

**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)	
Telephone, L.P., d/b/a AT&T Missouri,)	
)	
Respondent.)	

**AT&T MISSOURI'S RESPONSE TO BIG RIVER'S
SUPPLEMENTAL MOTION TO STRIKE**

COMES NOW, Southwestern Bell Telephone Company, f/k/a Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri ("AT&T Missouri"), and respectfully submits its response to the "supplemental" motion of Big River Telephone Company, LLC ("Big River") to strike the testimony of AT&T Missouri's witnesses William Greenlaw and Mark Neinast.

Big River previously moved to strike portions of the testimony of Messrs. Greenlaw and Neinast. AT&T Missouri demonstrated in response why Big River's motion should be denied. Big River's "supplemental" motion – which seeks to strike the entirety of the testimony of Messrs. Greenlaw and Neinast – should be denied for much the same reasons.

The crux of Big River's supplemental motion is that witnesses should not be permitted to testify unless they (1) are "fact" witnesses that were involved in the parties' dispute prior to the filing of the complaint, or (2) qualify as an "expert" witness. Neither of Big River's proposed evidentiary restrictions has any basis in the Commission's Rules.

As an initial matter, Big River's assertion that Messrs. Greenlaw and Neinast are not "fact witnesses" rests entirely upon the erroneous suggestion that a person cannot be a "fact witness" unless they were involved in the dispute prior to the filing of the complaint. *See* Motion ¶¶ 7-8. That suggestion is baseless. Witnesses can and do learn of relevant facts after the filing of a complaint, and even under the technical rules of evidence applicable in court proceedings such testimony is perfectly permissible. Witnesses may, for example, observe and learn of facts from investigation and review of a company's records and other pertinent materials (such as AT&T Missouri's bills to Big River and Big River's admissions, in this case), and the fact that they reviewed those records after the filing of the complaint does not somehow destroy their competence to testify regarding the facts they observed.

Here, the testimony of Messrs. Greenlaw and Neinast makes plain that their testimony is based, in part, upon facts learned from reviewing Big River's own materials and AT&T Missouri's records. Big River certainly will have an opportunity to cross these witnesses upon such matters, but its supplemental motion comes nowhere close to demonstrating that Messrs. Greenlaw and Neinast are not competent to testify to *any* facts, such that their testimony should be entirely stricken.

Perhaps more importantly, under Missouri law, the Commission "shall not be bound by the technical rules of evidence," and "[n]o formality in any proceeding nor in any manner of taking testimony before the commission or any commissioner shall invalidate any order, decision, rule or regulation made, approved or confirmed by the commission." Mo. Rev. Stat. § 386.410. This alone is a sufficient basis for denying Big River's motion. While Big River suggests the Commission should allow testimony only from witnesses with pre-complaint first-

hand knowledge, or from those that would qualify as an expert, such an approach cannot be squared with the Commission's practice, as two examples show.

First, the Commission routinely takes testimony from Staff witnesses, even though (1) they generally were not involved in the dispute prior to the filing of the complaint, and (2) they generally are not expert witnesses under the technical rules of evidence applicable in court proceedings. Under Big River's approach, such Staff testimony would be excluded.

Second, the Commission's Rules provide that "[d]irect testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief." 4 CSR 240-2.130(7)(A). This, of course, is not the rule in court proceedings, where parties may proffer fact and/or expert witnesses (as determined by the technical rules of evidence), leaving it to the attorneys to explain, in briefs and argument, the party's entire case-in-chief – that is, to explain the party's ultimate position upon what conclusions the decision-maker should draw from the evidence presented. Because, in contrast, the Commission's Rules require AT&T Missouri to explain its entire case-in-chief, its testimony necessarily sets forth AT&T Missouri's position regarding the meaning of the parties' ICA, its view of Big River's assertions, and its view of the import of pertinent regulatory precedent – whether or not such matters would properly be the subject of fact or expert testimony under the rules of evidence applicable in court proceedings.

Finally, while 4 CSR 240-2.130(8) allows parties to submit expert reports, nothing in the Commission's rules *requires* non-"fact witness" testimony to qualify as "expert" testimony, as Big River erroneously suggests. Again, the technical rules of evidence do not apply in Commission proceedings, and the Commission is perfectly capable of deciding for itself what weight to give the testimony presented.

WHEREFORE, for all of the foregoing reasons, AT&T Missouri respectfully submits that Big River's motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties by e-mail on January 4, 2013.


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