

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 2nd day of
August, 2007.

In the Matter of the Bona Fide Request of)	
Big River Telephone Company, LLC for)	
Interconnection, Services and Network)	<u>Case No. TO-2008-0003</u>
Elements from BPS Telephone Company)	
pursuant to 47 U.S.C 251(f)(1).)	

ORDER DENYING MOTION TO DISMISS

Issue Date: August 2, 2007

Effective Date: August 2, 2007

On July 2, 2007, Big River Telephone Company, LLC, filed a Notice of Bona Fide Request for Interconnection, Services and Network Elements from BPS Telephone Company pursuant to 47 U.S.C. 251(f)(1). The Notice requested that the Commission terminate BPS's rural exemption, at least with regard to Big River's request, and establish an implementation schedule for compliance with Big River's request.

On July 3, 2007, notice of the case was issued directing the Staff to begin its preliminary investigation and setting a prehearing conference which was held on July 18, 2007. On July 13, 2007, BPS filed a response to the Notice. In its response, BPS objects to the Commission going forward with its investigation on the grounds that Big River has not given BPS a bona fide request for interconnection.

Attached to Big River's Notice was the e-mail purporting to be Big River's bona fide request for interconnection. The e-mail, which was sent from John Howe on

June 22, 2007, to Trip England, attorney for BPS, and Lisa Winberry with the subject line “Interconnection Agreement,” stated:

We would like to continue the discussion on the negotiation of the Interconnection Agreement that we approached BPS with last year. For your review, I have attached a draft agreement that we have negotiated with other independent telephone companies. It is relatively brief and covers only the limited issues we need to accomplish interconnection. Please let me know when we can have a follow on (*sic*) discussion of this agreement.

Mr. England sent a return e-mail on June 26, 2007, which stated in relevant part:

Thank you for your e-mail and draft proposed interconnection agreement between Big River and BPS Telephone Company dated June 22. . . . As we have previously indicated, BPS has a rural exemption from any interconnection obligation under Section 251(f)(1) of the Telecommunications Act and is not willing to voluntarily wave that exemption. Pursuant to that section of the Act, BPS has no obligation to negotiate an interconnection agreement with Big River until a bona fide request for interconnection has been received, and, pursuant to Section 251(f)(1)(B), Big River notifies the Missouri Public Service Commission and the Commission determines that the request for interconnection is not unduly economically burdensome, is technically feasible, and consistent with Universal Service.

Until such time as BPS’s rural exemption is terminated by the Commission, we do not believe BPS is under any obligation to negotiate an interconnection agreement, nor that the statutory timetable is triggered.

Section 251(f)(1)(B) requires the Commission to complete an inquiry for the purpose of determining whether to terminate the exemption no later than 120 days after receiving notice of a bona fide request. October 30, 2007, would be the operation of law date in this instance.

BPS argues that the June 22, 2007, e-mail did not constitute a bona fide request. BPS states that “although Big River included a proposed interconnection agreement with its June 22nd e-mail message, nowhere in that message – or in the proposed agreement – did

Big River state or even suggest the type, quantity, or location of the interconnection facilities it alleges it wants from BPS.”¹

On July 18, 2007, Big River responded to BPS’s reply. Big River argued that the interconnection agreement which it submitted to BPS for its consideration was complete and “detail[ed] all aspects of interconnection, services and network elements requested by Big River.” Big River proceeds to list several examples of specific requests for trunking facilities, number portability, dialing parity, and reciprocal compensation.

The Staff of the Missouri Public Service Commission filed its recommendation with regard to the bona fide request issue on July 25, 2007. Staff stated that it believes Big River’s request was a “bona fide request” because Big River: a) indicated its desire to negotiate; b) submitted a proposed interconnection agreement which included the terms for number portability and interconnection; c) made reference to the geographic area; d) provided negotiation and arbitration timeframes; e) identified the type of interconnection; and f) stated that the terms regarding the quantity of facilities would be negotiated. In addition, Staff believes that the intent of the request is clear and BPS should not be allowed to avoid negotiating because of the format or wording of the request.

The Commission has examined the verified Notice, its attachments and the responses and replies. The Commission considers BPS’s response to be a motion for dismissal of the proceeding based on its argument that Big River did not make a bona fide request. The Commission agrees with Staff’s analysis of the proposed agreement and determines that Big River has put forth sufficient evidence that it made a bona fide request for the Commission to proceed with this case. The Commission determines, based on the

¹ *Response of BPS Telephone Company*, filed July 13, 2007, para. 5.

uncontroverted facts, that Big River has made a bona fide request. BPS's motion for dismissal is denied.

BPS also argues that Big River does not allege sufficient facts to prove its case. BPS argues that *Iowa Utilities Board v. FCC*² clearly establishes that Big River has the burden of proving that BPS's rural telephone company exemption should be terminated. The *Iowa Utilities Board* case invalidated 47 C.F.R. 51.405, which placed the burden of proof on BPS in this type of proceeding. Later, the *Iowa Utilities Board* case was also overturned on different grounds.³ Thus, which party has the burden of proof is an issue that the Commission must determine before making its final decision in this matter. The Commission would be aided by further briefs on this topic from the parties. The parties are therefore directed to submit briefs regarding which party has the burden of proving each of the necessary elements in this matter. Nothing in this order shall otherwise alter the procedural schedule previously set and the parties shall comply with that schedule.

IT IS ORDERED THAT:

1. The request by BPS Telephone Company to dismiss this application for failure to submit a bona fide request is denied.
2. The parties shall submit briefs regarding the burden of proof no later than September 7, 2007.

² *Iowa Util. Bd. v. FCC*, 219 F.3d 744, 762 (8th Cir. 2000).

³ *Verizon Comm. Inc. v. FCC*, 575 U.S. 476 (2002).

3. This order shall become effective on August 2, 2007.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Clayton,
and Appling, CC., concur.
Gaw, C., dissents.

Dippell, Deputy Chief Regulatory Law Judge