

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Application of Access Point, Inc.)	
for Expansion of Certificate of Service Authority to)	<u>File No. CA-2010-0221</u>
Provide Basic Local Exchange Telecommunications)	Tariff No. YC-2010-0467
Service in the State of Missouri and to Classify said)	
Service and the Company as Competitive)	

ORDER GRANTING UNOPPOSED REQUEST FOR EXPANSION OF CERTIFICATE TO PROVIDE BASIC LOCAL TELECOMMUNICATIONS SERVICES, GRANTING COMPETITIVE CLASSIFICATION AND APPROVING TARIFF

Issue Date: February 25, 2010

Effective Date: March 7, 2010

SYLLABUS: This order grants Access Point, Inc. ("API") an expansion of its certificate of service authority to provide basic local telecommunications services in the state of Missouri, classifies those services and the company as competitive, and waives certain statutes and regulations. This order also approves the tariffs submitted by API with its application.

Findings of Fact

The Missouri Public Service Commission has considered all relevant factors and makes the following findings of fact.¹

¹ Section 292.430, RSMo 2000 requires a hearing for certificate applications, so by statutory definition, this matter is a contested case. See also Section 536.010(4), RSMo Cu. Supp. 2009. When interpreting Section 386.420, RSMo 2000, the statute delineating the Commission's procedural requirements for conducting hearings and making its reports, Missouri Courts have held that in contested cases the Commission ***must*** include findings of fact in its written report. Section 386.420, RSMo 2000; *State ex rel. Monsanto Co. v. Public Serv. Comm'n of Missouri*, 716 S.W.2d 791, 794-795 (Mo. banc 1986); *State ex rel. Rice v. Public Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61, 65 (Mo. banc 1949); *State ex rel. Fischer v. Public Serv. Comm'n*, 645 S.W.2d 39, 42-43 (Mo. App. 1982). The Commission cannot merely adopt agreements or positions of the parties on the ultimate legal issues presented because such action fails to satisfy the competent and substantial evidence standard embodied in the Missouri Constitution, Article V, Section 18. *Id.* Litigants cannot stipulate as to questions of law. *State v. Biddle*, 599 S.W.2d 182, 186 and n. 4 (Mo banc 1980). The Commission must independently and impartially review the facts and make a separate and independent determination. *Kennedy v. Missouri Real Estate Comm'n*, 762 S.W.2d 454, 457 (Mo. App. 1988).

1. On January 21,² API, applied for an expansion of its certificate of service authority to provide basic local telecommunications, and for competitive classification.³

2. API is a corporation organized and existing under the laws of the State of North Carolina.⁴

3. API is authorized to do business in Missouri as evidenced by its Certificate of Authority from the Missouri Secretary of State.⁵

4. API's principal place of business is 1100 Crescent Green, Suite 109, Cary, North Carolina (NC) 27518. Its telephone number is 919-851-4838 and its toll-free customer service number is 1-800-957-6468.⁶

5. API seeks certification to provide competitive basic local exchange service to residential and business customers throughout all the exchanges of all incumbent local exchange companies (ILECs) in the state of Missouri.⁷

6. The exchanges in which API seeks to expand its service authority are listed in the approved tariffs of the ILECs, and will be listed in Applicant's basic local service tariff.⁸

² All dates throughout this order refer to the year 2010 unless otherwise noted.

³ EFIS Docket Entry No. 2, *Application to Expand Certificate of Basic Local Service Authority* ("Application"), paragraph 1. "EFIS" is the Commission's Electronic Filing and Information System.

⁴ *Application*, paragraph 1; SOS Certificate No. 10475131-1; SOS File No. 200909691194. See also: Case No. TA-98-106, *Order Approving Interexchange Certificate of Service Authority and Order Approving Tariff*, effective October 23, 1997; Case No. CA-2008-0336, *Order Approving Certificate to Provide Basic Local Telecommunications Services*, Effective June 12, 2008.

⁵ *Application*, para 6; EFIS Docket Entry No. 7, *Staff Recommendation and Memorandum*, filed February 23, 2010 ("Staff Recommendation").

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

7. API seeks authority to offer and provide all forms of facilities-based and resold basic local telecommunications service as defined in 386.020(4) RSMo.⁹

8. API seeks continued classification as a competitive company, including classification of its expanded basic local exchange telecommunications services as competitive, pursuant to Section 392.361, RSMo Cum. Supp 2009 and Section 392.420 RSMo 2000 and 4 CSR 240-3.510(1)(A), with the accompanying reduced regulation that accompanies such classification.¹⁰

9. API filed a basic local exchange services tariff contemporaneously with its application, bearing a forty-five day effective date, in compliance with the Commission's rules.¹¹

10. The effective date of the proposed tariff, assigned tariff tracking number YC-2010-0467, is March 7, 2010.¹²

11. On January 25, the Commission issued its Notice of Applications, establishing a 15-day deadline for intervention.¹³

12. No applications to intervene were received.

13. No party contested API's application or requested an evidentiary hearing.

⁹ *Application*, para. 7.

