

**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
PROPOSED ORDER**

Complainant Big River Telephone Company, LLC submits the following proposed findings of fact and conclusions of law pursuant to the Missouri Public Service Commission's ("Commission") scheduling order.

APPEARANCES

APPEARING FOR BIG RIVER TELEPHONE COMPANY, LLC:

Brian C. Howe, 12444 Powerscourt Drive, St. Louis, Missouri 63131

**APPEARING FOR SOUTHWESTERN BELL TELEPHONE COMPANY, D/B/A
AT&T MISSOURI:**

Robert J. Gryzmala, 909 Chestnut Street, Room 3518, St. Louis, Missouri 63101,

and

Hans J. German, Mayer Brown, L.L.P., 71 South Wacker Drive, Chicago, Illinois 60606.

APPEARING FOR THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:

Colleen M. Dale, Senior Counsel, and John D. Borgmeyer, Legal Counsel,
Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102.

REGULATORY LAW JUDGE: Michael Bushman, Deputy Chief Regulatory Law Judge

Granting the Office of the Public Counsel's Motion to be Excused, issued June 22, 2012. EFIS is the

INTRODUCTION AND SUMMARY

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"). Big River filed a Complaint, requesting that the Commission find that certain traffic Big River exchanged with AT&T Missouri was "enhanced services traffic" and, therefore, not subject to exchange access charges. As a part of its response to Big River's Complaint, AT&T Missouri filed a counterclaim seeking a finding that the access charges that AT&T Missouri billed to Big River are due and owing and that Big River violated the parties Interconnection Agreement ("ICA").

In this order, the Commission finds and concludes that traffic which Big River exchanged with AT&T Missouri is enhanced services traffic and that Big River is not liable to AT&T Missouri for exchange access charges on this traffic, as per the ICA between the parties.

BACKGROUND AND PROCEDURAL HISTORY

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

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.

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 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

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

Big River, AT&T Missouri, and the Commission Staff (“Staff”) all filed written testimony, and all parties filed an agreed issues list, list of witnesses, and order of cross-examination on December 17, 2012. All of the parties filed position statements on December 21, 2012.¹³

⁵ Id. at para. 9.

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.

¹³ EFIS Nos.

Big River filed a Motion to Strike portions of AT&T Missouri's witnesses' testimony and filed a Supplemental Motion to Strike.¹⁴ Big River also filed a Motion for Summary Determination.¹⁵ The Commission denied the Motion for Summary Determination on December 19, 2012.¹⁶ Big River's motions to strike were also overruled.¹⁷

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

The Commission admitted the testimony of 6 witnesses. Initial post-hearing briefs were filed on January 28, 2012. Proposed findings of fact were filed on February 1, 2012. Reply Briefs were filed on February 7, 2012, and the case was deemed submitted for Commission's decision on that date when the Commission closed the record.

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FINDINGS OF FACT

The Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

A. The Parties

1. Big River

Complainant, Big River, is a competitive facilities-based telecommunications limited liability company duly organized and existing under and by virtue of the laws of the State of Delaware and duly authorized to do business in the State of Missouri as a foreign corporation with its principal place of business located at 24. S. Minnesota Ave., Cape Girardeau, Missouri 63702.¹⁸ Big River, pursuant to authority granted by the Commission, provides intrastate switched and non-switched local exchange and interexchange telecommunications services in Missouri. Big River is also an authorized provider of interstate telecommunications services in Missouri under the jurisdiction of the Federal Communications Commission.¹⁹

2. AT&T Missouri

Respondent, AT&T Missouri is a "local exchange telecommunications company" and a "public utility," and is duly authorized to provide "telecommunications service" within the State of Missouri, as each of those phrases is defined in Section 386.020, RSMo 2000.²⁰

¹⁸ EFIS No. 66, Joint Stipulation

¹⁹ EFIS No. 1, Big River Complaint

²⁰ EFIS No. 13, AT&T Missouri Answer and Complaint

3. Commission Staff

The Staff of the Missouri Public Service Commission (“Staff”) is a party in All Commission investigations, contested cases, and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.²¹

B. Big River’s ICA with AT&T Missouri

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 and amendments 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.”²² The parties do not charge each other for local traffic. That section 13.3 further states:

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

²¹ Commission Rules 4 CSR 240-2.010(10), (21) and 2.040(1).

