BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Review of the Competitive Classification of the Exchanges of Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri.	)))	Case No. TO-2007-0053

AT&T MISSOURI'S POST-HEARING BRIEF

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AT&T Missouri,[1] pursuant to the Missouri Public Service Commission's ("Commission's") Order Directing Filing and Setting Briefing Schedule,[2] respectfully submits this Post-Hearing Brief.

EXECUTIVE SUMMARY

SB 237 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,[3] 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. This new objective standard reflects the Legislature's policy determination favoring predictability in the marketplace and the opening of an exchange to competition by all providers when the requisite two additional competitors are providing services in that exchange.

The evidence presented by Staff and AT&T Missouri in this case unequivocally demonstrates that the conditions upon which the Commission previously granted competitive

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

[2] Order Directing Filings and Setting Briefing Schedule, Case No. TO-2007-0053, issued March 15, 2007.

[3] Compare Section 392.245.5 RSMo (2000).

classification to AT&T Missouri's business and/or residential services under both the 30-day and the 60-day criteria continue to exist and that competitive classification should be re-affirmed:

The 30-Day Exchanges.

- There is at least one non-affiliated CLEC providing "local voice" service in whole or in part over facilities in which it or one of its affiliates has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3).

- AT&T Missouri 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). And Staff testified that there has been no change in the presence of the wireless carriers upon which the Commission relied in its initial grant of competitive classification for these exchanges.

No party opposes the Commission's continuing competitive classification in the 30-day exchanges.

The 60-Day Exchanges.

- 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. In most exchanges, there are substantially more than two, even without counting wireless or VoIP:

    - 94% of the residential 60-day exchanges have four or more additional competitors; 71% have eight or more.

    - 97% of the residential 60-day exchanges have three or more additional competitors; 73% have five or more.

- Although the criteria has been met based on two CLECs having been identified, AT&T 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 nearly all exchanges, there are at least two providers offering business and/or residential VoIP service using an unaffiliated cable television company's broadband network within the meaning of Section 392.245.5.

No party has presented any competent and substantial evidence to show that the requisite number of providers are not operating in these exchanges.

OPC claims that continued competitive classification in the 60-day exchanges would be contrary to the public interest. But it has failed to meet its burden of proving this assertion. Its complaints about AT&T Missouri's price increases, the exit of some CLECs from the market, CLEC line losses and gaps in wireless coverage are nothing more than an improper attempt to have the Commission resurrect the subjective "effective competition" test the Legislature removed when it re-wrote the statute through SB 237. The Commission should reject OPC's urgings to ignore the new statutory standard and should re-affirm the competitive classification it previously granted.

ARGUMENT

I. THE COMMISSION MUST APPLY SB 237'S NEW STATUTORY STANDARD FOR COMPETITIVE CLASSIFICATION.

Senate Bill No. 237 ("SB 237")[4] dramatically changed the process for determining whether the services in an exchange are to be classified as competitive. This process reflects a clear legislative determination that conferring competitive status will advance the public interest when the requisite two additional competitors are providing service in an exchange. As the Commission explained in both Case Nos. TO-2006-0093 and TO-2006-0102, before SB 237, the statute required the Commission to:

> determine whether effective competition exists in the exchange." Under this "effective competition" standard, the Commission considered, among other things, the extent of competition in the exchange, whether pricing was reasonably

[4] 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.

> comparable, and whether competitors were offering functionally equivalent or similar services.[5]

SB 237, however, deleted the "effective competition" requirement from Section 392.245.5, and replaced it with strict objective triggers that focus on the number of competitive providers in an exchange:

> Under SB 237, the Commission is now required to apply an expedited, two track procedure when a price-cap-regulated ILEC seeks competitive classification for its services within one or more exchanges. The 30-day track establishes a competitive "trigger" that focuses solely on the number of carriers providing "basic local telecommunication service" within an exchange. Under the 30-day track, the Commission must classify as competitive the ILECs' services (business, residential, or both) as competitive in any exchange in which at least two other carriers, using their own or an affiliate's facilities in whole or in part, are providing 'basic local telecommunications service' within that exchange.
>
> Under the 60-day track, in addition to the specified competitive triggers found in the 30-day track, the statute permits a price cap regulated ILEC to seek competitive classification based on competition from other entities providing 'local voice service.' That is, the 60-day track recognizes competition from local voice providers that use the ILEC's facilities or a third party's facilities in addition to recognizing competition from entities providing local service using their own facilities in whole or in part. The statute requires the Commission to grant competitive classification within 60 days unless it determines that such classification is contrary to the public interest.[6]

[5] In the Matter of the Request of Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, for Competitive Classification pursuant to Section 392.234.6, RSMo 2005 – 30-day petition, (MoPSC Report and Order in 30-Day Case); and In the Matter of the Request of Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, for Competitive Classification pursuant to Section 392.234.6, RSMo 2005 – 60-day petition, Case No. TO-2006-0102, Report and Order, issued October 25, 2005, p. 4 (MoPSC Report and Order in 60-Day Case).

[6] MoPSC Report and Order in 60-Day Case, pp. 4-5 (emphasis added).

This statutory revision is mandatory:

> 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.[7]

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. Under the new statute, a requesting incumbent LEC need only identify the requisite two competitors providing qualifying services in each exchange.

II. OPC CONTINUES TO DISREGARD THE NEW STATUTORY STANDARD FOR COMPETITIVE CLASSIFICATION IN A 60-DAY CASE.

A. OPC Incorrectly Claims that the Old "Effective Competition" Criteria Should be Applied even though SB 237 Removed the "Effective Competition" Requirement from Section 392.245.5.

OPC asks the Commission to ignore the clear rewrite of the statute by the Legislature. Despite its claims that it is not doing so, OPC continues to insist that the Commission ignore the Legislature's removal of the "effective competition" requirement from the criteria for obtaining competitive classification. Instead of focusing on the objective standards in the new statute, OPC improperly urges the Commission to ignore the Legislature's actions in 2005 and use the

7 State v. Bouse, 150 S.W.3d 326, 334 (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 B.C.H., 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).

now-irrelevant subjective elements of "effective competition"[8] (that applied under the old statute) in determining whether competitive classification is to be renewed.[9] For example:

- OPC wants the Commission to examine the extent to which services are available from alternative providers in the relevant market,[10] which was the first required element for evaluating "effective competition" under the old statute.[11]

- OPC urges the Commission to analyze the extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions, [12] which was the second element for evaluating "effective competition" under the old statute.[13]

- OPC asks the Commission to base its public interest evaluation on the "legislative intent and purposes identified in Section 392.185 RSMo"[14] which was essentially the third element for evaluating "effective competition" under the old statute.[15]

- Like it did in the prior case tried under the old statute that contained the "effective competition" requirement,[16] OPC here urges the Commission to

[8] 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.

