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6 TRANSCRIPT OF PROCEEDINGS
7 Hearing
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12 In the Matter of the Request of)
Southwestern Bell Telephone, L.P.,)
13 d/b/a SBC Missouri, for Competitive)
Classification Pursuant to) Case No. TO-2006-0102
14 Section 392.245.6, RSMo (2005) -)
60-Day Petition)

15

VICKY RUTH, Presiding,
16 SENIOR REGULATORY LAW JUDGE.

17 LINWARD "LIN" APPLING,
ROBERT M. CLAYTON,
18 COMMISSIONERS.

19

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1 P R O C E E D I N G S

2 JUDGE RUTH: Good morning. We are
3 reconvening the hearing in TO-2006-0102. We are going to
4 start this morning with the redirect of Ms. Meisenheimer,
5 then we may need to take a short break and allow the
6 Commissioners to come down, and we will recall at that
7 time John Van Eschen.

8 After Mr. Van Eschen is recalled, I'll give
9 the parties an opportunity for closing arguments if you
10 wish. However, I am going to suggest the possibility of
11 having some closing briefs also. So I may give you two
12 bites of the apple. But if you don't want to do closing
13 arguments and just want to follow up with a brief, we'll
14 discuss that, too. So you can be thinking about that.

15 One of the things I'm expecting in the
16 briefs, Mr. Bub, there was an argument yesterday you were
17 not able to pursue, a legal argument, and you can include
18 that in your brief.

19 And then the parties, the Commissioners
20 would like to see some more discussion of where the burden
21 of proof falls on both just the general evidence, and then
22 -- I mean by which CLECs are operating, that type of
23 thing, and more discussion on the phrase not contrary to
24 the public interest, where that makes the burden fall.

25 And Staff in particular, the Commission

1 wants you to respond to how SBC has used the Dycus case
2 that Staff referenced in 0093 and the Commission used in
3 its last Report and Order. If you have any questions,
4 we'll come back to this perhaps at the end of the hearing
5 and we can follow up on that.

6 Mr. Dandino, are you ready?

7 MR. DANDINO: Yes, ma'am.

8 JUDGE RUTH: Then I'll just remind you,
9 Ms. Meisenheimer, that you still are under oath. Thank
10 you.

11 BARBARA A. MEISENHEIMER testified as follows:

12 REDIRECT EXAMINATION BY MR. DANDINO:

13 Q. Good morning, Ms. Meisenheimer.

14 A. Good morning, Mr. Dandino.

15 Q. Mr. Bub had asked you a number of questions
16 about using the effective competition standard for
17 evaluating -- for the Commission to evaluate the public
18 interest test. Are you suggesting that this Commission
19 make a determination of effective competition?

20 A. No, I'm not.

21 Q. And are you asking that they use the --
22 what are you asking them to do with the standard of
23 effective competition?

24 A. Well, certainly some elements of the
25 definition of effective competition are relevant in

1 considering a determination in this case as to whether
2 Southwestern Bell should be granted competitive
3 classification in certain exchanges. Elements of
4 competition, elements of protection of the public interest
5 are very relevant, and I -- however, as I said, I did not
6 rely on the definition of effective competition. Instead,
7 I asked that the Commission look to 392.185 in the
8 statute, which describes what I believe from an economic
9 perspective are relevant ways to measure the public
10 interest in this case.

11 And I think that those elements, and
12 they're listed, promote universally available and widely
13 affordable telecommunications service, maintain and
14 advance the efficiency and availability of
15 telecommunications services, promote diversity in the
16 supply of telecommunications services and products
17 throughout the state of Missouri, ensure that customers
18 pay only reasonable charges for telecommunications
19 service, permit flexible regulation of competitive
20 telecommunications companies and competitive
21 telecommunications services, allow full and fair
22 competition to function as a substitute for regulation
23 when consistent with the protection of ratepayers and
24 otherwise consistent with the public interest, promote
25 parity of urban and rural telecommunications services,

1 promote economic, educational, health care and cultural
2 enhancements and protect consumer privacy.

3 I believe that these are the fundamental
4 elements that the Commission should rely upon when
5 evaluating SBC's request in this case. I think that they
6 are appropriate yardsticks for measuring to what extent
7 granting or not granting Southwestern Bell's request can
8 be evaluated in terms of protecting consumers, promoting
9 economic and social development, and in protecting the
10 public interest.

11 Q. Is there anything inconsistent with the
12 standards or the considerations the Commission should take
13 into effect in -- or that was to take into effect with
14 effective competition? Is any of those inconsistent with
15 the purposes and goals set out in 392.185 from an economic
16 or a public policy perspective?

17 A. From an economic or public policy
18 perspective, I don't believe they are. However, I don't
19 believe that of -- that the same degree of consideration
20 is necessarily called for in this proceeding. As I -- as
21 I said, with effective competition, I developed in it a
22 number of ways to measure effective competition, such as
23 the use of the HHI, and in this case I have not gone to
24 that. In this case, I have spent a great deal more time
25 in my testimony evaluating the quality of wireless service

1 throughout an exchange as in contrast to how I did when
2 the standard was specifically set out as effective
3 competition.

4 Q. As far as your survey of wireless companies
5 set out in your schedule, are you advocating that that
6 is -- that the Commission should -- strike that.

7 What was the purpose of your schedules
8 concerning the wireless companies?

9 A. In this case, under the 60-day track, I
10 believe that there is a great deal more flexibility in
11 terms of the types of competition which the Commission can
12 consider in evaluating whether competitive classification
13 should be granted.

