

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  
MOTION TO DISMISS COMPLAINT  
AND SUGGESTIONS IN SUPPORT OF MOTION FOR STAY**

COMES NOW Big River Telephone Company, LLC pursuant to 4 CSR 240-2.080(15) and Commission Order Directing Filing dated September 27, 2006 and for its Response to AT&T Missouri's Motion to Dismiss and Suggestions in Support of Motion for Stay states to the Commission:

**SUMMARY**

As Big River requests by separate Motion for Stay filed contemporaneously herewith, the Commission should stay these proceedings pending completion of the appellate review of the federal district court judgment upon which AT&T Missouri bases its Motion to Dismiss. AT&T Missouri bases its motion solely upon the district court judgment in Southwestern Bell Telephone, LP d/b/a SBC Missouri v. The Missouri Public Service Commission, Case No. 4:05-CV-1264 CAS (ED Mo.).<sup>1</sup> That judgment was issued on September 14, 2006. In accordance with FRAP 4, Big River and the other interested parties, including the Commission itself, have until October 14, 2006 to file their notices of appeal, and upon filing of such notice by any party,

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<sup>1</sup> AT&T Missouri supplied the Commission with a copy of the Federal Court's Declaratory Judgment and Permanent Injunction and its Memorandum and Order as attachments to its Motion to Dismiss.

the others would have 14 days in which to file additional notices of appeal. The CLEC Coalition, of which Big River is a member, currently intends to file a timely notice of appeal. Further, as a member of the CLEC Coalition, Big River fully anticipates that the appellate court will reverse the district court and uphold the Commission's Arbitration Order issued in Case No. TO-2005-0336. Upon such affirmation of the Commission's Arbitration Order, Big River will be entitled to all the relief requested in its Complaint pending in this matter.

The Commission could simply deny AT&T Missouri's Motion to Dismiss now. Notwithstanding the federal district court ruling, Big River's Complaint states a claim upon which relief can and should be granted as to the period of time preceding March 11, 2006. During that time period, AT&T Missouri violated provisions of the interconnection agreement that are based on the FCC's Triennial Review Remand Order transition rules and not the provisions of the Commission's Arbitration Order affected by the court's judgment. However, it would not be an efficient use of the resources of the Commission and the parties to proceed with this case on a piecemeal basis. Rather, the Commission should stay these proceedings until completion of the aforesaid appellate review process, so that all aspects of this proceeding can be heard and resolved at one time.

**BIG RIVER'S COMPLAINT STATES A CLAIM ON WHICH THE COMMISSION  
MAY GRANT RELIEF WITHIN ITS JURISDICTION**

1. Big River's Complaint states a claim regarding improper billing by AT&T Missouri that commenced in March 2006 but purported to reach back to January 1, 2006. (Complaint, para. 18).

2. For the period from January 1, 2006 to March 11, 2006, that improper billing 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). The federal court judgment did not purport to affect these rights of Big River under section 251. To the contrary, the federal court's preliminary injunction expressly preserved Big River's rights during this period to obtain unbundled local switching under section 251 for service to existing customers pursuant to the FCC's Triennial Review Remand Order transition rules. (Complaint, para. 10).<sup>2</sup>

3. For the period from January 1, 2006 to January 31, 2006, AT&T Missouri's improper billing also violated provisions of the interconnection agreement concerning unbundled local switching to provide additional lines to existing customers and to address moves and changes for such existing customers, all pursuant to section 251 of the Act. (Complaint, para. 9 and 18). While AT&T Missouri's obligation to meet these provisions was suspended by the federal court's preliminary injunction, it was not precluded from doing so voluntarily and it chose to continue to provide elements under section 251. (Complaint, para. 10 and 11).

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<sup>2</sup> AT&T Missouri acknowledges the applicability of the FCC's TRRO transition rules in its Motion to Dismiss, at footnote 3.

4. AT&T Missouri's improper billing otherwise violated provisions of the interconnection agreement concerning unbundled local switching used for service pursuant to Section 271 of the Act. (Complaint, para. 7 and 18). Thus, AT&T Missouri violated Big River's rights under Section 271 and the interconnection agreement as to new customers starting January 1, 2006, as to moves and additional lines for existing customers starting January 1, 2006, and as to continued service for existing customers starting March 11, 2006. These are the provisions that were affected by the federal court judgment. Big River only agreed to subject itself to the unapproved LWC agreement as to customers that were new as of January 1, 2006, pending completion of the judicial review process. (Complaint, para. 12 and 18). Except as to such new customers, AT&T Missouri has violated the interconnection agreement by trying to impose the unapproved LWC rates on Big River. (Complaint, para. 18).

5. Thus, 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. The federal court judgment has no impact on this aspect of the Complaint. AT&T Missouri's Motion to Dismiss does not even purport to address this aspect of the Complaint.

6. However, Big River submits that it would not be an efficient use of the resources of the parties and the Commission to proceed with this case regarding this one aspect of the Complaint, until the uncertainty created by the court judgment as to other aspects of the case is resolved on appeal. Otherwise, the case would have to proceed in two phases. Accordingly, Big River's Motion for Stay seeks a suspension of the entire case.

7. As to the aspects of the case that are affected by the federal court judgment, Big River submits that AT&T Missouri's Motion to Dismiss is premature. The judgment was issued on September 14, 2006. Under FRAP 4, parties have until October 14, 2006 to file notices of appeal. The CLEC Coalition, of which Big River is a member, intends to appeal. Accordingly, it will be quite some time before there is a final resolution to the federal proceedings. Further, Big River fully expects that the federal court of appeals will reverse the district court and affirm the Commission's Arbitration Order and the related order approving Big River's interconnection agreement with AT&T Missouri. Such appellate relief will render moot AT&T Missouri's Motion to Dismiss.

8. Assuming that there is no stay of the district court judgment, Big River will presumably have to pay higher rates pending appeal. But it will do so under protest. And upon obtaining relief from the appellate court, Big River will be entitled to restitution from AT&T Missouri for the overcharges. Kirtley v. Abrams, 299 F.2d 341, 348 (2d Cir. 1962); Stafford v. Mesnik, 1996 WL 31162 (N.D. Ill. 1996); State ex rel Utility Consumers Council of Missouri, Inc. v. PSC, 602 S.W.2d 852 (Mo App 1980); 2 Mo. Prac., Methods of Practice, Litigation Guide sec. 23.5. Thus, when the appellate court reverses the district court judgment and affirms the Commission's Arbitration Order, all aspects of this complaint case will be ripe for adjudication by the Commission.

9. AT&T Missouri rests its Motion to Dismiss solely upon the federal district court judgment. Hence, its motion is premature and cannot properly be considered until that judgment becomes final from the perspective of appellate review.

10. AT&T Missouri ignores the aspects of the Complaint that concern Big River's rights under interconnection agreement provisions that rest upon Section 251 of the Act and are

not affected by the federal court judgment. In that respect, AT&T Missouri's motion has no merit regardless of the outcome of the expected appeals of the district court judgment.

FOR ALL THE FOREGOING REASONS, the Commission should deny AT&T Missouri's Motion to Dismiss and grant Big River's Motion for Stay.

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

/s/ Carl J. Lumley

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**Certificate of Service**

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 10th day of October, 2006, by either placing same in the U.S. Mail, postage paid, by fax or email transmission.

/s/ Carl J. Lumley

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