[9] Ex. 4, Meisenheimer Surrebuttal, p. 3; T.99 (". . . to some extent, aspects of each of these considerations I believe is relevant in the Commission's consideration in this case").

[10] OPC Statement of Position, p. 2 ("extent of competition must be considered"); Ex. 3, Meisenheimer Direct, pp. 12-13.

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

[12] Ex. 3, Meisenheimer Direct, p. 12 ("The Commission should consider if comparable services are available at comparable price, terms and conditions.").

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

[14] Ex. 3, Meisenheimer Direct, pp. 8-9.

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

[16] In 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." See Case No. TO-2006-0102, T. 224-225.

> examine not only the quantity and quality of competition, but also whether prices will be constrained by competition.[17]

In an attempt to boot-strap these "effective competition" elements back into the statutory test, OPC claims the Commission is required to consider "all relevant factors" in determining whether continued competitive classification is contrary to the public interest.[18] Such an approach is clearly unlawful. The 2005 legislation eliminated the "effective competition" standard and OPC should not be allowed to resurrect it under the rubric of the "public interest."

Neither the Utility Consumers Council[19] nor the Laclede Gas[20] cases OPC cites[21] have any application here, as they provide no guidance on how "public interest" questions are to be addressed. Rather, both focus on narrow pricing issues under rate-based rate-of-return regulation, under which state law specifically required the Commission to consider "all relevant

[17] In her Direct Testimony (Exhibit 3), p. 7, OPC witness Meisenheimer stated:

> Q. FROM AN ECONOMIC PERSPECTIVE, DO YOU BELIEVE IT IS IMPORTANT IN THE 60-DAY TRACK PETITIONS FOR THE COMMISSION, IN ITS DESCRETION, TO EVALUATE THE QUALITY AND QUANTITY OF COMPETITION ASSOCIATED WITH 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 or a dominate provider might otherwise charge for service. . . .

[18] OPC Statement of Position, p. 2; Ex. 3, Meisenheimer Direct, p. 11 ("Good public policy and regulatory policy demands that the Commission consider all relevant factors in its decision making process and evaluate the evidence of those relevant factors."); and Ex. 4, Meisenheimer Surrebuttal, p. 3 ("Commission is exercise its expertise and investigatory authority to look at all relevant factors at work in the provision of telecommunications service in these exchanges. . . .")

[19] State ex rel. Utility Consumers Council, Inc. v. Public Service Commission, 525 S.W.2d 41 (Mo. 1979).

[20] State ex rel. Laclede Gas Co. v. Public Service Commission, 535 S.W.2d 561 (Mo. App. 1976).

[21] OPC Statement of Position, p. 2.

factors" in setting rates.[22] There is no statutory basis to expand SB 237's objective test into the broad and subjective evaluation urged by OPC.[23] Adopting OPC's position to apply the old "effective competition" criteria requires a refusal to acknowledge the Legislature's removal of that requirement in 2005.[24] It cannot be in the "public interest" to enforce a standard the State Legislature has determined no longer applies.

B. 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."[25] Again, OPC asks that the Commission ignore the Legislature.

In making this claim, 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 it under a strained definition of the "public interest." Had the Legislature intended that competitive classification be granted unless such classification

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[22] State ex rel. Utility Consumers Council, 585 S.W.2d at 49 ("Even under the file and suspend method, by which a utility's rates may be increased without requirement of a public hearing, the commission must of course consider all relevant factors including all operating expenses and a utility's rate of return, in determining that no hearing is required and that the filed rate should not be suspended."). State ex rel. Laclede Gas, 535 S.W.2d at 570 (citing Section 393.207(4) RSMo, the court stated "[i]n determining the price to be charged for gas . . . the commission may consider all facts which in its judgment have any baring upon a proper determination of the question. . . .") and at 574 (upholding the commission's denial of Laclede's application for an interim rate increase pending determination of its application for a permanent rate increase, the court stated: "rather than helping Laclede, this reference [to a finding the commission made in a permanent rate case] simply emphasizes the desirability of leaving a whole question of just and reasonable rates . . . to the permanent rate proceeding in which all the facts can be developed more deliberately with full opportunity for an auditing of financial figures and a mature consideration by the commission of all factors and all interests.")

[23] Indeed, the Commission is barred from granting OPC's request, as the Commission is "purely a creature of statute . . . [its] . . . powers are limited to those conferred by . . . statute." Utility Consumers Council, 585 S.W.2d at 49.

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

[25] Ex.3, Meisenheimer Direct, pp. 9-10.

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."

OPC's attempt to equate the "public interest" and the "purposes" clause of Section 392.185[26] is similarly misplaced. All words utilized by the Legislature are "presumed to have separate and individual meaning, which is essentially a presumption against redundancy."[27] 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 exchange wide basis, states:

> For services proposed on an exchange wide 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. . . .[28]

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

[26] Ex. 3, Meisenheimer Direct, pp. 8-9, 11; T. 22-23 (describing Section 392.185 as the "fundamental . . . standards, elements of what the public interest is.")

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

[28] 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.

> smaller geographic area or such other market segmentation is contrary to the public interest or is contrary to the purposes of this chapter. . . .[29]

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:

> 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. [30]

III. THE BURDEN OF PROVING THAT CONTINUED COMPETITIVE CLASSIFICATION IS "CONTRARY TO THE PUBLIC INTEREST" FALLS ON THE PARTY ASSERTING THAT PROPOSITION.

A. Parties Advocating Reaffirmation of Competitive Classification Need Only Show the Continued Presence of the Requisite Number of Qualifying Competitors.

Missouri case law requires the party asserting the positive of a proposition to bear the burden of proving that proposition.[31] Here, Section 392.245.5(6) directs the Commission to:

> . . . review those exchanges where an incumbent local exchange carrier's services have been classified as competitive, to determine if the conditions of this subsection for competitive classification continue to exist in the exchange. . . .

