

**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’S POST-HEARING BRIEF**

AT&T<sup>1</sup> respectfully submits this post-hearing brief in support of its proposed order, findings of fact and conclusions of law, as to both Big River’s<sup>2</sup> complaint against AT&T and AT&T’s complaint against Big River, arising under the parties’ 2005 interconnection agreement (“ICA”), as amended in 2009.

This proceeding was prompted by Big River’s refusal to pay access charges that AT&T has billed to it since January, 2010 on Billing Account Number 110 401 0113 803 (“BAN 803”), for interexchange traffic delivered by Big River to AT&T over local interconnection trunks established pursuant to the parties’ ICA, and terminated by AT&T to its end user customers. There is no dispute that, under the ICA, as amended, access charges generally *do not* apply to “enhanced services” traffic, but *do* apply to interconnected Voice over Internet Protocol (or “interconnected VoIP”) traffic. The two issues presented to the Commission are how Big River’s traffic should be classified, and what charges apply to that traffic.

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<sup>1</sup> Southwestern Bell Telephone Company, d/b/a AT&T Missouri, will be referred to in this pleading as “AT&T Missouri” or “AT&T.”

<sup>2</sup> Big River Telephone Company, LLC will be referred to in this pleading as “Big River.”

As to the first issue, the evidence establishes that Big River's traffic should be classified as interconnected VoIP traffic. There is no dispute that Big River provides VoIP service that requires Internet protocol-compatible customer premises equipment, enables Big River's customers to engage in real-time, two-way voice communications, and allows users to make calls to and receive calls from the public switched telephone network, thus satisfying three of the four criteria of the statutory definition of interconnected VoIP service. *See* Section 386.020(23), RSMo. The fourth criteria also is satisfied, because Big River's VoIP service requires a broadband connection. That is because Big River holds its VoIP service out to, and provides its VoIP service only to, customers with DSL or cable broadband connections, and not to customers with narrowband or analog connections. *See* Issue No. 1, Section A, *infra*.

Because Big River's traffic is interconnected VoIP traffic, the Commission need not reach the issue of whether various features of Big River's service (such as fax, recording, and call management features) make its service an "enhanced service." In any case, these features that Big River makes available to its VoIP customers do not, contrary to Big River's claim, make Big River's telephone service an enhanced service. These features are ancillary to and can be used separately from the underlying voice service by which Big River's customers can call AT&T's customers, and hence do not affect the classification of that voice service. *See* Issue No. 1, Section B, *infra*.

As to the second issue, there can be no question that access charges apply to the traffic delivered to AT&T by Big River. That is because the parties' ICA amendment specifically provides that effective January 1, 2010, interconnected VoIP traffic is subject to access charges to the same extent as telecommunications traffic, consistent with Section 392.550, RSMo, enacted in 2008 (HB 1779). *See* Issue No. 2, Section A, *infra*. There also is no dispute as to the

amount of access charges that AT&T billed on BAN 803 and that Big River has refused to pay – \$352,123.48, through the December 2012 bill. *See* Issue No. 2, Section B, *infra*.

Finally, while Big River suggests there may be some question as to the accuracy of AT&T's bills, it has not, at any time in the three years it has been receiving the bills at issue, presented *any* evidence of *any* inaccuracy. Big River's failure to contest the accuracy of AT&T's bills in its complaint and answer in this proceeding, and its failure to contest the accuracy of AT&T's bills when it otherwise disputed those bills, mean that Big River cannot now manufacture such a dispute. *See* Issue No. 2, Section C, *infra*.

**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.**

The parties' ICA, as amended, provides 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." *See* Joint Stipulation of Non-Disputed Material Facts ("Stipulation") No. 10. Section 386.020(23) RSMo, in turn, 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 Commission should find that Big River's telephone service falls squarely within the definition of interconnected VoIP service. Staff agrees that Big River's telephone service constitutes interconnected VoIP service, and even Big River has admitted as much on multiple occasions in the past.

1. There is no dispute that Big River's VoIP service enables real-time voice communications, requires IP-compatible customer premises equipment, and allows users to make calls to and receive calls from the public switched telephone network.

There is no dispute that Big River's telephone service satisfies at least three of the four criteria of the definition of interconnected VoIP service. In particular, there is no dispute that that service (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.

