

**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

**STAFF’S POST-HEARING BRIEF**

**COMES NOW** the Staff of the Missouri Public Service Commission (Staff) and for its post-hearing brief respectfully states as follows:

This case is before the Missouri Public Service Commission (Commission) on the application of Big River Telephone Company (Big River) to expand its certificate of service authority into the service area of BPS Telephone Company (BPS). Big River has also requested to retain its competitive classification and has requested that it be granted the waiver of statutes and rules that are typically granted to competitive companies. BPS, a small incumbent local exchange carrier (ILEC), has intervened, challenging the permissibility of Big River’s request for competitive classification and waivers under Section 392.451 RSMo.

**Argument**

**Issue 1.** ...Has Big River demonstrated that it meets all of the applicable requirements of Sections 392.450, 392.451, and 392.455 and 4 CSR 240-3.510, such that the Commission should approve its application to expand its area of basic local service authority to include the BPS exchanges?

**Staff Position.** Big River’s application is complete with respect to Sections 392.450, 392.451, and 392.455 and 4 CSR 240-3.510 and the application should be approved.

The Missouri Public Service Commission (Commission) granted Big River Telephone Company (Big River) a certificate to provide basic local telecommunications services in Case Nos. TA-2001-699, LA-2003-0551, and TA-2005-0415. Big River currently has authority to provide service in the exchanges of Southwestern Bell, L.P. d/b/a AT&T Missouri (AT&T), CenturyTel of Missouri, LLC (CenturyTel), Spectra Communications Group, Inc. (Spectra), and Embarras Missouri, Inc. (Embarras). In granting the applications, the Commission determined that Big River satisfied the requirements of Section 392.450 RSMo, the statute outlining general requirements for certificate approval. The Commission also determined that Big River had satisfied Section 392.455 RSMo, the statute directing the Commission to establish a certification process. Staff's position is that Big River continues to comply with these Sections. (Van Eschen Rebuttal, Ex. 1, p. 6, ln. 17-20).

Commission rule 4 CSR 240-3.510 is the Commission rule setting out the certificate application process. Big River has requested a waiver of 4 CSR 240-3.510(1)(D). This subdivision requires a company applying for a certificate of service authority to submit certain financial information. Because Staff had the opportunity to review Big River's financial information in Case Nos. TA-2001-699 and LA-2003-0551, Staff recommends that Big River be granted a waiver of this subdivision. (Van Eschen Rebuttal, Ex. 1, p. 4, ln. 22-23, p. 5, ln. 1-2). Big River's application is complete with respect to the remaining portions of 4 CSR 240-3.510. (Van Eschen Rebuttal, Ex. 1, p. 6, ln. 22).

As a CLEC seeking to provide service in the service area of a small ILEC, Big River must comply with the requirements of Section 392.451. Because Big River has only provided service in the service areas of large ILECs up to this time, Big River has not yet had to comply with the portions of Section 392.451 that do not mirror Section 392.450. Staff notes that Big

River has stated that it intends to comply with the additional requirements of Section 392.451.1 if its application is granted. (Van Eschen Rebuttal, Ex. 1, p. 10, ln. 14-23, p. 11, ln. 1-2). Staff's position is that Big River has generally complied with the reporting requirements of Section 392.451.2(3), although Big River needs to make adjustments to the tracking and compilation of data in its quarterly quality of service reports.<sup>1</sup> (Van Eschen Rebuttal, Ex. 1, p. 5, ln. 17-23, p. 7, ln. 1-10).<sup>2</sup> Staff's position is that Section 392.451.2(4) does not require the Commission to deny Big River the waivers normally granted to CLECs. (Van Eschen Rebuttal, Ex. 1, p. 7, ln. 1-30, p. 8, ln. 1-8). Staff recommends that the Commission find that Big River has complied with Sections 392.450, 392.451, 392.455, and 4 CSR 240-3.510 and that the Commission should grant Big River's application to expand its certificate of service authority into the service area of BPS.

**Issue 2.** ...Is Big River's request to continue to be classified as competitive and to designate the services it proposes to offer in the BPS service area as competitive services permissible under Section 392.451, such that the Commission should grant the requested continued classification?

**Staff Position.** Allowing Big River to retain its competitive classification is permissible under Section 392.451.

In Case Nos. TA-2001-699, LA-2003-0551, and TA-2005-0415 the Commission granted certificates of service authority and competitive classification to Big River in the exchanges of the large ILECs currently providing basic local telephone service in Missouri. In this case, Big River requests that the Commission grant its request to expand its certificate of service authority into the service area of BPS. Big River also requests that the Commission allow it to retain the competitive classification it has previously been granted.

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<sup>1</sup> Quarterly quality of service reports are required by 4 CSR 240-3.550(5).

<sup>2</sup> Staff and Big River are currently working to bring Big River's quarterly quality of service reports into compliance with 4 CSR 3.550.(5)(A). Staff will file a status report addressing this issue no later than March 27, 2007.

