

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of the Application of Big)	
River Telephone Company, LLC to)	
Expand its Certificate of Basic Local)	Case No. TA-2007-0093
Service Authority to Include Provision)	
of Basic Local Exchange)	
Telecommunications Services in the)	
Exchanges of BPS Telephone Company)	
and to Continue to Classify the)	
Company and its Services as Competitive.)	

BIG RIVER TELEPHONE COMPANY, LLC'S BRIEF

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Introduction

By its application in this matter, Big River seeks to expand its certificate of basic local service authority to include the three exchanges served by BPS (Bernie, Parma and Steele), which are the exchanges in the boot heel of the State that are not served by AT&T Missouri. Big River also seeks continued competitive classification and continued standard waivers of statutes and regulations. In support of its application, Big River submitted the testimony of its CEO Jerry Howe, who has headed up the company from its start and who has been involved in the telecommunications industry for nearly 30 years. (Howe Direct, Ex 3, p. 1-2, 4, 13-15).

Big River has been providing telecommunications services in Missouri since 2001 as a competitive carrier with standard waivers. It currently has authority to operate in the AT&T Missouri, Embarq, CenturyTel and Spectra exchanges, although to date it is only providing service in the AT&T areas.¹ It started business by acquiring the operations of LDD, which had been in business since 1983 and had begun providing local services in 1999. (Id. p. 3-5, 13-15).

Big River's main office is located in Cape Girardeau. It has approximately 50 employees. It serves nearly 20,000 access lines in Missouri, Arkansas, Kentucky, Mississippi, and Tennessee, including in some small ILEC areas in such other states. It is in the process of expanding into Illinois, Kansas and Nebraska. (Id. p. 1, 3, 5; Howe Surrebuttal, Ex 4, p. 9).

It is unusual to have a hearing in a CLEC certification case. Such applications have been routinely granted since the mid-1990's. As discussed in detail below, Big River is not the first applicant for basic local authority in a small ILEC exchange, nor is it the first even as to the BPS exchanges. At least one prior CLEC has been authorized to provide service in the BPS exchanges, with BPS's stipulated consent to the same relief sought by Big River herein – service

¹ Notwithstanding a minor error in Big River's annual report, it does not currently provide local service to end users outside AT&T Missouri areas. (Howe, Tr. 72-73).

authority, competitive classification, and standard waivers. This is not a case of first impression.²

The Commission should grant Big River's application. There is no legitimate reason to deny it. As demonstrated below, the three issues in this case are simply the standard decision points for a routine CLEC application.

Big River meets the statutory requirements for issuance of a certificate of service authority to provide basic local service in the BPS exchanges. Particularly given that it is already an operating CLEC in other areas, any lingering collateral concerns that Staff may have about things like tariffs or reports should be addressed separately. Likewise, any issues that BPS may raise regarding interconnection must be addressed separately, as required by federal law. Such matters are not a basis for denial of Big River's application herein.

Big River meets the requirements for competitive classification as to the three new exchanges. It is already classified as a competitive company offering competitive services and there is no basis to change that status.

Big River meets the requirements for continued standard waivers of statutes and regulations. It already operates pursuant to such waivers and there is no basis to change that status.

In sum, the evidence shows that Big River meets the applicable requirements and the Commission should grant its application, so that customers in the BPS exchanges can have greater choice in providers, and so that CLECs in general are not deterred from seeking to provide service in small ILEC exchanges. The Commission should pay no heed to self-serving anti-competitive opposition from incumbent BPS. By approving the application, the Commission will continue to advance the competitive goals of both federal and state law.

² As requested by the Commission, this point is discussed in detail under Issue 3.

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 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 240-3.510, such that the Commission should approve its application to expand its area of basic local service authority to include the BPS exchanges?

The Commission should approve the Application of Big River Telephone Company, LLC to expand its area of basic local service authority to include the BPS exchanges. The evidence shows that Big River has complied with the certification process established by Sections 392.450, 392.451 and 392.455, and 4 CSR 240-3.510.³ The evidence shows that Big River has and will address Staff concerns about its tariffs, including by updating its tariffs regarding VOIP services, notwithstanding pending disputes between the Commission and other carriers and other uncertainties regarding the Commission's jurisdiction over such services. The evidence shows that Big River is current on required reports and will address Staff's concerns about the tracking and compilation of future quarterly quality of service reports. The evidence shows that Big River will address interconnection with BPS in due course and in compliance with federal law. In any event, such collateral matters do not have a legitimate bearing upon Big River's application to expand its area of service authority and should be addressed separately, or at most as a condition of approval, if necessary. (Van Eschen, Tr. p. 108). There is no basis to deny Big River's application.

