted, and the Eighth Circuit's decision must stand. According to the Eighth Circuit (and the district court whose decision it affirmed), the Commission does not have the authority to grant Big River the relief it seeks.³ Applying this binding precedent, it is evident that this case should be dismissed.

WHEREFORE, AT&T Missouri respectfully renews its Motion to Dismiss Complaint filed September 26, 2006.


¹ See, Order Directing Filing, p. 2, July 2, 2008.

² See, Order List -- Certiorari Denied, 555 U. S. ___, at 4, January 12, 2009. The notice of denial also is available at <http://origin.www.supremecourtus.gov/docket/08-531.htm>.

³ See, AT&T Missouri's Motion to Dismiss, filed September 26, 2006 (Attachment 1 hereto, without copy of district court's decision attached thereto); see also, 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, filed October 20, 2006 (Attachment 2 hereto).

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

BY 

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AT&T MISSOURI’S MOTION TO DISMISS COMPLAINT

Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri (“AT&T Missouri”) hereby moves the Commission, pursuant to Rule 2.070(6) (4 CSR 240-070(6)), to dismiss the Complaint of Big River Telephone Company, LLC (“Big River”) for failure to state a claim on which relief may be granted by this Commission and for lack of jurisdiction.

SUMMARY

Big River claims that AT&T Missouri is required by the Commission-approved interconnection agreement between Big River and AT&T Missouri, to “provide local switching pursuant to billing arrangements under Section 271 of the Act together with local loops pursuant to billing arrangements under Section 251 for use in serving Big River’s existing customers.” Complaint, p. 1. Big River asks the Commission to determine that Big River does not owe AT&T Missouri any amounts for local switching and loops beyond the rates set forth in the parties’ interconnection agreement and to require AT&T Missouri to continue to provide local switching at the rates set forth in that agreement. Complaint, pp. 1, 12. Big River’s position, however, is directly contrary to the Declaratory Judgment and Permanent Injunction, and Memorandum and Order, entered September 14, 2006, by the Federal District Court for the Eastern District of Missouri, in the appeal of the Commission’s July 11, 2005 Arbitration Order in Case No. TO-2005-0336,

Southwestern Bell Telephone, L.P. d/b/a SBC Missouri v. The Missouri Public Service Commission, et al., No 4:05-CV-1264 CAS (E.D. Mo.).

Big River's Complaint must be dismissed for failure to state a viable claim and for lack of jurisdiction because the requirement in the Commission's Arbitration Order that AT&T Missouri "include § 271 unbundling obligations in its interconnection agreements is beyond the jurisdiction of the Commission." Memorandum and Order, p. 21. The federal court determined that the Arbitration Order which is the basis for Big River's claim "conflicts with and is preempted by federal law to the extent it requires [AT&T Missouri] to provide unbundled access to switching and the UNE Platform." Memorandum and Order, p. 23. Were the Commission to grant Big River any relief, it would run afoul of the Court's Declaratory Judgment and Permanent Injunction, in that the Commission "is permanently enjoined from enforcing the Arbitration Order dated July 11, 2005, as well as related orders approving interconnection agreements between [AT&T Missouri] and each CLEC defendant" – including Big River, a named defendant therein – "to the extent they require [AT&T Missouri] to (1) fill new orders for unbundled local switching or the network elements which together comprise the UNE Platform, and (2) continue offering unbundled access to de-listed network elements." Declaratory Judgment and Permanent Injunction, p. 2. Granting Big River relief would place the Commission in direct violation of both aspects of the Court's Declaratory Judgment and Permanent Injunction.¹

**BIG RIVER'S COMPLAINT FAILS TO STATE A CLAIM ON WHICH
THE COMMISSION MAY GRANT RELIEF AND IS BEYOND THE COMMISSION'S
JURISDICTION.**

Big River's Complaint requests that the Commission perpetuate the continued provision of unbundled local switching and the UNE Platform ("UNE-P") -- albeit under Section 271 rather than Section 251 -- by AT&T Missouri. The Commission is precluded from doing so, however, by the

¹ Copies of the Declaratory Judgment and Permanent Injunction and the Memorandum and Order are attached hereto and incorporated herein as Exhibits 1 and 2, respectively.

September 14, 2006, Declaratory Judgment and Permanent Injunction, and Memorandum and Order, entered by the Federal District Court for the Eastern District of Missouri, in Case No. TO-2005-0336, Southwestern Bell Telephone, L.P. d/b/a SBC Missouri v. The Missouri Public Service Commission, et al., No 4:05-CV-1264 CAS (E.D. Mo.). This federal action was initiated by AT&T Missouri's appeal of the Commission's July 11, 2005, Arbitration Order in Case No. TO-2005-0336.

