

1 BEFORE THE PUBLIC SERVICE COMMISSION

2 STATE OF MISSOURI

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4 TRANSCRIPT OF PROCEEDINGS

5 PREHEARING CONFERENCE

6 FEBRUARY 21, 2007

7 Jefferson City, Missouri

8 Volume 1
9 _____

10 In the Matter of

11 BIG RIVER TELEPHONE COMPANY,)
12 Complainant,) Case No. TC-2007-0085
13)
13 vs.)
14)
14 SOUTHWESTERN BELL TELEPHONE,)
15 L.P. d/b/a AT & T MISSOURI,)
15) Respondent.)

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18 _____
19 RONALD D. PRIDGIN,
20 SENIOR REGULATORY LAW JUDGE.
21 _____

21 REPORTED BY:
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1 P R O C E E D I N G S

2 JUDGE PRIDGIN: Good morning. We're on
3 the record. This is the prehearing conference in Case
4 No. TC-2007-0085, Big River Telephone Company, LLC,
5 versus Southwestern Bell Telephone, LP, doing business
6 as AT&T Missouri. If I could I'd like to get oral
7 entries of appearance from counsel beginning with Big
8 River Telephone Company, please.

9 MR. LUMLEY: Thank you, Judge.
10 Appearing for Big River Telephone Company Carl Lumley
11 from the Curtis Heinz Law Firm, 130 South Bemiston,
12 Suite 200, Clayton, Missouri 63105.

13 JUDGE PRIDGIN: Mr. Lumley, thank you.
14 On behalf of Southwest Bell Telephone, LP, d/b/a AT & T
15 Missouri, please.

16 MR. GRYZMALA: Good morning, Your Honor.
17 My name is Bob Gryzmala, appearing on behalf of
18 Southwestern Bell Telephone, LP, d/b/a AT & T Missouri.
19 My office is at One AT & T Center, Room 3516,
20 St. Louis, Missouri 63101.

21 JUDGE PRIDGIN: Mr. Gryzmala, thank you.
22 On behalf of the staff of the Commission, please.

23 MR. HAAS: Good morning. William K.
24 Haas appearing on behalf of the staff of the Public
25 Service Commission. My address is Post Office box 360,

1 Jefferson City, Missouri 65102.

2 JUDGE PRIDGIN: Mr. Haas, thank you.

3 Any appearance on behalf of the office of the Public
4 Counsel? Seeing none. Is there anything that counsel
5 wishes to bring to my attention? Any pending motions
6 or anything counsel thinks I need to know about?

7 Hearing nothing. Mr. Gryzmala, go
8 ahead.

9 MR. GRYZMALA: It looks like I'm up,
10 Your Honor.

11 JUDGE PRIDGIN: Okay.

12 MR. GRYZMALA: Bob Gryzmala for AT & T,
13 Your Honor. In the spirit of brotherly -- this is a
14 case that was filed against AT & T Missouri on August
15 23 of 2006. Shortly thereafter there was a ruling
16 which directly impacts the case that we refer to in our
17 papers, September 14 of '06, in which Judge Shaw in
18 St. Louis issued permanent injunction. We move to
19 dismiss. There's been filings made on that point.

20 The short -- or the bottom line to what
21 I would like to present here is that AT & T Missouri
22 believes and continues to believe that that motion
23 should be granted in full. Frankly, even if the Judge
24 or the Commission would disagree, I don't think there's
25 any legitimate disagreement that the motion to dismiss

1 should be granted for all conduct, damages and
2 occurrences after March 11, 2006 for the reasons we
3 pointed out in our documents.

4 If however, the Commission were to
5 conclude otherwise, or would not be disposed to grant
6 either of those motions whether in full or in part, it
7 may be best to do that without prejudice because the
8 motions could still be reraised or resurrected as it
9 were, after the Eighth Circuit rules. Briefing in that
10 case, Your Honor, is undergoing -- or is going on now.
11 And it will close, effectively, in mid-March.