¹⁰ *Application*, para. 10; *Staff Recommendation*.

¹¹ EFIS Docket Entry No. 3, *Tariff and Cover Letter*, ("Tariff") filed on January 21, 2010; *Application*, para. 13. See also Commission Rules 4 CSR 240-2.060 4 CSR 240-3.510.

¹² Tariff, Tracking Number YC-2010-0467.

¹³ EFIS Docket Entry No. 4, Notice of Applications for Intrastate Certificates of Service Authority and Opportunity to Intervene.

14. API was previously granted a certificate of service authority to provide interexchange services in Missouri.¹⁴

15. API was previously granted a certificate of service authority to provide basic local exchange services to Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri.¹⁵

16. API's proposed service areas will follow the respective exchange boundaries of the incumbent LECs and shall be no smaller than any exchange as required by Section 392.455(3), RSMo 2000.¹⁶

17. API is managerially and technically qualified to provide telecommunications services in the state of Missouri.¹⁷

18. API possesses the necessary financial resources and abilities to provide the services it proposes as required by Section 392.455(1), RSMo 2000, and has the necessary capital to conduct its proposed operations in Missouri. Based on the prior, recent determination, Access Point seeks a waiver of the requirement that financial data be submitted under 4 CSR 240-3.510(1)(D).¹⁸

¹⁴ Case No. TA-98-106, *Order Approving Interexchange Certificate of Service Authority and Order Approving Tariff*, effective October 23, 1997.

¹⁵ Case No. CA-2008-0336, *Order Approving Certificate to Provide Basic Local Telecommunications Services*, Effective June 12, 2008.

¹⁶ *Application*, para. 6.

¹⁷ *Application*, para. 8; *Staff Recommendation*; Commission Rules 4 CSR 240-2.060 4 CSR 240-3.510. API was previously found to possess sufficient technical and managerial resources and abilities to provide basic local telecommunications service as required by Section 392.455(1) RSMo. *Application*, para. 8; Case No. CA-2008-0336, *Order Approving Certificate to Provide Basic Local Telecommunications Services*, Effective June 12, 2008. API's principal management employees have not changed. A list of their qualifications was attached to API's Application in Case No. CA-2008-0336, and was incorporated by reference to the current application pursuant to 4 CSR 240-2.060(1)(G).

¹⁸ *Application*, para. 9; *Staff Recommendation*. API was previously found to possess sufficient financial resources and abilities to provide the services it proposes. See Case No. CA-2008-0336, *Order Approving Certificate to Provide Basic Local Telecommunications Services*, Effective June 12, 2008.

19. If the certificate expansion is granted, API will compete with all incumbent local exchange carriers in their respective service territories.¹⁹

20. API's proposed services will be subject to sufficient competition to justify a lesser degree of regulation and that granting this request will allow greater price and service options for telephone users.²⁰

21. API will offer basic local telecommunications services as a separate and distinct service in accordance with applicable law.²¹

22. API will give consideration to equitable access for all Missourians, regardless of where they might reside or their income, to affordable telecommunications services in Access Point's proposed service areas in accordance with the law.²²

23. API is willing to comply with all applicable Commission rules, except those that are waived, will file and maintain tariffs, and meet applicable minimum standards established by the Commission.²³

24. On February 23, after reviewing API's application, the Commission's Staff filed its recommendation and verified memorandum.²⁴

25. Staff recommended that the Commission grant API's basic local certificate, grant competitive classification, and grant the waivers requested.²⁵

¹⁹ *Application*, para. 10; *Staff Recommendation*.

²⁰ *Id.* In the Commission's previous orders granting certificates of service authority, the Commission classified API and its services as competitive. Case No. TA-98-106, *Order Approving Interexchange Certificate of Service Authority and Order Approving Tariff*, effective October 23, 1997; Case No. CA-2008-0336, *Order Approving Certificate to Provide Basic Local Telecommunications Services*, Effective June 12, 2008.

²¹ *Application*, para. 11; *Staff Recommendation*.

²² *Id.*

²³ *Application*, para. 12; *Staff Recommendation*.

²⁴ *Staff Recommendation*.