Sections 392.450 and 392.455 set general standards that pertain to all applications for

³ Big River understands that it must continue to abide by standard restrictions on CLEC switched access charges. (Howe Direct, Ex 3, p. 14-15; Van Eschen Rebuttal, Ex 1, p. 10-11).

basic local service authority. The evidence shows that Big River, which has been providing basic local service in other areas of the State since 2001, meets these standards regarding its application:

- Big River has sufficient technical, financial and managerial resources and abilities to provide basic local service as required by Section 392.455(1)(Howe Direct, Ex 3, p. 3, 5-9; Surrebuttal, Ex 4, p. 9; Van Eschen Rebuttal, Ex 1, p. 4, 7);

- Big River's services are required to meet the applicable minimum standards established by the Commission in accordance with Sections 392.450.2(2) and 392.455(2)(Howe Direct, Ex 3, p. 7; Surrebuttal, Ex 4, p. 2; Van Eschen Rebuttal, Ex 1, p. 7, 9);

- Big River's proposed new service territory follows the exchange boundaries of incumbent BPS and is not smaller than an exchange, as required by Section 392.455(3)(Howe Direct, Ex 3, p. 6; Van Eschen Rebuttal, Ex 1, p. 7);

- Big River offers basic local service as a separate and distinct service as required by Section 392.455(4)(Howe Direct, Ex 3, p. 8; Tr. 66; Van Eschen Rebuttal, Ex 1, p. 7; Tr. 93)⁴;

- Big River is required to file and maintain tariffs in accordance with Section 392.450.2(1)(Howe Direct, Ex 3, p. 5, 12; Van Eschen Rebuttal, Ex 1, p. 9); and

- granting the application will show due consideration by the Commission of equitable access to affordable telecommunications services for all Missourians, regardless of location or income, as required by Section 392.455(5)(Howe Direct, Ex 3, p. 10-12; Van Eschen Rebuttal, Ex 1, p. 7-8)⁵.

⁴ On the other hand, Big River is entitled to also offer packages of services under Section 392.200.12, which authorizes companies to offer different packages in different areas including based on whether or not service is offered by means of cable facilities. (Howe Surrebuttal, Ex 4, p. 11-12). Likewise, while customers are free to choose any long distance provider, if they subscribe to a package then they must take the entire package including Big River long distance service. (Howe Tr. 64-66; Van Eschen Tr. 89).

⁵ Granting the application is also in the public interest under Section 392.430. (Howe Direct, Ex 3, p. 10-12; Surrebuttal, Ex 4, p. 14; Van Eschen Rebuttal, Ex 1, p. 7-8).

In particular, granting the application will enhance customer access to affordable services in these three rural exchanges by bringing significant wireline competition to the area. (Id).

Section 392.451 sets some additional standards for applications to provide basic local service in small ILEC exchanges. The evidence shows that Big River, which has not yet had to meet these additional standards regarding its operations in large ILEC areas, will meet these standards regarding its application for authority to serve the BPS exchanges:

- Big River will offer all telecommunications services which the Commission has determined are essential for purposes of qualifying for state universal service fund support, as required by Section 392.451.1(1)(Howe Direct, Ex 3, p. 7-8; Van Eschen Rebuttal, Ex 1, p. 8-9);

- Big River will advertise the availability of such essential services and the charges therefore using media of general distribution, as required by Section 392.451.1(2)(Howe Direct, Ex 3, p. 9-10; Surrebuttal, Ex 4, p. 13; Van Eschen Rebuttal, Ex 1, p. 8-9);⁶

- Big River will be required to file and maintain tariffs in accordance with Section 392.451.2(1)(this is duplicative of the requirements of Section 392.450.2(1) discussed above);

- Big River will be required to meet the Commission's minimum standards in accordance with Section 392.451.2(2)(this is duplicative of the requirements of Sections 392.450.2(2) and 392.455(2) discussed above);

- Big will be required to make reports in accordance with Section 392.451.2(3)(this is duplicative of Section 392.390)(Howe Surrebuttal, Ex 4, p. 7-8)(this is discussed in detail under Issue 3 of this Brief); and

- Big River will be required to comply with the same rules and regulations as the Commission may impose on the incumbent in accordance with Section 392.451.2(4)(Howe

⁶ Current marketing materials are not pertinent to this inquiry, as Big River has not been subject to the marketing requirements of Section 392.451.1(2) in the large ILEC areas in which it currently operates. (Howe Surrebuttal, Ex 4, p. 12).

