BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for Competitive Classification Pursuant to Section 392.245.6, RSMo (2005) - 60-Day Petition.	))))	Case No. TO-2006-0102 Tariff File No. YI-2006-0145

SBC MISSOURI'S POST-HEARING BRIEF

PAUL G. LANE #27011
LEO J. BUB #34326
ROBERT J. GRYZMALA #32454
MIMI B. MACDONALD #37606

Attorneys for Southwestern Bell Telephone, L.P.,
d/b/a SBC Missouri
One SBC Center, Room 3518
St. Louis, Missouri 63101

October 19, 2005

TABLE OF CONTENTS

Page

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for Competitive Classification Pursuant to Section 392.245.6, RSMo (2005) - 60-Day Petition.	))))	Case No. TO-2006-0102 Tariff File No. YI-2006-0145

SBC MISSOURI'S POST-HEARING BRIEF

SBC Missouri,[1] pursuant to the Missouri Public Service Commission's ("Commission's") directive at the close of the hearing,[2] respectfully submits this Post-Hearing Brief.

EXECUTIVE SUMMARY

Through Senate Bill 237 ("SB 237"), the Missouri Legislature made the policy decision that economic development and consumer welfare will be enhanced by allowing incumbent local exchange companies ("ILECs") to compete on an equal basis with rival providers of local voice communications services, such as competitive local exchange companies ("CLECs"), wireless carriers and voice over Internet protocol ("VoIP") service providers that utilize a third party's broadband network.

In doing so, the Legislature greatly simplified the process for an ILEC to obtain competitive classification for its services, setting out two distinct, expedited tracks:

- The 30-day track establishes a competitive "trigger" that focuses solely on whether two non-affiliated entities are providing "basic local telecommunications service" within an exchange using their own (or an affiliate's) facilities in whole or in part to provide local voice service, where one of the providers may be a wireless carrier.

- The 60-day track recognizes that there are additional forms of competition. It requires the Commission to count not only competitors using their own facilities in whole or in part, but also competitors using

[1] Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, will be referred to in this pleading as "SBC Missouri."

[2] T. 280-286.

> other company's facilities in whole or in part – including those of the ILEC (e.g., UNE-P or commercial wholesale services) – as well as competitors providing service using a third party's broadband network. Again, one of the providers may be a wireless carrier. The Commission is to grant competitive classification when a requesting carrier identifies two competitors providing service in an exchange "unless it finds that such competitive classification is contrary to the public interest."

Unlike the cumbersome burdens imposed under the prior statute on an ILEC seeking competitive classification, SB 237 only requires a requesting ILEC to identify the requisite number of competitors in each exchange. The statute also imposes an obligation on the Commission to examine its own records and identify any exchanges that its records show the requisite number of carriers providing service. Competitive status is automatically conferred in a 30-day case once the requisite number of competitors has been shown. And once the requisite number of competitors has been shown in a 60-day case, the Commission must confer competitive status "unless it finds that such competitive classification is contrary to the public interest."

Here, Staff of the Missouri Public Service Commission ("Staff") and the Office of Public Counsel ("OPC") claim that SBC Missouri bears the burden of demonstrating that a grant of competitive status would not be "contrary to the public interest." Staff and OPC, however, have turned the statute on its head. When a party asserts that competitive classification is "contrary to the public interest" (as Staff and OPC have here), that party -- as the one asserting the positive of the proposition -- bears the burden of proof on the issue. SBC Missouri has made no such assertion and has no burden to carry on the public interest issue.

The evidence presented in this proceeding satisfies the statutory standard and requires the Commission to grant competitive classification for business and residential services in the exchanges identified by SBC Missouri in Revised Exhibits B-1 and B-2, which include

exchanges not granted competitive classification in SBC Missouri's 30-day case and the additional exchanges identified by Staff in its testimony in that case and for residential services in the Agency exchange, which Staff identified in this case:

- SBC Missouri has presented substantial evidence demonstrating that 30 exchanges for business services and 51 exchanges for residential services are being served by multiple competitors, including CLECs providing service using UNE-P or under commercial agreements with SBC Missouri. In addition, SBC Missouri has provided evidence that these exchanges are also being served by various wireless carriers, and in most cases by one or more VoIP providers using a third party's broadband network.

- Staff has presented evidence demonstrating that 17 of the requested exchanges (15 for business services and 2 for residential services) and the Agency exchange for residential services, meet the statutory 30-day criteria.[3] These exchanges also meet the statutory criteria under the 60-day track.

No party has presented evidence or even claims that the requested exchanges lack the requisite number of service providers qualifying under the 60-day criteria. While OPC has questioned some of the wireless carriers SBC Missouri identified, SBC Missouri meets the statutory minimum number of competitors without them. In addition to the two or more wireless carriers SBC Missouri identified, SBC Missouri also identified at least two (and in most cases several more) CLECs providing service in each requested exchange utilizing either commercial wholesale agreements or UNE-P from SBC Missouri. Most of those exchanges also had at least one VoIP provider using a third party's broadband network.[4] Nineteen of the 30 exchanges where competitive classification is sought for business service have at least a dozen entities

[3] Ex. 5, Van Eschen Direct, pp. 13-14, Sch. 1; Ex. 6, Van Eschen Rebuttal, pp. 9-10; T. 146-150. Staff, however, has recommended competitive classification be granted for only 17 of these exchanges. Staff is withholding a positive recommendation on the Agency exchange because SBC Missouri did not specifically request competitive status for it in either the 30 or 60-day portions of its Petition.

[4] See, Ex. 3, Unruh Rebuttal, Revised Schedules 2(HC) and 3(HC).

providing services, while 39 of the 51 exchanges where competitive classification has been sought for residential services have at least a dozen entities providing services.

Although Staff and OPC oppose competitive classification in the majority of exchanges, they do so primarily based on a claim that such a grant would be against the public interest because the identified competitors are wireless providers, VoIP providers, or are CLECs providing service utilizing wholesale services from SBC Missouri under terms commercially acceptable to both parties or UNE-P and should not be counted.

But their position provides no basis for denial of competitive classification. Section 392.245.5 specifically provides that 60-day petitions are "based on competition from any entity providing local voice service in whole or in part by using… the telecommunications facilities or other facilities of a third party, including those of the incumbent local exchange company as well as providers that rely on an unaffiliated third-party internet service" (emphasis added). The Commission may not refuse competitive classification based on the "public interest" because it comes from providers the Legislature has expressly included. The remaining arguments advanced by Staff and OPC similarly find no support in SB 237, but are instead reprisals of arguments made under the "effective competition" standard in the statute as it existed prior to the passage of SB 237.

ARGUMENT

I. THE COMMISSION MUST APPLY THE NEW STATUTORY STANDARD SET OUT IN SB 237 FOR DETERMINING COMPETITIVE CLASSIFICATION.

Senate Bill No. 237 ("SB 237")[5] dramatically changes the process for determining whether the services in an exchange are to be classified as competitive. Before SB 237, the

[5] Governor Blunt signed SB 237 into law on July 14, 2005, after it was overwhelmingly passed by both the Missouri Senate (29 to 3) and House of Representatives (155 to 3). It became effective August 28, 2005.

Commission was required to determine whether or not "effective competition" existed for the requested services in the designated exchanges. Under this "effective competition" standard, the Commission considered, among other things, the extent of competition in the exchange, whether pricing and other terms and conditions were comparable, whether competitors were offering functionally equivalent or substitutable services and whether the purposes and policies of Chapter 392, as set out in Section 392.185, were being advanced.

