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 Company, d/b/a AT&T Missouri,	)	
	)	
Respondent.	)	

STAFF'S INITIAL POST-HEARING BRIEF

Respectfully submitted,

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January 28, 2013

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COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its Initial Brief, pursuant to Commission Rule 4 CSR 240-2.140 and the procedural schedule in this case, states the following:

I. Introduction

As Big River CEO Gerard Howe explained during the hearing, this case turns entirely on whether Big River's voice over Internet protocol (VoIP) service "requires a broadband connection" pursuant to the statutory definition of interconnected VoIP (I-VoIP) traffic in § 386.020(23)(b).[1] Unquestionably it does.

Big River concedes two facts: One, Big River admits to providing VoIP service.[2] Two, Big River states that its VoIP customers are able to make and receive two-way telephone calls over the public switched telephone network (PSTN).[3] In other words, from the user's perspective, Big River's VoIP service is similar to traditional telephone service. That's the exact definition of I-VoIP: Voice over Internet protocol traffic that begins and ends like a regular

[1] EFIS No. 100, Transcript Vol. 4, p. 103, lns 1- 8.
[2] EFIS No. 72, *Big River Telephone Company, LLC's Position Statement* p. 1; Tr. Vol. 4, p. 74, lns 11-13.
[3] EFIS No. 163, Staff's Ex. 1, *Rebuttal Testimony of William L. Voight*, p. 7 lns19-25; Tr. Vol. 4, p. 75, lns 4-12. Traffic over the PSTN is often referred to as "plain old telephone service," or "POTS."

phone call, with the customer using a familiar telephone handset.[4] Missouri statute expressly provides that I-VoIP traffic is subject to access charges. That makes this an easy, straightforward case, as Staff Witness William L. Voight explained in his pre-filed and hearing testimony.

Staff's brief explains why the Commission should ignore discursions into the nature of "enhanced" traffic and avoid contortions around the definition of "broadband." Big River's reading of the I-VoIP statute must be rejected, because it would render the law meaningless. The Commission should resolve the issues presented in this case by finding that Big River's traffic is I-VoIP and subject to the access charges as billed by AT&T.

II. The Issues

Pursuant to Paragraph 3.G of the Commission's *Order Setting Procedural Schedule and Establishing Additional Procedural Requirements*, Staff's brief addresses the list of issues as filed in this case.

A. Should the traffic which Big River has delivered to AT&T Missouri over the local interconnecting trunks for termination, and for which AT&T Missouri has billed Big River access charges since January, 2010 under Billing Account Number 110 401 0113 803 ("BAN 803"), be classified as interconnected VoIP traffic, enhanced services traffic, or neither?

1. Big River's traffic should be classified as interconnected VoIP (I-VoIP) traffic.

Section 386.020(23) RSMo. defines I-VoIP 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."

[4] EFIS No. 102, Tr. Vol. 6, p. 251 ln 23 – p. 252 ln 10. VoIP service processes a customer's voice signal through a small computer utilizing session initiation protocol ("SIP") software attached to the customer's telephone. This is the "customer premises equipment" referenced in § 386.020(23)(c). From the user's perspective, an I-VoIP phone call is similar to regular telephone service, and this similarity is one difference between I-VoIP and other types of VoIP service, such as Skype, that take place only over the Internet. The *VoIP Industry Task Force Report* filed March 30, 2004, in Case No. TW-2004-0324 discusses the variety in VoIP technology.

VoIP is a technology that transmits real-time, two-way voice communications by converting the speech into digital "packets" that are routed to their destination using internet protocol (as opposed to traditional analog telephone service over the PSTN, where a voice conversation takes place over a single copper wire).[5] These features are described in subsections (a), (b) and (c) of § 386.020(23). "Interconnected" VoIP refers to the ability of a VoIP customer to make and receive calls to and from the PSTN. This interconnection with the PSTN is described in subsection (d) of § 386.020(23).[6]

In his rebuttal testimony, Staff witness William L. Voight explained that Big River's traffic should be classified as I-VoIP pursuant to § 386.020(23) RSMo., based on deposition responses by Big River witness Gerard Howe. Mr. Voight's testimony cited specific responses establishing that Big River customers have IP customer premises equipment where their telephone calls are converted to IP format, that the IP equipment uses a broadband connection, and that Big River customers have the ability to make telephone calls to people who are served on the PSTN.[7] In subsequent testimony and pleadings, Big River expressly concedes that its traffic is VoIP.[8] VoIP traffic interconnected with the PSTN is the statutory definition of I-VoIP service under Missouri law. The case is, in fact, that simple.

