

Exhibit No.:
Issue:
Witness: Gerard J. Howe
Sponsoring Party: Big River Telephone
Company, LLC
Type of Exhibit: Surrebuttal Testimony
Case No.: TC-2012-0284

BIG RIVER TELEPHONE COMPANY, LLC

SURREBUTTAL TESTIMONY

OF

GERARD J. HOWE

TC-2012-0284

November 30, 2012

**PRE-FILED SURREBUTTAL TESTIMONY
OF
GERARD J. HOWE**

1 **Q. PLEASE STATE YOUR NAME.**

2 A. Gerard J. Howe.

3 **Q. ARE YOU THE SAME GERARD J. HOWE WHO SUBMITTED DIRECT AND**
4 **REBUTTAL TESTIMONY IN THIS CASE?**

5 A. Yes.

6 **Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY?**

7 A. I am responding to various statements made in the rebuttal testimony of AT&T and
8 Missouri Public Service Commission Staff (“Staff”) witnesses.

9 **Q. MR. WILLIAM VOIGHT, THE STAFF WITNESS IN THIS CASE,**
10 **CONCLUDED THAT “THE ONLY ISSUE FOR THE COMMISSION TO**
11 **DECIDE IN THIS CASE IS WHETHER OR NOT BIG RIVER IS PROVIDING**
12 **I-VOIP SERVICE AS DEFINED BY §386.020(23) RSMO”. HE WENT ON TO**
13 **CONCLUDE BIG RIVER IS PROVIDING I-VOIP SERVICE BASED ON**
14 **YOUR RESPONSES TO QUESTIONS POSED BY AT&T MISSOURI’S LEGAL**
15 **COUNSEL IN YOUR DEPOSITION OF OCTOBER 23, 2012. DO YOU**
16 **BELIEVE HIS CONCLUSION THAT BIG RIVER IS PROVIDING**
17 **INTERCONNECTED VOIP SERVICE IS CORRECT?**

1 A. No. Big River has not provided, and is not providing, interconnected voice over
2 internet protocol service (“Interconnected VOIP” or “I-VOIP”) as defined in
3 §386.020(23). I think he drew conclusions from answers to questions that are
4 irrelevant to the requirements of the statute.

5 **Q. PLEASE EXPLAIN.**

6 A. Both Mr. Voight and AT&T Missouri’s witness, Mr. Greenlaw, cited §386.020(23) in
7 support of the position that Big River is an interconnected VOIP provider. However,
8 the statute states four conditions that define “Interconnected voice over internet
9 protocol” service. The second condition, item (b), says that the service “requires” a
10 broadband connection from the user’s location.” Mr. Voight pointed this out on Line 9
11 of Page 7 of his Rebuttal Testimony. Quite simply, the service Big River provides does
12 not “require” a broadband connection from the user’s location.

13 **Q. BUT, IN RESPONSE TO THE QUESTION IN YOUR DEPOSITION FROM**
14 **AT&T’S LEGAL COUNSEL, DIDN’T YOU STATE THAT YOU THOUGHT**
15 **BIG RIVER CUSTOMERS HAVE A BROADBAND CONNECTION TO**
16 **THOSE CUSTOMER’S LOCATION?**

17 A. Yes, I did state that I thought so. I said that I thought so because I don’t know.
18 Whether or not they have broadband connections is irrelevant and a fact which Big
19 River doesn’t need to know because Big River’s service does not require a broadband
20 connection. Some Big River customers may have a broadband connection and some

1 may not. The only relevant fact is that a broadband connection is not required, of
2 which, I am certain.

