BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

AT&T'S POST-HEARING REPLY BRIEF

AT&T[1] respectfully submits this post-hearing reply brief in support of its proposed order, findings of fact and conclusions of law, as to both Big River's[2] complaint against AT&T and AT&T's complaint against Big River, arising under the parties' 2005 interconnection agreement ("ICA"), as amended in 2009.

AT&T demonstrated in its initial post-hearing brief why the Commission should conclude that (1) the traffic Big River has delivered to AT&T is interconnected VoIP traffic, and (2) as a result, Big River must pay the access charges billed by AT&T on BAN 110 401 0113 803 ("BAN 803"). Staff agrees on both points.[3] Big River offers nothing new in its initial brief, but reiterates the meritless positions that AT&T and Staff have already refuted. AT&T briefly responds to Big River's initial brief below, and explains why the Commission should reject Big River's arguments regarding each of the two issues presented.

[1] Southwestern Bell Telephone Company, d/b/a AT&T Missouri, will be referred to in this pleading as "AT&T Missouri" or "AT&T."
[2] Big River Telephone Company, LLC will be referred to in this pleading as "Big River."
[3] *See* Staff Br. at 2 ("The Commission should resolve the issues presented in this case by finding that Big River's traffic is I-VoIP and subject to the access charges as billed by AT&T.").

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Big River attempts to distract the Commission from these two issues by beginning its argument with a broadside against Messrs. Neinast and Greenlaw. Big River's rhetoric should be ignored. Both of these gentlemen have decades of experience working with various AT&T companies in areas that are directly relevant here, including interconnection, switching, signaling, Internet protocol ("IP") and other network-related functions (in the case of Mr. Neinast), and supporting and interacting with competitive local exchange carriers ("CLECs") in ICA and other wholesale-related matters (in the case of Mr. Greenlaw).[4] While neither is employed by AT&T Missouri, there is, contrary to Big River's suggestion, nothing at all improper or untoward about AT&T's incumbent LECs using centralized services from a shared services affiliate to support their enterprise-wide ICA and wholesale-related functions. Indeed, Big River is in no position to profess surprise that AT&T Missouri uses such affiliates in its business, as both its own 2005 ICA and 2009 amendment were entered into by AT&T Operations, Inc. as AT&T Missouri's authorized agent.[5]

Nor should it come as a surprise that a litigant may choose to present witnesses with solid communications skills. While Big River suggests (at 5) that this makes them "actors," it ignores the fact that the individuals AT&T Missouri chooses to speak for it are specifically chosen for their knowledge and subject-matter expertise.[6]

For these reasons, Big River's attacks on Messrs. Neinast and Greenlaw should be dismissed out of hand. The Commission did not error in admitting their testimony.

Regardless, Big River's rhetoric about AT&T's choice of witnesses is beside the point. With respect to Issue No. 1, while Mr. Neinast addresses the nature of Big River's traffic, it is

[4] *See* EFIS No. 123, AT&T Exh. 1 (Neinast Direct) at 1-2; EFIS No. 126, AT&T Exh. 4 (Greenlaw Direct) at 1-2.
[5] *See* EFIS No. 131, AT&T Exh. 9; EFIS No. 135, AT&T Exh. 13.
[6] *See* EFIS No. 94, Big River Exh. 11.

Big River's *own* testimony, documents, and admissions that conclusively establish that Big River provides interconnected VoIP service.

With respect to Issue No. 2, the applicable charges are governed by the parties' ICA, which represents the contract between Big River and AT&T. In particular, the ICA dictates that access charges apply to interconnected VoIP traffic. As to the amount of the access charges at issue, there is no genuine dispute that over the course of three years AT&T has billed Big River $352,123.48 on BAN 803 (through the December 2012 bill) that Big River has refused to pay. None of Big River's arguments go to Mr. Greenlaw's competence to review, add-up, and present a summary of these monthly bills, nor does Big River present a shred of evidence that AT&T has incorrectly calculated the charges reflected in these bills.

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?

A. The Traffic That Big River Delivered To AT&T Missouri Should Be Classified As Interconnected VoIP Traffic.

Big River argues (at 11) that its VoIP service is not interconnected VoIP because it allegedly "does not 'require' a broadband connection." As explained in AT&T's initial post-hearing brief, Big River's argument misses the mark.

