

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Big River Telephone Company, LLC,)	
)	
Complainant,)	
)	
v.)	Case No. TC-2012-0284
)	
Southwestern Bell Telephone Company,)	
d/b/a AT&T Missouri,)	
)	
Respondent.)	

BIG RIVER TELEPHONE COMPANY, LLC'S INITIAL BRIEF

COMES NOW Big River Telephone Company, LLC, by and through counsel, and for its Initial Brief, states as follows:

INTRODUCTION

Statement of the Case

This case arises out of a billing dispute between Big River Telephone Company, LLC ("Big River") and Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T Missouri"). The issue is whether certain traffic Big River exchanged with AT&T Missouri was "enhanced services traffic" and, therefore, not subject to exchange access charges.

On or about August 13, 2005, in Case No. TK-2006-0073, the Commission approved an interconnection agreement ("ICA") made and submitted by Big River and AT&T Missouri. The ICA was amended on

November 2, 2009, which amendment was submitted to the Commission, Reference No. VT-2010-0011. The ICA and amendment thereto remain in effect.

Attachment 12, section 13.3 of the ICA states, “The Parties shall compensate each other for the exchange of IS Traffic applying the same rate elements used by the Parties for the exchange of ISP-bound traffic whose dialing patterns would otherwise indicate the traffic is local traffic.”¹ The parties do not charge each other for local traffic. Pursuant to the ICA, Big River informed AT&T Missouri October 20, 2005, that its traffic was 100% enhanced.²

AT&T Missouri, however, billed Big River exchange access charges for that traffic.³ Big River filed suit against AT&T Missouri in St. Louis County Circuit Court on or about September 29, 2008, alleging that AT&T Missouri wrongly billed Big River “for terminating Enhanced/Information Services traffic sent by Big River to AT&T.”⁴ That lawsuit was settled by agreement of the parties on October 31, 2009.⁵ The parties amended the ICA to include a provision which states, “The Parties shall exchange interconnected voice over Internet protocol service traffic, as defined in Section 386.020 RSMo., subject

¹ EFIS No. 66, Joint Stipulation, para. 6.

² Id. at para 7.

³ EFIS No. 36, Direct Testimony of Mark Neinast, 14:5-6.

⁴ EFIS No. 66, Joint Stipulation, para. 8.

⁵ Id. at para. 9.

to the appropriate exchange access charges to the same extent that telecommunications services are subject to such charges.”⁶

On or about February 5, 2010 and thereafter, AT&T Missouri billed Big River monthly on BAN 110 401 0113 803.⁷ Big River disputed the entirety of the charges because its traffic continued to be 100% enhanced.⁸ After participating in an informal dispute process, AT&T Missouri denied Big River’s dispute.⁹

Procedural History

Big River filed its Complaint on March 1, 2012.¹⁰ AT&T Missouri filed its Answer and Complaint on July 31, 2012.¹¹ Big River filed its Answer to AT&T Missouri’s Complaint on August 20, 2012.¹² The matter proceeded to hearing on January 8 and 9, 2012, on the following issues:

1. Should the traffic which Big River has delivered to AT&T Missouri over the local interconnecting trunks for termination, and for which AT&T Missouri has billed Big River access charges since January, 2010 under Billing Account Number 110 401 0113 803 (“BAN 803”), be classified as interconnected VoIP traffic, enhanced services traffic, or neither?

⁶ Id. at para. 10.

⁷ Id. at para. 14.

⁸ Id. at para 15.

⁹ Id. at para. 20

¹⁰ EFIS No. 1, Big River’s Complaint.

¹¹ EFIS No. 13, AT&T Missouri’s Answer and Complaint.

¹² EFIS No. 25, Big River’s Answer.

2. What charges, if any, should apply to the traffic referenced in Issue No. 1?

ARGUMENT

Weight of Witness Testimony

As a preliminary matter, Big River will address the testimony of AT&T Missouri's principal witnesses, William Greenlaw and Mark Neinast. Big River continues to maintain, as it has from the outset, that the testimony of these two witnesses is inadmissible. However, since their testimony was admitted into evidence, the question is what weight, if any, should be given. The answer is none.

Neither man is employed by AT&T Missouri.¹³ Neither works for the company that processes AT&T Missouri's billing.¹⁴ Neither was even aware of this dispute until after the filing of Big River's Complaint.¹⁵ Both obtained their "knowledge" of the issues from hearsay provided by others who were not presented for cross-examination.¹⁶ As such, they are not fact witnesses.

AT&T Missouri's reason for using professional witnesses who have no connection to the dispute is transparent. Since they have no prior involvement in the dispute, they are blank slates. They are provided just enough information necessary to prepare their testimony and no more. In that way, the

¹³ Tr. 186, 200.

¹⁴ Tr. 186, 200.

¹⁵ Tr. 186, 201.

