

**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)	Case No. TO-2006-0102
Competitive Classification Pursuant to Section)	Tariff File No. YL-2006-0145
392.245.6, RSMo (2005) – 60 day Petition.)	

STAFF’S BRIEF

COMES NOW the Staff of the Missouri Public Service Commission and for its brief states:

Introduction

On August 30, 2005, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri filed its Petition for Competitive Classification pursuant to Section 392.245.5 RSMo. That statute, as amended by Senate Bill 237, establishes a 30-day track and a 60-day track by which a price cap regulated company may petition the Commission to have its business services or its residential services, or both, classified as competitive in a requested exchange. This case involves SBC Missouri’s request under the 60-day track for competitive classification of its business services in 30 exchanges and for competitive classification of its residential services in 51 exchanges.

Under the 30-day track, each telecommunications service offered to business customers, other than exchange access, of a price cap regulated incumbent local exchange telecommunications company (ILEC) shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the ILEC are providing basic local telecommunications service to business customers within the exchange. One of the entities may be a wireless company. One entity shall be providing local voice service in whole or in part over telecommunication facilities or other facilities in which it or one of its affiliates have an

ownership interest. This track has an identical provision for services provided to residential customers.

Under the separate 60-day track, a price cap regulated ILEC 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 ILEC as well as providers that rely on an unaffiliated third-party Internet service. The Commission shall approve the petition within sixty days unless it finds that such competitive classification is contrary to the public interest.

Public Interest

The public interest is found in the

positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic, which expression must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interest of the public.

In re Rahn's Estate, 316 Mo. 492, 501, 291 S.W. 120, 123 (1926), cert. den'd, 274 U.S. 745, 47 S. Ct. 591, 71 L.Ed. 1325.

“[I]f there is legislation on the subject, the public policy of the state must be derived from such legislation.” *Moorshead v. Railways Co.*, 203 Mo. 121, 165, 96 S.W. 261, 271 (banc 1907).

Section 392.185 RSMo directs that the provisions of Chapter 392 shall be construed to:

- (1) Promote universally available and widely affordable telecommunications services;
- (2) Maintain and advance the efficiency and availability of telecommunications services;
- (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;
- (4) Ensure that customers pay only reasonable charges for telecommunications services;
- (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;

- (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;
- (7) Promote parity of urban and rural telecommunications services;
- (8) Promote economic, educational, healthy care and cultural enhancements; and
- (9) Protect consumer privacy.

Burden of Proof

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 the parties with predictable rules of procedure. The party asserting the positive of a proposition bears the burden of proving that proposition.” *Dycus v. Cross*, 869 S.W. 2d 745,749 (Mo. banc 1994)

SBC Missouri suggests that the burden of proof is on a party opposing its petition to prove that competitive classification is contrary to the public interest. Reference to an analogous standard of review shows SBC Missouri to be mistaken.

“The Commission may not withhold its approval of the disposition of [utility] assets unless it can be shown that such disposition is detrimental to the public interest.” *State ex rel. Fee Fee Trunk Sewer v. Litz*, 596 S.W. 2d 466,468, citing *State ex rel. City of St. Louis v. Public Service Commission*, 335 Mo. 448, 73 S.W. 2d 393,400 (Mo. banc 1934). Yet, the parties asserting that the proposed transaction will “not” be detrimental to the public interest have the burden of approving that assertion. *Gateway Pipeline Company*, 10 Mo. P.S.C. 3d 520, 523-24 (2001).

Similarly, a plaintiff asserting a negative generally has the burden of proof as to such matter along with the other issues on which he bases his case. But there appears to be an exception to this rule where the evidence on such matter is peculiarly within the knowledge or control of the defendant. *Kenton v. Massman Const. Co.*, 164 S.W. 2d 349, 352 (Mo. 1942)

Petitioner SBC Missouri asserts that competitive classification is not contrary to the public interest. Evidence of the impact of the requested competitive classification upon the public interest is not peculiarly within the knowledge or control of the Staff or Public Counsel. Therefore, SBC Missouri has the burden of proof.

Argument

30-Day Track Criteria

The Staff reviewed SBC Missouri's 60-day request under the 30-day track criteria in addition to reviewing it under the 60-day track criteria. The Staff's review under the 30-day track criteria confirmed that an unaffiliated commercial mobile service provider is providing service in each of the following exchanges. Also, an unaffiliated wireline company is providing local voice service through its own switch, or loops, or both, to the specified customer class in the following exchanges.

Residential: Joplin and Sikeston

Business: Chaffee, Linn, Montgomery City, Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Farley, Marshall, Mexico, Moberly, St. Clair, and Union

(Van Eschen Amended Direct Testimony, Exh. 5, p. 13; Van Eschen Rebuttal Testimony, Exh. 6, p. 10; Unruh Rebuttal Testimony, Exh. 3, p. 11; Van Eschen, Tr. 147, 257)

The Staff recommends that the Commission, using the 30-day track criteria, grant competitive classification to residential or business services, respectively, in these exchanges. The Staff believes that the Legislature has already determined that the grant of competitive classification based on the 30-day track criteria is not contrary to the public interest. (Van Eschen, Tr. 150, 264-66)

60-Day Track Criteria

SBC Missouri's testimony under the 60-day track presents no evidence that its request is "based on competition." SBC's testimony merely counts other entities providing communication services in a given exchange. (Unruh Direct Testimony, Exh. 1). Similarly, SBC Missouri failed and refused to present evidence on whether its requested competitive classification under the 60-day track is contrary to the public interest.

The only evidence addressing whether competitive classification under the 60-day track is contrary to the public interest was presented by the Staff. The Staff's testimony was that competitive classification of additional exchanges, when applying the 60-day track criteria, is contrary to the public interest at this time. (Van Eschen Amended Direct Testimony, Exh. 5, pp. 20-29).

First, because of their higher cost and lower service quality, wireless service and VOIP service are not reasonable substitutes for SBC Missouri's basic local service. (Exh. 5, pp. 23-25; Van Eschen, Tr. 251-52) Currently, only a relatively small fraction of customers are solely using wireless service or VOIP service. (Van Eschen Amended Direct Testimony, Exh. 5, pp. 24-25). Second, providers using SBC Missouri's facilities on either a UNE-P basis or through a commercial agreement do not provide SBC Missouri with significant incentive to improve its facilities. (Exh. 5, pp. 25-26; Van Eschen, Tr. 252) SBC also acknowledges that SBC can receive more revenue for providing wholesale services to a customer rather than continuing to provide retail services to that same customer. (Unruh, Tr.50) Therefore, the ability of providers solely using SBC's facilities on either a UNE-P basis or through a commercial agreement to hold SBC's prices in check is questionable. (Van Eschen Rebuttal Testimony, Exh. 6, p. 7).

Conclusion

WHEREFORE, the Staff requests the Commission, using the 30-day track criteria, to grant competitive classification to residential or business services in the exchanges as listed above. The Staff requests the Commission, using the 60-day track criteria, to deny competitive classification to any other exchanges. The Staff further recommends that the Commission reject SBC Missouri's tariff filing and authorize it to submit a new tariff filing that complies with the Commission's order.

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 19th day of October 2005.

/s/ William K. Haas

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