

**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.)	

**AT&T MISSOURI’S PROPOSED ORDER, INCLUDING
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

AT&T¹ respectfully submits its proposed Order, including Findings of Fact and Conclusions of Law, in accordance with the Commission’s August 20, 2012 Order Setting Procedural Schedule and Establishing Additional Procedural Requirements.

FINDINGS OF FACT

The Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates that the omitted material was not dispositive of this decision.

¹ Southwestern Bell Telephone Company, d/b/a AT&T Missouri, will be referred to herein as “AT&T Missouri” or “AT&T,” unless indicated otherwise.

A. The Parties

1. Big River

Complainant, Big River² 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 63702.³ Big River, pursuant to authority granted by the Commission, provides intrastate switched and non-switched local exchange and interexchange telecommunications services in Missouri.⁴

2. AT&T

Respondent, and Cross-Complainant, Southwestern Bell Telephone Company, dba AT&T Missouri is a corporation and an incumbent local exchange carrier ("ILEC") as defined in 47 U.S.C. § 251(h) with offices at 909 Chestnut Street, St. Louis, Missouri, 63101. The company 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 in accordance with tariffs on file with and approved by the Commission.⁵

² Big River Telephone Company, LLC will be referred to herein as "Big River."

³ EFIS No. 66, Joint Stipulation of Non-Disputed Material Facts, filed December 17, 2012 ("Stipulation") No. 1.

⁴ *Id.*, Stipulation No. 3.

⁵ *Id.*, Stipulation No. 2; Halo Wireless, Inc. v. Craw Kan Telephone Cooperative, Inc., TC-2012-0331, Report and Order, issued August 1, 2012, at 20.

B. 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 that was the product of an arbitration between the companies before the Commission in Case No. TO-2005-0336. The ICA was amended by the parties on November 2, 2009, which amendment was submitted to the Commission, Reference No. VT-2010-0011. The ICA, and amendment thereto, of which the Commission may take official notice, remain in effect.⁶

On March 1, 2012, Big River filed a complaint with the Missouri Public Service Commission (“Commission”) against AT&T.⁷ On July 31, 2012, AT&T filed its answer to the complaint as well as its own complaint against Big River (hereinafter, “cross-complaint”).⁸ Generally speaking, the complaints concern Big River’s liability under the ICA, as amended, to AT&T for AT&T’s termination of non-local calls, which are delivered to it by Big River, to AT&T’s end user customers.

Big River’s complaint alleges that since February 5, 2010, AT&T has breached the ICA by wrongfully billing Big River, under Billing Account Number 110 401 0113 803 (“BAN 803”) exchange access charges related to Big River’s traffic, in an amount of approximately \$334,557.21 since February 5, 2010 (reflecting charges since January 1, 2010).⁹ Big River’s complaint further alleges that 100% of Big River’s traffic was (since 2005) and continues to be enhanced services traffic upon which access charges are not due under the ICA.¹⁰ Finally, the

⁶ EFIS No. 66, Stipulation No. 1.

⁷ EFIS No. 1.

⁸ EFIS No. 13.

⁹ EFIS No. 1, Big River Complaint, at 1, 7, 9.

¹⁰ *Id.* at 7.

complaint prays 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.¹¹

AT&T's answer and cross-complaint assert, among other things, that the traffic at issue constitutes either interconnected VoIP service traffic which is subject to exchange access charges under the terms of a settlement of a prior dispute between the parties and consequent 2009 ICA amendment reflecting the provisions of Section 392.550, RSMo, and/or traffic which is not enhanced services traffic.¹² AT&T also alleges in its cross-complaint that Big River is estopped from asserting that its traffic is exempt from access charges based upon the parties' prior settlement, under which AT&T agreed to refund or credit Big River for access charges assessed before January 1, 2010, upon the understanding that Big River would pay access charges for its traffic after January 1, 2010, in light of Section 392.550.¹³ AT&T's cross-complaint prays that the Commission, among other things, find and determine that (1) its charges are charges for terminating non-local traffic that either is not enhanced services traffic or is interconnected VoIP service traffic, (2) its charges are consistent with the parties' ICA, as amended, and (3) the access charges AT&T has billed Big River under BAN 803 since January 1, 2010 are due and owing.¹⁴

Big River filed its answer to AT&T's cross-complaint on August 30, 2012.¹⁵ Its affirmative defenses assert that the cross-complaint fails to state a claim upon which relief can be granted, and that Big River's traffic is exempt from access charges "because the traffic is enhanced."¹⁶

¹¹ *Id.* at 11.

¹² EFIS No. 13, AT&T Answer and Cross-Complaint, at 9-10.

¹³ *Id.* at 8, 11.

¹⁴ *Id.* at 11-12.

¹⁵ EFIS No. 25.

¹⁶ EFIS No. 25, Big River's Answer, at 2.

