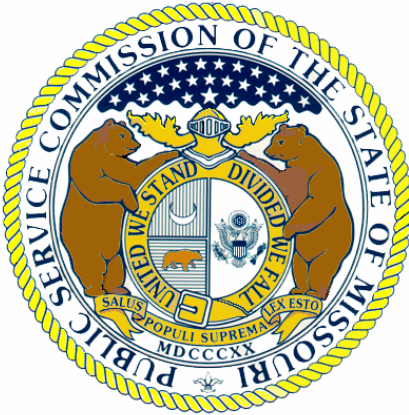


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



In the Matter of the Request of Southwestern Bell)
Telephone, L.P., d/b/a SBC Missouri, for Competitive) **Case No. TO-2006-0093**
Classification Pursuant to Section 392.245.6,) Tariff File No. YI-2006-0144
RSMo (2005) – 30-day Petition.)

REPORT AND ORDER

Issue Date: September 26, 2005

Effective Date: September 29, 2005

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OF THE STATE OF MISSOURI

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Telephone, L.P., d/b/a SBC Missouri, for Competitive)	<u>Case No. TO-2006-0093</u>
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Appearances

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Michael F. Dandino, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

William K. Haas, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Vicky Ruth, Senior Regulatory Law Judge.**

REPORT AND ORDER

Syllabus: In this Report and Order, the Commission grants in part and denies in part the request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for competitive classification, pursuant to Section 392.245.5, for business and residential services, other than exchange access service, in certain exchanges. More specifically, the Commission grants SBC Missouri competitive classification for business services for 45 of the 61 exchanges requested.¹ The Commission also grants SBC Missouri competitive classification for residential services for 26 of the 29 exchanges requested.² In addition, the Commission rejects the company's proposed tariffs, but authorizes it to file tariffs in compliance with this order. Finally, the Commission transfers, to Case No. TO-2006-0102, the consideration of SBC Missouri's request for competitive classification for business services in 16 exchanges³ and for residential services in three exchanges.⁴

Procedural History and Pending Motion

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 (2005). In its Petition, SBC Missouri requested that the Commission, within 30 days, classify the business services in 51 specified exchanges, and the residential services in 28 specified exchanges, as competitive. SBC Missouri also requested that within 60 days, the Commission classify the business services in 26 specified exchanges, and the residential

¹ See ordered paragraph 3.

² See ordered paragraph 4.

³ See ordered paragraph 5.

⁴ See ordered paragraph 6.

services in 49 specified exchanges, as competitive. In addition, SBC Missouri requested that the Commission grant it competitive classification for any exchanges where the Commission's investigation identified that competitive classification should be granted. During the course of the proceeding, SBC Missouri withdrew some exchanges and added others to its request for competitive classification. Consequently, SBC Missouri now requests that the Commission grant it competitive classification for business services in 61 exchanges for business services and in 29 exchanges for residential services.⁵

Subsection 392.245.5, RSMo, provides for an expedited two-track procedure when a price-cap regulated incumbent local exchange company seeks competitive classification for its services within one or more exchanges. The two procedures are designed as a 30-day track and a 60-day track. By notice issued September 2, 2005, the Commission informed the parties that this case, TO-2006-0093, would address the portions of the petition regarding the 30-day track. By a separate order issued the same day, the Commission opened a new case, TO-2006-0102, to address the portions of the petition regarding the 60-day track.

On September 2, 2006, the Commission ordered that notice of SBC Missouri's application be sent to all certificated competitive local exchange carriers and to all incumbent local exchange carriers in the State of Missouri. At the same time, the Commission set an intervention deadline; ordered the Commission's Staff to file its recommendation; set a deadline for any other party to file objections regarding the petition, set a procedural schedule; and adopted a Protective Order. No party filed an application to intervene.

⁵ Exhs. 2 and 3 (Exchange Charts).

On September 6, 2005, Public Counsel filed a motion to declassify certain exhibits from SBC Missouri's Petition that were designated as Highly Confidential and requested that its motion be handled on an expedited basis. On September 12, 2005, SBC Missouri filed its Response to Public Counsel's Motion. The Commission, on September 13, 2005, issued its Order granting Public Counsel's request and declassifying Exhibits A-1(HC) and A-2(HC) from SBC Missouri's Petition.

Also on September 6, 2005, Public Counsel filed a Request for Public Hearing, which the Commission later denied.

On September 12, 2005 Staff filed its recommendation, along with the Direct Testimony of John Van Eschen. Public Counsel filed comments on SBC Missouri's application on September 12, 2005. SBC Missouri filed the Direct Testimony of Craig A. Unruh on September 13, 2005. SBC Missouri and Staff filed Pretrial Briefs and Proposed Findings of Fact and Conclusions of Law on September 14, 2005. On September 16, 2005, the Commission conducted an evidentiary hearing. SBC Missouri, Staff, and Public Counsel were represented by counsel at the hearing. The Commission heard testimony from SBC Missouri's witness, Craig Unruh, and Staff's witnesses, John Van Eschen and Natelle Dietrich.

On September 19, 2005, the Commission issued an order directing its Staff and certain non-parties to expeditiously file additional information. Sprint Communications Company, L.P., NuVox Communications of Missouri, Inc., Big River Telephone Company, LLC, and Staff each filed responses on September 20, 2005. SBC Missouri filed its reply on September 21, 2005.

