



Missouri Public Service Commission

FILED³

MAY 10 2013

Missouri Public
Service Commission

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| Judge or Division: Administrative Law Judge Michael Bushman | Appellate Number: | 11:23912 (Date File Stamp) |
| Appellant: Big River Telephone Company, LLC | Missouri Public Service Commission File Number: | |
| vs. | TC-2012-0284 | |
| Respondent: Missouri Public Service Commission | | |

Notice of Appeal

Notice is given that Big River Telephone Company, LLC appeals to the Missouri Court of Appeals ☒ Western ☐ Eastern ☐ Southern District.

5-10-13
Date Notice of Appeal Filed
(to be filled in by Secretary of Commission)

Brian C. Howe 36624
Signature of Attorney or Appellant

The notice of appeal shall include the appellant's application for rehearing, a copy of the reconciliation required by subsection 4 of section 386.420, a concise statement of the issues being appealed, a full and complete list of the parties to the commission proceeding, and any other information specified by the rules of the court. The appellant(s) must file the original and (2) two copies and pay the docket fee required by court rule to the Secretary of the Commission within the time specified by law. **Please make checks or money orders payable to the Missouri Court of Appeals.** At the same time, Appellant must serve a copy of the Notice of Appeal on attorneys of record of all parties other than appellant(s), and on all parties not represented by an attorney.

CASE INFORMATION

| | |
|---|--|
| Appellant Name / Bar Number: Brian C. Howe #36624 | Respondent's Attorney / Bar Number: Shelley Brueggemann #52173 |
| Address: 12444 Powerscourt Drive, Suite 270 St. Louis, MO 63131 | Address: P.O. Box 360 Madison Street Jefferson City, MO 65102 |
| Telephone: 314/225-2215 | Fax: 314/225-2521 |
| Telephone: 573/526-7393 | Fax: 573/751-9285 |
| Date of Commission Decision: March 27, 2013 | Date of Application for Rehearing Filed: April 26, 2013 |
| Date Application for Rehearing Ruled On: May 1, 2013 | |

DIRECTIONS TO COMMISSION

A copy of the notice of appeal and the docket fee shall be mailed to the clerk of the appellate court. Unless otherwise ordered by the court of appeals, the commission shall, within thirty days of the filing of the notice of appeal, certify its record in the case to the court of appeals.

Certificate of Service

I certify that on May 9, 2013 (date), I served a copy of the notice of appeal on the following parties, at the following address(es), by the method of service indicated.
By U.S. Mail, prepaid to Missouri Public Service Commission, P.O. Box 360, 200 Madison Street, Jefferson City, MO 65102; By electronic mail to Mr. Robert Gryzmala, One AT&T Center, Room 3520, St. Louis, Attorney for AT&T Missouri; and Mr. John Borgmeyer, P.O. Box 360, Madison Street, Jefferson City, MO 65102, Staff Attorney for Missouri Public Service Commission.

Brian C. Howe
Appellant or Attorney for Appellant

FORM 1. CIVIL CASE INFORMATION FORM SUPPLEMENT

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

No. WD _____

Big River Telephone Company, L.L.C.

Petitioner/Appellant

Brian C. Howe, #36624
12444 Powerscourt Drive, Suite 270
St. Louis, MO 63131

vs.

Missouri Public Service Commission

Defendant/Respondent

Shelley Brueggeman, #52173
P.O. Box 360
200 Madison Street
Jefferson City, MO 65102

Date Notice filed in Circuit Court May 9, 2013

The Record on Appeal will consist of a Transcript and Legal File. (This will include records filed pursuant to Rules 81.13 and 81.16)

FACTUAL BACKGROUND:

The Missouri Public Service Commission ("Commission") issued the Report and Order that is the subject of this appeal in Commission Case No. TC-2012-0284 on March 27, 2013 with an effective date of April 26, 2013. The Commission denied Big River Telephone, L.L.C.'s ("Big River") complaint and granted Southwestern Bell Telephone Company d/b/a AT&T Missouri's ("AT&T Missouri") complaint. The Commission held that Big River owed AT&T Missouri \$352,123.48 in exchange access charges.

ISSUE(S):

1. the Commission erroneously concluded that Big River did not meet its burden of proving that its telecommunications traffic is enhanced;
2. the Commission erroneously decided that AT&T Missouri met its burden of proving that Big River's telecommunication traffic is Interconnected Voice Over Internet Protocol traffic and subject to RSMo 392.550;
3. the Commission adopted an arbitrary definition of broadband and that Big River's service requires a broadband connection;
4. the Commission erred in denying Big River's Motion for Summary Determination;
5. the Commission erred in overruling Big River's Motions to Strike and admitting the testimony of AT&T Missouri's witnesses; and
6. the Commission improperly determined that AT&T Missouri met its burden to establish the amount owed.

LIST OF PARTIES TO THE COMMISSION PROCEEDING

(As required by §386.510 RSMo)

The following parties participated in Public Service Commission Case Number TC-2012-0284:

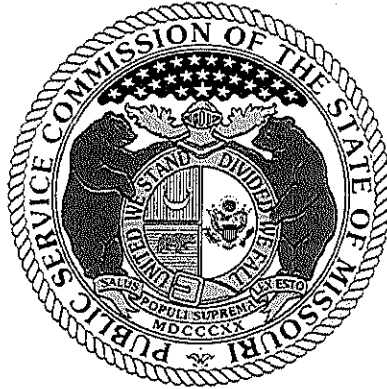
| | |
|---|---|
| Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri Robert J. Gryzmala, #32454 One AT&T Center, Room 3516 St. Louis, Missouri 63101 314-235-6060 (Telephone) 314-247-0014 (Facsimile) robert.gryzmala@att.com Hans J. Germann, (<i>pro hac vice</i>) Mayer Brown LLP 71 S. Wacker Drive Chicago, IL 60606 312-782-0600 (Telephone)/312-701- 7711 (Facsimile) HGermann@mayerbrown.com Attorneys for Southwestern Bell Telephone, L.P d/b/a AT&T Missouri | Public Service Commission Staff John D. Borgmeyer, #61992 P.O. Box 360 Jefferson City, Missouri 65102 Telephone: (573) 751-5472 Fax: (573) 751-9285 Email: john.borgmeyer@psc.mo.gov Attorney for the Staff of the Missouri Public Service Commission |
| Big River Telephone Company, L.L.C. Brian C. Howe, #36624 12444 Powerscourt Drive, Suite 270 St. Louis, Missouri 63131 Telephone: 314/225-2215 Facsimile: 314/225-2521 Email: bhowe@bigrivertelephone.com General Counsel for Big River Telephone Company, L.L.C. | |

STATEMENT OF THE ISSUES

The general issue that is being appealed is the Commission's determination that Big River Telephone Company, L.L.C., owes Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri exchange access charges in the amount of \$352,123.48.

The Commission's Report and Order is unlawful and unreasonable because: (1) the Commission erroneously concluded that Big River did not meet its burden of proving that its telecommunications traffic is enhanced; (2) the Commission erroneously decided that AT&T Missouri met its burden of proving that Big River's telecommunication traffic is Interconnected Voice Over Internet Protocol traffic and subject to RSMo 392.550; (3) the Commission adopted an arbitrary definition of broadband and that Big River's service requires a broadband connection; (4) the Commission erred in denying Big River's Motion for Summary Determination; (5) the Commission erred in overruling Big River's Motions to Strike and admitting the testimony of AT&T Missouri's witnesses; and (6) the Commission improperly determined that AT&T Missouri met its burden to establish the amount owed.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI



Big River Telephone Company, LLC,

Complainant,

v.