On August 20, 2012, the Commission entered its Order Setting Procedural Schedule and Establishing Additional Procedural Requirements.¹⁷ In its Order, the Commission, among other things, directed that Big River and AT&T each pre-file its Direct Testimony on September 28, that each pre-file its Rebuttal Testimony on October 19, that the Commission's Staff pre-file its testimony directed to both Big River's complaint and AT&T's cross-complaint on November 9, and that Big River and AT&T each pre-file its Surrebuttal Testimony on November 30. The Order also set an evidentiary hearing for January 8 and 9, 2013.

All testimonies were timely pre-filed. The parties and Staff timely submitted their agreed issues list, list of witnesses, and order of cross-examination (on December 14),¹⁸ and their Joint Stipulation of Non-Disputed Material Facts (on December 14).¹⁹ Each of the parties and Staff timely filed position statements (on December 21).²⁰ The evidentiary hearing was conducted on January 8 and 9, 2013. Big River's October 11, 2012 and January 4, 2013 motions to strike portions of AT&T's testimony were denied during the evidentiary hearing.²¹

C. Description of Pertinent ICA Provisions, the Parties' Prior Dispute, and Amendment of the ICA.

Attachment 12 of the parties' ICA is directed to the subject of "Inter-carrier Compensation."²² Section 13.1 of Attachment 12 states, in pertinent part: "For purposes of this Agreement only, Switched Access Traffic shall mean all traffic that originates from an end user physically located in one local exchange and delivered for termination to an end user physically located in a different local exchange."²³

¹⁷ EFIS No. 20.

¹⁸ EFIS No. 67.

¹⁹ EFIS No. 66.

²⁰ EFIS No. 70 (Staff); EFIS No. 71 (AT&T); EFIS No. 72 (Big River).

²¹ EFIS No. 102, Vol. 6, Hrg Tr. 194-195, 204-205.

²² EFIS No. 132, AT&T Exh. 10.

²³ *Id.*; EFIS No. 66, Stipulation No. 5.

Section 13.1 of Attachment 12 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 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 the locations of the calling and called parties, and regardless of the originating and terminating NPA/NXXs.²⁴

By letter dated October 20, 2005, Big River informed AT&T that its “Percent Enhanced Usage (“PEU”) for the state of Missouri is 100% as of the effective date of the Interconnection Agreement.”²⁵ Nevertheless, AT&T thereafter billed Big River access charges on BAN 803 and a dispute between the parties developed.²⁶

Big River filed suit against AT&T in St. Louis County Circuit Court on September 29, 2008 (Cause No. 08SLCC01630), in which Big River alleged, among other things, that AT&T had breached the terms and conditions of the ICA inasmuch as AT&T had wrongfully “billed Big River \$487,779.00 for terminating Enhanced/Information Services traffic sent by Big River

²⁴ EFIS No. 132, AT&T Exh. 10.

²⁵ EFIS No. 66, Stipulation No. 7.

²⁶ EFIS No. 132, Big River Exh. 4 (Jennings Direct) at 2.

to AT&T,” that Big River had paid the charges, that Big River was entitled to a refund of the payments, and that AT&T did not refund the payments.²⁷

Also in 2008, HB 1779 was enacted. Among other things, HB 1779 addressed, for the first time, the subject of “Interconnected voice over Internet protocol service” (“I-VoIP”) by amending Section 386.020, RSMo and by adding a new Section 392.550, RSMo. Subsection (23) of Section 386.020 defines “Interconnected voice over Internet protocol service” 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
- (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.

Section 392.550(2) RSMo states:

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, 2008.²⁸

On October 31, 2009, the parties executed a settlement agreement resolving all of the claims and issues presented in the St. Louis litigation.²⁹ With respect to the portion of the litigation involving Big River’s claim regarding its alleged enhanced services traffic, the agreement provides that **_____

²⁷ EFIS No. 66, Stipulation No. 8; EFIS No. 153, AT&T Exh. 31 at 5-6; EFIS No. 100, Vol. 4, Hrg. Tr. at 118.

²⁸ EFIS No. 66, Stipulation Nos. 11, 12.

²⁹ EFIS No. 77, AT&T Exh. 11 (HC); EFIS No. 107, Big River Exh. 4 (Jennings Direct), at 2.

[illegible]

In accordance with the settlement, Big River and AT&T amended the terms of their ICA. The amendment was presented to, and approved by, the Commission on November 5, 2009. In pertinent part, the amendment states.

House Bill 1779, Section 392.550. 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, 2010.³⁰

The amendment makes no reference to enhanced services.³¹

The parties' ICA also contains a section called General Terms and Conditions ("GT&Cs") which, among other things, sets forth the parties' rights and obligations regarding disputes that may arise under the ICA.³² Sections 9 and 13 of the GT&Cs govern billing disputes. Stipulation No. 16. Sections 9.2 and 9.3 of the GT&Cs state:

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.³³

³⁰ EFIS No. 66, Stipulation No. 10; EFIS No. 79, AT&T Exh. 13, at 3.

³¹ EFIS No. 79, AT&T Exh. 13.