On September 23, 2005, Staff filed a Motion to Waive Rule and Petition to Reopen the Record and Supplemental Direct of John Van Eschen. On the same date, the Commission issued an order directing that responses be filed no later than 10:00 a.m. on September 26, 2005. SBC Missouri timely filed its response, indicating that it has no objection to the Commission granting Staff's Motion. The Commission has reviewed Staff's request, along with SBC Missouri's response, and finds that good cause exists to waive rule 4 CSR 240-2.110(8). The Commission will therefore allow the record to be reopened for the purpose of accepting the Supplemental Direct Testimony of John Van Eschen, which will be designated as Exhibit 9.

Discussion

On July 14, 2005, Senate Bill No. 237⁶ was signed into law and became effective on August 28, 2005. Senate Bill No. 237 (S.B. 237) changes the process under the price cap statute⁷ for determining whether the business and residential services of a price cap regulated incumbent local exchange company (ILEC) should be classified as competitive in an exchange. Before S.B. 237, the Commission was required to determine whether or not "effective competition" existed for the requested services in the designated exchanges. Under this "effective competition" standard, the Commission considered, among other things, the extent of competition in the exchange, whether pricing was reasonably comparable, and whether competitors were offering functionally equivalent or similar services.

⁶ S.B. 237, 93rd Gen. Assem., 1st Reg. Sess. (Mo 2005). (The portions of the law relevant to this case will be codified at Section 392.245.5, RSMo 2005.

⁷ Section 392.245, RSMo 2000.

Under S.B. 237, the focus is solely on the number of carriers providing “basic local telecommunications service” within an exchange. The Commission must classify as competitive the ILEC’s services (business, residential, or both) as competitive in any exchange in which at least two other carriers are also providing “basic local telecommunications service” within an exchange.⁸

For the purpose of the 30-day investigation, one commercial mobile radio service (“CMRS” or “wireless”) provider is to be considered an entity providing “basic local telecommunications services”⁹ in an exchange. The statute also requires the Commission to consider as a “basic local telecommunications service provider” any entity providing “local voice”¹⁰ service “in whole or in part” over facilities in which it or one of its affiliates has an ownership interest.¹¹

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

⁸ Section 392.245.5, RSMo (2005).

⁹ Section 392.245.5(1), RSMo (2005) (however, only one such non-affiliated provider will be counted as providing basic local telecommunications service within an exchange).

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

Southwestern Bell Telephone, L.P., is a Texas limited partnership, with its principal Missouri office at One SBC Center, Room 3520, St. Louis, Missouri 63101.¹² Southwestern Bell Telephone, L.P., is authorized to do business in Missouri, and its fictitious name "SBC Missouri" is duly registered with the Missouri Secretary of State.¹³ SBC Missouri is a "local exchange telecommunications company" and a "public utility," and is duly authorized to provide "telecommunications service" within the state of Missouri as each of those phrases are defined in Section 386.020, RSMo 2000.¹⁴

SBC Missouri is a large incumbent local exchange carrier which became subject to price cap regulation under Section 392.245 on September 26, 1997.¹⁵

On August 30, 2005, SBC Missouri filed its Petition for Competitive Classification pursuant to Section 392.245.5, RSMo. In its Petition, SBC Missouri requested that the Commission, within 30 days, classify as competitive the business services in 51 specified SBC Missouri exchanges, and the residential services in 28 specified SBC Missouri exchanges. SBC Missouri also requested that if, during the 30-day investigation, the Commission rejects the company's request for competitive classification for business or residential service in any of the SBC Missouri exchanges in which such competitive classification is requested, that the Commission include those services and exchanges in its 60-day investigation and grant competitive classification in that proceeding. In addition, SBC Missouri requested that the Commission grant it competitive classification for business

¹¹ Section 392.245.5(2) RSMo (2005).

¹² SBC Missouri's Petition, para. 10.

¹³ SBC Missouri's Petition, para. 10, and see Case No. IN-2003-0247.

¹⁴ SBC Missouri's Petition, para. 10.

¹⁵ SBC Missouri's Petition, para. 11, and see Case No. TO-97-397

or residential services in any additional exchanges that Staff determines meet the statutory criteria for competitive classification.

In support of its request, SBC Missouri filed its verified application on August 30, 2005, including maps identifying the exchanges in which the company requests competitive classification.

SBC Missouri's Executive Director-Regulatory, Craig A. Unruh, filed Direct Testimony on September 13, 2005, further supporting SBC Missouri's Request for Competitive Classification. Mr. Unruh also provided supplemental information by means of affidavits filed on September 21, 2005.

Staff filed its recommendation on September 12, 2005, along with the Direct Testimony of John Van Eschen, the Manager of the Telecommunications Department. For many of the exchanges identified in SBC Missouri's Petition, Staff provided additional verification that the statutory criteria has been met for granting competitive classification for business or residential service (or both) in the requested exchanges. Staff's evidence primarily consists of a review of confidential CLEC annual reports filed with the Commission and telephone calls to some CLECs to discuss their reports.