3 **Q. BIG RIVER'S SERVICE DOES NOT REQUIRE A BROADBAND**
4 **CONNECTION TO THE CUSTOMER'S LOCATION?**

5 A. Absolutely not.

6 **Q. CAN YOU EXPLAIN HOW THAT CAN BE?**

7 A. First, one must understand what is broadband. Broadband is a connection with a
8 minimum speed in excess of 200 kilobits per second (kbps) in both the uplink and
9 downlink directions. The FCC established this minimum broadband speed standard in
10 its First Broadband Development Report released on February 2, 1999. It is a widely
11 accepted standard. It was referenced and used by AT&T in its Merger Commitments
12 made to the federal government in the merger of AT&T and BellSouth in December
13 2006. The 200 kbps standard was also used by the Missouri PSC in its Missouri
14 Broadband Report, issued in December 2011 in response to a request from the Missouri
15 State Senate Committee on Commerce, Consumer Protection, Energy and the
16 Environment.

17 The 200 kbps minimum broadband speed standard far exceeds Big River's
18 service requirements. Thus, a broadband connection is not required for Big River's
19 services.

20 To demonstrate this capability, I directed one of Big River's Network

1 Operations staff members to set one of Big River's test DSL lines with a capped
2 bandwidth speed of 40 kbps. Capping the bandwidth at 40 kbps will limit the speeds
3 on the uplink and downlink on that connection to 40 kbps. Forty (40) kbps is slower
4 than a traditional dial-up connection. I then directed him to attach an IP-enabled
5 customer premise equipment device to the DSL connection and asked him to call me. I
6 recorded the conversation on my iPad, running a softphone app which I used to answer
7 and record the call. I have attached the recording to my testimony as Howe Surrebuttal
8 Attachment 1. That call, like all calls on Big River's network, is using IP protocol,
9 formatted using a G.729 codec, and has access to all of the enhanced information
10 service features that were listed in my direct testimony and/or Big River's Complaint.
11 Thus, Big River's services do not "require" a broadband connection.

12 As I said in my deposition, I think that Big River's customers with CPE have a
13 broadband connection, but it is certainly not required as specified in §386.020(23). As
14 such, Big River is not an interconnected VOIP provider.

15 **Q. MR. VOIGHT REFERENCED THE FCC ORDER ISSUED ON JUNE 27, 2006**
16 **AND CONCLUDED THAT THE FCC DOES NOT CONSIDER FIXED**
17 **LOCATION VOICE OVER INTERNET PROTOCOL AN ENHANCED**
18 **SERVICE. DO YOU AGREE?**

19 **A.** No. I reviewed the order that Mr. Voight cited. From my reading of the FCC's
20 decision, his reference to that order is inapplicable for a couple of reasons. First, in that
21 order, the FCC references and defines "Interconnected Voice Over IP" and uses the

1 same definition as that used in the Missouri statute which, as explained, does not apply
2 to Big River's service.

3 Second, as CEO of Big River, I have to stay abreast of developments at the
4 FCC. Accordingly, I have followed the FCC's Intercarrier Compensation Reform
5 docket. In an order from that docket dated November 18, 2011, the FCC acknowledged
6 that it had not yet officially determined whether VOIP was a telecommunication (basic)
7 service or an information (enhanced) service, contradicting Mr. Voight's conclusion.

8 Third, as I pointed out in my rebuttal testimony, the wording in Section 13.3 of
9 the Interconnection Agreement has been fully litigated, and I have been personally
10 involved in each step of that litigation. Initially, it was arbitrated and approved by the
11 Missouri Public Service Commission. Despite the fact that AT&T sued the
12 Commission in Federal District Court, seeking alternative language for Section 13.3,
13 the Federal District Court upheld the language now included in Section 13.3. When the
14 Federal District Court upheld the Missouri PSC's decision, the Court had before it, a
15 variety of legal arguments as to why the language now in Section 13.3 was
16 inappropriate given various FCC orders, regulations and statutes. The FCC order
17 referenced by Mr. Voight as well as the previous FCC Order in that docket, released
18 June 3, 2005, predated the federal court's decision regarding paragraph 13.3 and was
19 presumably known to the court when it issued its order.

