

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

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

**AT&T MISSOURI’S MEMORANDUM OF LAW IN OPPOSITION TO BIG RIVER’S  
MOTION FOR SUMMARY DETERMINATION**

COMES NOW Southwestern Bell Telephone Company, formerly known as Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri (“AT&T”), and hereby respectfully submits its memorandum of law in opposition to the motion for summary determination filed by complainant Big River Telephone Company, LLC (“Big River”). For the reasons explained below, Big River’s motion, which seeks summary determination on both its and AT&T’s Complaints, should be denied in its entirety.

In support of its motion, Big River argues that AT&T has not put forth sufficient evidence to show the accuracy of the access charges that AT&T has billed Big River since January, 2010. Big River’s “billing accuracy” argument is not only incorrect, it is irrelevant because it misses the fundamental point of this proceeding as framed by the parties’ pleadings. As explained below in Section I, even if Big River’s argument were correct (and it is not), Big River would not be entitled to summary determination of its Complaint against AT&T. Big River’s Complaint does not dispute the calculation or accuracy of the charges billed by AT&T.

Instead, its Complaint raises but a single issue: whether 100% of Big River's traffic is "enhanced services" traffic that is entirely exempt from access charges. Big River's motion does not set forth *any* evidence or argument on that issue. Moreover, the undisputed facts conclusively demonstrate that Big River is *not* exempt from access charges under the parties' interconnection agreement ("ICA"). As a result, AT&T, not Big River, is entitled to summary determination on Big River's Complaint.

In any event, as explained in Section II below, Big River's suggestion that AT&T has not provided sufficient evidence to support the amount of access charges it seeks to collect leads nowhere. There is no dispute that AT&T sent Big River detailed monthly access charge bills, and Big River disputed and refused to pay those bills. AT&T's testimony presents a month-by-month summary of the access charges that AT&T billed beginning in 2010, and that Big River has refused to pay ever since, and Big River has made no attempt to dispute that AT&T's testimony accurately summarizes those amounts.

Instead, Big River suggests there is some controversy over whether AT&T's bills were accurate. But that suggestion is made from whole cloth. Big River does not even attempt to identify any purported inaccuracy in AT&T's bills. Perhaps more importantly, Big River never disputed AT&T's bills on that basis, nor was such an issue raised by the pleadings. As a result, the accuracy of AT&T's bills is simply not an issue properly before the Commission in this proceeding; the only issue properly before the Commission in this proceeding is whether Big River is exempt from all of the charges presented in those bills.

**I. AT&T, Not Big River, Is Entitled To Summary Determination On Big River's Complaint.**

Big River's Complaint against AT&T sets forth a single issue: whether Big River is exempt from the exchange access charges billed by AT&T because Big River's traffic

purportedly is “enhanced services” traffic. According to Big River’s Complaint, “AT&T has imposed charges in violation of . . . its Commission-approved interconnection agreement (ICA) with Big River that exempts enhanced services traffic from exchange access charges.”

Complaint p. 1. Big River alleged that “[t]he services available to subscribers of Big River’s network are ‘enhanced services’ or ‘information services,’ not VOIP, and are, therefore, not subject to exchange access charges,” and Big River requested that the Commission “determine that Big River does not owe any of the amounts claimed by AT&T for exchange access charges on enhanced services traffic.” Complaint p. 11. AT&T, not Big River, is entitled to summary determination on Big River’s Complaint, because the undisputed facts make clear that Big River’s traffic is *not* exempt from access charges under the parties’ ICA.

As an initial matter, Big River makes no attempt either in its motion or in its supporting memorandum to demonstrate that its traffic is “enhanced services” traffic and exempt from access charges under the parties’ ICA, as it alleges in its Complaint. That alone is sufficient grounds to deny Big River’s motion for summary determination of its Complaint. Stated another way, while Big River’s motion does argue that AT&T has failed to provide sufficient evidence to support the *amount* of access charges it seeks to collect, even if that were correct (which it is not, as explained in Section II below), it still would not entitle Big River to summary determination on its Complaint. Big River’s Complaint makes no allegations concerning the accuracy of the amounts billed by AT&T, but instead alleges only that no access charges are due *in the first instance*, because Big River’s traffic is “enhanced services” traffic exempt from such charges under the ICA. Big River bears the burden of proof on that allegation, and because its motion

makes no attempt to establish that its traffic is entirely exempt from access charges, the motion must be denied.<sup>1</sup>

That Big River did not even attempt to address its allegation that it is exempt from access charges under the parties' ICA should come as no surprise, because the undisputed facts disprove that allegation. In particular, the undisputed facts show that Big River's traffic is interconnected Voice over Internet Protocol ("I-VoIP") traffic, which remains subject to access charges under the parties' ICA. *See* Section I.A below. Moreover, even if Big River's traffic were not I-VoIP (though it is), the features and functions Big River describes do not make Big River's traffic 100% "enhanced services" traffic, as Big River has wrongly suggested. *See* Section I.B below.

