

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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Illinois Bell Telephone Company	)	
	)	
	)	ICC Docket No. 11-0083
	)	
Petition for Arbitration of	)	
Interconnection Agreement with	)	
Big River Telephone Company, LLC.	)	

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**INITIAL BRIEF OF THE  
STAFF OF THE ILLINOIS COMMERCE COMMISSION**

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April 18, 2011

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The Staff of the Illinois Commerce Commission (the "Staff"), by and through its counsel, and pursuant to Section 761.400 of the Commission's Rules of Practice (83 Ill. Adm. Code 761.400), respectfully submits its Initial Brief in the above-captioned matter.

## **I. Procedural History**

On January 27, 2011, the Illinois Bell Telephone Company (hereafter "AT&T Illinois") filed its Petition seeking arbitration of an interconnection agreement (hereafter "ICA") with Big River Telephone Company LLC (hereafter "Big River") pursuant to Section 252(b) of the federal Telecom Act of 1996. See, *generally*, Petition. The Petition alleges that AT&T Illinois and Big River attempted to negotiate terms and conditions of an ICA between them, but failed to reach agreement with respect to several significant points. Petition, ¶¶8, 10-12. AT&T requested Commission arbitration of these open issues. Id. at 6.

On February 10, 2011, pursuant to Commission Rule 761.210(b), AT&T Illinois filed and served the Direct Testimony of J. Scott McPhee (AT&T Ex. 1.0) and Carl C. Albright, Jr. (AT&T Ex. 2.0). On February 24, 2011, the matter was convened for status before a duly-appointed Administrative Law Judge (hereafter "ALJ") and a schedule for further proceedings and discovery was duly set. Tr. at 4-20. The parties also agreed to extend the dates for decision established by federal statute and Commission rule. Tr. at 10-11.

On February 24, 2011, Big River submitted its response to the Petition, and the Direct Testimony of Gerard J. Howe (Big River Ex. 1). Thereafter, on March 14, 2011, the Staff of the Commission (hereafter "the Staff") submitted the

Direct Testimony of Dr. James Zolnierек (Staff Ex. 1.0). On April 1, 2011, AT&T filed the Rebuttal Testimony of Mr. McPhee (AT&T Ex. 1.1) in response to Dr. Zolnierек's testimony, while Big River submitted the Rebuttal Testimony of Mr. Howe (Big River Ex. 2). On April 5, 2011, an evidentiary hearing was convened, and testimony taken and evidence otherwise adduced Tr. at 25-192.

## **II. Issues Presented**

In the Arbitration Petition, AT&T Illinois identified five issues in dispute between the parties. In the Arbitration Response, Big River did not identify any additional issues beyond those identified by AT&T Illinois. Staff will hereafter use the numbering format adopted by AT&T Illinois in its DPL when referring to the issues in this proceeding.

Accordingly, pursuant to Section 252(b)(4)(A) of the federal Telecommunications Act, 47 U.S.C. §252(b)(4)(A), the issues presented for resolution in this proceeding are limited to the following:

1. Should the ICA provide for a bill and keep arrangement for traffic that is otherwise subject to reciprocal compensation but is roughly balanced?
2. If so, what terms and conditions should govern such bill and keep arrangements?
3. Should AT&T be required to provide transit traffic service under the ICA?
4. If the Commission requires the inclusion of transit in the ICA, what are the appropriate rates that AT&T should charge for such service?
5. If the Commission requires the inclusion of transit in the ICA, what are the appropriate terms and conditions for transit traffic?

Petition, Ex. B at 1-4 (Disputed Points List)

### III. Applicable Statute

Section 252(b)-(d) of the federal Telecommunications Act of 1996, 47

U.S.C. §252(b)-(d), provides that:

(b) Agreements arrived at through compulsory arbitration.

(1) Arbitration. During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner.

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond. A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission.

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate

conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate. The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration. In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 [47 USCS § 251], including the regulations prescribed by the Commission pursuant to section 251 [47 USCS § 251];

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards.