Thus, AT&T Missouri and Staff, which both assert that the conditions for competitive classification in the exchanges at issue continue to exist, bear the burden of proving that the requisite two competitors are providing service in those exchanges. In Case No. TO-2006-0102 (the previous 60-day proceeding), the Commission reached a similar conclusion:

> The Missouri Supreme Court has stated that "[t]he law in this state as to the burden of proof is clear and designed to assure that hearings on contested matters provide parties with predictable rules of procedure. The party asserting the positive of a proposition bears the burden of proving that proposition." SBC Missouri asserts that there are the requisite numbers of entities providing local

[29] Section 392.200.4(2)(b) RSMo (2006 C. Supp.) (emphasis added).

[30] 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).

[31] Dycus v. Cross, 869 S.W.2d 745, 749 (Mo. banc 1994).

> voice service to business or residential customers, or both, in the specified exchanges. Therefore SBC Missouri has the burden of proof on this issue . . . [32]

B. The Party Asserting that Continued Competitive Classification is "Contrary to the Public Interest" Has the Burden of Proving It.

Once the conditions for competitive classification in Section 392.245.5 are shown to exist, the Commission must reaffirm competitive status in an exchange unless it finds that such competitive status is "contrary to the public interest." Here, OPC claims that continued competitive classification would be contrary to the public interest. As the party asserting the positive of this proposition, OPC bears the burden of proof on the issue:

> Section 392.245.5(6) RSMo (2005), provides that the Commission 'shall approve such petition within 60 days unless it finds that such competitive classification is contrary to the public interest.' [emphasis added.] Here, the parties asserting that the grant of a competitive classification would be contrary to the public interest . . bear the burden of proof.[33]

Nothing in SB 237 requires the incumbent LEC to make a public interest showing. Under the statute, AT&T Missouri has no burden to carry on the public interest issue.[34]

IV. THE COMMISSION SHOULD REAFFIRM COMPETITIVE CLASSIFICATION IN ALL EXCHANGES BECAUSE THE STATUTORY CONDITIONS CONTINUE TO EXIST.

A. The Commission Should Reaffirm Competitive Classification In the 30-Day Exchanges.

1. No Party Opposes the Commission's Continuing Competitive Classification in the 30-Day Exchanges.

By an October 5, 2006, stipulation jointly filed in this case by Staff, OPC and AT&T Missouri, the parties have agreed "to narrow the contested issue in this case to a determination of

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[32] 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 20005 (60-Day Petition), Case No. TO-2006-0102, Report and Order, issued October 25, 2005 at p. 14, quoting Dycus v. Cross, 869 S.W.2d 745, 749 (Mo. banc 1994).

[33] Id.

[34] Even if it had the burden of proof, AT&T 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.

whether competitive conditions continue to exist in those exchanges granted competitive classification under the 60-day track."[35] The stipulation reflects Staff and AT&T Missouri's agreement that Staff's August 8, 2006 Report demonstrates that the competitive conditions for the 30 day exchanges continue to exist and that those exchanges should remain classified as competitive. While OPC did not join that part of the stipulation, OPC agreed not to object to it and agreed not to offer any evidence in opposition to that stipulation.[36]

2. Staff and AT&T Missouri Have Identified More than the Requisite Number of Qualifying Competitors in Each of the 30-Day Exchanges.

Staff's Evidence. Staff provided uncontroverted evidence of at least one CLEC providing basic local telecommunications service on a full facilities or partial facility basis in each of the business and residential exchanges in the 30-day portion of this case.[37] Staff's evidence of full or partial facilities based competition was based on 2005 Annual Reports submitted by individual CLECs themselves that provide basic local telecommunications service in competition with AT&T Missouri. CLECs file these reports with the Commission each year pursuant to statute and Commission rule and provide line counts on a per exchange basis showing the number of lines served as of December 31 of that year, specifically showing how the carrier is serving the lines within an exchange (e.g., full facility, partial facility, other resale or pure resale). This access line data is the same type of data upon which the Commission relied

[35] Joint Motion to Establish Procedural Schedule and Stipulation as to 30 Day Exchanges, filed October 5, 2006 in Case No. TO-2007-0053, p. 3.

[36] Id.

[37] See Ex. 1, Van Eschen Rebuttal, Sch. 3(HC) (Business 30-Day Competitive Exchanges), and 4(HC) (Residential 30-day Exchanges). These two schedules are revised versions of Appendices C and D from Staff's August 2006 Report in this proceeding; and Van Eschen T. 161, 164, 169-170, 181.

in initially granting competitive status to various AT&T Missouri exchanges in Case No. TO-2006-0093.[38] No party has disputed or provided any evidence to show that the data provided by Staff or AT&T Missouri is incorrect. Although OPC did not present any evidence with respect to these 30-day exchanges, its witness indicated that the annual report data Staff used is the very same data it would have used itself had it chosen to present evidence in the 30-day portion of this case.[39]

AT&T Missouri's Evidence. For each exchange in which business and/or residential services are competitively classified under the 30-day criteria, AT&T Missouri presented uncontested evidence that the requisite number of competitors are providing service in each exchange. AT&T Missouri's data concerning the provision of service by facilities or partial facility-based CLECs came from AT&T Missouri's internal business records identifying CLECs that have 911 listings, or ported telephone numbers from AT&T Missouri within each of the exchanges. AT&T Missouri identified the wireless companies by confirming their service availability within the respective exchanges through each wireless carrier's individual website.[40]

The Marble Hill, Farmington and Washington Exchanges. During the hearing, a question was raised concerning three of the 30-day exchanges for which Staff schedules show zero facility or partial facility-based competitors (the Marble Hill exchange[41] for business; and the Farmington and Washington exchanges[42] for residential service). Staff, however, explained that these entries just reflect what appeared in CLEC 2005 Annual Reports. Based on its further investigation, Staff explained that it considers these three entries to be "miscategorized." Staff

[38] Ex. 1, Van Eschen Rebuttal, pp. 6-7.

[39] Meisenheimer T. 239-240.

[40] Ex. 5, Unruh Rebuttal, p. 5, Schs. 4 and 5; Unruh T. 198-199.

[41] Ex. 1, Van Eschen Rebuttal, Sch. 3(HC).