²² EFIS No. 66, Joint Stipulation, para. 6.

customers a capability for generating, acquiring storing, transforming, processing, retrieving, utilizing, or making available information.²³

Big River and AT&T Missouri exchange IS (VOIP and other enhanced services)

Traffic over the same interconnection trunk groups used to exchange local traffic.²⁴ Under section 13.3, enhanced services traffic is not subject to exchange access charges.²⁵

C. The ICA Amendment

The ICA was amended on November 2, 2009, which amendment was submitted to the Commission, Reference No. VT-2010-0011.²⁶ The amendment to the ICA, as approved by the Commission on November 5, 2009, 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; provided, however, to the extent that as of August 28, 2008, the Agreement contains intercarrier compensation provisions specifically applicable to interconnected voice over Internet protocol service traffic, those provisions shall remain in effect through December 31, 2009, and the intercarrier compensation arrangement described in the first clause of this Section shall not become effective until January 1, 2010.²⁷

D. Traffic Delivered by Big River to AT&T Missouri

The traffic delivered by Big River to AT&T Missouri is enhanced services traffic. Section 13.3 defines “enhanced traffic” in two ways:

²³ EFIS No. 66, Joint Stipulation, para. 6.

²⁴ Id.

²⁵ EFIS No. 106, Jennings Direct, 2:10-11.

²⁶ EFIS No. 66, Joint Stipulation, para. 4.

²⁷ EFIS No. 66, Joint Stipulation, para. 10.

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.²⁸ AT&T Missouri's network has not been updated to process VOIP traffic.²⁹ 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.³⁰ 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.³¹ Thus, calls made by Big River's customers to AT&T Missouri's customers undergo a net protocol conversion, and, in doing so, the traffic meets the first definition of enhanced traffic. Big River also offers a softphone application which allows calls to be made on Big River's network from an iPhone or Android smart phone which require a net protocol change to be exchanged with AT&T Missouri's network.³²

It also meets the second classification because it provides customers "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." Big River's CEO, Gerard Howe, explained some of the features offered by Big River to its customers.

²⁸ EFIS No. 103, Howe Direct, p. 4

²⁹ EFIS No. 124, Neinast Rebuttal, p. 9

³⁰ EFIS No. 103, Howe Direct, p. 4

³¹ Id.

³² Id.

For example, Big River's virtual fax feature allows a Big River customer to receive a fax transmission without having a fax machine.³³ Big River's network can convert an incoming fax transmission to an electronic PDF document and email the document to the Big River customer.³⁴ 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. That allows the customer to acquire, store, retrieve, and utilize available information.

Similarly, a Big River customer can access his or her voicemail via computer while on a call with an AT&T Missouri customer.³⁵ 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

³³ Id. at 8.

³⁴ Id.

³⁵ Id. at 12

original call.³⁶ 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.³⁷ Any changes made would be effective immediately.³⁸ As with the virtual fax, this allows the Big River customer to acquire, store, process, retrieve, and utilize available information.

Mr. Howe provided other examples. Mass Announcement "transforms" information by duplicating a message and delivering it to a pre-set list of telephone numbers.³⁹ A Fire Bar number is not a typical call from one point to another, either. Instead, it dials a pre-set list of telephone numbers and immediately establishes a conference.⁴⁰ Big River also provides high definition phone calls and conferencing,⁴¹ Direct Media,⁴² and Privacy Defender,⁴³ each of which offer "a capability of generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."

