

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Big River Telephone Company, LLC,)	
)	
Complainant,)	
)	
v.)	<u>Case No. TC-2012-0284</u>
)	
Southwestern Bell Telephone Company,)	
d/b/a AT&T Missouri,)	
)	
Respondent.)	

STAFF'S REPLY BRIEF

Respectfully submitted,

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February 7, 2013

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STAFF’S REPLY BRIEF

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its Reply Brief, pursuant to Commission Rule 4 CSR 240-2.140 and the procedural schedule in this case, states the following:

I. Introduction

Staff’s *Initial Brief* explained why this is an easy case: Big River concedes that the traffic that is the subject of this case is voice over Internet protocol (VoIP) communication that is interconnected with the public switched telephone network (PSTN). Pursuant to Missouri’s interconnected VoIP (I-VoIP) statute, this traffic is subject to exchange access charges.

II. Staff’s Reply to Big River Telephone Company, LLC’s Initial Brief

A. Weight of Witness Testimony

Big River’s brief argues that the testimony of AT&T witnesses William Greenlaw and Mark Neinast should be given no weight, because they weren’t involved in the dispute prior to this litigation. Staff notes, however, that the Commission’s rules provide for discovery by the

same means as civil court,¹ including the issuance of subpoenas to require a person to appear at a deposition or hearing.² Big River filed its complaint on March 3, 2012, didn't seek discovery until the cutoff date of December 10,³ and never sought to subpoena or depose anyone.

Regardless, the outcome of this case doesn't depend on the weight given to AT&T's witnesses. As complainant, Big River bears the burden of proving, by a preponderance of the evidence, that its traffic is not subject to exchange access charges as billed by AT&T.⁴ Big River's evidence fails to meet that burden. Substantial competent evidence in the record provided by Big River and Staff witness William Voight supports denial of Big River's complaint.⁵

B. The Definition of Broadband and the Meaning of "Require"

Staff does not contest the plain and ordinary meaning of the word "require." The Commission's duty, however, is to give plain and ordinary meaning to *every* word in § 386.020(23)(b) RSMo., which provides that one feature of I-VoIP is that it "requires a broadband connection from the user's location."

This statutory phrase means that I-VoIP service requires high-speed, switched, telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications—as opposed to a dial-up connection, which cannot provide such capability. **Big River's traffic undergoes an Internet protocol conversion, which cannot take place over a dial-up connection. A customer with a dial-up connection cannot**

¹ Commission Rule 4 CSR 240-2.090(1).

² Commission Rule 4 CSR 240-2.100(1).

³ EFIS No. 62, *Certificate of Service of Big River's First Set of Interrogatories, Request for Documents, and Request for Admissions*, filed December 10, 2012.

⁴ *Halo Wireless v. Craw-Kan Telephone Cooperative, Inc., et al.*, TC-2012-0331, *Report and Order* p. 35, citing *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).

⁵ AT&T Missouri filed its own complaint in this case alleging that Big River's traffic is interconnected VoIP traffic and that the access charges AT&T Missouri has billed Big River since January 1, 2010, by means of BAN 110 401 0113 802 are due and owing by Big River.

use Big River's VoIP service, therefore Big River's VoIP service requires a broadband connection from the user's location.⁶ Big River's own admission that its traffic is "VoIP" implicitly concedes this fact.

The Commission should not be led astray by Big River's argument—which confuses the Federal Communication Commission's minimum broadband speed requirements⁷ with a "definition" of broadband—because such an interpretation would render Missouri's I-VoIP statute completely meaningless. Any I-VoIP provider seeking to avoid paying the access charges required by statute could perform the same demonstration and make the same argument as Big River. This underscores the fact that the statutory words "broadband connection" broadly refer to a *kind* of technology, not a particular *capability* of that technology.⁸

C. Enhanced traffic

Finally, Big River's brief reiterates its original argument, that its traffic is "enhanced." Staff's *Initial Brief* cites testimony from both Staff and AT&T that clearly refutes this argument.

⁶ EFIS No. 103, Transcript Vol. 6, p. 255 ln 3 - p. 256 ln 1.

⁷ As explained in Staff's *Initial Brief*, the FCC establishes a minimum speed threshold as a benchmark in its annual determination of "whether broadband is being deployed to all Americans in a reasonable and timely fashion." *FCC Sixth Broadband Deployment Report*, GN Docket No. 09-137, 25 FCC Rcd. 9556, 9562; 2010 WL 2862584, 1 (July 16, 2010). The benchmark speed, which was recently increased to 4 Mbps, serves to indicate whether all Americans have access to the kind of high-quality, high-definition video, voice and data communication that is increasingly available and expected by consumers. As Staff witness William Voight explained at the hearing, a broadband connection operating at speeds below the FCC's minimum threshold has not ceased to be a "broadband connection." EFIS No. 103, Transcript Vol. 6, p. 255 ln 3 - p. 256 ln 1.

⁸ It is reasonable to assume that if the legislature intended the phrase "broadband connection" in § 386.020(23)(b) to specifically mean a broadband connection operating at 200 kbps and *only* 200 kbps, it would have expressly defined the term that way. See § 392.245.5(2) RSMo., where the legislature specifically defined a "broadband network," expressly for the purposes of that subsection only, as "a connection that delivers services at speeds exceeding two hundred kilobits per second in at least one direction." The fact that § 392.245.5(2) defines "broadband network" in terms of its speed capability, along with the fact that the legislature left "broadband connection" undefined in § 386.020(23) is further evidence that the term "broadband connection" should be understood as a *type* of connection rather than a *capability* of that connection.

Staff replies here only to reiterate a key point: the Commission need not reach the question of whether Big River's traffic is "enhanced" or "information services."⁹ The whole issue is irrelevant. The Commission need only determine that Big River's traffic in this case is I-VoIP.

III. Conclusion

The Commission need not determine whether Big River's traffic is "enhanced." Missouri law expressly decides the case: Big River's traffic is I-VoIP, and thus subject to exchange access charges, the same as any other telecommunications service. Big River's own testimony and admissions provide substantial and competent evidence that Big River's traffic is I-VoIP pursuant to § 386.020(23) RSMo, and subject to exchange access charges pursuant to § 392.550 RSMo. The Commission should not be led astray by Big River's arguments.

Respectfully Submitted,

**STAFF OF THE MISSOURI
PUBLIC SERVICE COMMISSION**

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⁹ The terms "enhanced" and "information services" are roughly analogous terms used by the FCC to distinguish between basic telephone-style "telecommunications service" that had traditionally been subject to regulation, and new computer-based innovations, such as email or the World Wide Web, generally unregulated by the FCC and available in a competitive market. With VoIP, however, the Commission disrupted this means of regulation by splitting VoIP implementations between both categories and declining to assign I-VoIP to either category. For a discussion on VoIP and these distinctions, see Marc Elzweig, *D, None of the Above: On the FCC Approach to Voip Regulation*, 2008 U. Chi. Legal F. 489, 506 (2008). Big River's initial brief mischaracterizes Mr. Voight's reference to the FCC's IP-Enabled Services Report and Order, WE 04-36 (June 27, 2006), which merely establishes that the FCC has not classified VoIP service, and that I-VoIP with the capability to track the jurisdictional confines of customer calls would be subject to state regulation—i.e., Missouri's I-VoIP statute.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were served electronically to all counsel of record this 7th day of February, 2013.

/s/ John D. Borgmeyer