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

Respondent.

File No. TC-2012-0284

REPORT AND ORDER

Issue Date: March 27, 2013

Effective Date: April 26, 2013

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

| | | |
|--------------------------------------|---|--|
| Big River Telephone Company, LLC, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | |
| |) | |
| Southwestern Bell Telephone Company, |) | |
| d/b/a AT&T Missouri, |) | |
| Respondent. |) | |

File No. TC-2012-0284

APPEARANCES

Appearing for **BIG RIVER TELEPHONE COMPANY, LLC:**

Brian C. Howe, 12444 Powerscourt Drive, Suite 270, St. Louis, Missouri 63131.

Appearing for **SOUTHWESTERN BELL TELEPHONE COMPANY d/b/a AT&T
MISSOURI:**

Robert J. Gryzmala, One AT&T Center, Room 3516, St. Louis, Missouri 63101.

Hans J. Germann, Mayer Brown LLP, 71 S. Wacker Drive, Chicago, Illinois 60606.

Appearing for the **STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:**

Colleen M. Dale, Senior Counsel, and **John D. Borgmeyer**, Legal Counsel,
Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102.

REGULATORY LAW JUDGE: Michael Bushmann

REPORT AND ORDER

I. Procedural History

On March 1, 2012, Big River Telephone Company, LLC ("Big River") filed a complaint with the Missouri Public Service Commission ("Commission") against Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T Missouri"). Big River alleged that AT&T Missouri has improperly imposed exchange access charges against it, in violation of the interconnection agreement between the parties and federal law, because the traffic Big River delivered to AT&T Missouri is enhanced or information services traffic. After an attempt at mediation between the two parties failed, AT&T Missouri filed an answer to the complaint, which included a cross-complaint against Big River. AT&T Missouri alleged that Big River is liable for access charges for all telephone traffic delivered to AT&T Missouri that is either interconnected voice over internet protocol traffic (i-VoIP) or that is not enhanced/information services traffic. On December 19, 2012, the Commission denied Big River's motion for summary determination. On January 8-9, 2013, the Commission conducted an evidentiary hearing on the complaint and cross-complaint.¹

II. Findings of Fact

Any finding of fact for which it appears that the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence. On December 17, 2012, the parties

¹ Transcript, Volumes 4-6. In total, the Commission admitted the testimony of six witnesses and received sixty-one exhibits into evidence. Final post-hearing briefs were filed on February 20, 2013, and the case was deemed submitted for the Commission's decision on that date when the Commission closed the record. "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

filed a *Joint Stipulation of Non-Disputed Material Facts*, which the Commission incorporates and adopts in its entirety as its own Findings of Fact.

1. Big River is a competitive facilities-based telecommunications limited liability company duly organized and existing under and by virtue of the laws of the State of Delaware and duly authorized to do business in the State of Missouri as a foreign corporation with its principal place of business located at 24. S. Minnesota Ave., Cape Girardeau, Missouri 63702.²

2. Big River, pursuant to authority granted by the Commission, provides intrastate switched and non-switched local exchange and interexchange telecommunications services in Missouri. Big River is also an authorized provider of interstate telecommunications services in Missouri under the jurisdiction of the Federal Communications Commission.³

3. Big River is a "competitive telecommunications company", "local exchange telecommunications company", "interexchange telecommunications company", and a "public utility", and is duly authorized to provide "telecommunications service" within the State of Missouri, as each of those phrases is defined in Section 386.020, RSMo Supp 2012, in accordance with tariffs on file with and approved by the Commission.

4. Southwestern Bell Telephone Company d/b/a AT&T Missouri is a corporation, is the successor in interest to Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri, and is an incumbent local exchange carrier ("ILEC").⁴

5. Southwestern Bell Telephone Company, d/b/a AT&T Missouri is a "local exchange telecommunications company" and a "public utility," and is duly authorized to

² *Joint Stipulation of Non-Disputed Material Facts*, paragraph 1.

³ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 3.

⁴ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 2.

provide "telecommunications service" within the State of Missouri, as each of those phrases is defined in Section 386.020, RSMo Supp 2012, in accordance with tariffs on file with and approved by the Commission.⁵

6. The Office of the Public Counsel ("Public Counsel") "may represent and protect the interests of the public in any proceeding before or appeal from the public service commission."⁶ Public Counsel "shall have discretion to represent or refrain from representing the public in any proceeding."⁷ The Public Counsel did not participate in this matter.

7. The Staff of the Missouri Public Service Commission ("Staff") is a party in all Commission investigations, contested cases and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.⁸

8. On or about August 13, 2005 in Case No. TK-2006-0073, the Commission approved an interconnection agreement ("ICA") made and submitted by Big River and AT&T Missouri, that was the product of an arbitration between the companies before the Commission in Case No. TO-2005-0336. On or about October 25, 2005, the Commission approved errata to the agreement. The ICA was amended again on November 2, 2009, which amendment was submitted to the Commission, Reference No. VT-2010-0011. The

⁵ Following its June 26, 2007, Order in Case No. TO-2002-185 allowing Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, to alter its status from a Texas limited partnership to a Missouri corporation, the Commission approved tariff revisions to reflect the new corporate name, Southwestern Bell Telephone Company d/b/a AT&T Missouri. See, *Order Granting Expedited Treatment and Approving Tariffs*, Case No. TO-2002-185, issued June 29, 2007.

⁶ Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

⁷ Section 386.710(3), RSMo 2000; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

⁸ Commission Rules 4 CSR 240-2.010(10) and (21) and 2.040(1).

ICA and amendments thereto, of which the Commission may take official notice, remain in effect.⁹

9. Section 13.1 of Attachment 12 (entitled "Intercarrier Compensation") of the parties' ICA states:

13.1 For purposes of this Agreement only, Switched Access Traffic shall mean all traffic that originates from an end user physically located in one local exchange and delivered for termination to an end user physically located in a different local exchange (excluding traffic from exchanges sharing a common mandatory local calling area as defined in SBC MISSOURI's local exchange tariffs on file with the applicable state commission) including, without limitation, any traffic that (i) terminates over a Party's circuit switch, including traffic from a service that originates over a circuit switch and uses Internet Protocol (IP) transport technology (regardless of whether only one provider uses IP transport or multiple providers are involved in providing IP transport) and/or (ii) originates from the end user's premises in IP format and is transmitted to the switch of a provider of voice communication applications or services when such switch utilizes IP technology and terminates over a Party's circuit switch.