(1) Interconnection and network element charges. Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 [47 USCS § 251(c)(2)], and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section [47 USCS § 251 (c)(3)]--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic.

(A) In general. For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) [47 USCS § 251(b)(5)], a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction. This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

#### **IV. Contested Issues**

##### **Issue No. 1 Should the ICA provide for a bill and keep arrangement for traffic that is otherwise subject to reciprocal compensation but is roughly balanced?**

AT&T Illinois Position: AT&T Illinois does not believe that such a provision should be included in the ICA. AT&T Illinois contends that bill and keep approaches to reciprocal compensation invite arbitrage, and are not favored by statute or rule.

Big River Position: Big River advocates a bill and keep arrangement, asserting that the practice is widespread, and that it captures the economic impact of reciprocal compensation while reducing transaction costs. Big River further asserts that its proposed contract provision permits moving to a paid reciprocal compensation arrangement if traffic flows cease to be in balance.

Staff Recommendation: Based on the record adduced in this proceeding, AT&T Illinois' position should be adopted. The only reliable evidence points to traffic being extremely out of balance over the last year. Big River's proposed contract language allowing the parties to transition to a reciprocal compensation and billing arrangement is, moreover, unworkable, in light of the positions taken by Big River in this proceeding.

Issues No. 1 concerns reciprocal compensation. Accordingly, a detailed summary of the law governing reciprocal compensation, as it affects this proceeding, is warranted here.

Reciprocal compensation has its genesis in the federal Telecommunications Act of 1996. Section 251(b)(5) of that enactment provides in relevant part that: “[e]ach local exchange carrier has ... [t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. §251(b)(5). It was the Congress’s intent that the principal manner in which telecommunications carriers would interconnect and exchange traffic would be pursuant to the terms of interconnection agreements arrived at through negotiation. 47 U.S.C. §252(a). The Congress anticipated, however, that disputes were likely to arise in the negotiation of such agreements, and established procedures for resolution of disputes through arbitration by state Commissions. 47 U.S.C. §252(b). With respect to arbitrating disputes regarding reciprocal compensation, as noted above, the Act affords state Commissions the following pricing guidelines:

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) [of this Act], a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

47 U.S.C. §252(d)(2)(A)

To further guide state Commissions in setting reciprocal compensation rates, and otherwise resolve reciprocal compensation disputes, the Federal Communications Commission (FCC) issued its Local Competition Order, promulgating rules governing these matters, on August 8, 1996. *See, generally, First Report And Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, FCC No. 96-325, CC Docket No. 96-98; CC Docket No. 95-185, 11 FCC Rcd 15499; 1996 FCC Lexis 4312; 4 Comm. Reg. (P & F) 1 (August 8, 1996) (hereafter “Local Competition Order”). That *Order*, with its associated rules, bears directly upon matters at issue here.

The FCC recognized that “bill and keep” arrangements, pursuant to which carriers neither pay reciprocal compensation to carriers for traffic terminated on their networks, nor seek reciprocal compensation for traffic terminated on their own networks, might be appropriate in certain cases. Local Competition Order, ¶1096. In the *Local Competition Order*, the FCC accordingly found that

[S]tate commissions may impose bill-and-keep arrangements if neither carrier has rebutted the presumption of symmetrical rates and if the volume of terminating traffic that originates on one network and terminates on another network is approximately equal to the volume of terminating traffic flowing in the opposite direction, and is expected to remain so, as defined below.

Local Competition Order, ¶1111

Based upon this determination, the FCC promulgated a regulation which permits “bill-and-keep”, which is to say that carriers neither pay reciprocal compensation to other carriers for traffic terminated on the latter’s networks, nor

seek reciprocal compensation for traffic terminated on their own networks. See, generally, 47 C.F.R. §51.713. This section further provides that:

(b) A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to Sec. 51.711(b).

(c) Nothing in this section precludes a state commission from presuming that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption.

