BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of the Application of Sprint Missouri, Inc., for Competitive Classification Under Section 392.245.5 RSMo (2005)	)	**Case No. IO-2006-0092** Tariff File No. YL-2006-0174

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 the newly revised §392.245, RSMo. 2005. However, this Commissioner has concerns with the implementation of this revised section, including the shortened time limits for review, several vague and unclear statutory references and the concern that certain customers in these exchanges will not be protected from the occasionally unkind "invisible hand of competition." Real competition and real alternative options for consumers must be present within an exchange before incumbent providers are released from pricing regulation. Premature competitive classification could lead to unrestrained prices and unnecessarily higher costs to consumers.

While the parties have argued that the General Assembly has set a very low bar for the incumbent provider to clear in achieving competitive status, this Commission has an obligation to compile a complete record with competent and substantial evidence in determining whether that burden has been met. This Commissioner supports the Report and Order and its conclusions but laments on the future impact on the customers of certain exchanges.

First of all, this Commission has been left with very little time to make a thorough review of this application. According to the enabling statute, §392.245, RSMo. 2005,[1] within thirty days of the initial filing, the Commission is required to make a determination on the applicant's request. Due process in any contested case requires that a procedural schedule be set, that pleadings and reports from the parties be reviewed, that evidentiary and discovery matters be decided, a hearing conducted complete with an opportunity to ask questions, a thorough record be established and that a Report and Order be issued. While this Commissioner appreciates the need for setting time lines and encouraging prompt rulings, this time period is simply inadequate to ensure that enough material has been reviewed and evaluated to support a Report and Order. Considering that Commission Orders have effective dates subsequent to the date of issue, it is unclear whether the review time has been reduced to 20 days, using a normal 10-day effective date. In addition, scheduling dates for evidentiary hearings has been a tedious and difficult endeavor because the four large incumbents filed their five cases near in time requesting prompt attention.

Secondly, this Commissioner is concerned with the definitions presented by the parties and their interpretation of the legislature's intent. It is this Commissioner's opinion that the General Assembly intended to open up only those exchanges in which competition was present and multiple providers are available for hire by customers. Regulation stands in the place of competition only when there is an absence of competition in the marketplace or when one provider may act without discipline from competitive pressures. When consumers have a choice of services and providers, less market regulation is necessary.

1 All statutory references are Revised Missouri Statutes 2005.

Prior to the release of full-fledged pricing "flexibility" for Missouri's incumbent providers, the General Assembly demanded the presence of two different, non-affiliated competitive providers—for both business and residential customers—and that those companies be "providing basic local telecommunications service to . . . customers within the exchange . . . ." §392.245.5. A description of this competition in the marketplace also includes a requirement that the competitor provide "local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest . . . ." §392.245.5(2).

The General Assembly offered additional direction by indicating the form of choice and the type of provider or service. The statute requires the presence of not merely one, but two different providers who must not have an affiliation with the incumbent. In addition, the statute specifically excludes certain types of Voice-over Internet Protocol (VoIP) service, especially if that service is dependent on an unaffiliated, third-party broadband internet service provider. §392.245.5.

In contrast, the statute also references Commercial Mobile Radio Service (CMRS) and specifically includes this medium as one type of technology or service, which may count as one, and only one, of the two non-affiliated competitors.

> (1) Commercial mobile service providers as identified in 47 U.S.C. Section 332(d)(1) and 47 C.F.R. Parts 22 or 24 shall be considered as entities providing basic local telecommunications service, provided that only one such non-affiliated provider shall be considered as providing basic local telecommunications service within an exchange; Section 392.245.5.

In each of the subject exchanges in this case, the applicant has used this section in compiling the list of competition by referencing at least one wireless provider. Staff, in submitting its report and recommendation, indicated its concurrence, eventually stipulating to not opposing the

application and the alleged existence of at least one wireless carrier in each exchange. However, it appears from the record that staff only did a partial review of the wireless service in each of the exchanges by scanning the exhibits filed by the applicant, which included copies of coverage maps from websites. Such evidence that the cities of Ferrelview, Platte City, Weston, St. Robert or Waynesville fall within the shaded sections of the coverage maps amounts to unsubstantiated hearsay.

The record is devoid of any reference to whether the competing wireless carrier holds itself out to customers in those exchanges or whether it offers a local phone number to those exchanges or whether a customer from any of these communities may name an address in that community for billing services. It is unclear whether there are any cell phone stores offering some type of service in these exchanges. Moreover, it is unclear from the record whether any of the proposed wireless providers have any business or residential customers. The record should contain this information so that the Commission is aware of the extent of the competition.

