

**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 REPLY BRIEF

COMES NOW Big River Telephone Company, LLC, by and through counsel, and for its Reply Brief, states as follows:

Weight of Witness Testimony

In its initial brief, Big River provided a detailed explanation of why the testimony of AT&T Missouri's witnesses, William Greenlaw and Mark Neinast, admitted over Big River's objection, should be given no weight. It is unnecessary to restate those points.

The initial briefs of AT&T Missouri and Staff, however, reinforce Big River's position. Staff did not cite the testimony of either witness in support of the points made in its brief.¹ Likewise, AT&T Missouri's brief contains no references to Mr. Neinast's testimony², and references Mr. Greenlaw's

¹ See EFIS No. 167.

² See EFIS No. 166.

testimony only in regard to an amount allegedly owed.³ (Big River addresses Mr. Greenlaw's lack of competence concerning that topic under Issue 2 below.) AT&T Missouri and Staff's disregard for AT&T Missouri's witnesses further illustrates why the Commission should give no weight to their testimony.

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?

Interconnected Voice Over Internet Protocol

AT&T Missouri's Brief

AT&T Missouri asserts that Big River's position does not require a broadband connection "is an 11th hour tactic worthy of no credence" because it was not raised until surrebuttal.⁴ (Staff also argued this point.⁵) This is absurd since Big River has never claimed that its traffic is IVOIP. It addressed the matter in surrebuttal because it was responding to the testimony presented by AT&T Missouri and then Staff, both of whom raised the issue of IVOIP.

AT&T Missouri went to great lengths in its initial brief to establish that Big River customers use broadband connections.⁶ "Use" of a broadband

³ Id. at 18.

⁴ EFIS No. 166, AT&T Missouri Brief, p. 9.

⁵ EFIS No. 167, Staff's Initial Brief, p. 3.

⁶ EFIS No. 166, AT&T Missouri Brief, pp. 5-8.

connection, however, is not the statutory standard. The statute defines IVOIP as a service that “requires a broadband connection.”⁷

AT&T Missouri, though, concludes that “Big River’s VoIP service should be deemed to ‘require a broadband connection’ because that service is designed to be made available only to customers that have DSL or cable broadband connections.”⁸ In reality, Big River’s service is not designed “to be made available only” to such customers. Big River’s CEO, Gerard Howe, testified that Big River is responding to the market’s demand. He stated,

We work with a number of network providers, most of which all use high speed services. That's what we find is in demand in the market today. We really don't find a lot of demand for people wanting narrow band services. Everybody wants high speed data services, and so that's generally who we partner with, both cable TV companies, fiber to the home companies, satellite companies, but generally they're all companies that provide high speed Internet access.⁹

Mr. Howe further explained that there are Big River customers who are served at 40 kilobits per second. If a customer is having trouble paying their bill, Big River restricts their Internet speeds to 40 kbps, but they are still able to make and receive telephone calls.¹⁰

AT&T Missouri (and Staff) have argued that giving the word “requires” in section 386.020(23) would render the statute meaningless. Their argument ignores the reality of the statute’s effect. As of January 31, 2013, the

⁷ EFIS No. 66, para. 12.

⁸ EFIS No. 166, AT&T Missouri’s Brief, p. 11.

⁹ Tr. 79:12-20.

¹⁰ Tr. 69:2-9.

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."

AT&T Missouri also argued that, in a prior settlement agreement, Big River indicated that it was delivering IVOIP traffic.¹¹ AT&T Missouri offered no evidence to substantiate that claim. The settlement agreement itself contains no such representation.¹² AT&T Missouri went on to state, "Had 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."¹³ That statement is wholly without basis in the record before the commission. AT&T Missouri elected to present its case through two witnesses who had no prior involvement in the dealings between the parties. As such, it offered no evidence of the intent of the parties. Similarly, AT&T Missouri argued that after the settlement agreement, Big River's traffic would be treated as IVOIP.¹⁴ The agreement did not state that and AT&T Missouri presented no witness to substantiate that claim. In contrast, Big River's CFO, John Jennings, specifically denied it.¹⁵

Staff's Brief

¹¹ EFIS No. 166, AT&T Missouri's Brief, p. 8.