Indeed, Big River concedes that since January 1, 2010, the traffic it delivered to AT&T over the interconnection trunks established pursuant to the parties' ICA "originated with Big River telephone service customers using IP-enabled customer premises equipment," "originated in Internet Protocol ('IP') format," and "was Voice over Internet Protocol ('VoIP') traffic." *See* Stipulation Nos. 24, 25, and 26.<sup>3</sup> Big River also concedes that its telephone service has "allowed Big River's customers to make voice telephone calls to, and receive voice telephone calls from, the public switched telephone network (PSTN)," "to make voice telephone calls to, and receive voice telephone calls from, customers of AT&T Missouri," and "to engage in real-time, two-way voice communications with customers served via the PSTN." *See* Stipulation Nos. 27, 28, and

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<sup>3</sup> Wholly apart from its VoIP service, Big River also provides non-VoIP service to some customers via resale of a local exchange carrier's local telephone service (including AT&T Missouri's local service). *See* AT&T Exh. 14 (Howe Dep.) at 16-17, 23-24. This traffic, which Big River concedes is "non-enhanced," is not at issue here. *See* Big River Exh. 6 (Jennings Surrebuttal) at 3-4.

29. These stipulated facts are consistent with the deposition testimony of Big River witness Mr. Howe. *See* AT&T Exh. 14 (Howe Dep.) at 19-20, 28-30.

The parties' dispute instead centers upon whether Big River's VoIP service "requires a broadband connection from the user's location" within the meaning of subsection (23)(b) of the statute. As explained below, the testimony and other evidence – including statements made by Big River to its customers and state and federal regulators – establishes that Big River's VoIP service does require a broadband connection, and hence constitutes interconnected VoIP.

2. Big River's VoIP service requires a broadband connection.

The Missouri statute does not define a "broadband connection," but its definition of interconnected VoIP is borrowed from and precisely tracks the definition first promulgated by the Federal Communications Commission ("FCC") in its 2005 *VoIP E911 Order*. *See* First Report and Order and Notice of Proposed Rulemaking, *In the Matters of IP-Enabled Services*, 20 FCC Rcd. 10245, 2005 WL 1323217, ¶ 24 (FCC rel. June 3, 2005) ("*VoIP E911 Order*") (excerpts included in Attachment 1 hereto); *see also* 47 C.F.R. § 9.3 (included in Attachment 2 hereto). As a result, it is reasonable and appropriate for the Commission to look to the FCC's order in construing the term "broadband connection." In that order, the FCC stated that an interconnected VoIP service "requires a broadband connection from the user's location" (*id.* ¶ 24), and it then explained in a footnote that "[w]hile we recognize that some kinds of VoIP service can be supported over a dialup connection, we expect that most VoIP services will be used over a broadband connection" (*id.* ¶ 24 n.76).

At the hearing, Big River admitted that it does not provide its VoIP service over analog telephone lines or over dial-up Internet access connections. Hrg. Tr. at 63-64. Instead, it "partners with cable companies to provide telephone service in IP format over the cable

companies' 'last mile' facilities, and in some cases uses DSL (broadband service provided over 'last mile' telephone facilities) to provide telephone service in IP format." Stipulation No. 30. These are not narrowband or dialup connections, but are "broadband connections" under any reasonable construction of the term. *See* Hrg. Tr. at 254-55 (Voight) ("it 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"); *see also* Ninth Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd. 26901, 2002 WL 31890210, n.127 (FCC rel. Dec. 31, 2002) (excerpts included in Attachment 3 hereto) ("Broadband technologies include cable modem, telephone company digital subscriber line ('DSL'), broadband wireless, and broadband satellite.").

Big River's own stipulation describes DSL as a "broadband service" (*see* Stipulation No. 30), and its website describes DSL as "a technology for bringing high-bandwidth information to homes and small businesses" (AT&T Exh. 21). Similarly, Big River's witness conceded that he believes Big River's VoIP customers have a broadband connection, and that Big River provides service using the "broadband connections" of local cable companies. AT&T Exh. 14 (Howe Dep.) at 28, 57. Consistent with this testimony, 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." AT&T Exh. 20 (emphasis added). Such language clearly conveys that the service is provided only to customers that have a broadband connection (*i.e.*, a broadband connection is required), rather than an analog or narrowband connection (*i.e.*, customers having a traditional narrowband connection "need not apply"). Indeed, Big River has not identified *any* portion of its VoIP customer base that is *not* served using broadband connections.