12 I don't know whether or not if the
13 matter has been set for oral argument in the Eighth
14 Circuit. But that's about the latest information I
15 know of.

16 JUDGE PRIDGIN: I'm sorry to interrupt.
17 But briefs are due to be submitted in mid-March?

18 MR. GRYZMALA: In the action stemming
19 from the appeal of Judge Shaw's permanent injunction in
20 St. Louis, that ruling was taken to the appeal to the
21 Eighth Circuit Court --

22 JUDGE PRIDGIN: Yes, sir.

23 MR. GRYZMALA: -- of Appeals by
24 principal parties, briefings underway at the Eighth
25 Circuit. No indication, to my knowledge, that there is

1 a date for oral argument set. And of course I would
2 not know when the decision might be forthcoming. But
3 if the Commission were to determine at this time that
4 rather than grant the motion whether in full or in part
5 was denied, we would ask that that be done without
6 prejudice.

7 In that event -- without prejudice -- in
8 that event, we would not have an objection to a stay of
9 the case. You might recall the Big River and I believe
10 the Public or the staff, both suggested that the case
11 should be stayed pending any outcome of the Eighth
12 Circuit's decision. So in the event that -- as I
13 mentioned the motion to dismiss was denied without
14 prejudice, for example, we would not object to a motion
15 for stay.

16 The reason why I bring that up is
17 because that bears directly on the procedure schedule.
18 There's no reason candidly, to engage the useless act.
19 That's not the most efficient use of resources, if we
20 need not do that at this time.

21 JUDGE PRIDGIN: Mr. Gryzmala, thank you.
22 Mr. Lumley, any response?

23 MR. LUMLEY: Yes, Judge. First of all,
24 I am not sure if Mr. Gryzmala misspoke or not, but I
25 want to make clear that under no circumstances do we

1 agree that any form of dismissal would be appropriate
2 as to any aspect of the case.

3 With respect to the period of time, the
4 billing for the period of time from January 1st of '06
5 through March 11 the Federal District Court decision
6 has no effect whatsoever on our claim that we have been
7 improperly billed because those charges were based on
8 Section 251 and were not effected in any way by his
9 decision, which has to do with obtaining elements of
10 Section 271.

11 But beyond March 11th, because the
12 appeal is pending and because, you know, we obviously
13 wouldn't pursue the appeal if we didn't believe we had
14 a significant opportunity to prevail, we do not believe
15 that dismissal is appropriate as to that period of time
16 either.

17 Having said that, we did file a motion
18 for stay because we do feel there is some efficiency to
19 be gained to find out exactly what the Eighth Circuit
20 is going to say in this matter. But if the Commission
21 is not inclined to stay the case, then we are prepared
22 to go forward.

23 JUDGE PRIDGIN: And Mr. Haas, I will
24 give you a chance to respond if you want to. I'm just
25 wondering -- and you don't have to respond if you don't

1 want to, Mr. Lumley. But I'm wondering if, since it's
2 your complaint, and you're asking for stay -- I'm just
3 wondering what harm your client would have by
4 dismissing and then refiling after the Eighth Circuit
5 opinion.

6 MR. LUMLEY: Judge, the dispute
7 resolution provisions of our agreement have timelines
8 in them and we do not believe that we would have the
9 opportunity to come back. Additionally, if we don't
10 have the dispute pending, then we would be obligated to
11 pay the full amounts being wrongfully billed as opposed
12 to only paying undisputed amounts.

13 JUDGE PRIDGIN: Okay. Mr. Gryzmala, go
14 ahead. I'll let Mr. Haas respond. Did you have
15 anything to add?

16 MR. HAAS: Judge Pridgin, in our
17 November 9 filing, staff request that Commission stay
18 this proceeding pending a final non-appeal of a court
19 order. And we would restate that position again today.