20 The language in Section 13.3 of the ICA now stands on its own, subject of
21 course, to the amendment for HB 1779 which does not apply to Big River because Big

1 River is not an interconnected VOIP provider.

2 **Q. DID THE FEDERAL DISTRICT COURT’S OPINION AFFIRMING THE**
3 **MISSOURI PUBLIC SERVICE COMMISSION’S ORDER ADDRESS THE**
4 **COMMISSION’S DECISION TO SUBJECT IP-PSTN TRAFFIC TO**
5 **RECIPROCAL COMPENSATION RATHER THAN ACCESS CHARGES?**

6 A. Yes. To my understanding, the Federal District Court clearly indicated that IP-PSTN
7 traffic “undergoes a net change in form and content” because it originates at the caller’s
8 location in IP protocol and is transformed at the CLEC’s switch into the TDM format
9 recognized by conventional PSTN telephones, and ends at the recipient’s location in
10 TDM.” The Court also stated that such a net-protocol conversion is determinative of
11 whether a service is an enhanced or information service.

12 **Q. DOES BIG RIVER’S NETWORK PERFORM THE TYPES OF CONVERSION**
13 **AS DESCRIBED IN THE FEDERAL DISTRICT COURT’S OPINION?**

14 A. Yes. The calls on our network originate in IP format at the customer’s location and are
15 transformed to TDM at Big River’s switch for delivery to AT&T Missouri’s network.
16 If Big River did not change the protocol of the data received from the customer’s
17 location to TDM, the called party’s traditional telephone could not receive the call.

18 **Q. DO YOU CONCUR IN MR. VOIGHT’S RECOMMENDATION THAT THE**
19 **COMMISSION ORDER AT&T TO PROVIDE CALL DETAIL RECORDS TO**
20 **SUBSTANTIATE AT&T’S CLAIM?**

1 A. I concur with Mr. Voight's assessment that AT&T has not substantiated its claim.
2 However, the time is past due for AT&T to have produced its supporting evidence.
3 AT&T has failed to provide any supporting detail other than a schedule offered by
4 AT&T's witness, Mr. Greenlaw. And even Mr. Greenlaw admits that he is "not an
5 expert on usage record field values"; the very data that would be required to
6 substantiate AT&T's claim.

7 Further, it is too late for AT&T to present such data. Big River had requested
8 supporting data necessary to reconcile AT&T's billing during the course of its dispute
9 with AT&T and was refused. As AT&T pointed out in its response to Big River's
10 Motion to Strike Portions of AT&T Missouri's Direct Testimony, AT&T Missouri
11 presented "its entire case" in its direct testimony. AT&T had its opportunity and
12 presented its entire case but failed to provide any evidence to support the amount it
13 claimed it is owed. AT&T had its opportunity to present evidence so that all parties
14 could analyze and evaluate such evidence and confirm or rebut its validity as
15 appropriate. AT&T failed to do so and has provided no justification for being allowed
16 to do so at this late juncture.

17 **Q. IS IT REASONABLE TO ASSUME THAT THE AMOUNT PROVIDED BY MR.**
18 **GREENLAW ACCURATELY REPRESENTS THE AMOUNT BIG RIVER**
19 **WOULD OWE IF THE COMMISSION FOUND THAT ITS TRAFFIC WAS**
20 **SUBJECT TO ACCESS CHARGES?**

21 A. No. First, there has been no evidence provided to substantiate the amount. Second,

1 even Mr. Greenlaw admits that he is not an expert on call detail records, which is the
2 very data required to substantiate AT&T's claimed amount owed. This supports Big
3 River's assertion that Mr. Greenlaw lacks the experience and/or expertise to testify
4 regarding billing. He has no basis for his opinions regarding the contents of usage
5 records other than having "confirmed" them with some unnamed source. So, AT&T
6 has proffered no fact witness or any expert to whom Big River or the Staff could direct
7 questions to address any underlying issues. Third, the traffic data upon which the billed
8 amount would be calculated is out of the ordinary course of AT&T's processing of
9 traffic data which makes it more susceptible to mishandling as described by John
10 Jennings. And finally, Big River's experience with similar data presented by supposed
11 AT&T "expert" witnesses in cases before other state commissions reflect an inability to
12 consistently provide accurate data in their testimony and in their responses to data
13 requests.