Other of Big River's own prior statements confirm that Big River provides interconnected VoIP service, using broadband connections. In its *VoIP E911 Order*, the FCC adopted rules requiring interconnected VoIP providers to provide E911 service, and it required interconnected VoIP providers to submit a letter to the FCC by November 28, 2005, detailing their compliance with the new E911 rules applicable to (and *only* to) providers of interconnected VoIP service. See 47 C.F.R. § 9.5(f); 9.5(a) (included in Attachment 2 hereto). Big River submitted its "Compliance Report" by means of a letter to the FCC, provided under oath, detailing its compliance with the FCC's interconnected VoIP E911 rules. See AT&T Exh. 22. 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*." *Id.* p. 4 (emphasis added).

In other contexts, Big River likewise has held itself out as an interconnected VoIP provider that uses broadband connections to provide service. For example, Big River described itself as an interconnected VoIP provider in testimony to the Kansas Corporation Commission. In particular, 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 that it "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." AT&T Exh. 24 at p.11 (emphasis added). Big River also explained that it partnered with a cable company in Kansas to provide VoIP service over its "hybrid fiber coax network" (*id.* at p.6), which is "an alternative network with advanced capabilities and a significant amount of bandwidth to support high speed data services" (*id.* at p.14).

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.*” AT&T Exh. 25, pp. 6-7 (emphases added). 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.” AT&T Exh. 26, Section IV.

In addition, in the parties’ 2009 settlement agreement,<sup>4</sup> \*\* \_\_\_\_\_

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<sup>4</sup> That settlement resolved a lawsuit which had been prompted by the very same October 2005 “Percent Enhanced Usage” declaration as Big River relies on here. *Compare*, Big River’s March 1, 2012 Complaint filed in TC-2012-0284, at 7 (referencing a PEU declaration in or about October, 2005 of “100%”) with AT&T Exh. 31, Big River’s Counterclaims against AT&T filed on September 29, 2008 in AT&T v. Big River, Cause No. 08SL-CC01630, St. Louis County Circuit Court, at 5 (stating that “Big River provided its PEU factor of 100% to AT&T in October 2005.”); *see also* Big River Exh. 4 (Jennings Direct) at Sch. 1 (attaching Big River’s letter of October 20, 2005, indicating a PEU of 100%).

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Despite characterizing its traffic as interconnected VoIP on multiple occasions, and despite benefiting financially in the parties' settlement on account of such a characterization, Big River now argues that its VoIP service is not "interconnected VoIP" because it does not "require a broadband connection." *See* Big River Position Statement. As an initial matter, this is an 11<sup>th</sup>-hour tactic worthy of no credence. Big River first made this assertion in the very last round of testimony, within the November 30, 2012, surrebuttal testimony of Mr. Howe (Big River Exh. 3). Yet, in response to a direct question during his October 23 deposition, Mr. Howe asserted that Big River's traffic is not interconnected VoIP for an entirely different reason – because "we are not registered with the state to provide that service." He next confirmed during his deposition that he was "done with [his] answer," and, finally, he conceded that if Big River had registered, then its traffic would qualify as interconnected VoIP. *See* AT&T Exh. 14 (Howe Dep.) at 27-28. Big River's current position is plainly inconsistent with Mr. Howe's prior testimony (including not only his deposition testimony in this case, but also his prior testimony

in other proceedings, cited above). In any event, even on its merits Big River's latest argument<sup>5</sup> should be rejected.

According to Big River, even if its VoIP service is provided over broadband connections, it should not be deemed to "require" a broadband connection because it does not need more than 100 kbps, rather than 4 Mbps, of the connection's bandwidth to operate. *See* Hrg. Tr. at 101. The suggestion that a VoIP service is not interconnected VoIP – and hence is not subject to E911 and the several other requirements imposed on interconnected VoIP providers under federal law and Section 392.550, RSMo – unless it requires a bandwidth of at least 4 Mbps to operate is nonsense. Four Mbps may be required to, *e.g.*, stream high-quality video while surfing the Internet, but there is no evidence that *any* voice telephone service requires 4 Mbps to operate. After all, high-quality voice service has been provided for decades before such high-capacity facilities even existed. And the FCC has recognized that real-time VoIP services can operate at 100 kbps, well below its line between narrowband and broadband.