SB 237, however, deleted the "effective competition" requirement from Section 392.245.5. The Commission is obligated to give effect to this statutory revision. As the Courts explain:

> When the General Assembly alters a statute, we are obligated to deem the alteration as having an effect. We are not to conclude that the legislature's deleting significant terms from its statutes is meaningless.[6]

Accordingly, the Commission is not to determine whether "effective competition" exists, and the criteria which the Commission previously considered in making that determination under the old statute no longer apply.

Instead, SB 237 requires the Commission to apply a simple, expedited, two-track procedure when a price cap regulated ILEC seeks competitive classification for its services within one or more exchanges. Under both tracks, the statute directs the Commission to

[6] State v. Bouse, 150 S.W.3d 326, 34 (Mo. App. W.D. 2004) (Legislature redefined the offense of indecent exposure eliminating all references to "open," "gross," and "notorious," which had been the basis for prior judicial interpretations requiring exposure be in a public place or the victim's actual presence, and prosecution not required to prove those elements); State v. Sweeney, 701 S.W.2d 420, 423 (Mo. banc 1985) (under revised receiving stolen property statute, state not required to prove wrist watch Appellant received was "stolen" because the new statute discarded the required element of the crime that the property received "shall have been stolen" and replaced it with language that the property received need merely be "property of another"); and In the Interest of BCH, 718 S.W.2d 158, 165 (Mo. App. W.D. 1986) (Manford, J. concurring) (DFS not required to show parental abandonment of child during a six-month period immediately preceding the filing of petition to terminate parental rights because amended statute removed requirement that a prescribed period of abandonment immediately precede the filing of petition).

determine whether two non-affiliated entities, one of which can be a wireless provider, are providing local voice service in the exchange:

A. <u>The 30-Day Track</u>.

The 30-day track establishes a competitive "trigger" that focuses <u>solely</u> on whether two non-affiliated entities are providing "basic local telecommunications service" within an exchange:

> Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.[7]

The types of competitors that may be counted by the Commission in a 30-day case are very narrow: at least two non-affiliated competitors using their own (or an affiliate's) facilities in whole or in part to provide local voice service, where one of the providers may be a wireless carrier.

B. <u>The 60-Day Track</u>.

The 60-day track on the other hand, recognizes that there are additional forms of competition and therefore directs the Commission to count additional types of competitors in determining whether two non-affiliated entities are providing local voice service. Not only must the Commission count the types of carriers eligible for counting in a 30-day case, but the Commission must also count other competitors, such as those using UNE-P or commercial wholesale services from the ILEC, or those providing services over a third party's broadband network (e.g., VoIP providers). The 60-day track also accords some discretionary authority to

[7] Section 392.245.5(6) RSMo (2005).

the Commission to deny competitive classification if it determines that such a grant would be contrary to the public interest: Once a petition is filed based on competition from any entity required to be considered under the 60-day track, the statute directs that: "The commission shall approve such petition within sixty days unless it finds that such competitive classification is contrary to the public interest."[8]

C. Common Aspects of the Two Tracks for Competitive Classification.

The 30-day track and the 60-day track are both contained in the same statutory subsection of SB 237 (i.e., Section 392.245.5) and share many common aspects under the statute:

- The requisite minimum number of competitors. The first paragraph of the statutory subsection adopting the new procedure for obtaining competitive classification makes clear that the Commission must classify the ILEC's services (business, residential, or both), as competitive in any exchange in which two other non-affiliated entities are also providing such basic local telecommunications services within the exchange:

  > Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in an exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange.[9]

  As the introductory paragraph to this new statutory subsection, it applies to both the 30 and 60-day tracks for obtaining competitive classification, which are described a few paragraphs later within the subsection.

[8] Id.

[9] Section 392.245.5 RSMo (2005), emphasis added.

- The counting of competitors using their own facilities in whole or in part. The statute also requires the Commission, under both the 30 and 60-day tracks, generally to consider as a "basic local telecommunications service provider" any entity providing "local voice"[10] service "in whole or in part" over facilities in which it or one of its affiliates has an ownership interest.[11]

- The counting of one CMRS provider. For the purposes of both the 30 and 60-day tracks, the statute provides that one commercial mobile radio service ("CMRS" or "wireless") provider is to be considered an entity providing "basic local telecommunications services" in an exchange.[12]

- The definition of "telecommunications facilities." Section 386.020(56) RSMo (2000), which applies in both the 30-day and 60-day tracks, defines "telecommunications facilities" very broadly to include, among other items, "lines, conduits, ducts, poles, wires, cables, crossarms, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service."[13] Thus, the Legislature has clearly provided that any equipment or property used to provide service is a telecommunications facility and that use of any such telecommunications facility qualifies an entity as being a provider of service in the exchange.

- Exclusion of prepaids and resellers. For both tracks, the statute excludes prepaid[14] service providers and resellers:

> Telecommunications companies only offering prepaid telecommunications service or only reselling telecommunications service as defined in subdivision (46) of section 386.020, RSMo, in the exchange being considered for competitive classification shall not be considered entities providing basic telecommunications service.[15]

---

[10] Section 392.245.5(3) RSMo (2005) defines "local voice service" as meaning "[r]egardless of the technology used . . . two-way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo."

[11] Section 392.245.5(2) RSMo (2005).

[12] Section 392.245.5(1) RSMo (2005) (however, only one such non-affiliated provider will be counted as providing basic local telecommunications service within an exchange).

[13] Section 386.020(52) RSMo (2005).

[14] The statute defines "prepaid telecommunications service" to mean "a local service for which payment is made in advance that excludes access to operator assistance and long distance services." Section 392.245.5(5) RSMo (2005).

[15] Section 392.245.5(4) RSMo (2005).

As SBC Missouri witness Craig Unruh testified, SBC Missouri appropriately excluded companies offering only prepaid or resold telecommunications services from its list of competitors providing either business or residential services in the requested exchanges.[16] And no party has provided any competent evidence to show that the appropriate exclusions were not made.[17]

D. Differences Between the 30 and 60-Day Tracks.

While the 30 and 60-day tracks are contained in the same statutory section of SB 237, they also have several significant differences that are set out in specific subsections of the statute. These differences are critical to the Commission's appropriate processing of a 60-day case:

- Treatment of UNE-P or other wholesale provisioning. While both the 30 and 60-day tracks require the counting of competitors using their own (or an affiliate's) facilities in whole or in part to provide service, the 60-day track also requires the Commission to count competitors using the facilities of other companies, including those using the ILEC's facilities, to provide service:

> Notwithstanding any other provision of this subsection, any incumbent local exchange company may petition the commission for competitive classification within an exchange based on competition from any entity providing local voice service in whole or in part by using its own telecommunications facilities or other facilities or the telecommunications facilities or other facilities of a third party, including those of the incumbent local exchange company…[18]

[16] Ex. 1, Unruh Direct, p. 9, Revised Exhibits B-1 and B-2 (see, exhibit footer); and Ex. 3, Unruh Rebuttal, Revised Exhibits B-1 and B-2 (see, exhibit footer).

[17] Although OPC raised no such concerns in its Rebuttal Testimony, OPC's witness did question the inclusion of Missouri Comm South as a UNE-P provider, stating that she recalled her research from Case No. TO-2005-0035 showing this carrier as a reseller and a prepaid provider. She acknowledged, however, that her research was done for testimony filed in December 2004, that she has had no recent contact with the company, and that it is possible that Missouri Comm South now provides service using UNE-P as SBC Missouri's wholesale billing records reflect. Meisenheimer, T. 211-221. Staff's November 11, 2005 Supplemental Information filing (Exhibit 10HC), upon which OPC's witness also relied, appears to base its representations concerning Missouri Comm South on the company's 2004 Annual Report filing, which would likewise fail to show very recent competitive activity. Van Eschen, T. 155. But in any event, there are many other entities providing service in the exchanges where Missouri Comm South has been identified as providing service. See, Ex. 10HC.