47 C.F.R. §51.713(b-c)

The FCC's endorsement of bill-and-keep was not, however, unqualified. In the *Local Competition Order*, it found that:

**Section 252(d)(2)(A)(i) provides that to be just and reasonable, reciprocal compensation must "provide for the mutual and reciprocal recovery by each carrier of costs associated with transport and termination."** [fn] In general, we find that carriers incur costs in terminating traffic that are not de minimis, and consequently, bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs. In addition, as long as the cost of terminating traffic is positive, bill-and-keep arrangements are not economically efficient because they distort carriers' incentives, encouraging them to overuse competing carriers' termination facilities by seeking customers that primarily originate traffic. On the other hand, when states impose symmetrical rates for the termination of traffic, [fn] payments from one carrier to the other can be expected to be offset by payments in the opposite direction when traffic from one network to the other is **approximately balanced** with the traffic flowing in the opposite direction. In such circumstances, bill-and-keep arrangements may minimize administrative burdens and transaction costs. **We find that, in certain circumstances, the advantages of bill-and-keep arrangements outweigh the disadvantages, but no party has convincingly explained why, in such circumstances, parties themselves would not agree to bill-and-keep arrangements.** We are mindful, however, that negotiations may fail for a variety of

reasons. **We conclude, therefore, that states may impose bill-and-keep arrangements if traffic is roughly balanced in the two directions and neither carrier has rebutted the presumption of symmetrical rates.**

Local Competition Order, ¶1111 (emphasis added; footnotes from original omitted)

In this passage, the FCC determined that a cardinal principle of reciprocal compensation, deriving from statute, is the proposition that reciprocal compensation “**must ‘provide for the mutual and reciprocal recovery by each carrier of costs associated with transport and termination[,]’**” if it is to satisfy that statutory “just and reasonable” standard. See 47 U.S.C. §201(b) (“All charges, practices, classifications and regulations for and in connection with [federally regulated] telecommunications services shall be just and reasonable, and any ... charge, practice, classification or regulation that is unjust or unreasonable is ... unlawful;”) see *also* 220 ILCS 5/9-101, 9-250 (all rates charged by Illinois telecommunications carriers must be just and reasonable). It follows that any reciprocal compensation arrangement that does not result in “mutual and reciprocal recovery by each carrier of costs associated with transport and termination” is therefore not just and reasonable, and is therefore unlawful.

This Commission has likewise grappled in several proceedings with the issue of whether it is reasonable to impose a bill and keep arrangement for reciprocal compensation given various traffic balances. Most recently, in its Order, Sprint Communications L.P., et al. -vs- Illinois Bell Telephone Company: Complaint and Request for Declaratory Ruling pursuant to Sections 13-514, 13-515, 13-801, and 10-108 of the Illinois Public Utilities Act, ICC Docket No. 07-

0629 (July 30, 2008), the Commission declined to find a 60% / 40% traffic balance “roughly balanced” within the meaning of FCC Rule 51.713(c). Sprint Order at 23.

Here, however, there is no question of traffic being roughly, or indeed even remotely in balance. Data regarding traffic volumes produced by AT&T Illinois demonstrate that traffic flowing between the two carriers is profoundly out of balance.<sup>1</sup> Staff Ex. 1.0 at 9-10, *citing* AT&T Illinois Responses and Supplemental Responses to Staff Data Requests JZ 1.02 and 1.15. The imbalance shown by AT&T Illinois data markedly exceeds the +/- 5% benchmark for imbalance that both parties apparently accept. Staff Ex. 1.0 at 10, *citing* Petition, Ex. B at 2 (AT&T Illinois Contract Provision, Issue 2; Big River Contract Provision, Issue 1).

