

**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 MOTION TO DISMISS COMPLAINT

Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri (“AT&T Missouri”) hereby moves the Commission, pursuant to Rule 2.070(6) (4 CSR 240-070(6)), 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.

SUMMARY

Big River claims that AT&T Missouri is required by the Commission-approved interconnection agreement between Big River and AT&T Missouri, 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.” Complaint, p. 1. Big River asks the Commission to determine that Big River does not owe AT&T Missouri any amounts for local switching and loops beyond the rates set forth in the parties’ interconnection agreement and to require AT&T Missouri to continue to provide local switching at the rates set forth in that agreement. Complaint, pp. 1, 12. Big River’s position, however, is directly contrary to the Declaratory Judgment and Permanent Injunction, and Memorandum and Order, entered September 14, 2006, by the Federal District Court for the Eastern District of Missouri, in the appeal of the Commission’s July 11, 2005 Arbitration Order 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.).

Big River's Complaint must be dismissed for failure to state a viable claim and for lack of jurisdiction because the requirement in the Commission's Arbitration Order that AT&T Missouri "include § 271 unbundling obligations in its interconnection agreements is beyond the jurisdiction of the Commission." Memorandum and Order, p. 21. The federal court determined that the Arbitration Order which is the basis for Big River's claim "conflicts with and is preempted by federal law to the extent it requires [AT&T Missouri] to provide unbundled access to switching and the UNE Platform." Memorandum and Order, p. 23. Were the Commission to grant Big River any relief, it would run afoul of the Court's Declaratory Judgment and Permanent Injunction, in that the Commission "is permanently enjoined from enforcing the Arbitration Order dated July 11, 2005, as well as related orders approving interconnection agreements between [AT&T Missouri] and each CLEC defendant" – including Big River, a named defendant therein – "to the extent they require [AT&T Missouri] to (1) fill new orders for unbundled local switching or the network elements which together comprise the UNE Platform, and (2) continue offering unbundled access to de-listed network elements." Declaratory Judgment and Permanent Injunction, p. 2. Granting Big River relief would place the Commission in direct violation of both aspects of the Court's Declaratory Judgment and Permanent Injunction.¹

**BIG RIVER'S COMPLAINT FAILS TO STATE A CLAIM ON WHICH
THE COMMISSION MAY GRANT RELIEF AND IS BEYOND THE COMMISSION'S
JURISDICTION.**

Big River's Complaint requests that the Commission perpetuate the continued provision of unbundled local switching and the UNE Platform ("UNE-P") -- albeit under Section 271 rather than Section 251 -- by AT&T Missouri. The Commission is precluded from doing so, however, by the

¹ Copies of the Declaratory Judgment and Permanent Injunction and the Memorandum and Order are attached hereto and incorporated herein as Exhibits 1 and 2, respectively.

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.). This federal action was initiated by AT&T Missouri's appeal of the Commission's July 11, 2005, Arbitration Order in Case No. TO-2005-0336.

The basis of Big River's Complaint is that AT&T Missouri has violated the Commission-approved interconnection agreement between Big River and AT&T Missouri by failing 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." Complaint, p. 1. Big River asks the Commission to determine that Big River does not owe AT&T Missouri any amounts for local switching and loops beyond the rates set forth in the parties' interconnection agreement and to require AT&T Missouri to continue to provide local switching at the rates set forth in that agreement. Complaint, pp. 1, 12.

The Commission determined in its Arbitration Order that AT&T Missouri must provide continued access to unbundled switching (thus enabling continued provision of a UNE-P equivalent), on the basis that even though such unbundling is not required by Section 251(c)(3) of the Act, it is sufficient that the unbundling is required by Section 271.² The Commission made this

² See, TO-2005-0336, Final Arbitrator's report, Section III, pp. 11, 16-17, 26-30. The Commission's July 11, 2005, Arbitration Order adopted the Final Arbitrator's report in all respects pertinent here.

decision despite ample FCC precedent to the contrary.³ This decision, and others related to it, led to appeal of the Arbitration Order.