[42] Id., Sch. 4(HC).

testified it confirmed the existence of a CLEC in each of these exchanges providing service using its own switch. Staff based this conclusion on data from AT&T showing that CLECs were porting telephone numbers from AT&T Missouri to their own switches to serve customers in those exchanges.[43] Staff's conclusion on these three exchanges is also supported by AT&T Missouri's uncontroverted evidence showing facility-based competition in those exchanges (Big River providing business service in the Marble Hill exchange;[44] Charter providing residential service in the Farmington exchange; and Big River providing residential service in the Washington exchange[45]). No party contested Staff or AT&T Missouri's evidence showing the requisite competitive presence in these three exchanges.

Evidence of Wireless Service Providers. A question was also raised why Staff's schedules did not identify the wireless carriers providing service in the 30-day exchanges. On this point, Staff explained that there was no need to do so in this case. Staff testified that all of the wireless carriers upon whom the Commission relied in initially granting competitive classification in the 30-day exchanges are still providing the requisite service in each of those exchanges.[46]

In Case No. TO-2006-0093 (the initial 30-day case), Staff provided verifying evidence that each wireless carrier AT&T Missouri identified as providing service in the 30-day exchanges was actually doing so.[47] In this case, Staff testified that it was unaware of: any

[43] Van Eschen T. 161, 164, 169-170, 181.

[44] Ex. 5, Unruh Rebuttal, Sch. 5.

[45] Ex. 5, Unruh Rebuttal, Sch. 4.

[46] Ex. 1, Van Eschen Rebuttal, p. 13.

[47] See Staff's Response to Order Directing Filing and Motion for Leave to File Out of Time, Case No. TO-2006-0093, filed September 20, 2005 (verifying that the wireless provider had assigned local telephone numbers in the exchange or telephone numbers in another exchange which has some form of toll free calling between the exchanges so that callers in the exchange can dial subscribers to the designated wireless provider on a toll free basis). By agreement of the Parties and Commission Order, the Commission has taken administrative notice of the evidence from Case No. TO-2006-0093. T. 188-189.

conditions changing the presence of these qualifying wireless carriers in any AT&T Missouri competitive exchange; any wireless provider withdrawing service from any exchange; or any changed conditions that would make it a toll call to reach a wireless subscriber residing in the same exchange.[48]

While Staff did not conduct a new analysis for this proceeding of wireless carrier availability in the 30-day exchanges, AT&T Missouri did. Using the service availability function on each individual wireless carrier's website, AT&T Missouri verified service areas and confirmed that the respective wireless carriers offered service in each AT&T Missouri exchange in which it listed the wireless carrier as a competitor.[49]

No evidence has been presented that would even suggest that any wireless carrier's service has changed to no longer allow an AT&T Missouri competitively classified exchange to qualify for competitive status. OPC has specifically acknowledged that it did not conduct any survey or other study for this case of wireless carrier service availability.[50]

3. No Evidence Has Been Presented to Show that Conditions for Competitive Classification Have Ceased to Exist in the 30-Day Exchanges.

In the 30-day portion of this case, only Staff and AT&T Missouri provided exchange-specific evidence of the provision of qualifying service by AT&T Missouri's competitors. This evidence unequivocally demonstrates that the requisite number of competitors are actively providing basic local business and/or residential telephone service in each of the 30-day exchanges. No party presented any evidence in this proceeding to the contrary. Accordingly, the Commission must reaffirm competitive classification.

[48] Ex. 1, Van Eschen Rebuttal, p. 13.

[49] Ex. 5, Unruh Rebuttal, p. 9, Sch. 4 and 5; Unruh T. 198-199.

[50] Meisenheimer T. 94, 236.

B. The Commission Should Reaffirm Competitive Classification in the 60-Day Exchanges.

1. Staff and AT&T Missouri Have Identified Substantially More than the Requisite Number of Qualifying Competitors In Each of the 60-Day Exchanges.

The evidence presented by Staff and AT&T Missouri demonstrates that the required conditions continue to exist in each of the exchanges the Commission previously classified as competitive under the 60-day criteria (51 exchanges for residential service; 30 exchanges for business service). Multiple CLECs and wireless carriers are actively providing residential and/or business service in each of the 60-day exchanges (and nearly all such exchanges have multiple VoIP providers as well).[51] No evidence has been presented showing otherwise. While the statue requires that wireless providers be counted, there are more than enough traditional wireline competitors (e.g., CLECs) in each of the 60-day exchanges even without counting the presence of wireless carriers.

Staff's Evidence. Staff has provided evidence that at least three or more qualifying CLECs are providing service in each AT&T Missouri exchange granted competitive status under the 60-day track and Staff recommends the Commission retain competitive classification for all AT&T Missouri exchanges with competitive classification.[52] Even before considering evidence of wireless carriers (of which there is at least one in each exchange), the evidence more than demonstrates that the requisite number of qualifying competitors are providing service in each 60-day exchange.[53] Staff's evidence with respect to residential service (counting only CLECs

[51] Ex. 1, Van Eschen Rebuttal, Revised Schedules 1(HC) and 2(HC); Ex. 5 Unruh Schedules 2 and 3 (the only exchange for which AT&T Missouri lists no VoIP provider is the Portage Des' Sioux exchange; and it lists the Montgomery City exchange as having only one. This restrictive showing results from AT&T Missouri counting only VoIP providers in exchanges where cable modem service and porting of local telephone numbers is available).

[52] Ex. 1, Van Eschen Rebuttal, p. 9, 14; Revised Sch. 1(HC) and Revised Sch. 2(HC). Staff clarified that the CLECs Staff listed in its evidence to support continued classification as providing service using "Other Resale" was not the type of resale the statute requires to be excluded from consideration. Ex. 1, Van Eschen Rebuttal, p. 5; T. 182-183.

