

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.	)	

**BIG RIVER TELEPHONE COMPANY, LLC'S  
RESPONSE TO ORDER DIRECTING FILING**

COMES NOW Big River Telephone Company, LLC, pursuant to the Commission's Order Directing Filing and provides its Response to the questions posed in that Order:

**1. Are the parties asking the Commission to interpret the Local Wholesale Complete agreement (LWC) entered into by Big River and AT&T Missouri to determine whether the terms of that contract apply to all of Big River's customers, irrespective of when they began service, or only apply to new customers obtaining service from Big River after either December 31, 2005 or March 11, 2006?**

No, Big River is asking the Commission to enforce the approved interconnection agreement and require AT&T to continue to charge the rates set forth therein for local switching and loops. Currently, the Commission can only grant that relief as to those elements used by Big River to serve the base of customers that it was already serving as of 12/31/05, for the period of service through 3/11/06. During that time period, the FCC's TRRO transition rules authorized the continued application of the interconnection agreement rates and no court order disturbed that authorization or the related provisions of the agreement. When the Eighth Circuit Court of

Appeals reverses the district court, the Commission will also be able to grant that relief for the period starting 3/11/06 for Big River's service to its 12/31/05 base of customers, and also for all new customers added since 12/31/05.

There is no dispute that the interconnection agreement approved by the Commission remains in effect and contains rates for switching and loops. There is no dispute that no pertinent amendment or successor to the interconnection agreement has been approved by the Commission. Section 252 of the Telecommunications Act of 1996 requires that all agreements, including as amended, be approved by the state commission and made publicly available for adoption by other carriers. The Commission's rules likewise require approval of all amendments. 4 CSR 240-3.513. The Commission's order approving the interconnection agreement requires all amendments to be submitted for approval. (Howe Direct, Schedule H-4). In the interconnection agreement itself, the parties acknowledge that it can only be amended if approved by the Commission. (Howe Direct, Schedule H-3, section 39.2). The agreement has not been amended or superseded, and the fact that the parties never submitted a proposed amendment or successor agreement to the Commission confirms they never intended to amend or supersede it.

However, the court did rule on several occasions and those rulings limited the effect of the interconnection agreement. (Howe Direct, Schedules H-7, H-8, H-9). Accordingly, the parties entered into the LWC effective 1/1/06 so that Big River could still obtain switching from AT&T in order to serve certain customers.<sup>1</sup> Based on the first court ruling of Sept. 05, Big River only needed switching under the LWC for service to new customers pending further court action

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<sup>1</sup> In the LWC AT&T offers switching and loops together; hence the involvement of loops in the dispute even though Big River's rights to obtain loops under the interconnection agreement have not changed.

and Big River remained entitled to switching under the interconnection agreement for its existing customers. Big River confirmed its intent to continue to exercise those rights under the approved interconnection agreement when it offered the LWC to AT&T for signature. (Howe Direct Schedule H-11). When the court thereafter made its final ruling in Sept. 06, Big River also needed switching under the LWC for service to existing customers, pending appellate court review of the district court decision. But even then, despite the court decision, Big River had remained entitled to obtain switching under the interconnection agreement for its existing customers until the FCC's TRRO transition rules expired on 3/11/06. Both parties agree court rulings (including any future orders) apply retroactively, but the FCC rules were not affected.

The LWC did not amend the interconnection agreement, but rather filled gaps created by court rulings that affected terms and conditions of the interconnection agreement. In the LWC the parties expressly agreed that the LWC "shall not operate as or constitute a novation of any agreement or contract between the Parties that predates the execution and/or Effective Date of this Agreement." (Howe Direct, Schedule H-10, section 36.1). And again, the parties did not submit the LWC for approval as an amendment or successor agreement. The interconnection agreement remains applicable and enforceable except to the extent currently limited by court order.

**2. If the parties are not asking the Commission to interpret the LWC agreement, upon what basis could the Commission grant Big River the requested relief?**

The Commission has full authority under section 252 to enforce the interconnection agreement as requested by Big River. See, e.g., SWBT v. Connect Comm., 225 F3d 942, 947 (8<sup>th</sup> Cir. 2000). In doing so, because AT&T has tried to apply the LWC in lieu of the

interconnection agreement, presumably the Commission needs to understand the limited scope of the LWC as a document that did not amend or supplant the interconnection agreement, and also the intentions of the parties regarding the applicability of these two agreements that both contain provisions regarding the provision of switching. In addition to the fact that the unapproved LWC cannot lawfully amend or supersede the approved interconnection agreement, even if the two agreements are viewed on equal terms, the evidence shows that the ambiguity created by having two agreements with seemingly overlapping terms and conditions should be resolved in Big River's favor as it expressly only entered into the LWC to address gaps created by the court and AT&T also expressly entered into the LWC with that understanding. (Howe Direct, including Schedule H-11).<sup>2</sup>

**1. Why the LWC agreement does not constitute either a newly negotiated interconnection agreement or an amendment to Big River and AT&T's interconnection agreement?**

**2. If the LWC is an interconnection agreement or an amendment to the approved interconnection agreement, why the LWC was not filed with the Commission as required by Section 252(e)(1) of the Telecommunications Act of 1996 or Commission Rule 4 CSR 240-3.513(6).**

These two questions are related. As indicated above, the parties did not intend the LWC to amend or supersede the interconnection agreement and accordingly did not submit it for approval. The parties expressly agreed that the LWC was not subject to sections 251 and 252 of

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<sup>2</sup> The explanatory offer letter sent by Big River with the LWC is part of that contract. See, e.g., *Cavalier Homes of Alabama v. Security Pacific*, 5 FSupp2d 712 (ED Mo. 1997)(contract consists of multiple related documents). In any event, the latent ambiguity created by the dual documents and the court orders calls for interpretation of the agreements consistent with Big River's letter. See, e.g., *Union Electric v. Consolidation Coal*, 188 F3d 998 (8<sup>th</sup> Cir. 1999)(collateral matters create latent ambiguity and allow extrinsic evidence to explain contractual intent). And even absent ambiguity, the express language of the LWC and the actions of the parties in not submitting the LWC for approval as an amendment to the interconnection agreement demonstrate their intent that the interconnection agreement continue to apply. See, e.g., *Cavalier*, supra.

the Act. (Howe Direct, Schedule H-10, section 1.1). If the Commission disagrees<sup>3</sup> and requires the parties to submit the LWC as an amendment, the result in this case would not be affected as the intended scope of the amendment would be no different than the intended scope of the LWC as a free-standing agreement – it would still only fill the gaps created by the court. The evidence is clear that this is what the parties intended at the time they entered into the LWC, regardless of AT&T’s efforts to backtrack now.

Moreover, any such “submitted and approved LWC” would only be effective in such form as of the date of PSC approval and, therefore, such approval would only have a prospective impact on this dispute and would not affect the prior periods.

WHEREFORE, Big River Telephone, LLC requests the Commission to hold its hearing and thereupon grant to Big River the relief requested in its Complaint and such other and further relief to Big River as the Commission deems proper.

CURTIS, HEINZ,  
GARRETT & O’KEEFE, P.C.

/s/ Carl J. Lumley

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<sup>3</sup> Qwest v. PUC of Colorado and PSC of Utah, 479 F3d 1184 (10<sup>th</sup> Cir. Mar. 2007)(Qwest required to submit to state commission for approval an agreement concerning Qwest Platform Plus, comprised of switching and shared transport).

**Certificate of Service**

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 12th day of September, 2007, by either placing same in the U.S. Mail, postage paid, by fax or email transmission.

/s/ Carl J. Lumley

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