Notwithstanding anything to the contrary in this Agreement, all Switched Access Traffic shall be delivered to the terminating Party over feature group access trunks per the terminating Party's access tariff(s) and shall be subject to applicable intrastate and interstate switched access charges; provided, however, the following categories of Switched Access Traffic are not subject to the above stated requirement relating to routing over feature group access trunks:

(i) IntraLATA toll Traffic or Optional EAS Traffic from a CLEC end user that obtains local dial tone from CLEC where CLEC is both the Section 251(b)(5) Traffic provider and the intraLATA toll provider;

(ii) IntraLATA toll Traffic or Optional EAS Traffic from an SBC end user that obtains local dial tone from SBC where SBC is both the Section 251(b)(5) Traffic provider and the intraLATA toll provider;

(iii) Switched Access Traffic delivered to SBC from an Interexchange Carrier (IXC) where the terminating number is ported to another CLEC and the IXC fails to perform the Local Number Portability (LNP) query; and/or

(iv) Switched Access Traffic delivered to either Party from a third party competitive local exchange carrier over interconnection trunk groups carrying Section 251(b)(5) Traffic and ISP-Bound Traffic (hereinafter referred to as "Local Interconnection Trunk Groups") destined to the other Party. Notwithstanding anything to the contrary in this Agreement, each Party reserves its rights, remedies Big River has delivered to AT&T Missouri for termination to end users non-local traffic, commencing as early as 2005.¹⁰

⁹ Joint Stipulation of Non-Disputed Material Facts, paragraph 4.

¹⁰ Joint Stipulation of Non-Disputed Material Facts, paragraph 5.

10. Attachment 12, section 13.3 of the ICA states as follows:

Notwithstanding any other provision of this Agreement, the Parties shall exchange enhanced/information services traffic, including without limitation Voice Over Internet Protocol ("VOIP") traffic and other enhanced services traffic (collectively, "IS Traffic"), in accordance with this section. IS Traffic is defined as traffic that undergoes a net protocol conversion, as defined by the FCC, between the calling and called parties, and/or traffic that features enhanced services that provide customers a capability for generating, acquiring storing, transforming, processing, retrieving, utilizing, or making available information. The Parties shall exchange IS Traffic over the same interconnection trunk groups used to exchange local traffic. In addition to other jurisdictional factors the Parties may report to one another under this Agreement, the Parties shall report a Percent Enhanced Usage ("PEU") factor on a statewide basis or as otherwise determined by CLEC at its sole discretion. The numerator of the PEU factor shall be the number of minutes of IS Traffic sent to the other Party for termination to such other Party's customers. The denominator of the PEU factor shall be the total combined number of minutes of traffic, including IS Traffic, sent over the same trunks as IS Traffic. Either Party may audit the other Party's PEU factors pursuant to the audit provisions of this Agreement. The Parties shall compensate each other for the exchange of IS Traffic applying the same rate elements used by the Parties for the exchange of ISP-bound traffic whose dialing patterns would otherwise indicate the traffic is local traffic. This compensation regime for IS Traffic shall apply regardless of the locations of the calling and called parties, and regardless of the originating and terminating NPA/NXXs.¹¹

11. By letter dated October 20, 2005, Big River informed AT&T Missouri that its "Percent Enhanced Usage ("PEU") for the state of Missouri is 100% as of the effective date of the Interconnection Agreement." ¹²

12. Big River filed suit against AT&T Missouri in St. Louis County Circuit Court on or about September 29, 2008, Cause No. 08SLCC01630, in which Big River alleged that "AT&T billed Big River \$487,779.00 for terminating Enhanced/Information Services traffic

¹¹ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 6.

¹² *Joint Stipulation of Non-Disputed Material Facts*, paragraph 7.

sent by Big River to AT&T," that Big River paid these charges, that Big River was entitled to a refund of these payments and that AT&T did not refund the payments.¹³

13. Paragraph 9 of the *Joint Stipulation of Non-Disputed Material Facts* relates to the terms of an October 31, 2009 settlement agreement between Big River and AT&T Missouri, which resolved a variety of claims and issues involved in the above-referenced lawsuit. The Commission adopts as a finding of fact the complete paragraph 9 stated in the *Joint Stipulation of Non-Disputed Material Facts*, but as those terms have been designated as Highly Confidential they are omitted in this order.

14. The amendment to the ICA, as approved by the Commission on November 5, 2009, states:

The 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; provided, however, to the extent that as of August 28, 2008, the Agreement contains intercarrier compensation provisions specifically applicable to interconnected voice over Internet protocol service traffic, those provisions shall remain in effect through December 31, 2009, and the intercarrier compensation arrangement described in the first clause of this Section shall not become effective until January 1, 2010.¹⁴

15. Section 392.550(2) RSMo states:

Interconnected voice over internet protocol service shall be subject to appropriate exchange access charges to the same extent that telecommunications services are subject to such charges. Until January 1, 2010, this subsection shall not alter intercarrier compensation provisions specifically addressing interconnected voice over internet protocol service contained in an interconnection agreement approved by the commission pursuant to 47 U.S.C. Section 252 and in existence as of August 28, 2008.¹⁵

¹³ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 8.

¹⁴ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 10.

¹⁵ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 11.

16. Section 386.020, RSMo, 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.¹⁶

17. Section 13.5.1 of the General Terms and Conditions further provides: "Except as otherwise specifically set forth in this Agreement, for all disputes arising out of or pertaining to this Agreement, including but not limited to matters not specifically addressed elsewhere in this Agreement require clarification, renegotiation, modifications or additions to this Agreement, either party may invoke dispute resolution procedures available pursuant to the complaint process of the MO-PSC...."¹⁷

18. AT&T Missouri billed Big River monthly on Billing Account Number (BAN) 110 401 0113 803 on or about February 5, 2010 and thereafter.¹⁸

19. Big River claims that its PEU continues to be 100%, which AT&T Missouri denies.¹⁹

20. Sections 9 and 13 of the General Terms and Conditions of the Commission-approved ICA govern billing dispute resolution.²⁰

21. Big River invoked the informal dispute resolution ("IDR") process disputing 100% of the billing on BAN 110 401 0113 803 by letter dated April 19, 2011, signed by

¹⁶ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 12.

¹⁷ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 13.

¹⁸ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 14.

¹⁹ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 15.

²⁰ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 16.

John Jennings and which indicated that Mr. Jennings would be Big River's representative for the informal dispute resolution.²¹

22. AT&T Missouri responded to Big River's request for an informal dispute resolution by an e-mail sent on May 10, 2011 by Eileen Mastracchio, acknowledging Big River's IDR request and explaining that Janice Mullins would be AT&T's contact for handling the IDR.²²

23. Mr. Jennings and Ms. Mullins participated in a conference call on May 13, 2011, in an attempt to resolve the billing issue.²³

24. Mr. Jennings and Ms. Mullins continued the IDR through November 1, 2011, at which time Ms. Mullins informed Mr. Jennings by letter that AT&T Missouri denied the dispute.²⁴

25. On February 15, 2012, AT&T Missouri conveyed to Big River that should Big River's refusal to pay continue, Big River's requests for additional service would not be accepted and provisioning activity on all pending orders would be suspended.²⁵

26. Big River filed its Complaint in this matter on March 1, 2012.²⁶

27. Subsequent to the filing of Big River's Complaint, AT&T Missouri has not suspended or refused to accept a request for additional service from Big River.²⁷

28. Since January 1, 2010, the traffic that Big River delivered to AT&T Missouri over the interconnection trunks established pursuant to the parties' ICA originated in Internet Protocol ("IP") format.²⁸

²¹ Joint Stipulation of Non-Disputed Material Facts, paragraph 17.

²² Joint Stipulation of Non-Disputed Material Facts, paragraph 18.

²³ Joint Stipulation of Non-Disputed Material Facts, paragraph 19.

²⁴ Joint Stipulation of Non-Disputed Material Facts, paragraph 20.