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<sup>5</sup> Big River's Position Statement does not maintain that Big River's traffic should not be classified as interconnected VoIP traffic because Big River has not registered as an interconnected VoIP provider, and hence AT&T Missouri assumes that Big River has abandoned that argument.

See *Eighth Broadband Progress Report*, 27 FCC Rcd. 10342, 2012 WL 3612019, ¶ 23 (FCC rel. Aug. 21, 2012) (excerpts included in Attachment 4 hereto).<sup>6</sup>

Instead, 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. 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. Again, 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

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<sup>6</sup> Big River wrongly asserts that the FCC changed the definition of broadband to 4 Mbps in its *Eighth Broadband Progress Report*. See Hrg. Tr. at 64-65, 253. In that report (Att. 4 hereto, ¶¶ 18-19), the FCC merely reaffirmed the speed “benchmark” of 4 Mbps it had adopted in its 2010 *Sixth Broadband Deployment Report*. The FCC releases its broadband progress reports pursuant to its obligation under section 706 to report upon whether broadband is being deployed to all Americans in a reasonable and timely fashion (*see id.* ¶ 1), and the broadband “benchmark” it uses in those reports is not used for any other purposes. When it adopted the 4 Mbps benchmark, the FCC was careful to “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 . . .” *Sixth Broadband Deployment Report*, 25 FCC Rcd. 9556, 2010 WL 2862584, ¶ 11 n.46 (FCC rel. July 20, 2010) (emphases added) (excerpted in Attachment 5 hereto). The FCC’s own report thus refutes Big River’s contention that the broadband progress report benchmark should be used for purposes of classifying interconnected VoIP providers.

For regulatory purposes, the FCC has indicated that the line between narrowband and broadband is 200 kbps, in either direction. For example, when it extended to interconnected VoIP providers the requirements of the Communications Assistance for Law Enforcement Act (CALEA), the FCC stated: “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.” 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) (“*CALEA Order*”) (excerpted in Attachment 6 hereto). See also 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 (“*Wireline Broadband Framework Order*”) (excerpted in Attachment 7 hereto) (“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).”); Declaratory Ruling, *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd. 5901, 2007 WL 1288052, ¶ 19 n.55 (FCC rel. March 23, 2007) (“*Wireless Broadband Framework Order*”) (excerpted in Attachment 8 hereto) (same); FCC Enforcement Advisory No. 2011-12, 26 FCC Rcd. 16769, 16771, 2011 WL 6288126 (FCC rel. Dec. 16, 2011) (“*FCC Enforcement Advisory*”) (Attachment 9 hereto) (“broadband connections are wired ‘lines’ or wireless ‘channels’ that enable the end user to receive information from and/or send information to the Internet at information transfer rates exceeding 200 kbps in at least one direction” (emphasis in original)).

customers. *See* Hrg. Tr. at 63-64; AT&T Exh. 14 (Howe Dep.) at 28, 57. Whether or not Big River uses the entire capacity of these connections for its voice service, the connections remain “broadband connections” designed to provide high-capacity, broadband services. *See, e.g.*, Stipulation No. 30 (DSL is “broadband service provided over ‘last mile’ facilities”); 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”); 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”).

**B. The Other Features Of Big River’s Telephone Service Do Not Make It “Enhanced Services” Traffic.**

In its complaint and opening testimony presenting its case-in-chief, Big River did not assert that its traffic is “enhanced” because it is VoIP traffic. Instead, Big River contended the dispute did not involve VoIP traffic, and that other features of its traffic that are not “part of Voice Over IP” made its traffic “enhanced.” *See* Big River Exh. 4 (Jennings Direct) at 6; Big River Exh. 1 (Howe Direct) at 6.

As an initial matter, the Commission need not and should not reach the issue of whether these other features make Big River’s service an enhanced service. Under the parties’ interconnection agreement, as amended, interconnected VoIP traffic is subject to access charges whether or not it is enhanced services traffic. Because, as explained above, Big River’s traffic is interconnected VoIP traffic, that is the end of the matter.

In any event, as explained below, even if Big River’s traffic were not interconnected VoIP traffic (though it is), the other purported “enhancements” Big River relies upon do not make its traffic “enhanced services” traffic.