The basis of Big River's Complaint is that AT&T Missouri has violated the Commission-approved interconnection agreement between Big River and AT&T Missouri by failing to "provide local switching pursuant to billing arrangements under Section 271 of the Act together with local loops pursuant to billing arrangements under Section 251 for use in serving Big River's existing customers." Complaint, p. 1. Big River asks the Commission to determine that Big River does not owe AT&T Missouri any amounts for local switching and loops beyond the rates set forth in the parties' interconnection agreement and to require AT&T Missouri to continue to provide local switching at the rates set forth in that agreement. Complaint, pp. 1, 12.

The Commission determined in its Arbitration Order that AT&T Missouri must provide continued access to unbundled switching (thus enabling continued provision of a UNE-P equivalent), on the basis that even though such unbundling is not required by Section 251(c)(3) of the Act, it is sufficient that the unbundling is required by Section 271.² The Commission made this

² See, TO-2005-0336, Final Arbitrator's report, Section III, pp. 11, 16-17, 26-30. The Commission's July 11, 2005, Arbitration Order adopted the Final Arbitrator's report in all respects pertinent here.

decision despite ample FCC precedent to the contrary.³ This decision, and others related to it, led to appeal of the Arbitration Order.

Following various cross motions for summary judgment, the Court ruled, on September 14, 2006, that the requirement in the Commission's Arbitration Order that AT&T Missouri "include § 271 unbundling obligations in its interconnection agreements is beyond the jurisdiction of the Commission." Memorandum and Order, p. 21. The Court determined that "[t]he only role Congress delegated to state Commissions under § 271 is to act as consultant to the FCC during the application process." *Id.*, p. 17, citing § 271(d)(2)(B) (emphasis added). The Court expressly found that the Arbitration Order "conflicts with and is preempted by federal law to the extent it requires [AT&T Missouri] to provide unbundled access to switching and the UNE Platform." Memorandum and Order, p. 23.

Consequently, the Commission "is permanently enjoined from enforcing the Arbitration Order dated July 11, 2005, as well as related orders approving interconnection agreements between [AT&T Missouri] and each CLEC defendant" – including Big River, a named defendant therein – "to the extent they require [AT&T Missouri] to (1) fill new orders for unbundled local switching or

³ The demise of UNE-P was dictated by the FCC when it concluded in its TRRO decision that "the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives." Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("TRO"), vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC, 359 F. 3d 554 (D.C. Cir. 2004) ("USTA II"), Order on Remand, 20 FCC Rcd 2533 (2005) ("TRRO"), at para. 199, aff'd, Covad Communications Company, et al. v. FCC, et al., No. 05-1095 (D.C. Cir.) (Op., June 16, 2006).

The FCC's UNE-P transition plan required CLECs to convert their existing UNE-P customers to "alternative arrangements" by March 11, 2006. The FCC's TRRO intended that these alternative arrangements be "arrangements that carriers voluntarily have negotiated on a commercial basis." TRRO, para. 199, and did not provide for commingled Section 271 local switching and Section 251 elements. Indeed, the FCC had already held in its TRO that if an element is required under Section 271 but not under Section 251, BOCs such as AT&T Missouri are under no obligation to "commingle" the Section 271 element with others. TRO, para. 655, note 1990 ("We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3). We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items."); see also, USTA II, 359 F. 3d at 589-90 (affirming FCC's no-combinations holding). Local switching is known as checklist item 6. See, Section 271(c)(2)(B)(vi).

the network elements which together comprise the UNE Platform, and (2) continue offering unbundled access to de-listed network elements.” Declaratory Judgment and Permanent Injunction, p. 2.

Big River’s Complaint states no viable claim for relief or a basis for Commission jurisdiction given the Court’s analysis and rulings. The Complaint wholly relies on the Commission-approved interconnection agreement’s Section 271-related obligations, including that related to unbundled local switching. Complaint, pp. 1, 5, 7. Big River further asks the Commission to determine that it owes nothing more to AT&T Missouri than the amounts that would have applied had AT&T Missouri “provide[d] local switching pursuant to billing arrangements under Section 271 of the Act together with local loops pursuant to billing arrangements under Section 251 for use in serving Big River’s existing customers.” Complaint, p. 1; see also, id., p. 12).