2. Big River's traffic "requires" broadband.

After Mr. Voight filed his rebuttal testimony applying the I-VoIP statue, Big River filed surrebuttal testimony presenting, for the first time, Big River's argument that Missouri's I-VoIP

[5] EFIS No. 100, Tr. Vol. 4, p. 60 lns 4-9. See TW-2004-0324, *In the Matter of A Study of Voice Over Internet Protocol in Missouri, VoIP Industry Task Force Report* filed March 30, 2004, p. 1. By converting analog telephone conversations into digital data and transmitting the packets over the Internet, VoIP technology is more efficient than plain old telephone service and provides numerous benefits for consumers, including the ability to bypass the telephone company altogether.
[6] EFIS No. 102, Tr. Vol. 6, p. 251 ln 23 – p. 252 ln 10.
[7] EFIS No. 163, Staff's Ex. 1, Voight Rebuttal, p. 7 lns 7-32.
[8] EFIS No. 72, *Big River Position Statement* p. 1. EFIS No. 100, Tr. Vol. 4, p. 74 lns 11-13. EFIS No. 103, *Direct Testimony of Gerard J. Howe*, p. 3, ln 3; p. 5 ln 13 – p. 6 ln 5.

statute does not apply to its traffic because it does not "require" a broadband connection at the user's location, pursuant to subsection (d) of § 386.020(23).[9] On its face, this argument is illogical, given Big River's admissions described above, because the fact that the traffic is VoIP necessarily implies that it "requires" broadband. VoIP is described by elements (a), (b), and (c) of the statutory definition of I-VoIP at § 386.020(23). It is only subsection (d) that determines whether the VoIP traffic is "interconnected," or I-VoIP. Therefore, it defies logic to state both that Big River's traffic is VoIP, but that it does not meet § 386.020(23)(b).

Nor does Big River's argument satisfy the laws of statutory construction. The primary rule of statutory construction requires a court "to ascertain the intent of the legislature by considering the plain and ordinary meaning of the words used in the statute… Each word, clause, sentence and section of a statute should be given meaning."[10] Moreover, when a court interprets a statute, it does not presume that the legislature has enacted a meaningless provision.[11] The court should not construe the statute so as to work unreasonable, oppressive or absurd results.[12] As explained below, Big River fails to give a plain and ordinary reading to the statutory phrase "requires a broadband connection," and Big River argues for an interpretation that would render Missouri's I-VoIP legislation completely meaningless.

To demonstrate its point, Big River CEO Mr. Howe's testimony included a recording of a telephone call on Big River's VoIP service that was completed when the bandwidth of the internet connection is capped at 40 kilobits per second (kbps).[13] Big River argues that because the FCC, in its broadband reports, has established a minimum standard speed of 200 kbps for

[9] EFIS No. 105, Big River Ex. 3, *Surrebuttal Testimony of Gerard J. Howe*, p. 3 ln 3 – p. 4 ln 11.
[10] *State Ex rel. Praxair, Inc. v. Pub. Serv. Comm'n of the State of Missouri*, 328 S.W.3d 329, 344 (Mo. Ct. App. 2010).
[11] *Stopaquila.Org v. Aquila, Inc.*, 180 S.W.3d 24, 32 (Mo. Ct. App. 2005).
[12] *AG Processing, Inc. v. S. St. Joseph Indus. Sewer Dist.*, 937 S.W.2d 319, 324 (Mo. Ct. App. 1996).
[13] EFIS No. 105, Howe surrebuttal, p. 3 ln 3 – p. 4 ln 14.

broadband connections, therefore its VoIP service does not "require" broadband because its VoIP service can be transmitted at less than the FCC's minimum standard broadband speed.[14]

Big River's argument misinterprets the meaning of the FCC's minimum speed threshold. The Telecommunications Act of 1996 requires the FCC to determine annually whether broadband "is being deployed to all Americans in a reasonable and timely fashion."[15] In order to make this determination, the FCC uses a "minimum threshold for broadband services,"[16] which is a minimum speed reflecting evolutions in technology and consumer demands. For example, the FCC recently raised the minimum speed threshold for broadband service from 200 kbsp—a level set in 1999—to 4 megabits per second (Mbps), a speed which matches the modern consumer demand for high-quality voice, data, graphics, and video telecommunications.[17] The FCC will use this speed standard to assess the extent to which broadband is being deployed to Americans, but that is wholly irrelevant to the Commission's interpretation of § 386.020(23).

