

**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

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

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

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-VolP E911 service requirements and acknowledged that Big River customers can update their location information "using the VolP telephone equipment that they use to access their interconnected VolP service".⁴⁰

41. Big River CEO Gerard Howe testified to the Kansas Corporation Commission that Big River is an i-VolP 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-VolP 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-VoIP, 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-VoIP 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-VoIP 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-VoIP 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-VoIP 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.

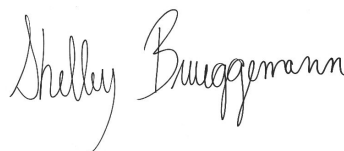
⁶⁵ *Southwestern Bell v. Connect Communications Corp.*, 225 F.3d at 946.

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