**A. Big River's Traffic Is I-VoIP Traffic.**

As indicated in Big River's Complaint, while the parties' ICA generally exempts enhanced services traffic from access charges, it contains an exception for I-VoIP traffic. In particular, the ICA was amended by the parties such that, effective January 1, 2010, "[t]he 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." *See*, VT-2010-0011, making amendment effective November 9, 2005; AT&T Surrebuttal Testimony of Mark Neinast, Schedule MN-2 (copy of amendment); Complaint p. 5. Section 386.020(23) of the Missouri Revised Statutes in turn defines "Interconnected voice over internet protocol service" as a:

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

---

<sup>1</sup> Indeed, Big River's motion for summary determination is so facially defective that it could only be construed as a transparent attempt at sandbagging. In the event Big River attempts in its reply to demonstrate for the first time that it is entitled to summary adjudication on its assertion that it is exempt from access charges, AT&T would regard it as an attempt to obtain summary determination on a newly raised ground, entitling AT&T to seek and be granted leave to file a surrebuttal brief.

receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

While Big River's Complaint asserts that Big River does not provide I-VoIP service, the undisputed facts establish the contrary.

At his deposition, Big River's CEO, Gerald Howe, admitted that Big River provides service that meets each of these four criteria. In particular, Big River partners with cable companies to provide telephone service in Internet Protocol ("IP") format over the cable companies' "last mile" facilities, and in some cases uses DSL (broadband service provided over "last mile" telephone facilities) to provide telephone service in IP format. *See* Howe Dep. at 19-20.<sup>2</sup> These customers have IP-compatible customer premises equipment (*see id.* at 19-20, 28), use a broadband connection (*id.* at 28), engage in two-way voice communications (*id.* at 28-29), can make voice telephone calls to people who are served on the public switched telephone network ("PSTN") (*id.* at 30), and can receive calls from persons calling from the PSTN (*id.* at 30). As Staff has correctly concluded, the service described by Mr. Howe is I-VoIP service. *See* Voight Rebuttal at 7-8.

Mr. Howe suggested at his deposition that Big River's telephone service is not I-VoIP service because Big River has not registered with the State to provide I-VoIP service. Howe Dep. at 26-27. That, however, is beside the point. 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 (*i.e.*, when the traffic is long distance, or interexchange, traffic). Nothing in the ICA makes the application of access charges turn upon whether Big River has chosen to register with the State to provide I-VoIP service. Similarly, the definition of "interconnected voice over

---

<sup>2</sup> Excerpts of Mr. Howe's deposition are attached hereto as Exhibit 1.

Internet protocol service” in Section 386.020 RSMo. does not turn upon whether a provider has registered with the State to provide service. And while a different statutory provision, Section 392.550, addresses registration requirements for I-VoIP providers, those registration requirements have nothing to do with whether Big River’s traffic satisfies the definition of “interconnected voice over Internet protocol service” set forth in Section 386.020 and incorporated into the parties’ ICA. Stated another way, under the parties’ ICA the applicability of access charges turns upon whether Big River is delivered I-VoIP traffic, not upon whether it is *registered* to provide I-VoIP service.

In the surrebuttal testimony of Mr. Howe, Big River asserts for the first time that its traffic is not I-VoIP because its service does not “require” a broadband connection. As an initial matter, Mr. Howe’s assertion must be rejected since he did not make any such assertion in his deposition. Rather, in response to a direct question during his deposition, he asserted that Big River’s traffic is not I-VoIP because “we are not registered with the state to provide that service.” He next confirmed that he was “done with [his] answer,” and, finally, he conceded that if Big River had registered, then its traffic would qualify as I-VoIP. *See* Howe Dep. at 27-28.

In any event, Big River’s new assertion misses the mark even if it were worthy of consideration. Big River provides its VoIP service using IP-enabled customer premises equipment over DSL connections and cable connections, both of which are broadband connections. Most of Big River’s VoIP customers are served over cable connections, which Big River’s testimony expressly admits are broadband connections. For example, Big River submitted a sworn application to the Minnesota commission explaining that to provide telephone service, “[c]ustomers will be accessed through the *broadband connections* of local Cable TV operators,” and Mr. Howe admitted that Big River provides service in other states in the same

manner. Howe Dep. Ex. 6, p. 9 (emphasis added) (attached hereto as Exhibit 2); Howe Dep. pp. 56-58.