³² EFIS No. 75, AT&T Exh. 9.

³³ EFIS No. 66, Stipulation No. 33; EFIS No. 75, AT&T Exh. 9.

Section 13.4 of the GT&Cs provides:

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.³⁴

The ICA provides for both informal dispute resolution (GT&Cs § 13.3), and formal dispute resolution by the Commission (GT&Cs § 13.5).³⁵ With respect to the latter, Section 13.5.1 of the GT&Cs provides: “Except as otherwise specifically set forth in this Agreement, for all disputes arising out of or pertaining to this Agreement, including but not limited to matters not specifically addressed elsewhere in this Agreement [that] require clarification, renegotiation, modifications or additions to this Agreement, either party may invoke dispute resolution procedures available pursuant to the complaint process of the MO-PSC.”³⁶ Section 13.1.1 of the GT&Cs of the parties’ ICA also 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.”³⁷

D. The Parties’ Prior Dispute Resolution Attempts.

AT&T billed Big River access charges on BAN 803 after January 1, 2010, beginning with the first bill of the year, dated February 5, 2010, and thereafter.³⁸ Big River invoked the informal dispute resolution (“IDR”) process, disputing 100% of the billing on BAN 803, by a

³⁴ *Id.*

³⁵ EFIS No. 75, AT&T Exh. 9.

³⁶ EFIS No. 66, Stipulation No. 13; EFIS No. 75, AT&T Exh. 9.

³⁷ EFIS No. 75, AT&T Exh. 9.

³⁸ EFIS No. 66, Stipulation No. 14; EFIS No. 106, Big River Exh. 4 (Jennings Direct) at 2.

letter dated April 19, 2011 and signed by John Jennings, in which he indicated that he would be Big River's representative for the informal dispute resolution.³⁹ The letter stated, among other things, that AT&T had billed Big River approximately \$202,990.19 as of the February 5, 2010 invoice through and including the March 5, 2011 invoice, and that Big River disputed all of the charges based upon its view that all of the traffic was enhanced services (or, more precisely, that "the Percent Enhanced Usage ('PEU') factor of 100% on October 5, 2005" remained applicable).⁴⁰

With respect to the 2009 settlement agreement, the letter acknowledged that "the prior dispute resolutions mentioned VoIP traffic multiple times." And, although the letter recites that "AT&T did agree to the terms of the Interconnection Agreement for all future dealings with this enhanced traffic, which plainly states that AT&T will apply our PEU factor,"⁴¹ neither the agreement nor the ICA amendment which the parties' executed to effectuate the agreement so states.⁴²

AT&T responded to Big River's April 19 request in an e-mail sent on May 10, 2011 by Eileen Mastracchio, acknowledging Big River's IDR request and explaining that Janice Mullins would be AT&T's contact for handling the IDR.⁴³ Mr. Jennings acknowledged the letter the same day.⁴⁴ Mr. Jennings and Ms. Mullins participated in a conference call on May 13, 2011, in an attempt to resolve the matter.⁴⁵ Mr. Jennings and Ms. Mullins thereafter continued the IDR through November 1, 2011, at which time Ms. Mullins informed Mr. Jennings by letter that

³⁹ EFIS No. 66, Stipulation No. 17; EFIS No. 130, AT&T Exh. 8 (Mullins Surrebuttal), Sch. JM-1.

⁴⁰ EFIS No. 130, AT&T Exh. 8 (Mullins Surrebuttal), Sch. JM-1.

⁴¹ *Id.*

⁴² EFIS No. 77, AT&T Exh. 11 (HC); EFIS No. 79, AT&T Exh. 13.

⁴³ EFIS No. 66, Stipulation No. 18; EFIS No. 130, AT&T Exh. 8 (Mullins Surrebuttal), Sch. JM-3.

⁴⁴ EFIS No. 130, AT&T Exh. 8 (Mullins Surrebuttal), Sch. JM-4.

⁴⁵ EFIS No. 66, Stipulation No. 19.

AT&T denied the dispute.⁴⁶ The letter stated that “[b]oth parties are free to pursue any other remedies they believe are appropriate under the Interconnection Agreements or otherwise.”⁴⁷

Big River filed its complaint in this matter on March 1, 2012.⁴⁸ Prior to the filing, AT&T had conveyed to Big River that should Big River’s refusal to pay continue, Big River’s requests for additional service would not be accepted and provisioning activity on all pending orders would be suspended. However, in light of the pendency of this case, AT&T has not suspended or refused to accept a request for additional service from Big River.⁴⁹

E. Description of Big River’s Telephone Service and the Traffic It Delivered to AT&T

Since January 1, 2010, the traffic that Big River delivered to AT&T over the interconnection trunks established pursuant to the parties’ ICA originated in Internet Protocol (“IP”) format, and was Voice over Internet Protocol (“VoIP”) traffic.⁵⁰ This traffic originated with Big River telephone service customers using IP-enabled customer premises equipment,⁵¹ which telephone service allowed the customers to make voice telephone calls to, and receive voice telephone calls from, the public switched telephone network (PSTN) and customers of AT&T,⁵² and to engage in real-time, two-way voice communications with customers served via the PSTN.⁵³

Big River does not provide this VoIP service over analog telephone lines, or over dial-up Internet access connections.⁵⁴ Instead, Big River partners with cable companies to provide telephone service in IP format over the cable companies’ “last mile” facilities, and in some cases

⁴⁶ EFIS No. 66, Stipulation No. 20; EFIS No. 116, Big River Exh. 14; EFIS No. 154, AT&T Exh. 32.

