

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

Big River Telephone Company, LLC,)	
)	
Complainant,)	
)	
v.)	Case No. TC-2012-0284
)	
Southwestern Bell Telephone)	
Telephone, L.P., d/b/a AT&T Missouri,)	
)	
Respondent.)	

**AT&T MISSOURI’S RESPONSE TO BIG RIVER’S MOTION TO STRIKE
PORTIONS OF AT&T MISSOURI’S DIRECT TESTIMONY**

COMES NOW, AT&T Missouri,¹ and respectfully submits its response to the motion of Big River Telephone Company, LLC (“Big River”) to strike portions of the pre-filed direct testimony of witnesses William Greenlaw and Mark Neinast.

SUMMARY

This case requires the Commission to decide whether the calls at issue – interexchange, voice telephone calls from Big River’s customers to AT&T Missouri’s customers that both originate and terminate on the Public Switched Telephone Network, or “PSTN” – constitute “telecommunications services” traffic, to which access charges apply, or “enhanced/information services” traffic, exempt from access charges under the parties’ interconnection agreement. Notwithstanding Big River’s insistence otherwise, that decision cannot be made in a vacuum. Rather, the decision requires an assessment based on the nature of the traffic and other facts and circumstances, including but not limited to the various federal and state regulatory considerations involved.

¹ Southwestern Bell Telephone Company, f/k/a Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri (“AT&T Missouri”).

To enable the Commission to issue a fully informed decision, the Commission imposes various obligations on the parties to a case. The obligation which controls with respect to the content of direct testimony is clear: “Direct testimony shall include all testimony and exhibits asserting and explaining that party’s entire case-in-chief.” 4 CSR 240-2.130(7)(A). AT&T Missouri’s direct testimony meets that standard. Simply put, AT&T Missouri could hardly “explain[]” its “entire case-in-chief” without explaining its position that Big River’s services are not “enhanced” services under the governing standards. As a result, AT&T Missouri’s case-in-chief here necessarily includes relevant considerations based upon Big River’s certificates of authority, tariffs and annual reports, and prior statements made to the Commission, as well as pertinent FCC and Commission orders. The Commission’s consideration of all of them will enable the Commission to issue a fully informed decision and, importantly, Big River does not claim otherwise. Moreover, despite Big River’s assertions, admitting the testimony challenged by Big River will in no way “strip the Commission of its roles as fact-finder and arbiter of the law,” nor “encroach[] upon the province of the Commission.” Motion, at 1. For these reasons, as explained further herein, Big River’s motion should be denied in its entirety.

ARGUMENT

The sufficiency of AT&T Missouri’s direct testimony must be determined by reference to the *only* Commission rule directed to the subject: “Direct testimony shall include all testimony and exhibits asserting and explaining that party’s entire case-in-chief.” 4 CSR 240-2.130(7)(A); *In re Missouri Gas Energy’s Tariffs Increasing Rates for Gas Service Provided to Customers in the Company’s Missouri Service Area*, Case No. GR-2006-0422, Opinion, December 6, 2006, 2006 Mo. PSC LEXIS 1630, at *2. AT&T Missouri’s direct testimony, unlike that of Big River, does so, because it both asserts and fully explains why Big River’s traffic delivered to AT&T

Missouri for termination constitutes telecommunications services traffic, not enhanced/information services traffic. AT&T Missouri's explanation correctly focuses on the nature of the traffic and other facts and circumstances, including but not limited to the various federal and state regulatory considerations involved. Big River's motion does not claim that AT&T Missouri's explanation is either irrelevant or inadequate, or even that AT&T Missouri's direct testimony otherwise fails to meet the requirements of Commission Rule 2.130(7)(A). Rather, its motion represents no more than Big River's frustration that Big River has no legitimate answer to AT&T Missouri's case-in-chief.

AT&T Missouri's testimony is similar to that which this Commission has routinely, and properly, admitted in cases heard by it, and Big River's motion to strike based on evidentiary rules applicable to civil court proceedings is beside the point. Motion, at 1-2. Under Missouri law, the Commission "shall not be bound by the technical rules of evidence," and "[n]o formality in any proceeding nor in any manner of taking testimony before the commission or any commissioner shall invalidate any order, decision, rule or regulation made, approved or confirmed by the commission." Mo. Rev. Stat. § 386.410. Consequently, like most state public utility commissions, the Commission is not bound by technical rules of evidence and has wide latitude in deciding what types of evidence to admit.