Big River suggests that its VoIP service does not “require” a broadband connection because, even though Big River provides its service over broadband connections, the service will work even if the connection is limited to lower, non-broadband speeds. Howe Rebuttal at 2-4. That is nonsense. Big River’s service is designed to be provided to customers over broadband connections (whether DSL or cable broadband), and Big River has provided no evidence that it provides its VoIP service to any customers that do not have a broadband connection. That is sufficient to make its VoIP service an I-VoIP service, whether or not the service would continue to work if a customer’s broadband connection was not operating at proper speeds.

Big River appears to be suggesting that the statute’s reference to “requiring” a broadband should be interpreted in a strict network engineering sense, such that a service designed to be provided over broadband connections is not I-VoIP service unless it is inoperable at 199 kbps or less, and only works at 200 kbps or greater speeds. That interpretation would likely gut the statute, allowing I-VoIP providers throughout the state to avoid the statute (and its various universal service, 911, Telecommunications Relay Service and Commission assessment funding requirements) on the theory that their service will continue to work if a customer’s broadband connection falls to sub-200 kbps speeds.

Instead, 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 connection. Indeed, this interpretation would comport with the distinction the FCC drew when it first defined I-VoIP service, using the same definition that the Missouri Legislature later adopted. *See In the Matters*

*of IP-Enabled Services*, 20 FCC Rcd 10245, 2005 WL 1323217, ¶ 24 (2005). The FCC explained that I-VoIP “service requires a broadband connection from the user’s location,” and then noted that “[w]hile we recognize that some kinds of VoIP service can be supported over a dialup connection, we expect that most VoIP services will be used over a broadband connection.” *Id.* ¶ 24 & n.76. Here, Big River has no evidence that it offers VoIP service over dialup connections. Instead, its service is specifically targeted to users of cable broadband or DSL connections.

**B. The “Enhancements” Described By Big River Do Not Make Its Traffic “Enhanced Services” Traffic.**

Because, as explained above, Big River’s traffic plainly is I-VoIP traffic, it is subject to access charges under the plain language of the parties’ ICA. Accordingly, the Commission need not even consider Big River’s assertions that various features or functions of its network make its traffic “enhanced services” traffic. In any event, as explained below, even if Big River’s traffic were not I-VoIP traffic (though it is), the other purported “enhancements” Big River relies upon do not make its traffic “enhanced services” traffic.

Big River’s testimony distinguishes between the transmission of “media,” or the content of a voice telephone call, and “signaling,” or the exchange of other information between networks to enable the exchange of calls, and asserts that Big River converts the protocol of or makes “enhancements” to both. *See* Howe Direct at 4-5. As an initial matter, any change in format of the “media” exchanged between AT&T and Big River merely confirms that Big River provides I-VoIP service, which necessarily involves a net protocol conversion between the format used for the IP portion of the call and the format used to carry the call on the PSTN.

With respect to signaling, Mr. Howe asserts that Big River uses one of three signaling protocols, and converts signaling information to and from the different format (SS7) used by

AT&T. *Id.* This includes the purported conversion of the Dual Tone Multi-Frequency (“DTMF”) signals that are generated when a customers presses his or her telephone keypad. *Id.* at 9-10. As a matter of law, however, Big River’s use of different protocols for signaling information does not makes its telephone service an “enhanced service.”

As Mr. Howe states, enhanced services traffic includes “traffic that undergoes a net protocol conversion, as defined by the FCC, between the calling and called parties.” Howe Direct at 2-3. Signaling information is not “traffic . . . between the calling and called parties.” Rather, the traffic between the calling and called parties is the “media,” or the content of the voice communication. Moreover, a net protocol conversion, as defined by the FCC, does not include the conversion of signaling information. The FCC has made clear that “[t]he definition of enhanced service includes . . . ‘processing applications that act on the . . . protocol *of the subscriber’s transmitted information,*’” but “the definition of enhanced service does not reach protocol conversions what are performed internally to a carrier’s network, and not manifested at the outputs of the network in end-to-end transmission.” *Communication Protocols*, 95 FCC2d 584, 1983 WL 182962, ¶ 14 (FCC 1983) (emphases added). Thus, for example, the transformation of “subscribers’ transmitted dialing (routing) information,” including “premises equipment-generated signals which . . . tell the network the destination of the call (i.e., dialing-type signals),” do not make a service “enhanced.” *Id.* at ¶¶ 14-15. As a result, Big River’s use of different protocols for DTMF signals and other signaling information does not make the telephone service it provides an “enhanced service.”