14 And in that -- or to that extent, I believe
15 that there appears to be now heavier reliance on wireless
16 than previously, and so I felt that it was important to
17 demonstrate to the Commission that, although wireless
18 service exists in many exchanges, that the quality of the
19 signal can vary drastically within a particular area and
20 that that was something that the Commission could
21 reasonably consider in its evaluation under the 60-day
22 track.

23 Q. Just because there is an entity providing
24 local voice service in whole or in part in a exchange,
25 does that end the Commission's inquiry into -- for the

1 purpose of determining whether there is grounds for
2 competitive classification?

3 A. No, I don't think it does. I would warn
4 against the Commission simply being turned into bean
5 counters in this process. Instead, I think that it is
6 reasonable from an economic perspective for the Commission
7 to evaluate on a more granular level what is the quality
8 of service and are those services good substitutes, as
9 Mr. Van Eschen had earlier alluded to in his testimony,
10 for the services that would receive a competitive
11 classification. In particular, one that I was primarily
12 concerned with is basic local service.

13 Q. All those considerations that the
14 Commission weighs, do those go into the Commission making
15 a determination whether or not granting classification --
16 competitive classification is contrary to the public
17 interest or not?

18 A. Absolutely.

19 MR. DANDINO: That's all I have, your
20 Honor. Thank you.

21 JUDGE RUTH: Ms. Meisenheimer, you may step
22 down, but please remain in the room in case we need to
23 recall you.

24 Okay. And at this time we will recall
25 Mr. Van Eschen, but I'm going to go off the record for

1 about one to two minutes to see if we have any other
2 Commissioners coming down.

3 (AN OFF-THE-RECORD DISCUSSION WAS HELD.)

4 JUDGE RUTH: Mr. Van Eschen, I'll remind
5 you that you are still under oath, and we've recalled you
6 for some more questions from the Bench, and at this time I
7 believe we'll start with Commissioner Appling.

8 JOHN VAN ESCHEN testified as follows:

9 QUESTIONS BY COMMISSIONER APPLING:

10 Q. Good morning.

11 A. Good morning.

12 Q. I apologize that I was not here yesterday.
13 I was in hopes that you-all would end this by the time I
14 got back.

15 But since you haven't, would you describe
16 for me just briefly -- and I'm not sure exactly what I'm
17 looking for, but talk to me a little bit about the
18 residential. I'm a little concerned about residential, as
19 far as the 60-day is concerned. Can you kind of in five
20 minutes or less kind of summarize for me what your
21 thoughts is on the residential side? And also at the end
22 of that, talk to me about why you're only giving 50
23 percent of the business exchange, if you can help me out
24 and collect your thoughts on it.

25 A. Well, my recommendation is that in this

1 60-day proceeding the Commission grant competitive status
2 to two residential exchanges, the Joplin exchange and the
3 Sikeston exchange, and that's primarily based on the fact
4 that we've observed what we would consider to be a
5 qualifying CLEC under the 30-day track where that CLEC
6 would be providing local voice service using some of its
7 own facilities. It either has a switch or has the local
8 loops. And so we feel that those two exchanges would
9 qualify for the residential market.

10 For business services, we're recommending
11 that competitive status be granted to, I believe, about
12 15 or so exchanges for similar reasons, that a CLEC is
13 operating in those exchanges, and the CLEC is providing
14 local voice service using facilities that it owns, and
15 that's the basis for recommending competitive status be
16 granted to those exchanges.

17 We haven't gone beyond that primarily
18 because I have reservations about whether the other
19 service providers cited by Southwestern Bell are
20 sufficient to grant competitive status to these other
21 exchanges.

22 Specifically, Southwestern Bell is asking
23 the Commission to consider competition from such other
24 providers as additional wireless providers, VOIP
25 providers, and providers that are essentially using all of

1 Bell's facilities in providing local voice services,
2 whether they be under a UNE-P arrangement or what they
3 refer to as under a commercial agreement.

4 And I have reservations about whether the
5 type of customer that would be -- that is targeted in this
6 60-day proceeding, which I feel is the person that simply
7 subscribes to basic local service, since Southwestern Bell
8 and any company has complete pricing flexibility for
9 pricing of bundles of telephone service, I have
10 reservations about whether the single-line customer, the
11 customer that simply subscribes to local voice service,
12 would view a product offering from a VOIP provider, for
13 example, as something that, well, if Southwestern Bell did
14 raise its rates, they'd find it reasonable to switch to a
15 VOIP provider, would they
16 find -- and I question whether they would.

17 I think they -- the fact that they have to
18 also subscribe to broadband service and things like that
19 is something that I don't know if that type of consumer is
20 ready to do that.

21 And I also have reservations about
22 wireless, the quality of service. There are places I know
23 here in Jeff City, we've got lots of wireless providers,
24 but there's still, I mean, lots of places where you can't
25 get a signal, and it's difficult to get a signal. When

1 people are even in this building, they walk outside the
2 building in order to make a call, and I just -- I'm not
3 saying that eventually we won't get there, but I don't
4 think we're quite there yet.

5 I also have reservations about competition
6 from UNE-P providers where in some instances it may be in
7 Southwestern Bell's best interests financially to actually
8 have the customers being served by a UNE-P provider. They
9 make more money if the customer switches to UNE-P and is
10 served by another competitor, I guess, in that sort of
11 arrangement, if that is the sort of competition that is
12 really envisioned in helping to try to control prices.