Direct, Ex 3, p.13-15; Surrebuttal, Ex 4, p. 3-7; Van Eschen Rebuttal, Ex 1, p. 3; Surrebuttal, Ex 2, p. 7-8)(this is discussed in detail under Issue 3 of this Brief).

Finally, Big River's application meets the filing standards of rule 4 CSR 240-3.510. (Howe Surrebuttal, Ex 4, p. 3; Van Eschen Rebuttal, Ex 1, p. 6).

The foregoing requirements govern the application. The evidence shows that Big River's application should be granted pursuant to such standards.

Several collateral issues have been raised in this proceeding. Big River has addressed these issues, but in any event they are not a basis for denying the application. These are simply examples of normal minor issues that arise from time to time for any company. (Van Eschen Tr. 84).

Staff expressed a concern because it discovered that Big River had not kept current on its quality of service reports. (Van Eschen Rebuttal, Ex 1, p. 2, 9-10). Big River was not aware that submittal of reports had been interrupted and it immediately submitted the required reports.⁷ (Howe Surrebuttal, Ex 4, p. 2; Van Eschen Surrebuttal, Ex 2, p. 5-6). Big River continues to work with Staff to make certain that Staff receives the information that it wants. (Howe Surrebuttal, Ex 4, p. 2, Tr. 31-32; Van Eschen Surrebuttal, Ex 2, p. 5-6, Tr. 105). However, whether or not Big River has now fully addressed Staff's concerns, the Commission should keep in mind that the standard regarding the application is not that Big River has perfectly complied with such requirements, but rather that the Commission's rules and regulations require it to comply. See Section 392.451.2(3).

Staff also expressed concern about certain services that were not included in Big River's tariffs. (Van Eschen Surrebuttal, Ex 2, p. 4-5). Specifically, this concern involves VOIP

⁷ These reports further demonstrate that Big River is meeting minimum standards in compliance with Commission requirements. (Howe Surrebuttal, Ex 4, p. 2).

services. The Commission is well aware that there is significant uncertainty regarding federal and state jurisdiction over such services. The FCC has yet to reach the issue of statutory classification of VOIP services as telecommunications services or information services. (WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004). Further, the Commission is involved in several disputes with other companies regarding such services. (Case No. LT-2006-0162, appeal pending; Case No. TC-2007-0111 and related federal case). Despite such uncertainties and disputes, Big River has committed to including such services in its Missouri intrastate tariffs to meet the new Commission expectations. (Howe Surrebuttal, Ex 4, p. 12-13, Tr. 33-34). Again, it is important to keep in mind that for purposes of certification, the issue is whether the Commission requires Big River to tariff its intrastate services, not the current status of Big River's tariffs. See Sections 392.450.2(1) and 392.451.2(1). Moreover, Big River's tariff changes for service in the BPS area will still have to be separately approved before it can provide service. (Van Eschen Rebuttal, p. 5).

There is nothing to BPS's feigned concerns about Big River's ability to provide services outside of areas served by the cable company; Big River does that today in various areas. (Howe Surrebuttal, Ex 4, p. 9, Tr. 74-78). Likewise, Big River will seek an interconnection agreement with BPS, as it has done in other large and small ILEC areas. (Id, p. 9-11; Van Eschen Surrebuttal, Ex 2, p. 2-3). Finally, Big River directly contracts with and provides services to its customers even when it uses cable television facilities to do so. (Howe Surrebuttal, Ex 4, p. 13-14, Tr. 39-55, 60, Ex 7).⁸

Big River's application meets the applicable standards and should be granted.

⁸ The question and answer on page 32, lines 22-25 of the transcript are miss-transcribed. As is made clear throughout the evidence, Big River provides telecommunications services to its customers.