However, the Court’s ruling necessarily requires dismissal of Big River’s Complaint. The Commission has no Section 271 authority nor can it enforce any portion of the Big River/AT&T Missouri interconnection agreement it had approved which purports to require that AT&T Missouri provide Big River access to de-listed network elements, such as local switching, or to any other 271 network element (whether on a standalone basis or as part of a combined arrangement). It is likewise clear that the Commission cannot compel AT&T Missouri to provide Big River switching connected to a loop. The Court specifically considered the CLEC Defendants’ argument for continued provision of Section 271 switching together with Section 251 loops and emphatically rejected it. It first correctly observed that the FCC had already held that “facilities which are required only under § 271, unlike UNEs required under § 251, need not be provided in combined, pre-packaged form.” Memorandum and Order, p. 22, citing TRO, n. 1990. The Court further explained that the Commission’s contrary determination was preempted:

The Arbitration Order permits CLECs to use the same combination of facilities which comprise the UNE Platform, without limitation and at the same transitional rates the FCC held should apply only to the embedded customer base. See Arbitration Order at 28-30. The Arbitration Order therefore conflicts with substantive restrictions the FCC has placed on UNE access, and accordingly is preempted. See 47 U.S.C. §§ 251(d)(3), 261(b)-(c) (precluding state commission actions that are not “consistent” with federal law). Id.


For these reasons, the Commission is without jurisdiction to grant Big River any of the relief it seeks and Big River fails to state a claim on which relief can be granted.

CONCLUSION

Big River’s Complaint fails to state a claim on which any relief may be granted by the Commission. Enforcement of the Commission-mandated interconnection agreement relied on by Big River is expressly precluded by the recent decision of the United States District Court and is beyond the Commission’s jurisdiction. Therefore, AT&T Missouri respectfully submits that Big River’s Complaint must be dismissed.

Respectfully submitted,

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**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**

Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri ("AT&T Missouri") hereby submits this Reply in Support of its Motion to Dismiss the Complaint of Big River Telephone Company, LLC ("Big River") for failure to state a claim on which relief may be granted by this Commission and for lack of jurisdiction. AT&T Missouri also responds herein to Big River's and Staff's Motions for Stay of this case.

SUMMARY

Big River's Response¹ to AT&T Missouri's Motion offers no sufficient reason why its Complaint should not be dismissed in its entirety. Big River concedes that its post-March 11 claim is contrary to the Federal District Court's September 14, 2006 Declaratory Judgment and Permanent Injunction, and Memorandum and Order ("Order and Injunction"). While Big River attempts to salvage its claim by asserting a "pre-March 11" claim, the Order and Injunction does not provide a "pre-March 11" exception.

Big River concedes that the theory of recovery which is the cornerstone of its Complaint -- the Commission's authority to compel AT&T Missouri to provide Section 271 switching and UNE-

¹ Big River Telephone Company, LLC's Response to AT&T Missouri's Motion to Dismiss Complaint and Suggestions in Support of Motion for Stay (hereinafter, "Big River's Response").

P -- has been clearly and unequivocally rejected by the Order and Injunction.² The Court's ruling has the force and effect of law and must be respected absent Big River's securing a stay or suspension of that ruling from the District Court or the Eighth Circuit Court of Appeals. This Commission does not have the authority to stay or override the District Court's Order and Injunction; indeed, this Commission is itself enjoined by the District Court from taking the action sought by Big River. The Commission must, consistent with the District Court's Order and Permanent Injunction, dismiss this case.

Nor can the Complaint be saved by invoking a purported "pre-March 11" claim. Big River cannot avoid dismissal on this basis as the District Court's Order and Injunction precludes any attempt to enforce the offering of unbundled access to de-listed network elements. The Order and Injunction does not carve out a "pre-March 11" exception to its applicability.

With regard to the request for a stay, both Big River and Staff imply that the Order and Injunction is not effective because of the appeal. However, the Order and Injunction became effective by operation of law on September 14, 2006, and became binding upon the parties to the District Court case – including the Commission and Big River – upon notice to them. Absent a stay from the District Court or the Eighth Circuit Court of Appeals, the injunction must be obeyed. The Commission has no jurisdiction to implement a stay of this case if the effect of such a stay is to preclude AT&T Missouri from taking action to eliminate the provision of Section 271 elements (including local switching) or UNE-P. Although Big River concedes it must pay "higher rates" under the Order and Injunction,³ its Complaint asserts that it is not required to pay disputed amounts under the interconnection agreement pending resolution of the dispute.⁴ Such an action would run afoul of the Order and Injunction issued by the District Court and would place the Commission in

² Big River's Response, paras. 4, 8.