13 Q. I reckon my final question is, is that I'm
14 just concerned about the residential, and I'm not exactly
15 sure what I'm concerned about, but I just don't think that
16 some of the little small areas that you have described
17 here this morning probably doesn't have the service to be
18 considered for competitive classification.

19 Did you see the memo which the judge sent
20 out to all of us dated October the 11th that described the
21 business and also residential 51?

22 A. No.

23 JUDGE RUTH: Commissioner Clayton, that
24 memo just goes to the Commissioners. Sorry. You're on my
25 mind. Commissioner Appling.

1 COMMISSIONER APPLING: I will yield to
2 Commissioner Clayton, and which one of us is Commissioner
3 Clayton.

4 JUDGE RUTH: Let me assure you that the
5 memo only went to the Commissioners.

6 COMMISSIONER APPLING: All right. I'm
7 going to yield to Commissioner Clayton and maybe collect
8 my thoughts by the time he finishes. Okay. Thank you,
9 sir.

10 JUDGE RUTH: Commissioner Clayton?

11 QUESTIONS BY COMMISSIONER CLAYTON:

12 Q. Good morning, Mr. Van Eschen.

13 A. Good morning.

14 Q. Nice to see you again. I have just a
15 couple of questions, and if you give me a second to get
16 organized here.

17 Just so that I understand Staff's position,
18 SBC has requested reclassification of
19 30 business exchanges and 51 residential exchanges, and
20 Staff concurs only in 15 exchanges relating to business
21 services; is that correct?

22 A. Correct.

23 Q. And agrees that zero exchanges of the
24 51 should be reclassified for residential service?

25 A. No, that's incorrect.

1 Q. Okay.

2 A. We're recommending that two exchanges be
3 granted competitive status.

4 Q. Which ones are those?

5 A. Joplin and Sikeston.

6 Q. What sets Joplin and Sikeston apart from
7 the other residential exchanges?

8 A. They are the exchanges that we are
9 observing a CLEC providing local voice service where the
10 CLEC is using some of its own facilities, either a switch
11 and/or local loops.

12 Q. So do you use the same standard as you used
13 in the other case that we had in terms of setting a
14 minimum threshold, I think was your language?

15 A. That's what we did, yes.

16 Q. And you continue to use the thought that
17 either a CLEC must be provisioning service based on a
18 UNE-L arrangement at a minimum or be fully
19 facilities-based; is that accurate?

20 A. That's correct.

21 Q. Okay. And in Joplin, you found -- is it
22 just simply more than two customers or lines that are
23 being served in one of those manners, without getting into
24 specific figures?

25 A. Yeah. That would be spelled out in that

1 filing that we made earlier this week, and in that filing
2 we list the competitors that we have in our records that
3 are -- and the number of lines that they're providing in
4 specific exchanges, and that is categorized as to whether
5 they're providing service on a UNE-L, UNE-P or full
6 facility-based arrangement.

7 Q. I want to go to that document, if we may.
8 This is Staff's supplemental information filed, I think,
9 this week that you just referred to. I don't know if
10 that's been marked as an exhibit.

11 JUDGE RUTH: No, and some of it's HC.

12 COMMISSIONER CLAYTON: I recognize that.
13 Has that been marked as an exhibit?

14 JUDGE RUTH: No.

15 COMMISSIONER CLAYTON: Is this information
16 in the record?

17 JUDGE RUTH: Yes.

18 COMMISSIONER CLAYTON: How is it in the
19 record?

20 JUDGE RUTH: They filed a verified
21 affidavit. There are several documents, including this
22 one, that we discussed at the beginning that may be
23 marked, but they have not yet been.

24 COMMISSIONER CLAYTON: Okay. Could we go
25 ahead and mark this information, because I'm going to

1 refer to it a couple of times, just so we're clear in the
2 record.

3 JUDGE RUTH: Staff's supplemental
4 information filed 10/11/05 is marked as Exhibit 10, and
5 I'll go ahead and ask at this time if the parties have any
6 objection to it being received into the record?

7 COMMISSIONER CLAYTON: And I guess this
8 would remain HC.

9 JUDGE RUTH: Yes, it would still be HC.
10 SBC?

11 MR. BUB: No, your Honor.

12 JUDGE RUTH: Public Counsel?

13 MR. DANDINO: No objections.

14 JUDGE RUTH: Staff, it's your document. Do
15 you have any objections to it being received?

16 MR. HAAS: No objection.

17 JUDGE RUTH: Exhibit 10HC is received into
18 the record.

19 (EXHIBIT NO. 10HC WAS RECEIVED INTO
20 EVIDENCE.)

21 BY COMMISSIONER CLAYTON:

22 Q. Okay. Mr. Van Eschen, I'm going to refer
23 you to page 16 where the Sikeston exchange is listed, and
24 I'm having difficulty finding where there is more than two
25 lines or more than two customers being served by a CLEC in

1 the manner that you have suggested in the minimum
2 threshold. Could you identify on this?

3 A. Big River, and they are indicated in that
4 document as providing service on a UNE-P arrangement. And
5 I had revised -- yesterday I had revised my rebuttal
6 testimony to include the Sikeston exchange on the basis
7 that -- on the evidence that Southwestern Bell had
8 produced in their rebuttal testimony that indicated that
9 Big River was migrating customers from UNE-P to a UNE-L
10 arrangement.