¹² EFIS No. 152, Settlement Agreement.

¹³ EFIS No. 166, AT&T Missouri Brief, p. 8.

¹⁴ *Id.* at 9

¹⁵ Tr. 138:6-10.

The very first statement in Staff's initial brief is a blatant misrepresentation of Mr. Howe's testimony. Staff claims that Mr. Howe opined that "this case turns entirely on whether Big River's voice over Internet protocol (VoIP) service "requires a broadband connection"¹⁶ Big River has never claimed that this case is only about IVOIP. Big River's position has consistently been that its traffic is enhanced.¹⁷ It was AT&T Missouri that first raised the issue of IVOIP.¹⁸ Then, Staff witness William Voight accepted AT&T Missouri's position.¹⁹

The fact that Staff's initial brief began with such an obvious misreading of the testimony is instructive because it did not stop there. Staff counsel also stated that the first three elements of Section 386.020(23) define VOIP, while the fourth describes "interconnected".²⁰ The portion of the transcript cited does not support such an interpretation²¹ and, more importantly, there is no legal precedent for that conclusion.

Staff counsel, again without legal or evidentiary support, argued that "VoIP traffic interconnected with the PSTN is the statutory definition of I-VoIP service under Missouri law."²² Staff counsel also asserted that the call made by Mr. Howe at a speed of 40 kbps was "*actually conducted on a broadband*

¹⁶ EFIS No. 167, Staff's Initial Brief, p. 1.

¹⁷ See EFIS No. 1; EFIS No. 103.

¹⁸ See EFIS No. 13.

¹⁹ See EFIS No. 163, Rebuttal Testimony of William L. Voight.

²⁰ EFIS No. 167, Staff's Initial Brief, p. 6.

²¹ Tr. 251:23 - 252:10.

²² EFIS No. 167, Staff's Initial Brief, p. 3.

connection.”²³ [Emphasis original]. That statement directly contradicts the testimony of Mr. Howe without a citation to any evidence or legal authority.

Finally, Staff counsel claimed, “An Internet protocol conversion cannot be accomplished over a dial-up connection; it requires a digital connection.”²⁴ Once more, Staff counsel offered no support for such an assertion.

Staff counsel’s unfounded claims led to the erroneous conclusion that there is no distinction between VOIP and IVOIP.²⁵ That ignores the distinction set out in the parties’ ICA. Section 13.3 of Attachment 12 addresses VOIP.²⁶ The 2009 amendment deals with IVOIP.²⁷ Moreover, if VOIP was the same as IVOIP, the legislature would have had no need to define IVOIP in Section 386.020.

Furthermore, when Staff’s brief does present legal authority, it actually supports Big River’s position. Staff declared that “the FCC defines ‘broadband’ by referring to the general capability to transmit high-quality information at high speeds, not by specific minimum speed requirements.”²⁸ That bolsters Big River’s position that its service does not require broadband. The same is true for Staff’s argument that “[t]he legislature meant that I-VoIP requires more than dial-up; it requires a high-speed digital connection.”²⁹ As Mr. Howe clearly

²³ *Id.* at 6.

²⁴ *Id.* at 6-7.

²⁵ *Id.* at 4 (“the fact that the traffic is VoIP necessarily implies that it “requires” broadband.”)

²⁶ EFIS No. 66, para. 6.

²⁷ *Id.* at para. 10.

²⁸ EFIS No. 167, Staff’s Initial Brief, p. 6.

²⁹ *Id.* at 7.

explained³⁰ and irrefutably demonstrated,³¹ Big River does not require high speeds to deliver its service.

Enhanced Services

Both AT&T Missouri and Staff's briefs concentrated on the IVOIP issue and provided only a cursory review of Big River's claim that its traffic is enhanced. AT&T Missouri's position can be summed up as claiming that Big River's services are merely "incidental" to the underlying telephone service.³² The basis for this assertion is that the telephone calls can be made without engaging the additional services.³³

This argument is flawed in two ways. First, it ignores the protocol conversion that takes place when Big River converts its VOIP traffic to TDM for delivery to AT&T Missouri's network. Second, enhanced features do not have to be used every time a call is made. They need only be available. The ICA defines enhanced as "services that provide customers a **capability** for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information."³⁴ [Emphasis added]. Big River's enhanced services offer the "capability" of acquiring, storing, transforming, processing, retrieving, utilizing or making available information.