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?

The Commission should grant Big River’s request to continue to classify the company and its services as competitive pursuant to Section 392.361. While Issue 2 presents a necessary decision point for the Commission in this case, there is no legitimate dispute that the Commission should continue to classify Big River and its services as competitive. Section 392.451 does not in any way affect the Commission’s authority to classify competitive companies and services under Section 392.361. As discussed further under Issue 3, section 392.451 (specifically subsection 2(4)) only addresses “rules and regulations as the commission may impose”, and does not affect statutory authority such as the authority to grant competitive classification and the statutory rights that attend such classification. The Commission should rule in favor of Big River on Issue 2.

The evidence shows that the Commission should grant Big River’s request for continued competitive classification, as it has always done before for CLECs including in the case of Missouri State Discount Telephone (MSDT, Case No. TA-2001-0334) in the BPS exchanges based on stipulation of the parties to that case including BPS.⁹ In his testimony, Mr. Howe reminded the Commission that it has previously classified Big River and its services as competitive and indicated that there should not be any change in that classification. (Howe Direct, Ex 3, p. 4). Mr. Van Eschen concurred. (Van Eschen Rebuttal, Ex 1, p. 5; Surrebuttal, Ex 2, p. 7-9). BPS offered no testimony. The record shows that Big River will have to compete

⁹ The Commission’s prior actions concerning MSDT are discussed in detail under Issue 3.

against incumbent BPS as well as MSDT in these exchanges, in addition to wireless and internet services. In accordance with innumerable prior decisions by the Commission, such competition justifies a competitive classification under Section 392.361. There is no basis to deny Big River's request.

Examination of the consequences of a denial of the request underscores that it simply cannot be denied. Assuming that the Commission denied the request and Big River nonetheless commenced services as a "noncompetitive CLEC" in the BPS exchanges, then based on such competition and the presence of wireless service, BPS would be able to elect price cap regulation and have its services classified as competitive under Section 392.245. (Howe Surrebuttal, Ex 4, p. 3-5, Van Eschen Tr. 103). So the new competitor would be noncompetitive and the incumbent would be competitive. George Carlin might enjoy adding such an oxymoronic result to his list (jumbo shrimp, etc), but in the real world of telecommunications the outcome must be rational.

The Commission should grant the requested 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 BPS exchanges permissible under Section 392.451, such that the Commission should grant the requested waivers?

a. This is not an issue of first impression.

In its Order Setting Briefing Schedule and Directing the Filing of a Late Exhibit, issued February 14, 2007, the Commission directed the parties to specifically address the question of

whether this issue is in fact an issue of first impression. The simple and direct answer is quite plainly “No, this is not an issue of first impression”.

In 2001, the Commission issued its Order Granting Certificate to Provide Basic Local Exchange and Interexchange Telecommunications Service in Case No. TA-2001-334, acting upon the application of Missouri State Discount Telephone (MSDT). In that order, the Commission authorized MSDT to provide basic local telecommunications service throughout Missouri, in exchanges served by both large and small incumbent local exchange carriers including BPS. The Commission also classified MSDT as a competitive company offering competitive services. Further, the Commission granted the same statutory and regulatory waivers as those that are at issue in the instant case. (A copy of the Order is attached to Mr. Howe’s surrebuttal testimony – Exhibit 4 – as Schedule 2).¹⁰

The Commission relied in part upon the stipulation submitted by the parties in Case No. TA-2001-334, including BPS. A copy of that stipulation is included as Schedule 1 to Mr. Howe’s surrebuttal testimony in this case. (Ex. 4). In that stipulation, the parties to the proceedings, including BPS, agreed that MSDT should be classified as a competitive company offering competitive services, and that the statutes and regulations should be waived. (Stipulation pages 6-7, 9-10).

In issuing its Order, the Commission reached the following conclusion of law: “Sections 392.361 and .420 authorize the Commission to modify or suspend the application of rules and certain statutory provisions for companies classified as competitive or transitionally competitive.” Further, the Commission stated: “Based upon the Commission’s review of the applicable law, the Agreement of the parties, and upon its findings of fact, the Commission concludes that the Agreement should be

¹⁰ Some of the regulation numbers are different due to reorganization of Commission rules, but the regulations involved are the same.

approved.”