⁴⁷ EFIS No. 116, Big River Exh. 14.

⁴⁸ EFIS No. 1; EFIS No. 66, Stipulation No. 22.

⁴⁹ EFIS No. 66, Stipulation Nos. 21, 23.

⁵⁰ EFIS No. 66, Stipulation Nos. 24, 25.

⁵¹ EFIS No. 66, Stipulation No. 26.

⁵² EFIS No. 66, Stipulation Nos. 27, 28.

⁵³ EFIS No. 66, Stipulation No. 29; *see also* EFIS No. 136, AT&T Exh. 14 (Howe Dep.) at 19-20, 28-30.

⁵⁴ EFIS No. 100, Vol. 4, Hrg. Tr. at 63-64.

uses DSL (broadband service provided over “last mile” telephone facilities) to provide telephone service in IP format.⁵⁵ These are broadband connections, not narrowband or dial-up connections. As Staff’s witness aptly put it, Big River’s service “meets the definition of a broadband connection by any standard that I’ve ever been familiar with, and it’s more than a dial-up service.”⁵⁶ Big River has not identified any portion of its VoIP customer base that is not served using broadband connections.

DSL is a broadband service.⁵⁷ Big River’s CEO believes that Big River’s VoIP customers have a broadband connection, and that Big River provides service using the “broadband connections” of local cable companies.⁵⁸ Big River’s website describes its “Digital Telephone service or VOIP (Voice over Internet Protocol)” as “a residential phone or business phone service that uses a broadband connection rather than a traditional (analog) line.”⁵⁹

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 Big River provides service in other states in the same manner.⁶⁰ Big River also submitted a letter to the FCC, under oath, detailing its compliance with the FCC’s interconnected VoIP E911 rules.⁶¹ In its letter, Big River noted, among other things, that its customers can update their location information “using the VoIP telephone equipment that they use to access their interconnected VoIP service.”⁶²

⁵⁵ EFIS No. 66, Stipulation No. 30.

⁵⁶ EFIS No. 102, Vol. 6, Hrg. Tr. at 254-255.

⁵⁷ EFIS No. 66, Stipulation No. 30; EFIS No. 143, AT&T Exh. 21 (Big River website, describing DSL as “a technology for bringing high-bandwidth information to homes and small businesses”).

⁵⁸ EFIS No. 136, AT&T Exh. 14 (Howe Dep.) at 28, 57.

⁵⁹ EFIS No. 142, AT&T Exh. 20.

⁶⁰ EFIS No. 66, Stipulation No. 31.

⁶¹ EFIS No. 144, AT&T Exh. 22.

⁶² *Id.* p. 4.

There are other instances where Big River has held itself out as an interconnected VoIP provider, providing VoIP service using broadband connections. For example, Big River described itself as an interconnected VoIP provider in testimony to the Kansas Corporation Commission. Big River's CEO, Mr. Howe, testified that "[a]s a provider of *interconnected Voice Over IP*, Big River will continue to offer retail services via individual service agreements," and "will meet all the obligations of interconnected Voice Over IP providers such as: providing 911 service, providing Telecommunications Relay Service, and collecting and remitting USF fees."⁶³ Big River also explained that it partnered with a cable company in Kansas to provide VoIP service over its "hybrid fiber coax network,"⁶⁴ which is "an alternative network with advanced capabilities and a significant amount of bandwidth to support high speed data services."⁶⁵

In subsequent testimony, Big River explained that "[s]ince Big River uses Voice Over IP as the essential technology to access customers, Big River is capable of using any broadband Internet or data connection to a customer premise," and "by the very nature of Big River's service strategy and network, *our connections to customers are made using high capacity, broadband facilities*."⁶⁶ Similarly, in an application to the Alabama commission requesting authority to provide service, Big River explained that it "leases network access from cable TV companies" to gain access to telephone customers, and "[t]he capabilities of the underlying cable TV networks are significant and can readily provide 10 to 50 Mbps of bandwidth."⁶⁷

⁶³ EFIS No. 146, AT&T Exh. 24 at p.11 (emphasis added).

⁶⁴ *Id.* at p. 6.

⁶⁵ *Id.* at p. 14.

⁶⁶ EFIS No. 147, AT&T Exh. 25, pp. 6-7 (emphasis added).