Big River first asserts (at 10) that "broadband" means a minimum speed of 200 kbps in both the uplink and downlink directions, pointing to the testimony of Mr. Howe. Interpretation of the statute's reference to requiring a broadband connection is, however, an issue of law, not one of fact, as evidenced by Mr. Howe's own testimony. In particular, Mr. Howe suggests the Commission should look to the FCC's definition of "broadband," and points to the FCC's

purported "minimum broadband speed standard."[7] That, however, is not the FCC's definition of broadband for regulatory purposes, including the determination of whether a carrier is providing interconnected VoIP service. As AT&T explained (at 11 n.6), the FCC's broadband benchmark in its broadband development reports is used solely for purposes of preparing those reports, and not for regulatory purposes.[8] For regulatory purposes, the FCC has consistently defined broadband as connections with speeds of 200 kbps in either direction, and it has consistently reaffirmed this definition.[9] Further, while the Missouri statute which defines interconnected VoIP service (Section 386.020(23), RSMo) does not also define a "broadband connection," a provision of Chapter 392 defines a "broadband network" consistent with the FCC's regulatory definition – namely, as "a connection that delivers service at speeds exceeding two hundred kilobits per second in at least one direction."[10]

Big River next asserts (at 11-12) that "requires" means "compulsory, necessary, or essential." That, however, is not the only accepted (much less preferred) meaning of the term "require" – particularly in the context of utility regulation. For example, in *National Railroad Passenger Corp. v. Boston and Maine Corp.*, the Supreme Court construed a statute allowing the condemnation of property "required for intercity rail passenger service."[11] The Court rejected

[7] EFIS No. 103 (Howe Direct) at 3.
[8] *Sixth Broadband Deployment Report*, 25 FCC Rcd. 9556, 2010 WL 2862584, ¶ 11 n.46 (FCC rel. July 20, 2010) (we "emphasize that we are benchmarking broadband in this report *solely* for purposes of complying with our obligations under section 706. We specifically do not intend this speed threshold to have *any* other regulatory significance under the Commission's rules absent subsequent Commission action. For example, *today's report has no impact on which entities are classified as interconnected VoIP providers* . . . ." (emphases added)).
[9] *See, e.g.*, First Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 20 FCC Rcd. 14989, 2005 WL 2347765, ¶ 24 n.74 (FCC rel. Sept. 23, 2005) ("we define 'broadband' as those services having the capability to support upstream or downstream speeds in excess of 200 kilobits per second (kbps) in the last mile"); Report and Order and Notice of Proposed Rulemaking, *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14853, 2005 WL 2347773 (FCC rel. Sept. 23, 2005), ¶ 9 n.15 ("For purposes of this proceeding, we define the line between broadband and narrowband consistent with the Commission's definition in other contexts (i.e., services with over 200 kbps capability in at least one direction).").
[10] Section 392.245.5(2), RSMo.
[11] 503 U.S. 407, 420 (1992).

the argument that "required" meant "necessary" in the sense of "indispensable."[12] Instead, it upheld the view of the regulatory agency (the Interstate Commerce Commission, or ICC) that "'required' can also mean 'useful or appropriate,'" noting that a dictionary definition supported the ICC's view.[13] As a result, the Court upheld the ICC's determination that the condemned track at issue was "required" for intercity rail passenger service simply because "Amtrak intends to use the condemned track" for its service.[14]

Big River's VoIP service "requires" a broadband connection in the very same sense. Big River's VoIP service is designed to be provided over, and is provided using, broadband connections, and Big River has not identified *any* VoIP customer that does not have a broadband connection.[15] Even in its brief, Big River concedes (at 14) that it "has partnered with companies that offer broadband services since it has found that more people are interested in broadband connections than in dial-up Internet services." In short, there is no question that Big River's VoIP service uses, and is intentionally designed to be provided to customers with, a broadband connection, thus making a broadband connection "useful or appropriate" for Big River's VoIP service.

Moreover, even if "required" meant "necessary," as Big River posits, its VoIP service would still "require" a broadband connection. While Big River contends that its service does not require 200 kbps to operate, but can operate as low as 40 kbps, that misses the point. A

[12] *Id.* at 418-19.
[13] *Id.*
[14] *Id.* at 420.
[15] Big River asserts (at 14) that some customers' connections are, at times, restricted to 40 kbps or less, and they can still access Big River's voice services. However, even in these cases Big River's VoIP service is provided over a broadband connection. Big River may sometimes throttle a customer's broadband connection to sub-200 kbps speeds due to non-payment. *See* EFIS No. 100, Vol. 4, Hrg. Tr. at 69. But a customer's broadband connection cannot reasonably be re-classified as non-broadband merely because its speed is temporarily operating below its normal maximum capacity. Indeed, if that were the case, then every high-speed connection would have to continually be reclassified as broadband and non-broadband, perhaps numerous times every day, depending upon whether, at any given moment, the connection was idle or not being used, or was in use and transmitting data at 200 kbps or more.