³⁰ Tr. 101:17-18.

³¹ EFIS No. 53, Howe Surrebuttal, Attachment 1.

³² EFIS No. 166, AT&T Missouri's Brief, p. 14.

³³ *Id.* at 17

³⁴ EFIS No. 66, Joint Stipulation, para. 6.

Staff also made the “incidental” argument. But it went further and likened Big River’s services to adding comfort or background noise, similar to the Halo case.³⁵ This demonstrates a facile understanding of the services offered by Big River. The clearest examples that refute Staff’s position are Big River’s services that can be accessed via computer while the customer is on the phone, i.e. Web Self-Care, Virtual Fax, and Voicemail.³⁶

CONCLUSION – ISSUE 1

The Commission should conclude that Big River’s traffic is not IVOIP, that it is enhanced services traffic, and that it is not subject to exchange access charges.

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

Both AT&T Missouri and Staff fail to fully understand the issue of what charges, if any, should be applied. ***It is not just about the accuracy of AT&T Missouri’s bills.*** It is an evidentiary matter. As Judge Bushman stated, “technical rules do not apply but basic rules of evidence do.”³⁷

In its post-hearing brief, AT&T Missouri cited Missouri Rule of Civil Procedure 55.05.³⁸ AT&T Missouri referenced Rule 55.05 in support of its argument that Big River’s pleadings did not properly challenge the accuracy of

³⁵ EFIS No. 167, Staff’s Brief, p. 8.

³⁶ EFIS No. 168, Big River’s Brief, pp. 21-22.

³⁷ Tr. 151:9-10.

³⁸ EFIS No. 166, AT&T Missouri’s Brief, p. 19.

AT&T Missouri's bills.³⁹ AT&T Missouri argued that "Missouri law and the Commission's rules are clear that the issues to be adjudicated in a case are those which are framed by the facts alleged in the complaint [citation omitted] and in the defenses to the complaint [citation omitted]."⁴⁰ AT&T Missouri further contended, "Nowhere in either Big River's complaint or its answer to AT&T Missouri's complaint does Big River question, much less place in issue or challenge, the accuracy of the charges billed by AT&T."⁴¹

AT&T Missouri's argument ignores two critical factors: AT&T Missouri's answer and complaint. In its answer to Big River's complaint, AT&T Missouri asserted that "Big River owes AT&T Missouri more than \$335,000 in access charges."⁴² In its complaint, AT&T Missouri alleged, "Non-local traffic that Big River delivers to AT&T Missouri for termination to end users is subject to switched access charges pursuant to Section 13 of Attachment 12 of the ICA, and the ICA amendment."⁴³ AT&T Missouri requested that the Commission determine that "the access charges AT&T Missouri has billed Big River....are required by and consistent with the parties' ICA, as amended."⁴⁴ It also requested a finding that "the access charges AT&T Missouri has billed Big River....are due and owing."⁴⁵

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² EFIS No. 13

⁴³ EFIS No. 13, AT&T Missouri's Answer and Complaint, p. 10.

⁴⁴ Id. at p. 11.

⁴⁵ Id. at p. 12.

AT&T Missouri's citation of Rule 55.05 left out an important part of the rule's language. It states, "If a recovery of money be demanded, the amount shall be stated."⁴⁶

AT&T Missouri's complaint seeks "a recovery of money." Yet, it fails to state the amount sought. As such, it fails to state a claim upon which relief can be granted. That was the first affirmative defense set out in Big River's answer to AT&T Missouri's complaint.

In its answer, AT&T Missouri did set out an amount, although not a specific sum.⁴⁷ It alleged that "Big River owes AT&T Missouri more than \$335,000 in access charges."⁴⁸ Big River, and presumably Staff, expected AT&T Missouri to provide the specific sum along with supporting evidence of such sum to be included in AT&T Missouri's direct case. AT&T Missouri failed to provide any such amount or any supporting evidence. AT&T Missouri failed to provide a witness competent to speak to any amount it was allegedly owed.