¹⁶ Tr. 186, 201

professional witnesses can present the points that AT&T Missouri wants to make while their lack of in-depth knowledge gives them plausible deniability and shelters them from cross-examination.

Professional witness like Mr. Greenlaw and Mr. Neinast are part of what is called witnessing support.¹⁷ They are chosen to testify because of their excellent communication, presentation, and influencing skills.¹⁸

They are, in effect, actors. They are brought in, given a script, and then they put on a show for the Commission. They then move on to put on a show for a commission in some other state.

They will go almost anywhere and testify about almost anything. For example, Mr. Greenlaw has testified before numerous commissions on such wide-ranging topics as the effect of laches, estoppels, and waiver in Florida,¹⁹ the legal status of corporate entities as alter egos in Michigan,²⁰ and the subrogation of workers' compensation insurance in Michigan.²¹ Likewise, Mr. Neinast has provided testimony on an equally remarkable variety of topics,

¹⁷ EFIS No. 35, Greenlaw Direct, 1:12-14.

¹⁸ EFIS No. 94, Big River Ex. 11.

¹⁹ In re: Notice of adoption of existing interconnection, unbundling, resale and collocation agreement between Bellsouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Image Access. Inc. d/b/a NewPhone Inc., by Express Phone Service, Inc. Docket No. 110087-TP (March 1, 2012)

²⁰ In the matter of the formal complaint of Michigan Bell Telephone Company d/b/a AT&T Michigan against B&S Telecom, Inc., Quick Communications, Inc. and Bruce Yuille for breach of the approved Interconnection Agreement Between AT&T Michigan and B&S Telecom, Inc., Case No. U-16501 (February 10, 2011)

²¹ In the matter of the petition of ACD Telecom, Inc., Arialink Telecom, LLC, CynergyComm.Net, Inc., DayStarr LLC, Lucre, Inc., Michigan Access, Inc., Osirus Communications, Inc., Superior Spectrum Telephone and Data, LLC, TC3 Telecom, Inc., and TelNet Worldwide, Inc. for Arbitration of Interconnection rates, terms, conditions, and related arrangements with Michigan Bell Telephone Company d/b/a AT&T Michigan, Case No. U-16906 (November 18, 2011)

including what constitutes customer premises equipment in Florida,²² Section 251 requirements for 911 routing in Iowa,²³ and whether a virtual NXX offering was compliant with Washington state laws and FCC rules in Ohio.²⁴

AT&T Missouri's abuse of the Commission's process is highlighted by its third witness, Janice Mullins, an actual fact witness. She has been involved in informal dispute resolutions for over fifteen years.²⁵ Over that period, she has been involved in hundreds of disputes some of which ended up before state commissions.²⁶ Yet, until this case, she has never testified before a commission.²⁷ And, she obviously was not intended to testify in this case as she did not appear until the time for surrebuttal testimony.

AT&T Missouri's argument that witnesses like Mr. Greenlaw and Mr. Neinast can be fact witnesses by examining documents prepared by others is ludicrous. The Commission obviously rejected that contention because it instead admitted their testimony on the grounds that they were experts.²⁸

²² In Re: Aventure Communication Technology, L.L.C. vs. Qwest Communications Corporation, Sprint Communications Company, L.P., AT&T Communications of the Midwest, Inc., TCG Omaha, and Level 3 Communications, Inc., Docket No. FCU-2011-0002 (October 17, 2011)

²³ Petition of Intrado Communications Inc. for Arbitration Pursuant To Section 252(b) of the Communications Act of 1934, as amended, to Establish an Interconnection Agreement with The Ohio Bell Telephone Company d/b/a AT&T Ohio, Case No. 07-1280-TP-ARB (October 7, 2008)

²⁴ Qwest Corporation V. Level 3 Communications, LLC; Pac-West Telecomm, Inc.; Northwest Telephone Inc.; Tcg-Seattle; Electric Lightwave, Inc.; Advanced Telcom Group, Inc. d/b/a Eschelon Telecom, Inc.; Focal Communications Corporation; Global Crossing Local Services Inc; and, Mci Worldcom Communications, Inc., Docket No. UT-063038 (February 2, 2007)

²⁵ Tr. 233.

²⁶ Tr. 233.

²⁷ Tr. 234.

²⁸ Tr. 194, 204.

The decision to treat them as experts was also incorrect for a number of reasons. The primary reason is that AT&T Missouri did not offer them as expert witnesses. On the contrary, when asked to identify each issue on which the witnesses were being offered as experts, AT&T Missouri specifically stated that they were not “testifying as ‘experts’ in the strict technical sense” and AT&T Missouri did not provide any issues to which these witnesses applied their ‘expertise’.²⁹

Further, while each claimed to have specialized knowledge, neither identified what that special knowledge was. Also, regardless of what that specialized knowledge might be, both men failed to state that they had applied their specialized knowledge in preparing their testimony. They did not testify that their opinions were given subject to any recognized standard as required.³⁰ They did not establish that the facts that they relied upon were of a type reasonably relied upon by experts in their field.³¹

Allowing these witnesses to testify as experts at the eleventh hour, without specifying which issues they applied their ‘expertise’, or even identifying each witnesses’ ‘special knowledge’ provided no foundation for any of the testimony of these witnesses to be useful.