The parties to Case No. TA-2001-334 implicitly represented¹¹ to the Commission, and the Commission expressly concluded, that it was lawful for the Commission to waive statutes and rules in conjunction with granting a certificate of service authority for a competitor to offer basic local service in the exchanges of a small incumbent local exchange carrier. Hence, the Commission has without question already addressed the issue that BPS has raised in this proceeding, and ruled against the position taken by BPS herein. This is not an issue of first impression.¹²

BPS’s position herein is not credible. When faced with a Staff over-earnings complaint, it was more than willing to stipulate to the lawfulness of waiving statutes and regulations for MSDT, so that it could try to use MSDT to gain price cap regulation and escape the earnings reduction. Unfortunately for BPS, the Commission saw through its efforts to prohibit MSDT from actually competing by means of restrictions in the interconnection agreement, and denied its request for price cap regulation. At that point, BPS actually was urging Big River to become its competitor so that BPS could try again for price caps. BPS never gained price cap regulation and ultimately agreed to an earnings reduction of \$460,000. With that complaint case finally behind it, now BPS seeks to obstruct competition by switching positions on legal issues that have already resolved by the Commission. (Howe Surrebuttal, Ex 4, pages 5-7 and Schedules 1-5).

Undaunted by its self-serving flip-flopping, BPS erroneously asserts that there is a distinction

¹¹ BPS will no doubt assert that in the stipulation it reserved the right to take a different position in a different case, but regardless of any reservation of rights, BPS’ signature to the stipulation constituted a warranty that the actions proposed therein were lawful. 4 CSR 240-2.080(7).

¹² Mr. Van Eschen testified on cross-examination that the Commission had also granted a certificate of service authority for Universal Telecom to compete in small ILEC exchanges. (Tr. 83-84). In Case No. TA-2002-183, the Commission granted Universal Telecom’s application to add small ILEC exchanges to its existing basic local service authority, classified the company and its services as competitive and waived the standard statutes and regulations. The Commission stated in its Conclusions of Law, “The Commission finds that Universal Telecom should be granted the same waivers of the statutes and rules as the Commission usually grants to competitive companies.” Again, the issue raised by BPS in the instant case is not an issue of first impression. For convenience, a copy of the Universal Telecom order is appended to this Brief.

between this case and the MSDT case, because MSDT did not become a facilities-based provider, whereas Big River will provide service using its own facilities. But the Commission granted MSDT an unlimited certificate of service authority, and addressed the issue at hand by granting waivers to MSDT without any consideration of the manner in which MSDT might provide service. (Howe Surrebuttal, Ex. 4, p. 2-3 and Schedule 2).¹³ Likewise, the stipulating parties, including BPS, did not base their agreement upon MSDT's operational plans. (Ex 4, Schedule 1). Contrary to BPS's arguments, in its prior decisions the Commission has determined that statutes and regulations could be lawfully waived for competitors in small ILEC exchanges without regard to whether the carrier would operate as a facilities-based provider.

And again, BPS is not consistent. In Case Nos. IO-2003-0012 and IO-2004-0597, when it was trying to persuade the Commission to grant it price cap regulation so that it could avoid the Staff's overearnings complaint, BPS argued that the manner in which MSDT provided service was irrelevant – basic local was basic local.¹⁴ (Copies of the BPS price cap orders are attached to Mr. Howe's surrebuttal testimony as Schedules 3 and 4). While the Commission determined that BPS was wrong on the question of whether MSDT was providing service in a manner that would support commencement of price cap regulation, the Commission did find and conclude that MSDT's certification was in fact unlimited and sufficient to support price cap regulation. (Report and Order, Case No. IO-2004-0597, p. 8-9, Schedule 4 to Howe Surrebuttal).

The short answer to the Commission's question is still, "No, this is not an issue of first

¹³ Similarly, the Commission granted Universal Telecom a certificate to provide basic local service and waived the standard statutes and regulations without any limitation against facilities-based service.