[18] Section 392.245.5(6) RSMo (2005), emphasis added.

- Treatment of providers using a third party's broadband network. Under the 30-day track, the statute specifically provides that providers (such as VoIP providers) which use an unaffiliated company's broadband network to provide service may not be counted:

> A provider of local voice service that requires the use of a third party, unaffiliated broadband network[19] or dial-up Internet for the origination of local voice service shall not be considered a basic local telecommunications service provider.[20]

But for the 60-day track, the statute specifically directs the Commission to count those providers (such as VoIP providers) which use an unaffiliated company's broadband network:

> Notwithstanding any other provision of this subsection, any incumbent local exchange company may petition the commission for competitive classification within an exchange based on competition from any entity providing local voice service in whole or in part by using its own telecommunications facilities or other facilities or the telecommunications facilities or other facilities of a third party, including those of the incumbent local exchange company as well as providers that rely on an unaffiliated third-party Internet service.[21]

II. STAFF AND OPC INAPPROPRIATELY DISREGARD THE NEW STATUTORY STANDARD FOR DETERMINING COMPETITIVE CLASSIFICATION IN A 60-DAY CASE.

A. Staff Improperly Suggests that the Stricter 30-Day Criteria be Applied in a 60-Day Case.

Staff has unequivocally acknowledged that SBC Missouri has met the first "prong" of the 60-day criteria by identifying at least two competitors providing

- basic business voice service in each of the 30 exchanges for which SBC Missouri has requested competitive classification for such services, and

[19] This statute, for the purpose of this subsection only, defines a "broadband network" as "a connection that delivers services at speeds exceeding 200 kilobits per second in at least one direction. Section 392.245.5(2) RSMo (2005).

[20] Section 392.245.5(2) RSMo (2005).

[21] Section 392.245.5(6) RSMo (2005), emphasis added.

- basic residential voice service in each of the 51 exchanges for which SBC Missouri has requested competitive classification for such services,[22]

Staff, however, urges the Commission not to count competitors in a 60-day proceeding that provide service using UNE-P or wholesale service from the ILEC. Staff claims that it would be "contrary to the public interest" to grant competitive classification using such evidence. Staff makes a similar argument with respect to wireless service and VoIP service.[23] Instead, Staff is only willing to recommend competitive classification where the competitors are shown to be providing service utilizing their own facilities, either in whole or in part, which is the statutory criteria under the 30-day track.[24]

But these positions are flatly contrary to SB 237. Section 392.245.5 directs the Commission to count competitors using these provisioning methods to provide service. Even Staff acknowledges that competitors providing service using UNE-P, wholesale commercial services from the ILEC, wireless or VoIP service using a third-party's Internet service all "fit the definition" under the statute as qualifying service providers to be counted under the 60-day track.[25] And Staff acknowledged that the competitors SBC Missouri identified in each of the categories of providers listed in Unruh Revised Schedules 2(HC) and 3(HC) as providing service in the requested exchanges "fit" under the statutory 60-day criteria and could be "counted."[26] Nevertheless, Staff excluded them.

[22] Van Eschen, T. 152-154, 157.

[23] Van Eschen Direct, pp. 7-8.

[24] Van Eschen, T. 150, 168, 266-267. While Staff acknowledges wireless providers must be counted in a 30-day proceeding, it opposes consideration of wireless providers in a 60-day proceeding.

[25] Van Eschen, T. 269, 272-273.

[26] Van Eschen, T. 273-274. Mr. Van Eschen also acknowledged that Staff provided no evidence that any of the information listed in Mr. Unruh's Revised Schedules 2(HC) or 3(HC) was incorrect. T. 274.

As a matter of law, however, these competitors cannot be excluded. If the Legislature did not intend for the Commission to consider these other forms of competition, it would not have created the 60-day track. The Courts have consistently held that statutes should not be interpreted "in a way which will render some of their phrases to be mere surplusage," but "must presume that every word of a statute was included for a purpose and has meaning."[27] If the Legislature did not intend for the Commission to consider these other forms of competition, it would not have created the 60-day track. The Commission may not, under the rubric of the "public interest," reject competitive classification because it comes from service providers the Legislature has directed be counted.[28]

B. Staff and OPC Incorrectly Claim that the Old "Effective Competition" Criteria Should be Applied even though SB 237 Removed the "Effective Competition" Requirement from Section 392.245.5.

Despite the clear rewrite of the statute by the Legislature to remove the "effective competition" requirement from the criteria for obtaining competitive classification,[29] OPC, and to a lesser extent Staff, continue to insist that the elements of "effective competition" be shown before competitive classification is granted:

[27] Committee on Legislative Research of Mo. Gen. Assembly v. Mitchell, 886 S.W.2d 662, 664 (Mo. App. W.D. 1994). See also, Knob Noster Educ. V. Knob Noster R-VIII School District, 101 S.W.3d 356, 363 (Mo. App. W.D. 2003).

[28] Although not relevant to the determination the Commission must make in this proceeding, OPC asserts that the Commission retains authority over competitive services under Section 392.200.1. See, OPC's Objections and Recommendations filed September 13, 2005, p. 1. OPC, however, is mistaken. SB 237 eliminated the ability of the Commission to regulate on that basis. Under Section 392.500 RSMo (2005), the application of Section 392.200 is limited to Subsections 2-5 of that section.

[29] See, Section I of this Brief.

- OPC in its Pretrial Brief characterizes the statutory definition for "effective competition" as the "applicable law," [30] even though it has been removed as a requirement under Section 392.245.5 RSMo (2000).[31]

- OPC wants the Commission to examine "the extent to which services are available from alternative providers in the relevant market," [32] which was the first element that was required to evaluate "effective competition" under the old statute[33]. Staff similarly wants the Commission to examine the extent that people were actually using these services offered by these other entities.[34]

- Both OPC and Staff urge the Commission to analyze "the extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions,"[35] which was the second element that was required to evaluate "effective competition" under the old statute. [36]

- OPC asks the Commission to examine "the extent to which the purposes and policies of Chapter 392, RSMo, including the reasonableness of rates as set out in Section 392.185 RSMo are being advanced,"[37] which was the third element to evaluate "effective competition" under the old statute.[38]

---

[30] OPC Pretrial Brief, pp. 7, 11.

[31] Section 386.020(13) RSMo (2000) states that:

"**Effective competition**" shall be determined by the commission based on :
(a) The extent to which services are available from alternative providers in the relevant market;
(b) The extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions;
(c) The extent to which the purposes and policies of chapter 392, RSMo, including the reasonableness of rates, as set out in section 392.185, are being advanced;
(d) Existing economic or regulatory barriers to entry; and
(e) Any other factors deemed relevant by the commission and necessary to implement the purposes and policies of chapter 392, RSMo.

[32] Meisenheimer, T. 226-228.

[33] Section 386.020(13)(a) RSMo (2000).

[34] Van Eschen, T. 158.

[35] Ex. 7, Meisenheimer Rebuttal, p. 11; T. 228-229; Van Eschen, T. 158-159.

[36] Section 386.020(13)(b) RSMo (2000).

[37] Ex. 7, Meisenheimer Rebuttal, p. 10; T. 229-230.

[38] Section 386.020(13)(c) RSMo (2000).

- Like it did in the prior case tried under the old statute that contained the "effective competition" requirement, [39] OPC here urges the Commission to examine the quantity and quality of competition and whether prices will be constrained by competition.[40]

The approach recommended by the Staff and OPC is clearly unlawful. The legislation has eliminated the "effective competition" standard and the Commission may not resurrect it under the rubric of the "public interest." The Commission is obligated to apply the revised standards for competitive classification under SB 237. To continue to adhere to the old "effective competition" requirement would impermissibly render the Legislature's removal of that requirement meaningless.[41] It cannot be in the "public interest" to enforce a standard the legislation has determined no longer applies.