²⁹ EFIS No. 111, Big River Ex. 9

³⁰ Scott v. Blue Springs Ford, 215 S.W.3d 145, 177 (Mo. App. 2006)

³¹ Id. at 176.

Mr. Greenlaw and Mr. Neinast are not fact witnesses, and their testimony does not meet the standards of expert testimony. Their testimony, then, should be given no weight.

ISSUE 1 - SHOULD THE TRAFFIC WHICH BIG RIVER HAS DELIVERED TO AT&T MISSOURI OVER THE LOCAL INTERCONNECTING TRUNKS FOR TERMINATION, AND FOR WHICH AT&T MISSOURI HAS BILLED BIG RIVER ACCESS CHARGES SINCE JANUARY, 2010 UNDER BILLING ACCOUNT NUMBER 110 401 0113 803 ("BAN 803"), BE CLASSIFIED AS INTERCONNECTED VOIP TRAFFIC, ENHANCED SERVICES TRAFFIC, OR NEITHER?

Interconnected Voice Over Internet Protocol

Both AT&T Missouri and Staff have taken the position that this case is merely a referendum on whether Big River is providing Interconnected Voice Over Internet Protocol ("IVOIP"). If so, they argue, Big River's traffic is subject to exchange access charges. Using that benchmark, the Commission must find that Big River's traffic is not IVOIP and, as demonstrated, it undergoes a net protocol conversion. Big River's traffic, therefore, is not subject to exchange access charges.

Section 392.550

AT&T Missouri and Staff base their arguments on the Amendment to the parties' ICA and Section 392.550 of the Missouri Revised Statutes. The Amendment states, in pertinent part:

The Parties shall exchange interconnected voice over Internet Protocol ("VOIP") served traffic, as defined in Section 386.020 RSMo., subject to

appropriate exchange access charges to the same extent that telecommunications services are subject to such charges.³²

Subsection 2 of Section 392.550 provides:

Interconnected voice over internet protocol service shall be subject to appropriate exchange access charges to the same extent that telecommunications services are subject to such charges. Until January 1, 2010, this subsection shall not alter intercarrier compensation provisions specifically addressing interconnected voice over internet protocol service contained in an interconnection agreement approved by the commission pursuant to 47 U.S.C. Section 252 and in existence as of August 28, 2008.³³

Subsection 1 of Section 392.550 references the definition of IVOIP in Section 386.020. There, “interconnected voice over Internet protocol service” is defined as service that:

- (a) Enables real-time, two-way voice communications;
- (b) Requires a broadband connection from the user’s location;
- (c) Requires Internet protocol-compatible customer premises equipment; and
- (d) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.³⁴

From the outset of this case, AT&T Missouri has argued that Big River’s traffic is IVOIP. Staff has also taken that position. That contention fails, however, because of part (b) of the above-referenced definition. Big River has provided uncontroverted evidence that its service does not “require” a

³² EFIS No. 66, Joint Stipulation, para. 10.

³³ EFIS No. 66, Joint Stipulation, para. 11.

³⁴ EFIS No. 66, Joint Stipulation, para. 12.

broadband connection from the user's location and, in some cases, does not use a broadband connection.

Definition of Broadband

None of the witnesses presented by AT&T Missouri offered any definition of what constitutes broadband. Mr. Voight, on behalf of the Staff, testified that Big River's service requires a broadband connection "because it meets the definition of a broadband connection by any standard" that he is familiar with.³⁵ However, he never explained what any of those standards might be.

Big River's CEO, Gerard Howe, is the only witness who provided any definition of what "broadband" means. Mr. Howe stated:

Broadband is a connection with a minimum speed in excess of 200 kilobits per second (kbps) in both the uplink and downlink directions. The FCC established this minimum broadband speed standard in its First Broadband Development Report released on February 2, 1999. It is a widely accepted standard. It was referenced and used by AT&T in its Merger Commitments made to the federal government in the merger of AT&T and BellSouth in December 2006. The 200 kbps standard was also used by the Missouri PSC in its Missouri Broadband Report, issued in December 2011 in response to a request from the Missouri State Senate Committee on Commerce, Consumer Protection, Energy and the Environment.³⁶

At the hearing, Mr. Howe testified that the FCC is considering redefining broadband to speeds over 4 megabits per second.³⁷ Regardless of a potential change in the definition of broadband, the fact remains that Big River's service

³⁵ Tr. 254-253.

³⁶ EFIS No. 103, Howe Direct, 3:7-16.

³⁷ Tr. 64.

does not “require” a broadband connection even using the definition dating back to 1999 which set the 200 kbps minimum standard.

