

**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

**BRIEF OF INTERVENOR BPS TELEPHONE COMPANY**

BPS Telephone Company ("BPS") intervened in this application case where Big River Telephone Company ("Big River") seeks an expansion of its certificate of authority to provide basic local telecommunications service in the exchanges of Bernie, Parma and Steele currently served by BPS. BPS stated that it had an interest in the proceeding in that Big River was seeking to provide basic local telecommunications in its exchanges and also in seeing that Big River fully complied with the statutory requirements in order to be able to provide service in a small company exchange.

The statutory requirements for a certificate of service authority in a small company exchange are significantly different from the requirements for obtaining a certificate in a large company exchange. Section 392.451 requires that the Commission find that an applicant for a certificate of service authority to provide basic local telecommunications service in a service area that is served by a small incumbent local exchange company offer all telecommunications services which the Commission has determined are essential for purposes of qualifying for state

**NON-PROPRIETARY**

universal service fund support and that the applicant advertise the availability of such essential services and the charges for those services using media of general distribution. These requirements prevent an applicant seeking to provide service in a small company service area from “cherry picking” among the exchanges served by the small company. It also means that an applicant for service in a small company service area cannot pick and choose between the town or rural areas within a particular exchange, nor can it pick and choose between the business and residential customers within an exchange. (Tr. 26)

In addition, the applicant for a certificate of service authority in a small company exchange is required, at a minimum, 1) to file and maintain tariffs in the same manner as the company with which it seeks to compete; 2) to meet the minimum service standards as the Commission requires of the incumbent; 3) to make the same reports and other informational filings with the Commission that the incumbent must make; and 4) to comply with all of the same rules and regulations as the Commission may impose on the incumbent with which it seeks to compete. While an applicant for a certificate of service authority in a large company exchange must comply with Commission rules regarding quality of service and billing standards, § 392.451 states that the applicant 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.”<sup>1</sup> This statute clearly has meaning different from and in addition to the requirements for applicants in the large company exchanges. The legislature did not intend to enact a meaningless provision when it included that language in the statute.

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<sup>1</sup>Section 392.451.2(4), RSMo 2000.

BPS is in the position of being "once bitten, twice shy" in that in 2001 another competitive local exchange company, Missouri State Discount Telephone ("MSDT"), was granted a certificate of service authority by the Missouri Public Service Commission ("Commission") to provide basic local telecommunications service throughout the state including small company exchanges in Case No. TA-2001-334. MSDT stated in its verified application that it would comply with all of the requirements of § 392.451, RSMo, if the certificate were granted, and BPS entered into a Resale Agreement with MSDT to allow it to resell its services in the BPS exchanges. When BPS later attempted to use the fact that MSDT was providing service in its exchanges in order to qualify for price cap status pursuant to § 392.245, RSMo, the Commission investigated the service being provided by MSDT, found that MSDT was not providing basic local telecommunications service as required by the statute and thus denied BPS' request. BPS would like to ensure in this case that the Commission thoroughly investigate Big River's compliance with the applicable statutes and rules before the certificate is granted, rather than determining after the fact that the services provided by Big River are somehow deficient in other situations.

Additionally, this request is a case of "first-impression" in that, to the best of BPS' knowledge, the other certificates the Commission has granted to applicants seeking to provide service in small company exchanges have been granted to resellers.<sup>2</sup> Staff witness Van Eschen

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<sup>2</sup>In fact, not only were most of these other companies resellers, they were prepaid resellers. Missouri State Discount Telephone was granted a certificate to provide basic local telecommunications service throughout the State of Missouri in Case No. TA-2001-334. MSDT provided service through resale, and was a prepaid provider as evidenced by its tariff as approved by the Commission. This is the only company that has sought a certificate in the BPS service area. Universal Telecom, Inc. was granted a certificate to provide resold prepaid basic local telecommunications service in exchanges served by Southwestern Bell Telephone Company,

stated at hearing that Staff has taken positions in previous cases that resellers should be viewed differently when granting competitive classification, because resellers do not pose as significant a competitive threat to the incumbent. (Tr. 85-86) This is the first application by a facilities-based provider in the BPS service area, and thus ensuring compliance with the applicable statutes and rules is even more important. The parties agree that this case will likely set precedent for future applications of this nature.