Since AT&T Missouri made the allegations regarding an amount owed, it has the burden to prove it.⁴⁹ AT&T Missouri has failed to meet its burden.

In its brief, AT&T Missouri claims that it "presented a detailed accounting of the charges", citing AT&T Exh. 33.⁵⁰ That exhibit is not a detailed accounting. It is a one page document. In fact, the heading indicates that it is a

⁴⁶ Mo. Civ. Pro. Rule 55.05.

⁴⁷ EFIS No. 13, p. 7.

⁴⁸ Id.

⁴⁹ Holt v. Director of Revenue, 3 S.W.3d 427, 430 (Mo. App. 1999)

⁵⁰ EFIS No. 166, AT&T Missouri's Brief, p. 18

“summary”.⁵¹ It shows only that amounts were billed on a monthly basis on a particular billing account number (“BAN”).⁵² It does not show the jurisdictional nature of the traffic, the rate applied, the minutes of use, or the number of calls.⁵³ Further, AT&T Missouri has not identified who prepared the document.

The summary was introduced by AT&T Missouri’s witness William Greenlaw, the only witness offered by AT&T Missouri to address an amount allegedly owed.⁵⁴ As pointed out in Big River’s initial brief, Mr. Greenlaw’s testimony should be given no weight. Mr. Greenlaw does not work for AT&T Missouri. He does not work in billing and has no experience in billing. He had to confirm with some unidentified individual what fields are included on call detail records.⁵⁵ He was not even involved in this dispute until after Big River filed its complaint.⁵⁶

Mr. Greenlaw’s knowledge of the amount owed was based on information provided by others.⁵⁷ AT&T Missouri’s response to Big River’s discovery shows that AT&T Missouri’s billing is handled by some combination of AT&T Billing Southeast and AT&T Services, Inc.⁵⁸ Employees of AT&T Services, Inc. provided information on the alleged amount owed.⁵⁹ Employees of AT&T Billing

⁵¹ EFIS No. 155, AT&T Missouri Ex. 33.

⁵² Id.

⁵³ Id.

⁵⁴ EFIS No. 166, AT&T Missouri’s Brief, p. 18.

⁵⁵ EFIS No. 128, Rebuttal Testimony of William E. Greenlaw, p. 3.

⁵⁶ EFIS No. 92, Big River Ex. 9, AT&T Response to Big River DR No. 5.

⁵⁷ Tr. 201:8-14.

⁵⁸ EFIS No. 112, Big River Ex. 10.

⁵⁹ Id.

Southeast furnished data regarding usage records.⁶⁰ Mr. Greenlaw was unaware that AT&T Missouri did not handle its own billing.⁶¹

Mr. Greenlaw's credibility is further undermined by the fact that he reviewed the wrong type of records. He examined category 92 records. He should have examined category 11 records. He did not identify the rates applied. He did not present the number of minutes of use. Nor did he explain how the non-local traffic was distinguished from the local traffic on that trunk for billing purposes. Mr. Greenlaw's testimony in general should be given no weight, but even less so, in regard to any alleged amount owed.

AT&T Missouri's argument that the issue should not be considered because it was not included in Big River's pleadings is erroneous for another reason. Rule 55, cited by AT&T Missouri, includes a provision dealing with issues not contained in pleadings. Rule 55.33(b) states, "When issues not raised by pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."⁶²

The issue regarding the documentation in support of AT&T Missouri's bills was undeniably tried before the Commission. Mr. Jennings, on behalf of Big River, addressed it in his testimony.⁶³ AT&T Missouri presented Janice Mullins surrebuttal testimony to discuss the matter.⁶⁴ Mr. Jennings was cross-

⁶⁰ Id.

⁶¹ Tr. 200:16-23.

⁶² Mo. Civ. Pro. Rule 55.33.

⁶³ EFIS No. 45, Rebuttal Testimony of John Jennings, p. 4-6.

⁶⁴ EFIS No. 55, Surrebuttal Testimony of Janice Mullins, p 5.

examined about it at the hearing. The pleadings, then, should be considered amended by interlineation because the matter was tried before the Commission.