²⁵ Joint Stipulation of Non-Disputed Material Facts, paragraph 21.

²⁶ Joint Stipulation of Non-Disputed Material Facts, paragraph 22.

²⁷ Joint Stipulation of Non-Disputed Material Facts, paragraph 23.

²⁸ Joint Stipulation of Non-Disputed Material Facts, paragraph 24.

29. Since January 1, 2010, the traffic that Big River delivered to AT&T Missouri over the interconnection trunks established pursuant to the parties' ICA was Voice over Internet Protocol ("VoIP") traffic.²⁹

30. Since January 1, 2010, the traffic that Big River delivered to AT&T Missouri over the interconnection trunks established pursuant to the parties' ICA originated with Big River telephone service customers using IP-enabled customer premises equipment.³⁰

31. Since January 1, 2010, Big River's telephone service has (among other things) allowed Big River's customers to make voice telephone calls to, and receive voice telephone calls from, the public switched telephone network (PSTN).³¹

32. Since January 1, 2010, Big River's telephone service has (among other things) allowed Big River's customers to make voice telephone calls to, and receive voice telephone calls from, customers of AT&T Missouri.³²

33. Since January 1, 2010, Big River's telephone service has (among other things) allowed Big River's customers to engage in real-time, two-way voice communications with customers served via the PSTN.³³

34. Big River 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.³⁴

35. Big River submitted a sworn application to the Minnesota commission explaining that to provide telephone service, "[c]ustomers will be accessed through the

²⁹ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 25.

³⁰ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 26.

³¹ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 27.

³² *Joint Stipulation of Non-Disputed Material Facts*, paragraph 28.

³³ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 29.

³⁴ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 30.

broadband connections of local Cable TV operators,” and Big River provides service in other states in the same manner.³⁵

36. Big River provides voice telephone service to some customers in Missouri, who originate telephone calls in IP format over IP-enabled customer premises equipment, pursuant to tariffs filed with the Commission.³⁶

37. Sections 9.2 and 9.3 of the General Terms and Conditions of the parties’ ICA 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. The Non-Paying Party should utilize any existing and preferred form provided by the Billing Party to provide written notice of disputes to the Billing Party. The Non-Paying Party must pay when due: (i) all undisputed amounts to the Billing Party.³⁷

38. Section 13.4 of the General Terms and Conditions of the parties’ ICA provides:

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.³⁸

³⁵ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 31.

³⁶ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 32.

³⁷ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 33.

³⁸ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 34.

39. Big River's digital telephone service is designed for and marketed to customers that use a broadband connection.³⁹

40. Big River represented to the Federal Communications Commission by verified letter on November 28, 2005 that it was in compliance with i-VoIP E911 service requirements and acknowledged that Big River customers can update their location information "using the VoIP telephone equipment that they use to access their interconnected VoIP service".⁴⁰

41. Big River CEO Gerard Howe testified to the Kansas Corporation Commission that Big River is an i-VoIP service provider using broadband connections to connect its customers.⁴¹

42. Big River has not registered with the Missouri Public Service Commission as an i-VoIP provider.⁴²

43. Big River is able to connect a telephone call on its system at 40 kilobits per second.⁴³ Big River provides DSL service at this speed to a very small percentage of its customer base in Missouri.⁴⁴

44. Dial-up Internet service, also known as analog or narrowband, connects at a speed of 14.4 kilobits per second.⁴⁵ Big River does not provide service over dial-up connections.⁴⁶ 40 kilobits per second is faster than 14.4 kilobits per second.

45. Staff's witness, William Voight, testified credibly that the Big River traffic at issue that was delivered to AT&T Missouri involves an Internet protocol conversion at the

³⁹ ATT Ex. 20, 21.

⁴⁰ ATT Ex. 22.

⁴¹ ATT Ex. 24, p. 11; ATT Ex. 25, p. 6-7.

⁴² Big River Ex. 2, Howe Rebuttal, p. 16; ATT Ex. 14, G. Howe Deposition, p. 26-28.

⁴³ Big River Ex. 3, Howe Surrebuttal, p. 4.

⁴⁴ Transcript, Vol. 4, p. 68-69.

⁴⁵ Transcript, Vol. 4, p. 68.

⁴⁶ Transcript, Vol. 4, p. 64.

customers' premises, which requires a broadband connection.⁴⁷ Big River's traffic cannot be sent using a dial-up service connection.⁴⁸ Connection speeds for an individual broadband connection may fluctuate, but those fluctuations do not mean that the connection is not broadband while connecting at a slower speed.⁴⁹

46. Mr. Voight testified credibly that broadband means a connection speed faster than dial-up service⁵⁰ and that Big River's service requires a broadband connection at the user's location.⁵¹

47. The access charge rates for billing purposes are tariff rates incorporated by reference into the ICA.⁵² AT&T Missouri's federal tariff, filed with the FCC, requires Big River to pay access charges on the interstate traffic AT&T Missouri has terminated for Big River, and AT&T Missouri's state tariff, filed with the Commission, requires Big River to pay access charges on the intrastate non-local traffic AT&T Missouri has terminated for Big River.⁵³

48. At no time during the IDR process between Big River and AT&T Missouri did Big River dispute the accuracy of AT&T Missouri's calculation of the access charges billed to Big River.⁵⁴

49. The correct total amount billed for access charges on BAN 110 401 0113 803 by AT&T Missouri for traffic Big River delivered to AT&T Missouri between January 1, 2010 and January 4, 2013 is \$352,123.48.⁵⁵

⁴⁷ Transcript, Vol. 6, p. 254-255.

⁴⁸ *Id.*

⁴⁹ Transcript, Vol. 6, p. 255-256.

⁵⁰ Transcript, Vol. 6, p. 254-255.

⁵¹ Transcript, Vol. 6, p. 252.

⁵² ATT Ex. 5, Greenlaw Direct (NP), p. 19-20.

⁵³ *Id.*

⁵⁴ ATT Ex. 8, Mullins Surrebuttal, p. 5-6.

⁵⁵ ATT Ex. 33.

III. Conclusions of Law

Big River and AT&T Missouri are “telecommunications companies” and “public utilities” as those terms are defined by Section 386.020, RSMo. Supp. 2011. Big River and AT&T Missouri are subject to the Commission’s jurisdiction, supervision, control, and regulation as provided in Chapters 386 and 392, RSMo. The Commission has the authority under 47 U.S.C. §252(e) to approve interconnection agreements negotiated under the Telecommunications Act of 1996. This authority includes the power to interpret and enforce the agreements the Commission has approved.⁵⁶

Since Big River brought the complaint, it bears the burden of proof. The burden of proof is the preponderance of the evidence standard.⁵⁷ In order to meet this standard, Big River must convince the Commission it is “more likely than not” that its allegations are true.⁵⁸ Similarly, AT&T Missouri bears the burden of proof for its cross-complaint.

The first issue for determination is whether the traffic that Big River delivered to AT&T Missouri should be classified as interconnected voice over Internet protocol traffic (i-VoIP). If the traffic Big River delivered to AT&T Missouri was i-VoIP traffic, Big River would be liable to AT&T Missouri for exchange access charges under Section 392.550.2, RSMo,⁵⁹ and the parties’ interconnection agreement. Section 386.020(23), RSMo, provides a definition of “interconnected voice over Internet protocol service” that includes four

⁵⁶ *Southwestern Bell v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *Budget Prepay, Inc. v. AT&T*, 605 F.3d 273 (5th Cir. 2010).