³ Big River's Response, para. 8.

⁴ Complaint, paras. 26-28.

violation of the District Court's Order and Injunction. The only appropriate course of action is dismissal.

**BIG RIVER'S COMPLAINT MUST BE DISMISSED IN ITS ENTIRETY
BECAUSE IT FAILS TO STATE A CLAIM ON WHICH THE COMMISSION MAY
GRANT RELIEF AND IS BEYOND THE COMMISSION'S JURISDICTION.**

As AT&T Missouri explained in its Motion to Dismiss,⁵ Big River's Complaint must be dismissed because it requests that the Commission perpetuate the continued provision of unbundled local switching and the UNE Platform ("UNE-P"), under Section 271. The Commission cannot take such action, however, due to the September 14, 2006, Declaratory Judgment and Permanent Injunction, and Memorandum and Order, entered by the Federal District Court for the Eastern District of Missouri, in Case No. TO-2005-0336, Southwestern Bell Telephone, L.P. d/b/a SBC Missouri v. The Missouri Public Service Commission, et al., No 4:05-CV-1264 CAS (E.D. Mo.) ("Order and Injunction"). Both Big River and Staff correctly concede that the relief sought in the Complaint is directly prohibited by the Order and Injunction.⁶

Big River states that it and other CLECs intend to pursue an appeal of the District Court's ruling, and that, in the meantime, AT&T Missouri's Motion "is premature and cannot properly be considered until that judgment becomes final from the perspective of appellate review."⁷ Big River is wrong as a matter of law. The Declaratory Judgment became effective by operation of law on September 14, 2006, the date on which it was entered on the docket of the District Court case.⁸ The Permanent Injunction bound each party to the District Court case, including the Commission and

⁵ AT&T Missouri's Motion to Dismiss, pp. 2-3.

⁶ See, Staff's Motion, para. 5 ("The Staff agrees that, under the current posture of the court case, the Commission lacks authority to enforce the Section 271 requirements included in the Arbitration Order."). Big River concedes that the District Court's Order and Injunction "affected" its Section 271 "rights" regarding "continued service for existing customers starting March 11, 2006." Big River's Response, para. 4.

⁷ Big River's Response, para. 9.

⁸ Fed. R. Civ. P. 58.

Big River, immediately upon notification to them of the Permanent Injunction's issuance through the District Court's electronic filing system.⁹

The force and effect of the District Court's Declaratory Judgment and Permanent Injunction are not stayed during the pendency of any appeal. Rather, "where the court's judgment awards injunctive relief, the injunction is effective, and consequently must be obeyed, unless it is stayed."¹⁰ Moreover, this Commission has no authority to stay the effectiveness of the District Court's Declaratory Judgment and Permanent Injunction. Only the District Court or the Eighth Circuit Court of Appeals can stay their effectiveness.¹¹

As to the substance of AT&T Missouri's Motion, Big River offers no reason that should give the Commission pause. The cornerstone of Big River's Complaint is grounded upon its claim that AT&T Missouri violated the parties' Commission-approved interconnection agreement in connection with Big River's existing customer base. The Complaint alleges, for example, that AT&T Missouri failed to "provide local switching pursuant to billing arrangements under Section 271 of the Act together with local loops pursuant to billing arrangements under Section 251 for use in serving Big River's existing customers."¹² The Complaint also alleges that AT&T Missouri disregarded Big River's alleged intention in entering into a LWC commercial agreement with AT&T Missouri, to the effect that Big River "in no way, intend[ed] for our base of customers to be

⁹ Fed. R. Civ. P. 65(d) states, in relevant part, that every order granting an injunction is binding "upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." This passage makes it clear that "the amenities of original process need not be followed." Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2956 (Supp. 2006), p. 83; see also, Additive Controls & Measurement Systems, Inc. v. Flowdata, Inc., 154 F.3d 1345, 1355 (Fed. Cir. 1998).

¹⁰ 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).

¹¹ Fed. R. Civ. P. 62(a) ("Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction . . . shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal"); Fed. R. App. P. 8 (a motion for stay of a judgment or an order suspending an injunction while an appeal is pending "may be made to the court of appeals or to one or more of its judges").

