

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

In the Matter of the Application)
of Big River Telephone Company, LLC)
to Expand Its Certificate of Basic Local)
Service Authority to include provision of)
Basic Local Exchange Telecommunications)
Service in the Exchanges of BPS)
Telephone Company and to Continue)
to Classify the Company and its Services)
as Competitive.)

Case No. TA-2007-0093

MOTION FOR REHEARING

Comes now BPS Telephone Company ("BPS"), pursuant to Section 386.500, RSMo 2000, and 4 CSR 240.2-160, and for its Motion for Rehearing of the Report and Order ("Order") granting a certificate of service authority to provide basic local telecommunications service to Big River Telephone Company, L.L.C. ("Big River") issued on April 24, 2007 in the above-referenced case states to the Missouri Public Service Commission ("Commission") as follows:

1. The Commission's Order is unjust, unlawful and unreasonable because the decision misinterprets and misapplies the statute controlling the issuance of certificates of service authority in the service areas of small local exchange companies, § 392.451, RSMo. This statute sets out the requirements an applicant must meet in order to be granted a certificate in an area served by a small incumbent local exchange company and states in pertinent part:

- (1) The applicant shall, throughout the service area of the incumbent local exchange telecommunication company, offer all telecommunications services which the commission has determined are essential for purposes of qualifying for state universal service

fund support; and

- (2) The applicant shall advertise the availability of such essential services and the charges therefore using media of general distribution.
2. In addition, the commission shall adopt such rules, consistent with section 253(b) of the federal Telecommunications Act of 1996 to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. Such rules, at a minimum, shall require that all applicants seeking a certificate to provide basic local telecommunications services under this section:
 - (1) File and maintain tariffs with the commission in the same manner and form as the commission requires of the incumbent local exchange telecommunications company with which the applicant seeks to compete;
 - (2) Meet the minimum service standards, including quality of service and billing standards, as the commission requires of the incumbent local exchange telecommunications company with which the applicant seeks to compete;
 - (3) Make such reports to and other information filings with the commission as is required of the incumbent local exchange telecommunications company with which the applicant seeks to compete; and
 - (4) Comply with all of the same rules and regulations as the commission may impose on the incumbent local exchange telecommunications company with which the applicant seeks to compete.

Despite the clear provisions of this statute, the Commission chose to grant a certificate of service authority to Big River without a showing that Big River had complied with several provisions of this statute. Section 392.451.2(2) states that an applicant for a certificate of service authority in a small company exchange must, "Meet the minimum service standards, including quality of service and billing standards, as the commission requires of the incumbent local exchange telecommunications company

with which the applicant seeks to compete.” Big River was delinquent in the filing of quarterly quality of service reports for six (6) quarters at the time it filed this application. When Big River did file the reports they did not contain all of the necessary information as Big River had not included information generated by its cable partners in the reports. In the Order, the Commission states that Big River must submit to the Staff “acceptable quality of service reports . . . pursuant to the plan it has agreed to follow with the Staff. . . .” (Order at 27) Whatever plan Big River and the Staff have agreed to was not in evidence in this case, and it is not clear just what the agreement is. The statute clearly states that Big River must meet the same quality of service standards as the Commission requires of the incumbent, but from the language in the Order, it is not clear if Big River is going to be complying with the quality of service regulations in the same manner as BPS.

BPS also presented evidence in testimony and at the hearing that Big River was providing services that were not included in its tariff that had not been substantially revised since 1999. (Tr. 70-71) Section 392.451.2(1) states that the applicant must, “File and maintain tariffs with the commission in the same manner and form as the commission requires of the incumbent local exchange telecommunications company with which the applicant seeks to compete.” The Commission states in its Order that Big River must file updated tariffs within thirty days following the issue date of the Order correcting all deficiencies in its current tariff, but Big River was clearly not in compliance with the statute at the time it filed its application nor at the time the Order was issued. This is not compliance with the statute such that a certificate can be granted. Moreover,

given Big River's admitted noncompliance with existing Commission rules, it is unreasonable for the Commission to accept Big River's statements that it will comply in the future simply because it says it will.

Perhaps the most important provision, and the one for which Big River did not submit sufficient evidence of compliance, is § 392.451.2 (4) which states that the applicant for a certificate of service authority in a small company service area must, "Comply with all of the same rules and regulations as the commission may impose on the incumbent local exchange telecommunications company with which the applicant seeks to compete." Big River requested waivers of certain rules that it referred to as the Commission's "standard waivers" for competitive local exchange companies. In other words, by its request, Big River is specifically asking that it not be required to comply with the unequivocal mandate of the statute.

In its Order, the Commission granted these standard waivers finding that "the waiver of those statutes and regulation is consistent with the purposes of Chapter 392." (Order at 25) By granting these waivers, the Commission has effectively negated the effect of § 392.451.2(4). The Commission cannot completely ignore the language of this statute by simply stating that waiver of the rules is consistent with the purposes of Chapter 392. The legislature is presumed not to enact meaningless provisions.