11 Q. Okay.

12 A. And based on the Commission's decision in
13 the 30-day proceeding, I felt that that was sufficient to
14 change my recommendation.

15 Q. Okay. That's good. So Joplin and
16 Sikeston, however, are the only two residential exchanges
17 that Staff would recommend reclassification?

18 A. That's correct.

19 Q. Okay. Now, let's talk about a few of these
20 business exchanges. Did you use the same criteria in
21 determining whether or not --

22 A. Yes.

23 Q. -- whether or not to grant classification,
24 the same minimum threshold language that you've suggested
25 earlier?

1 A. Yes.

2 Q. And did you use a quantity of customers or
3 lines?

4 A. No, we did not.

5 Q. Was it simply greater than one or greater
6 than two or --

7 A. One or more.

8 Q. One or more.

9 A. If it had one line under the category of
10 UNE-L or facility based --

11 Q. Okay. Then you would agree that --

12 A. I don't know if that, without going through
13 that, but that's -- I know going into this case that that
14 was our mindset.

15 Q. And when you say that was satisfactory to
16 you, you were referring to the section of 392.245, is it
17 sub 6, which requires the presence of -- was it two
18 alternative providers? I guess explain to me how this is
19 different, how this section is different from the -- since
20 you filed the same testimony in each one, you used the
21 same analysis, how does the statute differ between the
22 30-day track and the 60-day track?

23 A. Well, in my opinion, and I think my legal
24 counsel could probably explain this better, but under the
25 30-day track, it's fairly specific in terms of there needs

1 to be a demonstration that two non-affiliated entities are
2 providing local voice service within the exchange. And
3 one of those entities can be a wireless provider, and the
4 other entity must be providing local voice service in
5 whole or in part over using some of its own facilities,
6 and there's some exceptions that are noted in 392.245
7 subpart 5.

8 The difference in my view is under
9 subpart 6 of that section where it talks about an
10 incumbent exchange -- incumbent local exchange company may
11 petition the Commission for competitive classification
12 within an exchange based on competition from any entity
13 providing local voice service.

14 Q. So the 30-day track requires the presence
15 of two, and the 60-day track only requires the presence of
16 one?

17 A. In our internal discussion, yeah, it could
18 possibly just be one.

19 Q. Okay.

20 A. And I know there's a difference of opinion
21 perhaps among the parties on that point, but I'll let the
22 lawyers debate that.

23 Q. Lay off the lawyers now. No need for that.

24 Okay. so you use the presence of one line,
25 one customer, some standard like that which would meet

1 that basic threshold. Did you do a second part of the
2 analysis in the last sentence of this section regarding
3 contrary to the public interest?

4 A. Well, what we did is looked at these other
5 providers that were cited by Southwestern Bell, and I
6 discussed them in my testimony as to whether these types
7 of service providers are the types of providers that --
8 the customers that are really affected by the Commission's
9 decision in this proceeding, which I feel are the
10 single -- the customers that are only subscribing to basic
11 local voice service and nothing more, as to whether they
12 would find these other providers as reasonable and whether
13 these other providers would be sufficient in controlling
14 the price prices of Southwestern Bell.

15 Q. Okay.

16 A. I think the concept is that if these
17 alternatives are reasonable, that they would somehow
18 temper the potential for rate increases.

19 Q. In the exchanges, the business exchanges in
20 which Staff has recommended reclassification, did Staff
21 make a finding that, No. 1, there is another entity that
22 meets this statutory definition providing service, and 2,
23 also that the finding was not -- was not contrary to the
24 public interest?

25 A. The exchanges that we're recommending

1 competitive classification in our view meet the 30-day
2 track, and that's really the basis for our recommendation
3 for granting competitive status for those exchanges.

4 Q. Are there any exchanges that have an entity
5 providing service according to subsection 6 that have at
6 least one or two or more customers or lines being served,
7 depending on how you read the section, where Staff found
8 there to be something contrary to the public interest in
9 granting reclassification?

10 For example, in your Exhibit 10HC, you have
11 three columns that are listed listing UNE-L, UNE-P and
12 facilities-based services. If you have an exchange that
13 has numbers in either facilities-based or UNE-L in a
14 particular exchange, are there any exchanges in which you
15 have those numbers where there was a positive number
16 greater than one or two where Staff also found it to be
17 contrary to the public interest to grant reclassification?

18 A. No.

19 Q. Okay. So Staff found or Staff argues that
20 in and of itself having proof of one or more customers
21 being served by a UNE-L or facilities-based --
22 facilities-based basis is sufficient proof of competitive
23 presence in an exchange to say that it is not contrary to
24 the public interest? That was a long question. Did you
25 understand it?

1 A. Well, I think under the 30-day track, given
2 that it is such a short timeframe to decide those, decide
3 that issue --

4 Q. But we're not under the 30-day track
5 anymore. We're under the 60-day track, correct, which is
6 a different section?

7 A. That's correct. And when we identified
8 most of these exchanges, it was in the 30-day case. And
9 we identified all the exchanges that we felt met the
10 criteria for granting competitive classification under the
11 30-day track in that 30-day proceeding because -- and we
12 did that because Southwestern Bell requested that in their
13 request, and it's on that basis that we simply maintained
14 our recommendation to grant competitive status.

15 Q. What was Staff's position in the last -- in
16 the -- it was one of either CenturyTel or Sprint or
17 Spectra regarding the Bourbon exchange. Do you recall
18 that case?

