

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of CenturyTel of Missouri, LLC's)	
Request for Competitive Classification Pursuant)	<u>Case No. IO-2006-0109</u>
to Section 392.245.6, RSMo (2005) – 30-day Petition.)	
)	

OPINION OF COMMISSIONER ROBERT M. CLAYTON III
CONCURRING, IN PART, AND DISSENTING, IN PART

This Commissioner concurs with the majority's Report and Order granting competitive status in certain of the applicant's exchanges pursuant to §392.245, RSMo., 2005. With the exception of the Bourbon exchange, this Commissioner agrees that the statute was satisfied for each of the subject exchanges in making a finding of competition. The evidence at hearing established that a wireline provider using its own facilities in whole or in part was providing basic local telecommunications service to more than one customer in each exchange. In addition, the evidence clearly established that a wireless provider had, not only coverage in the areas involved, but also offered local telephone numbers and local service. While this Commissioner has concerns with the lack of competitive protections in the marketplace for business customers served in the Bourbon exchange due to the absence of competitive wireline and wireless service, the remaining provisions of the Report and Order warrant support.

The lack of evidence suggested several problems for the applicant in meeting the statutory criteria within the Bourbon exchange. First of all, the evidence suggested that no wireless provider was holding itself out in the marketplace by offering a local phone number with support personnel in

the community. No evidence was presented to show the existence of an Extended Area Service (EAS) route¹ or other means of offering unlimited toll-free in-bound and out-bound calling in a local service area.² This Commissioner has stressed the importance of the letter and the spirit of SB237 in making a finding of basic local service offered by a wireless provider.³ That is, a wireless provider must have local phone numbers and local service available in an exchange for that provider to be counted in the competitive analysis.

In all other exchanges named in the company's Petition, such a presence was explored and identified to the satisfaction of this Commissioner. Without the existence of those local numbers, business owners are forced to procure a wireless phone from a different community, forcing its Bourbon customers to dial a long distance phone number to reach that business. This Commissioner has yet to hear of an example of a business owner completely supplanting its wireline service for wireless service, but rather, supplementing its communications resources by procuring both services. If the service is not local, for both out-bound and in-bound service, it is unlikely that that a wireless provider can be a competitor.

Secondly, the evidence failed to establish the presence of a wireline competitor in Bourbon actually holding itself out to the community to offer basic local service. The applicant named this "competitor" as Fidelity Communications. Fidelity intervened in the case and agreed that it served

¹ "Extended Area Service" known as EAS is defined as "[a] novel name for a larger than normal local telephone calling area. The local phone company extends it subscribers the option of paying less per month for a small calling area and paying extra per individual call outside that area (i.e. the extended area), or paying more per month flat rate but having a larger calling area (i.e. having extended area service)." Harry Newton, *Newton's Telecom Dictionary*, p. 413 (10th Ed. 1996).

² Transcript p. 21, lines 1-4; *see also*, Exh. 8.

³ *See, In Re Sprint*, Case No. IO-2006-0092, Opinion of Commissioner Clayton; *In Re SBC*, Case No. TO-2006-0093, Opinion of Commission Clayton.

two business customers in the exchange but that those customers constituted special arrangements.⁴ Fidelity further argued that it did not offer basic local service to any other customers within the exchange nor did have any plans to ever offer basic local service to any future customers. Fidelity suggested in support of that assertion that it was without interconnection agreements or facilities to offer any type of service to any other business customers in the exchange.⁵

The whole purpose of assessing competitive classification and authorizing deregulation is to determine whether competition exists in a given exchange and to replace regulation with a vibrant competitive market. SB237 established a streamlined mechanism in reviewing such a classification.

By admission, Fidelity serves two business customers within the exchange, but it does not hold itself out as a provider, does not “offer” service to the general public and does not intend to “compete” in any sense of the word. Although the majority argues that the statute has been technically satisfied, it makes no sense to consider that “competitor” as standing in place of regulation when it currently does not hold itself out to the public to offer service nor does it have any plans to ever hold itself out to the public. Such non-existence of service is not what the General Assembly had in mind in deregulating telecommunications services in Missouri.

The Commission, however, should be mindful to not rely solely on the testimony of an alleged competitor when making such a review because such evidence would enable a competitor to hold the only keys to unlock an incumbent’s regulatory constraints. A competitor’s business plan and intentions of market entry are important components in reviewing an exchange, but the Commission should look beyond the statements of the competitor to its actions and the actions of

⁴ Beier Direct, Exh. 10, pp. 3-4, lines 64-78.

⁵ Transcript, p. 29, lines 6-13.

other in the marketplace. In this case, it was not disputed that Fidelity only served two business customers and lacked the facilities and resources to offer any additional service in the community. It is this Commissioner's opinion that the General Assembly should revisit this issue to protect communities in such circumstances.

This Commissioner believes that the business customers of Bourbon may be vulnerable to significant price increases without any price discipline from a competitive market and, additionally, without the protections of the Commission, which formerly stood in the place of competition. For the above-mentioned reasons, this Commissioner would have denied the applicant's request for competitive classification for business services in the Bourbon exchange.

For all other portions of the majority Report and Order, this Commissioner concurs.

Respectfully submitted,


Robert M. Clayton III
Commissioner

Dated at Jefferson City, Missouri,
on this 7th day of December 2005.