C. The "Purposes" Clause Contained in Section 392.185 does not Equate to the Public Interest.

OPC claims the purposes identified in Section 382.185 RSMo (2000) should serve as "a reasonable yardstick" in evaluating what is in the "public interest" and asserts that:

> To the extent the Commission believes that granting of competitive classification for services in an exchange would be contrary to the goals established by Section 392.185, RSMo, it should reject the petition for competitive classification.[42]

---

[39] Case No. TO-2005-0035, OPC Witness Barbara Meisenheimer testified in her Rebuttal Testimony, p. 15 that "the primary economic benefit of truly effective competition is that no single firm or group of firms has the ability to profitably sustain price increases to any significant degree above cost."

[40] In her Rebuttal Testimony (Exhibit 7), p. 9, OPC witness Meisenheimer stated:

> Q. FROM AN ECONOMIC PERSPECTIVE, DO YOU BELIEVE IT IS IMPORTANT IN A 60-DAY TRACK PETITIONS FOR THE COMMISSION, IN ITS DESCRETION, TO EVALUATE THE QUALITY AND QUANTITY OF COMPETITION BEFORE IT GRANTS A COMPETITIVE CLASSIFICATION?
>
> A. Yes. For competition to be meaningful and not contrary to the public interest, it should constrain the price a monopoly provider might otherwise charge for service. The Legislature apparently sought to protect against basic local price increases in directing that the Commission review the qualifications for competitive classification if an incumbent increases rates for basic local telecommunications services in an exchange classified as competitive.

[41] State v. Bouse, 150 S.W.3d at 334.

[42] Exhibit 7, Meisenheimer Rebuttal, p. 10.

OPC's interpretation of SB 237 is incorrect. OPC again seeks to resurrect the standard of "effective competition" which has now been rejected by the Legislature. Under Section 386.020(13)(c), the standard of "effective competition" specifically referenced the extent to which the purposes and policies of Chapter 392 as set forth in Section 392.185 are being advanced. But that is no longer the standard and OPC cannot reinstitute that standard under a strained definition of the "public interest." Had the Legislature intended that competitive classification be granted unless such classification was contrary to the purposes set out in Section 392.185, it could have instead referred to Section 392.185 when it re-wrote the statute in SB 237. But it did not. Instead, it referenced the "public interest:"

> The commission shall approve such petition within 60 days unless it finds that such competitive classification is contrary to the public interest.[43]

Chapter 392 also makes clear that the "public interest" and the "purposes" of the chapter are two separate things. Statutory provisions in Chapter 392 -- enacted both before and after SB 237 -- treat the "purpose" clauses set out in Section 392.185 and the "public interest" as two distinct things. Section 392.200.4(2)(a), which sets out the legislative presumption for service proposed on an exchangewide basis, states:

> For services proposed on an exchangewide basis, it shall be presumed that a tariff which defines and establishes prices for a local exchange telecommunications service or exchange access service as a different telecommunications service in the geographic area, no smaller than an exchange, within which such local exchange telecommunications service or exchange access service is offered is reasonably necessary to promote the public interest and the purposes and policies of this chapter. . . .[44]

[43] Section 392.245.5 RSMo (2005), emphasis added.

[44] Section 392.200.4(2)(a) RSMo (2000), emphasis added. Similar separate references to "the public interest" and "the purposes and policies of this chapter" are contained in Section 392.200.4(3), which also predated SB 237.

And Chapter 392.200.4(2)(b), which authorizes a carrier to petition the Commission to define a service proposed in a geographic area smaller than an exchange as a different service -- which the Legislature added as part of SB 237 -- states:

> For services proposed in a geographic area smaller than an exchange or other market segmentation within which or to whom such telecommunications service is proposed to be offered, a local exchange telecommunications company may petition the commission to define and establish a local exchange telecommunications service or exchange access service as a different local exchange telecommunications service or exchange access service. The commission shall approve such a proposal unless it finds that such service in a smaller geographic area or such other market segmentation is contrary to the public interest or is contrary to the purposes of this chapter. . . .[45]

But reading the "public interest" and the "purposes" of Chapter 392 as the same thing, as OPC would have the Commission do, would render language in these two statutory provisions superfluous, which would violate a cardinal rule of statutory construction. In construing a statute, Courts have universally held that:

> It is presumed that the legislature intended that every word, clause, sentence and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert idol verbiage or superfluous language in a statute. [46]

All words utilized by the Legislature are "presumed to have separate and individual meaning, which is essentially a presumption against redundancy."[47]

Moreover, it would be inappropriate to utilize the "purposes clauses" set out in Section 392.185 to over-ride express language that calls for certain types of competitors to be counted under the 60-day track. The Courts have made clear that:

> Only when a statute's language is ambiguous or uncertain or if its plain meaning would lead to an illogical result will extrinsic matters, such as the statute's

[45] Section 392.200.4(2)(b) RSMo (2005).

[46] Hyde Park Houseing v. Director of Revenue, 850 S.W.2d 82, 84 (Mo. banc 1993); State v. Belton, 108 S.W.3d 171, 175 (Mo. App. W.D. 2003).

[47] State, ex rel. Competitive Telecommunications v. Mo. Pub. Serv. Com'n, 886 S.W.2d 34, 39 (Mo. App. W.D. 1994).

> history, surrounding circumstances and objectives to be accomplished through the statute be considered."[48]

Here, there is no ambiguity that competitors providing service through UNE-P, wholesale commercial services from the incumbent, wireless services or VoIP service using an unaffiliated broadband network are to be counted by the Commission under the 60-day track. Accordingly, there is no need to resort to the "purposes" clauses of Section 392.185 to interpret the statute and any attempt to exclude these forms of competition from being counted based on such clauses would be wholly inappropriate. The Commission may not rely on the purposes of the Chapter as set forth in Section 392.185 to justify ignoring an express direction of the Legislature.

The new requirements prescribed by SB 237 have dramatically changed the Commission's role in determining competitive classification for a price cap regulated incumbent LEC. By removing the provisions from Section 392.245 that previously required the Commission to "investigate the state of competition" and to determine whether "effective competition" exists in the exchange,[49] and replacing them with strict numerical triggers and explicit directions on what should and should not be counted under each track, the Legislature has made clear that where customers have a choice, competitive classification must be granted.

III. THE BURDEN OF PROVING THAT A GRANT OF COMPETITIVE CLASSIFICATION IS "CONTRARY TO THE PUBLIC INTEREST" FALLS ON THOSE WHO ASSERT THAT PROPOSITION.

A. The Requesting ILEC Need Only Identify the Requisite Number of Qualifying Competitors in the Requested Exchanges.

[48] Cook v. Newman, 142 S.W.3d 880, 887 (Mo. App. W.D. 2004).

[49] Compare Section 392.245.5 RSMo (2000).

The Legislature, through SB 237, has charged the Commission with investigating and determining whether a requesting incumbent LEC has satisfied the statutory criteria for granting competitive classification to its services in a particular exchange:

> The commission shall maintain records of regulated providers of local voice service, including those regulated providers who provide local voice service over their own facilities, or through the use of facilities of another provider of local voice service. In reviewing an incumbent local exchange telephone company's request for competitive status in an exchange, the commission shall consider their own records concerning ownership of facilities and shall make all inquiries as are necessary and appropriate from regulated providers of local voice service to determine the extent and presence of regulated local voice providers in an exchange.[50]

The streamlined process established by SB 237 reflects a clear legislative determination that conferring competitive status will advance the public interest when the requisite number of competitors are providing service in an exchange. Previously, the statute required the Commission to "investigate the state of competition" and to "determine whether effective competition exists in the exchange."[51] Under that standard, the Commission considered, among other things, the extent to which services were available from alternate providers in the exchange, whether pricing and other terms and conditions of service were reasonably comparable, and whether competitors were offering functionally equivalent or substitutable services.