⁵⁷ *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996).

⁵⁸ *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez*, 936 S.W.2d at 109-111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

⁵⁹ “Interconnected voice over Internet protocol service shall be subject to appropriate exchange access charges to the same extent that telecommunications services are subject to such charges. Until January 1, 2010, this subsection shall not alter intercarrier compensation provisions specifically addressing interconnected voice over Internet protocol service contained in an interconnection agreement approved by the commission pursuant to 47 U.S.C. Section 252 and in existence as of August 28, 2008.”

elements⁶⁰ and is substantially the same as the FCC definition.⁶¹ The parties have stipulated that Big River's traffic meets three of those elements, but the final element in dispute is whether Big River's service "requires a broadband connection from the user's location". Neither the ICA nor Missouri law⁶² defines "broadband connection" in relation to i-VoIP.

The Commission concludes that Big River does provide i-VoIP service to its customers. Staff presented credible evidence that the Big River traffic at issue involves an Internet protocol conversion at the customers' premises, which requires a broadband connection. The term "broadband" should be considered for the purposes of defining i-VoIP as a connection speed faster than dial-up, which connects at 14.4 kilobits per second. Big River's service connections should still be considered to be broadband regardless of the specific speed of the connection because they are faster than analog dial-up service. This definition finds support in language in a U.S. Supreme Court decision, which explained that "[d]ial-up connections are therefore known as "narrowband," or slower speed, connections. "Broadband" Internet service, by contrast, transmits data at much higher speeds. There are two principal kinds of broadband Internet service: cable modem

⁶⁰ "Interconnected voice over Internet protocol service", 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;

⁶¹ *In the Matter of Universal Serv. Contribution Methodology Fed.-State Joint Bd. on Universal Serv. 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Admin. of Telecommunications Relay Serv., N. Am. Numbering Plan, Local No. Portability, & Universal Serv. Support Mechanisms Telecommunications Services for Individuals with Hearing & Speech Disabilities, & the Americans*, 21 F.C.C.R. 7518 (2006), paragraph 36.

⁶² The term "broadband network" is defined elsewhere in Section 392.245.5(2), RSMo, as "a connection that delivers services at speeds exceeding two hundred kilobits per second in at least one direction". (emphasis added) However, this statute deals with whether a provider of local voice service is considered to be a basic local telecommunications service provider, and by its own terms the definition of "broadband network" only applies for the purposes of that subsection. The Commission determines not to adopt that definition for purposes of i-VoIP.

service and Digital Subscriber Line (DSL) service”.⁶³ The parties have stipulated that Big River partners with cable and DSL providers to provide telephone service in IP format over those companies’ “last mile” facilities, which are broadband connections.

Big River proposes various connection speeds as an appropriate definition of broadband, such as at least 200 kilobits per second and a 4-megabits-per-second standard supposedly required by the FCC.⁶⁴ The Commission decides not to adopt an FCC benchmark as a definition for broadband for purposes of i-VolP, since improving technology will continually change the FCC’s goals for broadband deployment across the country and will result in constantly changing benchmarks.

The evidence shows that Big River has represented to the FCC and another state utility commission that it provides i-VolP service and to the public and other commissions that it provides service through broadband connections, but has failed to register in Missouri as an i-VolP provider. The Commission does not agree with Big River’s argument that the ability to make a telephone call at a slower than normal connection speed relieves it of its responsibility to pay access charges under the ICA. Big River’s interpretation of the statute would render Section 392.550.2, RSMo, meaningless and allow any i-VolP provider to avoid paying access charges as Big River has attempted to do. Big River’s system requires a broadband connection for all its customers and, therefore, should be classified as an i-VolP service provider and liable for exchange access charges. In making this

⁶³ *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 975, 125 S. Ct. 2688, 2696, 162 L. Ed. 2d 820 (2005).

⁶⁴ The FCC order cited by Big River, however, proposes this connection speed as a policy goal for deployment throughout the country rather than as a legal requirement. See, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act*, 27 F.C.C.R. 10342 (2012).

determination, the Commission need not consider the additional issue of whether Big River provides enhanced or information services.

The final issue is what charges should apply under the parties' ICA to the traffic that Big River delivered to AT&T Missouri. AT&T Missouri presented evidence in the form of a spreadsheet, updated to January 4, 2013, showing billing to Big River from February 2010 to December 2012 in the total amount due of \$352,123.48. At no time during the IDR process between Big River and AT&T Missouri did Big River dispute the accuracy of AT&T Missouri's calculation of the access charges billed to Big River. The Commission determines that AT&T Missouri has presented credible and substantial evidence on the amount of the access charges and concludes that Big River owes AT&T Missouri access charges under the ICA in the total amount of \$352,123.48. Since federal law, 47 U.S.C. §252, implicitly grants the Commission the power to enforce interconnection agreements⁶⁵, the Commission will require Big River to pay to AT&T Missouri any charges due and owing under the ICA.

IV. Decision

In making this decision, the Commission has considered the positions and arguments of all of the parties. After applying the facts to the law to reach its conclusions, the Commission concludes that the substantial and competent evidence in the record supports the conclusion that that Big River has failed to meet, by a preponderance of the evidence, its burden of proof to demonstrate that access charges do not apply to traffic Big River delivered to AT&T Missouri since January 1, 2010. Big River's complaint will be denied on the merits.

⁶⁵ *Southwestern Bell v. Connect Communications Corp.*, 225 F.3d at 946.

The Commission also concludes that the substantial and competent evidence in the record supports the conclusion that that AT&T Missouri has met, by a preponderance of the evidence, its burden of proof to demonstrate that the traffic at issue delivered to AT&T Missouri by Big River was i-VolP traffic to which access charges apply, and that Big River owes AT&T Missouri access charges in the total amount of \$352,123.48.

THE COMMISSION ORDERS THAT:

1. Big River Telephone Company, LLC's complaint is denied.
2. Southwestern Bell Telephone Company d/b/a AT&T Missouri's cross-complaint is granted. Big River Telephone Company, LLC shall pay to Southwestern Bell Telephone Company d/b/a AT&T Missouri all charges due and owing under the ICA, including access charges billed by AT&T Missouri since January 1, 2010 under BAN 110 401 0113 803 in the amount of \$352,123.48.
3. This Report and Order shall become effective on April 26, 2013.
4. This file shall close on April 27, 2013.

BY THE COMMISSION



Shelley Brueggemann
Acting Secretary

R. Kenney, Chm., Jarrett, Stoll,
and W. Kenney, CC., concur, and
certify compliance with the provisions
of Section 536.080, RSMo.

Bushmann, Regulatory Law Judge

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

| | | |
|-----------------------------------|---|------------------------|
| Big River Telephone Company, LLC, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | Case No. TC-2012- 0284 |
| |) | |
| SOUTHWESTERN BELL |) | |
| TELEPHONE, L.P. d/b/a |) | |
| AT&T MISSOURI |) | |
| |) | |
| Respondent. |) | |

BIG RIVER TELEPHONE COMPANY, LLC'S
MOTION FOR REHEARING

COMES NOW, Big River Telephone Company, LLC ("Big River"), and for its Motion for Rehearing pursuant to Section 386.500, RSMo and 4 CSR 240-2.160, states as follows:

On March 27, 2013, the Commission issued its Report and Order ("Order") in the above-referenced case. The decision was unjust, unlawful, and unreasonable and is arbitrary, capricious, unsupported by substantial and competent evidence, and is against the weight of the evidence considering the whole record, is unauthorized by law, and constitutes an abuse of discretion.