¹⁴ In the first BPS price cap application case (IO-2003-0012), the Commission found that BPS was not entitled to price cap regulation because it had prohibited MSDT from competing against it by means of a non-compete clause in the interconnection agreement between the companies. In the second case (IO-2004-0597), the Commission found that BPS was not entitled to price cap regulation because MSDT was not complying with its certificate of authority, was not offering all essential services, and was not providing service in a manner that would support releasing BPS from rate of return regulation. Neither decision conflicts with the Commission's original MSDT certification decision or its conclusion that it had the authority to waive statutes and regulations as usual in conjunction with authorizing MSDT to compete in small incumbent LEC exchanges.

impression”.

b. Denial of standard waivers would deter competition in small ILEC exchanges.

In its Order Setting Briefing Schedule and Directing the Filing of a Late Exhibit, issued February 14, 2007, the Commission also directed the parties to specifically address the question of how a ruling in favor or, or against, BPS would affect both prior and future determinations by the Commission regarding this issue. In short, the answer is that it would effectively preclude competition in small ILEC exchanges, such that the Commission likely would not even receive other applications and face the issue again.

Based on the record, the Commission has thus far only certified two companies to compete in small ILEC exchanges (apparently only one in BPS exchanges) and it has found that competition to be insufficient to warrant price cap regulation of BPS. If the Commission were to rule in favor of BPS and conclude that it cannot grant the requested waivers, then presumably the Commission would have to withdraw the waivers it has previously granted (see section 392.361.7 RSMo, authorizing reimposition of suspended requirements) and deny any subsequent requests as well. (Van Eschen Tr. 109-10). The Commission would in effect be determining that at least as to small ILEC exchanges (and perhaps everywhere), a competitor like Big River seeking to operate in small ILEC exchanges would have to somehow be subject to rate of return regulation under Section 392.240.1, even though its presence would allow the incumbent to escape such regulation by means of price caps under Section 392.245. (Howe Surrebuttal, Ex 4, p. 3-5, Van Eschen Tr. 103). To say the least, it is doubtful that any competitor would be interested in doing business in such an upside-down regulatory environment, particularly if it would also affect operations in large ILEC exchanges. Given that Big River appears to be only the third applicant, and by all accounts the first to be willing to invest in its own facilities, such an adverse decision by the Commission would seem

destined to completely insulate small incumbents from wireline competition – which of course is what BPS unmistakably wants.

On the other hand, rejection of BPS’s arguments would simply mean business as usual – CLECs would continue to receive standard waivers. Prior orders would not need to be revisited. Big River could go forward with its plans and other competitors could follow. And the pro-competitive goals of Chapter 392, as stated in Section 392.185, would be achieved.

The Commission posed an important question. The ramifications of an abandonment of standard waivers for CLECs could be both significant and detrimental. On the other hand, continued and predictable reduced regulation would encourage the wireline competition sorely lacking and desperately needed in small ILEC areas.

c. Big River’s request for waivers of statutes and rules relative to providing service in BPS exchanges is permissible under Section 392.451, and the Commission should grant the requested waivers.

The Commission should grant the standard waivers of statutes and regulations as requested by Big River. The request includes the following:

<u>Statutes</u>	<u>Missouri Public Service Commission Rules</u>
392.210.2	4 CSR 240-10.020
392.240 (1)	4 CSR 240-30.040
392.270	4 CSR 240-3.550(5)(C)
392.280	
392.290	
392.300.2	
392.310	
392.320	
392.330	
392.340	

Waiver of these statutes for a competitive carrier like Big River remains appropriate. (Howe Direct, Ex 3, p. 13-15; Howe Surrebuttal, Ex 4, p. 3-7). Staff witness Van Eschen agreed. (Van Eschen Rebuttal, Ex 1, p. 3; Surrebuttal, Ex 2, p. 7-8).

Section 392.451 requires, in pertinent part, that the Commission “adopt rules” that “at a minimum, shall require that all applicants seeking a certificate to provide basic local telecommunications services” in an area that is served by a small incumbent local exchange telecommunications company “comply with all of the same rules and regulations as the commission may impose on the incumbent.” The Commission has satisfied this requirement by adopting rules that generally apply to all basic local providers.

Sections 392.361 and .420 authorize 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, except as provided in section 392.390”, with .420 adding “if such waiver or modification is otherwise consistent with the other provisions of sections 392.361 to 392.520 and the purposes of this chapter.”