SB 237, however, replaced that subjective standard with strict triggers that focus on the number of competitive providers in an exchange. Now, a requesting incumbent LEC need only identify the requisite number of competitors in each exchange (or ask the Commission to examine its own records and to conduct necessary and appropriate inquiries of regulated

[50] Section 392.245.5 RSMo (2005), emphasis added.

[51] Compare Section 392.245.5 RSMo (2000).

providers). Once the requisite number of competitors have been identified in a 30-day case, competitive status is automatically conferred. In a 60-day case once the requisite number of competitors have been identified, the Commission must confer competitive status "unless it finds that such competitive classification is contrary to the public interest."

B. Those Asserting that a Grant of Competitive Classification is "Contrary to the Public Interest" Have the Burden of Proving It.

Staff and OPC claim that SBC Missouri has the burden to demonstrate that granting competitive classification will not be contrary to the public interest.[52] This claim is incorrect. In the event a party in a 60-day case asserts that a grant of a competitive classification would be contrary to the public interest, that party – as the one asserting the proposition – bears the burden of proof on this issue. Quoting the Missouri Supreme Court, the Commission explained this in Case No. TO-2006-0093, in an Order issued just last month:

> The law in this state as to the burden of proof is clear and designed to assure that hearings on contested matters provide the parties with predictable rules of procedure. The party asserting the positive of a proposition bears the burden of proving that proposition.[53]

Here, Staff and OPC have asserted the claim that granting competitive classification in any exchanges beyond those they support would be contrary to the public interest. Staff and OPC therefore have the burden of proof on this issue. Nothing in SB 237 requires a requesting incumbent ILEC to make a public interest showing. Under the statute, SBC Missouri has no burden to carry on the public interest issue.[54]

---

[52] Ex. 5, Van Eschen Direct, pp. 18-19, 27; Ex. 7, Meisenheimer Rebuttal, p. 11.

[53] In the Matter of the Request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for Competitive Classification pursuant to Section 392.234.6, RSMo 2005 – 30-day petition, Case No. TO-2006-0093, Report and Order, Issued September 26, 2005, at p. 26, quoting Dycus vs. Cross, 869 SW 2nd 745, 749 (Mo. banc 1994).

[54] Even if it had the burden of proof, SBC Missouri would have satisfied it by citing the requisite number of competitors and noting the Legislature's determination that competitive classification was the preferred approach.

Staff attempts to support its claim that SBC Missouri should bear the burden of proof on this public interest issue by citing three utility asset sale cases from the sewer, electric and gas industries.[55] None of these cases has application here. In each case Staff cites, the operative statute was materially different than the operative language of Section 392.245.5, in that none of those other statutes required the Commission to grant approval "unless it finds that [the required relief] is contrary to the public interest." Those statutes only require the utility "to obtain approval of the Commission."[56] Moreover, neither cited Court decision places the public interest burden on the sale applicant. Only the cited Commission decision places the burden on the applicant, and it is done based only on a Commission rule that does not exist here.

IV. THE STATUTORY STANDARDS FOR COMPETITIVE CLASSIFICATION HAVE BEEN MET.

SBC Missouri seeks a competitive classification under the 60-day track for business services in 30[57] of its 160 exchanges. And it seeks a competitive classification for residential services in 51[58] of those 160 exchanges.[59] Although Staff only supports (and OPC does not oppose)[60] competitive classification for 17 exchanges (15 for business services and two for

---

[55] Staff's Pretrial Brief, p. 2.

[56] See, e.g. State ex rel. Fee Fee Trunk Sewer v. Litz, 596 S.W.2d 466, 467 (Mo. App. E.D. 1980), citing Section 393.190.1 RSMo (1969).

[57] SBC Missouri originally requested competitive classification under the 60-day track for business services in 26 exchanges. The four additional exchanges are the Excelsior Springs exchange, which was rejected for competitive classification in the 30-day case; and the Chaffee, Linn and Montgomery City exchanges, which SBC Missouri did not list either in its 30 or 60-day case, but which Staff identified - - based on information unavailable to SBC Missouri - - as satisfying the 30-day criteria. Ex. 3, Unruh Rebuttal, pp. 7-9.

[58] SBC Missouri originally requested competitive classification under the 60-day track for residential services in 49 exchanges. The two additional exchanges are the San Antonio and Sikeston exchanges, which were rejected for competitive classification in the 30-day case. Ex. 3, Unruh Rebuttal, pp. 7-9.

[59] SBC Missouri also requested competitive classification for any additional exchanges where the Commission's investigation revealed the statutory criteria were met. (SBC Missouri Petition, para. 21).

[60] Ex. 7, Meisenheimer Rebuttal, p. 15 ("based on the available information, Public Counsel does not disagree with Staff's recommendation based upon service by UNE-L); and Meisenheimer, T. 194-197 (". . . for the purposes of the 60-day track, we don't oppose what -- the Staff's recommendation related specifically to UNE -- to UNE-L . . . we can support their recommendation with respect to the UNE-L").

residential services),[61] the evidence SBC Missouri has provided more than sufficiently demonstrates that competitive classification must be granted for the specified services in all of the requested exchanges.

A. SBC Missouri Has Identified Substantially More than the Requisite Number of Qualifying Competitors in Each of the Requested Exchanges.

SBC Missouri bases its Petition for competitive classification under the 60-day review procedure on competition reflected in four exhibits. SBC Missouri updated these exhibits to include exchanges not granted competitive classification in SBC Missouri's 30-day case and the additional exchanges identified by Staff.[62] These exhibits identify the exchanges for which SBC Missouri seeks competitive classification under the 60-day criteria and identifies more than the requisite number of competitors providing local voice service[63] on which SBC Missouri relies to meet the statutory criteria and the source of that information:

> Revised Exhibit B-1, which identifies for each SBC Missouri exchange for which competitive classification is being sought under the 60-day trigger, the minimum number of carriers providing local voice service to business customers using each of the following methods of providing service:
>
> - Use of wholesale services from SBC Missouri (i.e., replacement for UNE-P) under a commercial agreement;
> - UNE-P from SBC Missouri;
> - Wireless carrier;
> - VoIP provider using a third party's broadband network.

[61] Ex. 5, Van Eschen Direct, pp. 13-14, Sch. 1; Ex. 6, Van Eschen Rebuttal, pp. 9-10; T. 146-150.

[62] The original version of these Exhibits were attached to SBC Missouri's Petition for Competitive Classification filed August 30, 2005. Updated versions were incorporated into SBC Missouri witness Craig A. Unruh's Direct testimony filed September 19, 2005 (Exhibit 1), and also into Mr. Unruh's Rebuttal testimony filed October 3, 2005 (Exhibit 3).

[63] SBC Missouri excluded Cingular from the 60-day trigger review because the statute requires the trigger company to be a non-affiliated entity. SBC Missouri also excluded the AT&T companies from its review, even though AT&T remains a competitor. SBC Missouri chose to exclude the AT&T companies from its analysis to avoid issues that parties might raise given the pending acquisition of AT&T by SBC Communications. See, Ex. 1, Unruh Direct, pp. 10-11.

Revised Exhibit B-2, which identifies for each SBC Missouri exchange for which competitive classification is being sought under the 60-day trigger, the minimum number of carriers providing local voice service to residential customers using each of the following methods of providing service:

- Use of wholesale services from SBC Missouri (i.e., replacement for UNE-P) under a commercial agreement;
- UNE-P from SBC Missouri;
- Wireless carrier;
- VoIP provider using a third party's broadband network.