Further, AT&T Missouri's argument that the issue was not raised in a timely manner does not pass the common sense test. Big River notified AT&T Missouri that it was contesting 100% of the access charges billed by AT&T Missouri.⁶⁵ Big River had no reason to question the accuracy of the bills because it was contending that it should not have been billed at all.

Only when Ms. Mullins denied Big River's dispute did Big River have reason to reconcile the bills with its own call data. Big River did so shortly after being informed that the dispute was denied.⁶⁶ It took AT&T Missouri three months to provide any documentation in response to Big River's request.⁶⁷ When AT&T Missouri did finally respond, it delivered just one week's worth of records rather than the month worth requested by Big River.⁶⁸ Further, the records provided were the wrong category type.⁶⁹

Pursuant to the ICA, the parties are required to "retain records of call detail for two years from when the calls were initially reported to the other Party."⁷⁰ As noted, however, AT&T Missouri took several months to respond to the request for just one month's worth of data, and when it did, it sent the

⁶⁵ EFIS No. 66, Joint Stipulation, para. 7.

⁶⁶ Tr. 141:22.

⁶⁷ Tr. 140:15.

⁶⁸ Tr. 153:14.

⁶⁹ Tr. 155:8.

⁷⁰ ICA, General Terms and Conditions, 38.3.

wrong records. Further, when AT&T Missouri filed its complaint, it did not include any supporting documentation. Even Mr. Greenlaw's testimony included just the one page summary of the billing with no supporting documentation.⁷¹ Then, when Mr. Voight recommended⁷² that AT&T Missouri provide more documentation in support of the amount allegedly owed, AT&T Missouri argued against doing so.⁷³ At the hearing, Ms. Mullins testified that it would be a "huge project" to provide the supporting documentation.⁷⁴ This all begs the question as to why it is so difficult for AT&T Missouri to produce records which they are required to maintain according to the ICA and why has it failed in providing supporting documentation in response to Big River's requests and to Staff's recommendation in this case. It certainly appears there is something out of the ordinary in AT&T Missouri's calculation of the charges allegedly owed but if anything out of the ordinary exists, AT&T Missouri has successfully concealed it from Big River, and now, from the Commission.

AT&T Missouri has also made the ridiculous statement that "[t]here is.... no dispute that the charges billed through and including the December, 2012, bill total \$352,123.48."⁷⁵ If there is no dispute, it is only because there is no competent evidence to establish the amount billed. But AT&T Missouri's contention is based on its assertion that "Big River has not presented *any*

⁷¹ Schedule 9

⁷² Despite Mr. Voight's recommendation, Staff Counsel has now accepted AT&T Missouri's mistaken argument that this is a question of the informal dispute process.

⁷³ EFIS No.129, Surrebuttal Testimony of William Greenlaw, p. 5.

⁷⁴ Tr. 235:11-12.

⁷⁵ EFIS No. 166, AT&T Missouri's Brief, p. 18.

evidence of any alleged inaccuracy that the Commission might resolve.”⁷⁶ That is a completely spurious argument. It is uncontested that Big River requested a month’s worth of call detail records. It is also undisputed that when AT&T Missouri responded – three months after the request – it provided only one week’s worth of data. Further, it provided the wrong type of records.⁷⁷ Big River could not present “any evidence of any alleged inaccuracy” because AT&T Missouri refused to provide the information necessary for Big River to gauge the accuracy of the bills.

Finally, AT&T Missouri has averred that Big River could have used the discovery process to obtain the support for AT&T Missouri’s bills. This assertion ignores the fact that establishing the amount owed was AT&T Missouri’s burden. The decision not to provide such evidence was a risk that AT&T Missouri incurred voluntarily. It was not Big River’s duty to prove AT&T Missouri’s case.

CONCLUSION – ISSUE 2

The Commission cannot find that any amount is owed by Big River to AT&T Missouri for the simple reason that AT&T Missouri has failed to prove what amount, if any, is owed.

⁷⁶ Id.

⁷⁷ Tr. 154:19 – 155:9.

Dated: February 7, 2013

Respectfully submitted,

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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 February 7, 2013.

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