Public Counsel did not file any testimony, nor did it provide any witnesses at the hearing. Public Counsel asserts that SBC Missouri should be held to "strict proof" in its claim for competitive classification.¹⁶ Although Public Counsel acknowledges that the price cap revisions for the 30-day competitive petition do not require a determination of the number of customers or of the market strength of the competitors cited by SBC Missouri, Public Counsel suggests that the Commission nonetheless require disclosure of the

¹⁶ Office of the Public Counsel's Objections and Recommendations, filed September 12, 2005.

number of customers served by the qualifying competitors so that the public and the Commission understand the extent to which competition exists under the 30-day petition.

I. Business Services

Pursuant to Section 392.245.5, SBC Missouri requests competitive classification for business services in the following 61 exchanges:

Antonia, Archie, Ash Grove, Billings, Bonne Terre, Boonville, Camdenton, Cape Girardeau, Carthage, Cedar Hill, Chaffee, Chesterfield, Clever, Eldon, Eureka, Excelsior Springs, Farley, Fenton, Farmington, Festus-Crystal City, Flat River, Fredericktown, Fulton, Grain Valley, Gravois Mills, Greenwood, Harvester, Herculaneum-Pevely, High Ridge, Imperial, Jackson, Joplin, Kansas City, Lake Ozark-Osage Beach, Linn, Manchester, Marble Hill, Marshall, Maxville, Mexico, Moberly, Monett, Montgomery City, Nevada, Pacific, Perryville, Pond, Poplar Bluff, Scott City, Sedalia, Sikeston, Smithville, Springfield, St. Charles, St. Clair, St. Genevieve, St. Joseph, St. Louis, Union, Valley Park, and Washington.

A. The “Additional” Exchanges

The Commission notes that SBC Missouri’s petition did not request competitive classification for six of these 61 exchanges under the 30-day or the 60-day track. These six exchanges are Chaffee, Linn, Moberly, Montgomery City, St. Clair, and Union. The following nine exchanges were listed in the 60-day request but not in the 30-day request: Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Farley, Marshall, and Mexico. SBC Missouri added these 15 exchanges to its request after John Van Eschen, of the Commission’s Staff, filed his testimony on September 12, 2005. In that testimony, Mr. Van Eschen indicates that it appears that these 15 exchanges qualify for competitive status under the 30-day track. Staff, however, recommends that the Commission not grant competitive classification under the 30-day track in these 15 exchanges because Staff believes that before competitive status is granted, an incumbent local exchange company

“should be required to identify the specific exchanges . . . and provide some sort of supporting evidence.”¹⁷

SBC Missouri did not request, by exchange name, that it be granted competitive classification under the 30-day track in these 15 exchanges until it filed its pretrial brief on September 13, 2005. Thus, interested parties could not have learned that SBC Missouri might request and receive competitive classification in this case in the 15 exchanges until nearly one-half way through the 30-day process. As will be discussed in the conclusions of law section of this order, the Commission finds that fundamental fairness and due process require that SBC Missouri specifically identify the exchanges in its original petition so that interested parties have a meaningful opportunity to intervene and respond to the application. Therefore, the Commission will not consider SBC Missouri’s request for competitive classification for business services for the 15 exchanges that are not listed in the 30-day portion of SBC Missouri’s Petition. The Commission will, however, transfer these exchanges to Case No. TO-2006-0102, where they will be evaluated pursuant to the 60-day track of Section 392.245.5. If SBC Missouri prefers, it may expeditiously file a notice indicating that it prefers to file a new petition for these 15 exchanges pursuant to the 30-day procedure in Section 392.245.5.

B. The Exchanges Agreed Upon by SBC Missouri & Staff

SBC Missouri and Staff agree that SBC Missouri should be granted competitive classification for business services in 43 of the 61 requested exchanges.¹⁸ These 43 exchanges are as follows:

¹⁷ Exhibit 6, Amended Direct Testimony of John Van Eschen, p. 13.

¹⁸ Exh. 3 (Exchange Chart); Exh. 6, Amended Direct Testimony of John Van Eschen; and Exh. 9, Supplemental Direct Testimony of John Van Eschen.

Antonia, Camdenton, Cape Girardeau, Chesterfield, Clever, Eldon, Eureka, Fenton, Farmington, Festus-Crystal City, Flat River, Fredericktown, Fulton, Grain Valley, Gravois Mills, Greenwood, Harvester, Herculaneum-Pevely, High Ridge, Imperial, Jackson, Joplin, Kansas City, Lake Ozark-Osage Beach, Manchester, Maxville, Monett, Nevada, Pacific, Perryville, Pond, Poplar Bluff, Scott City, Sedalia, Sikeston, Smithville, Springfield, St. Charles, St. Genevieve, St. Joseph, St. Louis, Valley Park, and Washington.

In these 43 exchanges, SBC Missouri and Staff provided evidence that:

- There is at least one non-affiliated CLEC providing “local voice” service in whole or in part over facilities in which it or on 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); and
- There is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1).¹⁹

SBC Missouri indicates that, for the first competitor (the CLEC) listed on its charts,²⁰ the sources of its data include E-911 records, (internal records) of migrations from UNE-P to CLEC facilities, Annual Reports (public versions) filed with the Commission, and directory listings.²¹ SBC Missouri also indicates that for the wireless competitors, the source of its data was the web site “LetsTalk.com.”²² Staff’s data is primarily based upon the Commission’s Annual Reports, including those that are designated as Highly Confidential, and Staff’s telephone calls to some CLECs to discuss these reports.²³

¹⁹ Petition and its Exhs. A-1 and A-2; Exh. 1, Direct Testimony of Craig Unruh; Exh. 3 (Exchange Chart); and Exhibit 6, Amended Direct Testimony of John Van Eschen.