### **Argument**

**Issue 1. Section 392.450.1 states that an applicant for a certificate of service authority to provide basic local telecommunications service must show that it has complied with the certification process established pursuant to Section 392.455, which in turn sets out several requirements for an applicant to meet before a certificate can be granted. An applicant seeking a certificate of service authority to provide basic local telecommunications service in an area served by a small incumbent local exchange telecommunications company such as BPS also must comply with the provisions of Section 392.451 in order for the Commission to approve its application. Pursuant to these statutes the Commission has promulgated 4 CSR 240-3.510 setting out the requirements for an application for a certificate of basic local service authority. 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-**

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Sprint/United Telephone Company, GTE Midwest, Inc., ALLTEL, Spectra Communications and TDS Telecom in Case No. TA-2002-183 in March of 2002. Additionally, other applicants have sought authority in the Alltel (now Windstream) service areas. Windstream is a small local exchange company in that it has fewer than 100,000 access lines in Missouri. Windstream is considerably larger than BPS, however, and the applicants have generally listed it with the other large companies in these applications.

**3.510, such that the Commission should approve its application to expand its area of basic local service authority to include the BPS exchanges?**

At hearing it was shown that Big River has not yet demonstrated that it meets all of the applicable requirements of the statutes. In his rebuttal testimony, Staff witness Van Eschen stated that Big River was delinquent in filing its quarterly quality of service reports. In fact, at the time this application was filed, the last report filed by Big River was for the second quarter of 2005. (Exh. 1, p. 9) Thus, reports for six (6) quarters or one and a half years were overdue. In his rebuttal testimony, Mr. Van Eschen recommended that the Commission delay granting Big River's request to expand its service area until Big River had submitted to the Staff a current and acceptable quality of service report. (Exh. 1, p.10) During the hearing, both Mr. Van Eschen and Mr. Howe testified that Big River had subsequently submitted the delinquent reports. However, after review of the reports, the Staff found that Big River was not correctly tracking and compiling the information for the quality of service reports. Specifically, the reports did not reflect any tracking and compiling results where Big River's cable partner was involved in providing the service. \*\*

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\*\* (In camera Tr. 41-44) Thus, the quality of service report measures did not include tracking of orders, installation and other performance measures. (Tr. 98-100) In response to a question from Commissioner Appling, Mr. Van Eschen stated that he was still not comfortable saying that Big River had addressed all of Staff's concerns. (Tr. 105) On March 8, 2007, the Commission issued an Order Directing Staff to File a Status Report no later than March 27, 2007, with regard to whether Big River had fully complied with the filing of

the quarterly reports. It is clear that Big River has not in the past fully complied with the Commission's rules and has been seriously delinquent in the filing of the reports even during the time it was filing this application.

Likewise, since the filing of its application for expansion of authority, it was discovered that Big River's tariff is seriously deficient as it does not include rates for all of the services (including bundled services) that Big River provides. Many of the services offered in the exchanges where Big River currently provides service, such as digital telephone service, are not found in Big River's tariff. (Exh. 5, p.10, RCS Schedule 2) Upon investigation, Mr. Schoonmaker found that Big River was not offering the package of services found in its tariff in at least one exchange, and it also appeared that Big River was not offering basic local service as a separate and distinct service as required by § 392.455(4), RSMo. (Exh. 6, p. 4) In the Poplar Bluff exchange, Mr. Schoonmaker was told that the only service available was a package that included local service, several features and unlimited long distance for a total of \$46.00 per month. When he specifically asked for a more limited package of services, he was told that this was the only service offered in Poplar Bluff. (Exh. 6, p. 4)

It is also not clear whether Big River is providing basic local service at its tariffed rates. There is a discrepancy between the rates listed in Big River's tariff and the rates Big River is actually charging its customers. In response to a query by Mr. Schoonmaker, a Big River service representative stated that the rate for basic service was \$17.00, while Big River's tariff states that the rate for basic service is \$7.67 in Malden, \$8.84 in Sikeston, \$9.04 in Cape Girardeau and \$9.29 in Dexter. (Exh. 6, p. 4; Tr. 119) This would seem to be a problem in that Mr. Van Eschen testified that in certain cases the Staff has required ILECs to give refunds to customers when it

was found they were charging rates different from those in their tariff. (Tr. 97) Although § 392.451.2(1) specifically requires that the applicant file and maintain tariffs in the same manner and form as the Commission requires of the incumbent with which the applicant seeks to compete, Big River has demonstrated that it does not maintain tariffs that are consistent with the services it advertises and offers to its customers.<sup>3</sup>