The Commission engaged in a process that erred in regards to determining if Big River's traffic was not enhanced but rather was Interconnected Voice Over Internet Protocol ("IVOIP") traffic by ignoring the preponderance of evidence offered in the case in favor of a single statement by one of the witnesses that was taken out of context and, in so doing, this Commission;

- i) flouts the Commission's own legal precedent;

- ii) discards all previous analyses of the definition of broadband performed by the Commission; and
- iii) rolls back the standard for the definition of broadband in the state of Missouri to a level 90% lower than the nationally accepted standard.

The Commission further erred in the finding that AT&T Missouri proved that it is owed \$352,123.48 by Big River. The Commission relied on a single piece of evidence introduced in the testimony of an AT&T witness that AT&T Missouri asserted was not an expert and his testimony was not offered as such. In a strange turn of events, the testimony of the AT&T witness was accepted into the record as expert testimony despite failing to meet the most fundamental standards for admission of such testimony. It was upon that witness's testimony that the Commission relied.

Enhanced Services

The Missouri Public Service Commission's Order is unlawful, unjust and unreasonable because the Commission's decision regarding enhanced services traffic is unsupported by substantial and competent evidence, and is against the weight of the evidence considering the whole record, is unauthorized by law, and constitutes an abuse of discretion.

The Commission found that Big River failed to meet its burden of proof that "access charges do not apply to traffic Big River delivered to AT&T Missouri since January 1, 2010."¹ That conclusion is erroneous. Big River did establish that its traffic was enhanced and, therefore, not subject to access charges. Section 13.3 of Attachment 12 of the parties' interconnection agreement ("ICA") excludes "Voice Over

¹ Order, p. 17.

Internet Protocol (“VOIP”) traffic and other enhanced services traffic” from exchange access rates.²

The Commission found **as fact** that the traffic Big River delivered to AT&T Missouri originated in VOIP format.³ The Commission also found **as fact** that Big River’s network allowed its customers to make calls to the public switched telephone network (“PSTN”), including AT&T Missouri’s network.⁴ Converting VOIP to PSTN constitutes a net protocol conversion.⁵ Traffic that undergoes a net protocol conversion is, by definition, enhanced services traffic.⁶ By its own findings here and its own precedent in the MO PSC Arbitration Order, the Commission should have concluded that Big River’s traffic met the first prong of Section 13.3. As it stands, the Commission’s decision in the present case is against the preponderance of the evidence and is inconsistent with its MO PSC Arbitration Order.

The Commission’s Order did not address the second prong, “enhanced services”. Big River, however, also met its burden of establishing that its traffic was enhanced by showing that its service provides “customers a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information.” There was no competent evidence offered by any party that Big River’s traffic was not enhanced. Accordingly, Big River also met the second prong of Section 13.3.

Interconnected Voice Over Internet Protocol

² Id. at 6.

³ Id. at 10.

⁴ Id.

⁵ Southwestern Bell Telephone, L.P., d/b/a SBC Missouri’s Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement, Case No. TO-2005-0336, Order, p. 36 (July 11, 2005) (“MO PSC Arbitration Order”).

⁶ Id.

The Missouri Public Service Commission's Order is unlawful, unjust and unreasonable because the Commission's decision regarding interconnected voice over internet protocol traffic is unsupported by substantial and competent evidence, and is against the weight of the evidence considering the whole record, is unauthorized by law, and constitutes an abuse of discretion.

As a result of a statutory change made by the Missouri legislature in 2008⁷, an amendment to the ICA provides for an exception to Section 13.3 if the traffic is "interconnected voice over internet protocol" ("IVOIP"). AT&T Missouri filed a counterclaim against Big River asserting that Big River's traffic was IVOIP. It was, therefore, AT&T Missouri's burden to prove that allegation. Despite AT&T Missouri's failure to meet its burden, and with clear and irrefutable evidence to the contrary, the Commission found in AT&T Missouri's favor.

The route taken by the Commission to reach its conclusion is unique in telecommunications law and creates the danger of far-reaching unintended consequences. According to the Commission's Order, broadband is defined as anything above 14.4 kbps. The Commission definition is entirely arbitrary, unsubstantiated, and unprecedented. While the rest of the country is considering raising the threshold for broadband from the heretofore accepted standard of 200 kbps⁸, this Commission is now on record as having lowered it to a speed that has been substandard for even dial-up connections for over a decade. As far back as 1999, dial-up speed has been considered to be 56 kbps.⁹

⁷ HB 1779, resulting in RSMo 392.550 and 386.020(23).

⁸ EFIS No. 105, Howe Surrebuttal, p. 3, l. 7-16

⁹ In the Matter of an Inquiry Concerning the Deployment of Advanced Telecommunications Capability, CC Docket No. 98-146, para. 20 ("FCC 1999 Order"). This order is replete with references to dial up speeds at 56 kbps, in addition to paragraph 20, see Appendix A, note 2; Chart 2; Footnote 31; and paragraph 25.

In its Order, the Commission acknowledged that Missouri's definition of IVOIP is "substantially the same as the FCC definition."¹⁰ Not only are the definitions the same, it is clear that the definition in the Missouri statute passed in 2008, was derived from the definition of IVOIP established by the FCC in its 2005 Order in FCC Dockets 04-36 and 05-196¹¹. In the FCC 2005 911 Order, the FCC stated:

Thus, an interconnected VoIP service is one we define for purposes of the present Order as bearing the following characteristics:

- (1) the service enables real-time, two-way voice communications;
- (2) the service requires a broadband connection from the user's location;
- (3) the service requires IP-compatible CPE; and
- (4) the service offering permits users generally to receive calls that originate on the PSTN and to terminate calls to the PSTN.¹²

Missouri's statute RSMo 386.020(23) reads the same; stating the same four characteristics of IVOIP in the same sequence as the FCC 2005 911 Order. Both definitions include the element that the service "requires a broadband connection from the user's location."¹³ Despite the fact that Missouri's definition is derived from the FCC definition, the Commission chose to ignore the FCC's classification of broadband as being at least 200 kbps.¹⁴

The Commission also noted that Section 392.245.5(2) RSMo contains a definition of 'broadband' and defines it as "a connection that delivers services at speeds exceeding two hundred kilobits per second in at least one direction." However,

¹⁰ Order, p. 15.

¹¹ In the Matters of IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers, WC Docket Nos. 04-36 and 05-196, ("FCC 2005 911 Order")

¹² *Id.* at para. 24.

¹³ *Id.*

¹⁴ FCC 1999 Order at para. 20.

because the statute states that this definition is specific to that subsection, the Commission opted not to apply it to Section 386.020.

In addition to ignoring the underlying definition of broadband as established by the FCC and that codified by the Missouri legislature in RSMo 392.245.5(2), the Commission also ignored its own 2007 Commissioners' Report on Missouri Broadband Availability ("MO PSC 2007 Broadband Report") as well as its 2011 Report to the Missouri State Senate Committee on Commerce, Consumer Protection, Energy and the Environment ("MO PSC 2011 Broadband Report"). (The MO PSC 2007 Broadband Report was prepared in part by William Voight who appeared as Staff's witness in the current case.)