[53] Ex. 1, Van Eschen rebuttal, p. 9 ("simply looking at CLEC activity, the evidence indicates this criteria is met . . . a wireless competitor is not needed to satisfy the required numbers of competitors offering service in any exchange").

and without counting wireless carriers) shows that 94% of the 60-day exchanges have four or more additional competitors; and 71% have eight or more.[54] And with respect to business services, Staff's evidence shows that 97% of the exchanges have three or more additional competitors; and 73% have five or more.[55]

AT&T Missouri's Evidence. For each exchange in which business and/or residential services are competitively classified under the 60-day criteria, AT&T Missouri presented unrefuted evidence that there are many more than the requisite two competitors providing local voice service in each exchange. For each exchange, AT&T Missouri identified two qualifying CLECs (listed as "trigger companies") which, by itself, satisfies the statutory criteria for continued competitive classification. In addition, AT&T Missouri identified a sampling of some of the other carriers that also provide service in each exchange: other CLECs, two wireless carriers and in most cases two VoIP providers (with most exchanges having even more competitors).[56] AT&T Missouri gathered this data from an examination of its internal provisioning and billing records, from which it identified traditional wireline companies (e.g., CLECs) that have 911 listings, ported telephone numbers, or wholesale services purchased from AT&T Missouri (e.g., Local Wholesale Complete) within each of the exchanges. AT&T Missouri identified the wireless companies by confirming their service availability within each exchange through the service availability function on each wireless carrier's individual website.

[54] Ex. 1, Van Eschen Rebuttal, Sch. 1(HC).

[55] Ex. 1, Van Eschen Rebuttal, Sch. 2(HC).

[56] Ex. 5, Unruh Rebuttal, p. 10, Schs. 2 and 3. AT&T 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 AT&T Missouri affiliates such as Cingular. See Ex. 5, Unruh Rebuttal, Schs. 2, 3, 4 and 5.

AT&T Missouri identified the VoIP companies by reviewing the VoIP providers' websites and confirming service availability and their respective exchanges.[57]

The Commission should also note that the uncontested evidence provided by Staff and AT&T Missouri shows expanded facility-based competition in the 60-day exchanges, as most of the exchanges could now qualify under the 30-day criteria (specifically, at least 27 of the 51 exchanges, and at least 27 of the 30 business exchanges now qualify under the 30-day criteria).[58]

2. No Evidence Has Been Presented to Show that Conditions For Competitive Classification No Longer Exist in the 60-Day Exchanges.

Staff and AT&T Missouri were the only parties in this proceeding providing exchange-specific evidence pertaining to the number of additional competitors providing service in the exchanges in which business and/or residential service is classified as competitive under the 60-day criteria. OPC, the only party opposing continued competitive classification of residential and business services in the 60-day exchanges, acknowledged that it has not presented evidence disputing Staff and AT&T Missouri's evidence of competitors providing business and/or residential service in the 60-day exchanges.[59]

The evidence Staff and AT&T Missouri have presented more than sufficiently demonstrates that the conditions for competitive classification for the specified services continue to exist in all of the exchanges at issue in this proceeding. Accordingly, the Commission should reaffirm the competitive status previously granted.

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[57] Ex. 5, Unruh Rebuttal, p. 11.

[58] Ex. 5, Unruh Rebuttal, p. 13, Schedule 2 and 3, and Ex. 6, Unruh Surrebuttal Testimony, p. 8; see also Van Eschen Rebuttal Schedule 1 (showing 15 of the 51 residential exchanges meet the 30-day criteria) and Schedule 2 (showing 23 out of the 30 business exchanges now meet the 30-day criteria).

[59] Meisenheimer T. 88-95.

3. OPC Has Failed to Provide any Competent or Substantial Evidence to Show that Continued Competitive Classification would be "Contrary to the Public Interest."

OPC opposes continued competitive classification of AT&T Missouri's services for business and residential services in the 60-day exchanges, claiming that it would be "contrary to the public interest." OPC bases its claims on its concern that AT&T Missouri recently increased prices for its basic local and other services beyond what it would have been able to have done under price caps; that there are fewer CLECs offering service in some of the 60-day exchanges; some CLECs have lost access lines in some exchanges; and that there have been mergers of companies within the industry. In addition, OPC expresses the concern that it would be against the public interest to rely on a wireless carrier as a qualifying competitor where the wireless carrier's service does not cover the entire exchange.[60]

None of these concerns, however, provide any substantial or competent evidence that continuation of competitive status for the business and/or residential services in the 60-day exchanges would be contrary to the public interest.

a. AT&T Missouri's Modest Price Increases do not Make Continued Competitive Classification Contrary to the Public Interest.

OPC claims that since acquiring competitive classification in the 60-day exchanges, AT&T Missouri has increased prices for some basic services above what would have previously been permitted under price cap regulation (above the limit of the Consumer Price Index-Telecommunications Services ("CPI-TS") adjustment for basic local service, and above the 5% allowable increase for non-basic services). It claims that "these trends do not demonstrate a

[60] OPC Statement of Position, pp. 2-3.

competitive market that is sufficiently robust to protect rate payers and offer them real alternatives for comparable services."[61]

OPC is mistaken. First, SB 237 itself specifically authorizes price increases after services have been declared competitive by the Commission:

> If the services of an incumbent local exchange telecommunications company are classified as competitive under this subsection, the local exchange telecommunications company may thereafter adjust its rates for such competitive services upward or downward as it determines appropriate in its competitive environment, upon filing tariffs which shall become effective within the time limits identified in Section 392.500.[62]

Staff concurs in this view, stating that "since the statute allows an ILEC to increase rates for its competitive services, it is contrary to logic to suggest that such a rate increase is a change in conditions such as would make the competitive classification contrary to the public interest."[63]

Similarly, the Commission has recognized that price increases are normal occurrences in competitive markets:

> …although falling rates are often touted as an argument for establishing a competitive market, there is no economic, or logical reason why prices must always fall in a competitive market. Sometime prices do rise in markets that are clearly competitive. Any motorist that observes the price fluctuations in the competitive retail gasoline market is aware that competition does not always result in falling prices. In fact, it is possible that the competitive market rates for telephone service are higher than the rates imposed on that market under rate of return regulation and carried through under price cap regulation. If that is the case, then rates will rise in a competitive market.[64]

Had the Legislature intended for consumers to be protected from basic local price increases, it would have prohibited them in some fashion (for example, the law could have exempted basic local services from being competitively classified as it did with switched access

[61] Ex. 4, Meisenheimer Surrebuttal, pp. 2-3.

[62] Section 392.245.5(6) RSMo (2006 C. Supp.).

[63] T. 16.

[64] In the Matter of the Investigation of the State of Competition in the Exchanges of Sprint Missouri, Inc., Case No. IO-2003-0281, Report and Order, issued December 4, 2003 at p. 31.

services). The law, however, makes clear that basic local service is to be included in the services that become competitively classified once an exchange is declared competitive and that the marketplace is to determine pricing levels in competitively classified exchanges.

