

**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, L.P.)	
d/b/a AT&T Missouri,)	
)	
Respondent.)	

**AT&T MISSOURI’S REPLY TO STAFF’S AND BIG RIVER’S
RESPONSES TO ORDER DIRECTING FILING**

Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri (“AT&T Missouri”) hereby replies to the responses of Staff and Big River Telephone Company, LLC (“Big River”) to the Commission’s October 31, 2006, Order Directing Filing (“Order”). As explained below, while the Commission should dismiss Big River’s Complaint, in no event should the Commission issue a stay in this case that would preclude AT&T Missouri from taking action to eliminate the provision of Section 271 elements (including local switching) or UNE-P.

As an initial matter, Staff and Big River take AT&T Missouri to task for suggesting that they implied that the Federal District Court’s September 14, 2006 Declaratory Judgment and Permanent Injunction, and Memorandum and Order (“Order and Injunction”) are not effective. Staff’s Response, para. 3, Big River’s Response, p. 2 (both citing AT&T Missouri’s Combined Reply, p. 2). However, Big River had asserted that AT&T Missouri’s motion to dismiss “cannot properly be considered until [the Order and Injunction] become[] final from the perspective of appellate review.” Big River’s Suggestions in Support of Motion for Stay, para. 9 Staff likewise offered that the Order and Injunction “are not final” as its basis for moving for a stay of the case. Staff’s Motion to Stay proceedings, para. 6. Whether the Order and Injunction are “final” is beside the point. What matters instead are that the Court’s Declaratory Judgment and Permanent

Injunction are effective, that they bind all parties to that case, that their force and effect are not stayed during the pendency of the parties' appeal, and that "[since] the court's judgment awards injunctive relief, the injunction is effective, and consequently must be obeyed, unless it is stayed." AT&T Missouri's Combined Reply in Support of its Motion to Dismiss, pp. 3-4.¹ Neither Staff nor Big River has obtained any such stay from the federal District Court or the Eighth Circuit Court of Appeals.

Additionally, neither Staff nor Big River quarrels with AT&T Missouri's argument that "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." AT&T Missouri's Combined Reply, p. 5. Big River claims that, for the approximately ten weeks from January 1, 2006 to March 11, 2006, the Complaint raises Section 251 issues that "are independent of the Court's ruling regarding [Section] 271 elements." Big River's Response, para. 5. More particularly, Big River asserts: "For the period from January 1, 2006 to March 11, 2006, the Complaint seeks redress for improper billing that violated provisions of the interconnection agreement concerning unbundled local switching used for service to existing Big River customers pursuant to section 251 of the Telecommunications Act of 1996. (Complaint, para. 7 and 18)." *Id.* (emphasis original). Closer inspection of these two paragraphs of the Complaint reveals otherwise.

Paragraph 7 of the Complaint does not allege any improper billing, or indeed, anything improper at all. Moreover, although paragraph 7 alleges that AT&T Missouri was required before March 11 to provide "unbundled local switching under Section 251 billing arrangements," no allegation follows as to how AT&T Missouri allegedly breached this duty. Elsewhere, however, the very first page of the Complaint clearly alleges that the duty AT&T Missouri breached under the

¹ Citing, *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).

interconnection agreement was to “provide local switching pursuant to billing arrangements under Section 271 of the Act,” not Section 251. (emphasis added). Paragraph 18, the other paragraph of the Complaint cited by Big River, references the interconnection agreement but makes no mention of Section 251 at all. Regardless, elsewhere in its Complaint, Big River makes clear that its unbundled switching claim stems from an alleged Section 271 duty, not a Section 251 duty. See, para. 8 (citing Section 7.3 of Attachment 6 of the agreement as standing for the proposition that AT&T Missouri was required to develop a process to bill Big River “the Commission-approved rate applicable to Section 271 ULS [unbundled local switching].”) (emphasis added); para. 12 (alleging that “AT&T’s representative provided assurances that Big River was able to order 251 local loops and 271 local switching under its interconnection agreement.” (emphasis added). It is clear that the Complaint raises the claim of a violation of Section 271 duties, not Section 251 duties, and should be dismissed in accordance with the Order and Injunction.

For the reasons AT&T Missouri has previously explained, and in light of the above additional considerations prompted by Staff’s and Big River’s Responses, Big River’s Complaint should be dismissed in its entirety. Moreover, it is important to note that neither Staff nor Big River clearly and unequivocally states what effect they believe a stay would have on AT&T Missouri’s ability to collect the rates it is permitted to charge as a result of the District Court’s Order and Injunction. 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. Complaint, para. 26. While Big River has admitted that it “will presumably have to pay higher rates pending appeal[,]” Big River’s Response to AT&T Missouri’s Motion to Dismiss Complaint, para. 8, Big River does not identify what rate it would pay nor whether it would pay retroactively. If a stay would have the effect of precluding AT&T Missouri from charging the rates it determines to be appropriate or from disconnecting service if Big River fails to pay, then a stay is clearly and

unequivocally unlawful and contrary to the District Court's order. Big River does not address the provisions of Section 13.3.3 of the parties' interconnection agreement (GT&Cs), which precludes disconnection or suspension of order acceptance where a CLEC has filed a dispute and sought interim relief. Application of this provision to preclude AT&T Missouri from disconnection or suspension of order acceptance would unequivocally violate the Order and Injunction.

Wherefore, for all the foregoing reasons, AT&T Missouri respectfully requests the Commission to dismiss the complaint, and for such other and further relief as determined appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on November 20, 2006.


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