Hence, under Sections 392.361 and .420, the Commission is authorized to suspend the application of certain statutes, including all of the statutes listed in Big River’s request (which are the standard set of waived statutes). Section 392.451 does not in any way limit the ability of the Commission to suspend statutes. It only references rules and regulations that the Commission “may impose”. Rules and regulations are not statutes, nor may the Commission impose statutes. Accordingly there is no basis for any dispute as to Big River’s requested statutory waivers and such request should be granted (as has previously been done for other CLECs, including MDST and Universal Telecom as to small ILEC areas).

Furthermore, the language of Section 392.451 regarding application of rules and regulations must be interpreted in the context of other applicable law. Once the Commission waives statutory system of accounts (Section 392.210.2) and rate of return earnings oversight (Section 392.240.1), it would have no statutory basis for imposition of related rules and regulations on Big River. The

Commission derives its regulatory powers from the applicable statutes. See, e.g., State ex rel. and to Use of Kansas City Power & Light Co. v. Buzard, 168 SW2d 1044 (Mo 1943). Accordingly, such related rules and regulations (4 CSR 240-10.020 – income on depreciation fund investments, 4 CSR 240-30.040 – uniform system of accounts) can and should also be waived, as has always been done for CLECs. Indeed, once the statutes are waived, the related rules simply cannot be lawfully applied to Big River.

Regarding the final rule at issue, under Section 392.455 Big River will be required to follow BPS exchange boundaries. Certainly Big River could obtain a copy of those maps and re-file them, but to what end? To incur needless expense and needlessly use up Commission personnel time and information storage resources? Multiplied by however many competitors that would have to follow suit in the future? Certainly, waiver of 4 CSR 240-3.550(5)(C) – filing of exchange boundary maps – is appropriate. (Howe Surrebuttal, Ex 4, p. 4; Tr. 78; Van Eschen Rebuttal, Ex 1, p. 3; Surrebuttal, Ex 2, p. 7-8).

Although not directly related to Big River’s waiver requests, BPS has also made an issue out of the format to be used for Big River’s annual reports. Section 392.451.2(3) does require that Big River file annual reports. But again, as discussed above, Section 392.361.5 authorizes modification of statutes, and Section 392.390(1) expressly authorizes the Commission to “require different forms of annual reports for different telecommunications companies.” These statutes, when read together, directly authorize the Commission to continue to allow Big River to file its annual reports in the form prescribed for CLECs. To require otherwise would impose needless costs on Big River, as the additional information required in an ILEC reporting format has to do with monitoring rate of return and would be of no use regarding Big River. (Howe Surrebuttal, Ex 4, p. 7-8). Mr. Van Eschen agreed that Big River should continue to file reports in the CLEC format. (Van Eschen Surrebuttal,

Ex. 2, p. 6).

BPS wants the Commission to miss-read Section 392.451 as blindly requiring imposition of all regulations on Big River and other competitors, without regard to other statutes and provisions of law. To what end? To require the substantial expense of additional accounting information that would be useless outside rate of return regulation? (Howe Tr. 78-80; Schoonmaker Rebuttal, Ex 5, p. 5; Tr. 113-116). To require filing of duplicative exchange maps? To require annual reports with more useless information? BPS's position is nonsensical and obstructive. (Van Eschen Tr. 109-10).

Once Big River is certificated and providing services in the BPS exchanges, then BPS will be able to obtain price cap regulation under Section 392.245. And it can seek its own waivers as well. Under BPS's argument, even then Big River would have to comply with regulations aimed at controlling monopoly entities. (Howe Surrebuttal, Ex 4, p. 3-5). Why would any competitor be willing to operate in such an upside-down regulatory environment? Of course they would not.

There is no basis to deny Big River's request for standard waivers. The Commission has already decided that such waivers are lawful and appropriate even as to small ILEC areas. To change course now would serve no public purpose, but rather would only further insulate BPS and other small incumbents from the competition that they have by and large avoided thus far.

Conclusion

The Commission should grant to Big River the relief requested in its Application including expansion of its area of basic local service authority to include the BPS exchanges, continued classification of the company and its services as competitive, and continued waiver of statutes and rules as previously granted to Big River and other CLECs. There is no legitimate basis to deny such relief to Big River. Granting such relief will further the pro-competitive goals of Chapter 392 and promote the public interest by allowing substantial wireline competition in

the BPS exchanges.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of this document was emailed to the parties listed below on this 27th day of March, 2007.

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