²⁰ Exh. 3 (Exchange Chart).

²¹ Exh. 1, Direct Testimony of Craig Unruh; and Exh. 3 (Exchange Chart).

²² Id.

²³ Exh. 6, Amended Direct Testimony of John Van Eschen.

No party presented any evidence refuting the claims of SBC Missouri and Staff that these 43 exchanges have the requisite number of carriers providing basic local telecommunications services for business services.

Based upon the evidence presented by SBC Missouri and Staff, the Commission finds that in each of these 43 exchanges, there is (1) at least one non-affiliated CLEC providing local voice service to business customers, and (2) at least one non-affiliated wireless carrier providing service to business customers.

C. Exchanges In Dispute By SBC Missouri and Staff

As noted above, SBC Missouri now requests that the Commission grant it competitive classification for business services in 61 exchanges. The Commission has addressed 58 of those exchanges – the 15 exchanges that were not specifically identified in SBC Missouri’s original 30-day request plus the 43 exchanges that Staff and SBC agree should be granted competitive classification. The three exchanges remaining are Bonne Terre, Excelsior Springs, and Marble Hill.

1. Bonne Terre

SBC Missouri alleges that it should be granted competitive classification for business services in the exchange of Bonne Terre. SBC Missouri identifies Sprint/Nextel as the non-affiliated wireless, or CMRS, company providing local voice service to business customers.²⁴ According to SBC Missouri, the source of its data for the wireless competitor is the web site “LetsTalk.com.” Staff agrees that the wireless company, Sprint/Nextel, is a wireless company providing local voice service to business customers in the exchange.

²⁴ Exh. 3 (Exchange Chart).

SBC Missouri identifies Big River Telecommunications as a competitor providing local voice service to business customers in the exchange of Bonne Terre.²⁵ SBC Missouri indicates that its position is based upon its own records of migrations from UNE-P to CLEC facilities.²⁶ Staff, however, contends that Big River should not count as a competitor because the company is not providing business local voice service on a full facility basis or UNE-L basis in this exchange.²⁷ Staff claims that according to a Big River Telecommunications official, Big River Telecommunications is providing business local voice service in these exchanges on a UNE-P basis.²⁸

Pursuant to a Commission order, Big River Telecommunications filed a verified pleading on September 20, 2005, indicating that it is providing basic local telecommunications services in the Bonne Terre exchange. Big River Telecommunications' filing does not indicate whether the company is providing service to business or residential customers, or both.

SBC Missouri has proposed, in certain exchanges such as Bonne Terre, to base its claim for competitive status on the existence of competitors who provide service through an unbundled network element platform (UNE-P). Service provided to customers through UNE-P is identical to the service provided through resale. In *USTA v. FCC*, 25 S. Ct 313 (2004), the Supreme Court determined that the Federal Communications Commission's (FCC's) analysis that the impairment to competitors necessary to a finding that a network element must be unbundled had reached too far. The FCC had previously required the

²⁵ Id.

²⁶ Id.

²⁷ Exh. 6, Amended Direct Testimony of John Van Eschen, p. 15, lines 12-15.

²⁸ Exh. 9, Supplemental Direct Testimony of John Van Eschen.

incumbent carriers to unbundle the entirety of their networks, because without access to the network at element pricing, competitors were economically impaired from market entry.

In finding economic impairment to be overbroad, the Court noted:

. . . The touchstone of the Commission's impairment analysis is whether the enumerated operational and entry barriers "make entry into a market uneconomic." Uneconomic by whom? . . . By a hypothetical CLEC that used "the most efficient telecommunications technology currently available," the standard that is built into TELRIC? . . .

* * *

. . . In the name of "universal service," state regulators have commonly employed cross-subsidies, tilting rate ceilings so that revenues from business and urban customers subsidize residential and rural ones. On remand from our decision in *USTA I*, the Commission decided to consider regulated below-cost retail rates as a factor that may "impair" CLECs in competing for mass market customers. . . .

The Commission's brief treatment of the issue makes no attempt to connect this "barrier" to entry either with structural features that would make competitive supply wasteful or with any other purposes of the Act (other than, implicitly, the purpose of generating "competition," no matter how synthetic). . . . [W]here TELRIC rates are so low that unbundling does elicit competitive entry, . . . artificially low rates [are] funded by [cross-subsidies from] other areas.

. . . [H]istoric accounting costs . . . may not track true accounting cost. But that is no justification for the Commission's refusal . . . to adopt . . . a policy that . . . advances the goals of the Act. [Italics and cites omitted.]

In response to the *USTA II* decision discussed above, the FCC issued its Triennial Review Remand Order (TRRO), in which it significantly limited the economic impairment test and established a phase-out of UNE-P. In doing so, it noted:

This Order imposes unbundling obligations in a more targeted manner where requesting carriers have undertaken their own facilities-based investments and will be using UNEs in conjunction with self-provisioned facilities. TRRO, FCC 04-240, at ¶ 3.