Following various cross motions for summary judgment, the Court ruled, on September 14, 2006, that the requirement in the Commission's Arbitration Order that AT&T Missouri "include § 271 unbundling obligations in its interconnection agreements is beyond the jurisdiction of the Commission." Memorandum and Order, p. 21. The Court determined that "[t]he only role Congress delegated to state Commissions under § 271 is to act as consultant to the FCC during the application process." *Id.*, p. 17, citing § 271(d)(2)(B) (emphasis added). The Court expressly found that the Arbitration Order "conflicts with and is preempted by federal law to the extent it requires [AT&T Missouri] to provide unbundled access to switching and the UNE Platform." Memorandum and Order, p. 23.

Consequently, the Commission "is permanently enjoined from enforcing the Arbitration Order dated July 11, 2005, as well as related orders approving interconnection agreements between [AT&T Missouri] and each CLEC defendant" – including Big River, a named defendant therein – "to the extent they require [AT&T Missouri] to (1) fill new orders for unbundled local switching or

³ The demise of UNE-P was dictated by the FCC when it concluded in its TRRO decision that "the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives." Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order on Remand and Further notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("TRO"), vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC, 359 F. 3d 554 (D.C. Cir. 2004) ("USTA II"), Order on Remand, 20 FCC Rcd 2533 (2005) ("TRRO"), at para. 199, *aff'd*, Covad Communications Company, et al. v. FCC, et al., No. 05-1095 (D.C. Cir.) (Op., June 16, 2006).

The FCC's UNE-P transition plan required CLECs to convert their existing UNE-P customers to "alternative arrangements" by March 11, 2006. The FCC's TRRO intended that these alternative arrangements be "arrangements that carriers voluntarily have negotiated on a commercial basis." TRRO, para. 199, and did not provide for commingled Section 271 local switching and Section 251 elements. Indeed, the FCC had already held in its TRO that if an element is required under Section 271 but not under Section 251, BOCs such as AT&T Missouri are under no obligation to "commingle" the Section 271 element with others. TRO, para. 655, note 1990 ("We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3). We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items."); see also, USTA II, 359 F. 3d at 589-90 (affirming FCC's no-combinations holding). Local switching is known as checklist item 6. See, Section 271(c)(2)(B)(vi).

the network elements which together comprise the UNE Platform, and (2) continue offering unbundled access to de-listed network elements.” Declaratory Judgment and Permanent Injunction, p. 2.

Big River’s Complaint states no viable claim for relief or a basis for Commission jurisdiction given the Court’s analysis and rulings. The Complaint wholly relies on the Commission-approved interconnection agreement’s Section 271-related obligations, including that related to unbundled local switching. Complaint, pp. 1, 5, 7. Big River further asks the Commission to determine that it owes nothing more to AT&T Missouri than the amounts that would have applied had AT&T Missouri “provide[d] 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.” Complaint, p. 1; see also, id., p. 12).

However, the Court’s ruling necessarily requires dismissal of Big River’s Complaint. The Commission has no Section 271 authority nor can it enforce any portion of the Big River/AT&T Missouri interconnection agreement it had approved which purports to require that AT&T Missouri provide Big River access to de-listed network elements, such as local switching, or to any other 271 network element (whether on a standalone basis or as part of a combined arrangement). It is likewise clear that the Commission cannot compel AT&T Missouri to provide Big River switching connected to a loop. The Court specifically considered the CLEC Defendants’ argument for continued provision of Section 271 switching together with Section 251 loops and emphatically rejected it. It first correctly observed that the FCC had already held that “facilities which are required only under § 271, unlike UNEs required under § 251, need not be provided in combined, pre-packaged form.” Memorandum and Order, p. 22, citing TRO, n. 1990. The Court further explained that the Commission’s contrary determination was preempted:

The Arbitration Order permits CLECs to use the same combination of facilities which comprise the UNE Platform, without limitation and at the same transitional rates the FCC held should apply only to the embedded customer base. See Arbitration Order at 28-30. The Arbitration Order therefore conflicts with substantive restrictions the FCC has placed on UNE access, and accordingly is preempted. See 47 U.S.C. §§ 251(d)(3), 261(b)-(c) (precluding state commission actions that are not “consistent” with federal law). Id.


For these reasons, the Commission is without jurisdiction to grant Big River any of the relief it seeks and Big River fails to state a claim on which relief can be granted.

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. Therefore, AT&T Missouri respectfully submits that Big River’s Complaint must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on September 26, 2006.


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