⁶⁷ EFIS No. 148, AT&T Exh. 226, Section IV.

F. The Charges In Dispute

AT&T presented a detailed accounting of the charges it billed Big River under BAN 803.⁶⁸ The evidence establishes, without dispute, that AT&T billed Big River access charges monthly in 2010, beginning with the February 5, 2010 bill, and that it has continued to do so.⁶⁹ There is likewise no dispute that the charges billed, through and including the December, 2012, bill, total \$352,123.48.⁷⁰

G. Big River's "Call Detail" Request

Big River claimed in its rebuttal testimony that the amount Big River may owe AT&T is in question because Big River was not provided sufficient underlying call details to determine whether there was "any erroneous billing." Big River Exh. 5 (Jennings Rebuttal), at 4-5. While AT&T strenuously objects to this claim on both contractual and legal grounds (as discussed later), the Commission finds that there is no evidence that Big River ever requested such records or other data in discovery in this proceeding, despite its opportunity to do so.

Moreover, the record reflects, and the Commission finds, that on November 30, 2011 (prior to the initiation of this case), Big River requested call detail records from AT&T for AT&T's November, 2011 invoice.⁷¹ There is no indication in the record that Big River had previously made such a request since AT&T began billing Big River in February, 2010,⁷² or that when it made its request in November, 2011, it explained to AT&T why it wanted the data. The record also reflects that this request came only after AT&T had formally denied Big River's

⁶⁸ See, e.g. EFIS No. 155, AT&T Exh. 33.

⁶⁹ See EFIS No. 66, Stipulation No. 14; EFIS No. 1, Big River Complaint, ¶ 23; EFIS No. 13, AT&T Answer, ¶ 23.

⁷⁰ EFIS No. 155, AT&T Exh. 33; EFIS No. 102, Vol. 6, Hrg. Tr. at 198, supplementing EFIS No. 126, AT&T Exhibit 4 (Greenlaw Direct), at 22.

⁷¹ EFIS No. 100, Vol. 4, Hrg. Tr. at 141, 152.

⁷² Moreover, Big River could have obtained access to the data when it initially commenced service as a CLEC and established its account with AT&T. As AT&T's Janice Mullins explained, "they're asking for data that's already available to them if they would have requested [it] initially when they set themselves up as a CLEC." EFIS No. 102, Vol. 6, Hrg. Tr. at 234-235. "[H]ad [the data] already been requested up front, they would have had access to those records themselves." EFIS No. 102, Vol. 6, Hrg. Tr. at 235.

dispute on November 1, 2011, and only after the informal dispute resolution process was concluded.⁷³

Big River initiated the informal dispute resolution process by written notice to AT&T's Notices Manager on April 19, 2011, in accordance with the notice provisions of the parties' ICA.⁷⁴ Its April 19 letter to AT&T made no claim that AT&T's bills had been inaccurately calculated.⁷⁵ Nor did its May 19, 2011, letter to AT&T.⁷⁶ Rather, both of these letters made the single claim that none of Big River's traffic was subject to access charges, on the theory that the traffic constitutes "enhanced services" traffic. Mr. Jennings twice admitted 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."⁷⁷

AT&T's Janice Mullins, assigned as AT&T's representative for handling the dispute,⁷⁸ and Mr. Jennings spoke to one another and continued the dispute resolution process through November 1, 2011, at which time Ms. Mullins informed Mr. Jennings by letter that AT&T denied the dispute.⁷⁹ AT&T's Ms. Mullins testified that 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 purportedly was 100% enhanced services traffic and, therefore, exempt from access charges.⁸⁰ She confirmed that "no 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

⁷³ EFIS No. 102, Vol. 6, Hrg. Tr. at 243-245.

⁷⁴ EFIS No. 102, Vol. 6, Hrg. Tr. at 210, 218; EFIS No. 75, AT&T Exh. 9, at Sections 15.1 and 15.3.

⁷⁵ EFIS No. 106, Big River Exh. 4 (Jennings Direct), Sch. 3; EFIS No. 100, Vol. 4, Hrg. Tr. at 136.

⁷⁶ EFIS No. 106, Big River Exh. 4 (Jennings Direct), Sch. 4; EFIS No. 100, Vol. 4, Hrg. Tr. at 137.

⁷⁷ EFIS No. 106, Big River Exh. 4 (Jennings Direct), at 6.

⁷⁸ EFIS No. 66, Stipulation No. 18.

⁷⁹ EFIS No. 66, Stipulation No. 20; *see also* EFIS No. 116, Big River Exh. 14; EFIS No. 102, Vol. 6, Hrg. Tr. at 222, 226.

⁸⁰ EFIS No. 130, AT&T Exh. 8 (Mullins Surrebuttal) at 5.

that it should not be billed at all, i.e., that it was *exempt* from access charges.”⁸¹ John Jennings, Big River’s appointed representative, did not disagree with Ms. Mullins, as is apparent from the following questions and answers at the hearing:

Question: “We understand that the dispute that was brought between you and worked with Ms. Mullins had to do with whether [the traffic] was enhanced services or not?”