Neither has the tariff been revised to include the exchanges served by CenturyTel and Embarq, although Big River has previously received certificates of authority from the Commission to provide service in those exchanges. Mr. Howe testified that Big River does not yet provide service in those service areas (Tr. 72), yet the company's annual reports filed with the Commission include several CenturyTel and/or Embarq exchanges in the list of exchanges where Big River provides service. There is thus a problem with either the tariff or the annual reports. Although Mr. Howe attempted to explain these matters as mistakes or oversights, there does seem to be a pattern of either intentional disregard of Commission rules or serious inattention to regulatory matters. Mr. Van Eschen stated that Big River will have to make adjustments to its tariff before the Staff will recommend granting of Big River's current application for authority in the BPS exchanges. (Tr. 106) However, to our knowledge, Big River has not made a filing to correct its tariff since the hearing in this case.

BPS also questions whether Big River will provide equal access to all its customers as required by Commission rule. Although Mr. Howe testified that Big River will provide equal access, when Mr. Schoonmaker spoke with a Big River service representative, he was told that

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<sup>3</sup>Most of the Big River tariff sheets have not changed since 1998/1999 when Big River acquired LDD, Inc. Mr. Howe admitted that, in a competitive environment, one would think that prices would change within a 7-9 year period of time. (Tr. 70)

he could not choose a long distance carrier different from the carrier included in the package of services offered by Big River. (Exh. 6, p. 4) Mr. Van Eschen stated that the Staff had not done any independent analysis of Big River's claim that they provided equal access to its customers. Staff based its review on the statements of the company and a review of its tariff and interconnection agreement with AT&T. (Tr. 91-92)

Before hearing, BPS expressed doubt that Big River intended to offer all of the services determined by the Commission to be essential services throughout the BPS service area as required by § 392.451.1(1), RSMo. It is BPS's contention that Big River has not sufficiently demonstrated that it will offer service to end users throughout the BPS service in areas not served by its cable TV partners, nor whether the services will be the same in those areas as in the areas where Big River's cable TV partners have facilities. And, despite Big River's assurances to the contrary, it is not entirely clear whether Big River will be providing service to the end user customers or whether the cable TV partners will be providing such service. In a data request, BPS asked Big River to provide sample marketing materials describing the features of the pricing plans described in Mr. Howe's Direct testimony. In response, Big River provided five (5) samples of marketing materials, only two (2) of which contain the name "Big River Telephone Company." The other three (3) samples offer telephone service, along with high speed Internet and Digital Cable, under the name NewWave Communications with a phone number and website for that company on the materials. (Late-filed Exhibit 8) NewWave will be the cable partner for the BPS exchanges. Section 392.451.2(3) requires the provider to advertise, in media of general distribution, the availability and cost of the essential services it offers, yet Mr. Howe stated at hearing that "we will generally simply advertise our services through our cable TV partners. . . .



[W]e will generally just use the marketing and sales efforts that we've contracted with our cable partners and our agreements with our cable partners." (Tr. 61) If the advertisements for telecommunications service are not in the name of the certificated providers, how can the company be complying with this statutory provision? \*\* \_\_\_\_\_

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\_\_\_\_\_ \*\* (In camera Tr. 41-44; 48-49) In prior cases, the Commission has expressed concern if it found that the telecommunications company was not providing service to customers using the exact name in which its certificate was issued, and Mr. Van Eschen stated at hearing that in the past Staff has been very concerned about who is actually providing the services, particularly with respect to fictitious names and marketing, even requiring companies to modify their tariffs to include the fictitious names they are offering service under. (Tr. 87-88) BPS believes there is an issue in this case that the Commission should carefully consider before granting this application as to which entity is actually providing telecommunications service to the end-user and which company should request the certificate.