Meaning of “Require”

The word “require” is not defined in Section 386.020. “In interpreting statutes, our purpose is to ascertain the intent of the legislature.”³⁸ “In doing so, we look to the language used, giving it its plain and ordinary meaning.”³⁹ “When a word used in a statute is not defined therein, it is appropriate to derive its plain and ordinary meaning from a dictionary.”⁴⁰ “In interpreting a statute, we are required to give meaning to each word, clause, and section of the statute whenever possible.”⁴¹ “The courts are without authority to read into a statute a legislative intent that is contrary to the intent made evident by giving the language employed in the statute its plain and ordinary meaning.”⁴²

AT&T Missouri, though, argued in its Memorandum in Opposition to Big River’s Motion for Summary Determination that “the statute’s reference to a service ‘requiring’ a broadband connection should be interpreted to mean VoIP services that are offered to customers with broadband connections, as opposed to VoIP services that are offered to customers without a broadband

³⁸ Hunter v. County of Morgan, 12 S.W.3d 749 (Mo. App. 2000).

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

connection.”⁴³ AT&T Missouri’s suggested interpretation ignores the plain meaning of the word “requires”.

The Oxford English Dictionary defines “require” as follows: 1) need for a particular purpose; 2) cause to be necessary; 3) specify as compulsory; and 4) instruct or expect someone to do something.⁴⁴ Even more on point, the MacMillan Dictionary definition “if a rule, law, contract, etc. requires something, you must do that thing.”⁴⁵ It is also instructive to look at the antonyms of “require”. Roget’s Thesaurus lists the antonyms as “nonessential, optional, unnecessary.”⁴⁶

The plain meaning of the word “requires” is compulsory, necessary, or essential. Mr. Howe’s evidence has proven that a broadband connection is not compulsory, necessary, or essential for Big River to provide its service. And, this was not just a matter of his opinion. He attached to his surrebuttal testimony a recording of a call⁴⁷ made over Big River’s network with a capped bandwidth speed of 40 kbps.⁴⁸ Mr. Howe testified at hearing that Big River’s service never requires more than 100 kps which is significantly lower than any definition of broadband speed.⁴⁹

The recording made at 40 kbps is concrete evidence that Big River’s service can be provided without a broadband connection. Neither AT&T

⁴³ EFIS No.59, Memorandum in Opposition, p. 7.

⁴⁴ “require.” Oxford English Dictionary, 2nd Edition (1989).

⁴⁵ “require.” MacMillan English Dictionary, 2nd Edition (2007)

⁴⁶ “require.” Roget’s International Thesaurus, 7th Edition (2011)

⁴⁷ EFIS No. 53, Howe Surrebuttal, Attachment 1.

⁴⁸ The playback of this message during the hearing had a significant echo due to the hearing room equipment. That echo is not present on the recording submitted via EFIS.

⁴⁹ Tr. 101.

Missouri nor Staff contested the validity of that recording nor provided any evidence suggesting that Big River's service requires a broadband connection.

Rather, AT&T Missouri argues that Big River's service requires a broadband connection because most of Big River's customers "use" a broadband connection to access Big River's service. In fact, AT&T Missouri has been careful to avoid referencing the statutory prerequisite that the service "requires" a broadband connection to be considered IVOIP. Mr. Neinast cited Mr. Howe's deposition testimony which he claimed explained "how Big River customers use IP compatible customer premises equipment for telephone service that allows them to engage in real-time, two-way voice communications, and to make calls to, and receive calls from, the PSTN."⁵⁰ His purported 'expert' testimony simply ignores the "requires a broadband connection" element of the definition with no explanation as to his omission of that element. Likewise, when AT&T Missouri's attorney deposed Mr. Howe, he asked "is there a broadband connection to those customer's location" that have internet protocol customer premises equipment.⁵¹ The question from AT&T Missouri's attorney was fundamentally different than the standard set forth in the statute and one that has no bearing on whether Big River's service requires a broadband connection. The most striking example is in AT&T Missouri's Memorandum in Opposition to Big River's Motion for Summary Determination. There, AT&T Missouri argued that Big River's service meets each of the four criteria the

⁵⁰ EFIS No. 125, Neinast Surrebuttal, 2:18-20.