The new statute does provide some guidance on the type of service necessary for a finding of competitive status. Initially, in §392.245.5, carriers that may be considered when evaluating an exchange must be "providing basic local telecommunications service to . . . customers within the exchange." In addition, §392.245.5(3) provides, "Regardless of the technology utilized, local voice service shall mean ***two-way voice service capable of receiving calls from a provider of basic local telecommunications services*** as defined by subdivision (4) of §386.020, RSMo;"(emphasis added). That section defines "basic local telecommunications service" as "two-way switched voice service ***within a local calling scope*** as determined by the commission comprised of any of the following

services . . ." (emphasis added) §386.020(4).[2] This definition recognizes boundaries of a "two-way" service within a "local calling scope." Lastly, the new statutory language of §392.245, does not include a reference to the term "interexchange telecommunications service," which is defined as "service between points in ***two or more exchanges***;" (emphasis added) §386.020(24), RSMo. 2005, which is known as long distance or toll calling service.

Reading these provisions in concert, the customer of the local voice service provider must be capable of receiving calls from a provider of "basic local telecommunications services," defined in §386.020(4). If there is no local phone number for a wireless company in an exchange, the wireless customer cannot receive calls from the "basic local telecommunications services" carrier without the call being routed through an "interexchange telecommunications services" provider. The wireless customer would then be receiving the call from the "interexchange" carrier, which is not referenced in the new statute. Therefore, the wireless carrier should not be considered as a provider to enable competitive status.

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2 It should be noted that §386.020(4) continues in the definition of "Basic Local Telecommunications Service" as two-way switched voice service within a local calling scope as determined by the commission comprised of any of the following services and their recurring and nonrecurring charges:

(a) Multiparty, single line, including installation, touchtone dialing, and any applicable mileage or zone charges;

(b) Assistance programs for installation of, or access to, basic local telecommunications services for qualifying economically disadvantaged or disabled customers or both, including, but not limited to, lifeline services and link-up Missouri services for low-income customers or dual-party relay service for the hearing impaired and speech impaired;

(c) Access to local emergency services including, but not limited to, 911 service established by local authorities;

(d) Access to basic local operator services;

(e) Access to basic local directory assistance;

(f) Standard intercept service;

(g) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission;

(h) One standard white pages directory listing.

If there is no local cell number available and a cell phone customer can only be reached by a local wireline customer by making a long distance toll call within the exchange, does it make sense that the customer will be experiencing competition for his local telephone service? Does it make sense that a business customer will subject his customers to calling long distance to an out-of-town cell phone if a local landline is available? Is this real, direct marketplace competition?

At the very least, this issue should have been fully reviewed and considered. While the record may lack sufficient evidence of local cell phone service in an exchange, the record does not indicate the converse or that providers are not serving the areas. This Commission has not been provided information about the exact nature of the cell phone service and is forced to decide the case without such material. This Commissioner believes that the General Assembly fully expected the Commission to complete this analysis and that any decision reached would be made on competent and substantial evidence presented by the parties. In a scenario where a customer procures a cell phone from a different community, possibly miles away because a local number is not available, and if the customer's neighbors, friends, family and business clients, have to pay long distance charges because the call is not considered a local call, it is this Commissioner's belief that the legislature did not intend for that provider to be considered as a competitor of "basic local telecommunications service."

In conclusion, this Commissioner is concerned about the overall lack of competent, direct, first-hand knowledge-based evidence. While this Commissioner recognizes that there are challenges to gathering information and putting that information in evidentiary form, and that this case is the

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Basic local telecommunications service does not include optional toll free calling outside a local calling scope but within a community of interest, available for an additional monthly fee or the offering or provision of basic local telecommunications service at private shared-tenant service locations;

first of its type to be prosecuted, this case is based almost entirely on second- or third-hand evidence. Information has been retrieved from webpages and advertisements and data taken from reports filed by third parties at the Commission. While some have argued that business and official records can be included in the record, subject to authentication and adequate foundation, but much of that evidence is outdated. The Commission's Annual Reports used by staff use 2004 data. Much has occurred in telecommunications in recent years casting doubt on the relevance of such documents including the recently issued *USTA II* and *Brand X* Supreme Court decisions, the FCC's *Trienniel Review Remand Order*, Universal Service Fund and ETC Reform, three major mergers of large nationwide carriers, new FCC Orders relating to billing, intercarrier compensation and enhanced records exchange rules, not to mention the proposed Telecom Act of 2006 and additional proposals at both the state and federal level. In reviewing this application, the Commission should demand that it have solid evidence before it of the competitive presence in an exchange before unleashing the unbridled hand of competitive forces on customers in these exchanges.

This Commissioner supported the majority's Report and Order because of the Stipulation of no opposition, the apparent lack of any contested issue and because, frankly, it is the first of the competitive classification cases moved through the system in 30 days. If this Commissioner had additional time, more scrutiny would have been applied to the nature and existence of wireless providers in the subject exchanges. It is critical that the Commission complete this analysis prior to the reduction of regulatory protections for consumers.

For the foregoing reasons, this Commissioner respectfully submits this concurrence.

Respectfully submitted,

Robert M. Clayton III
Commissioner

Dated at Jefferson City, Missouri,
on this 29th day of September 2005.