Answer: “Correct.”

Question: “. . . Did you at any time during your discussions with Ms. Mullins assert or claim that the bills had otherwise been calculated incorrectly or incorrectly billed?”

Answer: “No, I hadn’t.”⁸²

Moreover, even after Big River received some call detail data from AT&T, Big River did not question it or further pursue the matter in any way.⁸³ This was reinforced by Mr. Jennings himself during the hearing, as shown in the following questions and answers:

Question: “At any time after February 15 of 2012, did you express to Ms. Mullins the view that the data you had been provided was insufficient for any reason?”

Answer: “Not to Ms. Mullins, no.”

Question: “Did you ever convey to Ms. Mullins that you were unable to reconcile AT&T’s billing with Big River’s own billing records?”

Answer: “Not with Ms. Mullins, no.”

Question “Did you ever submit to the notices manager at AT&T pursuant to Section 15.3 of the ICA which provides the contacts, notices manager, that Big River was submitting a dispute based on the fact that its bills had been incorrectly calculated or incorrectly billed?”

Answer: “In the notices dispute? To the notices dispute? No.”⁸⁴

⁸¹ *Id.* at 8. (emphasis original).

⁸² EFIS No. 100, Vol. 4, Hrg. Tr. at 139-140.

⁸³ EFIS No. 130, AT&T Exh. 8 (Mullins Surrebuttal) at 3-8; EFIS No. 102, Vol. 6, Hrg. Tr. at 244-247.

⁸⁴ EFIS No. 100, Vol. 4, Hrg. Tr. at 140-141.

At no time did Big River request an audit of AT&T's billing records, in accordance with Section 38 of the GT&Cs of the parties' ICA. AT&T Exh. 9; Hrg. Tr. at 143, 245-246.

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

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 both interpret and enforce the agreements the Commission has approved, like the one between Big River and AT&T.⁸⁵ In their ICA, the parties also expressly agreed they could invoke formal dispute resolution via the Commission's complaint process.⁸⁶

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 Big River delivered to AT&T Missouri over the local interconnection trunks for termination, and for which AT&T Missouri billed Big River access charges on BAN 803, should be classified as interconnected VoIP traffic under the parties' ICA and Section 386.020(23), RSMo.

⁸⁵ *Southwestern Bell v. Connect Communs Corp.* 225 F.3d 942 (8th Cir. 2000) (The Act's "grant of power to state commissions necessarily includes the power to enforce the interconnection agreement."); *Budget Prepay, Inc. v. AT&T*, 605 F.3d 273 (5th Cir. 2012) (State commissions have "power both to approve ICAs and to interpret and enforce their clauses.").

⁸⁶ EFIS No. 75, AT&T Exh. 9 (GT&Cs § 13.5.1).

Section 386.020(23) RSMo defines “Interconnected voice over Internet protocol service” 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
- (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.

The parties’ stipulations of fact, and in particular Stipulation Nos. 24-29,⁸⁷ establish that Big River provides VoIP service that (i) enables real-time, two-way voice communications, (ii) requires Internet protocol-compatible customer premises equipment, and (iii) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

Big River’s VoIP service also requires a broadband connection within the meaning of the parties’ ICA and Section 386.020(23) RSMo. Whether or not Big River’s VoIP service requires the entire bandwidth of the connection to operate, that service requires a broadband connection because it is designed to be made available only to customers that have DSL or cable broadband connections. That is, even if the service itself may operate below broadband speeds, it nevertheless requires a broadband connection because it is provided only to customers that have a broadband connection. Big River has not identified *any* VoIP customers that do not have a broadband connection, and it concedes that it does not provide VoIP over analog telephone lines or over dial-up Internet connections, but uses broadband connections to reach its customers.⁸⁸ Whether or not Big River uses the entire capacity of these connections for its voice service, the

⁸⁷ EFIS No. 66.

⁸⁸ See EFIS No. 100, Vol. 4, Hrg. Tr. at 63-64; EFIS No. 136, AT&T Exh. 14 (Howe Dep.) at 28, 57.

connections remain “broadband connections” designed to provide high-capacity, broadband services.⁸⁹

Other evidence amply supports our conclusion on this issue. Among other things, Big River's representations and statements made to state commissions and the FCC, and the parties' settlement agreement, make it apparent that Big River provides interconnected VoIP service.

Because the Commission finds and concludes that the traffic at issue is interconnected VoIP traffic, it need not and does not reach the issue of whether that traffic, if not interconnected VoIP traffic, would properly be classified as “enhanced services” traffic.

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

Because the traffic Big River delivered to AT&T is interconnected VoIP traffic, it is subject to access charges under Section 392.550, RSMo and the terms of the parties' 2009 amendment to their ICA, which states that, as of 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.”⁹⁰ Thus, there remains only the matter of establishing the amount of those charges.