OPC's concern about the level of price increases lack merit. As AT&T Missouri witness Craig Unruh testified, prices in the U.S. economy for most goods and services generally tend to rise over time. To remain viable, companies have to recover their costs and generate money to invest in their operations to bring new and better services to their customers.[65] Prior to the price increases, residential basic local prices were lower then they were in 1984. Even after the residential basic local price increases, which ranged from $0.93 to $1.26, prices are only $0.25 to $0.95 per month more than they were in 1984 -- over 20 years ago. If basic local prices had simply kept pace with inflation, they would have roughly doubled since 1984. And just applying OPC's figures for the CPI for land-line telephone services, local charges from 1996 to the present yields rates substantially higher than those currently in effect.[66] Even after the modest increases in 2006, AT&T Missouri's residential basic local prices remain some of the lowest in the nation.[67]

In an apparent attempt to show that AT&T Missouri's basic local price increases are unreasonable, OPC claims that the previous prices for basic local service covered cost.[68] OPC, however, offers nothing to support this claim except the hearsay statements made by another

[65] Ex. 5, Unruh Rebuttal, p. 16.

[66] Appendix B. Compare the column for "2006" CPI adjusted rate with the column for "current" rates.

[67] Ex. 5, Unruh Rebuttal, pp. 16-17.

[68] Ex. 4, Meisenheimer Surrebuttal, p. 10.

witness in another proceeding,[69] whose conclusions were never adopted by the Commission.[70] But specific findings by the Commission in Case No. TO-97-40 showed just the opposite. There, the Commission in an arbitration under the federal Telecommunications Act, established cost-based prices for the AT&T Missouri network elements necessary to provide basic local service (consisting of the loop, switching and cross-connect elements, together known as the "Unbundled Network Element Platform" or "UNE-P"). As shown on Appendix C, the Commission-determined costs for these elements are higher than AT&T Missouri's residential basic local rates.[71]

OPC's concerns that the prices for vertical services have remained above cost are similarly inapposite. As the Commission is well aware, the Commission's policy has been to residually price AT&T Missouri's basic local services after maximizing contribution for non-basic services. The result was to price residential basic local service at very low prices and to "make up" the difference by pricing other services at higher prices.[72] The arguments that there is no competition because vertical services are priced above cost or that there is no competition because some prices for a la cart vertical services have risen even though their prices are above cost fail because these arguments do not take into account the fact that vertical services can only be purchased with basic local service,[73] which, as the evidence shows, is priced below the costs established by the Commission for UNE-P service.[74] What occurs, then, is a situation where the price for basic local service (which is below cost) plus the price for the vertical service (which is

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[69] Id.

[70] Meisenheimer T. 111, referring to the MoPSC's Report and Order in Case No. TR-2001-65, issued August 26, 2003 at p. 17. The Commission has taken administrative notice of this order, T. 113.

[71] Appendix C. Compare column G (total cost) with columns H, I and J (current retail rate). See also Ex. 5, Unruh Rebuttal, p. 18.

[72] Case No. 18-309; Ex. 5, Unruh Rebuttal, pp. 17-18.

[73] Van Eschen, T. 295.

[74] See Appendix C.

above cost) is still below the cost of the two services. The argument also fails to acknowledge the significant price reductions for packages containing vertical services that are now commonplace in the marketplace.[75]

Finally, OPC claims that AT&T represented to the Commission, the Legislators and customers that competitive classification in these exchanges "will mean that prices will decrease and local service prices will not increase because of competition. . . ."[76] OPC is incorrect. AT&T Missouri's witness previously testified he did not believe AT&T Missouri would make any substantial or unreasonable price increases because competition, negative customer reaction, and political realities would prevent AT&T Missouri from implementing significant increases. He also candidly discussed how prices tend to rise in competitive markets and that residential basic local prices are below cost and have historically been restrained by regulatory action, suggesting that there is natural pressure on basic local pricing levels. The evidence here shows basic local price increases AT&T Missouri recently implemented were modest. The lack of public outcry from these increases demonstrates that customers do not see the price increases as unreasonable.[77]

OPC has presented no evidence that AT&T Missouri has made any representations to the Legislature or to customers regarding the impact of competitive classification. In fact, OPC's witness admitted that she did not attend any of the local public hearings the Commission conducted in Case No. TO-2006-0102 for obtaining public input.[78] The record is clear, however, that Staff provided at those hearings a written handout advising that with competitive

[75] Unruh T. 297-299.

[76] OPC Statement of Position, p. 3; Ex. 3, Meisenheimer Direct, pp. 16-17; Ex. 4, Meisenheimer Surrebuttal, pp. 8-10.

[77] Ex. 5, Unruh Rebuttal, p. 19.

[78] Meisenheimer T. 132.

classification, AT&T Missouri "would be permitted to raise or lower its telephone prices at its own discretion, subject to the marketplace."[79]

b. Competitor Market Entry and Exit, Company Mergers and the Fluctuation in Company Access Line Counts Simply Reflect the Normal Workings of the Marketplace.

OPC asserts that "the extent of competition must be considered" and claims that competitors have "dwindled," Missouri customers' competitive alternative have "become diluted through AT&T's merger with the legacy AT&T and BellSouth," and that there has been a net loss in residential and business lines served by CLECs in the 60-day exchanges.[80]

These claims, however, focus on criteria SB 237 removed from the statutory test for competitive classification under Section 392.245.5. As explained in more detail in Section II(A) above, "the extent to which services are available from alternative providers in the relevant market" was one of the elements the Commission was required to evaluate in determining "whether effective competition" for business and/or residential services existed in an exchange.[81] In removing this criteria from the statute, the Legislature has removed it from Commission consideration.

But even if it was appropriate for the Commission to include these criteria in its evaluation -- which it is not -- such claims lack evidentiary support. With respect to its claim of competitor access line loss, OPC states that for residential 60-day exchanges, there has been "76% negative or no growth in facility-based CLEC lines," and for business 60-day exchanges

[79] Ex. 8, Staff Information Sheet -- SBC Missouri competitive classification request from Case No. TO-2006-0102.

[80] OPC Statement of Position, pp. 2-3.