In contrast, Big River was unable to produce traffic flow volumes between it and AT&T Illinois because it does not maintain such information. Staff Ex. 1.0 at 9, *citing* Big River Responses to Staff Data Requests JZ 1.02, 1.05 and 1.06; Tr. at 60-61. Big River attempted to argue that the AT&T data failed somehow to pass a so-called “reasonableness test” of its president’s own devising, *see, generally*, Big River 2 at 5, *et seq.*, but this “reasonableness test” was shown to have a number of significant flaws, not the least of which being the fact that Big River’s surrogate figures (based on one day’s traffic data, Big River Ex. 2 at 6, in contrast to the twelve months’ traffic data provided by AT&T Illinois, Staff Ex. 1.0 at 9-10) included traffic originated by carriers other than Big River and terminated

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<sup>1</sup> Data regarding traffic flows is confidential. See Staff Ex. 1.0 at 9-10.

to carriers other than AT&T Illinois. Tr. at 66-67, 144-145. This, of course, renders the Big River “analysis” useless for purposes of determining traffic volumes subject to reciprocal compensation.

Indeed, what fails to pass any sort of reasonableness test is Big River’s position regarding proposed contract language. Big River asserts that its ICA proposal: “allows for the institution of reciprocal billing when traffic is out-of-balance by a mere 5% of the total local traffic exchanged.” Big River Ex. 1.0 at 3. This indeed might work well under other circumstances. However, Big River: (a) considers AT&T Illinois’ data regarding the total local traffic exchanged to be inherently unreliable; and (b) maintains no such data itself.<sup>2</sup> Accordingly, Big River’s ICA proposal appears – due to Big River’s own position – difficult or impossible to implement, and moreover has been superseded by events, in light of the best available data showing that traffic is out of balance by far more than 5%.

AT&T Illinois’ proposal is supported by the overwhelming weight of evidence, and Staff recommends its adoption.

**Issue No. 2: If a bill and keep arrangement is adopted, what terms and conditions should govern such bill and keep arrangements?**

AT&T Illinois Position: If the ICA must provide a bill and keep option, the term “Section 251(b)(5) Traffic” should be used in lieu of Big River’s undefined

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<sup>2</sup> Big River states that it “would periodically monitor traffic to determine if the traffic is out of balance by capturing call records, sorting those reports as incoming and outgoing, and then summing them up to determine relative imbalance”. Tr. at 63, *summarizing* Big River Response to Staff Data Request JZ 1.04. It is not clear how Big River proposes to do this, or indeed why such a process is preferable to using actual data, such as that provided by AT&T Illinois.

term “Local Traffic.” AT&T’s language allows either Party to audit the traffic being exchanged between the Parties to ensure it meets the criteria for traffic eligible for bill and keep, and provides that the Parties will work together to reconcile any inconsistencies in usage records in the event there is a dispute over the balance of traffic.

Big River Position: See Issue No. 1 above

Staff Recommendation: The Commission need not reach this issue, as traffic is significantly out of balance.

As noted, Staff does not consider adoption of a bill and keep arrangement to be proper based on this record. Further, as noted, adoption of either party’s proposal would result in an immediate reversion to a billed reciprocal compensation regime in any case, since traffic volumes are significantly out of balance.

**Issue No. 3: Should AT&T Illinois be required to provide transit traffic service under the ICA?**

AT&T Position: Transit service is not required by sections 251(b) or 251(c) of the 1996 Act. AT&T therefore cannot lawfully be required to provide transit service under rates, terms or conditions governed by the 1996 Act or imposed in an arbitration conducted under the 1996 Act. Transit service should not be covered by the ICA, but instead should be addressed, if at all, in a negotiated commercial agreement.

Big River Position: Transit traffic arrangements should be incorporated in the ICA. In order to exchange local traffic, Big River was directed by AT&T to establish number resources in rate centers subtending AT&T’s tandem. As a result, Big River’s in-bound IXC and other third party traffic is delivered to AT&T’s tandem requiring the traffic to transit AT&T’s network.

Staff Recommendation: The Commission need not reach this issue, since AT&T has agreed to provide transit services to Big River.