Big River's attempt to overcome the obvious force of Section 386.410 is without merit. It first makes the unremarkable observation that Section 386.410 "does not strip the Commission of its roles as fact-finder and arbiter of the law." Motion, at 1. But it next asserts that AT&T Missouri's testimony "encroaches upon the province of the Commission." *Id.* AT&T Missouri does not deny that the Commission's role in this case is that of ultimate fact-finder and ultimate arbiter of the law. But nowhere does Big River explain precisely how the Commission's mere

consideration of the testimony to which Big River objects – which testimony fully explains AT&T Missouri’s case-in-chief – somehow “encroaches” on either of the Commission’s roles as fact-finder and arbiter of the law. The admission of AT&T Missouri’s testimony will not bind the Commission to accept AT&T Missouri’s testimony as ultimate fact or law, and it in no way strips the Commission from making its own determinations in these regards. On the contrary, the Commission will, as it always has in contested cases, make the findings of fact and conclusions of law that it deems appropriate, based on a fully informed record.

Virtually all of Big River’s motion complains that the testimony it challenges constitutes improper expressions of legal opinion. Indeed, it claims no less than 13 times that the testimony it challenges constitutes “instructions on law.” Motion, at 2-4 (paras. 10-17, 20-24). But AT&T Missouri does not purport to instruct the Commission on the law merely because AT&T Missouri has conveyed its view of the import of the applicable FCC and state rules and orders and other regulatory considerations. Instead, the testimony explains AT&T Missouri’s case-in-chief, in compliance with the Commission’s rule.

Moreover, even Big River concedes that the term “enhanced service” in the parties’ ICA cannot be properly defined, interpreted or applied without reference to these rules and orders. For example, one form of an enhanced service is, as Big River admits, “traffic that undergoes a net protocol conversion, *as defined by the FCC.*” Big River, Howe Direct (pre-filed), at 2. (emphasis added). And Big River does not deny (and it could not deny) that exactly what services constitute enhanced services has been the subject of significant FCC and state regulatory consideration for many years. Given this, AT&T Missouri’s testimony fully comports with the rule’s requirement that a party’s direct testimony should explain its entire case. (Big River’s testimony, on the other hand, repeatedly asserts that its traffic is “enhanced” without attempting

to explain how that could be under the pertinent FCC orders defining what qualifies as an enhanced service.)

At appropriate points in their testimony, AT&T Missouri's witnesses provide context by informing the Commission of relevant orders, contractual provisions, and similar matters that bear on the evidence they present. They also inform the Commission of AT&T Missouri's general positions regarding those matters. In doing so, they take appropriate care to leave it to AT&T Missouri's attorneys to present the legal argument supporting those positions in briefs. This common practice of putting regulatory testimony in the context of applicable rules, decisions, and contractual provisions is entirely appropriate and does not render any aspect of the testimony inadmissible. As the Wisconsin commission explained in similar circumstances, "Commission practice supports the presentation of facts in an organized and meaningful way," and "[o]ften the way to offer meaningful presentation of the facts requires a witness to describe the applicable law, as the witness perceives it, to provide the context necessary to make an informed decision." Att. A hereto, at 3. Indeed, only two months ago, this Commission issued a Report and Order in another access charge-related complaint case in which the Commission relied extensively on FCC orders, as well as Mr. Neinast's testimony. Mr. Neinast's testimony included reference to those orders. *See, In Halo Wireless, Inc. v. Craw-Kan Telephone Cooperative, Inc., et al.* Case No. TC-2012-0331, Report and Order, August 1, 2012, at 42, note 136.

Big River's further claim that Mr. Neinast's direct testimony "pontificates on the meaning of" three federal statutory definitions is specious. Motion, at 4. Close inspection of Attachment 10 to Big River's motion quickly reveals that the challenged testimony merely quotes three communications-related statutes, and makes the unremarkable and incontrovertible

points that federal law distinguishes between telecommunications services and enhanced services, and that Internet access service is an example of an enhanced service.