14 **Q. YOU MENTIONED THAT BIG RIVER HAS EXPERIENCE WITH SIMILAR**
15 **DATA PRESENTED BY AT&T PROFESSIONAL WITNESSES IN CASES IN**
16 **OTHER STATES THAT REFLECTS AT&T MISSOURI'S INABILITY TO**
17 **PROVIDE ACCURATE DATA. COULD YOU EXPLAIN?**

18 A. Yes. In just the past few years alone, we have had experience with data presented by
19 AT&T "expert" witnesses that have been wrong, misleading and inaccurate, especially
20 when it comes to billing and data derived from detail call records.

21 For instance, in a recent case in Illinois, AT&T Illinois and Big River arbitrated

1 an issue involving intercarrier compensation. In that case, AT&T Illinois proffered an
2 “expert” witness by the name of J. Scott McPhee. In the Illinois arbitration case, Mr.
3 McPhee provided data that reflected that AT&T Illinois was sending Big River tens of
4 thousands of minutes of traffic each month and Big River sent less than 1,000 minutes
5 of traffic over an entire twelve month period.

6 I rebutted the validity of Mr. McPhee’s data, citing that the data was ridiculous
7 and absurd.

8 It was later shown that AT&T Illinois was billing Big River for tens of
9 thousands of minutes of traffic that AT&T was terminating from Big River’s network
10 each month, in line with the volume of traffic I provided in my testimony and over 700
11 times the volumes testified to by Mr. McPhee. Moreover, in Big River’s subsequent
12 analysis of AT&T’s billing, AT&T was found to be billing Big River a rate per minute
13 that was seven (7) times the rate that was indicated in the interconnection agreement
14 with between the parties.

15 Mr. McPhee and Mr. Greenlaw seem to be treated as interchangeable parts by
16 the AT&T affiliates. In the last two billing disputes between an AT&T affiliate and
17 Big River, Mr. McPhee testified on behalf of the AT&T affiliate. In addition, Mr.
18 McPhee testified before this Commission in the Halo case which AT&T Missouri has
19 repeatedly argued is similar to the case at hand. But now, instead of Mr. McPhee,
20 AT&T Missouri has engaged Mr. Greenlaw. Mr. Greenlaw’s background is very
21 similar to that of Mr. McPhee; both appear to have spent their entire working careers at

1 AT&T with essentially all of their experience in wholesale marketing and support, with
2 each now providing regulatory and witnessing support. Neither have any work
3 experience or any particular expertise in billing and yet AT&T affiliates like AT&T
4 Missouri repeatedly rely on them for the purposes of testifying before regulatory
5 commissions.

6 **Q. ARE THERE OTHER EXAMPLES OF ERRORS IN DATA PROVIDED BY**
7 **AT&T PROFESSIONAL WITNESSES?**

8 A. Yes. In a subsequent arbitration case between AT&T and Big River in Indiana,
9 network traffic and billing data provided by AT&T's professional witnesses was again
10 found to be in error.

11 In that case, Big River requested data relative to the amounts and minutes of
12 traffic for which AT&T was billing Big River in the state of Illinois. Mr. Stanley
13 Mensinger was the responsible person that responded for AT&T to Big River's request.
14 Interestingly and incorrectly, Mr. Mensinger stated that AT&T did not have a record of
15 billing Big River Telephone for reciprocal compensation in the state of Illinois. Mr.
16 Mensinger's assertion that AT&T had not billed Big River for reciprocal compensation
17 in Illinois was clearly in error; AT&T had been billing Big River for reciprocal
18 compensation in Illinois for a year at the time of Mr. Mensinger's response. Since Mr.
19 Mensinger was not a witness in the Indiana case, I have no idea as to his background or
20 why he was the responsible person responding to Big River's data request.