Big River also points to its use of a “high definition” codec to provide better sound quality on voice telephone calls. *See* Howe Rebuttal at 6-8. That too is irrelevant. The FCC explained decades ago that a “basic” service, as opposed to an enhanced service, includes “the

offering of transmission capacity between two or more points suitable for a user's transmission needs and subject only to the technical parameters of fidelity or distortion criteria, or other conditioning," and "[u]se internal to the carrier's facility of . . . message or packet switching, error control techniques, etc., that facilitates economical, *reliable* movement of information does not alter the nature of the basic service." *Second Computer Inquiry*, 77 FCC2d 384, 1980 WL 356789, ¶ 95 (1980) (emphasis added). In an enhanced service, on the other hand, "computer processing applications are used to act on the content, code, protocol, and other aspects of the subscriber's information," and "[i]n these services additional, different, or restructured information may be provided the subscriber." *Id.* ¶ 97.

Here, Big River's alleged use of a "high definition" codec is merely an internal technique used to more reliably transmit the users' information (*i.e.*, speech); it does not actually alter the users' information. Indeed, Big River admits that "the 'speech' is the same," and "[t]he difference is not in the content of the speech but in the quality of the data transmitted coupled with the codec used to process the audio information to reproduce in the highest quality manner on the other end." Howe Rebuttal at 7. Even if Big River's voice service more faithfully transmits users' speech, that would not make it an enhanced service.

Finally, Big River points to the several features and functions it provides its telephone service customers, such as fax-to-pdf capabilities, call recording capabilities, voice mail capabilities, the ability to configure incoming call features like call forwarding via the web, conference call features, and the like. *See* Howe Direct at 7-8, 12-14. As a matter of law, none of these features are sufficient to transform Big River's underlying telephone service – in particular the service allowing Big River's customers to make voice telephone calls to AT&T's customers – into an enhanced service.

As the FCC has explained, “services that are ‘incidental’ to an underlying telecommunications service and do not ‘alter[] their fundamental character’ even if they may meet the literal definition of an information service or enhanced service” are classified as “[a]djunct-to-basic services,” and are “not an ‘enhanced service.’” *In re AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826, 2005 WL 433235, ¶ 16 (2005). (In the more modern terminology, these are “telecommunications services, rather than information services.” *Id.*) “Such ‘adjunct-to-basic services’ may include, among others, ‘speed dialing, computer-provided directory assistance, call monitoring, call tracing, call blocking, call return, repeat dialing, call tracking, call waiting, caller I.D., call forwarding, and certain centrex features.” *In re Telecommunications Relay Services*, 23 FCC Rcd. 11591, 2008 WL 2553510, n.367 (2008). Here, all of the features described by Big River are incidental to its provision of telephone service, and do not change the fundamental character of that service – *i.e.*, the ability to pick up a telephone and place a voice telephone call.

The FCC also has explained that “the key question in classifying offerings with both telecommunications and information service capabilities is whether the telecommunications transmission capability is ‘sufficiently integrated’ with the information service component ‘to make it reasonable to describe the two as a single, integrated offering.’” In contrast, as the FCC has emphasized, “merely packaging two services together does not create a single integrated service.” *Prepaid Calling Card Order*,<sup>3</sup> ¶ 14. Here, Big River’s customers can, of course, make voice telephone calls without simultaneously sending or receiving a fax, accessing voicemail, or modifying their incoming call options via the web. As a result, the features described by Big

---

<sup>3</sup> Declaratory Ruling and Report and Order, *In the Matter of Regulation of Prepaid Calling Card Services*, 21 FCC Rcd. 7290 (rel. June 30, 2006) (“*Prepaid Calling Card Order*”), available at 2006 WL 1826190.

River, even if “enhanced,” are merely packaged with its underlying voice service, and are not sufficiently integrated with that service as to govern its classification.

\* \* \*

In short, Big River’s traffic is not exempt from access charges under the parties’ ICA. As a result, Big River is not entitled to a decision in its favor upon its Complaint, which seeks a ruling that Big River’s traffic is exempt from access charges. Instead, the Commission should enter summary determination for AT&T upon Big River’s Complaint.