Whether or not AT&T Illinois must provide transit service to Big River, is a determination that the Commission need not make in this proceeding. AT&T

Illinois has agreed to voluntarily provide transit service to Big River subject to the rates, terms, and conditions proposed by AT&T Illinois in connection with Arbitration Issues 4 and 5. Staff Ex 2.0.

**Issue No. 4: If the Commission requires the inclusion of transit in the ICA, what are the appropriate rates that AT&T Illinois should charge for such service?**

AT&T Illinois Position: The transit rates included in the ICA should be the rates in AT&T's Commission-approved tariff, ILL CC No. 22, Part 23, Section 2 First Revised Sheet 4.

Big River Position: Rates should be those currently applicable in the existing ICAs between Big River and AT&T.

Staff Recommendation: AT&T Illinois' proposed rates have been approved by the Commission and should be adopted.

The rates AT&T Illinois proposes are the TELRIC rates that the Commission in its *Second Interim Order, Investigation into forward looking cost studies and rates of Ameritech Illinois for interconnection, network elements, transport and termination of traffic*, ICC Docket Nos. 96-0486 / 96-0569 (consol.) (February 17, 1998)(hereafter "TELRIC Order"), directed AT&T Illinois to develop. These rates were reviewed and finalized by the Commission in its *Order, Illinois Commerce Commission On Its Own Motion: Investigation into the compliance of Illinois Bell Telephone Company with the order in Docket 96-0486/0569 Consolidated regarding the filing of tariffs and the accompanying cost studies for interconnection, unbundled network elements and local transport and termination and regarding end to end bundling issues*, ICC Docket No. 98-0396 (October 16, 2001) (hereafter "TELRIC II Order"), and its *Order on Rehearing*,

Illinois Commerce Commission On Its Own Motion: Investigation into the compliance of Illinois Bell Telephone Company with the order in Docket 96-0486/0569 Consolidated regarding the filing of tariffs and the accompanying cost studies for interconnection, unbundled network elements and local transport and termination and regarding end to end bundling issues, ICC Docket No. 98-0396 (April 30, 2002). The rates are currently included in AT&T Illinois' tariffs.

The rate Big River proposes is purportedly: "the arbitrated transit rate in between the parties in Missouri." Response at 3. Other than this representation, Big River provides no support whatsoever for its proposed rate. *See, generally, Response*, Big River Ex. 1, Big River Ex. 2. Big River does not explain whether the rate it proposes is cost based, what cost methodology if any was used to develop the rate, nor does it provide cost support of any description for its proposed rate. Big River provides no evidence, apart from an assertion of such in its petition, that its proposed rate was adopted through arbitration in Missouri. Nor does Big River explain why it was adopted by the arbitrator. Big River's sole witness in this proceeding, Mr. Howe, makes no mention of Big River's proposed transit rates in his Direct Testimony. While he does discuss transit rates in his Rebuttal Testimony, it is only to collaterally attack the TELRIC rates developed under the direction and scrutiny of this Commission throughout the course of several proceedings. Completely absent from any of Mr. Howe's testimony is any cost support for the rate proposed by Big River. Big River has provided no evidence of any description in this proceeding that would explain the derivation of

the rate it proposed, other than to assert that it was imported from an ICA arbitrated in a different state.

In his Rebuttal Testimony, Mr. Howe advances several arguments in support of his contention that AT&T's tariffed rates should not be used. Big River 2 at 10. All of these are unavailing, bordering on frivolous.

As an initial matter, Mr. Howe provides no support at all for the rate proposed by Big River. While Mr. Howe states: "I believe that the rates that I suggested in my direct testimony are a better indicator of current costs (for reasons I will explain below)[,]" Big River Ex. 2 at 10, he actually makes no reference to transit rates in his Direct Testimony. Furthermore, while Big River proposed a transit rate in its Response to the Petition and in its proposed contract language, see Response at 4; Petition, Ex. B (Big River Proposed ICA Provision, Issue 3) it provided no cost support at all for its proposed rates, other than Mr. Howe's unsupported assertion that the rate Big River proposes reflects cost savings resulting from the acquisition of Ameritech by SBC. Big River Ex. 2 at 17.

