

**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 POSITION STATEMENT**

Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T Missouri") hereby submits its Position Statement, in accordance with the Commission's March 5, 2007 Order Setting Procedural Schedule.

The single issue presented in this case is which of two competing rate structures applies to the base of customers held by Big River as of January 1, 2006 -- the rates in the interconnection agreement for Section 271 switching and Section 251 loops, or the rates in the Local Wholesale Complete ("LWC") agreement<sup>1</sup> for basic analog service (loops with switching)? Put simply, does the Section 271-related ICA language control, or does the parties' LWC control?

AT&T Missouri's position is that the LWC controls. Big River freely and voluntarily entered into the LWC and agreed to make it effective as of January 1, 2006. The LWC expressly requires that "*all* of [Big River's] UNE-Ps using basic analog switching to serve Eligible End Users shall be transitioned to, and provided as, LWC with an effective billing date as LWC as of the effective date of this Attachment [i.e., January 1, 2006]." (Attachment Local Wholesale Complete,

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<sup>1</sup> The term "Local Wholesale Complete," or "LWC" for short, is often used to refer to the contract documents comprised of the "Commercial Agreement -- General Terms and Conditions" and the several attachments referenced in and incorporated into it, such as the Attachment Local Wholesale Complete, Appendix LWC 800, Appendix LWC OSS, etc. (*See*, Direct Testimony of Mr. Howe of Big River, Schedule H-10).

Section 7.1.1). (emphasis added).<sup>2</sup> Staff agrees that this language clearly encompasses “all” such existing UNE-P customers.<sup>3</sup>

Given this unequivocal and unambiguous language, Big River’s attempt to limit the LWC to apply only to “new” customers is of no effect. AT&T Missouri witnesses also unequivocally deny that any such limitation was agreed to by the parties. In any case, the LWC expressly states that it is the “entire agreement between the parties.” (Commercial Agreement, Section 36.1). Therefore, its four corners must and should be enforced as written. As Staff correctly observes, “AT&T is well within its rights to bill Big River at the rates contained in the LWC as of the effective date of the LWC.”<sup>4</sup> Big River’s complaint should be dismissed for this reason alone.

Big River’s complaint also should be dismissed on the independent ground that it seeks to perpetuate the continued provision of unbundled local switching and the UNE-P under Section 271. Such a course is foreclosed by 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 Southwestern Bell Telephone, L.P. d/b/a SBC Missouri v. Missouri Public Service Commission, 461 F. Supp. 1055 (E.D. Mo. 2006) (“Order and Injunction”). Moreover, despite the CLECs’ subsequent appeal, the Order and Injunction has not been stayed, and must therefore be obeyed.<sup>5</sup>

Importantly, Big River concedes that the Order and Injunction, issued one month after Big River filed its complaint with the Commission, blocks virtually all of the relief sought by the

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<sup>2</sup> The parties intended the term “Eligible End Users” to convey, as the LWC states, that with but a limited exception not material here, the “LWC is only available to [Big River] for use in providing local exchange telecommunications service to its residential, business, and government end users within a [s]ervice [a]rea.” See, Attachment Local Wholesale Complete, Section 4.1.

<sup>3</sup> See, Direct Testimony of Mr. McKinnie of the Commission’s Staff, p. 5.

<sup>4</sup> See, Direct Testimony of Mr. McKinnie of the Commission’s Staff, p. 6.

<sup>5</sup> 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); 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”)

complaint.<sup>6</sup> It is no answer to suggest that a portion of that complaint can be saved by invoking a purported “pre-March 11, 2006” claim, as Big River’s “splitting” of the key issue here attempts to do. The force and effect of the Court’s Order and Injunction are no less binding as to Big River’s purported Section 271-related claims arising before March 11 as to such claims arising after March 11. In any case, as noted earlier, the parties to the LWC expressly agreed to an effective date of January 1, 2006 for that agreement. Consequently, the LWC likewise is no less binding as to Big River’s claims arising before March 11 as to claims arising after March 11.

For these reasons, AT&T Missouri’s position on the issue presented is that the LWC rates should control. Big River’s complaint should be dismissed.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

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<sup>6</sup> 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. Big River’s Response to AT&T Missouri’s Motion to Dismiss Complaint, October 10, 2006, para. 4. 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.” *Id.*, para. 5.

**CERTIFICATE OF SERVICE**

Copies of this document were served on the following parties by e-mail on September 7, 2007.

  
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