AT&T presented a detailed, month-by-month accounting of the charges it has billed Big River under BAN 803 since January, 2010.⁹¹ The evidence establishes, without dispute, that AT&T billed Big River access charges monthly in 2010, beginning with the February 5, 2010 bill,

⁸⁹ See, e.g., EFIS No. 66, Stipulation No. 30 (DSL is “broadband service provided over ‘last mile’ facilities”); EFIS No. 148, AT&T Exh. 26, Section IV (“[t]he capabilities of the underlying cable TV networks [used by Big River] are significant and can readily provide 10 to 50 Mbps of bandwidth”); EFIS No. 147, AT&T Exh. 25, at pp.6-7 (“by the very nature of Big River’s service strategy and network, our connections to customers are made using high capacity, broadband facilities”).

⁹⁰ EFIS No. 79, AT&T Exh. 13, § 6.

⁹¹ See, e.g., EFIS No. 155, AT&T Exh. 33.

and that it has continued to do so.⁹² There is likewise no dispute that the charges billed, through and including the December, 2012, bill, total \$352,123.48.⁹³

Big River does not challenge AT&T's showing, nor its month-by-month accounting of the charges owed, as shown in AT&T Exh. 33. Big River has not denied that the amount sought by AT&T reflects the total of the access charges that were billed monthly by AT&T and that Big River refused to pay.⁹⁴ On this basis, the Commission concludes that the amount of the access charges which Big River owes to AT&T is \$352,123.48, as well as amounts since billed and to be billed on BAN 803, including any applicable late payment charges.⁹⁵

The Commission further determines that this conclusion is not undermined by Big River's billing accuracy claim, which the Commission rejects for three separate and independent reasons.

First, Big River has presented no evidence to the Commission of any inaccuracy in AT&T's bills. While Big River has suggested that it lacked sufficient data to "validate" AT&T's invoices, it had every opportunity to seek such data through discovery in this proceeding. Big River's speculation about potential inaccuracies is just that – speculation – and is insufficient to raise any genuine issue regarding billing accuracy.

Second, Big River's contentions regarding billing accuracy are beyond the scope of Big River's complaint and its affirmative defense to AT&T's own complaint. Missouri law and the Commission's rules are clear that the issues to be adjudicated in a case are those which are

⁹² See EFIS No. 66, Stipulation No. 14; EFIS No. 1, Big River Complaint, ¶ 23; EFIS No. 13, AT&T Answer, ¶ 23.

⁹³ See EFIS No. 155, AT&T Exh. 33; EFIS No. 102, Vol. 6, Hrg. Tr. at 198, supplementing EFIS No. 126, AT&T Exhibit 4 (Greenlaw Direct), at 22.

⁹⁴ Thus, for example, Big River's acknowledgement that Big River had been billed in the amount of \$202,990.19 through and including the March 5, 2011 invoice corresponds precisely to the amount shown by AT&T as the "total amount past due" as of April, 2011. *Compare*, EFIS No. 106, Big River Exh. 4 (Jennings Direct), Sch. 3 with EFIS No. 126, AT&T Exhibit 4 (Greenlaw Direct), Schedule 9 (HC) and EFIS No. 155, AT&T Exh. 33.

⁹⁵ EFIS No. 75, AT&T Exh. 9, § 14.1; AT&T Missouri Access Services Tariff, P.S.C. Mo.-No. 36, 1st Revised Sheet 17.01, Section 2.4.1.D.

framed by the facts alleged in the complaint⁹⁶ and in the defenses to the complaint.⁹⁷ Nowhere in either Big River's complaint or its answer to AT&T's complaint does Big River question, much less place in issue or challenge, the accuracy of the charges billed by AT&T.

Instead, Big River's 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.⁹⁸ Likewise, Big River's lone specific affirmative defense to AT&T's complaint asserted that "Big River's traffic is *exempt from* the access charges claimed by AT&T Missouri because the traffic is enhanced."⁹⁹

Third, Big River is precluded by the dispute provisions of the parties' ICA from asserting this claim before the Commission. Under the GT&Cs of the parties' ICA, all billing disputes are governed by the terms of the ICA,¹⁰⁰ under which Big River was required to specifically identify to AT&T the details and reasons for its disputing any charges billed by AT&T.¹⁰¹ However, the only basis identified by Big River when it disputed AT&T's access charge bills was that Big River was purportedly exempt from access charges. Big River did not dispute any of AT&T's bills on the ground that AT&T had incorrectly calculated any of them, and the ICA does not permit Big River to raise any such dispute now.

⁹⁶ 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[.]").

⁹⁷ 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.").

⁹⁸ See, e.g., EFIS No. 1, Big River 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.").

⁹⁹ EFIS No. 25, Big River Answer, p. 2 (emphasis added).

¹⁰⁰ EFIS No. 75, AT&T Exh. 9, § 9.

¹⁰¹ *Id.*, §§ 9.3, 13.4.1.