20 JUDGE PRIDGIN: Okay. Thank you. I'm
21 sorry. Mr. Gryzmala, did you have anything?

22 MR. GRYZMALA: Two brief points.

23 JUDGE PRIDGIN: Go ahead.

24 MR. GRYZMALA: I would like to dispel
25 any notion that the Federal District Court's judgment

1 is now binding. We stated the reasons in our motion
2 papers that that District Court judgment has not been
3 stayed. If Mr. Lumley's client, with all due respect,
4 felt it had a -- I don't know how it was put, but had a
5 very good chance on appeal, that would have formed a
6 basis of our motion to stay directed to Judge Shaw of
7 the Eighth Circuit Court Of Appeal. So at this time
8 that District Court judgment is binding. And
9 Mr. Lumley had -- or rather motion papers also
10 indicated presumably they would have to pay higher
11 rates on appeal.

12 I think the bottom line there is there's
13 no question but that that is the case. Judge Shaw said
14 loud and clear combining 271 and 251 elements in the
15 ICA on which Big River basis its complaint was
16 unlawful. That's the end of it and that's why I made
17 the point particularly with respect to the period after
18 March 11, 2006 there is no claim. And that remains the
19 case today because the District Court judgment has not
20 been stayed.

21 And presumably it may well be it may be
22 well the point, as Mr. Lumley pointed out in his
23 papers, that if Eighth Circuit were to reverse Judge
24 Shaw, then and only then might there be a situation of
25 reimbursement, you see. Where AT & T would have to

1 give back the difference, if you will, between the
2 commercial rate and the ICA rate, the interconnection
3 agreement rate.

4 But those are the two point I make;
5 number one, that judgment is binding today. And for
6 that reason that is why we feel the particularity at
7 the motion to dismiss that we offer should be granted
8 for the period after March 11 of '06.

9 JUDGE PRIDGIN: Okay.

10 MR. GRYZMALA: Having said that, again,
11 I remain of the opinion and represent to the court that
12 if the Commission were to conclude otherwise at this
13 time, or would want you to be inclined to deny the
14 motion without prejudice, we have no objection to stay
15 at that time. Thank you.

16 JUDGE PRIDGIN: Thank you, Mr. Gryzmala.
17 Anything further?

18 MR. LUMLEY: Judge, just to clarify; you
19 know, when the Commission made its decision in the case
20 in the arbitration when it set the agreement, that
21 decision was binding and in effect. And nonetheless,
22 AT & T violated it. Yes, the Court opinion currently
23 is in effect, but it's subject to appeal and subject to
24 reversal.

25 And I don't understand Mr. Gryzmala's

1 comment about the seriousness of our appeal. I mean,
2 you don't go to the Eighth Circuit Court of Appeals
3 frivolously. You know, it's a very serious place of
4 business. It's a very expensive process. And you
5 don't undertake an appeal to the Eighth Circuit
6 lightly. And they don't take the appeal lightly.

7 You know, we're very serious about that
8 appeal. We believe we're going to prevail. And
9 frankly the decision that the Commission makes about
10 the documents for the period of time from January 1st
11 to March 11, is going to be controlling for all
12 subsequent periods as well, subject only to the
13 potential of an intervening event, which is, you know,
14 the final court decision, you know, effective March 11.

15 So there's no efficiency gained by some
16 partial dismissal of the case. And frankly if the
17 Commission views it in sort of an all or nothing
18 perspective, then we're prepared to just proceed with
19 the entire case.

20 JUDGE PRIDGIN: Okay. And I think I
21 mentioned in my order setting prehearing the potential
22 of a stipulation on facts. And I didn't know if that's
23 something that the parties -- if this more of a legal
24 dispute in that the parties really don't really
25 disagree on the facts or -- obviously if you do

1 disagree on the facts, the Commission can hear those.
2 But I didn't know if that's something that the parties
3 would at least consider doing.

4 You'll certainly don't have to tell me
5 right now one way or the other. If you're unsure,
6 you're certainly welcome to discuss that. But I'm
7 wondering if this is more of a legal dispute and
8 something that can be condensed somewhat if the
9 Commission decided to go to hearing instead of having
10 prefiled and witnesses to perhaps go on a stipulation
11 of facts. But that's obviously your decision.