AT&T Missouri and Staff countered Mr. Howe's evidence with nothing more than opinion testimony that these features do not meet the definition of enhanced. They also argued that the services are not enhanced because they are not used on every call. That argument misses the mark. A service does not

³⁶ Id. at 13

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id. at 14

⁴² Id.

⁴³ Id.

have to be used on every call to be enhanced. Rather, the service need only “offer the capability.”⁴⁴

E. Interconnected Voice Over Internet Protocol

AT&T Missouri has argued that Big River’s traffic is IVOIP. Staff has also taken that position. This is based on the 2009 amendment to the ICA which states, “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.”⁴⁵

Their contention fails, however, because of Big River’s traffic does not meet the statutory definition of interconnected voice over internet protocol (“IVOIP”). IVOIP is defined in Section 396.020(23) 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

⁴⁴ In the Matter of Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45, para. 3 (FCC 2004)

⁴⁵ EFIS No. 66, Joint Stipulation, para. 10.

(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.⁴⁶

Big River's service does not require a broadband connection. 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.⁴⁷

Mr. Howe attached to his surrebuttal testimony a recording of a call made over Big River's network where the connection to the customer's location had a maximum 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 And, when asked at the evidentiary hearing whether Big River's service requires a broadband connection, he stated unequivocally that it does not.⁵⁰ In fact, Mr. Howe indicated that it was routine

⁴⁶ EFIS No. 66, Joint Stipulation, para. 12.

⁴⁷ EFIS No. 103, Howe Direct, 3:7-16.

⁴⁸ EFIS No. 53, Howe Surrebuttal, Attachment 1.

⁴⁹ Tr. 101.

⁵⁰ Tr. 108-109.

for Big River to provide its VOIP service to customers over connections to customer's locations with speeds of 40 kbps.⁵¹

The recording made at 40 kbps is concrete evidence that Big River's service can be provided without a broadband connection. Neither AT&T Missouri nor Staff contested the validity of that recording nor provided any evidence suggesting that Big River's service requires a broadband connection.

AT&T Missouri and Staff, on the other hand, argue that Big River's service meets the definition of IVOIP because most of its customers "use" a broadband connection. This ignores the plain meaning of the word "requires" which refers to something that is compulsory, necessary, or essential. Accordingly, Big River's service is not one that "requires a broadband connection from the user's location."

Staff witness, Mr. William Voight, testified that Big River's service met the statutory definition of IVOIP but 'form(ed) the primary basis' of his view on Big River's CEO testimony in a deposition conducted by AT&T. The basis of Mr. Voight's testimony is not valid because Mr. Howe was asked by AT&T Missouri's legal counsel whether or not there was a broadband connection to Big River's customer's locations, to which Mr. Howe could not give a definitive answer. To the point of the statutory requirement, the question posed by AT&T Missouri's legal counsel was off the point. Mr. Voight provided no other basis for his opinion. During hearings, Mr. Voight was asked if Big River's traffic

⁵¹ TR. 69:2

requires a broadband connection. While Mr. Voight said it did require a broadband connection, he stated it met ‘the definition of a broadband connection by any standard that I’ve ever been familiar with’, he failed to cite any references or any specific definitions of broadband.

AT&T Missouri finally addressed the statutory requirements in the surrebuttal testimony of Mr. Mark Neinast. There, Mr. Neinast cites the characteristics of Big River’s service but merely states that calls from Big River customers ‘originate in IP format over a broadband connection’. He provides no basis for his observation relative to originating over a broadband connection and fails to address whether such a connection is required or the definition of a broadband connection. His testimony did not address the statutory definition.

Both AT&T Missouri and Staff argue that such an interpretation of the statute would render the statute meaningless. Their argument ignores the reality of the statute’s effect. As of January 31, 2013, the Commission’s website shows that fifty (50) companies have registered in Missouri as interconnected voice over internet protocol providers. The applications of those companies include affidavits from officers of their respective companies asserting that their IVOIP service “requires a broadband connection from the user’s location.”