19 A. Yes.

20 Q. What was Staff's position on the
21 reclassification of the Bourbon exchange?

22 A. I think, if I recall that correctly, that
23 may have been an instance where the CLEC was only
24 providing service to itself, and in that instance we felt
25 that it did not qualify.

1 Q. So to answer the question, it was that
2 you-all found that the definition was not met in the
3 Bourbon exchange in that Spectra or CenturyTel case?

4 A. Yeah.

5 Q. Correct?

6 A. Yes.

7 Q. Okay.

8 A. Yeah.

9 Q. And the reason was that they were serving
10 either their own employees or serving an affiliate or
11 something?

12 A. And let me just clarify maybe something I
13 said earlier. When I said no, that there was a CLEC that
14 listed lines under UNE-L or full facility based, I should
15 qualify that in that there may be some instances where a
16 CLEC does show some lines in those categories, but we
17 didn't count them simply because in subsequent discussion
18 with the CLEC, they were only serving an Internet service
19 provider.

20 Q. An ISP?

21 A. Right.

22 Q. Okay.

23 A. Which was primarily for data purposes and
24 not local voice service.

25 Q. Okay.

1 A. And those instances are noted in that
2 filing that we made earlier this week.

3 Q. Okay. Do you recall the facts of that case
4 with the Bourbon exchange that there were, I think, just
5 two customers being served in that case?

6 A. Yeah. I think Fidelity had raised an issue
7 as to the fact that they were only serving two business
8 customers, and for that aspect of it, we did recommend
9 competitive classification.

10 Q. You did recommend competitive
11 classification?

12 A. Yes, we did. And I may be getting my
13 exchanges mixed up as to -- but there was an instance
14 where a CLEC was only providing service to itself and we
15 felt that didn't qualify. In the instance where Fidelity
16 brought up the fact that they were only providing service
17 to two business customers, we still felt that that would
18 allow the exchange to qualify under the 30-day track.

19 Q. Would a circumstance where you have a
20 competitor serving or offering service to a limited number
21 of customers, would that be an example of an issue that
22 the Commission can look at in terms of determining whether
23 reclassification is contrary to the public interest?

24 A. I think the Commission could. I guess I
25 have some reservations about whether the Commission could

1 do that if the competitor's providing service under a
2 UNE-L or full facility arrangement.

3 Q. Let's say if a competitor is offering full
4 facilities, say it's got full facility service, but it is
5 only offering the service to one or two customers, say a
6 hospital and a college in a community.

7 A. Yes.

8 Q. Is not reaching out to any other business
9 customers. And none of the other business customers have
10 the benefit of having that choice in provisioning service.
11 Is that an example of something that would cause
12 reclassification to be contrary to the public interest?

13 A. We still would recommend that competitive
14 status be granted. We feel that it would qualify at least
15 under the 30-day track.

16 Q. We're not talking about 30-day. The 30-day
17 section does not have any contrary to the public interest
18 language in it, so we're not talking about 30-day. The
19 60-day, which this is a 60-day case, includes language in
20 the statute which says, we shall approve such petition
21 within 60 days unless it finds that such competitive
22 classification is contrary to the public interest.

23 And so you're telling me the fact that a
24 business -- that a CLEC providing only two business
25 customers in an exchange and not offering any other

1 service to any of the other customers, that's the only
2 evidence of competitive presence, I'm asking you if that
3 would be an example where the Commission could make a
4 finding that is contrary to the public interest?

5 A. I think the Commission could, but again, I
6 think from a practical standpoint, if the Commission did
7 reject competitive status in that situation, I guess I
8 think that the company could just turn around and refile
9 it in the 30-day proceeding, and then I wonder where we're
10 at in the whole situation. I think in the end the
11 exchange would still receive competitive classification,
12 whether it's in the 60-day or 30-day proceeding.

13 Q. Does Staff believe that service that is
14 provided on a UNE-P basis does fit within the type of
15 entity defined in subsection 6 of 392.245, or are you
16 saying, no, it does not fit into that definition?

17 A. Well, we don't believe that the Commission
18 should find that UNE-P providers are providing sufficient
19 competition to justify granting competitive classification
20 under the 60-day. I think an incumbent could clearly
21 apply for competitive status on the basis of UNE-P
22 competition. But in response to that, I don't believe
23 that the Commission should grant competitive status solely
24 on the basis of UNE-P competition.

25 Q. You use the same minimum threshold for both

1 the 30-day and the 60-day case; is that correct?

2 A. That's correct.

3 Q. And that's in spite of the fact that the
4 definitions of competitive are different in subsection 5
5 and subsection 6?

6 A. Yes.

7 Q. But you use the same definition. How do
8 you justify that?

9 A. Well, I think it partially gets back to the
10 burden of proof and that issue. I guess in my way of
11 looking at the statutes under the 30-day track, it seems
12 like the Legislature wanted to set up a very streamlined
13 process that would allow competitive classification to be
14 granted if certain conditions are met. And those
15 conditions appear to be the presence of a wireless
16 provider and the presence of a wireline competitor that's
17 providing local voice service using some of its own
18 facilities. I think intuitively under the 60-day
19 proceeding the Commission has clearly more discretion.

20 Q. Where do you find that discretion?

21 A. I think the Commission has that discretion
22 when it talks about the Commission shall approve such
23 petition within 60 days unless it finds that such
24 competitive classification is contrary to the public
25 interest.