Neither § 386.020 nor the I-VoIP statute at § 392.550 defines the term "broadband." This Commission's VoIP Task Force explained in a 2004 report that while "there is no single definition of broadband," VoIP service "requires a 'broadband' connection to achieve the necessary speed and 'always on' functionality."[18] Thus, the plain and ordinary meaning of a "broadband connection" is a digital internet connection that is "always on" and functioning at significantly higher speeds than dial-up.

In its Broadband Deployment Reports, the FCC defines "broadband" as synonymous with "advanced telecommunications capability," which Section 706 of the Telecommunications Act

[14] *Id.*
[15] *FCC Sixth Broadband Deployment Report*, GN Docket No. 09-137, 25 FCC Rcd. 9556; 2010 WL 2862584, 1 (July 16, 2010).
[16] *Id.*
[17] *Id.* at 2.
[18] TW-2004-0324, *VoIP Industry Task Force Report*, p. 1, fn. 1. "Always on" functionality means the connection is always open, as opposed to analog dial-up service that requires the user to 'make a call' to the ISP. See Harry Newton, *Newton's Telecom Dictionary* 57 (CMP Books 2003) (Nineteenth Edition).

of 1996 defines as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.[19] Similar to the Commission's VoIP Task Force, the FCC defines "broadband" by referring to the general capability to transmit high-quality information at high speeds, not by specific minimum speed requirements.

The FCC's website defines broadband by contrasting it to dial-up service:

> "Broadband or high-speed Internet access allows users to access the Internet and Internet-related services at significantly higher speeds than those available through 'dial-up' Internet access services. Broadband speeds vary significantly depending on the particular type and level of service ordered and may range from as low as 200 kilobits per second (kbps), or 200,000 bits per second, to 30 megabits per second (Mbps), or 30,000,000 bits per second. Some recent offerings even include 50 to 100 Mbps." [20]

Big River's own promotional material explains "broadband" by referring to its capability in contrast to dial-up. Big River describes its VoIP service this way: "Digital Telephone service or VOIP (Voice over Internet Protocol) is a residential phone or business phone service that uses a broadband connection *rather than a traditional (analog) line* to make unlimited local and long distance telephone calls."[21]

Indeed, the demonstration in Mr. Howe's surrebuttal testimony was *actually conducted on a broadband connection*—not a dial-up connection. Just because the call functioned at a speed less than the FCC's standard minimum speed does not change the fact that the call required a broadband connection as opposed to a dial-up connection.

As Staff witness William Voight explained, Big River's traffic uses an Internet protocol conversion. An Internet protocol conversion cannot be accomplished over a dial-up connection—

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[19] *FCC Sixth Broadband Deployment Report*, GN Docket No. 09-137, 25 FCC Rcd. 9556, 9562; 2010 WL 2862584, 1 (July 16, 2010).
[20] http://www.fcc.gov/guides/getting-broadband.
[21] EFIS No. 121, Staff Ex. 6, *Digital Telephone Services FAQ*, http://www.bigrivertelephone.com/voip_faq.html (emphasis added).

it requires a digital connection. Therefore, Big River's I-VoIP service requires a broadband connection.

It should be clear that in 2008 when the Missouri legislature approved the language § 386.020(23)(b) that I-VoIP traffic "requires a broadband connection from the user's location," the legislature was not referring to a particular speed. The legislature meant that I-VoIP requires more than dial-up; it requires a high-speed digital connection.

Finally, the Commission must reject Big River's interpretation of the statute because it would render the law meaningless. Any I-VoIP provider could replicate Big River's demonstration and make a VoIP telephone call through an artificially restricted bandwidth and thereby evade access charges. Big River's interpretation would thus render Missouri's I-VoIP statute inapplicable to any I-VoIP traffic exchanged in Missouri. Because a reviewing court will not presume the legislature enacted a meaningless statute, it would probably strike down such an interpretation by the Commission.