The Commission may classify a telecommunications provider or its services as competitive if the Commission determines it is “subject to sufficient competition to justify a lesser degree of regulation.” Section 392.361.2 RSMo (2000). All services provided by a competitive company must be classified as competitive. Section 362.361.3 RSMo (2000).

Because Big River is seeking to provide service in the area of a small ILEC, it must comply with the requirements of Section 392.451 in addition to the requirements of Sections 392.450 and 392.455 and 4 CSR 240-3.510. The Commission determined that Big River complied with Sections 392.450 and 392.455 and 4 CSR 240-3.510 when it granted Big River a certificate of service authority and competitive classification in Case Nos. TA-2001-699, LA-2003-0551, and TA-2005-0415.

Section 392.451 provides:

1. Notwithstanding any provisions of this act\* to the contrary, and consistent with section 253(f) of the federal Telecommunications Act of 1996, the commission shall approve an application for a certificate of local exchange service authority to provide basic local telecommunications service or for the resale of basic local telecommunications service in an area that is served by a small incumbent local exchange telecommunications company only upon a showing by the applicant, and a finding by the commission, after notice and hearing, that:

(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 therefor 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.

3. The state of Missouri hereby adopts and incorporates in total the provisions of section 251(f)(1) of the federal Telecommunications Act of 1996 providing exemption for certain rural telephone companies.

Several provisions of Section 392.451 are identical to provisions of 392.450.<sup>3</sup> Additionally, a CLEC operating in the service area of a small ILEC must offer all the services that have been determined to be essential to qualify for state universal fund support and must advertise those services through media of general distribution. Section 392.451.1 RSMo. Big River has not had to comply with Section 392.451.1 to date, but Mr. Howe, the CEO of Big River, testified that if its application is granted Big River will comply with this subsection going forward. (Howe Direct, Ex. 3, p. 10, ln. 4-5). The introductory language of Section 392.451.2 and subdivisions (1) and (2) of Section 392.451.2 are identical to Section 392.450.2. The Commission determined that Big River satisfies these requirements in Case Nos. TA-2001-699, LA-2003-0551, and TA-2005-0415.

The additional subdivisions of Section 392.451.2 require Big River to make such reports and other informational filings as are required of BPS and to comply with the same rules and

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<sup>3</sup> The identical portions of Sections 392.450 and 392.451 require CLECs to file and maintain tariffs in the same manner as ILECs and to meet minimum service standards. These requirements are meant to ensure quality and safeguard consumers and they fall under the four rule-making subjects listed in Sections 392.450 and 392.451.

regulations as the Commission imposes on BPS. These subdivisions are related to the four rule-making subjects listed in the introductory language of the subsections. Staff's position is that Big River's request to retain competitive classification is consistent with Section 391.451.

In interpreting a statute, the statute is to be read as a whole. *Lane v. Lensmeyer*, 158 S.W.3d 218, 226 (Mo. 2005). Statutes are also to be read *in pari materia* with related sections. *Id.* Statutes on closely related subjects may be considered if the statutes shed light on each other's meaning, even if the statutes were enacted at different times. *Id.*

None of the four rule-making subjects listed in the introductory language of Section 392.451.2 address the classification of a company as competitive or non-competitive. The rules likewise do not address the lesser degree of regulation imposed on companies that are granted competitive classification. The listed rule-making subjects are: preserving and advancing universal service, protecting the public safety and welfare, ensuring the continued quality of telecommunications services, and safeguarding the rights of consumers. The Commission has promulgated rules on these subjects, see *infra*, and the rules on these subjects are to be imposed equally on Big River and BPS. Section 392.451.2, read as a whole and in conjunction with Section 392.361, does not prevent a company from offering service in the service area of a small ILEC and from being classified as competitive. The Commission should allow Big River to retain its competitive classification.

**Issue 3.** ...Is Big River's request for waivers of statutes and rules relative to providing service in BPS exchanges permissible under Section 392.451, such that the Commission should grant the requested waivers?

**Staff Position.** The granting of the waivers requested by Big River is permissible under Section 392.451.

In Case Nos. TA-2001-699, LA-2003-0551, and TA-2005-0415, the Commission granted Big River a certificate of service authority to provide basic local telecommunications service in the service areas of AT&T, CenturyTel, Spectra, and Embarq. In this case, Big River requests that its certificate of service authority be expanded to include the service area of BPS. Big River also requests that it continue to be classified as competitive and to be subject to the same waivers it was previously granted.

Because BPS is a small ILEC, Big River must comply with the requirements of Section 392.451. This section sets forth additional requirements that must be met by a CLEC applying for a certificate to provide service in the service area of a small ILEC. Section 392.451.2 provides:

In addition, the Commission shall adopt such rules, consistent with Section 253(b) of the Telecommunications Act of 1996 to preserve and advance universal service, protect the public safety; ensure the continued quality of telecommunications services, and safeguard the rights of all consumers. Such rules, at a minimum, shall require all applicants seeking a certificate to provide basic local telecommunications services under this section:

...