## **II. Big River Also Is Not Entitled To Summary Determination On AT&T’s Complaint.**

In response to Big River’s Complaint asserting AT&T was not entitled to collect the access charges it billed because Big River’s traffic purportedly is “enhanced,” AT&T filed a Complaint that essentially is the converse. AT&T’s Complaint asks the Commission to rule that Big River is required to pay the access charges billed by AT&T because Big River’s rationale for disputing those charges (*i.e.*, that Big River’s traffic is purportedly exempt from access charges) does not hold water.

As explained above, the undisputed evidence makes clear that Big River’s excuse for failing to pay the charges billed by AT&T is baseless. Big River’s traffic is I-VoIP traffic, and access charges remain applicable to such traffic under the parties’ ICA. In a transparent attempt to further delay its day of reckoning, Big River now argues there is another reason it should not have to pay – because AT&T has allegedly failed to adequately support the *amount* of the access charges it seeks to collect. As explained below, Big River’s new excuse is as hollow as its prior excuse, for a number of reasons.

First, contrary to Big River’s suggestion, AT&T has presented evidence to establish the amount of access charges Big River owes. *See* Section II.A, *infra*.

Second, Big River is not entitled to summary determination upon its newly-raised theory because that claim simply is not within the scope of the instant proceeding. The *only* issue raised by the parties' pleadings is whether Big River was justified in refusing to pay the access charges billed by AT&T because Big River is entirely exempt from access charges. *See* Section II.B, *infra*.

Third, Big River's new claim is barred by the parties' ICA. Under the ICA, Big River is required to specifically identify the basis for any dispute of the charges billed by AT&T. The only basis identified by Big River when it disputed AT&T's bills was that it is purportedly exempt from access charges. Big River did not dispute AT&T's bills on the ground that AT&T had incorrectly calculated any of the charges, and the ICA does not permit Big River to raise any such dispute now. *See* Section II.C, *infra*.

**A. There Is No Genuine Dispute Regarding The Amount Of Access Charges Sought By AT&T.**

Contrary to Big River's suggestion, AT&T has produced evidence to establish the amount it claims Big River owes in access charges. That amount is the total of the amounts that AT&T billed Big River monthly upon Billing Account Number 110 401 0113 803 (or "BAN 803"), and which Big River disputed and failed to pay. AT&T witness Greenlaw presented a summary of these amounts for every month for the time period at issue, and totaled the amounts, showing that AT&T billed Big River a total of \$350,637.60 (through the August 2012 billing cycle) in access charges that Big River failed to pay. *See* Greenlaw Direct at 22 & Schedule WEG-9 (HC).

Big River does not dispute that this is the amount sought by AT&T, nor does Big River dispute that this amount reflects the total of the access charges that were billed monthly by AT&T and that Big River refused to pay. Big River asserts that Mr. Greenlaw is not a billing

expert, but it does not take a billing expert to summarize and total the amount of the monthly bills. Perhaps more importantly, Big River of course has the bills AT&T sent it, and presumably knows the amounts it refused to pay, yet Big River does not dispute that AT&T has accurately summarized the monthly amounts billed by AT&T that Big River failed to pay. (Indeed, in its March, 2012 Complaint (¶¶ 23, 34), Big River admits that the amount sought by AT&T is approximately \$335,000, billed on BAN 803, as of the date of the complaint.)

Moreover, those bills contain detailed information about the rates, charges, traffic quantities, and other details, including the number of calls and minutes of use broken down by their jurisdictional nature (*e.g.*, intrastate or interstate). *See* Rich Aff. ¶ 5 & Attachment (attached as Exhibit 3 hereto). Yet Big River has never specifically identified *any* purported inaccuracy in AT&T's bills. As a result, it is Big River, not AT&T, that has failed to raise any genuine dispute as the amount of access charges in dispute.

**B. The Accuracy Of AT&T's Monthly Access Charge Bills Is Not At Issue In This Proceeding.**

While Big River now argues that it is entitled to summary determination as to the alleged accuracy of AT&T's monthly bills, that motion is barred because none of the facts giving rise to it were ever alleged by Big River in either its Complaint or in its affirmative defenses submitted in response to AT&T Missouri's own Complaint. Stated another way, the motion is based on alleged facts which are wholly irrelevant.

Missouri law and the Commission's rules are clear that the issues to be adjudicated in a case are those which are framed by the facts alleged in the complaint<sup>4</sup> and in the defenses to the

---

<sup>4</sup> *See, e.g.*, Mo. Civ. Pro. Rule 55.05 ("A pleading that sets forth a claim for relief . . . shall contain (1) a short and plain statement of the facts showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the pleader claims to be entitled."); *see also*, 4 CSR 240-2.070(4) ("The formal complaint shall contain the following information: . . . (D) The nature of the complaint and the complainant's interest in the complaint, in a clear and concise manner; [and] (E) The relief requested[.]").

complaint.<sup>5</sup> That is for several good reasons, not the least of which is to give a party, and the court or Commission, early notice of the issues to be tried so that the case can proceed in an orderly, fair and expeditious manner. Here, however, *none* of the facts Big River now raises in its motion were alleged either in its Complaint or its affirmative defenses submitted in response to AT&T Missouri's own Complaint.