²⁵ *Id.*

26. Staff recommended that the Commission grant API's basic local certificate subject to the following conditions:

A. The applicant's originating and terminating access rates shall not exceed the access rates of the incumbent local exchange company against whom the applicant is competing pursuant to Sections 392.361.6 and 392.370, RSMo.

B. If the directly competing ILEC, in whose service area the applicant is operating, decreases its originating and/or terminating access service rates, the applicant shall file an appropriate tariff amendment to reduce its originating and/or terminating access rates in the directly competing ILEC's service area within 30 days of the directly competing ILEC's reduction of its originating and/or terminating access rates in order to maintain the cap.²⁶

27. Staff also recommends that the tariff API submitted with its application be approved or allowed to go into effect by operation of law.²⁷

28. As a condition of certification and competitive classification, API agrees that, unless otherwise ordered by the Commission, API's originating and terminating switched exchange access rates will be no greater than the lowest Commission-approved corresponding access rates in effect for each ILEC within those service area(s) in which Applicant seeks authority to provide service.²⁸

29. API agrees that if the ILEC in whose service area the API is operating decreases its originating and/or terminating access service rates, API shall file an appropriate tariff amendment to reduce its originating and/or terminating access rates within thirty (30) days of the ILEC's reduction of its originating and/or terminating access rates in order to maintain the cap on switched access rates.²⁹

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Application*, para. 15.

²⁹ *Application*, para. 15.

30. With the exception of the requested waiver of the filing requirements embodied in 4 CSR 240- 3.510(1)(D), API has met all of the Commission's filing requirements to approve its application.³⁰

31. API has no pending actions or final unsatisfied judgments or decisions against it from any state or federal agency or court involving customer service or rates.³¹

32. API is not delinquent in filing an annual report or in paying the PSC assessment, the Missouri Universal Service Fund, and Relay Missouri surcharges.³²

33. Granting the expanded certificate will benefit the public by creating and enhancing competition, expanding customer service options, and increasing customer choice for telecommunications, consistent with the legislative goals set forth in the Telecommunications Act of 1996 and Chapter 392, RSMo.³³

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.³⁴

Jurisdiction

API is a "telecommunications company" and a "public utility," as defined in Section 386.020, RSMo Cu. Supp. 2009, and is subject to the jurisdiction and supervision of the Commission.³⁵ The extent of the Commission's jurisdiction over API is delineated in

³⁰ *Application; Staff Recommendation*; Commission Rules 4 CSR 240-2.060 and 3.510.

³¹ *Staff Recommendation*.

³² *Id.*

³³ *Application*, para. 14. EFIS Docket Entry No. 7, *Staff Recommendation*.

³⁴ Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

³⁵ Section 386.020(52) and (43), RSMo Cum. Supp. 2009.

Chapter 392, and includes the Commission's authority to rule upon API's application to expand its basic local certificate and its request to be classified as a competitive telecommunications provider.³⁶

Requirement for a Hearing

Sections 392.410 through 392.450 require any telecommunications company seeking to offer or provide local exchange telecommunications services to obtain a certificate of service authority from the Commission prior to offering or providing those services. The statutes require the Commission to issue notice and hold a hearing.³⁷

Section 392.361 RSMo Cum. Supp. 2009, requires that any request by a telecommunications company to be classified as competitive be submitted to the Missouri Public Service Commission for approval. This statute further requires the Commission to issue notice and provide an opportunity for a hearing to any interested person prior to making its determination.³⁸

This matter is a contested case as defined in Section 536.010(4), RSMo Cum. Supp. 2009, because it involves a proceeding before this agency in which the legal rights, duties or privileges of API are required to be determined after hearing.³⁹ However, the requirement for a hearing was met when the opportunity for hearing was provided and no

³⁶ Chapter 392. See in particular Sections 392.361, RSMo Cum. Supp. 2009; 392.410, RSMo Cum. Supp. 2009; 392.420, RSMo Cum. Supp. 2009; 392.430, RSMo 2000, 392.440, RSMo 2000; 392.450, RSMo Cum. Supp. 2009 and 392.455, RSMo 2000.

³⁷ Sections 392.430, RSMo 2000; 392.440 RSMo 2000; and 392.450.1, RSMo Cum. Supp. 2009.

³⁸ Section 392.361.2, RSMo Cum. Supp. 2009.