The MO PSC 2007 Broadband Report noted that the first generation of Internet Service Providers offered dial-up service at speeds no greater than 56 kbps.¹⁵ A clear acknowledgement that dial-up speeds are up to, but no greater than 56 kbps, not the 14.4 kbps found by the Commission in this proceeding.

Both MO PSC reports established a threshold of 200 kbps in each direction to define broadband.¹⁶ The Commission also noted that such a threshold is 4 times faster than dial-up speed.¹⁷ The MO PSC 2007 Broadband Report further stated, "These Commissioners believe 200 kbps in today's environment is inadequate to meet the communications needs of Missouri consumers."¹⁸ The Commissioners, therefore, encouraged the FCC to increase its threshold.¹⁹

¹⁵ MO PSC 2007 Broadband Report, p. 4.

¹⁶ Id. at 9; MO PSC 2011 Broadband Report, p. 3.

¹⁷ MO PSC 2007 Broadband Report, at 10.

¹⁸ Id.

¹⁹ Id.

The MO PSC 2007 Broadband Report concluded that 22% of Missourian households lacked access to broadband.²⁰ Likewise, MO PSC 2011 Broadband Report designated “underserved” areas as those “lacking availability of broadband service meeting the FCC’s broadband availability target of 4 Mbps/1 Mbps.”²¹

On the contrary, this Commission has set an unprecedented definition of broadband in this Order that results in an astonishing observation that Missouri has 100% broadband coverage today and has had for at least the 14 years since the FCC’s order released in 1999.

Having abandoned its own historical definition of broadband, the Commission instead arrived at its new, unique delineation of broadband by misinterpreting case law and testimony. The Commission cited Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Service, 545 U.S. 967 (2005) for the proposition that dial-up connections are known as narrowband.²² The Commission inferred from that statement that any service above dial-up speed is broadband.²³ The Supreme Court, however, never said that.

The Commission then further erred by misreading the testimony of Big River’s CEO, Gerard Howe. The Order cites Mr. Howe’s testimony to support the conclusion that dial-up speed is 14.4 kbps.²⁴ That was taken from just one answer out of all of Mr. Howe’s testimony and was a complete misunderstanding of what he said. He never said that 14.kbps was equivalent to dial-up speed. Rather, Mr. Howe used 14.4 kbps as an example of how low speeds could get on the ‘extremity of a loop’.

²⁰ Id. at 21.

²¹ MO PSC 2011 Broadband Report, p. 25.

²² Order, p. 16.

²³ Id. at 15.

²⁴ Order, p. 12.

More significantly, Mr. Howe testified that “(f)orty (40) kbps is slower than a traditional dial-up connection” in his surrebuttal testimony wherein he demonstrated a VOIP call over Big River’s network where the DSL connection was set with “a capped bandwidth speed of 40 kbps”.²⁵ His reference clearly is to a dial-up connection that must be at some speed higher than 40 kbps, i.e., the 56 kbps standard that has been in use since 1999.

And finally, Mr. Howe testified that the 200 kbps standard for broadband is “a widely accepted standard”.²⁶ Mr. Howe testified that the 200 kbps benchmark is not only used by the FCC, but had been adopted and previously used by both AT&T and the Missouri PSC.²⁷ Mr. Howe’s statement that 200 kbps is a widely accepted standard for the minimum speed for a broadband connection was unrefuted.

There is nothing in the record to support the Commission’s finding that 14.4 kbps is the standard for dial-up, much less broadband. For over 14 years, the accepted standard for dial up speeds has been 56 kbps, not 14.4 kbps, which explains Mr. Howe’s observation that his demonstrated call at 40 kbps was “slower than a traditional dial-up connection”.²⁸ In fact, as early as the FCC’s 1999 Order, the FCC acknowledged that “Internet access received through a standard phone line [is] at 56 kbps”.²⁹

Neither the witnesses of AT&T Missouri or the Staff offered a broadband standard other than the 200 kbps identified by Mr. Howe as the “widely accepted standard”. It appears obvious that a standard for broadband speeds of 14.4 kbps

²⁵ EFIS No. 105, Howe Surrebuttal, p. 4, l. 1-3.

²⁶ *Id.* at 3, l. 10-11.

²⁷ *Id.* at 3, l. 11-16.

²⁸ *Id.* at 4, l. 3-4.

²⁹ 1999 FCC Order, para. 20.

never entered the mind of any participant of this proceeding. Accordingly, the Commission had no basis upon which to declare that dial-up speed is 14.4 kbps and that broadband is anything above that speed.

The Commission's Order contradicts all of the analyses conducted by all major telecommunications regulatory bodies and economic development authorities across the country. The Commission's Order and its interpretation of 'broadband' goes well beyond telecommunications regulation and serves as a precedent that impacts general economic development efforts in the state of Missouri. According to this Commission's Order, despite earlier Commission reports to the contrary, the entire state of Missouri has access to broadband communications. It appears from the Commission's Order that any efforts to further deploy broadband communications infrastructure in the state of Missouri are a waste of time, money and energy. According to this Commission, the state of Missouri defines 'broadband' as measured at speeds of 14.4 kilobits per second. The Order is, of course, precedent setting in a very unsettling way.

While finding that AT&T Missouri met its burden to establish that the traffic at issue was IVOIP, the Commission cited not a single piece of evidence submitted by AT&T Missouri in support of the conclusion that Big River's service requires a broadband connection.³⁰ Rather, the Commission pointed to the testimony of Staff witness, William Voight, to support the determination that "Big River's service requires a broadband connection at the user's location."³¹

³⁰ See Order, p. 2-11.

³¹ Id. at 13.

The Commission found that Mr. Voight “testified credibly” that Big River’s traffic cannot be sent using dial-up service connection and that “broadband” means a connection faster than dial-up service.³² Mr. Voight, however, failed to provide any credible evidence to support his opinion that Big River’s traffic cannot be sent using a dial-up connection. His claim that Big River’s traffic cannot be sent over a dial-up connection is in direct contradiction to Mr. Howe’s demonstrated VOIP call at 40 kbps and the observation made by the FCC in its 2005 911 Order, wherein the FCC stated:

While 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.³³

Further, while stating that broadband means faster than dial-up, he never provided his threshold for the speed that determines his understanding of either broadband or dial-up. Thus, he failed to establish that his opinions were subject to any recognized standard since he failed to identify any benchmark for what or how the determination is made whether a connection is broadband or not. Because of that, the Commission had to engage in the convoluted logic that resulted in it concluding that dial-up speed is 14.4 kbps.

Amount Allegedly Owed

The Missouri Public Service Commission’s Order is unlawful, unjust and unreasonable because the Commission’s decision regarding the amount allegedly owed by Big River to AT&T Missouri is unsupported by substantial and competent evidence,

³² Id.

³³ FCC 2005 911 Order, note 76. While the concept of VOIP over a connection other than broadband appears foreign to this Commission, it clearly has been dealt with by the FCC. In addition to the observation noted, the FCC also asked for comments in its Notice of Proposed Rulemaking stemming from the FCC 2005 911 Order, specifically asking ‘Are there any other services upon which the Commission should impose E911 obligations, including any IP-based voice services that do not require a broadband connection?’, see para. 58.

and is against the weight of the evidence considering the whole record, is unauthorized by law, and constitutes an abuse of discretion

The Commission erred in finding that Big River owes AT&T Missouri \$352,123.48. The burden was upon AT&T Missouri to prove the amount it claims is owed.