Both Big River witness Howe and Staff witness Van Eschen state that granting Big River's request for additional authority will bring more customer choice and that bringing more advanced services to rural areas will promote the public interest, yet neither party could offer any specifics as to what these services would be or what the benefits would be. Mr. Howe stated that, other than basic services, Big River could not list any specific services or the charges for those services that Big River planned to offer in the BPS exchanges. (Tr. 66-67) Mr. Van Eschen

agreed that he was not aware of any new or advanced telecommunications services that Big River would bring to the exchanges served by BPS that BPS was not already providing. (Tr. 90)

Thus, Big River has not demonstrated that it meets all of the statutory requirements necessary to be granted an extension of its certificate to provide basic local service nor has it shown that customers in these exchanges will enjoy new advanced services or receive any additional benefits from the grant of authority.

**Issue 2. In its Application, Big River has requested that the company and the services it proposes to offer in the BPS service area be classified as competitive under Section 392.361. Section 392.451 states that the Commission shall adopt rules requiring applicants to “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.” 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?**

Big River and its services cannot be classified as competitive in the exchanges served by BPS. Under the plain meaning of the statute, such classifications are clearly inconsistent with the requirement to comply with all the rules and regulations of the Commission. Section 392.451.2(4), RSMo, states that when considering an application to provide basic local telecommunications service in an area served by a small incumbent local exchange telecommunications company, the Commission “shall require that all applicants seeking a

certificate to provide basic local telecommunications services under this section . . . [c]omply 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 relies on § 392.361, RSMo, and prior Commission decisions granting competitive status to competitive local exchange company applicants. As has been stated before, however, most of these applicants sought certificates of authority to provide service in large company exchanges, and, with one exception noted below, the other companies who have sought certificates of authority in the Alltel/Windstream exchanges were resellers, mostly prepaid resellers. Big River is the first company to seek a certificate to provide basic local telecommunications service in a true small company’s exchanges that will be a facilities-based provider. Section 392.361.5, RSMo, states:

By its order classifying a telecommunications service as competitive or transitionally competitive or a telecommunications company as competitive or transitionally competitive, **the commission may**, with respect to that service or company and with respect to one or more providers of that service, **suspend or modify the application of its rules or the application of any statutory provision contained in section 392.200 to 392.340, except as provided in section 392.390. The commission may suspend different requirements for different telecommunications companies, if such different treatment is reasonable and not detrimental to the public interest.** (Emphasis added.)

Thus, pursuant to this statutory language, the Commission has discretion as to whether or not to grant competitive status to a company or the services it provides. When this language is considered in relation to the more specific provisions of § 392.451.2(4), RSMo, it is clear that the

Commission can, and should, deny Big River's request for competitive status. Section 392.361.5 states that the Commission may suspend different requirements for different telecommunications companies if such different treatment is reasonable and not detrimental to the public interest. The Commission should exercise its statutory discretion in this proceeding and deny Big River's request for competitive classification.

**Issue 3. In its application for a certificate of service authority, Big River has requested that the Commission waive certain statutory provisions and rules that have been waived for other applicants requesting competitive local exchange authority pursuant to Section 392.361. Section 392.451 states that the Commission shall adopt rules requiring applicants to "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." Is Big River's request for waivers of statutes and rules relative to providing service in the BPS exchanges permissible under Section 392.451, such that the Commission should grant the requested waivers?**

Big River's request for waivers of Commission statutes and rules is not consistent with the provisions of § 392.451, RSMo 2000. The statute is very clear in stating that any applicant for a certificate of service authority in a small company exchange is required, at a minimum, 1) to file and maintain tariffs in the same manner as the company with which it seeks to compete; 2) to meet the minimum service standards as the Commission requires of the incumbent; 3) to make the same reports and other informational filings with the Commission that the incumbent must make; and 4) to comply with all of the same rules and regulations as the Commission may impose on the incumbent with which it seeks to compete.

Section 392.420, RSMo, authorizes the Commission to “suspend or modify the application of its rules or the application of any statutory provision contained in sections 392.200 to 392.340 if such waiver or modification is otherwise consistent with the other provisions of section 392.361 to 392.520 and the purposes of this chapter.” Any applicant for a certificate of service authority in a small company exchange cannot be granted waivers of any rule or regulation that the incumbent local exchange carrier is obligated to follow. Waiver of these regulations would be inconsistent with § 392.451, RSMo and, thus, in violation of the statute quoted above.