broadband connection is nevertheless "necessary" for customers to obtain Big River's VoIP service because Big River does not offer that service to customers with narrowband or dial-up connections. Rather, as Big River has stated elsewhere, "by the very nature of Big River's service strategy and network, our connections to customers are made using high capacity, broadband facilities."[16]

In addition, allowing Big River's contention to prevail would have significant potential consequences beyond this case. As Staff points out (at 7), adopting Big River's position that VoIP service is not interconnected VoIP unless it is non-operable at 200 kbps or more "would render the law meaningless." That is because any VoIP provider could evade the obligations which Section 392.550 specifically imposes on interconnected VoIP providers merely by artificially and temporarily restricting the bandwidth of one of its broadband connections and showing that its voice service still worked. The consequences of so emasculating the statute would not be limited to merely allowing interconnected VoIP providers to "evade access charges."[17] It would also allow them to evade their obligations to bill, collect and remit fees and surcharges that support the Relay Missouri program for the deaf, and hearing- or speech-impaired individuals, the Missouri Universal Service Fund program for low-income and disabled individuals, local enhanced 911 programs, any applicable license taxes imposed by municipalities, and the Commission's annual assessment to pay for its expenses incurred in the regulation of public utilities – all of which are obligations imposed upon interconnected VoIP providers, and enforceable by the Commission against them, but not other VoIP providers.[18]

[16] EFIS No. 147, AT&T Exh. 25, at p. 7.
[17] Staff Br. at 7.
[18] *See* Sections 392.550.3(5); 392.550.4, RSMo. Big River's approach would also permit it and other VoIP providers using broadband connections to avoid the FCC's interconnected VoIP provider E911 obligations merely by showing that their voice service still worked if they temporarily throttled the speed of a broadband connection. *See* 47 C.F.R. § 9.3. The absurdity of such a result may explain why, contrary to the position it takes here, Big River has held itself out to the FCC as an interconnected VoIP provider. *See* AT&T Exh. 22.

Finally, Big River's attempt (at 17-19) to dismiss the relevance of the parties' prior settlement agreement ignores both the context and content of that agreement. **_______

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B. The Other Features Of Big River's Telephone Service Do Not Make It "Enhanced Services" Traffic.

As explained in AT&T's initial post-hearing brief, if the Commission concludes (as it should) that Big River's traffic is interconnected VoIP traffic, it need not reach the issue of whether that traffic is "enhanced services" traffic. That is because the parties' ICA, as amended, specifically makes interconnected VoIP traffic subject to access charges, whether or not it is enhanced services traffic. In any event, Big River's arguments regarding enhanced services are misplaced.

As an initial matter, Big River's assertion (at 20) that "[t]he FCC has held that access charges are inapplicable to 'enhanced services' or 'information services'" is flatly wrong – and notably, is not supported by any citation to FCC authority. As a matter of law, under the FCC's

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[19] EFIS No. 101, Vol. 5, Hrg. Tr. at 132 (in camera).

current compensation regime there is no access charge exemption for such services, and even under the FCC's prior compensation regime the enhanced service provider exemption did not extend to the circumstances here, where a provider delivers VoIP service for termination to a local exchange carrier's end users on the public switched telephone network. We will not endeavor here to provide a full explanation of the FCC's access charge rules (though if the Commission desires such background information, we respectfully refer it to AT&T's briefs in Case No. IO-2011-0057), because ultimately they are irrelevant in light of the binding language of the parties' ICA. It is not disputed that under the ICA, as amended, and irrespective of what the FCC's rules may provide, enhanced services traffic generally is not subject to access charges, but interconnected VoIP traffic is subject to such charges.