Likewise lacking in merit is Big River's assertion that the portion of Mr. Greenlaw's direct testimony regarding the parties' 2009 settlement is "objectionable because the settlement was confidential and is irrelevant." Motion, at 3. To the extent the settlement is confidential, AT&T Missouri has appropriately maintained confidentiality by filing its testimony in accordance with 4 CSR 240-2.135(11). As for Big River's relevance objection, Big River itself opened the door to discussion of the settlement, and made it relevant when, in its complaint filed on March 1, 2012, it attempted to cast the settlement in a light most favorable to itself, alleging that "[a]s part of the settlement of that lawsuit, AT&T credited Big River in full for the access charges." Complaint, para. 7.

Big River has continued its attempts to couch the parties' settlement in a light most favorable to itself, suggesting that AT&T was wrong in implementing the terms of the settlement. Mr. Jennings' direct testimony (at 2) asserts that "AT&T continued to bill for access charges after the settlement was reached." Furthermore, Mr. Jennings refers to and attaches an April 19, 2011 letter from him to AT&T (*see*, Jennings pre-filed direct testimony, at 6, and Schedule 3, attached thereto) which contains a detailed discussion of the settlement agreement and its ostensible import. As a result, Big River's motion seeking to exclude Mr. Greenlaw's testimony regarding the settlement should be denied.²

² Big River does not contend that this testimony should be stricken because it is privileged. Mr. Greenlaw's testimony discusses the fact of the settlement and the terms of a settlement, neither of which is privileged. And even if they were, under the *McNutt* doctrine, Missouri courts apply a "fairness" rationale to preclude a privilege holder from using the privilege strategically to exclude unfavorable evidence while at the same time admitting favorable evidence. *See*, State ex rel. McNutt v. Keet, 432 S.W.2d 597 (Mo. banc 1968); Brandt v. Medical Defense Associates, 856 S.W.2d 667, 672 (Mo. banc 1993); State ex rel. Southwestern Bell Publications v. Ryan, 754 S.W.2d 30, 32 (Mo. App. 1988); State ex rel. Rowland v. O'Toole, 884 S.W.2d 100, 103 (Mo. App. 1994). Here, it would be thoroughly unfair to permit Big River to use the parties' settlement both as "a shield and a dagger at one and the same time." *McNutt*, 432 S.W.2d at 601.

Finally, Big River asserts that the portion of Mr. Greenlaw's direct testimony which asks the Commission to determine AT&T Missouri's rights to suspend provisioning of Big River's pending and future orders placed under the parties' interconnection agreement should be stricken. That point, too, is specious. AT&T Missouri's complaint (at paras. 11-12) expressly "prays the Commission to . . . find and determine that . . . Big River has violated the terms of the parties' amended ICA by refusing to pay those [access] charges . . . and . . . grant such other and further relief to AT&T Missouri as the Commission may deem just and proper." Big River's own complaint asserts (at 10) that AT&T Missouri "threatened" to suspend order provisioning, and its direct testimony reiterates that AT&T Missouri "eventually threatened to stop processing orders from Big River if the disputed amount was not paid." Jennings' pre-filed direct testimony, at 3. Under these circumstances, the testimony submitted is entirely appropriate, and Big River's motion to strike it should be denied.

In all events, it is clear that to the extent that Big River's motion has any merit at all – which it does not – the relief it seeks is entirely overbroad in that it seeks to strike facts (not legal opinion) whose relevance is abundantly clear. As examples, Big River seeks to strike factual testimony merely reporting AT&T Missouri's requests to admit directed to Big River, and Big River's responses to those requests (*see*, Motion, at Att. 2); testimony conveying the facts that Big River is a certificated carrier and that it has Commission-approved telecommunications services tariffs, and quoting portions of those tariffs (*id.* at Att. 2, 3); testimony reporting statements made by Big River – under oath – to the Commission when it requested an expanded certificate of service authority (*id.*, at Att. 3); testimony conveying the facts stated in, and attaching, Big River's annual reports submitted to the Commission (*id.*, at Att. 4); testimony conveying the text and meaning of the parties' interconnection agreement, and an amendment to

