

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 AT&T MISSOURI'S RENEWED MOTION TO DISMISS**

COMES NOW Big River Telephone Company, LLC, pursuant to the Commission's Order Directing Filing issued January 27, 2009 and for its Response to AT&T Missouri's Renewed Motion to Dismiss states to the Commission:

1. Big River filed its Complaint in this matter in August 2006. By its Complaint, Big River seeks relief from AT&T Missouri's overbillings for unbundled switching and related loops obtained by Big River pursuant to the interconnection agreement approved by the Commission. The Complaint seeks relief from overbillings for section 251 elements regarding one period of time and from overbillings for section 271 elements for another period of time. (Complaint, para. 7 and 9).

2. AT&T Missouri originally filed its Motion to Dismiss Big River's Complaint in September 2006. Big River promptly responded, showing that the motion should be denied. Since then, the parties have submitted prefiled testimony, position statements, and various pleadings concerning Commission questions and federal court proceedings. The parties were on

the verge of appearing for evidentiary hearing when the Commission cancelled that proceeding by order issued September 18, 2007. Because pending federal court proceedings would have an impact on a portion of this case, the Commission has sensibly awaited the outcome of those proceedings.

3. In its prefiled testimony and pleadings, Big River has consistently demonstrated that it is entitled to relief from AT&T Missouri's overbillings for section 251 unbundled elements during one period of time under the provisions of the interconnection agreement approved by the Commission, separate and apart from the portion of Big River's complaint that pertained to overbillings for section 271 elements during a different time period.

4. In its "Renewed Motion to Dismiss Complaint", AT&T Missouri baldly asserts that the federal courts have somehow ruled that the Commission cannot grant relief to Big River in this proceeding. The courts did no such thing. The federal court proceedings only addressed the portions of the interconnection agreement concerning section 271 elements and did not in any way impair Big River's rights to obtain section 251 elements, including unbundled switching and related loops through March 11, 2006 under that agreement.

5. As Big River proves by its prefiled testimony, consistent with the terms of the Commission-approved interconnection agreement it continued to obtain unbundled switching and related loops from AT&T Missouri pursuant to section 251 through March 11, 2006. (For example, see Direct Testimony of Gerard Howe, p. 7, 19; and Interconnection Agreement (Schedule H-3) at Attachment 6, Section 6.1, "Unbundled Local Switching, as an unbundled network element under Section 251, shall be available to CLEC under the transition plan described in the FCC's TRO Remand Order and implemented in Section 7.1 of this Attachment 6."). These provisions of the interconnection agreement complied with the FCC's transition rules

regarding section 251 elements and have never been challenged by AT&T Missouri in the federal court proceedings or otherwise. Again, the courts did not in any way deny Big River's right to obtain such section 251 elements through March 11, 2006. But AT&T Missouri nonetheless continues to refuse to correct its invoices.

6. Big River fully acknowledges that the federal court proceedings invalidated the provisions of the interconnection agreement concerning rates for section 271 elements on which it relied for its claims for relief for the period of time after March 11, 2006. But Big River remains entitled to relief from AT&T Missouri's overbillings for section 251 elements for the period from January 1, 2006 through March 11, 2006. As Big River proves in its prefiled testimony, those unlawful overbillings – for that period of two and one-half months – total \$67,013.00. (Howe Direct, p. 19).

7. The Commission is the appropriate authority to make the initial decision on Big River's Complaint. Big River asserts rights under the interconnection agreement approved by the Commission, in contrast to AT&T Missouri's decision to bill pursuant to an agreement that was not approved by the Commission. Adjudicating a dispute over how regulated rates apply is the classic example of the Commission's primary jurisdiction. See, e.g., *Inter-City Beverage Co. v. KCPL*, 889 SW2d 875 (Mo. App. 1994). A final decision on Big River's Complaint is an essential prerequisite to resolving the dispute between the parties.

8. Once the Commission confirms that AT&T Missouri has applied the wrong rates, then either the parties or the courts will resolve the total amount of AT&T's overbillings. AT&T prematurely filed suit in the Circuit Court of St. Louis County on this matter in April 2008. Big River has moved for dismissal of AT&T's petition based on the Commission's primary jurisdiction, and filed counterclaims on other matters in dispute between the parties. The court is

currently considering the matter of dismissal. And the parties are still engaged in settlement negotiations that include the subject matter of this case.

9. The Commission should deny AT&T's "Renewed Motion" and convene a prehearing conference for the parties to discuss settlement and scheduling matters. The parties should be allowed to update their prefiled testimony in light of the final resolution of the portion of the case affected by the federal court proceedings, and then the Commission should hold the hearing and decide this matter.

WHEREFORE, the Commission should deny AT&T Missouri's Renewed Motion to Dismiss, schedule a prehearing conference, and grant such other and further relief to Big River as it deems meet and proper.

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

/s/ Carl J. Lumley

---

Carl J. Lumley, #32869  
Leland B. Curtis, #20550  
130 S. Bemiston, Suite 200  
Clayton, Missouri 63105  
(314) 725-8788  
(314) 725-8789 (FAX)  
clumley@lawfirmemail.com  
lcurtis@lawfirmemail.com

Attorneys for Big River Telephone Company, LLC

**Certificate of Service**

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 6th day of February, 2009, by either placing same in the U.S. Mail, postage paid, by fax or email transmission.

/s/ Carl J. Lumley

---

Office of Public Counsel  
P.O. Box 2230  
Jefferson City, Missouri 65102  
opcservice@ded.mo.gov

Office of General Counsel  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, Missouri 65102  
Fax 573-751-9285  
gencounsel@psc.mo.gov

William Haas  
Missouri Public Service Commission  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102  
William.haas@psc.mo.gov

Robert Gryzmala  
Leo Bub  
AT&T Missouri  
One SBC Center, Room 3518  
St. Louis, Missouri 63101-1976  
rg1572@att.com