Nor does Big River's November 1, 2011 request for call detail records rise to the level of any actionable dispute under the parties' ICA. First, it was not directed to the AT&T Notices Manager, as required by Section 15.1 of the GT&Cs of the ICA (to whom Big River wrote on April 19 regarding the separate matter of the "enhanced services" dispute).¹⁰² More fundamentally, Big River presented no evidence indicating that, when it requested the call detail records for the November, 2011, bill, it explained to AT&T why it wanted the information. Sections 9.3 and 13.4.1 of the GT&Cs of the parties' ICA clearly require that a dispute must be accompanied by a detailed description of the dispute and the reasons supporting it.

We also find telling other aspects of the evidence relating to this subject, including that Big River's request came only after AT&T had billed Big River every month for almost two years, that the request was not mentioned in Big River's April 19, 2011 letter requesting informal dispute resolution, and the request came only after AT&T had formally denied Big River's dispute on November 1, 2011.¹⁰³ Additionally, we find credible the testimony of AT&T's Ms. Mullins, AT&T's appointed informal dispute resolution representative who negotiated with Big River, who testified that Big River's only claim throughout the informal dispute resolution process (between April and November, 2011) was that AT&T was prohibited from billing access charges to Big River because the traffic allegedly was entirely comprised of enhanced services traffic exempt from access charges, and her further testimony that Big River never questioned the accuracy of the bills over the several months she corresponded with Big River.

Indeed, Big River's own appointed informal dispute resolution representative did not disagree with Ms. Mullins, as he confirmed at the evidentiary hearing that at no time did he

¹⁰² EFIS No. 75, AT&T Exhibit 9; EFIS No. 100, Vol. 4, Hrg. Tr. at 140-141.

¹⁰³ EFIS No. 102, Vol. 6, Hrg. Tr. at 243-245.

express to Ms. Mullins any concern that AT&T's bills might have been calculated incorrectly.¹⁰⁴ Finally, even after Big River received some call detail data from AT&T, the parties agree that Big River did not question it or further pursue the matter in any way.¹⁰⁵ Mr. Jennings never expressed to Ms. Mullins that the data AT&T provided was insufficient for any reason, or that, as he suggested in his rebuttal testimony, he was unable to reconcile AT&T's billings with Big River's own billing records.¹⁰⁶ At no time did Big River request an audit of AT&T's billing records, pursuant to Section 38 of the GT&Cs of the parties' ICA.¹⁰⁷

In sum, we conclude that Big River did not dispute AT&T's bills upon the ground of any alleged inaccuracy and that it cannot now attempt to manufacture such a dispute for resolution by the Commission. That would contravene the dispute resolution provisions of the ICA, which require Big River to present the specific reasons for its dispute to AT&T in the first instance, so the parties may jointly investigate and attempt to resolve the matter, and crystallize the specific areas of dispute for Commission resolution if they are unable to agree. The latter is, of course, precisely what is missing here, as Big River has not presented any evidence of any alleged inaccuracy that the Commission might resolve.¹⁰⁸

¹⁰⁴ EFIS No. 100, Vol. 4, Hrg. Tr. at 139-140.

¹⁰⁵ See EFIS No. 130, AT&T Exh. 8 (Mullins Surrebuttal) at 3-8; EFIS No. 100, Vol. 4, Hrg. Tr. at 140-141; EFIS No. 102, Vol. 6, Hrg. Tr. at 244-247.

¹⁰⁶ EFIS No. 100, Vol. 4, Hrg. Tr. 139-141.

¹⁰⁷ EFIS No. 75, AT&T Exh. 9; EFIS No. 100, Vol. 4, Hrg. Tr. at 143; EFIS No. 102, Vol. 6, Hrg. Tr. 245-246.

¹⁰⁸ Even if Big River were inclined at this point to submit a dispute of AT&T's bills upon the alleged grounds of inaccuracy, Section 13.1.1 of the ICA's GT&Cs 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." EFIS No. 75. River has admitted from the outset of this case 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." EFIS No. 1, Big River Complaint, p. 1. In the exercise of due care and attention to the monthly billing statements that AT&T provided to Big River, any claims 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.

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 reached the following final decision. The substantial and competent evidence in the record as a whole supports the conclusion that the traffic at issue delivered to AT&T by Big River was interconnected VoIP traffic to which access charges apply, and that Big River should be ordered to pay to AT&T all past-due amounts billed on BAN 803, with any applicable late-payment charges.

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 access charges on BAN 110 401 0113 803, was interconnected VoIP traffic;
2. Under the parties' ICA, as amended, access charges applied to such traffic and Big River was and is in violation of the ICA by refusing to pay such charges; and
3. The access charges AT&T Missouri has billed Big River since January 1, 2010 by means of BAN 110 401 0113 803 are due and owing by Big River, including any applicable late charges.
4. This Report and Order shall become effective _____, 2013.

WHEREFORE, AT&T respectfully requests that the Commission adopt this proposed order, including findings of fact and conclusions of law.

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 31, 2013.


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