Revised Exhibit B-3, which is a map geographically depicting the exchanges identified in Revised Exhibit B-1;

Revised Exhibit B-4, which is a map geographically depicting the exchanges identified in Revised Exhibit B-2.

The data in Revised Exhibits B-1, B-2, B-3 and B-4 reflect only the minimum number of competitors in each of the designated exchanges since there may be additional competitors who are providing service in the exchange.[64] In each exchange, the number of competitors far exceed the requirements for competitive classification.

As SBC Missouri witness Mr. Unruh certified, SBC Missouri developed the count of certain CLEC competitors in Revised Exhibits B-1 and B-2 from its internal billing records. Specifically, SBC Missouri confirmed through its internal wholesale billing records that it was providing and billing the CLECs listed in these exhibits for UNE-P or commercial wholesale services, which they use to provide local telecommunications on a retail basis to business or

[64] For example, SBC Missouri has focused only on six of the over 400 carriers that offer VoIP service and only counts the VoIP providers in exchanges where cable modem service is available (i.e., excluding DSL) and only if the customer in that exchange can port their telephone number or obtain a new local telephone number in the exchange; it relies only on wireless carriers that use their own facilities (ignoring Mobile Virtual Network Operators, or MVNOs, such as Virgin Mobile); and it does not include any competitive services currently being offered by AT&T or its affiliates, prepaid carriers or resellers. The information presented also excludes SBC Missouri affiliates such as Cingular. See, Ex. 1, Unruh Direct, p. 9.

residential customers in each requested exchange.[65] In Unruh Revised Schedules 2(HC) and 3(HC), SBC Missouri named the specific CLEC competitors providing service via each method in each requested exchange. In all the requested exchanges, there are multiple CLECs actively providing service in competition with SBC Missouri via UNE-P or commercial arrangements (for business services, a third of the exchanges have between 10 and 12 of these types of providers; for residential services, 6 exchanges had between 3 and 4 CLECs listed with nearly three-quarters having between 8 and 11).[66]

SBC Missouri identified wireless carrier competitors in each exchange primarily through Let'sTalk.com, a publicly available website that lists, for any Zip Code entered, the wireless carriers providing service in that area and various wireless rate plans offered by each carrier.[67] There are at least two providers of wireless service in each exchange in which competitive classification has been requested by SBC Missouri, thus satisfying one prong of the competitive classification criteria (for both the business and residential exchanges, the vast majority of exchanges have three or four, and with some having as many as five).[68] Under the statute, only one such provider is to be counted in determining whether competitive classification is to be granted.

In its October 7, 2005 Order Directing Filings, the Commission indicated an interest in whether the identified wireless carrier offered local numbers to subscribers. In response to this directive, SBC Missouri provided charts showing for every requested exchange, a wireless carrier identified as a competitor, and whether that wireless provider offers customers a local

[65] Unruh, T. 77-78, 138-139.

[66] Ex. 3, Unruh Rebuttal, Revised Exhibits B-1 and B-2, and Ex. 4(HC), Unruh Rebuttal, Revised Schedules 2(HC) and 3(HC).

[67] SBC Missouri also identified the service areas of certain local wireless carriers through their websites. Id.

[68] Id.

number. While the statute does not require that local numbers be available, these charts show that they are in the vast majority of exchanges. They also show that in a number of exchanges, the wireless provider has chosen to provide service using a number from an exchange in the mandatory portion of the MCA, which meets customer needs. With these numbers, all customers within the mandatory portions of the MCA, as well as subscribers to MCA service in the optional exchanges, may make calls to and receive calls from a wireless subscriber in the designated exchange on a locally dialed and toll free basis.[69]

It should also be noted that in all cases where local numbers are not already assigned to the wireless carrier, customers may seek to port their existing landline number to the wireless provider, thus meeting any concerns about the availability of "local numbers" from wireless providers. In such cases, if a wireless customer ports a landline number, customers in the identified exchange can continue to call the wireless customer on a locally dialed and toll free basis.[70] If there were a "local number" requirement (which there is not), the availability of landline number porting would satisfy the requirement. But as shown in Exhibit 12, in addition to porting, there are local numbers available from wireless carriers in the vast majority of exchanges.

Further, Revised Exhibits B-1 and B-2 also identify a number of providers of VoIP service which rely on the broadband network of a third party cable television network. The vast majority of exchanges reflect one or more such VoIP providers for both residential and business services. At the hearing, a question was raised concerning the availability of SBC Missouri's

[69] See, Exhibit 12, SBC Missouri Response to Order Directing Filing, filed October 11, 2005. As requested by the Commission, this filing supplied the same type of information Staff filed in Case No. TO-2006-0093 in its September 20, 2005 Response to Order Directing Filing and Motion For Leave to File Out of Time. Attachment 1 to SBC Missouri's filing addresses business service exchanges and Attachment 2 addresses residential service exchanges.

[70] Id.; see also, Unruh, T. 40-41.

DSL service. As SBC Missouri witness Craig Unruh testified, SBC Missouri is not relying on VoIP providers utilizing SBC Missouri's DSL service. Rather, SBC Missouri looked only where cable modem service or high-speed Internet service is available from a cable provider.[71] Thus, the availability of SBC Missouri's DSL service has no relevance here.

In addition, SBC Missouri has presented further evidence demonstrating that residential services in the Sikeston exchange should be classified as competitive. Based on the Commission's Report and Order in the 30-day case, it appears competitive classification was rejected based on a mistaken understanding that SBC Missouri based its request on Big River Telephone Company providing residential service in that exchange through the use of UNE-P. As SBC Missouri witness Craig Unruh testified here, the Commission's understanding was incorrect. SBC Missouri did not request competitive classification in its 30-day case for the Sikeston (or any other exchange) based on the presence of competitors using UNE-P. Its request in the 30-day case for residential service in the Sikeston exchange was based on directory listings placed by Big River from its own NPA NXX, establishing that Big River was using its own facilities to provide service. SBC Missouri has recently reviewed migration orders for the Sikeston exchange and found that SBC Missouri has recently completed several migration orders for a CLEC that ported Sikeston residential telephone numbers to its own switch. These orders demonstrate that the CLEC is using its own facilities in whole or in part to provide service to residential customers in the Sikeston exchange.[72]

[71] Unruh, T. 141-142.

[72] Ex. 4(HC), Unruh Rebuttal, p. 11, and Unruh Schedule 4(HC) provide samples of the migration orders. In addition, SBC Missouri presented information demonstrating that there are several competitors for residential service in the Sikeston exchange. Id., Schedule 3(HC), p. 7 of 7.

SBC Missouri's evidence satisfies the 60-day criteria in the statute because it shows for each exchange listed in Revised Exhibit B-1 for business services and for each exchange listed in Revised Exhibit B-2 for residential services that:

- There is competition from at least two CLECs providing "local voice" service in whole or in part by using its own telecommunications facilities or other facilities or the telecommunications facilities or other facilities of a third party, including those of the incumbent LEC within the meaning of Section 392.245.5.

- Although the criteria has been met based on two CLECs having been identified, SBC Missouri also showed that there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1).

- In the majority of exchanges, there is at least one provider offering business and/or residential VoIP service using an unaffiliated cable television company's broadband network within the meaning of Section 392.245.5.

On the basis of this showing, SBC Missouri is entitled to a grant of competitive classification for the requested exchanges.