³⁹ The term "hearing" presupposes a proceeding before a competent tribunal for the *trial of issues* between *adversary parties*, the presentation and the consideration of proofs and arguments, and determinative action by the tribunal with respect to the issues ... 'Hearing' involves an *opposite party*; ... it contemplates a listening to facts and evidence for the sake of *adjudication* ... The term has been held synonymous with 'opportunity to be heard'. (Emphasis added.) *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Com'n of State of Mo.*, 776 S.W.2d 494, 495 -496 (Mo. App. 1989); See also 39A C.J.S. Hearing, p. 632, et seq.

party requested the opportunity to present evidence.⁴⁰ No party requested an evidentiary hearing or trial-type contested proceeding when given the opportunity, and the Commission concludes that no evidentiary hearing is required.

Standards for Approval and Burden of Proof

Section 392.430, RSMo 2000, provides that the Commission shall approve an application for a certificate of service authority to provide local exchange telecommunications services upon a showing by the applicant and finding by the Commission that the grant of such authority is in the public interest. Section 392.361.3, RSMo Cum. Supp. 2009, provides that the Commission may classify a telecommunications company as competitive only upon a finding that a majority of the telecommunications services offered by that company are complete. Section 392.361.4, RSMo Cum. Supp. 2009, provides that grant of competitive classification is contingent upon the Commission finding that sufficient competition exists to justify a lesser degree of regulation and that lesser degree of regulation must be consistent with the protection of ratepayers and promote the public interest.

As petitioners, the API has the burden of proving that the requested expansion of its certificate of service authority and competitive classification is in the public interest. To carry their burden, the API must meet the preponderance of the evidence standard.⁴¹ And in order to meet this standard, API must convince the Commission it is “more likely than

⁴⁰ *Id.*

⁴¹ *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007). See *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003). See also *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996), citing to, *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979).

not” that approval of the requested addendum to their territorial agreement is in the public interest.⁴²

Decision

The Commission has thoroughly considered the API’s application, API’s asserted commitment to comply with all applicable regulatory obligations, the facts verified in the pleadings and Staff’s uncontested recommendation and verified memorandum in support of approval. The Commission concludes that API has met its burden of establishing that the requested expansion of API’s certificate of service authority is in the public interest.

API has previously been found to be a competitive company in Commission Case No. TA-2008-0336, and expanding API’s certificate will benefit the public interest by promoting direct competition with multiple incumbent basic local providers. Considering these findings, the Commission concludes that API will be subject to a sufficient level of competition to justify a lesser degree of regulation. API and its services shall be classified as competitive.

The Commission may waive certain statutes and administrative rules for competitively classified carriers if such waiver or modification is otherwise consistent with the other provisions of Section 392.361 to 392.520 and the purposes of Chapter 392.⁴³ The Commission finds that API’s requested waivers are consistent with the purposes of Chapter 392, and will waive those provisions for API in accordance with Section 392.420, RSMo Cum. Supp. 2009.

⁴² *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 109-111 (Mo. banc 1996); *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

⁴³ Sections 392.361.5 and 392.420, RSMo Cum. Supp. 2009.

An applicant for a basic local certificate must meet the minimum service standards that the Commission requires of the competing incumbent local exchange carriers.⁴⁴ API has agreed to provide services that will meet those minimum basic local service standards . The Commission concludes that API has met the requirements of Section 392.450.2(2), RSMo Cum. Supp. 2009.

API has complied with each of the Commission's application requirements and all statutory and regulatory requirements.⁴⁵ The Commission shall approve API's application subject to certain conditions.

Conditions and Regulatory Obligations

The Commission may "require a telecommunications company to comply with any conditions reasonably made necessary to protect the public interest by the suspension of the statutory requirement."⁴⁶ Staff recommends that API's application be granted subject to the conditions set out in the Commission's findings of fact. API agreed to these conditions. The Commission has considered the conditions proposed by Staff and concludes that they are reasonably necessary to protect the public interest and shall be adopted.

Prior to providing telecommunications service in the expanded area, API shall have in effect a tariff authorizing it to provide service in the area.⁴⁷ The certificate of service

⁴⁴ Section 392.450.2(2), RSMo Cum. Supp. 2009.

⁴⁵ *Application*, para. 11.

⁴⁶ Section 392.361.6, RSMo Cum. Supp. 2009.