⁵¹ EFIS No. 136, Howe Deposition, 28:15-19

statutory definition of IVOIP.⁵² AT&T Missouri then goes on to argue that Big River's customer's "use" a broadband connection rather than Big River's service "requires a broadband connection."⁵³

While Mr. Howe admitted that most Big River customers do use a broadband connection to access Big River's services, he also acknowledged that not all Big River customers do have broadband connections. As indicated by Mr. Howe, some Big River customers' connections are, at times, restricted to 40 kbps and those customers are still able to access Big River's services.⁵⁴ Further, in response to a question from Commissioner Jarrett, Mr. Howe indicated that most of Big River's customers have access to broadband connections because, quite simply from a marketing perspective, Big River has partnered with companies that offer broadband services since it has found that more people are interested in broadband connections than in dial-up Internet services.⁵⁵

Further, AT&T Missouri's proposed interpretation of "require" is undone by its own use of the word. In its Complaint, AT&T Missouri alleges that "Big River has delivered to AT&T Missouri for termination to end users non-local traffic for which Big River is **required** to pay charges which have been billed to it by means of Billing Account Number ("BAN") 110 401 0113 803."⁵⁶

[Emphasis added] AT&T Missouri has asked the Commission to "find and

⁵² EFIS No. 59, Memorandum in Opposition, p. 5.

⁵³ Id.

⁵⁴ Tr. 69.

⁵⁵ Tr. 101.

⁵⁶ EFIS No. 13, AT&T Missouri Answer and Complaint, para. 4.

determine...that the access charges AT&T Missouri has billed Big River...are **required** by and consistent with the parties' ICA, as amended.”⁵⁷ [Emphasis added] In its Memorandum in Opposition to Big River's Motion for Summary Determination, AT&T Missouri used some form of the word “require” no less than five times to describe something as being mandatory.

- “Under the ICA, Big River is **required** to specifically identify the basis for any dispute of the charges billed by AT&T.”⁵⁸
- “Sections 9.2 and 9.3 **require** that a party bringing a dispute must provide the other party “specific details and reasons” for submitting the dispute.”⁵⁹
- “In short, the ICA **requires** a party disputing a bill to provide the specific reasons for its dispute.”⁶⁰
- “In sum, Big River's motion must be denied for the reason that the “billing accuracy” dispute it now attempts to raise was never previously made the subject of a dispute under the parties' ICA, nor was it accompanied by “sufficient detail of and rationale for the dispute” as **required** by Section 13.4.1 of the GT&Cs of the ICA.”⁶¹
- “The parties' ICA **requires** Big River to pay access charges for “interconnected voice over Internet protocol service traffic, as defined in Section 386.020 RSMo” to the same extent that telecommunications services are subject to such charges.”⁶²

[Emphasis added] Obviously, AT&T Missouri is using “require” as compulsory which is consistent with the plain meaning of the word.

⁵⁷ EFIS No. 13, AT&T Missouri Answer and Complaint, p. 11.

⁵⁸ EFIS No. 59, Memorandum in Opposition,, p. 13

⁵⁹ Id. at 17

⁶⁰ Id.

⁶¹ Id. at 19.

⁶² Id. at 5.

Mr. Voight based his opinion that Big River's service requires a broadband connection on Mr. Howe's deposition testimony.⁶³ However, Mr. Howe never said that Big River's customers require a broadband connection. The question was:

With respect to Big River customers that have IP customer premises equipment where their telephone calls are converted to IP format at the customer premises, is there a broadband connection to those customer's location?

Mr. Howe answered, "I think so."⁶⁴ First, whether there is a broadband connection to the customer's location is not the relevant inquiry under Section 386.020. The question is whether the broadband connection is required. Second, his answer to the question asked was not definitive. Third, as he explained in his surrebuttal testimony, Mr. Howe does not know the answer to the above question because he does not need to know. And, he does not need to know because a broadband connection is not required for Big River's service.⁶⁵

AT&T Missouri has argued that Mr. Howe has in some way changed his position after his deposition. That argument is based on the fact that, at his deposition, he was asked why he did not think that Big River provides IVOIP service. He replied, "First, we are not registered with the state to provide that service."⁶⁶ Counsel for AT&T Missouri, however, failed to ask the obvious follow up question of why Big River was not registered as a VOIP provider which Mr.

⁶³ EFIS No. 163, Voight Rebuttal, p. 7-8.

⁶⁴ EFIS No. 136, Howe Deposition, p. 28.

⁶⁵ EFIS No. 105, Howe Surrebuttal, 2:17-20.

⁶⁶ EFIS No. 136, Howe Deposition, p. 27-28.

Howe explained in his surrebuttal testimony. AT&T Missouri also makes the absurd argument that Mr. Howe cannot use his surrebuttal testimony to clarify a point from his deposition.⁶⁷ AT&T Missouri, of course, provides no authority for that assertion because none exists. In these proceedings, AT&T Missouri has relied heavily on the fact that the technical rules of evidence do not apply to Commission hearings. Yet, here, AT&T Missouri seeks to enforce a rule of evidence that does not exist.

Prior Settlement Agreement

Big River and AT&T Missouri have been involved in a previous dispute over the issue of exchange access charges. That dispute led to the filing of claims in St. Louis County Circuit Court. The parties entered into a settlement agreement to resolve that dispute. AT&T Missouri claims, through the testimony of Mr. Greenlaw, that the settlement agreement included an acknowledgment by the parties that, after January 1, 2010, Big River's traffic would be treated as IVOIP.⁶⁸ A simple reading of the settlement agreement, however, shows that no such arrangement was made.