More specifically, the alleged factual basis on which Big River claims it is entitled to summary determination includes:

- AT&T Missouri has not “set forth a specific amount that it claims Big River owes for access charges.” (Motion, ¶ 7; *id.*, ¶ 8).
- AT&T Missouri did not attach copies of its bill or statement of account to its pleadings filed in the case. (*Id.*, ¶ 9).
- Before Big River filed its March 1 complaint, it had requested documentation to support AT&T Missouri's billing. (*Id.*, ¶ 10).
- “AT&T Missouri has never provided documentation, other than one week's worth of traffic data, to support the amount of access charges it claims to be owed.” (*Id.*, ¶ 11).
- “AT&T Missouri has never identified the access charge rate(s) it allegedly applied or the manner in which such rates were applied.” (*Id.*, ¶ 12).
- “AT&T Missouri has never identified the traffic for which it claims it is owed access charges or the jurisdictional nature of such traffic.” (*Id.*, ¶ 13).
- “AT&T Missouri has never identified the traffic for which it claims it is owed access charges or the number of minutes, calls, or rate elements to which AT&T allegedly applied those rates.” (*Id.*, ¶ 14).
- “AT&T Missouri has never even provided any evidence that the BAN on which it claims access charges are due involves traffic originated by Big River.” (*Id.*, ¶ 15).

---

<sup>5</sup> See, e.g., Mo. Civ. Pro. Rule 55.05 (“In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances. . . . A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance.”); see also, 4 CSR 240-2.070(9)(“The respondent shall file an answer to the complaint within the time provided. All grounds of defense, both of law and of fact, shall be raised in the answer.”).

- “One week’s worth of traffic data was insufficient to allow Big River to reconcile AT&T Missouri’s bills, which are based on a monthly cycle, to confirm the rates used, the jurisdictional nature of the traffic, the number of minutes, the PEU factor, whether the traffic originated from Big River’s network, and whether or not the traffic was billed on any other BAN. (*Id.*, ¶ 14).

None of these allegations were made in either Big River’s Complaint or its answer to AT&T Missouri’s Complaint. Instead, the facts alleged in the Complaint merely asserted that Big River owed *none* of the access charges billed to it since February of 2010, because the traffic in question purportedly consisted *entirely* of “enhanced services” traffic. *See, e.g.*, Complaint, ¶ 24 (“Big River disputed these charges under the informal dispute process of the terms of the ICA and stated that its traffic is Enhanced/Information [services] traffic due to the capabilities of Big River’s network.”). Likewise, Big River’s lone specific affirmative defense to AT&T Missouri’s Complaint is that “Big River’s traffic is *exempt from* the access charges claimed by AT&T Missouri because the traffic is enhanced.” Big River Answer, p. 2. (emphasis added). Big River never challenged the accuracy of AT&T’s bills – and even in its motion, Big River does not specifically allege any inaccuracy in AT&T’s bills. Therefore, Big River’s motion is outside the scope of the case and is legally barred, and the Commission should deny it.

**C. The Parties’ ICA Also Bars Big River’s Belated Attempt To Contest The Accuracy Of AT&T’s Access Charge Bills.**

Big River’s motion also is legally barred for the separate and independent reason that Big River has not complied with the dispute resolution procedures of the parties’ Commission-approved ICA.

The General Terms and Conditions (“GT&Cs”) of the ICA – and in particular, Sections 9 and 13 of the GT&Cs (attached hereto as Exhibit 4) – are very specific as to the requirements governing a party’s submission of a billing dispute. Section 9 of the GT&Cs pertains to

“Payment of Rates and Charges.” 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:

9.2. All billing disputes between the Parties shall be governed by this Section and Section 13.

9.3. If any portion of an amount due to a Party (the “Billing Party”) under this Agreement is subject to a bona fide dispute between the Parties, the Party billed (the “Non-Paying Party”) must, prior to the Bill Due Date, give written notice to the Billing Party of the amounts it disputes (“Disputed Amounts”) and include in such written notice *the specific details and reasons for disputing each item* that is listed in Section 13.4.1. The Non-Paying Party should utilize any existing and preferred form provided by the Billing Party to provide written notice of disputes to the Billing Party. The Non-Paying Party must pay when due: (i) all undisputed amounts to the Billing Party. [Emphasis added.]