F. Prior Settlement Agreement

AT&T Missouri also argues that a prior settlement between the parties established that, after January 10, 2010, Big River’s traffic would be treated as IVOIP. A review of the Settlement Agreement, however, reveals no such

covenant. It merely states that, after January 10, 2010, “the parties respective obligations will be governed by the Interconnection Agreement as to be amended as described herein.”⁵²

In its initial post-hearing brief, AT&T Missouri made the unsubstantiated statement that “(h)ad Big River not indicated it was delivering interconnected VoIP traffic, AT&T would have had no obligation under the settlement agreement to reverse these charges.”⁵³ First, when the language of a contract is unambiguous, “the court will determine the parties' intent from the four corners of the document itself.”⁵⁴ The agreement says that going forward “the parties respective obligations will be governed by the Interconnection Agreement as to be amended as described herein.” The ICA, as amended, included both the VOIP/enhanced services provision and the IVOIP provision. The document did not say that going forward the traffic would be treated as IVOIP.

AT&T Missouri has not argued that the settlement agreement is ambiguous. Even if they had, however, they presented no witnesses who were involved in the settlement negotiations and could testify to the parties' intent.

⁵² EFIS No. 152, Settlement Agreement, p. 4.

⁵³ EFIS No.

⁵⁴ CB Commercial Real Estate Group, Inc., 917 S.W.2d 641, 646 (Mo.App. 1996).

G. What Charges, If Any, Are Applicable

Issue 2 before the Commission is what charges, if any, should be applied to Big River's traffic. Because the Commission finds that Big River's traffic is enhanced services traffic pursuant to Attachment 12, Section 13.3, exchange access charges do not apply. Issue 2, therefore, is moot.

The Commission notes, however, that AT&T Missouri filed a counterclaim seeking a determination that exchange access charges were due and owing. As such, AT&T Missouri had the burden of proof on what amount was owed. AT&T Missouri failed to present any competent evidence as to the amount allegedly owed.

CONCLUSIONS OF LAW

After consideration of the evidence and the findings set forth above, the Commission has determined that substantial and competent evidence in the record as a whole supports the following conclusions of law.

A. The Commission's Jurisdiction and Burden of Proof

Big River and AT&T Missouri are "telecommunications companies" and "public utilities" as those terms are defined by Section 386.020 RSMo. Supp. 2011. The parties and their intrastate telecommunications networks are subject to the Commission's jurisdiction, supervision, control, and regulation as provided in Chapters 386 and 392 RSMo. In particular, Section 386.320.1

obligates the Commission to assure that all calls placed on the LEC-to-LEC network “are adequately recorded, billed, and paid for.”⁵⁵

Federal law authorizes the Commission “to impose, on a competitively neutral basis...requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”⁵⁶ The Commission has the authority under 47 U.S.C. §252 to approve interconnection agreements negotiated under the Telecommunications Act. This authority includes the power to interpret and enforce the agreements the Commission has approved.⁵⁷

Because Big River brought the complaint, it bears the burden of proof. The burden of proof is the preponderance of the evidence standard.⁵⁸ In order to meet this standard, Big River must convince the Commission it is “more likely than not” that its allegations are true.⁵⁹ Similarly, AT&T Missouri bears the burden of proof for its counterclaim. The Commission makes its ruling on consideration of each party’s allegations and arguments, and its decision must

⁵⁵ *ERE Order of Rulemaking*, Mo. Register, Vol. 30, No. 12, June 15, 2005, p. 1377.

⁵⁶ 47 U.S.C. §253(b)

⁵⁷ Southwestern Bell v. Connect Communs Corp., 225 F.3d 942 (8th Cir. 2000).

⁵⁸ *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996).