The settlement agreement merely states, "On and after January 1, 2010, the parties respective obligations will be governed by the Interconnection Agreement as to be amended as described herein."⁶⁹ The agreement contains nothing that indicates the parties agreed that Big River's traffic would be treated as IVOIP after January 1, 2010. Mr. Greenlaw's "specialized

⁶⁷ EFIS No. 59, Memorandum in Opposition, p. 6.

⁶⁸ EFIS No. 127, Greenlaw Direct, 16:1-3.,

⁶⁹ EFIS No. 152, Settlement Agreement, p. 4.

knowledge” upon which he relied to draw his conclusion, and upon which AT&T Missouri has based its argument, fails to counter a simple reading of the agreement. The fact that Mr. Greenlaw was also not involved and has no personal knowledge of the negotiations leading to the settlement agreement also impairs his ability to provide credible evidence regarding the terms of the agreement.

The interconnection agreement was amended to be in line with Section 392.550. The amendment states, “The Parties shall exchange interconnected voice over Internet protocol service traffic, as defined in Section 386.020 RSMo, subject to the appropriate exchange access charges to the same extent that telecommunications services are subject to such charges.”⁷⁰ As explained above, however, Big River does not exchange IVOIP traffic with AT&T Missouri. Big River’s traffic, then, continues to be governed by Attachment 12, section 13.3.

That section provides:

Notwithstanding any other provision of this Agreement, the Parties shall exchange enhanced/information services traffic, including without limitation, Voice Over Internet Protocol (“VOIP”) traffic and other enhanced services traffic (collectively, “IS Traffic”), in accordance with this section. IS Traffic is defined as traffic that undergoes a net protocol conversion, as defined by the FCC, between the calling and called parties, and/or traffic that features enhanced services that provide customers a capability for generating, acquiring storing, transforming, processing, retrieving, utilizing, or making available information. The Parties shall exchange IS Traffic over the same interconnection trunk groups used to exchange local traffic. In addition to other jurisdictional factors the Parties may report to one another under this Agreement, the Parties shall report a Percent Enhanced Usage (“PEU”) factor on a statewide basis or as otherwise determined by CLEC at its sole

⁷⁰ EFIS No. 66, Joint Stipulation, para. 10.

discretion. The numerator of the PEU factor shall be the number of minutes of IS Traffic sent to the other Party for termination to such other Party's customers. The denominator of the PEU factor shall be the total combined number of minutes of traffic, including IS Traffic, sent over the same trunks as IS Traffic. Either Party may audit the other Party's PEU factors pursuant to the audit provisions of this Agreement. The Parties shall compensate each other for the exchange of IS Traffic applying the same rate elements used by the Parties for the exchange of ISP-bound traffic whose dialing patterns would otherwise indicate the traffic is local traffic. This compensation regime for IS Traffic shall apply regardless of the locations of the calling and called parties, and regardless of the originating and terminating NPA/NXXs.⁷¹

Pursuant to section 13.3, enhanced services traffic includes, without limitation, voice over internet protocol ("VOIP") and other enhanced services traffic. VOIP is exchanged under section 13.3. Since Big River does not exchange IVOIP traffic with AT&T Missouri, its traffic continues to be governed by section 13.3. That section defines enhanced traffic as "traffic that undergoes a net protocol conversion, as defined by the FCC, between the calling and called parties, and/or traffic that features enhanced services that provide customers a capability for generating, acquiring storing, transforming, processing, retrieving, utilizing, or making available information."⁷²

Mr. Voight contends that the FCC determined in 2006 that traffic that originates in VOIP and terminates in TDM ("IP/PSTN") is not enhanced. He concluded this based on an inference he drew from the FCC's IP-Enabled Services Report and Order.⁷³ The FCC, on the other hand, stated as recently as November 2011 that it had never definitively stated whether IP/PSTN traffic

⁷¹ EFIS No. 66, Joint Stipulation, para. 6.

⁷² Id.

⁷³ Voight Rebuttal, p. 6, l. 15

was to be treated as enhanced.⁷⁴ Mr. Voight's inference from the prior FCC order is clearly in opposition to the FCC's own subsequently stated position.

Enhanced

The FCC has held that access charges are inapplicable to "enhanced services" or "information services". Enhanced services are services "which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."⁷⁵ The Act defines "information services" as "the offering of a capability of generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." The definition of enhanced services of traffic under Section 13.3 of Attachment 12 of the ICA mirrors the language of Section 64.702.

Under the ICA, VOIP is treated differently than IVOIP. Under Section 13.3, VOIP is included as an enhanced service and, therefore, not subject to access charges.⁷⁶ "Interconnected" voice over internet protocol, as discussed above, is subject to access charges pursuant to the Amendment to the ICA. Because Big River's traffic is VOIP, rather than IVOIP, it is not subject to exchange access rates in accordance with Section 13.3.