Section 13.4, in turn, pertains to “Billing Disputes.” Section 13.4.1 provides:

13.4.1. In order to resolve a billing dispute, the disputing Party shall furnish *written notice which shall include sufficient detail of and rationale for the dispute*, including to the extent available, the (i) date of the bill in question, (ii) CBA/ESBA/ASBS or BAN number of the bill in question, (iii) telephone number(s) in question, (iv) circuit ID number or trunk number in question, (v) any USOC information relating to the item(s) questioned, (vi) amount billed, (vii) amount disputed, (viii) *the reason the disputing Party disputes the billed amount*, (ix) minutes of use disputed by jurisdictional category, and (x) the contact name, email address and telephone number. [Emphases added.]

In short, the ICA requires a party disputing a bill to provide the specific reasons for its dispute. Here, while Big River disputed AT&T’s access charge bills on the ground that Big River purportedly is exempt from those charges, Big River did *not* dispute the bills upon any other ground, including any alleged inaccuracy in AT&T’s bills if Big River were not exempt. Indeed, nowhere in Big River’s motion or memorandum is there any demonstration that Big River complied with the terms of the ICA by disputing the accuracy of AT&T’s bills.

Instead, Mr. Jennings merely alleges that AT&T Missouri failed to provide “sufficient supporting detail”<sup>6</sup> regarding one of the bills spanning the period from February 2010 through

---

<sup>6</sup> Jennings Rebuttal Testimony at 5.

the present. As he explains: “As AT&T and Big River were discussing the dispute, I requested AT&T to provide supporting detail to, at least, one of their bills so that I could ascertain the appropriateness of the amounts billed.”<sup>7</sup> Big River’s discovery responses similarly reflect that it requested call detail records for only a single month, and that request was limited to the claim that Big River’s traffic enhanced services traffic, not that AT&T Missouri’s bills had been calculated inaccurately.<sup>8</sup>

Even after AT&T Missouri provided one week of voluminous call detail record data to Mr. Jennings,<sup>9</sup> neither Mr. Jennings nor anyone else at Big River ever followed up on the matter thereafter. There was no further communication from the company directed to AT&T Missouri, and Mr. Jennings does not claim otherwise.<sup>10</sup>

Moreover, Big River’s own letters to AT&T Missouri raise no billing accuracy claims. Neither Big River’s April 19, 2011 letter nor its May 19, 2011 letter sent to AT&T Missouri<sup>11</sup> contains any suggestion that AT&T Missouri’s billings were inaccurate. Instead, both of these letters make the single claim that none of Big River’s traffic is subject to access charges, on the

---

<sup>7</sup> Jennings Rebuttal Testimony at 4.

<sup>8</sup> See Big River Response to AT&T Missouri’s First Set of Document Requests (Request No. 10) and attachment noted there at ATT\_DISC\_1\_D\_10\_JR\_15\_1, filed in EFIS, August 20, 2012, stating: “Since the traffic type is not enhanced per AT&T, we have requested the Call Detail Records that supports the November 2011 invoice billing so we can review and bring closure to this issue internally.”

<sup>9</sup> Jennings Rebuttal at 4 (AT&T Missouri “provided me with a week’s worth of traffic [data].”); see also Mullins Surrebuttal at 7 (“I also confirmed that Big River was subsequently provided a voluminous report from AT&T detailing one week’s worth of traffic data. This data was sent to Big River on February 15, 2012, and contained over 41,000 lines of call detail information.”).

<sup>10</sup> See Mullins Surrebuttal Testimony at 3-8; see also Greenlaw Surrebuttal at 4. Big River’s other responses to discovery likewise reflect that the entirety of Big River’s dispute submitted to AT&T Missouri rests on its claim that its traffic is enhanced and thus exempt from access charges. See, e.g., Big River’s Responses to First Set of Document Requests (Request No. 10) and attachment noted there at ATT\_DISC\_10\_JR\_9\_1 (at p. 1) filed on August 20, 2012 in EFIS (stating: “Per the Interconnection Agreement between SBC Missouri and Big River Telephone Company, Attachment 12 - Section 13.3, we are allowed to report a Percent Enhanced Usage (PEU) factor. We submitted our PEU factor of 100% on October 20, 2005 to our account manager, Debbie Josephson. However we continue to get billed for this traffic and any dispute that pertains to the January 5, 2010 invoice forward has been declined with \$0 credit given. Invoices previous to January 5, 2010 had been credited to \$0 and we owed nothing. We should not be billed for any traffic given our previously submitted PEU factor. Therefore, we are disputing a total of \$118,156.56 that covers the billing from January 5, 2010 through and including September 5, 2010. A copy of the PEU letter has been attached to this dispute for your reference.”).