The Commission's finding was based on one single sheet of paper introduced by AT&T Missouri's witness, William Greenlaw.³⁴ The document relied upon was a spreadsheet prepared by someone who was never identified to the Commission.

The Commission first erred in failing to grant Big River's Motion for Summary Determination. Under 4 CSR 240-2.117(1)(E), the Commission may "grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest." The Commission may, under 4 CSR 240-2.117(1)(E), "grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest." AT&T Missouri presented only the unsubstantiated statement of William Greenlaw to establish the amount allegedly owed and, therefore, failed to create a genuine issue of material fact.

Mr. Greenlaw was the only source of any evidence regarding the amount allegedly owed by Big River to AT&T Missouri. Mr. Greenlaw's testimony was admitted

³⁴ EFIS No. 155, AT&T Missouri Ex. 33.

over Big River's Motion to Strike and its objections at the hearing. Big River established that Mr. Greenlaw had no personal factual knowledge of AT&T Missouri's billing procedures.³⁵

The Commission obviously agreed because it threw AT&T Missouri a lifeline and admitted Mr. Greenlaw's testimony as an expert witness.³⁶ This was an abuse of discretion on the part of the Commission because AT&T Missouri had not offered Mr. Greenlaw as an expert. Rather, AT&T Missouri specifically stated, "None of AT&T Missouri's witnesses are testifying as an 'expert' in the strict technical sense used in rules applicable to court proceedings, and the heightened standards for 'expert' testimony that may be used in court are not pertinent here."³⁷ Rather, AT&T Missouri placed its witnesses in the heretofore unheard of category of "non-fact witness".³⁸

In addition, the admission of Mr. Greenlaw's testimony as 'expert' testimony was an error because Mr. Greenlaw did not identify his area of specialized knowledge.³⁹ Also, regardless of what that specialized knowledge might be, he failed to state that he had applied that specialized knowledge in his testimony.⁴⁰ Nor did he establish that his opinions were given subject to any recognized standard as required.⁴¹ Further, he did not testify that the facts that he relied upon were of a type reasonably relied upon by experts in his field.⁴² He certainly did not testify to any credentials, experience or special knowledge he possesses that would allow him to provide any expert opinion to the validity and accuracy of the amount AT&T Missouri

³⁵ Tr. 199 – 203.

³⁶ Id. at 204.

³⁷ EFIS No. 111, Big River Ex. 9.

³⁸ EFIS No. 87, p. 3. ("[N]othing in the Commission's rules requires non-'fact witness' testimony to qualify as 'expert' testimony.")

³⁹ Tr. 204.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

allegedly billed Big River for the termination of traffic subject to the claims in this case.

On the contrary, there was no indication of any kind in the biography Mr. Greenlaw introduced in support of his testimony that he has any knowledge, much less expertise, in the highly complex process of billing or validating inter-carrier compensation. Mr. Greenlaw's own testimony, wherein he admitted that "I am certainly not an expert on usage record field values"⁴³ which is the very data used to calculate the billing amount to which he testified, completely undermines any claim that he is competent to introduce such evidence.

AT&T Missouri has proven quite fond of stating that the technical rules of evidence do not apply to Commission proceedings. The Missouri Supreme Court, however, emphasized that the fundamental rules of evidence do apply in administrative proceedings.⁴⁴ "The standards for admission of expert testimony constitute such a fundamental rule of evidence."⁴⁵ "The standards set out in section 490.065 therefore guide the admission of expert testimony in contested case administrative proceedings."⁴⁶ The Missouri Supreme Court held, therefore, that Section 490.065.3 "expressly requires a showing that the facts and data are of a type reasonably relied on by experts in the field in forming opinions or inferences upon the subject of the expert's testimony."⁴⁷ No such showing was made in regard to Mr.

⁴³ Greenlaw Rebuttal Testimony, p.3, l. 14.

⁴⁴ State Bd. of Reg. Healing Arts v. McDonagh, 123 S.W.3d 146, 154 (Mo., 2003)

⁴⁵ *Id.* at 154-55.

⁴⁶ *Id.* at 155.

⁴⁷ *Id.* at 156.

Greenlaw's testimony. As such, the Commission had no basis for admitting Mr. Greenlaw's testimony as expert testimony.⁴⁸

Even if Mr. Greenlaw's testimony was admissible, AT&T Missouri failed to lay the foundation for the amount allegedly owed. Mr. Greenlaw did not testify that Exhibit 33 is a business record prepared in the ordinary course of business. He did not testify that he prepared it, nor did he testify how he exercised his alleged expertise to verify its authenticity and accuracy, nor did he testify to the degree of confidence based upon his alleged expertise that the data is accurate. He did not identify the rates that were applied to the underlying traffic, nor the manner in which he exercised his alleged expertise to ascertain that the rates were applied correctly. He did not present the number of minutes of use upon which the total amount was calculated and whether he used his alleged expertise to ascertain the accuracy of those minutes and the degree of certainty to which those minutes were accurately calculated. He did not indicate how he determined (or whether he determined) if the traffic upon which the bills were allegedly calculated was traffic coming from Big River's network. He did not indicate how, based on his alleged expertise, he confirmed that such traffic did come from Big River's network. Nor did he explain how, or if, the non-local traffic was distinguished from the local traffic in the underlying call detail records that were allegedly used to calculate the billed amount. He testified that he had to confirm with some unidentified individual what fields are included on call detail records⁴⁹, calling into question his knowledge of the characteristics of the underlying data to which he testified.

⁴⁸ See *Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145, 173 (Mo. App., 2006) ("Failure to satisfy [§490.065] foundation requirements renders proffered expert witness testimony inadmissible.")

⁴⁹ EFIS No. 128, Rebuttal Testimony of William E. Greenlaw, p. 3.

Obviously, with his lack of expertise, his efforts to confirm his observations has no expert basis upon which he can determine whether the source of his confirmation had any basis in fact. His statements to the validity and accuracy of the billing amount to which he testified are complete hearsay. He was given information upon which he has no expertise to cast an opinion that the amount was correct. Expert witnesses opine, there was not a single opinion, professional or otherwise, in Mr. Greenlaw's testimony upon which the Commission could render a judgment whether the billed amounts were accurate.

AT&T Missouri failed to provide any competent evidence to support the amount that it alleged it is owed in its Complaint (in the event the Commission finds that access charges apply to Big River's traffic).

CONCLUSION

Big River's Motion for Rehearing should be granted because the Commission's Report and Order is unlawful, unjust, and unreasonable and is arbitrary, capricious unsupported by substantial and competent evidence, and is against the weight of the evidence considering the whole record, is unauthorized by law, and constitutes an abuse of discretion.

WHEREFORE, Big River Telephone Company, LLC respectfully requests that the Commission grant rehearing of its March 27, 2013, Report and Order.

Dated: April 25, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to the below-referenced parties by e-mail on April 25, 2013.

s/Brian C. Howe

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I hereby certify that copies of the foregoing documents were served to the below-referenced parties by the method indicated on May 9, 2013.

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