

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Second Investigation)	
Into the State of Competition in the)	Case No. TO-2005-0035
Exchanges of Southwestern Bell)	
Telephone, L.P. d/b/a SBC Missouri)	

STAFF RESPONSE TO ORDER DIRECTING FILINGS REGARDING BURDEN OF PROOF

COMES NOW the Staff of the Missouri Public Service Commission and in response to the Commission's *Order Directing Filings* of March 16, 2005, states:

1. The Commission has directed the Staff to file a supplemental pleading to clarify its position regarding the burden of proof in this matter.

2. The statute generally governing the burden of proof in matters before the Commission is Section 386.430 RSMo. (2000), which states:

In all trials, actions, suits and proceedings arising under the provisions of this chapter or growing out of the exercise of the authority and powers granted herein to the commission, the burden of proof shall be upon the party adverse to such commission or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful as the case may be.

3. This particular case was initiated by SBC Missouri, pursuant to Section 392.245.5 RSMo (2000), to initiate a second investigation of the state of the competition in SBC Missouri's exchanges and to classify as competitive SBC Missouri's access line and related services and operator/directory services that have not already received a competitive designation. In the prior investigation, the Commission had classified certain services as competitive.

4. In both the previous initial investigation involving SBC exchanges and in the similar proceeding involving Sprint Missouri, Inc. exchanges, the Commission has ruled that the telecommunications company seeking competitive designation bears the burden of proof.

5. In the first of those two cases, *In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company*, Case No. TO-2001-467, the Commission extensively analyzed the question of the appropriate party to bear the burden of proof:

Which party has the burden of proof became an issue in this case. A finding under Section 392.245.5, that effective competition exists for a particular service in an exchange would authorize Southwestern Bell to increase or to decrease its rates in response to competition. Currently, Southwestern Bell is subject to a price cap under Section 392.245. Thus, Southwestern Bell may adjust its rates downward, but there is a statutory limit on any increased prices.

The Staff and other parties argued that because Southwestern Bell would be the beneficiary of a change in the status quo, Southwestern Bell bears the burden of persuasion. n.5 [29 Am. Jur. 2d, Evidence § 158.] Southwestern Bell argues that the presumption of the statute is that there is effective competition, unless other parties produce evidence that there is not effective competition.

Section 392.245.5, provides in part:

Each telecommunications service of an incumbent local exchange telecommunications company shall be classified as competitive in any exchange in which at least one alternative local exchange telecommunications company has been certified under section 392.455 and has provided basic local telecommunications service in that exchange for at least five years, unless the commission determines, after notice and a hearing, that effective competition does not exist in the exchange for such service. The Commission shall, from time to time, on its own motion or motion by an incumbent local exchange telecommunications company, investigate the state of competition in each exchange where an alternative local exchange telecommunications company has been certified to provide local exchange telecommunications service and shall determine, no later than five years following the first certification of an alternative local exchange telecommunications company in such exchange, whether effective competition exists in the exchange for the various services of the incumbent local exchange telecommunications company.

In the first sentence set out above, there is a presumption of effective competition. In that sentence, Southwestern Bell must be classified as competitive "unless the commission determines . . . that effective competition does not exist." This sentence is not applicable in this case. The presumption of competition controls only where a competitor of Southwestern Bell has been both certified and has been providing service for at least five years. No competitor has been certified and providing service for a period of at least five years.

The second sentence of Section 392.245.5, set out above, does not include the presumption. Instead, it says that the Commission "shall determine . . . whether effective competition exists . . ." The Commission can only make such an affirmative finding based on competent and substantial evidence. n.6 [See, e.g., *State ex rel. Rice v. PSC*, 220 S.W.2d 61, 64 (Mo. 1949).] Consequently, the debate between the witnesses and parties regarding who bears the burden of proof is moot. Regardless of which party bears the burden of proof, absent competent and substantial evidence of effective competition the Commission cannot find that it exists.

Generally, the party seeking relief from the Commission bears the burden of proof. n.7 [See Section 386.430; *State ex rel. Rice v. PSC*, 220 S.W.2d 61, 66 (Mo. 1949).] The burden of proof remains upon the party asserting the affirmative of the ultimate issue throughout a proceeding. n.8 [See, e.g., *Been v. Jolly*, 247 S.W.2d 840, 854 (Mo. 1952).] In order for the Commission to make that determination it must have evidence of effective competition. Since Southwestern Bell is the only party advocating that position, the burden of proof and, therefore, the burden to present competent and substantial evidence, falls to Southwestern Bell.

2001 Mo. PSC LEXIS 1770; 11 Mo. P.S.C. 3d 42, 46-47 (December 27, 2001).

6. Subsequently, in *In the Matter of the Investigation of the State of Competition in the Exchanges of Sprint Missouri, Inc.*, Case No. IO-2003-0281, the Commission again found:

As the party asserting that there is effective competition in its exchanges, Sprint bears the burden of proof. That allocation of the burden of proof is consistent with the Commission's decision on that issue in a recent case regarding competition in the exchanges of Southwestern Bell Telephone Company. [] Sprint accepts that burden of proof and it is not an issue in this case.

2003 Mo. PSC LEXIS 1560; 229 P.U.R.4th 31 (December 4, 2003).

7. In this matter, SBC Missouri is the party seeking relief from the Commission. This case is *not* taking place under the statutory provisions that require the Commission to

review the state of competition no less than every five years in those exchanges where the Commission previously found the existence of effective competition. Section 392.245.5, fifth sentence. Indeed, SBC Missouri, in paragraph 5 of its *Motion to Investigate the State of Competition In SBC Missouri Exchanges* that initiated this case, cited to the same portion of Section 392.245.5 that supported the Commission's initial action in both Case Nos. TO-2001-467 (for SBC Missouri, Inc.) and IO-2003-0281 (for Sprint Missouri, Inc.). The Commission has previously found that in investigations under that provision, the burden of proof lies upon the party seeking relief from the Commission and a change in the *status quo* -- the telecommunications company. As this case operates under the same statutory provision, the same conclusion on the burden of proof is appropriate.

8. Thus, the telecommunications company whose exchanges are the subject of Commission determination in this case, SBC Missouri, Inc., should bear the burden of proof to demonstrate that its exchanges should be classified by the Commission as competitive.

WHEREFORE, Staff submits this statement regarding the burden of proof in this matter as directed by the Commission.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 16th day of March 2005.

/s/ David A. Meyer

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