3. Big River's Traffic is Not "Enhanced"

Big River's original argument stated that its BAN 803 traffic in this case is "enhanced service" exempt from access charges pursuant to its Interconnection Agreement with AT&T.[22] This is not the case.

The FCC defines "enhanced service" as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."[23] Examples of "enhanced services"

[22] EFIS No. 103, Howe direct.
[23] Mo. PSC Case No. TC-2012-0331, EFIS No. 262, *Report and Order*, p. 43 (August 1, 2012).

include Internet access service[24] or voice mail,[25] which reflect the "additional, different or restructured" information referenced in the FCC definition. As the Missouri PSC noted in the recent *Halo Wireless* case, service is not "enhanced" when it is merely incidental to the underlying telephone service, or when merely 'facilitate[s] establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone services," and that in deciding whether a service is "enhanced" one must use the end-user's perspective. In that case, the Commission explicitly recognized that minimizing background noise or adding comfort noise—the same type of "enhancements" that Big River describes[26]—do not classify a service as "enhanced."

Staff Witness William Voight testified that "under no circumstances that I'm able to tell is Big River offering any sort of an enhanced service."[27] Referring to Big River's testimony, Mr. Voight stated that he has no reason to doubt the engineering conclusions drawn by Mr. Howe, or Mr. Howe's testimony regarding the quality of Big River's traffic or the various transformations and changes it undergoes. "However, those facts do not support the contention that such traffic is subject to reciprocal compensation, or that such traffic fits the FCC's definition of an 'enhanced service,' much less is that sufficient for the Commission to conclude that 100 percent of Big River's traffic is an enhanced service."[28]

[24] *In re Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Providers of Internet Access Service,* DA 96-1647, 11 FCC Rcd. 12299, 1996 WL 557130 (Sept. 30, 1996).
[25] *In re Southwestern Bell CEI Plan for the Provision of Voice Messaging Services*, DA 88-1469, *Memorandum Opinion and Order*, 3 FCC Rcd. 6912, 1988 WL 489230 (Sept. 29, 1988).
[26] EFIS No. 103, Howe direct p. 3 ln 16 – p. 6 ln 5.
[27] EFIS No. 102, Tr. Vol. 6 at 253 lns 7-13.
[28] EFIS No. 163, Voight Rebuttal at12 ln 6 – 13 ln 2. Indeed, as Mr. Voight points out, Big River's own Annual Report identifies its traffic as either "telecommunications" service or "I-VoIP" service, both of which are subject to exchange access charges. *Id.* at 11 lns 20-22 and Tr. Vol. 6 at 253 lns 7-13.

B. What charges, if any, should apply to the traffic referenced in Issue No. 1?

Section 392.550.2 RSMo. provides: "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." Because Big River's traffic in this case is classified as I-VoIP, access charges apply.

In his rebuttal testimony, Staff witness William Voight recommended the Commission order AT&T to provide additional data sufficient to permit Big River to ascertain the appropriateness of the amounts billed.[29] However, in response, Big River witness Gerard Howe stated his belief that "the time is past due for AT&T to have produced its supporting evidence."[30] At hearing, AT&T witness Janice Mullins testified that it could take a "huge project" to gather the kind of data Big River is asking for, and that Big River could have had access to this data.[31] AT&T presents convincing evidence that Big River did not timely contest the accuracy of AT&T's bills for this traffic.[32]

Nothing in the record shows any reason to doubt the accuracy of AT&T's bills to Big River for the BAN 803 traffic. Staff recommends the Commission order that Big River owes access charges as billed by AT&T on this traffic.

III. Conclusion

Big River concedes that its traffic is classified as voice over Internet protocol (VoIP) and that its customers are able to make calls to the PSTN—thus its traffic is clearly I-VoIP. Pursuant to § 392.550, this I-VoIP traffic is subject to appropriate exchange access charges as billed by AT&T.

[29] EFIS No. 163, Voight Rebuttal at 10 lns 9-17.
[30] EFIS No. 105, Howe surrebuttal at 7 lns 1-16.
[31] EFIS No. 102, Tr. Vol. 6 at 234 ln 17 – 235 ln 18.
[32] *Id.* at 244 ln 25 – 247 ln 25.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were served electronically to all counsel of record this 28th day of January, 2013.

/s/ *John D. Borgmeyer*