

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.

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.*

Interconnected Voice Over Internet Protocol

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

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

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

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

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

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.

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.*

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, 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

¹⁴ FCC 1999 Order at para. 20.

¹⁵ MO PSC 2007 Broadband Report, p. 4.

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

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

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.

¹⁷ MO PSC 2007 Broadband Report, at 10.

¹⁸ Id.

¹⁹ Id.

²⁰ Id. at 21.

²¹ MO PSC 2011 Broadband Report, p. 25.

²² Order, p. 16.

²³ Id. at 15.

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'.

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

²⁴ Order, p. 12.

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.

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 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.

²⁸ *Id.* at 4, l. 3-4.

²⁹ 1999 FCC Order, para. 20.

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

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,

³⁰ See Order, p. 2-11.

³¹ *Id.* at 13.

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.

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, 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 Rig 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

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

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 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

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.”)

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 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

³⁹ Tr. 204.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

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)

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. 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

⁴⁵ *Id.* at 154-55.

⁴⁶ *Id.* at 155.

⁴⁷ *Id.* at 156.

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.”)

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.

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

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

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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