the agreement, filed with and approved by the Commission in 2009 (*id.* at Att. 6, 7); testimony pointing out that the ability to record a call is separate from the ability to place a call and quoting Big River's admission to that fact (*id.* at Att. 13); and, terms reciting the text of pertinent statutes and orders (*id.* at Att. 1, 5, 8, 10, 12, 13, 14 and 15). Such testimony is entirely appropriate, indeed, compelled by the Commission's rule. Furthermore, while Big River may complain about it, Big River does not claim that it is either immaterial or irrelevant. That being the case, Big River's motion is clearly overbroad and must be denied on this separate and independent ground.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, AT&T Missouri respectfully submits that Big River's motion should be denied in its entirety.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

BY 

ROBERT J. GRYZMALA #32454

LEO J. BUB #34326

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

One AT&T Center, Room 3520

St. Louis, Missouri 63101

314-235-6060 (Telephone)/314-247-0014 (Facsimile)

robert.gryzmala@att.com

Hans J. Germann (admitted *pro hac vice*)

Mayer Brown LLP

71 S. Wacker Drive

Chicago, IL 60606

312-782-0600 (Telephone)/312-701-7711 (Facsimile)

HGermann@mayerbrown.com

DATE MAILED

FEB 28 2012

Public Service Commission of Wisconsin
RECEIVED: 02/28/12, 3:11:50 PM**PUBLIC SERVICE COMMISSION OF WISCONSIN**

Investigation into Practices of Halo Wireless, Inc., and Transcom
Enhanced Services, Inc.

9594-TI-100

ORDER ON MOTIONS TO STRIKE

This order, pursuant to Wis. Admin. Code § PSC 2.04(1), denies the following Halo Wireless, Inc., and Transcom Enhanced Services, Inc., objections to direct prehearing testimony:

- Mark Neinast PSC REF#: 159344
- J. Scott McPhee PSC REF#: 159343
- Thomas McCabe PSC REF#: 159342
- Linda Robinson PSC REF#: 159345
- Lois L. Ihle PSC REF#: 159341

Wisconsin Rural Local Exchange Carriers, AT&T Wisconsin, and TDS Telecom Companies responded (PSC REF#: 159771, 159763 and 159759).¹ Movants replied (PSC REF#: 159877).

To conform the objections to Commission practice, this order deems each objection a Motion to Strike. On a Motion to Strike, movants carry the burden of demonstrating that the subject testimony fails to satisfy the applicable evidentiary standard as applied through Commission practice. This burden movants failed to carry.

Through separate motions, each applicable to one opposing party witness, movants make three practically identical objections. First, movants make a general objection claiming the

¹ The TDS Telecom Companies' response also requests a protective order from the movants' requests for "any data and other information underlying [the witness's testimony]" (PSC REF#: 159759 at 7). TDS correctly identifies the statement as improper and unenforceable to the extent one could consider it a discovery request.

Docket 9594-TI-100

witnesses use data in a manner not acceptable to experts in the field and, therefore, inadmissible as expert testimony.

However, this objection amounts to a misplaced critique of the validity and weight of the testimony. Determination of the validity and proper weight of probative evidence occurs not on a procedural motion, but as part of the Commission's review of the entire record. An opposing party may contest the validity and weight of evidence through rebuttal and cross-examination. This practice applies regardless of how the party attempts to label testimony.

Second, movants object to the admission of the subject testimony for lack of personal knowledge. However, the testimony relies on data either provided by the movants or gathered through standard industry practices. Each witness's education, experience and company position provide sufficient basis to rely on the offered facts and analysis. The Commission typically admits data of this nature. Therefore, sufficient foundation exists.