Section 13.3 defines "enhanced traffic" in two ways:

⁷⁴ ICC Transformation Order, para. 718, November 18, 2011

⁷⁵ 47 C.F.R. §64.702(a).

⁷⁶ EFIS No. 66, Joint Stipulation, para. 6.

1. traffic that undergoes a net protocol conversion, as defined by the FCC, between the calling and called parties, and/or
2. traffic that features enhanced services that provide customers a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information.

All traffic that originates on Big River's network is in the VOIP format.⁷⁷ AT&T Missouri's network has not been updated to process VOIP traffic.⁷⁸ Instead, it uses the same format - Time Division Multiplexed ("TDM") using Pulse Code Modulation ("PCM") – that it has employed for approximately the last forty years.⁷⁹ Because of the limitations of AT&T Missouri's network, Big River must convert calls that originate on its network from VOIP to TDM to be terminated on AT&T Missouri's network.⁸⁰ Thus, calls made by Big River's customers to AT&T Missouri's customers undergo a net protocol conversion.

Mr. Howe also explained how, in addition to being VOIP, Big River's service has other enhanced features. These services are enhanced because they offer "a capability of generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."

Big River's virtual fax feature allows a Big River customer to receive fax transmission without having a fax machine.⁸¹ Big River's network can convert an incoming fax transmission to an electronic PDF document and email the

⁷⁷ EFIS No. 103, Howe Direct, p. 4

⁷⁸ EFIS No. 124, Neinast Rebuttal, p. 9

⁷⁹ EFIS No. 103, Howe Direct, p. 4

⁸⁰ Id.

⁸¹ Id. at 8.

document to the Big River customer.⁸² AT&T Missouri argues that this is not relevant because an incoming fax does not involve a call from a Big River customer to an AT&T Missouri customer. That argument ignores a significant element of this service, particularly for business customers. A Big River customer can call an AT&T Missouri customer and request a document be sent for review. The AT&T Missouri customer, while still on the call, could fax the document to the Big River customer who would receive the document via email. The Big River customer, again while still on the original call, could pull the document up on a computer for review.

Similarly, a Big River customer can access his or her voicemail via computer while on a call with an AT&T Missouri customer.⁸³ Again, this is an important capability if the calling parties are awaiting a call from a third party. Because the Big River customer can see the number and name of the calling party leaving the message on the subject line of the inbound email message and on the voice mail page of our web self-care system, the customer can determine if and when the message might be timely to review while still on the original call.⁸⁴ While on a call with an AT&T Missouri customer, a Big River customer can manage incoming calls in other ways by accessing Big River's web self-care system via a standard web browser.⁸⁵ Any changes made would be effective immediately.⁸⁶

⁸² Id.

⁸³ Id. at 12

⁸⁴ Id. at 13

⁸⁵ Id.

⁸⁶ Id.

Big River's network can also deliver HD phone calls and HD Conferencing which are delivered in CD quality audio format.⁸⁷ Big River offers a softphone application which allows calls to be made on Big River's network from an iPhone or Android smart phone.⁸⁸ Mass Announcement delivers messages to a pre-set list of telephone numbers.⁸⁹ Direct Media allows a customer to maximize the quality of a connection by using a path for media that is separate from the path for signaling.⁹⁰ A Fire Bar number simultaneously dials a pre-set list of telephone numbers, establishing a conference call with everybody who answers.⁹¹ Privacy Defender requests and records information from anonymous callers and allows the customer to retrieve the recording to determine whether to take the call.⁹²

CONCLUSION – ISSUE 1

The traffic Big River exchanged with AT&T Missouri is not IVOIP because Big River's service does not require a broadband connection. Big River's traffic is VOIP which is treated as an enhanced service under the ICA. Big River's service is also enhanced because it offers "a capability of generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." Pursuant to Attachment 12, Section 13.3 of the ICA, Big River's traffic is not subject to exchange access charges.

⁸⁷ Id. at 14

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Id.

⁹² Id.

ISSUE 2 - WHAT CHARGES, IF ANY, SHOULD APPLY TO THE TRAFFIC REFERENCED IN ISSUE NO. 1?

For the reasons explained above, the Commission should find that Big River's traffic is not subject to exchange access charges. Even if the Commission does find that the charges apply, AT&T Missouri has not produced any competent evidence as to what that amount might be.

AT&T Missouri has adopted the absurd position that it does not have to establish the amount owed. It argues that it is too late for Big River to challenge the accuracy of the AT&T Missouri bills. This completely misses the point. Whether the amount billed was accurate is immaterial if the amount is not in evidence.