This Commission finds that the FCC's new approach in the TRRO is harmonious with Section 392.245.5(2), which requires a competitor to be providing service "in whole or in part" over its own facilities. Therefore, this Commission will not rely on the presence of any UNE-P competitor not currently in the process of converting to partial or full facilities-based in accordance with the provisions of the TRRO and recent decisions of this Commission, to meet the requirements of Section 392.245.5(2).

As SBC Missouri provided evidence that Big River Telecommunications is migrating from UNE-P to CLEC facilities, the Commission finds that Big River Telecommunications does qualify under Section 392.245.5, RSMo, as a competitor providing local voice service. Thus, SBC Missouri has provided competent and substantial evidence that for business services, in the Bonne Terre exchange there is at least one non-affiliated CLEC providing local voice service to business customers, and at least one non-affiliated wireless carrier providing service to business customers.

2. Excelsior Springs

SBC Missouri requests competitive classification for business services in the Excelsior Springs exchange. The company claims that one competitor is NuVox Communications of Missouri, Inc.; the source of SBC Missouri's data is E-911 listings.²⁹ SBC Missouri contends that its second competitor is the wireless company Verizon, which it based on information it gathered from the web site "LetsTalk.com."³⁰

Staff concurs with SBC Missouri that Verizon is providing local voice service in this exchange. Staff, however, objects to SBC Missouri's use of NuVox as one of its competitors. Staff states that it has been unable to confirm that a qualifying competitor is

²⁹ Exh. 3 (Exchange Chart).

providing business local voice service on a full facility basis or UNE-L basis in the Excelsior Springs exchange.³¹ Moreover, NuVox has informed Staff that NuVox does not believe that it has any customers in the Excelsior Springs exchange.³²

In addition, the supplemental Direct Testimony of Staff's witness John Van Eschen indicates that:

There appears to be a discrepancy as to whether the NuVox customer has a physical location in the Excelsior Springs exchange. SBC officials claim the customer has a premise in Excelsior Springs based on the directory listing data base which shows the Excelsior Springs telephone numbers in question are associated with a location in the Excelsior Springs exchange. In contrast, the E-911 data base shows the five telephone numbers are associated with a location in the Kansas City exchange. According to NuVox officials, NuVox is providing foreign exchange service to a customer with a location in the Kansas City exchange but the customer has been given five Excelsior Springs telephone numbers. Staff has been unable to resolve the discrepancy; however, it is probably reasonable to expect greater care is used to ensure location accuracy in the 911 data base.

Mr. Van Eschen also indicates that, in Staff's opinion, "foreign exchange service or a service where the customer is physically not residing in the exchange raises questions as to the appropriateness of granting competitive status in the exchange."³³ According to Staff, "such arrangements are not typically associated with competition within the designated exchange where dial tone is being provided, in this case Excelsior Springs."³⁴

³⁰ Id.

³¹ Exh. 6, Amended Direct Testimony of John Van Eschen, p. 15, lines 16-23.

³² Exh. 6, Amended Direct Testimony of John Van Eschen, p. 15, lines 20-23.

³³ Exh. 9, Supplemental Direct Testimony of John Van Eschen, page 8.

³⁴ Exh. 9, Supplemental Direct Testimony of John Van Eschen.

Staff recommends that the Commission not grant competitive classification of business services for the Excelsior Springs exchange.³⁵

The Commission finds that the evidence shows that Verizon, a wireless competitor, is providing local voice service in the Excelsior Springs exchange. However, SBC Missouri's second competitor, NuVox, does not withstand scrutiny. The Commission finds that Staff has shown that there is a discrepancy as to whether the NuVox customer has a physical location in Excelsior Springs. Consequently, there are significant questions as to whether NuVox is providing local voice service since the customer is not physically residing in the Excelsior Springs exchange. The Commission finds that SBC Missouri has not provided substantial and competent evidence that NuVox qualifies as a provider of local voice service.

3. Marble Hill

SBC Missouri states that, for the Marble Hill exchange, the wireless company Verizon qualifies as a competitor based on the web site "LetsTalk.com."³⁶ Staff agrees that the wireless company, Verizon, is providing local voice service in the Marble Hill exchange. The Commission finds that the parties have provided competent and substantial evidence that Verizon is providing local voice service in the Marble Hill exchange.

SBC Missouri names Big River Telecommunications as the other competitor in the Marble Hill exchange, based upon SBC Missouri's records of migrations from UNE-P to CLEC facilities.³⁷ Staff argues that the Commission should not count Big River Telecom-

³⁵ Exh. 9, Supplemental Direct Testimony of John Van Eschen, page 8.

³⁶ Exh. 3 (Exchange Chart).

³⁷ Exh. 3 (Exchange Chart).

munications as a competitor in the Marble Hills exchange because Big River was unable to confirm that it was utilizing its own switching facilities to service customers.³⁸

Big River Telecommunications filed a verified pleading on September 20, 2005, indicating that it does provide basic local telecommunications services in Marble Hill. The pleading does not, however, indicate whether the company uses UNE-P, UNE-L, or full facilities to provide such service. In addition, the pleading does not indicate whether Big River Telecommunication has business customers, residential customers, or both in this exchange.

