

4. On November 9, Big River filed a motion for summary determination (“Motion”) of both complaints in its favor pursuant to Commission Rule 4 CSR 240-2.117.

5. Also on November 9, Staff filed rebuttal testimony in this case. On November 30, the parties filed surrebuttal testimony.

6. AT&T Missouri filed its response to Big River’s motion for summary determination on December 6, specifically admitting or denying each of Big River’s factual statements pursuant to 4 CSR 240-2.117(1)(C). Instead of repeating the substance of AT&T’s responses, the following paragraphs concern disputes of fact and law related to Staff’s testimony to show that this case should not be resolved through summary determination.

II. Staff’s Response to Big River’s Motion

7. In Paragraph 29, Big River states: “AT&T Missouri has produced no evidence in its Answer, Complaint or Testimony to establish the amount it claims Big River owes in access charges. As such, AT&T Missouri has presented no genuine issue of material fact regarding the amount of charges allegedly owed by Big River.”²

8. Staff denies this conclusion. Staff Witness William L. Voight discerned that “[a]s of August 2012 the financial amount of the dispute appears to be between \$350,637.60 and \$355,000.00, based on the direct testimony of witnesses from both AT&T and Big River.”³ Therefore, in Staff’s view, the testimony shows there is a genuine issue as to the material fact of the amount in dispute in this case.

² Big River Telephone Company, LLC’s Motion for Summary Determination, ¶¶ 29-30.

³ Rebuttal Testimony of William L. Voight, p. 3 lns 4-5, citing the direct testimonies of Greenlaw Direct, pg. 22 ln 17, and Jennings Direct pg. 3 ln 5.

9. Moreover, genuine issues of material fact remain on the main issue in the case: whether Big River owes access charges for certain traffic Big River sends to AT&T.

10. In his rebuttal testimony, Staff witness Mr. Voight explained Staff's view that the applicability of access charges depends on whether or not Big River's traffic constitutes I-VoIP service as defined by § 386.020(23) RSMo. I-VoIP service is subject to appropriate exchange access charges, pursuant to § 392.550(2).⁴

11. Staff witness Mr. Voight testified that Big River's traffic discussed in this case constitutes I-VoIP service based on statements made by Big River witness Gerald Howe during his October 23 deposition.⁵ However, in his Surrebuttal Testimony, Mr. Howe disputed facts related to application of § 386.020(23)(b) and argued that the statute does not apply to Big River's services.⁶

12. Mr. Howe also disagreed with Staff regarding proper interpretation of an FCC order related to I-VoIP.⁷

13. Further, disputes remain about the sufficiency of information AT&T has provided to Big River. In his testimony, Staff Witness Mr. Voight recommended the

⁴ Section 392.550.2 RSMo.: "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."

⁵ Rebuttal Testimony of William L. Voight, p. 7 ln. 13 to p. 8 ln. 13.

⁶ Surrebuttal Testimony of Gerard J. Howe p. 2 ln. 6 to p. 4 ln. 14.

⁷ *Id.*, p.4 ln 15 to p. 5 ln 19.

Commission order AT&T to provide additional data sufficient to permit Big River to ascertain the appropriateness of the amounts billed.⁸

14. In Surrebuttal Testimony, AT&T witness Janice Mullins requested the Commission deny Staff's recommendation that AT&T should provide additional data. Ms. Mullins testified that she investigated the matter, and she recited facts about AT&T's communication with Big River regarding the issues in this case.⁹ Big River witness Mr. Howe, on the other hand, testified that Big River has not received sufficient data from AT&T.¹⁰ Thus, a number of material facts in this case remain in dispute.

III. Staff's Memorandum of Law

15. Rule 4 CSR 240-2.117(1)(E) provides, in part: "The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest. An order granting summary determination shall include findings of fact and conclusions of law."

16. Further, the rule provides: "If the commission grants a motion for summary determination, but does not dispose thereby of the entire case, it shall hold an evidentiary hearing to resolve the remaining issues. Those facts found in the order granting partial summary determination shall be established for purposes of the hearing."¹¹

⁸ Voight p. 10 lns 13-17.

⁹ Surrebuttal Testimony of Janice Mullins, p. 6 ln. 15 to p. 8 ln 16.

¹⁰ Howe Surrebuttal p. 6 ln 18 to p. 12 ln. 6.

¹¹ 4 CSR 240-2.117(F).

17. The Commission has stated that the rule was designed to provide for summary determination “in a manner similar to summary judgment.”¹² The Commission has stated that the Missouri Supreme Court Rule¹³ regarding summary judgment “is sufficiently similar to the Commission’s regulation to make cases interpreting the rule helpful to understanding the regulation,” and the Commission has looked to Missouri Supreme Court law on summary judgment to guide summary determinations under 4 CSR 240-2.117.¹⁴

18. The Missouri Supreme Court has explained: “The burden on a summary judgment movant is to show a right to judgment flowing from facts about which there is no genuine dispute. Summary judgment tests simply for the existence, not the extent, of these genuine disputes. Therefore, where the trial court, in order to grant summary judgment, must overlook material in the record that raises a genuine dispute as to the facts underlying the movant’s right to judgment, summary judgment is not proper.”¹⁵

19. “The key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question... a ‘claimant’ must establish that there is no genuine dispute as to those material facts upon which the ‘claimant’ would have had the burden of persuasion at trial.”¹⁶

20. “[W]here the non-movant has properly pleaded an affirmative defense, a ‘claimant’ seeking summary judgment must show more than the elements of its claim to

¹² AX-2002-159, *Order Finding Necessity for Rulemaking*, October 7, 2001.

¹³ Mo. Sup. Ct. R. 74.04.

¹⁴ EC-2011-0373, *Order Regarding Motion For Summary Determination*, December 23, 2011, fn. 9.

¹⁵ *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 378 (Mo. banc 1993).

¹⁶ *Id.* at 380-81.

establish a right to judgment as a matter of law; the ‘claimant’ must also show, beyond any genuine dispute, the nonexistence of some fact essential to the affirmative defense put forward by the non-moving party or that the defense is legally insufficient.”¹⁷

21. For purposes of summary judgment, the Supreme Court stated that “a ‘genuine issue’ exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts.”¹⁸

22. Rule 4 CSR 240-2.117(E) also requires the Commission to consider the public interest when deciding a motion for summary determination.¹⁹

23. As explained in both AT&T’s response and Staff’s response above, there are genuine issues of material fact in this case. The record shows factual disputes regarding not only the amount of access charges at issue, but also basic facts about Big River’s service and the law governing the application of access charges to that service. The record shows that no party is entitled to relief as a matter of law.

WHEREFORE, Staff recommends the Commission issue an Order denying Big River summary determination in this matter.

¹⁷ *Id.* at 383.

¹⁸ *Id.* at 382.

¹⁹ GO-2012-0363, *Order Denying Public Counsel’s Motion for Summary Judgment*, August 2, 2012.

Respectfully Submitted,

**STAFF OF THE MISSOURI
PUBLIC SERVICE COMMISSION**

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were served electronically to all counsel of record this 10th day of December, 2012.

/s/ John D. Borgmeyer