1. Big River's use of different signaling protocols is beside the point.

Much of Big River's testimony addresses Big River's use of different signaling protocols, and its conversion of signaling information to and from the different format (SS7) used by AT&T. *See, e.g.*, Big River Exh. 1 (Howe Direct) at 4-6, 9-10; Big River Exh. 2 (Howe Rebuttal) at 13; AT&T Exh. 14 (Howe Dep.) at 42-44 (explaining that Illustration 2 in Big River Exh. 2 shows signaling). For example, Big River purportedly converts the Dual Tone Multi-Frequency ("DTMF") signals that are generated when a customer presses his or her telephone keypad. Big River Exh. 1 (Howe Direct) at 9-10. As a matter of law, Big River's use of different protocols for signaling information does not make its telephone service an "enhanced service."

The FCC has made clear that "[t]he definition of enhanced service includes . . . 'processing applications that act on the . . . protocol of the subscriber's transmitted information,'" but "the definition of enhanced service does not reach protocol conversions that are performed internally to a carrier's network, and not manifested at the outputs of the network in end-to-end transmission." *Communication Protocols*, 95 FCC2d 584, 1983 WL 182962, ¶ 14 (FCC 1983) (emphases added) (excerpts included in Attachment 10 hereto). Thus, the FCC has explained that the conversion of signaling information such as "subscribers' transmitted dialing (routing) information," including "premises equipment-generated signals which . . . tell the network the destination of the call (i.e., dialing-type signals)," does not make a service "enhanced." *Id.* at ¶¶ 14-15. As a result, Big River's use of different protocols for DTMF signals and other signaling information does not make the telephone service it provides an "enhanced service."

2. Big River's facsimile features do not make its telephone service an "enhanced service."

Big River also explains that its fax service uses a different codec than on AT&T's network, and allows customers to have faxes converted to PDF files and emailed to them. *See* Big River Exh. 1 (Howe Direct) at 7-9. Even if this fax service were an enhanced service, that would not make the traffic Big River delivered to AT&T – which consisted of telephone calls from Big River customers to AT&T customers, not fax transmissions to Big River customers – enhanced services traffic.

As the FCC has explained, “services that are ‘incidental’ to an underlying telecommunications service and do not ‘alter[] their fundamental character’ even if they may meet the literal definition of an information service or enhanced service” are classified as “[a]djunct-to-basic services,” and are “not an ‘enhanced service.’” *In re AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826, 2005 WL 433235, ¶ 16 (2005) (“*AT&T Corp. Petition*”) (excerpts included in Attachment 11 hereto). “[T]he key question in classifying offerings with both telecommunications and information [*i.e.*, enhanced, in the older terminology] service capabilities is whether the telecommunications transmission capability is ‘sufficiently integrated’ with the information service component ‘to make it reasonable to describe the two as a single, integrated offering.’” AT&T Exh. 36, p. 4 ¶ 14 (*In the Matter of Regulation of Prepaid Calling Card Services*, 21 FCC Rcd. 7290, 2006 WL 1826190 (rel. June 30, 2006) (“*Prepaid Calling Card Order*”). “[M]erely packaging two services together does not create a single integrated service.” *Id.*

Here, Big River's fax service may be packaged with its voice telephone service, but it is not so integrated with its voice telephone service as to affect the latter's classification. Big River's telephone customers can, of course, place voice telephone calls without simultaneously

sending or receiving a fax. In any case, Big River has admitted that when a fax is converted to PDF and emailed to a Big River customer, that communications session does not consist of a telephone call to one of AT&T's customers. *See* AT&T Exh. 15 (RFA 14).

3. Big River's use of a high definition codec does not make its traffic an enhanced service.

Big River also points to its use of a "high definition" codec to provide better sound quality on voice telephone calls. *See* Big River Exh. 2 (Howe Rebuttal) at 6-8. That too is irrelevant. The FCC explained decades ago that a "basic" service, as opposed to an enhanced service, includes "the offering of transmission capacity between two or more points suitable for a user's transmission needs and subject only to the technical parameters of fidelity or distortion criteria, or other conditioning," but "[u]se internal to the carrier's facility of . . . message or packet switching, error control techniques, etc., that facilitates economical, reliable movement of information does not alter the nature of the basic service." *Second Computer Inquiry*, 77 FCC2d 384, 1980 WL 356789, ¶ 95 (1980) (excerpts included in Attachment 12 hereto).<sup>7</sup> In an enhanced service, on the other hand, "computer processing applications are used to act on the content, code, protocol, and other aspects of the subscriber's information," and "[i]n these services additional, different, or restructured information may be provided the subscriber." *Id.* ¶ 97.

