

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

Big River Telephone Company, LLC,)

Complainant,)

v.)

Case No. TC-2012-0284

SOUTHWESTERN BELL)

TELEPHONE, L.P. d/b/a)

AT&T MISSOURI)

Respondent.)

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

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

AT&T witnesses are not comparable to staff witnesses

AT&T Missouri’s response to Big River’s Supplemental Motion to Strike highlights how AT&T Missouri abuses the system by using professional witnesses like Greenlaw and Neinast. AT&T Missouri argues that “[w]hile 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. 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."

AT&T Missouri's argument ignores the fact that staff witnesses are fulfilling a statutory mandate. The Commission's staff is a statutorily created entity. Section 386.135, RSMo. Its members must have "expertise in accounting, economics, finance, engineering/utility operations, law, or public policy." Id. It is the staff's duty "to render advice and assistance to the commissioners and the commission's administrative law judges on technical matters within their respective areas of expertise that may arise during the course of proceedings before the commission." Id.

Section 386.135 completely undercuts AT&T's argument. Unlike staff witnesses, AT&T Missouri's witnesses do not have a statutory duty to "advise" the Commission. Yet, rather than use witnesses to offer facts, AT&T Missouri has brought in professional witnesses to offer their opinions as to how the Commission should rule.

Greenlaw and Neinast are not fact witnesses

AT&T Missouri also argues that "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." AT&T Missouri contends that

Greenlaw and Neinast are fact witness because they have reviewed Big River's materials and AT&T Missouri's records.

AT&T Missouri has obviously failed to understand Big River's argument. Among other elements determining whether a witness is competent to testify is the witness's "capacity to observe the occurrence about which testimony is sought." Cardenas v. Director of Revenue, 339 S.W.2d 608, 612 (Mo. App. 2011) Both Greenlaw and Neinast are employed by a company other than AT&T Missouri. According to AT&T Missouri, their testimony is based on the review of records that they did not create and of which they had no prior knowledge. Thus, they lack the "capacity to observe the occurrence about which testimony is sought." To accept AT&T Missouri's argument would mean that they could bring in anybody, have them review materials with which they were previously unfamiliar, and then testify about the contents of those materials.

As expected, AT&T Missouri falls back on the position that the Commission "shall not be bound by the technical rules of evidence" which it apparently interprets as meaning anything goes. AT&T's Response to Big River's motion, however, belies the absurdity of AT&T Missouri's argument. In its response, AT&T Missouri has spawned the novel category of the "non-fact witness." See AT&T Missouri's Response at p. 3.

Greenlaw and Neinast are not "position" witnesses

AT&T Missouri has also justified the use of its professional witnesses by citing 4 CSR 240-2.130(7)(A) which states that "[d]irect testimony shall include

all testimony and exhibits asserting and explaining that party's entire case-in-chief." It claims that because of that rule "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."

Assuming *arguendo* that AT&T Missouri's interpretation of that statute is correct, Greenlaw and Neinast are not competent to testify to AT&T Missouri's positions. Again, neither of them works for AT&T Missouri. How can somebody who doesn't work for the organization testify as to that company's positions without relying entirely on hearsay? AT&T Missouri's positions in regard to the access charges in dispute were established long before Greenlaw and Neinast became aware of the dispute. Logically then, neither of them were involved in establishing AT&T Missouri's positions nor would they have the authority to do so. As such, they have no basis upon which to testify regarding those positions except what they have been told by others.

The appropriate use of a position witness before the Commission is regularly seen in utilities' requests for rate adjustments. This was exhibited in the recent Ameren UE case before the Commission, in case ER-2012-0166. There, Ameren's CEO, Warner Baxter, testified as to Ameren's positions and background surrounding Ameren's request for an adjustment in rates they charge their customers. As CEO, he was obviously involved in developing those positions and knowledgeable to the background leading to Ameren's request.

Finally, Mr. Baxter identified a long list of fact and expert witnesses who Ameren presented to testify in support of Ameren's request and the positions to which Mr. Baxter attested. None of these conditions are present in the testimony of Greenlaw and Neinast.

This is not a matter for cross-examination

AT&T Missouri further argues that Big River will have the opportunity to cross-examine Greenlaw and Neinast. Of course, it will, but the fact of the matter is that is that they have presented no evidence that is worthy of cross-examination. AT&T Missouri took this risk when it enlisted witnesses who had no knowledge of its billing procedures or the nature of its interconnection with Big River's network. The Commission can, and should, determine as a matter of law that Greenlaw and Neinast are not competent to testify in this proceeding.

WHEREFORE, Big River Telephone Company, LLC respectfully requests the Commission issue an Order striking the testimony of William Greenlaw and Mark Neinast and for such other relief as it deems just and reasonable.

RESPECTFULLY SUBMITTED,
BIG RIVER TELEPHONE COMPANY, LLC

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served upon all parties via e-mail on January 6, 2013.

/s/ Brian C. Howe