[81] See Section 386.020(13)(a) RSMo (2006 C. Supp). Before SB 237, Section 392.245.5 required the Commission to "investigate the state of competition" and determine whether "effective competition exists in an exchange." Section 386.020(13) sets out the definition for "effective competition."

there has been "47% negative or no growth in facility-based CLEC lines."[82] But of the 39 residential exchanges (out of 51) counted as "negative or no growth" to calculate the 76% figure, OPC's witness acknowledged that only one exchange showed negative growth.[83] And of the 15 business exchanges (out of 30) so counted to calculate the 47% "negative or no growth," OPC's witness acknowledged that there were only nine exchanges showing negative growth.[84] From 2004 to 2005, CLEC 60-day exchange business lines only decreased by 126 lines and CLEC 60-day exchange residential lines only decreased by 1,542 lines.[85] During the same period, AT&T Missouri lost over 84,000 lines.[86] Moreover, facility-based competition or the degree to which facility-based competition has changed over time is not relevant in the 60-day track as the Commission is instructed to count all specified forms of competition and not just facility-based competition as is the case in the 30-day track.

Rather than reflect on the demise of competition, this fluctuation in line counts is indicative of a competitive market where customers are choosing between providers, causing relative customer counts within the market to vary over time. It is also indicative of the decline of traditional wireline telephone usage, as customers continue to replace wireline service with wireless or VoIP services. (Because these types of providers do not file annual reports with the Commission disclosing line counts, their market shares are not in evidence here.)[87]

OPC also points to the decline in the number of CLECs providing service in certain exchanges (even though all still have more than the requisite two providers).[88] But it omits that

[82] Ex. 3, Meisenheimer Direct, p. 12.

[83] Meisenheimer T. 129-130.

[84] Meisenheimer T. 131-132.

[85] Ex. 1, Van Eschen Rebuttal, pp. 7-8.

[86] Ex. 6, Unruh Surrebuttal, p. 8.

[87] Ex. 6, Unruh Surrebuttal, p. 7; Ex. 1, Van Eschen Rebuttal, p. 10.

[88] Exhibit 4, Meisenheimer Surrebuttal, p. 7.

nearly the same number of exchanges gained CLECs, as new CLECs enter the market and existing CLECs like Charter continue to enter new markets. While Staff's 2004 to 2005 annual report data shows that 20 of the 51 residential 60-day exchanges lost CLEC providers, it also shows that 19 exchanges actually gained CLEC providers. And while 16 business 60-day exchanges lost CLEC providers, nine gained.[89]

These fluctuations in line and competitor counts do not reflect a diminution of competition. As Staff explained, such fluctuations are a part of the normal workings of the market and should be expected.[90]

Finally, OPC expresses concerns about the merger of AT&T Missouri's parent corporation with Legacy AT&T and BellSouth as diluting Missouri customers' competitive alternatives.[91] The Commission should not be distracted by these red herrings. As OPC should be aware, the Commission in Case Nos. TO-2006-0093 and TO-2006-0102 granted competitive classification to AT&T Missouri for business and/or residential services in the 30 and 60-day exchanges at issue in this proceeding with full knowledge of the Legacy AT&T merger. In those proceedings, AT&T Missouri excluded as a competitor AT&T Communications of the Southwest, Inc. and its affiliates from the list of competitors upon which it sought competitive classification.[92] And similar exclusions were made in the current proceeding.[93] The BellSouth merger similarly has no bearing here. Its merger with AT&T Missouri's parent corporation did not reduce customer choice in Missouri because BellSouth provided neither basic local

[89] Ex. 1, Van Eschen Rebuttal, p. 8.

[90] Van Eschen T. 42.

[91] OPC Statement of Position, pp. 2-3

[92] Case No. TO-2006-0093, Ex. 1, Unruh Direct, pp. 10-11; Case No. TO-2006-0102, Ex. 1, Unruh Direct, p. 9.

[93] Ex. 5, Unruh Rebuttal, Schs. 2, 3, 4 and 5.

residential nor basic local business services in Missouri. The BellSouth merger simply has no impact on AT&T Missouri's service in Missouri.[94]

c. It is Not Contrary to the Public Interest for the Commission to Count Wireless and the Other Carriers That the Legislature Has Directed Must be Counted

OPC asserts that there should be "cautious reliance" on wireless providers in the count of competitors in an exchange "due to gaps in coverage."[95] In making this claim, however, OPC invites the Commission to disregard the specific legislative directive in SB 237 to count one wireless carrier providing service in an exchange as one of the two requisite competitors:

> Commercial mobile service providers as identified 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.[96]

Had the Legislature intended to impose a service coverage requirement before that carrier can be counted as a competitor in an exchange, it could have added such a requirement to the statute. But it did not. Under Missouri law, it is a fundamental precept of statutory interpretation that the Legislature is presumed to act with knowledge of the subject matter.[97] Certainly Missouri Legislators use cell phones and, as OPC's witness readily acknowledged, are likely aware of holes in wireless service.[98] Had they wished to impose a requirement of ubiquitous coverage before a wireless carrier could be counted as a competitor, they certainly could have done so.

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[94] Unruh T. 202.

[95] OPC Statement of Position, p. 3; Ex. 3, Meisenheimer Direct, pp. 14-15; and Ex. 5, Meisenheimer Surrebuttal, p. 8.

[96] Section 392.245.5(1) RSMo (2006 C. Supp.) (emphasis added).

[97] Holt v. Burlington Northern R. Co., 685 S.W.2d 851, 857 (Mo. App. W.D. 1984); Bushell v. Schepp, 613 S.W.2d 689, 691 (Mo. App. E.D. 1981); The State of Croom v. Bailey, 107 S.W.3d 457, 463 (Mo. App. S.D. 2003); State ex rel. Safety Roofing, 86 S.W.3d 488, 492 (Mo. App. S.D. 2002).

[98] Meisenheimer T. 83.

As a matter of law, wireless competitors cannot be excluded. 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."[99] The Commission may not, under the rubric of the "public interest," disregard service providers the Legislature has directed to be counted.