Missouri Bankers Association v. Director of Missouri Division of Credit Unions, 126 S.W.3d 360, 365 (Mo. banc 2003); *Murray v. Missouri Highway and Transportation Commission*, 37 S.W.3d 228, 233 (Mo. banc 2001). Thus, § 392.451.2(4) must mean something, but the Commission's decision effectively renders it meaningless. Granting

of the waivers is completely inconsistent with § 392.451.2(4), and rehearing should be granted because the decision is unlawful, unreasonable and unjust.

2. In addition to the above, the Order is unlawful, unreasonable and unsupported by competent and substantial evidence in that:

A. **Equal Access** Finding of Fact No. 20.d states that Big River will provide “access to basic local operator services, basic local directory assistance, equal access (presubscribed ‘1+’ dialing) to the long distance provider of their choice (including a full variety of long distance services from Big River), and standard intercept service.” Big River is required by 4 CSR 240-32.100(2)(G) to provide equal access and presubscription among interexchange companies for calling within and between local access and transport areas (“LATAs”). There was insufficient evidence presented by Big River showing that it currently provides equal access in the exchanges where it is currently certificated, much less that it will provide full equal access subject to the same rules and regulations as the incumbent BPS. When asked in a data request about the list of interexchange carriers from which its customers could choose, Big River provided a list of over 1650 carriers. When questioned during cross-examination as to whether this was the list provided to customers, Mr. Howe admitted they do not provide a list to their customers and that “a majority of our customers take our long distance service.” (Tr. 63) In fact, the only credible evidence demonstrates that Big River is not providing equal access, must less providing it in accordance with Missouri Commission and FCC requirements.

Big River is required by Federal law and Commission rule to provide equal access to its current customers. Missouri Commission rule 4 CSR 240-32.100(1) states that, "Each local telecommunications company shall provide all the minimum elements necessary for basic local interexchange telecommunications service prescribed in this rule." One of these minimum technologies found at (2)(G) of the same rule is, "Equal access in the sense of dialing parity and presubscription among interexchange companies for calling within and between local access and transport area (intraLATA and interLATA presubscription)." Subsection (3) of the same rule states, "IntraLATA equal access presubscription will be conducted as ordered by the commission," while subsection (4) states, "The interLATA equal access presubscription and processes shall be conducted in accordance with the requirements of the Federal Communications Commission (FCC) as set forth in 101 FCC2d 917 (1985), 101 FCC2d 935 (1985) and 102 FCC2d 505 (1985). These FCC orders are hereby incorporated by reference and made a part of this rule."

In his testimony, Mr. Schoonmaker showed that in at least one exchange, Poplar Bluff, Big River did not offer access to any other interexchange carrier. In its Order, the Commission dismisses Mr. Schoonmaker's testimony regarding the statements by the Big River representative stating that he could not choose a different long-distance carrier as "hearsay evidence." Mr. Schoonmaker's testimony was accepted into evidence at the hearing without objection by any party, so since it was received without objection, it is now competent and

substantial evidence in the proceeding. “[H]earsay testimony may be considered if no objection is made. In fact, all probative evidence received without objection in a contested case must be considered in administrative hearings.” *Concord Publishing House, Inc. v. Director of Revenue*, 916 S.W.2d 186, 185-95 (Mo. banc 1996). Thus, the Commission’s statement that “there is no credible evidence in the record to establish that Big River would not meet the Commission’s equal access requirements” is simply not true.

Additionally, Mr. Schoonmaker’s evidence was not inadmissible hearsay evidence in that the statements made to Mr. Schoonmaker were made by a representative of Big River with authority to accept applications for service. The statements clearly fall within the exception to the hearsay rule as a statement offered against a party that is “a statement made by a person with express or implied authority to make a statement concerning that subject.” Mo. Evidence Guide § 803 (25)(d) (MoBar 2003); *State v. Engleman*, 634 S.W.2d 467, 480 (Mo. 1982).

Finally, BPS did not have the burden to prove that Big River was not complying with all the applicable rules in this proceeding. To the contrary, Big River, as the applicant in this case, had the burden to show that it was not only currently complying with all applicable Commission rules and regulations, but would also comply with any additional rules applicable if granted the authority sought in this proceeding. Big River’s promise to comply is not substantial and competent evidence. The Commission did not make any investigation as to

whether Big River was actually providing equal access and complying with the Missouri Commission and Federal rules. In fact, Staff witness Van Eschen stated that it was merely his “understanding” that Big River would provide information to the customer regarding interexchange carriers upon request. (Tr. 89) In their Concurring Opinion, Commissioners Clayton and Gaw state that they would have preferred that the Commission order an audit in order to ensure that Big River is in compliance with all Commission regulations, and BPS believes that this was a necessary step before the Commission could grant the certificate of authority.

Big River not only did not provide evidence that it was currently complying with Federal and Commission rules regarding presubscription and equal access, it did not provide competent and substantial evidence that it would comply with those rules in the future if granted the additional authority.