¹² Complaint, p. 1. (emphasis added).

migrated to Local Wholesale Complete” only those residual customers that . . . cannot be serviced via 251 and 271 elements.”¹³

Yet, Big River now concedes that -- at least with respect to the period starting March 11, 2006 -- the District Court’s ruling precludes the Commission from exercising Section 271 authority regarding such customers. For example, Big River states that its rights under Section 271 and the interconnection agreement with respect to “continued service for existing customers starting March 11, 2006” were “affected by” the District Court’s judgment.¹⁴ To the same effect is its statement that “regardless of the federal court judgment, Big River has stated a claim upon which relief can be granted within the Commission’s jurisdiction concerning improper billing for unbundled local switching used in service to existing customers for the period from January 1, 2006 to March 11, 2006.”¹⁵ Thus, without question, AT&T Missouri’s Motion to Dismiss stands unrebutted -- at least with respect to the period starting March 11, 2006 -- and must be granted for the period commencing March 11, 2006, to the present.

Contrary to Big River’s assertion, however, AT&T Missouri’s Motion applies with equal force to the period before March 11, 2006. Big River’s Complaint stands on no better footing before March 11 as it does after March 11, 2006. Big River has expressly relied upon the Section 271-related provisions in the parties’ interconnection agreement as Big River’s basis for the relief it requests in its Complaint. As noted above, Big River’s Complaint rests squarely on the assertion that AT&T Missouri failed to “provide local switching pursuant to billing arrangements under Section 271 of the Act together with local loops pursuant to billing arrangements under Section 251 for use in serving Big River’s existing customers.”¹⁶ Other portions of the Complaint also explicitly rely on the Commission-approved interconnection agreement’s Section 271-related obligations,

¹³ Complaint, para. 12. (emphasis added).

¹⁴ Big River’s Response, para. 4.

¹⁵ Big River’s Response, para. 5.

¹⁶ Complaint, p. 1. (emphasis added).

including that related to unbundled local switching.¹⁷ Big River cannot avoid the express allegations of its own Complaint.

Despite Big River's attempt to salvage a portion of its claim, the District Court's ruling applies with no less force to Big River's pre-March 11 claim as to Big River's post-March 11 claim. Big River does not point to anything in the Order and Injunction which states otherwise. Moreover, Big River concedes that the ruling applies to its post-March 11 claim, and it advances no basis on which to conclude that the ruling does not apply before March 11. Indeed, the Court's ruling makes clear that the Commission never had any Section 271 jurisdiction, and does not purport to limit this finding to post-March 11, 2006. Thus, the Commission is precluded by the Order and Injunction from exercising any jurisdiction in this case, and there is no "exception" for claims that arose between January 1, 2006 and March 11, 2006.

In sum, Big River's Complaint affords no basis for the Commission to grant Big River relief. The District Court's recent Declaratory Judgment and Preliminary Injunction conclusively precludes it from doing so and mandates dismissal of the entirety of Big River's Complaint, including that which relates to the period from January 1 to March 11, 2006.

A STAY OF THIS CASE IS NOT APPROPRIATE.

For the reasons set forth above, the Commission has no jurisdiction to take any action other than dismissal. Most certainly, it has no jurisdiction to implement a stay if the effect of such a stay would be to preclude AT&T Missouri from taking action to eliminate the provision of UNE-P or Section 271 elements to Big River or to collect the amounts to which it is entitled. Big River's Complaint asserts that, under the interconnection agreement, the mere pendency of this case excuses Big River's obligation to pay the rates billed by AT&T Missouri.¹⁸ In its Response, however, Big

¹⁷ E.g., Complaint, paras. 8, 9 and 12.

¹⁸ Complaint, para. 26.

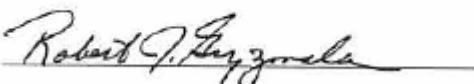
River concedes that it “will presumably have to pay higher rates pending appeal.”¹⁹ Big River does not identify what rate it would pay nor whether it would pay retroactively. The District Court’s Order and Injunction unequivocally precludes enforcement of the Arbitration Order as it pertains to de-listed network elements and this Commission cannot preclude AT&T Missouri from collecting the amounts to which it is entitled under the Order and Injunction. Given that Big River has not obtained a stay of the District Court’s ruling, that ruling is binding upon the Commission and Big River. As such, the only course is to dismiss Big River’s Complaint, not to stay the case.

CONCLUSION

Big River’s Complaint fails to state a claim on which any relief may be granted by the Commission. Enforcement of the Commission-mandated interconnection agreement relied on by Big River is expressly precluded by the recent decision of the United States District Court and is beyond the Commission’s jurisdiction. The basis for Big River’s newly articulated pre-March 11 claim likewise is precluded by the District Court’s decision. Therefore, AT&T Missouri respectfully maintains that the Commission must dismiss Big River’s Complaint in its entirety, not simply stay the case.

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¹⁹ Big River’s Response, para. 8.

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