Moreover, even if some measure of ubiquity of wireless coverage was required -- which it is not -- no competent and substantial evidence has been presented to show inadequate wireless coverage. All OPC presented on this issue was its witness' unsupported statements that she still has concerns about the accuracy of AT&T Missouri's wireless carrier data. She bases her concerns on a wireless carrier survey she conducted over a year and a half ago (about September 2005) for Case No. TO-2006-0102. But even when OPC's survey was fresh, the Commission did not credit it. Moreover, OPC's 2005 survey has no relevance to the wireless carrier data AT&T Missouri presented in this case. OPC's 2005 survey was performed to rebut the wireless data AT&T Missouri presented in Case No. TO-2006-0102, which it pulled from "third-party equipment vendor/reseller websites."[100] AT&T Missouri, however, did not use that data source in this case. Rather, AT&T Missouri pulled its wireless carrier data directly from the individual wireless carriers' websites, using the service availability function on those websites.[101] OPC did not redo or update its 2005 survey for this case.[102]

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[99] Committee on Legislative Research of Mo. Gen. Assembly v. Mitchell, 886 S.W. 2d 662, 665 (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).

[100] Ex. 3, Meisenheimer Direct, p. 14.

[101] Ex. 5, Unruh Rebuttal, p. 9; Ex. 6, Unruh Surrebuttal, pp. 5-7; and T. 198-199.

[102] T. 94, 236.

Clearly, OPC's unsupported "concerns" do not provide any legitimate or sufficient basis for the Commission to find that continuing AT&T Missouri's request for competitive classification is contrary to the public interest.

CONCLUSION

Based on the evidentiary showing made by Staff and AT&T Missouri, the Commission, in furtherance of the competitive policies articulated by the Legislature, is bound by the standards set out in SB 237 to reaffirm the competitive classifications for AT&T Missouri's business and residential services in all of its competitively classified exchanges.

Respectfully submitted,

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APPENDIX A

The Statutory Standard for Competitive Classification Under Section 392.245.5.

SB 237 requires the Commission to apply a simple, expedited, two-track procedure for determining competitive classification. Under both tracks, the statute directs the Commission to determine whether two non-affiliated entities, one of which can be a wireless provider, are providing local voice service in the exchange:

1. The 30-Day Track.

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:

> 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.[103]

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,[104] where one of the providers may be a wireless carrier.

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[103] Section 392.245.5(6) RSMo (2006 C. Supp.).

[104] Section 392.245.5(6) RSMo (2006 C. Supp.).

2. The 60-Day Track.

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).[105] The 60-day track also accords some discretionary authority to 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."[106]

3. 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

[105] Section 392.245.5(6) RSMo (2006 C. Supp.)

[106] Id.

> 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.[107]

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.

- 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"[108] service "in whole or in part" over facilities in which it or one of its affiliates has an ownership interest.[109]

- 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.[110]

- The definition of "telecommunications facilities." Section 386.020(56) RSMo (2006 C. Supp.), 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."[111] Thus, the Legislature has

[107] Section 392.245.5 RSMo (2006 C. Supp.), emphasis added.

[108] Section 392.245.5(3) RSMo (2006 C. Supp.) 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."

[109] Section 392.245.5(2) RSMo (2006 C. Supp.).

[110] Section 392.245.5(1) RSMo (2006 C. Supp.) (however, only one such non-affiliated provider will be counted as providing basic local telecommunications service within an exchange).

[111] Section 386.020(52) RSMo (2006 C. Supp.).

> 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[112] 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.[113]

4. 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…[114]

[112] 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 (2006 C. Supp.).

[113] Section 392.245.5(4) RSMo (2006 C. Supp.).

[114] Section 392.245.5(6) RSMo (2006 C. Supp.), 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[115] or dial-up Internet for the origination of local voice service shall not be considered a basic local telecommunications service provider.[116]

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.[117]

[115] 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 (2006 C. Supp.).

[116] Section 392.245.5(2) RSMo (2006 C. Supp.).

[117] Section 392.245.5(6) RSMo (2006 C. Supp.), emphasis added.

APPENDIX B

Application of CPI - Landline Telephone Services, Local Charges to 1996 Residence Local Rates

		1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	Current
CPI		0.002	0.014	0.016	0.018	0.041	0.052	0.045	0.041	0.015	0.027	0.021	
Rate Group	1996 Rate												
A	$7.55	$7.57	$7.67	$7.79	$7.93	$8.26	$8.69	$9.08	$9.45	$9.59	$9.85	$10.06	$7.15
B	$9.10	$9.12	$9.25	$9.39	$9.56	$9.95	$10.47	$10.94	$11.39	$11.56	$11.88	$12.13	$10.00
C-Prin	$10.10	$10.12	$10.26	$10.43	$10.61	$11.05	$11.62	$12.15	$12.64	$12.83	$13.18	$13.46	$11.00
C-1	$11.40	$11.42	$11.58	$11.77	$11.98	$12.47	$13.12	$13.71	$14.27	$14.49	$14.88	$15.19	$12.00
D-Prin	$11.35	$11.37	$11.53	$11.72	$11.93	$12.42	$13.06	$13.65	$14.21	$14.42	$14.81	$15.12	$12.00
D-1	$11.85	$11.87	$12.04	$12.23	$12.45	$12.96	$13.64	$14.25	$14.84	$15.06	$15.46	$15.79	$12.50
D-2	$12.50	$12.53	$12.70	$12.90	$13.14	$13.67	$14.39	$15.03	$15.65	$15.88	$16.31	$16.66	$13.00

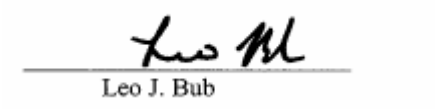
The CPI data for this schedule was taken from OPC witness Barbara Meisenheimer's Surrebutal Testimony, Schedule BAM SUR 2 p. 1 of 3.
The 2006 CPI figure was confirmed by Ms. Meisenheimer at the hearing. T. 136-138.

APPENDIX C

Comparison of UNE Rates from TO-97-40 July 31, 1997 Final Arbitration Order with AT&T Missouri Retail Residential Rates									
A	B	C	D	E	F	G	H	I	J
UNE Zone	Rate Group	UNE Loop	UNE Port	UNE Switching - Per Minute	UNE Switching - Month*	Total C+D+F	Current Retail	Metro Zone 1	Metro Zone 2
1	D	$12.71	$1.74	0.001988	$2.78	$17.23	$12.00	$12.50	$13.00
2	B	$20.71	$1.97	0.002391	$3.35	$26.03	$10.00	NA	NA
3	A	$33.29	$2.47	0.003444	$4.82	$40.58	$7.15	NA	NA
4	C	$18.23	$2.25	0.002934	$4.11	$24.59	$11.00	$12.00	NA
*Assumes 1400 minutes per month									

CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on April 18, 2007.



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