

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 ORDER DIRECTING FILING

COMES NOW Big River Telephone Company, LLC pursuant to Commission Order Directing Filing dated October 31, 2006 and for its Response states to the Commission:

1. On October 12, 2006, Big River and the other members of the CLEC Coalition timely filed their Notice of Appeal regarding 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.). Subsequently, both the Commission and AT&T filed timely appeals.

2. AT&T's assertion that a Commission stay of this proceeding would violate the federal court's order is totally devoid of merit. Such a frivolous assertion does not comply with the standards set forth in 4 CSR 240-2.080(7). The federal court order in no way enjoins the Commission from staying this billing dispute to await the outcome of the appeal.

3. The Commission should ignore the various straw men that AT&T sets up and knocks down. Big River and Staff do not ask the Commission to stay or override the court's order. (AT&T Combined Reply, p. 2). Likewise, neither Big River nor Staff asserts that the

court order is not effective. (Id.). Nor do they contend that a stay of this proceeding would preclude AT&T from taking action pursuant to the court order. (Id. p. 2, 6-7).

4. Big River seeks a stay because a portion of its claims are not affected by the court order, while another portion of its claims are affected at least until the court order is reversed.¹ Rather than address part of the case now and part after the reversal, it simply makes more sense to await the outcome of the appeal and address the entire Complaint at one time. As explained in prior pleadings, Big River will be entitled to relief after a reversal for excess monies paid during the appeal. 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. Accordingly, during the appeal AT&T acts at its own risk in collecting such excess monies because in fact and law the matter has not been finally resolved. And even if the appeal is not successful, Big River will still be entitled to relief on those portions of its claims that are not affected by the court order.

5. Despite the fact that AT&T wants to pretend otherwise (AT&T Combined Reply, p. 5), Big River's Complaint does raise issues that are independent of the court's ruling regarding 271 elements. 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**² 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,

¹ There is no "cornerstone" to the Complaint – there is no such legal concept. (AT&T Combined Reply, p. 1, 4).

² This is not, as AT&T asserts, a new articulation of the claims. (Id. p. 7). This is what the Complaint has always stated.

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).³ Similarly, 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 regarding additional lines, moves, and changes was suspended by the federal court's preliminary injunction, AT&T was not precluded from doing so voluntarily and it chose to continue to provide elements under **section 251**. (Complaint, para. 10 and 11). 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 **section 251** 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.

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

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

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

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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 8th day of November, 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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