1 Q. Okay. So that's where the discretion is?

2 A. Correct. And admittedly, public interest
3 is not defined. I think the Commission could use its
4 discretion to define public interest in any way it wants
5 to.

6 Q. Before you get to that last sentence in
7 subsection 6 where there's -- where it defines what type
8 of service has to be provided in an exchange, do you agree
9 that UNE-P service would fit in that definition? And I
10 specifically refer to, quote, based on competition from
11 any entity providing local voice service in whole or in
12 part by using its own telecommunication facilities or
13 other facilities or the telecommunications facilities or
14 other facilities of a third party.

15 A. I think in general the incumbent could
16 bring up competition from a variety of different
17 providers. The incumbent is not as restricted in bringing
18 forth a competitive request as it is -- it is somewhat
19 constrained in what type of competition it can cite in the
20 30-day proceeding.

21 Q. Mr. Van Eschen, I'm sorry. You've confused
22 me. The question was, do you agree that UNE-P service
23 fits within that definition or do you not agree?

24 A. Are you asking me can an incumbent --

25 Q. Is it Staff's position that UNE-P service,

1 as the entity referred to in subsection 6, is met -- that
2 type of service is met by the definition included within
3 that subsection, or is it Staff's position that it does
4 not fit within that definition?

5 A. I think UNE-P would fit in the definition
6 in the sense that when we're talking about competition
7 from any entity providing local service in whole or in
8 part using its own telecommunications facilities or other
9 facilities or the telecommunications facilities of --

10 Q. I understand. I read the section myself.
11 Do you agree that UNE-P fits in that definition or not?

12 A. Yes, I do.

13 Q. Okay. Okay. Good. That's all I needed,
14 yes or no. Okay. And just working through Staff's
15 position that -- that although it may fit within that
16 definition, the discretionary language of contrary to the
17 public interest Staff believes gives this Commission the
18 authority to reject reclassification based solely on UNE-P
19 because of certain reasons?

20 A. Yes.

21 Q. Okay. Good. All right. Now, are there
22 any other factors -- other than simply referring to UNE-P
23 service not being a sufficient form of competition, are
24 there any other factors that Staff believes that this
25 Commission can look at in determining something is

1 contrary to the public interest, any other factors, any
2 other problems in an exchange, any other concerns?

3 A. I think the Commission could look at what
4 evidence, if any, has been presented as to the amount of
5 competition provided by these providers. I think in some
6 instances there's minimal evidence as to the extent that
7 these different providers are really providing service. I
8 think the Commission could look at the service quality,
9 the rates that customers would have to pay and so forth in
10 reaching its decision.

11 Q. Well, let me just put out a list of
12 concepts, and so I don't have to repeat the full question,
13 I'm asking if it would be a possible element that the
14 Commission could look at in making a determination of
15 contrary to the public interest. Would a lack of market
16 pressure to enforce discipline on pricing in an exchange
17 be a factor?

18 A. Yes.

19 Q. Would perhaps an uneven playing field for
20 competition be considered as a possible element contrary
21 to the public interest?

22 A. Yes.

23 Q. Could you give me some examples where one
24 phone company would have an uneven or an unfair ability to
25 either dictate certain things on the market or keep out

1 competition?

2 A. Well, I think in particular when it comes
3 to say, for example, UNE-P providers where providers
4 solely using Southwestern Bell's facilities in providing
5 local voice service, I question the ability of those
6 providers to hold down prices perhaps for Southwestern
7 Bell. And I think that there may be some instances where,
8 since the company is providing -- is relying on
9 Southwestern Bell's facilities, whether the terms,
10 conditions, rates that Southwestern Bell might charge
11 these providers, as to whether Southwestern Bell would
12 have an unfair advantage there.

13 Q. Would you agree or disagree with the
14 statement that perhaps an exchange that would not provide
15 as many profitable opportunities, like a rural district or
16 a poor exchange, speaking in terms of demographics, would
17 that be a possible element to look at in terms of whether
18 reclassification would be contrary to the public interest?

19 A. Possibly, when the Commission's considering
20 the alternatives that are presented by the incumbent and
21 the ability for those customers to pay for these
22 alternative services.

23 COMMISSIONER CLAYTON: I don't think I have
24 any other questions. Thank you.

25 JUDGE RUTH: Are there any additional

1 questions from the Bench?

2 (No response.)

3 JUDGE RUTH: Then we will move on to
4 recross. And SBC, are you ready?

5 MR. BUB: Yes, your Honor.

6 RECROSS-EXAMINATION BY MR. BUB:

7 Q. Mr. Van Eschen, I only have a couple of
8 questions. On the 60-day track when you were talking
9 about the difference between the 30 and the 60-day
10 criteria and what would count under the definition for the
11 60-day track, you indicated to Commissioner Clayton that
12 you agreed that UNE-P fit within the definition of things
13 to be counted for the 60-day track. Do you recall that?

14 A. Yes.

15 Q. And your answer was yes, right?

16 A. Yeah. I think if a company wanted to bring
17 that forward, they could, yeah.

18 Q. I'd like to also look at some other things
19 that would count under that definition. You'd agree with
20 me also that a CLEC with a wholesale commercial agreement,
21 that would also count under that same definition, just
22 like UNE-P would, wouldn't it?