21 Also, in the Indiana arbitration case, AT&T proffered an "expert" witness, a Mr.

1 James Hamiter, whose expertise was in the area of “network policies, procedures and
2 plans from a regulatory perspective”. Mr. Hamiter provided data relative to existing
3 interconnection trunks between AT&T and Big River and he included trunk
4 information in an area in which Big River does not operate and has no network
5 facilities. When questioned about this apparent error, Mr. Hamiter said that the
6 information about the questionable trunk group was “part of the information that was
7 delivered to me by the network”. He further acknowledged that the error could very
8 well be the cause of a billing error, although he also acknowledged he wasn’t “the
9 billing expert”.

10 These sorts of errors by AT&T professional witnesses, especially in regard to
11 trunking, traffic and billing, reinforce the need for AT&T to have provided evidence in
12 support of their claim at the outset of this case so as to have allowed the Staff and Big
13 River the opportunity to validate their claim. The fact that AT&T had not done so, has
14 left Big River and Staff no opportunity to validate or question any amount AT&T might
15 claim they are owed.

16 **Q. MR. GREENLAW TESTIFIED THAT THE AUDIT PROVISIONS OF THE ICA**
17 **WERE NOT DESIGNED FOR THE TYPE OF DISPUTE AT ISSUE. DO YOU**
18 **AGREE?**

19 A. No. In fact, Mr. Greenlaw’s lengthy dissertation on the audit issue clearly demonstrates
20 his lack of familiarity with the ICA. Mr. Greenlaw spent considerable time discussing

1 the general audit provisions of the ICA. However, he completely overlooked the fact
2 that paragraph 13.3 specifically provides for an audit of a party's claimed PEU. It
3 states, "Either party may audit the other Party's PEU factors pursuant to the audit
4 provisions of this Agreement." It's difficult to understand why the parties would have
5 unambiguously included the right to audit in that paragraph if they did not intend for it
6 to apply.

7 **Q. DO YOU HAVE ANY COMMENTS ON THE REBUTTAL TESTIMONY OF**
8 **AT&T'S WITNESS, MR. NEINAST?**

9 A. Yes. Like his direct testimony, Mr. Neinast's rebuttal testimony suffers from the same
10 lack of knowledge with regard to Big River's network and its operations, which render
11 his observations in this case useless. He readily admitted in his rebuttal testimony that
12 he had "limited information at my disposal." I find that to be disingenuous. Big River
13 did not receive any discovery requests from Mr. Neinast, from which he could have
14 availed himself of considerable information about Big River's operation and network.
15 In addition, Big River has been required in the past to provide AT&T Missouri with
16 considerable network and operational details.

17 More than anything, Mr. Neinast seems transfixed on AT&T Missouri's case
18 with Halo and the AT&T declaratory ruling case before the FCC, each of which with a
19 significantly different set of facts which render his opinions moot in this case. Mr.
20 Voight, in fact, pointed out the stark contrast between this case and the facts in the Halo
21 case. Mr. Neinast should have come prepared with facts that are actually applicable to

1 Big River and its network, something which he inexplicably failed to do.

2 **Q. DOES THAT CONCLUDE YOUR TESTIMONY?**

3 **A. Yes.**

STATE OF MISSOURI
COUNTY OF ST. LOUIS

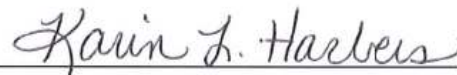
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VERIFICATION

Gerard J. Howe, being duly sworn upon his oath deposes and states that he is the Chief Executive Officer of Big River Telephone Company, LLC, that he has prepared and reviewed the foregoing, *Surrebuttal Testimony*, and that the statements contained therein are true and correct to the best of his knowledge, information and belief.


Gerard J. Howe

Subscribed and sworn to before me, a Notary Public, this 30th day of November, 2012.


Notary Public

My Commission Expires:

August 26, 2016



KARIN L. HARBERS
My Commission Expires
August 26, 2016
St. Louis County
Commission #12626110