B. Staff Supports Competitive Classification for 17 Exchanges Because They Meet Both the 30-Day and 60-Day Criteria.

In the course of Staff's investigation during the 30-day case (Case No. TO-2006-0093), Staff identified 17 additional exchanges (15 for business services and two for residential services) that were not listed by SBC Missouri, but which met the 30-day statutory criteria for granting competitive classification for business or residential service (or both) in the requested exchanges. Staff was able to make this showing because it had access to data, such as confidential CLEC annual reports, which were unavailable to SBC Missouri. Staff testified that the following SBC Missouri additional exchanges qualify for competitive classification under the 30-day criteria:

Exchange	Carrier	Type of Service
Joplin	McLeodUSA	Residence
Archie	MCImetro	Business
Ash Grove	NuVox	Business
Billings	NuVox	Business
Boonville	MCImetro	Business
Carthage	MCImetro	Business
Cedar Hill	MCImetro	Business
Chaffee	MCImetro	Business
Farley	McLeodUSA, NuVox	Business
Linn	MCImetro	Business
Marshall	MCImetro	Business
Mexico	MCImetro, McLeodUSA	Business
Moberly	MCImetro	Business
Montgomery City	MCImetro	Business
St. Clair	MCImetro	Business
Sikeston	Big River	Residence
Union	MCImetro	Business[73]

Staff based this positive recommendation on the presence of at least one non-affiliated entity providing local voice service in whole or in part over facilities in which it or one of its affiliates has an ownership interest. With respect to the CLEC competitors, Staff's evidence was based on a review of confidential CLEC annual reports filed with the Commission and telephone calls to some CLECs to discuss their reports.[74] SBC Missouri has also identified at least one wireless provider offering business and residential service within these exchanges.[75]

Staff's use of such data for this case and the Commission's grant of competitive classification based on that data are entirely appropriate because SB 237 requires the Commission to maintain and consider its own records concerning the methods carriers whom it regulates use to provide local voice services in an exchange; and it requires the Commission to consider such records in reviewing an ILEC's request for competitive status:

[73] See, Ex. 5, Van Eschen Direct, pp. 13-14, Sch. 1; Ex. 6, Van Eschen Rebuttal, p. 10; T. 146-150.

[74] Ex. 5, Van Eschen Direct, pp. 2, 12-13, Sch. 1,; Ex. 6, Van Eschen Rebuttal, pp. 9-10.

[75] Ex. 4HC, Unruh Rebuttal, Schedules 2(HC) and 3(HC).

> . . . The commission shall maintain records of regulated providers of local voice service, including those regulated providers who provide local voice service over their own facilities, or through the use of facilities of another provider of local voice service. In reviewing an incumbent local exchange telephone company's request for competitive status in an exchange, the commission shall consider their own records concerning ownership of facilities. . . .[76]

However, because SBC Missouri had not identified these exchanges as part of its 30-day case, Staff opposed competitive classification being granted there. But since SBC Missouri has now requested competitive classification for these exchanges in the 60-day proceeding, Staff recommends approval of the 17 exchanges during the 60-day case. No one has presented any competent and substantial evidence claiming that the requisite number of providers are not operating in these exchanges, nor has any party even attempted to demonstrate that granting competitive classification is contrary to the public interest. Staff also concluded that these exchanges meet the statutory criteria for competitive classification under the 60-day track.[77] Accordingly, the evidence and the law mandate that the Commission grant competitive classification in 17 exchanges.

C. <u>The Agency Exchange Meets the Statutory Criteria and Competitive Classification Should be Granted for Residential Services</u>.

Here, Staff has concluded that the statutory criteria for competitive classification in Agency has been met.[78] Yet Staff is unwilling to give a positive recommendation on the Agency exchange for residential service because SBC Missouri's Petition did not include it in its "request" for competitive classification. The statute does not allow competitive classification to be withheld on this basis. SBC 237 requires the Commission to go beyond the data carriers

[76] Section 392.245.5(6) RSMo (2005).

[77] Van Eschen, T. 149-150.

[78] Van Eschen, T. 150-152.

provide it in the ordinary course of business and pro-actively seek other necessary and appropriate data from carriers it regulates as part of its investigation:

> . . . In reviewing an incumbent local exchange telephone company's request for competitive status in an exchange, the commission . . . shall make all inquiries as are necessary and appropriate from regulated providers of local voice service to determine the extent and presence of regulated local voice providers in an exchange.[79]

Moreover, SBC Missouri did request the Commission to grant competitive classification for any exchange where the Commission's own investigation identified that a competitive classification should be granted.[80] In addition, from a practical standpoint, the Commission should grant competitive classification for this exchange because the Commission now knows that it meets the 30-day criteria as well as the 60-day criteria. Requiring a new case to be filed would only waste the Commission's and other parties' resources.

During the hearing, a question arose concerning whether any additional notice to customers or competitors is required before competitive classification in the Agency exchange could be granted.[81] No such notice is required here. Section 392.245.5 contains no notice requirement. And since it is only the rights and obligations of SBC Missouri that are being determined in this proceeding, its competitors are not necessary parties and have no due process right to notice. But in any event, such companies did receive notice of this proceeding because they are providing service in other exchanges for which the Commission issued notice of this proceeding.

[79] Section 392.245.5(6) RSMo (2005).

[80] See, SBC Missouri's Petition, para. 21.

[81] T. 20-22.

D. Staff and OPC Have Failed to Provide any Competent Evidence that Granting Competitive Classification in the Requested Exchanges would be "Contrary to the Public Interest."

Apart from the 17 exchanges Staff found meet the 30-day criteria (and therefore has given a positive recommendation on them), Staff and OPC oppose competitive classification of SBC Missouri's services in all of the remaining exchanges for which relief has been sought.

Staff and OPC's Concern with UNE-P. Staff and OPC base their opposition on their assertion that such a grant of competitive classification would be contrary to public interest because the CLEC competitors identified by SBC Missouri are only providing service utilizing UNE-P or similar commercial wholesale service from SBC Missouri and should not be counted.[82] Staff also makes a similar argument with respect to the wireless and VoIP competitors SBC Missouri identified.[83]

In taking this position, however, Staff and OPC fail to follow the statute. They improperly disregard clear directives in SB 237 by ignoring competition from CLECs that are not using their own facilities in whole or in part, competition from wireless carriers and competition from VoIP providers in the 60-day analysis. The statute specifically requires the Commission to recognize competition from:

> . . . any entity providing local voice service in whole or in part by using its own telecommunications facilities or other facilities or the telecommunications facilities or other facilities of a third party, including those of the incumbent local exchange company as well as providers that rely on an unaffiliated third-party Internet service.[84]

As reflected in SB 237's creation of the separate 60-day track, the Legislature recognized that there are other forms of competition in the market beyond that from entities that use their

[82] Ex. 5, Van Eschen Direct, p. 2; Ex. 7, Meisenheimer Rebuttal, pp. 14-15.

[83] Ex. 5, Van Eschen Direct, pp. 20-23.

[84] Section 392.245.5 RSMo (2005), emphasis added.

own facilities in whole or in part to provide service. And the marketplace validates this legislative assumption. As SBC Missouri witness Craig Unruh testified, there are CLECs that choose to use SBC Missouri's facilities rather than use their own. In every exchange at issue in this case, at least two CLECs have chosen to use either UNE-P or a commercial arrangement rather than their own switching facilities which they are actively using in other exchanges. Every service provider has a choice of how it provisions service to its customers, and that choice reflects its determination of its best economic self interest.[85] How a carrier exercises that choice does not make it any less of a competitor capable of serving customers in an exchange.[86] As the market share study SBC Missouri filed at the Commission's request[87] shows, SBC Missouri's CLEC competitors' share of the landline market for business and residential services has grown from July, 2001 - June, 2005.[88]

Other carriers choose to compete without using their own switching facilities in any exchanges. For example, Sage has chosen to enter into a seven-year commercial agreement with SBC Missouri to purchase a UNE-P replacement service under which Sage uses SBC Missouri's services (e.g., loops and switching) to enable Sage to provide service on a retail basis to its customers. For its own business reasons, Sage has chosen to take this approach rather than deploying its own facilities (e.g., its own switches).[89] And contrary to OPC's objection to counting Sage, any claim that it limits its customers to SBC Missouri's customers with existing service (i.e., does not sell new service) has little, if any impact on the availability of its service to

[85] Van Eschen, T. 170; Meisenheimer, T. 206-207.