23 A. Yes.

24 Q. And further in that same definition, they
25 talk about including those -- including providers that

1 rely on unaffiliated third-party Internet service, that
2 would be VOIP providers that use a third-party Internet
3 service, correct --

4 A. Yes.

5 Q. -- that could be counted as well?

6 Do you have -- and then lastly, in the
7 statute it talks about one wireless carrier being counted
8 as well; is that correct?

9 A. Yes.

10 Q. Now, I'd like turn your attention to
11 Mr. Unruh's Revised Schedule 2 and 3. Do you have those
12 with you?

13 A. I believe I do. Yes.

14 Q. I need to remind you that these are highly
15 confidential schedules, so we're not going to talk about
16 the providers or anything on an exchange-specific basis.
17 Let's just look at the third column. The heading is CLECs
18 with commercial agreements. Those all fit under -- that
19 category of provider fits under the 60-day criteria, does
20 it not?

21 A. Yes.

22 Q. And then let's go on to the next one, CLECs
23 with UNE-P. Those also fit?

24 A. Correct.

25 Q. And then go on over to the column that

1 begins wireless companies. They also can be counted?

2 A. Yes.

3 Q. And then finally VOIP companies that are
4 listed, those can be counted as well, because those are
5 put down as carriers that use third-party Internet service
6 providers that use third-party Internet service, meaning
7 not SBC DSL, for example?

8 A. Yes.

9 Q. Did you provide any evidence that any of
10 the information listed in Schedules 2HC or 3HC of
11 Mr. Unruh's testimony was incorrect?

12 A. No, I did not.

13 MR. BUB: Okay. Those are all the
14 questions we have, your Honor.

15 JUDGE RUTH: Mr. Dandino?

16 MR. DANDINO: Thank you, your Honor.

17 RECROSS-EXAMINATION BY MR. DANDINO:

18 Q. Good morning, Mr. Van Eschen.

19 A. Good morning.

20 Q. You've got me a bit confused in your
21 conversation with Commissioner Clayton about what's
22 standard. Your recommendation for the business exchanges
23 in this case, did you use the 30-day track standard or the
24 60-day track standard?

25 A. We used 30-day.

1 Q. Okay. Now, you kept referring when you
2 were talking with him to -- that they're providing local
3 service or local voice service. Doesn't the 30-day track
4 standard require providing basic local service?

5 A. I thought it -- let me just --

6 Q. Certainly.

7 A. -- look real quick.

8 Q. Please look.

9 A. It talks about basic local
10 telecommunications service under subpart 5.

11 Q. And that's different from local exchange
12 telecommunications service or local voice service?

13 A. I'm not sure if it's a relevant distinction
14 or not. I know the subsequent sections to that talk about
15 local voice service and don't use the term basic local
16 exchange telecommunications service.

17 Q. Doesn't Section 386.020, No. 4, provide a
18 specific definition for basic local service?

19 A. Yes, it does.

20 Q. And it has eight elements that that has to
21 include?

22 A. That's correct.

23 Q. And the general definition, it would
24 include two-way local voice or voice service within a
25 local exchange, very first part of the definition?

1 A. Yeah. There are a number of criteria that
2 the definition lays out for basic local exchange service.

3 Q. So basic local exchange service is
4 significantly more than just local exchange or local or
5 voice -- two-way voice service within an exchange?

6 A. I guess I don't know. I'm looking at some
7 of the subsequent sections where, like, in subpart 2 of
8 that same section where it talks about any entity
9 providing local voice service, and I guess to me the fact
10 that they're using that phrase local voice service, and in
11 the earlier part they talk about basic local exchange
12 telecommunications service, I'm not real sure on the
13 significance of the distinction. There may be. I don't
14 know.

15 Q. The Legislature usually uses terms that
16 they define in a very specific way, don't they?

17 A. I would say yes.

18 Q. And they have a specific definition for
19 local basic services, is that correct, and then use that
20 phrase in the 30-day track; isn't that correct?

21 A. They do use the phrase basic local exchange
22 telecommunications service, and that is defined in the
23 statutes.

24 Q. And wouldn't you assume that the 30-day
25 track would require a provider to provide basic local

1 service as defined in Section 386.020, subsection 4 in
2 parens?

3 A. Perhaps. And I say perhaps simply because
4 in other parts of the same section they talk about local
5 voice service, and to me, if they wanted to be totally
6 clear, they'd use the term basic local exchange
7 telecommunications service, not --

8 Q. What -- excuse me. Go ahead.

9 A. And not -- and frankly I'm not sure if
10 there is a significant distinction or not.

11 Q. Are you telling this Commission that there
12 is no difference between basic local service and voice
13 service for the purposes of evaluating competitive
14 classification under Section 392.245?

15 A. I don't know. I mean, I know -- basic
16 local telecommunications service is defined in the
17 statutes.

18 Q. And that definition should control; is that
19 correct?

20 A. I'd have to defer to my legal counsel on
21 that. I would assume it might.

22 Q. Now, the statute also defines Section
23 386.020, 31 in parentheses, as local exchange
24 telecommunications service; is that correct?

25 A. Yes.

1 Q. The Legislature did not use that term in
2 Section 392.245.5 for purposes of competitive
3 classification, did they?

4 A. No, not that I can tell.

5 Q. I believe yesterday you had testified that
6 you didn't look at -- evaluate whether any of the wireless
7 companies provided basic local service; is that correct?