<sup>11</sup> See Jennings Direct at 6, 7, and Schedules 3 and 4 attached thereto.

theory that the traffic constitutes “enhanced services” traffic. Mr. Jennings twice admits as much: “In my [April 19, 2011] letter to AT&T, as well as in subsequent discussions, I clearly indicated that our dispute was in regards to enhanced traffic and not VOIP traffic. . . . I sent a follow up letter on May 19, 2011 providing the rationale as to why this traffic is enhanced.”<sup>12</sup> Given this, it is entirely understandable that the entirety of the dispute resolution process between the companies centered solely on that single point.<sup>13</sup>

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.

Finally, it is too late for Big River to challenge the accuracy of the charges billed to Big River by AT&T. As noted above, Section 9.2 of the GT&Cs of the parties’ ICA states that “[a]ll billing disputes between the Parties shall be governed by this Section and Section 13.” Section 13.1.1, in turn, provides that “no claims will be brought for disputes arising from this Agreement more than 24 months from the date the occurrence which gives rise to the dispute is discovered or reasonably should have been discovered with the exercise of due care and attention.” Big River has admitted from the outset that the charges in question in this case are “exchange access charges” which “AT&T has sought to impose . . . going back to February 5, 2010.”<sup>14</sup> In the exercise of due care and attention to the monthly billing statements that AT&T Missouri

---

<sup>12</sup> Jennings Pre-filed Direct Testimony, p. 6, l. 17-18 & p. 7, l. 1.

<sup>13</sup> See Mullins Surrebuttal at 5 (“Big River’s only claim throughout the IDR process was that AT&T was prohibited from billing access charges to Big River because the traffic that Big River was terminating to AT&T and being billed on the BAN in question was 100% enhanced services traffic and, therefore, exempt from access charges.”); see also Mullins Surrebuttal at 8 (“[N]o suggestion was ever made to me during the [Informal Dispute Resolution] process that Big River questioned the accuracy of the bills; its sole complaint was that it should not be billed at all, i.e., that it was *exempt* from access charges. Nor, once provided data, did Big River ever submit that it was insufficient for its purposes.”) (emphasis original).

<sup>14</sup> Big River Complaint, p. 1.

provided to Big River, any claim as to the accuracy of AT&T's bills could and should have been made as early as February of 2010, but they were not. As a result, even if Big River were inclined to submit a dispute or to file a claim regarding the accuracy of AT&T's bills, such dispute or claim would be time-barred under the parties' ICA.

### **Conclusion**

WHEREFORE, for the reasons explained above, AT&T Missouri respectfully submits that Big River's motion for summary determination should be denied.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

BY 

ROBERT J. GRYZMALA #32454

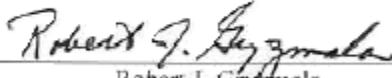
LEO J. BUB #34326

Attorneys for Southwestern Bell Telephone Company,  
d/b/a AT&T Missouri  
One AT&T Center, Room 3520  
St. Louis, Missouri 63101  
314-235-6060 (Telephone)/314-247-0014 (Facsimile)  
robert.gryzmala@att.com

Hans J. Germann (admitted *pro hac vice*)  
Mayer Brown LLP  
71 S. Wacker Drive  
Chicago, IL 60606  
312-782-0600 (Telephone)/312-701-7711 (Facsimile)  
HGermann@mayerbrown.com

## **CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing document were served to all parties by e-mail on December 6, 2012.

  
Robert J. Gryzmala

John Borgmeyer  
General Counsel  
Missouri Public Service Commission  
PO Box 360  
Jefferson City, Mo 65102  
[GenCounsel@psc.mo.gov](mailto:GenCounsel@psc.mo.gov)  
[john.borgmeyer@psc.mo.gov](mailto:john.borgmeyer@psc.mo.gov)

Lewis Mills  
Public Counsel  
Office of the Public Counsel  
PO Box 7800  
Jefferson City, MO 65102  
[opcservice@ded.mo.gov](mailto:opcservice@ded.mo.gov)

Brian C. Howe #36624  
Big River Telephone Company, LLC  
12444 Powerscourt Drive, Suite 270  
St. Louis, Missouri 63131  
Email: [bhowe@bigrivertelephone.com](mailto:bhowe@bigrivertelephone.com)