[86] Ex 1, Unruh Direct, p. 12; T. 79.

[87] T. 118-120, 134-136, 236-238 and 283.

[88] Late-Field Exhibit 9(HC).

[89] Id., pp. 12-13.

customers. If Sage does refrain from establishing new service for customers, it does so only for its own administrative convenience. Sage simply instructs the customer seeking to establish new service to order it from the incumbent LEC then move that service to Sage.[90] Moreover, other companies have also signed similar long-term commercial agreements with SBC Missouri and OPC presented no evidence that those other carriers engaged in this practice.[91]

Despite SB 237's clear directive, Staff opposes counting competitors providing service using UNE-P or commercial wholesale service from an ILEC because Staff questions whether these provisioning methods are "reasonable alternatives" to a CLEC's provision of service using its own facilities.[92] Staff raises similar questions with respect to wireless service and VoIP service, claiming that few customers will actually switch their landline telephone service to wireless or VoIP service if the consumer is expected to pay more for local voice service,[93] or if the quality of service is perceived to be inferior.[94] Staff also questions the ability of these provisioning methods to hold the incumbent LEC's prices in check.[95] Staff, however, has not conducted any surveys to determine whether consumers view such services being provided by the entities in revised Schedules 2(HC) and 3(HC) as reasonable substitutes and Staff has presented no such evidence in this regard.[96]

Moreover, Staff's positions are inconsistent with the statute. As pointed out above, Section 392.245.5 directs the Commission under the 60-day track to count competitors using

[90] Unruh, T. 79-80.

[91] Ex. 1, Unruh Direct, pp. 12-13; Meisenheimer, T. 203.

[92] Ex. 6, Van Eschen Rebuttal, pp. 2-3.

[93] Ex. 6, Van Eschen Rebuttal. p. 7.

[94] Ex. 6, Van Eschen Rebuttal, p. 6.

[95] Ex. 6, Van Eschen Rebuttal, p. 7.

[96] Van Eschen, T. 160.

these provisioning methods to provide service. Neither Staff nor the Commission can override the express direction of the Legislature.

Moreover, Staff's "concerns" do not provide any legitimate or sufficient basis for the Commission to find that granting SBC Missouri's request for competitive classification is contrary to the public interest. Section 271 of the federal Telecommunications Act continues to require SBC Missouri to offer unbundled switching to its wholesale customers. The pricing for SBC Missouri's wholesale commercial services are regulated by the FCC and are subject to the just and reasonable pricing standards set out in Sections 201 and 202 of the federal Act.[97] And in any event, CLECs have many alternatives to SBC Missouri's switching services. In addition to the option of acquiring their own switch, CLECs can obtain switching services from several other carriers in Missouri, including Sprint, McLeodUSA, Level 3, KMC and XO.[98]

OPC's concern that competition only benefits large businesses. OPC also attempts to portray large business customers as the "prime targets for competition" and expresses the concern that "competitors have not actively sought the small business customer or residential customer to the same extent."[99] OPC's concern is misplaced. OPC has provided no data to substantiate this claim. Moreover, it is contrary to the evidence that has been presented. In 19 of the 30 exchanges for which SBC Missouri seeks competitive status for its business services, there are more than 12 competitors.[100] In 37 of the 51 exchanges for which SBC Missouri seeks competitive status for its residential exchanges, there are at least 12 competitors.[101] Given the

[97] Unruh, T. 112, 144.

[98] Unruh, T. 113-114.

[99] Ex. 7, Meisenheimer Rebuttal, p. 2.

[100] Ex. 3, Unruh Rebuttal, Revised Exhibits B-1 and B-3; and Ex. 4(HC), Unruh Rebuttal, Revised Schedule 2(HC).

[101] Ex. 3, Unruh Rebuttal, Revised Exhibits B-2 and B-4; and Ex. 4(HC), Unruh Rebuttal, Revised Schedule 3(HC).

small size of some of these exchanges, it should be clear that SBC Missouri's competitors are not limiting themselves to large business customers.

Staff's resale concern. Staff also raises the concern that if the Commission grants competitive status based on competition from UNE-P providers and providers using a commercial agreement, competition from resale providers could also trigger competitive status.[102] This concern too is misplaced. Resale is a very distinct provisioning method that differs significantly from the provision of service using UNE-P or commercial wholesale agreement. Under resale, the CLEC purchases a finished telecommunication service from the incumbent for resale, as is, to the CLEC's retail customers. The service is the same as the incumbent's, but sold under the CLEC's brand. The wholesale price to the CLEC for resold service is tied to the incumbent's retail price (the wholesale price is derived by applying a negotiated or arbitrated wholesale discount – i.e., a percentage discount -- to the incumbent's retail price).[103] UNE-P and commercial wholesale services, on the other hand, are purchased by the CLEC as network elements that the CLEC fashions into its own retail service. The prices for such elements are unrelated to the incumbent's retail service pricing.[104] The legislature clearly understood these material provisioning differences as it required the Commission to give each very different consideration: the statute specifically requires the Commission to consider providers utilizing UNE-P or commercial wholesale services in the 60-day track, and to ignore resale providers.[105]

[102] Ex. 6, Van Eschen Rebuttal, p. 7.

[103] See, 47 USC Section 252(d)3; Meisenheimer, T. 207.

[104] Meisenheimer, T. 207-211.

[105] Section 392.245.5(4).

Other miscellaneous concerns. The remaining objections advanced by Staff and OPC also fail to pass statutory muster. Staff proposes that the Commission not grant competitive classification because it may be difficult to retract in the future, or because it may impinge on the Commission's ability to control prices in areas where it might wish to order expanded local calling. But the Legislature has set the standard for reviewing grants of competitive classification and those provisions control. The Legislature has also determined that where competitive classification is granted, the ILEC controls pricing decisions. The Commission may not refuse to grant competitive classification because it dislikes the Legislature's policy determination on these points.

CONCLUSION

Based on this evidentiary showing, the Commission, in furtherance of the competitive policies articulated by the Legislature, is bound by the standards set out in SB 237 to grant the requested competitive classifications for SBC Missouri's business and residential services in the exchanges listed in Revised Exhibits B-1 and B-2 and for SBC Missouri's residential services in its Agency exchange within the 60-day statutory timeframe.

Respectfully submitted,

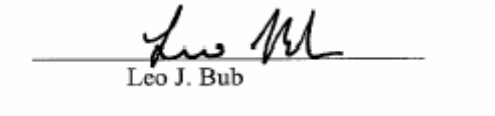
SOUTHWESTERN BELL TELEPHONE, L.P.
D/B/A SBC MISSOURI

BY _____

PAUL G. LANE #27011
LEO J. BUB #34326
ROBERT J. GRYZMALA #32454
MIMI B. MACDONALD #37606
Attorneys for SBC Missouri
One SBC Center, Room 3518
St. Louis, Missouri 63101
314-235-2508 (Telephone)
314-247-0014(Facsimile)
leo.bub@sbc.com

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties by e-mail on October 19, 2005.



Leo J. Bub

General Counsel
William Haas
Missouri Public Service Commission
PO Box 360
Jefferson City, MO 65102
william.haas@psc.mo.gov
GenCounsel@psc.mo.gov

Public Counsel
Michael F. Dandino
Office of The Public Counsel
PO Box 7800
Jefferson City, M) 65102
mike.dandino@ded.mo.gov
opcservice@ded.mo.gov