In both its Answer and its own Complaint, AT&T Missouri alleges that Big River owes access charges to AT&T Missouri.⁹³ In fact, AT&T Missouri has asked the Commission to "find and determine, upon further proceedings herein, that the access charges AT&T Missouri has billed Big River since January 1, 2010 by means of BAN 110 401 0113 803 are due and owing by Big River."⁹⁴

Having made these allegations, AT&T Missouri has the burden of proof to establish the amount allegedly owed, but it has failed to do so.

The only reference to any amount allegedly owed was made by William Greenlaw.⁹⁵ Mr. Greenlaw, as has been discussed, does not work for AT&T

⁹³ EFIS No. 13, AT&T Missouri Answer para. 34 and Complaint para. 6.

⁹⁴ EFIS No. 13, AT&T Missouri Answer and Complaint, Wherefore Clause, para. 4.

⁹⁵ EFIS No. 126, Greenlaw Direct, 22:17: Tr. 198.

Missouri.⁹⁶ He does not work in billing and has no experience in billing.⁹⁷ In addition, AT&T Missouri's billing is handled by another company, AT&T Billing Southeast.⁹⁸ Mr. Greenlaw was not even aware of this fact.⁹⁹

Accordingly, Mr. Greenlaw is not competent to testify as to the amount AT&T Missouri alleges Big River's owe. Without Mr. Greenlaw's testimony, the record is devoid of any evidence regarding an amount owed.

Another issue that AT&T Missouri has failed to address is the fact that the Billing Account Number at issue allegedly collects traffic from an interconnection trunk between Big River and AT&T Missouri's networks that also carries local traffic. There has been no evidence provided in support of this allegation by either party since Big River has been given no evidence to validate the traffic upon which the charges were calculated and AT&T Missouri has presented no evidence in support of their allegation. The local traffic is not subject to any charges under the parties' reciprocal compensation arrangement. AT&T Missouri presented no evidence to show that the bills did not include charges for local traffic.

Regarding AT&T Missouri's argument that Big River is barred from challenging the accuracy of the bills, this is based on the contention that Big River was required to assert this as part of the informal dispute process. This is mistaken for a number of reasons.

⁹⁶ Tr. 200.

⁹⁷ EFIS No. 126, Greenlaw Direct, 1:8 – 2: 8.

⁹⁸ EFIS No. 112, Big River Ex. 10.

⁹⁹ Tr. 200.

First, Big River challenged 100% of the charges contained on the bills it received from AT&T Missouri. The parties attempted to resolve the dispute through the informal dispute resolution procedure. That process was initiated by Big River on April 19, 2011.¹⁰⁰ AT&T Missouri's witness, Ms. Mullins, who served as AT&T Missouri's primary point of contact for the informal dispute, informed Big River that its dispute was denied via letter dated November 1, 2011.¹⁰¹ On November 30, 2011, Big River requested one month's worth of call detail records so it could reconcile its records and verify the accuracy and appropriateness of AT&T Missouri's bill.¹⁰² Several days later, AT&T Missouri sent to Big River a collection letter, threatening to suspend the provisioning of services if the exchange access charges were not paid.¹⁰³ Big River continued to request one month's worth of call detail records in its efforts to verify the accuracy and appropriateness of the billed amounts.¹⁰⁴ Finally, on February 15, 2012, AT&T Missouri provided one *week's* worth of data.¹⁰⁵ The single week's worth of data provided by AT&T Missouri was not the type of records used to validate access charges, but were of a type that AT&T Missouri provides to other carriers for those carriers, like Big River, to bill AT&T Missouri or other carriers.¹⁰⁶ Either on that same day or the next, Big River

¹⁰⁰ EFIS No. 66, Joint Stipulation, para. 17.

¹⁰¹ *Id.* at para 20.

¹⁰² EFIS No. 45, Jennings Rebuttal, 4:13-14.

¹⁰³ Tr. 226.

¹⁰⁴ EFIS No. 45, Jennings Rebuttal, 4:13-14.

¹⁰⁵ *Id.*

¹⁰⁶ TR 155:19

received a letter from AT&T Missouri threatening to stop provisioning orders as of March 1, 2012.¹⁰⁷

Prior to November 1, 2011, Big River had no reason to challenge the accuracy of the bills because it was claiming that it owed nothing. Once AT&T Missouri denied Big River's dispute, Big River asked for one month's worth of data to ensure the bills were accurate. It took AT&T Missouri three months to provide just one week's worth of data and the data that AT&T Missouri provided was not for the traffic that Big River had requested to verify the accuracy of AT&T Missouri's bills. AT&T Missouri contends that Big River should have continued to request the data even though it had threatened to stop provisioning service orders from Big River in two weeks' time.

CONCLUSION – ISSUE 2

AT&T Missouri had the burden of proof to establish what amount was allegedly owed in exchange access charges. AT&T Missouri failed to produce any credible evidence on any amount owed. The Commission must, therefore, find in favor of Big River on Issue 2.

¹⁰⁷ EFIS No. 66, para. 21.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to the below-referenced parties by e-mail on January 28, 2013.

s/Brian C. Howe

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