As discussed in the section on the Bonne Terre exchange (business services), the Commission finds that it is inappropriate to rely on the presence of a UNE-P competitor that is not currently in the process of converting to UNE-L (or facilities-based) in accordance with the provisions of the TRRO, in order to meet the requirements of Section 392.245.5(2). SBC Missouri has provided evidence that Big River Telecommunications is migrating from UNE-P to a partial or full facilities-based system. Therefore, the Commission finds that SBC Missouri has shown that there are two qualifying competitors in this exchange.

II. Residential Services

SBC Missouri requests competitive classification for business services in the following 29 exchanges:

Advance, Bell City, Chesterfield, Delta, Eureka, Farmington, Fenton, Fredericktown, Harvester, Joplin, Kansas City, Manchester, Monett, Nevada, Pacific, Perryville, Pochontas-New Wells, Pond, San Antonio, Sikeston, Smithville, Springfield, St. Charles, St. Genevieve, St. Joseph, St. Louis, Valley Park, Washington, and Wyatt.

³⁸ Transcript, p. 134-135.

A. The “Additional” Exchange

Although SBC Missouri named the Joplin exchange in its 60-day request, the company did not name the Joplin exchange in its 30-day request.³⁹ SBC Missouri added this exchange to its request once John Van Eschen, of the Commission’s Staff, filed his testimony on September 12, 2005. In that testimony, Mr. Van Eschen indicates that it appears that the Joplin exchange qualifies for competitive status under the 30-day track for residential services. Nonetheless, Staff recommends that the Commission not grant competitive classification for residential services in the Joplin exchange because Staff believes that an ILEC “should be required to identify the specific exchanges . . . and provide some sort of supporting evidence” before competitive classification is granted.⁴⁰

The Commission finds that would be inappropriate to grant competitive classification in an exchange that was not named in the petition. The Commission finds that fundamental fairness and due process require that SBC Missouri specifically identify the exchanges in its original petition so that interested parties have a meaningful opportunity to intervene and respond to the application. Accordingly, the request for competitive classification of residential services in the Joplin exchange will not be considered in this case, but it will be addressed in Case No. TO-2006-0102, the 60-day case, unless SBC Missouri files a notice, as discussed previously, indicating that it opposes such transfer.

³⁹ Petition, Exhs. A-4 and B-4; Exhibit 5, Direct Testimony of John Van Eschen, p. 13. See also, Exhibit 6, Amended Direct Testimony of John Van Eschen, p. 13.

⁴⁰ Exh. 6, Amended Direct Testimony of John Van Eschen, p. 13.

B. Exchanges Agreed Upon by SBC Missouri & Staff

In 25 of the 61 exchanges in which SBC Missouri requests competitive classification for business services, the company and Staff agree that SBC should be granted competitive classification. These 25 exchanges are as follows:

Advance, Bell City, Chesterfield, Delta, Eureka, Fenton, Fredericktown, Harvester, Kansas City, Manchester, Monett, Nevada, Pacific, Perryville, Pocohontas-New Wells, Pond, Smithville, Springfield, St. Charles, St. Genevieve, St. Joseph, St. Louis, Valley Park, Washington, and Wyatt.

In these 25 exchanges, SBC Missouri and Staff provided evidence that:

- There is at least one non-affiliated CLEC providing “local voice” service in whole or in part over facilities in which it or on 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); and
- There is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1).⁴¹

SBC Missouri indicates that, for the first competitor listed on its charts⁴², the sources of its data include E-911 records, (internal records) of migrations from UNE-P to CLEC facilities, Annual Reports (public versions) filed with the Commission, and directory listings.⁴³ SBC Missouri also indicates that, for the wireless competitors, the source of its data was the web site “LetsTalk.com.”⁴⁴ Staff’s data is primarily based upon the

⁴¹ Petition and its Exhs. A-1 and A-2; Exh. 1, Direct Testimony of Craig Unruh; Exh. 3; and Exhibit 6, Amended Direct Testimony of John Van Eschen.

⁴² Exh. 3 (Exchange Chart).

⁴³ Exh. 1, Direct Testimony of Craig Unruh; and Exh. 3 (Exchange Chart).

⁴⁴ Id.

Commission's Annual Reports, including those that are designated as Highly Confidential, and Staff's telephone calls to some CLECs to discuss these reports.⁴⁵

No party presented any evidence refuting the claims of SBC Missouri and Staff that these 25 exchanges have the requisite number of carriers providing basic local telecommunications services.

Based upon the evidence presented by SBC Missouri and Staff, the Commission finds that in each of these 25 exchanges, there is: (1) at least one non-affiliated CLEC providing local voice service to residential customers, and (2) at least one non-affiliated wireless carrier providing service to residential customers.

C. Exchanges In Dispute By SBC Missouri and Staff

As noted above, SBC Missouri now requests that the Commission grant it competitive classification for residential services in 29 exchanges. The Commission has addressed 26 of those exchanges. Those 26 exchanges consist of the 25 exchanges that Staff and SBC agreed upon plus the one exchange that was not specifically identified in SBC Missouri's original 30-day request. The remaining three exchanges are Farmington, San Antonio, and Sikeston.

1. Farmington

SBC Missouri alleges that it should be granted competitive classification for residential services in the Farmington exchange, where it identifies Sprint/Nextel as the wireless company qualifying as its second competitor.⁴⁶ The source of SBC Missouri's evidence is the web site LetsTalk.com. Staff agrees that Sprint/Nextel is providing local

⁴⁵ Exh. 6, Amended Direct Testimony of John Van Eschen.