Mr. McPhee, however, demonstrated that the rate proposed by Big River was developed before Ameritech was acquired by SBC. AT&T Ex. 1.1 at 3. Indeed, the rates proposed by Mr. Howe are older than the Commission-approved tariffed AT&T rates that he criticizes for obsolescence. See AT&T Ex. 1.1 at 3 (noting that Big River's proposed rate was set by order of the Missouri PUC dated December 17, 1997); see also TELRIC II Order (issued October 16, 2001). Further, Mr. McPhee states: "no cost of service evidence of any kind [was]

presented in [the Missouri] case by any party.” AT&T Illinois Ex. 1.1 at 3. Mr. McPhee refers this Commission to the Missouri PUC docket numbers so that his statements can be verified. Id.

Thus, Mr. Howe’s testimony demonstrates little beyond his general unfamiliarity with the origins of the rate Big River proposed for transit.

All other arguments advanced by Mr. Howe seeking to demonstrate that the Commission should adopt the rate proposed by Big River over those proposed by AT&T Illinois are presumably intended to demonstrate that AT&T Illinois’ existing tariffed transit rates are defective. As with his inability to support the Big River rate, Mr. Howe’s attempts to identify defects with AT&T Illinois’ existing rates do not, in fact, prove any defects.

Mr. Howe first argues that the rates contained in the AT&T Illinois transit tariff are inconsistent with the cost study provided by AT&T Illinois in response to a Staff data request. Big River Ex. 2 at 10-11. In an attempt to support this assertion, Mr. Howe provides a table which compares each of the transit rates with the companion rate element. Big River Ex. 2 at at 11. Mr. Howe, however, fails to include shared and common costs that are, pursuant to FCC rules, added to TELRIC costs in order to produce rates. See 47 C.F.R. §51.505(a)(1)-(2) (rate charged for a UNE includes TELRIC cost of the UNE plus a reasonable allocation of common costs). When shared and common costs are add to the TELRIC costs upon which Mr. Rowe relies, the result is the tariffed rates filed by AT&T Illinois. AT&T Cross Ex. 6 (Conf.); Tr. at 116-121; 166.

Mr. Howe next argues that AT&T filed the transit rates in such a way that they somehow were not subjected to proper Commission review and oversight. *See, generally*, Big River Ex. 2 at 13, *et seq.* However, the record in the TELRIC II proceeding demonstrates that both the Commission and Staff reviewed the cost studies supporting transit rates with care. The TELRIC II proceeding was a compliance docket opened for the purposes of whether AT&T Illinois developed certain TELRIC rates in compliance with the TELRIC Order and TELRIC principles. In fact, transit rates were among the rates at issue in the TELRIC II proceeding. *See, generally*, TELRIC II Order at 52-53. Further, in the TELRIC II Order, the Commission noted that Staff had reviewed, and identified certain defects in, the transit rates developed pursuant to the TELRIC docket. *See TELRIC II Order* at 52 (observing that Staff has identified defects in AT&T's filing). Mr. Howe's assertions regarding the failure of the Staff or the Commission to properly review AT&T Illinois' transit rates are ill-informed and simply incorrect.

Finally, Mr. Howe argues that the cost study does not capture changes in AT&T Illinois operations after its existing transit rates were developed. Big River Ex. 2 at 11. He asserts that alleged changes in transit traffic volumes subsequent to SBC's acquisition of Ameritech would cause AT&T Illinois' costs to differ from those relied on to develop the existing rates. Big River Ex. 2 at 15 - 17.

Again, however, Mr. Howe offers no evidence that the rate proposed by Big River better reflects these purported developments than the AT&T tariffed rate, or indeed reflects them at all. With respect to traffic volumes, Mr. Howe

offers no evidence as to what transit volumes, if any, Big River's proposed rate is based upon. As noted above, the record is clear that Big River's proposed rate also fails to account for the cost effect of the acquisition by SBC of Ameritech, since Big River's proposed rates are actually close to two years older than the Commission-approved tariffed rates. See AT&T Ex. 1.1 at 3 (Big River proposed rates date from late 1997); Order, Joint Application of SBC and Ameritech, ICC Docket No. 98-0555 (September 23, 1999) (hereafter "Merger Order") (Commission approves Ameritech / SBC merger on September 23, 1999).