(4) Comply with all of the same rules and regulations as the commission may impose on the incumbent local telecommunications company with which the applicant seeks to compete.

In interpreting a statute, the statute is to be read as a whole. *Lane*, 158 S.W.3d at 226. Statutes are also to be read *in pari materia* with related sections. *Id.*

The first sentence of subsection 392.451.2 directs the Commission to adopt rules on four listed subjects: universal service, public safety and welfare, quality of telecommunications services, and rights of consumers. Reading the statute as a whole, it is plain that subdivision (4) of the second sentence of this subsection directs that an applicant seeking a certificate to provide

basic services in a small ILEC's service area must comply with all of the same rules addressing the four listed subjects as the small ILEC.

The Commission has adopted rules to advance universal service at 4 CSR 240 Chapter 31—Missouri Universal Service Fund, to protect the public safety and welfare at 4 CSR 240 Chapter 34—Emergency Telephone Service Standards; to ensure the continued quality of telecommunications services at 4 CSR 240 Chapter 32—Telecommunications Service; and to safeguard the rights of consumers at 4 CSR 240-33.160—Customer Proprietary Network Information.<sup>4</sup> These rules apply equally to small ILECs and to applicants seeking to provide basic local service in a small ILEC's service area. Big River has not requested the waiver of these listed rules, nor of any other Commission rules that may pertain to the four rule-making subjects listed in Section 392.451.2.

Big River has requested the standard waivers ordinarily granted to CLECs. Commission rule 4 CSR 240-3.550(5)(C) requires each company providing basic local telecommunications service to have an exchange boundary map on file with the Commission. Commission rule 4 CSR 240-10.020 prescribes the use of income on investments from depreciation funds and the means for accounting for that income. Commission rule 4 CSR 240.30.040 adopts a uniform system of accounts for telecommunications companies. These rules do not address universal service, public safety and welfare, quality of service, or the rights of consumers. Because they do not address the four listed rule-making subjects of Section 351.451.2, the waivers requested by Big River are not inconsistent with that section. The Commission should grant the requested waivers.

Although it is unusual for a CLEC to request a certificate of service authority to provide service in the service area of a small ILEC, Big River's request is not unique. The Commission

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<sup>4</sup> This list of Commission rules on these subjects is illustrative rather than exhaustive.



previously granted a certificate of service authority to Missouri State Discount Telephone Service, a company seeking to provide service throughout Missouri, including BPS's service area. (Case No. TA-2001-334). BPS was part of a trade group that was a signatory to a stipulation and agreement recommending that the applicant company be granted competitive classification and the associated waivers. In that case, the Commission granted the company's certificate application and granted the company competitive classification along with the waivers usually granted to competitive companies. The fact that Big River is a facilities-based provider while the company granted a certificate in TA-2001-334 is not a facilities-based provider is immaterial. The certificate granted in TA-2001-334 does not specify how services are to be provided, nor does it prohibit the company from providing facilities-based service. Certificates granted by the Commission normally do not distinguish facilities-based providers from other providers. Nothing either in statutes or in Commission rules supports making such a distinction.

Staff does not believe that a decision either in favor of or against BPS in this case will have any impact on prior cases in which the Commission has granted competitive classification and waivers to CLECs providing service in the service area of large ILECs. First, Staff believes that a company may be granted a certificate of service authority as a competitive company and may be granted the associated waivers consistent with Missouri law and Commission rules. Second, CLECs providing service in the service area of large ILECs are not required to comply with Section 392.451.2. If the Commission determines that Section 392.451.2 is inconsistent with the granting of competitive classification and the associated waivers, that determination would affect future applications wherein a CLEC requests authorization to provide service in the area of a small ILEC but would not impact prior Commission decisions. It is Staff's position that the Commission's decision in Case No. TA-2001-334 would not be affected because of the

stipulation filed in that case wherein the parties consented to the granting of competitive classification and the associated waivers for the applicant company.

### **Conclusion**

Staff recommends that the Commission approve Big River's application to expand its service area into the service area of BPS. Staff further recommends that Big River be allowed to retain its competitive classification and that it be subject to the same waivers of statutes and rules that are routinely granted to competitive companies. Staff will file a status report addressing Big River's correction of the manner it tracks and compiles the data contained in its quarterly quality of service report. Staff notes that Big River must submit tariffs that are in compliance with Commission rules before providing service in the BPS service area.

**WHEREFORE,** Staff respectfully recommends that the Commission grant Big River's application to expand its certificate of service authority to include the service area of BPS. Staff further recommends that the Commission allow Big River to retain its competitive classification and to continue to be entitled to the waivers listed in the notice of applications.

Respectfully submitted,

/s/ Jennifer Heintz

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### **Certificate of Service**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 26th day of March 2007.

/s/ Jennifer Heintz