Big River argues (at 20-21) that its traffic is "enhanced" because it is VoIP, but not interconnected VoIP. However, as AT&T has demonstrated, Big River's VoIP traffic is interconnected VoIP traffic, and hence is subject to access charges under the ICA. In the event the Commission disagrees, it should disregard Big River's contention that, if its traffic is not interconnected VoIP, then it is enhanced services traffic because it is VoIP. The Commission's rules provide that "[d]irect testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief."[20] From the outset of the parties' dispute, Big River studiously avoided revealing to AT&T (until forced to at Mr. Howe's deposition) that its voice traffic originated in IP format; instead, it took the position that its traffic is *not* VoIP but was "enhanced" because of various other features of its service that have nothing to do with VoIP.[21]

Big River makes a cursory attempt (at 21-23) to defend its original position that these features make its voice service an "enhanced service," but that attempt fails. As AT&T

[20] 4 CSR 240-2.130(7)(A).
[21] *See* EFIS No. 106, Big River Exh. 4 (Jennings Direct) at 6; EFIS No. 103, Big River Exh. 1 (Howe Direct) at 6.

explained (at 12-17), none of the features described by Big River (fax, voicemail, web-based setting of incoming call options, and other add-ons) is sufficiently integrated with Big River's underlying voice service as to affect the classification of that voice service. It may be that Big River customers can call AT&T's end-users and then simultaneously receive a fax, access voicemail, or manage incoming call options online, as Big River suggests (at 22). But Big River customers can, of course, call AT&T's end-users *without* using any of these features. These are merely ancillary services packaged with Big River's underlying voice telephone service, in the same way that telephone companies have offered their customers various add-ons (like call waiting, speed dial, voicemail, call blocking, and the like) for decades.

In sum, for the reasons explained above, the Commission should conclude with respect to Issue No. 1 that the traffic at issue is interconnected VoIP traffic.

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

Big River claims (at 24) that AT&T has adopted the position that "it does not have to establish the amount owed" and that "the amount [owed] is not in evidence." Big River cites nothing in the record in support of its claims, and both are demonstrably false. As AT&T explained in its initial brief (at 18), there is no dispute that the charges billed to Big River through and including the December, 2012, bill total $352,123.48. AT&T's evidence consisted of, among other things, a detailed month-by-month accounting of the charges billed to Big River under BAN 803. While Big River may not like this evidence, it has never disputed that evidence, sought discovery of the matter, presented AT&T's bills to show AT&T incorrectly summarized the amounts billed, or disputed that the amount sought by AT&T is reflected by the total of the access charges that were billed monthly by AT&T and that Big River refused to pay.

Big River also claims (at 25) that AT&T's charges are questionable because "AT&T presented no evidence to show that the bills did not include charges for local traffic." Big River

has it backwards. As AT&T explained in its initial brief (at 18-23), any assertions to the effect that Big River had a basis to avoid being held responsible for the debt claimed by AT&T should have been raised by Big River in the dispute resolution process preceding the bringing of this case, and should have been included in its complaint and/or answer to AT&T's complaint. Big River also had every opportunity to conduct discovery if it contended AT&T's bills were inaccurate. However, none of these occurred.

Big River suggests (at 26) that it requested call detail information "to verify the accuracy and appropriateness of the billed amounts." But the record support cited for this proposition does not say that. Indeed, there is nothing in the record demonstrating that when Big River requested call detail data, it explained to AT&T why it wanted that data, much less that Big River had reason to believe AT&T's charges were inaccurate. Regardless, as AT&T explained (at 22-23), the record amply demonstrates that when Big River did receive data from AT&T, Big River expressed no dissatisfaction with it.

Finally, Big River's contention (at 27) that it "had no reason to challenge the accuracy of the bills" prior to the conclusion of the informal dispute resolution process on November 1, 2011, is baseless. The ICA itself provides reason enough. In particular, it *requires* Big River to provide AT&T the details and reasons for any dispute of AT&T's charges,[22] precisely so that such issues can be addressed and (ideally) resolved by the parties on a timely basis, including in the informal dispute resolution process. Nothing in the ICA permits Big River to continually raise new disputes (and completely speculative ones at that) *seriatim*, in a bald attempt to delay being held to account for its debt.

[22] *See* EFIS No. 131, AT&T Exh. 9, §§ 9.3, 13.4.1.

Conclusion

For all of the foregoing reasons and those set forth in AT&T's initial post-hearing brief, AT&T respectfully submits that the Commission should determine that (1) the traffic that Big River delivered to AT&T over the parties' local interconnection trunks for termination was interconnected VoIP traffic, and (2) pursuant to the parties' ICA, access charges apply to such traffic, in the amount that AT&T billed Big River under BAN 110 401 0113 803.

Respectfully submitted,

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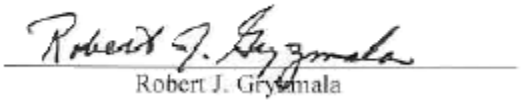

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