Big River's alleged use of a "high definition" codec is merely an internal technique used to facilitate the economic, reliable transmission of the users' information (*i.e.*, speech). It does not actually alter the users' information. Indeed, Big River admits that "the 'speech' is the

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<sup>7</sup> The Commission's own rulings have been faithful to the FCC's precedent. Only last summer, the Commission found that "suppressing background noise and adding comfort noise are not 'enhancements' to the underlying voice telecommunications service. They are merely the same type of call conditioning that carriers normally provide, and have provided for some time, as an incidental part of voice service (*e.g.*, by using repeaters to boost a voice signal over long distances)." *See*, *Halo Wireless, Inc. v. Craw Kan Telephone Cooperative, Inc.*, TC-2012-0331, Report and Order, issued August 1, 2012, at 44.

same,” and “[t]he difference is not in the content of the speech but in the quality of the data transmitted coupled with the codec used to process the audio information to reproduce in the highest quality manner on the other end.” Big River Exh. 2 (Howe Rebuttal) at 7. Even if Big River’s voice service more faithfully transmits users’ speech that would not make it an enhanced service.

4. The other features of Big River’s telephone service do not make its telephone service an enhanced service.

Finally, Big River points to several ancillary features and functions it provides its telephone service customers, such as call recording capabilities, voice mail capabilities, the ability to configure incoming call features like call forwarding via the web, conference call features, and the like. *See* Big River Exh. 1 (Howe Direct) at 7-8, 12-14. As a matter of law, none of these features are sufficient to transform Big River’s underlying telephone service – in particular the service allowing Big River’s customers to make voice telephone calls to AT&T’s customers – into an enhanced service.

As explained above, the FCC has held that “services that are ‘incidental’ to an underlying telecommunications service and do not ‘alter[] their fundamental character’ even if they may meet the literal definition of an information service or enhanced service” are classified as “[a]djunct-to-basic services,” and are “not an ‘enhanced service.’” *AT&T Corp. Petition*, ¶ 16. “Such ‘adjunct-to-basic services’ may include, among others, ‘speed dialing, computer-provided directory assistance, call monitoring, call tracing, call blocking, call return, repeat dialing, call tracking, call waiting, caller I.D., call forwarding, and certain centrex features.” *In re Telecommunications Relay Services*, 23 FCC Rcd. 11591, 2008 WL 2553510, n.367 (2008) (excerpts included in Attachment 13 hereto). Here, all of the features described by Big River are

incidental to its provision of telephone service, and do not change the fundamental character of that service – *i.e.*, the ability to pick up a telephone and place a voice telephone call.

Moreover, Big River’s customers can, of course, make voice telephone calls without simultaneously accessing voicemail, modifying their incoming call options via the web, or using the other features described by Big River. Indeed, Big River has admitted that its customers can place non-local voice telephone calls to AT&T Missouri’s customers without activating the feature to record the call, without configuring their incoming call manager or viewing, configuring, or managing their call-handling options, and without obtaining information via the web. *See* AT&T Exh. 15 (RFAs 9, 10, 12, 15). As a result, the features described by Big River, even if “enhanced,” are merely packaged with its underlying voice telephone service, and are not sufficiently integrated with that voice service as to govern its classification. AT&T Exh. 36, p. 4 ¶ 14 *Prepaid Calling Card Order*.

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In short, 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?**

**A. Access Charges Apply To The Traffic At Issue.**

The answer to Issue No. 2 is straightforward: because the traffic Big River delivered to AT&T is interconnected VoIP traffic, it is subject to access charges. Pursuant to the amendment to the parties’ ICA, 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.” AT&T Exh. 13, § 6.