Both Big River and the Staff argue that the waivers should be granted as the waivers only apply to rate of return oversight that should not be applicable to a competitive company. But no matter what the practicality of the matter, the fact is that the statutory language is very clear. Any applicant for a certificate of service authority in a small company exchange must comply with all of the same rules and regulations as the Commission imposes on the incumbent with which it seeks to compete. If BPS is required to keep its books of account in a certain manner by Commission rule, then Big River should be required to do so as well. The Commission cannot ignore the clear mandate of the statute just because it does not believe that it is reasonable to require that the competitive company comply with these regulations.

**Item 4. Response to Commission Request for Additional Briefing of Issue 3.**

In its Order Setting Briefing Schedule and Directing the Filing of a Late Exhibit, the Commission directed the parties to thoroughly brief issue number three and specifically to brief whether Big River’s request for certain waivers is an issue of first impression and how a ruling

would affect both prior and future determinations by the Commission with regard to the same issue. BPS believes that this is an issue of first impression, because this is the first request by a company to provide facilities-based service in a small company's service area such as BPS. As was explained before, the first applicant to be provided a certificate of service authority to provide basic local service in a small company exchange, Missouri State Discount Telephone ("MSDT"), was a reseller that provided prepaid service. Likewise, Universal Telecom, Inc., also a prepaid reseller, was granted authority to provide service in the small company exchanges served by ALLTEL and TDS Telecom. Because these companies were prepaid resellers, the issue of granting the same waivers as were routinely granted to other competitive local exchange companies was not raised in their application cases. Big River, however, intends to offer service using the facilities of its cable TV partner. This is the first applicant in a true small company exchange that will provide service using its own facilities or those of its cable TV partner.<sup>4</sup> Thus, it is a case of first impression, and it is appropriate for the Commission to consider whether these waivers should be granted.

As to how a ruling in favor of BPS would affect both prior and future determinations by the Commission on this issue, a ruling that the waivers were not appropriate would not affect the prior certificates granted by the Commission, where the applicants were only resellers of the incumbent company's services. As to future cases, the Commission's decision in this case of first impression where an applicant seeks to provide facilities-based basic local

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<sup>4</sup>Aurora Communications, Inc., was granted a certificate of service authority to provide basic local service in the Windstream service area along with the large incumbent local exchange companies on January 22, 2007, in Case No. CA-2007-0175. In its application, Aurora stated that it was facilities based. Aurora does not have an interconnection agreement with Windstream, however, and is not providing service in the Windstream exchanges.

telecommunications service in a small company exchange will serve as precedent, and any future applicants will understand that the waivers are not automatically available as the statutes require the applicant to comply with the same rules and regulations as the incumbent with whom the applicant seeks to compete.

### **Conclusion and Summary**

Big River has not demonstrated that it meets all of the statutory requirements to be granted this expansion of its certificate of service authority into the BPS service area. As was shown above, there are serious deficiencies and doubts about Big River's intentions regarding the provision of service in these exchanges and its ability to comply with the provisions of § 392.451, RSMo.

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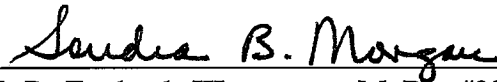
At the very least, if the Commission is not going to require Big River to:

- comply with all the same rules and regulations as BPS;
  - file quarterly quality of service reports as timely and as accurate as BPS;
  - update or follow tariff provisions in the same manner as BPS;
  - provide equal access like BPS; and
  - advertise its services in its own name (instead of in the name of its cable partner)
- as required of BPS;

then, if at some future time, BPS seeks to use the presence of Big River in its service area for purposes of obtaining a measure of relaxed regulation by electing price cap or competitive status, neither the Staff or the Commission should be able to raise these deficiencies as a bar and find that Big River is not providing basic local telecommunications service as required by statute.

For all the reasons stated above, BPS respectfully requests that the Commission deny the application of Big River for an expansion of its certificate of authority to provide basic local telecommunications service in the BPS exchanges until such time as it is assured that Big River is fully complying with, and will in the future comply with, all of the same rules and regulations as BPS.

Respectfully submitted,



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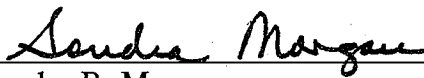
Certificate of Service

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 27<sup>th</sup> day of March, 2007, to:

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