⁴⁶ Exh. 3 (Exchange Chart).

voice service in the Farmington exchange. The Commission finds that the wireless company Sprint/Nextel is providing local voice service in Farmington.

SBC Missouri claims that its second competitor is Big River Telecommunications; the basis of SBC Missouri's evidence here is its records regarding migrations from UNE-P to CLEC facilities. Staff contends that a qualifying competitor is not providing residential local voice service on a full facility basis or UNE-L basis in the Farmington exchange.⁴⁷ Staff, however, considers "line served on a full facility basis or UNE-L basis as the minimum threshold to meet for competitive status in a 30-day proceeding. Full facility based lines involve lines owned by the company."⁴⁸ Staff indicates that it selected this minimum threshold because it reflects a situation where the company, or its affiliate, owns certain facilities in the provisioning of service.⁴⁹

As discussed in the section on the Bonne Terre exchange (under Business Services), the Commission finds that it is inappropriate to rely on the presence of a UNE-P competitor that is not currently in the process of converting to partial or full facilities-based in accordance with the provisions of the TRRO, in order to meet the requirements of Section 392.245.5(2). SBC Missouri has provided evidence that Big River Telecommunications is migrating from UNE-P to a partial or full facilities-based system. Therefore, the Commission finds that SBC Missouri has shown that there are two qualifying competitors in this exchange.

⁴⁷ Exh. 6, Amended Direct Testimony of John Van Eschen, p. 15.

⁴⁸ Exh. 6, Amended Direct Testimony of John Van Eschen, p. 7.

⁴⁹ Exh. 6, Amended Direct Testimony of John Van Eschen, pp. 7-8.

2. San Antonio

For the San Antonio exchange, SBC Missouri indicates that the second competitor is the wireless company, Verizon.⁵⁰ According to SBC Missouri, the source of its data for the wireless competitors is the web site “LetsTalk.com.”⁵¹ Staff agrees that Verizon is providing local voice service in the San Antonio exchange. The Commission also finds that the wireless company Verizon is providing local voice service in the exchange of San Antonio.

In the San Antonio exchange, SBC Missouri identifies Sprint as its competitor, and indicates that its position is based upon E-911 listings.⁵² Staff, however, indicates that it has been unable to verify from independent evidence that a qualifying UNE-L or facilities-based provider is providing local voice service within the San Antonio exchange.

As previously noted, the Commission finds that it is inappropriate to rely on the presence of a UNE-P competitor that is not currently in the process of converting to UNE-L (or facilities-based) in accordance with the provisions of the TRRO, in order to meet the requirements of Section 392.245.5(2). No party offered evidence that Big River Telecommunications is a qualified UNE-L or facilities-based provider. The Commission finds that SBC Missouri has not provided sufficient evidence supporting the presence of a second qualifying competitor in the San Antonio exchange.

3. Sikeston

SBC Missouri lists Verizon as its wireless competitor. Staff agrees that Verizon, a wireless company, is providing local voice service in the Sikeston exchange. The

⁵⁰ Exh. 3 (Exchange Chart).

⁵¹ Id.

Commission also finds that the wireless company Verizon is providing local voice service in the exchange of San Antonio.

SBC Missouri also identifies Big River Telecommunications as a competitor in the Sikeston exchange, based on directory listings.⁵³ Staff, however, indicates that it was unable to verify from independent evidence that a qualifying UNE-L or facilities-based provider is providing local voice service within this exchange.

As discussed in the section on the Bonne Terre exchange (under Business Services), the Commission finds that it is inappropriate to rely on the presence of a UNE-P competitor that is not currently in the process of converting to partial or full facilities-based in accordance with the provisions of the TRRO, in order to meet the requirements of Section 392.245.5(2). No party offered evidence that Big River Telecommunications is a qualified UNE-L or facilities-based provider. The Commission finds that SBC Missouri has not provided sufficient evidence supporting the presence of a second qualifying competitor in the Sikeston exchange.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Commission has jurisdiction over this matter pursuant to Section 392.245.5, RSMo. This statutory provision requires the Commission, within 30 days, to determine whether the requisite number of entities is providing basic local telecommunications services to business or residential customers, or both, in the requested exchange and to approve tariffs designating services as competitive if such a determination is made:

⁵² Id.

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.

For the purpose of competitive status, one CMRS provider can be considered an entity providing “basic local telecommunications services.”⁵⁴ The statute also requires the Commission to consider as a “basic local telecommunications service provider” any entity providing “local voice” service “in whole or in part” over facilities in which it or one of its affiliates has an ownership interest.⁵⁵

Senate Bill 237 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.”⁵⁶

The statute defines “telecommunications facilities” to include, among other items, “lines, conduits, ducts, poles, wires, cables, 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.”⁵⁷

⁵³ Id.

⁵⁴ Section 392.245.5(1), RSMo Supp. 2005.

⁵⁵ Section 386.020(52), RSMo (2005).

⁵⁶ Section 392.245.5(3), RSMo Supp. 2005.

⁵⁷ Section 386.020(52), RSMo Supp. 2005.

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.”⁵⁸ SBC Missouri asserts that there are the requisite numbers of entities providing basic local service to business or residential customers, or both, in an exchange. Therefore, SBC Missouri has the burden of proof.