Moreover, to bar the admissibility of this evidence, movants assert a standard foreign to Wisconsin. Recently, the Tennessee Regulatory Authority (TRA) heard a case involving, for practical purposes, the same issues and parties.² Movants submitted objections to the testimony of opposing party witnesses that were practically identical to the instant motions.³

Tennessee administrative law recognizes the inadmissibility of hearsay in contested cases, but allows the admission of hearsay for evidence, "of the type commonly relied upon by

² *In Re: Complaint of Concord Telephone Exchange, Inc., Humphreys County Telephone Co., Tellico Telephone Company, Tennessee Telephone Company, Crockett Telephone Company, Inc., Peoples Telephone Company, West Tennessee Telephone Company, Inc., North Central Telephone Coop., Inc., and Highland Telephone Cooperative, Inc., Against Halo Wireless, LLC, Transcom Enhanced Services, Inc., and Other Affiliates for Failure to Pay Terminating Intrastate Access Charges for Traffic and Other Relief and Authority to Cease Termination of Traffic*, Tennessee Regulatory Authority, Docket No. 11-00108.

³ *Objections to Rebuttal Testimony of Linda Robinson*, TRA, Docket No. 11-00108, January 23, 2012; *Objections to Rebuttal Testimony of Thomas McCabe*, TRA, Docket No. 11-00108, January 23, 2012; *Objections to Direct Testimony of Thomas McCabe*, TRA, Docket No. 11-00108, January 23, 2012; *Objections to Direct Testimony of Linda Robinson*, TRA, Docket No. 11-00108, January 23, 2012.

Docket 9594-TI-100

reasonably prudent men in the conduct of their affairs.”⁴ Movants asserted that the opposing party witness failed to meet this standard. The TRA overruled these objections.⁵

Notwithstanding the persuasive precedent of the TRA ruling, the instant motions fail on different grounds. In Wisconsin, the standard for admissibility of evidence in a contested case is far less restrictive than in Tennessee. A Wisconsin administrative agency: (1) may accept evidence outside the standards of “common law or statutory rules of evidence,” (2) “shall admit all testimony having reasonable probative value,” and 3) shall exclude “immaterial, irrelevant or unduly repetitious testimony” [Wis. Stat. § 227.45(1)].

This order denies the motions because movants failed to apply the correct standard and presented no basis for excluding the subject testimony according to it. Furthermore, no such basis exists.

Finally, movants object to the alleged presence of legal conclusions in the subject testimony. The presentation of legal argument is properly reserved to briefs. However, Commission practice supports the presentation of facts in an organized and meaningful way. Often the way to offer a meaningful presentation of the facts requires a witness to describe the applicable law, as the witness perceives it, to provide the context necessary to make an informed decision. Also, the record benefits from testimony that documents a party’s position on a mixed question of law and fact offered by a witness with particular expertise, background or experience with the case.

⁴ In contested cases:

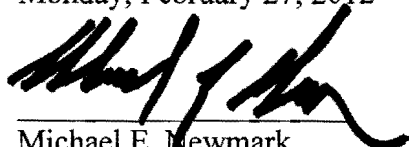
(1) The agency shall admit and give probative effect to evidence admissible in a court, and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.
TCA 4-5-313.

⁵ *Transcript of Proceedings*, TRA, Docket No. 11-00108, January 23, 2012, at 7-8.

Docket 9594-TI-100

Moreover, granting the Motions on the ground that the subject testimony contains legal conclusions would call into question the validity of movants' prehearing testimony because it is riddled with the same. Instead of negating the efforts made in this proceeding to date, by excluding the bulk of the prehearing testimony, prudence and efficiency dictate the process continue to run on its course.

Monday, February 27, 2012

A handwritten signature in black ink, appearing to read 'Michael E. Newmark', written over a horizontal line.

Michael E. Newmark
Administrative Law Judge

MEN::00462086 Order on Motions to Strike.docx

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties by e-mail on October 19, 2012.


Robert J. Gryzmala

John Borgmeyer
General Counsel
Missouri Public Service Commission
PO Box 360
Jefferson City, Mo 65102
GenCounsel@psc.mo.gov
john.borgmeyer@psc.mo.gov

Lewis Mills
Public Counsel
Office of the Public Counsel
PO Box 7800
Jefferson City, MO 65102
opcservice@ded.mo.gov

Brian C. Howe #36624
Big River Telephone Company, LLC
12444 Powerscourt Drive, Suite 270
St. Louis, Missouri 63131
Email: bhowe@bigrivertelephone.com