**B. Big River Should Be Ordered To Pay The Access Charges Billed By AT&T Missouri On BAN 803.**

Having demonstrated that Big River's traffic is subject to access charges, there remains only the matter of establishing the amount of those charges. AT&T's evidence on this score is clear and unrebutted. The Commission should find that the amount is \$352,123.48, as of the December, 2012 bill, as well as applicable late payment charges and any new charges that have accrued since the December, 2012 bill.<sup>8</sup>

AT&T presented a detailed accounting of the charges. *See, e.g.* AT&T Exh. 33. 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. *See* Stipulation No. 14; Big River Complaint, ¶ 23; AT&T Answer, ¶ 23. There is likewise no dispute that the charges billed through and including the December, 2012, bill total \$352,123.48. *See* AT&T Exh. 33; Hrg. Tr. at 198 (correcting AT&T Exh. 4 (Greenlaw Direct) at 22).

Big River does not dispute that this is the amount sought by AT&T, nor does Big River dispute that this amount reflects the total of the access charges that were billed monthly by AT&T and that Big River refused to pay.<sup>9</sup> On this basis, the Commission should find that the amount of the access charges which Big River owes to AT&T is as stated above.

**C. Big River Has Not Raised Any Genuine Issue Regarding The Accuracy Of AT&T's Monthly Access Charge Bills.**

Big River contended in its rebuttal testimony - for the first time - that the amount Big River owes AT&T may be in question because Big River was not provided sufficient data to

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<sup>8</sup> AT&T Exh. 9, Section 14.1; AT&T Missouri Access Services Tariff, P.S.C. Mo.-No. 36, 1<sup>st</sup> Revised Sheet 17.01, Section 2.4.1.D.

<sup>9</sup> 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 dollars-and-cents amount shown by AT&T as the "total amount past due" as of April, 2011. *Compare* Big River Exh. 4 (Jennings Direct), Sch. 3 with AT&T Exh. 4 (Greenlaw Direct) Sch. 9 (HC) and AT&T Exh. 33.

determine whether there was “any erroneous billing.” Big River Exh. 5 (Jennings Rebuttal) at 4-5. The Commission should reject that contention, for a number of independent reasons.

First, despite three years of billings from AT&T, Big River does not identify any actual alleged inaccuracy in AT&T’s bills. Rather, it merely speculates that inaccuracies might exist, while claiming to lack sufficient data to determine the accuracy of the bills. That ignores the fact that Big River had every opportunity in this proceeding to serve discovery regarding AT&T’s bills and to request whatever data Big River contended necessary to “validate” AT&T’s bills. Big River did not avail itself of that opportunity, and instead rests its case upon pure speculation. That is insufficient to raise any genuine issue regarding the accuracy of AT&T’s monthly access charge bills.

Second, Big River’s speculation about the accuracy of AT&T’s bills is, in any event, not an issue properly before this Commission. 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<sup>10</sup> and in the defenses to the complaint.<sup>11</sup> 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.

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. *See, e.g.*, Big River Complaint, ¶ 24 (“Big River disputed

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<sup>10</sup> *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[.]”).

<sup>11</sup> *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.”).

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.”).

Likewise, Big River's lone specific affirmative defense to AT&T Missouri's complaint asserted that “Big River's traffic is *exempt from* the access charges claimed by AT&T Missouri because the traffic is enhanced.” Big River Answer, p. 2 (emphasis added).

Third, Big River is precluded by the dispute provisions of the parties' ICA from asserting this claim before the Commission. Under the ICA, Big River is required to specifically identify to AT&T the details and reasons for disputing any charges billed by AT&T. 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 the charges, and the ICA does not permit Big River to raise any such dispute now.

Sections 9 and 13 of the General Terms and Conditions (“GT&Cs”) of the ICA govern billing dispute resolution matters. Stipulation No. 16. Section 9 of the GT&Cs pertains to “Payment of Rates and Charges.” Section 9.2 and Section 9.3 in pertinent part, 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. [Emphasis added.]

Section 13.4, in turn, pertains to “Billing Disputes.” Section 13.4.1 provides:

13.4.1. 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. [Emphases added.]

In short, the ICA requires a party disputing a bill to provide specific details and reasons for its dispute. While Big River disputed AT&T's access charge bills on the ground that Big River purportedly is exempt from those charges, Big River did *not* dispute the bills upon any other ground, including any alleged inaccuracy in AT&T's bills.