12 MR. LUMLEY: Judge, my observation on
13 that is that I think it's fairly likely that we can
14 reach a partial stipulate of facts. I doubt that we
15 could stipulate to every single fact. If the
16 inclination were to go to live testimony, I think we
17 could at least get historical documents and basic facts
18 stipulated so that the live testimony could focus on
19 the disputed points.

20 JUDGE PRIDGIN: And if that's something
21 that the parties agree to do, at least a partial
22 stipulation of facts, if you could at least, whenever
23 you file your proposed procedural schedule or your
24 alternative proposed procedural schedule, if you could
25 let me know when you anticipate filing such a

1 stipulation, if indeed you think you could do one at
2 all.

3 MR. GRYZMALA: Yeah. I think Carl's
4 correct. I think that there may be some possibility
5 for us to have stipulation in part. But frankly I may
6 be a little bit more pessimistic than he. Because
7 there's quite a bit of difference in the parties
8 conveyance of the facts as they recall them.

9 And I want to put on the record, if you
10 don't mind, Your Honor -- and I don't mean to demean
11 Mr. Lumley's point with regard to the seriousness of
12 the action in the Eighth Circuit. My only point is
13 that there's a difference in rates which apply during
14 this period as we sit here today. And to suggest that
15 that ruling is not binding today is something I want to
16 make my points directed to. I really want that to not
17 be misunderstood.

18 Having said that, if the -- again, if
19 the Commission declines to grant the motion to dismiss
20 at this time, we think it's a far better course to
21 simply stay the entire case. And I think Mr. Lumley
22 and frankly, Mr. Haas and I all agree on that. It's
23 far better to stay the case in its entirety than to
24 proceed any further because a good part, the lion's
25 share of this case, will ultimately be effected by that

1 Eighth Circuit ruling. So I would reiterate our
2 position. I think we're all united on that point, if
3 I'm not mistaken.

4 MR. LUMLEY: With regard to developing
5 this proposed schedule, we had a prehearing yesterday
6 in a different matter with Judge Jones. And there was
7 some discussion about live testimony versus prefile and
8 in that case he's going to give us some direction at
9 the end of the week. And then based on that direction
10 we're going to submit our proposed schedule.

11 So I think it would help us to know is
12 there an inclination one way or the other? Should we
13 be developing it, you know, in the alternative? Or how
14 do you want us to approach the testimony aspect of the
15 schedule?

16 JUDGE PRIDGIN: Without knowing exactly
17 what facts you may or may not stipulate to, it's hard
18 for me to say. But I know that the Commission normally
19 prefers prefiled. And my guess is that if we've got
20 some sort of facts that are disputed, that the
21 Commission would prefer prefiled, especially as complex
22 as these issues may become. Now obviously, if the
23 parties prefer to go with live and put on a compelling
24 reason to do so, we might do that. But I would -- I
25 would prefer you at least consider prefiled.

1 MR. LUMLEY: Right.

2 JUDGE PRIDGIN: Is there anything else
3 from the parties?

4 MR. GRYZMALA: I would only take it to
5 mean then however, that if a motion is stayed -- a stay
6 is granted, there would be no procedural schedule until
7 further order.

8 JUDGE PRIDGIN: True. That's correct.
9 And if that's something that you want to roll into your
10 proposed procedural schedule, like an either/or-type
11 that's certainly fine. And I understand that the
12 parties are somewhat hamstrung because you don't when
13 the Eighth Circuit is going to rule or if they're
14 necessarily going to settle an oral argument. I
15 understand. That's kind of a big unknown.

16 Is there anything else from the parties?
17 All right. Hearing nothing further, that will conclude
18 this prehearing conference in Case No. TC-2007-0085.
19 Thank you very much. We are off the record.

20 (WHEREIN; the prehearing is concluded at
21 10:19 a.m.)

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CERTIFICATE OF REPORTER

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Lisa M. Banks, CCR

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