⁵⁹ *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez*, 936 S.W.2d at 109 -111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

be “supported by the competent and substantial evidence upon the whole record.”⁶⁰

B. 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?

The Commission concludes that the traffic delivered by Big River to AT&T Missouri is enhanced services traffic and, therefore, not subject to exchange access charges. Attachment 12, section 13.3 of the ICA states as follows:

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 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

⁶⁰ Stone v. Mo. Dept. of Health, 350 S.W.3d 14, 19 (Mo. 2011).

the locations of the calling and called parties, and regardless of the originating and terminating NPA/NXXs.

All traffic that originates on Big River's network is in the VOIP format.⁶¹ AT&T Missouri's network has not been updated to process VOIP traffic.⁶² 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.⁶³ 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.⁶⁴ Calls that are converted from VOIP to PSTN undergo a net protocol conversion which meets the definition of enhanced services traffic under the ICA.

The ICA's definition of enhanced services traffic also includes "traffic that features enhanced services that provide customers a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." Big River's services such as Virtual Fax, Voicemail, Web Self-Care, Mass Announcement, Fire Bar, Direct Media, and Privacy Defender "provide customers a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." These, too, meet the definition of enhanced services traffic.

As opposed to the arguments of AT&T Missouri and Staff, Big River is not an interconnected voice over internet protocol provider. Section 386.020(23)

⁶¹ EFIS No. 103, Howe Direct, p. 4

⁶² EFIS No. 124, Neinast Rebuttal, p. 9

⁶³ EFIS No. 103, Howe Direct, p. 4

⁶⁴ Id.

defines IVOIP. That definition includes the element that the service “requires a broadband connection from the user’s location.”⁶⁵ This was AT&T Missouri’s allegation and, therefore, its burden to prove it. It failed to do so.

Rather, Big River’s CEO, Mr. Howe, attached to his surrebuttal testimony a recording of a call made over Big River’s network with a customer connection with a speed of 40 kbps.⁶⁶ 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.⁶⁷ And, when asked at the evidentiary hearing whether Big River’s service requires a broadband connection, he stated unequivocally that it does not.⁶⁸ Big River provided concrete evidence that it can provide its service without a broadband connection from the user’s location.

Likewise, AT&T Missouri’s argument that a prior settlement agreement established that Big River’s traffic should be treated as IVOIP is also misplaced. Again, AT&T Missouri had the burden of proof on this issue but failed to establish it by a preponderance of the evidence. Instead, the agreement merely set forth that, after January 1, 2010, “the parties’ respective obligations will be governed by the Interconnection Agreement as to be amended.”⁶⁹

⁶⁵ EFIS No. 66, Joint Stipulation, para. 12.

⁶⁶ EFIS No. 53, Howe Surrebuttal, Attachment 1.

⁶⁷ Tr. 101.

⁶⁸ Tr. 108-109.

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

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

Because the Commission has concluded that Big River's traffic is enhanced services traffic, Big River owes no exchange access charges to AT&T Missouri.

FINAL DECISION

In making this decision, the Commission has considered the positions and arguments of all of the parties. After applying the facts, as it has found them, to the law to reach its conclusions, the Commission has independently and impartially reached the following final decision. Big River has met its burden to prove that the traffic it exchanged with AT&T Missouri was enhanced services traffic. The substantial and competent evidence in the record as a whole supports the conclusion that the traffic at issue was enhanced services traffic to which access charges do not apply.

THE COMMISSION DETERMINES AND ORDERS THAT:

1. The traffic that Big River delivered to AT&T since January 1, 2010, over the local interconnection trunks established pursuant to the parties' ICA, and for which AT&T billed Big River, was enhance services traffic;
2. Under Attachment 12, Section 13.3 of the parties' ICA, access charges do not apply to such traffic and AT&T Missouri erred in billing Big River for said traffic.
3. This Report and Order shall become effective _____, 2013.

WHEREFORE, Big River Telephone Company, LLC respectfully requests that the Commission adopt this Proposed Order, including findings of fact and conclusions of law.

Dated: January 31, 2013

Respectfully submitted,

By: s/Brian C. Howe

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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 31, 2013.

s/Brian C. Howe

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