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. Hrg. Tr. at 210, 218; AT&T Exh. 9, §§ 15.1 and 15.3. Its April 19 letter to AT&T made no claim that AT&T's bills had been inaccurately calculated. Big River Exh. 4 (Jennings Direct), Sch. 3; Hrg. Tr. at 136. Nor did its May 19, 2011, letter to AT&T. Big River Exh. 4 (Jennings Direct), Sch. 4; Hrg. Tr. at 137. 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." Big River Exh. 4 (Jennings Direct) at 6.

Janice Mullins, assigned as AT&T's representative for handling the dispute (Stipulation No. 18), 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 Missouri denied the dispute. Stipulation No. 20; *see also* Big River Exh. 14; Hrg. Tr. at 222, 226. Ms. Mullins likewise confirmed that Big River's only claim throughout the informal

dispute resolution 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. AT&T Exh. 8 (Mullins Surrebuttal) at 5. Ms. Mullins 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 that it should not be billed at all, i.e., that it was *exempt* from access charges.” *Id.* at 8 (emphasis original). John Jennings, Big River’s appointed representative, did not disagree, as shown in 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.”

Hrg. Tr. at 139-140.

In addition, it is telling that Big River first requested call detail data on November 30, 2011. AT&T had commenced billing Big River access charges on a monthly basis long before that date, in February of 2010. Big River’s first request for records came nearly two years later, only after Big River had disputed the charges, after it engaged in informal dispute resolution, after AT&T had formally denied Big River’s dispute (on November 1, 2011), and after the informal dispute resolution process was concluded. *See* Hrg. Tr. at 243-245.

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. *See* AT&T Exh. 8 (Mullins Surrebuttal)

at 3-8. This point 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."

Hrg. Tr. at 140-141.

In short, because Big River did not dispute AT&T's bills upon the ground of any alleged inaccuracy, 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.<sup>12</sup>

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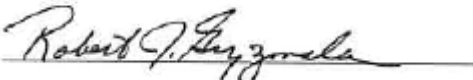
<sup>12</sup> Even if Big River were inclined at this point to submit a dispute of AT&T's bills upon the alleged grounds of inaccuracy, Section 13.1.1 of the ICA's GT&Cs provides that "no claims will be brought for disputes arising from this Agreement more than 24 months from the date the occurrence which gives rise to the dispute is discovered or reasonably should have been discovered with the exercise of due care and attention." Big River has admitted from the outset 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." 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 claim 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.

## Conclusion

For all of the foregoing reasons, 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, as amended, access charges apply to such traffic, in the amount that AT&T billed Big River under BAN 110 401 0113 803.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

BY 

ROBERT J. GRYZMALA

#32454

LEO J. BUB

#34326

Attorneys for Southwestern Bell Telephone Company,  
d/b/a AT&T Missouri

One AT&T Center, Room 3520

St. Louis, Missouri 63101

314-235-6060 (Telephone)/314-247-0014 (Facsimile)

[robert.gryzmala@att.com](mailto:robert.gryzmala@att.com)

Hans J. Germann (admitted *pro hac vice*)

Mayer Brown LLP

71 S. Wacker Drive

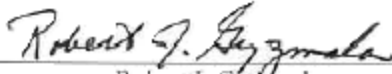
Chicago, IL 60606

312-782-0600 (Telephone)/312-701-7711 (Facsimile)

[HGermann@mayerbrown.com](mailto:HGermann@mayerbrown.com)

## **CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing document were served to all parties by e-mail on January 28, 2013.

  
Robert J. Grymalak

John Borgmeyer  
General Counsel  
Missouri Public Service Commission  
PO Box 360  
Jefferson City, Mo 65102  
[GenCounsel@psc.mo.gov](mailto:GenCounsel@psc.mo.gov)  
[john.borgmeyer@psc.mo.gov](mailto:john.borgmeyer@psc.mo.gov)

Lewis Mills  
Public Counsel  
Office of the Public Counsel  
PO Box 7800  
Jefferson City, MO 65102  
[opcservice@ded.mo.gov](mailto:opcservice@ded.mo.gov)

Brian C. Howe #36624  
Big River Telephone Company, LLC  
12444 Powerscourt Drive, Suite 270  
St. Louis, Missouri 63131  
Email: [bhowe@bigrivertelephone.com](mailto:bhowe@bigrivertelephone.com)