⁴⁷ Section 392.450.2(1) RSMo Cum. Supp. 2009. The Commission notes that before providing telecommunications services in Missouri, a party shall possess the following: (1) an interconnection agreement approved by the Commission; (2) except for wireless providers, a certificate of service authority from the Commission to provide interexchange or basic local telecommunications services; and (3) except for wireless providers, a tariff approved by the Commission.

authority granted in this order becomes null and void one year from the date of this order unless API has exercised its authority under that certificate.⁴⁸

The Commission reminds the company that failure to comply with its regulatory obligations may result in the assessment of penalties against it. These regulatory obligations include, but are not limited to, the following:

- A) The obligation to file an annual report, as established by Section 392.210, RSMo 2000. Failure to comply with this obligation will make the utility liable to a penalty of \$100 per day for each day that the violation continues. 4 CSR 240-3.540 requires telecommunications utilities to file their annual report on or before April 15 of each year.
- B) The obligation to pay an annual assessment fee established by the Commission, as required by Section 386.370, RSMo 2000.
- B) The obligation to comply with all relevant laws and regulations, as well as orders issued by the Commission. If the company fails to comply it is subject to penalties for noncompliance ranging from \$100 to \$2000 per day of noncompliance, pursuant to Section 386.570, RSMo 2000.
- C) The obligation to keep the Commission informed of its current address and telephone number.

API is further reminded that its officers may not represent it before the Commission.

The company must be represented by an attorney licensed to practice law in Missouri.

THE COMMISSION ORDERS THAT:

1. Access Point, Inc.'s ("API") application to expand its certificate of service authority to provide basic local telecommunications services in the exchanges of all Missouri incumbent local exchange carriers ("ILEC") is granted, subject to the conditions and recommendations contained in the Staff's Memorandum.

2. API, and the services it offers, are classified as competitive.

⁴⁸ Section 392.410.5, RSMo Cum. Supp. 2009.

3. API's originating and terminating access rates shall not exceed the access rates of the ILECs against whom Access Point, Inc. is competing pursuant to Sections 392.361.6 and 392.370, RSMo Cum. Supp. 2009.

4. If the directly competing ILEC, in whose service area API is operating, decreases its originating and/or terminating access service rates, API shall file an appropriate tariff amendment to reduce its originating and/or terminating access rates in the directly competing ILEC's service area within 30 days of the directly competing ILEC's reduction of its originating and/or terminating access rates in order to maintain the cap.

5. Application of the following statutes and Commission rules is waived:

Statutes

392.210.2	-	uniform system of accounts
392.240(1)	-	just and reasonable rates
392.270	-	valuation of property (ratemaking)
392.280	-	depreciation accounts
392.290	-	issuance of securities
392.300	-	transfer of property and acquisition of stock
392.310	-	stock and debt issuance
392.320	-	stock dividend payment
392.330	-	issuance of securities, debts and notes
392.340	-	reorganization(s)

Commission Rules

4 CSR 240-3.510(1)(D)	-	pro forma financial information
4 CSR 240-3.550(4)	-	records of applications
4 CSR 240-3.550(5)(A)	-	quality of service quarterly report
4 CSR 240-3.550(5)(C)	-	exchange boundary maps
4 CSR 240-10.020	-	depreciation fund income
4 CSR 240-30.040	-	uniform system of accounts
4 CSR 240-32.060	-	engineering and maintenance
4 CSR 240-32.070	-	quality of service
4 CSR 240-32.080	-	service objectives and surveillance levels
4 CSR 240-33.040(1)-(3) and (5)-(10)	-	billing and payment standards

- | | | |
|--------------------------------------|---|-----------------------------------|
| 4 CSR 240-33.045 | - | customer bills |
| 4 CSR 240-33.080(1) | - | company name for billing disputes |
| 4 CSR 240-33.130(1),
(4), and (5) | - | operator service |

6. The certification granted herein is conditioned upon the API's compliance with the regulatory obligations and conditions set out in this order.

7. The following tariff, assigned file number YC-2010-0467 is approved, as amended, to become effective on March 7, 2010. The specific tariff sheets approved are:

P.S.C. MO No. 3

1st revised page 1, Cancels Original Page 1

1st revised page 6, Cancels Original Page 6

Original Page 15.1

1st revised page 16, Cancels Original Page 16

Original Page 25.1

2nd Revised Page 29, Cancels 1st Revised page 29

2nd Revised Page 33, Cancels 1st Revised page 33

2nd Revised Page 38, Cancels 1st Revised page 38

2nd Revised Page 62, Cancels 1st Revised page 62

2nd Revised Page 63, Cancels 1st Revised page 63

2nd Revised Page 64, Cancels 1st Revised page 64

2nd Revised Page 65, Cancels 1st Revised page 65

2nd Revised Page 66, Cancels 1st Revised page 66

Original Page 107

Original Page 108

8. This order, API's certificate and API's tariff sheets shall become effective on March 7, 2010.

9. This case shall be closed on March 8, 2010.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'S. C. Reed', written in a cursive style.

Steven C. Reed
Secretary

(S E A L)

Harold Stearley, Senior Regulatory Law Judge,
by delegation of authority pursuant
to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 25th day of February, 2010.