B. **Customer Options** Finding of Fact No. 49 states that granting Big River’s application is in the public interest because it will: “(1) increase equitable access for Missourians; (2) create and enhance competition and expand customer service options consistent with the legislative goals of the Telecommunications Act of 1996 and Chapter 392, RSMo; (3) promote the availability of quality services and increased customer choice; (4) will promote the development of more economic and efficient services affording more customers a choice for innovative, diversified and reliable service offerings.” While it is true that these conclusory statements were made in the testimonies of Mr. Howe and Mr. Van

Eschen, when BPS tried to determine just what these expanded customer options might be in cross examination of both Mr. Howe and Mr. Van Eschen, they could not name any increased or expanded services that would be offered. (Tr. 90) This finding of fact is supported only by unsubstantiated statements by the applicant, and there was no evidence of any additional services that Big River intended to provide that were not already available to customers in the BPS service area.

Moreover, although Big River claims that a grant of a certificate to provide basic local telecommunications service in BPS territory will bring more choice and lower rates to those customers, its eight year history of competing in large ILEC service areas, as evidenced by its tariff, demonstrates that it has not added any new services nor lowered any rates since it acquired its business from LDD, Inc. in 1999. (Tr. 70-71)

C. **Customer Access** Finding of Fact No. 19 states that where BPS customers lack access to Big River's cable partners, Big River intends to enter into an Interconnection Agreement with BPS to resell BPS services to **those few** customers not accessible via the cable TV network. The evidence in this case showed that more than a few customers will not have access to Big River's services through its cable partners. In fact, about one-third of the BPS service area customers will not have access to Big River's services through the cable TV partners. (Exh. 5, p. 9)

D. **First Impression** In the Order, the Commission states that the fact that Big River is the first company to seek to provide facilities-based basic local telecommunications service in a small company exchange is a distinction “without significance in that the Commission has previously granted basic local certification to CLECs that were prepaid resellers to provide service in the exchanges of small incumbents.” (Order at 21-22) As a matter of law, just because the Commission has previously granted basic local certification to other prepaid CLECs does not excuse noncompliance with the statute. As was previously argued by BPS, the Commission did not find that these companies provided competition in the BPS exchanges. In fact, the Commission specifically found that the competitive local exchange company Missouri State Discount Telephone (“MSDT”) was not providing basic local service as required by the statute in the BPS exchanges and denied BPS the ability to be designated as a price cap company based on the fact that MSDT was providing competitive service in its exchanges.¹

E. **Separate and Distinct Service** Finding of Fact No. 28 states that “Big River will offer basic local service as a separate and distinct service in the new exchanges as required by Section 392.455(4) and Commission Rule 4 CSR 240-3.510(1)(D)(4).” Big River is required by the same statute and rule to provide basic local telecommunications service as a separate and distinct service to its

¹*In the Matter of BPS Telephone Company's Election to be Regulated under Price Cap Regulation as Provided in Section 392.245, RSMo 2000, Case No. IO-2004-0597, issued November 9, 2004, p. 7.*

current customers, yet BPS presented evidence that Big River does not offer basic local telecommunications service as a separate and distinct service. Mr. Schoonmaker's testimony regarding his conversation with the Big River representative in Poplar Bluff showed that the only service available in that area was a package that included local service, several features and unlimited long distance. When he specifically asked if there was any other service available, the representative verified that this was the only service offered in Poplar Bluff. (Exh. 6; p.4)² Considering that there was competent and credible evidence in the record showing that Big River did not currently provide basic local telecommunications service as a separate and distinct service in at least one exchange, and also evidence that the Staff had made no independent investigation, it is unreasonable to accept the unsubstantiated statement of the Big River witness concerning the company's future conduct. A company that does not currently comply with the rules is not likely to comply in the future.

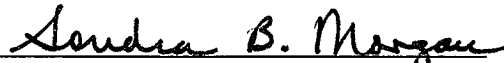
F. Advertising Finding of Fact No. 30 states that "Big River will advertise, in the media of general distribution, the availability and cost of the services it will offer as required by Section 392.451.1(2)." The evidence in this case showed that, in many instances, all advertising of the services provided was in the name of the cable TV provider. There is no finding by the Commission that the cable TV partner's advertising of the services without reference to Big River actually being

²As was set out in 2.A above, Mr. Schoonmaker's testimony on this issue was not inadmissible hearsay, and should be considered by the Commission as competent and substantial evidence.

the provider qualifies as advertising as required by the statute. When Big River was asked to provide copies of marketing materials describing the features of its pricing plans in a data request, only one piece of advertising out of all those provided even mentioned Big River. The other pieces advertised the services as if the cable TV partner were the only provider. (Exh. 8) BPS does not believe that Big River can be said to be complying with this requirement when the advertising does not even mention the true provider's name. Thus BPS does not believe that this finding is supported by competent and substantial evidence.

For all the reasons stated above, BPS respectfully requests that the Commission grant its Motion for Rehearing.

Respectfully submitted,



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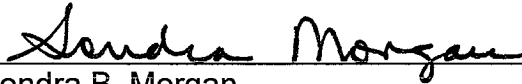
Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by electronic transmission, hand-delivered, or mailed, United States Mail, postage prepaid, this 3d day of May , 2007, to:

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