Thus, based on this record, there is no reason whatever to conclude that Big River's proposed rate better captures any recent operational developments that might impact transit costs. Indeed, there is no evidence that Big River's proposed rate has any cost basis at all.

The Commission is offered two choices here. The first is to adopt a rate based on Illinois-specific TELRIC studies that it and the Staff have thoroughly reviewed in several contested proceedings. The second is to adopt a rate from another state, supported by no cost information. Very obviously, the Commission should follow the former course.

**Issue No. 5: If the Commission requires the inclusion of transit in the ICA, what are the appropriate terms and conditions for transit traffic?**

AT&T Illinois Position: AT&T's language reflects the same terms and conditions as provided in AT&T's standard commercial transit agreement, and should be incorporated into the ICA. Big River's proposed language provides no terms to govern the routing and exchange of transit traffic, which, if adopted will likely result in future disputes over this traffic.

Big River Position: The terms proposed by Big River in the DPL adequately cover the conditions for both parties to exchange transit traffic. AT&T attempts to impose limitations on Big River's use of transiting by forcing Big River to connect directly to third party carriers when traffic to any individual carrier exceeds 24 or more trunks. This condition is i) not supported by any facts, ii) in the event Big River does exceed the 24 trunk limit, it imposes no requirement on AT&T Illinois beyond that which it is legally required to provide, and iii) is also inconsistent with the conditions it provides pursuant to its Tariff No. 22.

Staff Recommendation: AT&T Illinois' position should be adopted.

Of the two parties' proposed terms and conditions for transit service AT&T Illinois' proposed terms and conditions are, according to Dr. Zolnierek, more consistent with what AT&T Illinois offers in the tariff and appropriately conform the tariffed offering with the terms and conditions of local exchange interconnection in the parties interconnection agreement. Staff Ex. 1.0 at 23.

Mr. Howe challenges Dr. Zolnierek's assertion and contends that AT&T Illinois' proposed terms and conditions exceed the terms for transit service included in AT&T Illinois tariff. Big River Ex. 2 at 18. He supports this statement by referring to AT&T Illinois proposed language that imposes volume limits on transit traffic sent by Big River to AT&T Illinois. Id. Mr. Howe fails to explain how this volume limitation is inconsistent with AT&T Illinois' transit tariff.

AT&T Illinois tariff contains a traffic volume limitation of: "the CCS busy hour equivalent for one (1) DS1 (500 ccs)." Staff Cross Ex. 1 ( ILL. C.C. No. 22, Part 23, Section 2, 1<sup>st</sup> Revised Sheet 23, Section 4.2H). Big River's proposed language provides for no volume limitation. Petition, Ex. B at 5 (Big River Proposed Contract Provision, Issue 5). AT&T Illinois' proposed language provides for a limitation of: "twenty-four (24) or more trunks", which is the volume

equivalent of a DS1. Petition, Ex. B at 5 (AT&T Illinois Proposed Contract Provision, Issue 5). AT&T Illinois language, which provides for a limitation that is comparable to that found in the tariff, is more consistent with the tariff than is Big River's proposed language, which omits the tariffed transit volume limitation altogether. Mr. Howe's unsupported criticism is, thus, incorrect and should be rejected.

In summary, the Commission should adopt AT&T Illinois' proposed language to resolve Issues 5. In so doing, the Commission will also, given AT&T Illinois' agreement to voluntarily provide transit service to Big River subject to the rates, terms, and conditions proposed by AT&T Illinois in connection with Arbitration Issues 4 and 5, resolve issue 3.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

April 18, 2011

Respectfully submitted,

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