

**BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION**

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

**BIG RIVER TELEPHONE COMPANY, LLC’S**  
**MOTION TO STRIKE**

Big River Telephone Company, LLC (“Big River”) and, for its Motion to Strike portions of the testimony of William Greenlaw and Mark Neinast, states as follows:

1. AT&T Missouri has filed testimony of two witnesses, William Greenlaw and Mark Neinast.
2. Big River understands that under Missouri law, the Commission “shall not be bound by the technical rules of evidence” Mo. Rev. Stat. § 386.410.
3. However, that statute does not strip the Commission of its role as fact-finder and arbiter of the law.
4. Here, the testimony to which Big River objects goes beyond mere violations of the technical rules of evidence and encroaches upon the province of the Commission.
5. It is not apparent whether AT&T has proffered Mr. Greenlaw and Mr. Neinast as fact witnesses or expert witness.
6. If they are lay witnesses, “a lay witness generally cannot render an opinion as to the ultimate issue in a case.” Mohr v. Mobley, 938 S.W.2d 319, 322 (Mo. App. 1997).

7. If they are expert witnesses, “Section 490.065, RSMo 1994 authorizes an expert witness to render an opinion on an ultimate issue in a case ‘if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.’ Id.

8. Regarding issues of law, expert testimony is not admissible. Wulfing v. Kansas City Southern Industries, Inc., 842 S.W.2d 133, 153 (Mo. App. 1992). “That is because the special legal knowledge of the judge makes such testimony of the witness superfluous.” Id.

9. The testimony of Mr. Greenlaw at p. 5, l. 16 through p. 6, l. 23, as he endeavors to apply FCC legal definitions to the case at hand. (See Attachment 1)

10. The testimony of Mr. Greenlaw at p. 9, l. 20 through p. 10, l. 10 constitutes legal conclusions and invades the province of the commission by providing instructions on law as he attempts to describe the legal effect of a tariff and an admission by Big River and how it applies to the ultimate issue in this case. (See Attachment 2)

11. The testimony of Mr. Greenlaw at p. 10, l. 16 through p. 12, l. 2 constitutes legal conclusions and invades the province of the commission by providing instructions on law as he presumes to decide the applicability of a Commission order and a Big River tariff in relation to the ultimate issue. (See Attachment 3)

12. Likewise, the testimony of Mr. Greenlaw at p. 12, l. 7-19 constitutes legal conclusions and invades the province of the commission by providing instructions on law because he tries to apply 4 CSR 31.010(12) as it concerns Big River’s annual reports. (See Attachment 4)

13. The testimony of Mr. Greenlaw at p. 14, l. 14 through p. 15, l. 8 constitutes legal conclusions and invades the province of the commission by providing instructions on law as he offers his opinion as to the meaning and effect of Section 392.550. (See Attachment 5)

14. Again, the testimony of Mr. Greenlaw at p. 15, l. 9 through p. 17, l. 5 constitutes legal conclusions and invades the province of the commission by providing instructions on law because he provides his opinion on the meaning and effect of a prior settlement agreement and an amendment to the interconnection agreement (“ICA”). This testimony is further objectionable because the settlement was confidential and is irrelevant to the issue now before the Commission. (See Attachment 6)

15. Mr. Greenlaw’s testimony at p. 19, l. 9-18 constitutes legal conclusions and invades the province of the commission by providing instructions on law because he provides no “scientific, technical or other specialized knowledge” but rather merely voices his interpretation of the ICA and his legal opinion of how it applies to the traffic delivered by Big River. (See Attachment 7)

16. Further, Mr. Greenlaw’s testimony at p. 22, l. 6-15 constitutes legal conclusions and invades the province of the commission by providing instructions on law as it is nothing more than his opinion on how an FCC order applies to the ultimate issue. (See Attachment 8)

17. Mr. Greenlaw’s testimony at p. 23, l. 9-25 constitutes legal conclusions and invades the province of the commission by providing instructions on law as he sets forth his own “WHEREFORE” clause regarding the relief sought by AT&T and goes beyond that submitted by AT&T in its own Complaint by adding a fourth element, (d), not included in AT&T’s Complaint. The Complaint filed by AT&T speaks for itself. (See Attachment 9)

18. Mr. Neinast testimony is similarly lacking in statements of “scientific, technical or other specialized knowledge” but rather includes multiple instances of Mr. Neinast’s legal opinions.

19. Mr. Neinast’s testimony at p. 3, l. 5-17 as he pontificates on the meaning of 47 U.S.C. §§ 153(20), (43), and (46). (See Attachment 10)

20. Mr. Neinast’s testimony at p. 4, l. 16-17 also constitutes legal conclusions and invades the province of the commission by providing instructions on law as it is nothing more than a legal opinion what constitutes enhanced services traffic. (See Attachment 11)

21. The testimony of Mr. Neinast at p. 5, l. 17 through p. 6, l. 15 constitutes legal conclusions and invades the province of the commission by providing instructions on law as he goes into a lengthy discussion regarding the FCC IP Access Charge Order, void of any scientific, technical or other specialized knowledge. (See Attachment 12)

22. Similarly, the testimony of Mr. Neinast at p. 6, l. 21 through p. 7, l. 30 constitutes legal conclusions and invades the province of the commission by providing instructions on law as he attempts to interpret and apply the FCC’s InterCall Order. (See Attachment 13)

23. Again, the testimony of Mr. Neinast at p. 8, l. 22 through p. 10, l. 2 constitutes legal conclusions and invades the province of the commission by providing instructions on law as he provides a legal argument setting forth his opinion concerning the application of the FCC’s InterCall and Prepaid Calling Card Order to the facts at issue. His testimony here is again void of any scientific, technical or other specialized knowledge. (See Attachment 14)

24. Finally, the testimony of Mr. Neinast at p. 12, l. 4-14 constitutes legal conclusions and invades the province of the commission by providing instructions on law as he again

provides his opinion concerning how the Prepaid Call Card Order should be applied to this case.

(See Attachment 15)

WHEREFORE, Big River Telephone Company, LLC respectfully prays that the Commission enter an Order striking the above-referenced testimony and for such further relief as is just and reasonable.

RESPECTFULLY SUBMITTED,  
BIG RIVER TELEPHONE COMPANY,  
LLC

/s/ Brian C. Howe

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**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing was served upon all parties via e-mail on October 11, 2012.

/s/ Brian C. Howe

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