The Commission also finds that due process and issues of fundamental fairness require that SBC Missouri name, in its petition, all exchanges in which it seeks competitive classification.

Subdivision (2) of Section 392.245.5 requires the wireline entity to provide local voice service in whole or in part “over” telecommunications facilities or other facilities in which it or one of its affiliates has an ownership interest. The American Heritage College Dictionary, Third Edition, provides the following applicable definition of “over”: “Through the medium of.” The Commission concludes that a wireline entity providing local voice service through either a full facilities basis or a UNE-L basis meets the standard. Where the wireline entity and its affiliates own neither the loops nor the switch, the wireline entity is not providing local voice service “over,” *i.e.*, through the medium of, facilities in which it or its affiliates have an ownership interest.

Applying the facts to the relevant law, the Commission concludes that the evidence satisfies the 30-day criteria in Section 392.245.5 in the following exchanges because the evidence shows that for each of these exchanges, there is (1) at least one

⁵⁸ *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).

non-affiliated entity providing “local voice” service in whole or in part over facilities in which it or one of its affiliate has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245(3), and (2) at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1):

Exchanges for Business Services: Antonia, Bonne Terre, Camdenton, Cape Girardeau, Chesterfield, Clever, Eldon, Eureka, Fenton, Farmington, Festus-Crystal City, Flat River, Fredericktown, Fulton, Grain Valley, Gravois Mills, Greenwood, Harvester, Herculanum-Pevely, High Ridge, Imperial, Jackson, Joplin, Kansas City, Lake Ozark-Osage Beach, Manchester, Marble Hill, Maxville, Moberly, Monett, Nevada, Pacific, Perryville, Pond, Poplar Bluff, Scott City, Sedalia, Sikeston, Smithville, Springfield, St. Charles, St. Genevieve, St. Joseph, St. Louis, Valley Park, and Washington; and

Exchanges for Residential Services: Advance, Bell City, Chesterfield, Delta, Eureka, Farmington, Fenton, Fredericktown, Harvester, Kansas City, Manchester, Monett, Nevada, Pacific, Perryville, Pochontas-New Wells, Pond, Smithville, Springfield, St. Charles, St. Genevieve, St. Joseph, St. Louis, Valley Park, Washington, and Wyatt.

IT IS THEREFORE ORDERED:

1. That Staff’s motion, filed September 23, 2005, to reopen the record and waive rule 4 CSR 240-2.110(8), is granted. The Supplemental Direct Testimony of John Van Eschen, filed on September 23, 2005, is received into the record as Exhibit 9.

2. That the application of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for competitive classification is granted in part and denied in part.

3. That Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, is granted competitive classification for business services for the following 45 exchanges:

Antonia, Bonne Terre, Camdenton, Cape Girardeau, Chesterfield, Clever, Eldon, Eureka, Fenton, Farmington, Festus-Crystal City, Flat River, Fredericktown, Fulton, Grain Valley, Gravois Mills, Greenwood, Harvester, Herculanum-Pevely, High Ridge, Imperial,

Jackson, Joplin, Kansas City, Lake Ozark-Osage Beach, Manchester, Marble Hill, Maxville, Moberly, Monett, Nevada, Pacific, Perryville, Pond, Poplar Bluff, Scott City, Sedalia, Sikeston, Smithville, Springfield, St. Charles, St. Genevieve, St. Joseph, St. Louis, Valley Park, and Washington.

4. That Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, is granted competitive classification for residential services for the following 26 exchanges:

Advance, Bell City, Chesterfield, Delta, Eureka, Farmington, Fenton, Fredericktown, Harvester, Kansas City, Manchester, Monett, Nevada, Pacific, Perryville, Pochontas-New Wells, Pond, Smithville, Springfield, St. Charles, St. Genevieve, St. Joseph, St. Louis, Valley Park, Washington, and Wyatt.

5. That the request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for competitive classification for business services is rejected for the following 16 exchanges: Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Chaffee, Excelsior Springs, Farley, Linn, Marshall, Mexico, Moberly, Montgomery City, St. Clair, and Union.

6. That the request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for competitive classification for residential services is rejected for the following 3 exchanges: Joplin, San Antonio, and Sikeston.

7. That the request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for competitive classification for business services in the exchanges listed in ordered paragraph 4 shall be considered in Case No. TO-2006-0102, unless SBC Missouri files, no later than 9:00 a.m. on September 28, 2005, a notice indicating that it prefers to file a new petition for these exchanges.

8. That the request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for competitive classification for residential services in the exchanges of listed in ordered paragraph 5 shall be considered in Case No. TO-2006-0102, unless SBC Missouri files, no

later than 9:00 a.m. on September 28, 2005, a notice indicating that it prefers to file a new petition for these exchanges.

9. That the proposed tariff sheets (Tariff File No. YI-2006-0144) are rejected.

10. That Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, is authorized to file proposed tariff sheets in conformance with this order.

11. That this Report and Order shall become effective on September 29, 2005.

12. That this case may be closed on September 30, 2005.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', is positioned above the printed name and title.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, and Appling, CC., concur;
Gaw and Clayton, CC., dissent, with separate
dissenting opinions to follow:
certify compliance with Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 26th day of September, 2005.