

**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 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 un rebutted -- 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.

Respectfully submitted,

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¹⁹ Big River’s Response, para. 8.

CERTIFICATE OF SERVICE

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


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