8 A. That's correct.

9 Q. So you're telling this Commission that it
10 doesn't make any difference whether it's basic local
11 service that a competitor is providing or it's just voice
12 service, either one of them is sufficient for competitive
13 classification under either track?

14 A. We did not base our recommendation on
15 whether the entity was providing all the elements of basic
16 local telecommunications service, as it's defined in the
17 statute.

18 Q. So you made a recommendation for those
19 15 business exchanges without knowledge whether or not
20 they provided basic local service, and you made that
21 recommendation based on the 30-day track qualifications?

22 A. That's correct.

23 MR. DANDINO: That's all I have, your
24 Honor.

25 JUDGE RUTH: Redirect?

1 REDIRECT EXAMINATION BY MR. HAAS:

2 Q. Mr. Van Eschen, I will also have a few
3 questions for you about your discussion with Commissioner
4 Clayton about what standard the Staff used in today's
5 case.

6 When Staff recommended granting competitive
7 classification in this case, what standard did you use?

8 A. We used the same standard that was applied
9 in the 30-day proceeding. We specifically looked for
10 whether a wireline competitor, a CLEC was providing local
11 voice service using some of its own facilities.

12 Q. When Staff recommended denial of
13 competitive classification in this case, what standard did
14 you use?

15 A. The public interest. We feel that it would
16 be contrary to the public interest to grant competitive
17 status to these other exchanges that Bell has --
18 Southwestern Bell has requested.

19 MR. HAAS: Thank you. That's all my
20 questions.

21 JUDGE RUTH: Okay. Mr. Van Eschen, you may
22 step down.

23 I assume that's all the witnesses that the
24 parties plan to call, correct?

25 (No response.)

1 JUDGE RUTH: Okay. Then at this time you
2 have the opportunity to make closing arguments, if you
3 wish. However, I've indicated that there are some issues
4 that should be brought up in a brief. So you can either
5 have both or we'll go with just the brief, and I'll hear
6 from each party as to your preference.

7 SBC?

8 MR. BUB: Your Honor, if we're allowed to
9 have a closing brief, we're okay with just doing briefing.

10 JUDGE RUTH: And Staff?

11 MR. HAAS: Briefing will be sufficient.

12 JUDGE RUTH: And OPC?

13 MR. DANDINO: Briefing, your Honor.

14 JUDGE RUTH: Okay. Then we'll need to set
15 a briefing schedule, and I want to remind the parties that
16 we have some late-filed exhibits coming. And actually, my
17 apologies, but I want to go back and -- Staff, the
18 document that I'd asked that you file October 19th, that's
19 similar to the document you filed on October 11th but
20 instead of line counts it was going to be customer. That
21 needs to be marked as post-hearing Exhibit 11.

22 Once it comes in, I'd already said that the
23 parties, if you're going to file a response or objection,
24 you're going to give me a notice right away, and then the
25 actual objection isn't due until the 21st. So for now

1 that's just marked for identification purposes.

2 And then the Commission would also like
3 SBC's filing from this week dated 10/11/05. It's titled
4 SBC Missouri's response to order directing filing. That
5 is going to be marked as Exhibit 12, and it's my
6 understanding that none of that is HC, so that will be
7 Exhibit 12. Are there any objections to Exhibit 12 being
8 received into the record?

9 MR. DANDINO: No objection.

10 JUDGE RUTH: OPC has no objection. Staff?

11 MR. HAAS: No objection.

12 JUDGE RUTH: And I assume SBC's fine with
13 that?

14 MR. BUB: That's correct, your Honor.

15 JUDGE RUTH: Exhibit 12 then is received.

16 (EXHIBIT NO. 12 WAS RECEIVED INTO
17 EVIDENCE.)

18 MR. HAAS: Your Honor, regarding Staff's
19 Exhibit 11, the Order directed basically that we answer
20 the question of whether there are two or more customers of
21 a certain class in an exchange rather than provide the
22 number. Has your direction now changed?

23 JUDGE RUTH: The Commission liked the
24 document that you provided so far, which was the 10/11
25 document, and in it you actually list the company and

1 whether or not there are two or more for that company.

2 MR. HAAS: I'm not sure we're communicating
3 here. If you go back to the order, it said for each
4 regulated provider of local voice service that SBC
5 Missouri identifies as a competitor for business services
6 in an exchange, does such provider have two or more
7 business customers whose addresses are located within an
8 exchange? The answer to that question would be yes or no.
9 It would not be a number.

10 JUDGE RUTH: I understand, but that's not
11 what Staff did anyway. Staff provided access lines by
12 number. What I'm telling you is the Commission liked this
13 document. However, it didn't quite answer their question.
14 If Staff wants to just -- for instance, I'm looking at one
15 of the pages, you know, the columns are residential UNE-L,
16 residential UNE-P, residential facilities-based. Instead
17 of putting a number in those columns, if you want to put
18 yes, that there are two or more, that's fine. If you
19 actually have the customer counts, you may want to provide
20 that instead.

21 But mainly what the Commission's trying to
22 get is for each of those companies, does that company have
23 two or more? For instance, I'm looking at one where it
24 lists that there are three access lines. That could be
25 one customer, two customers or three customers, and the

1 Commission still wants to know that information. Are
2 there two or more customers? But they want it broken down
3 still by the company, and I -- I mean, some of those
4 companies are Sage, Nextel. I'm not saying which exchange
5 they're in. But is it more clear now or still not?

6 MR. HAAS: I think we understand now.
7 Thank you.

8 JUDGE RUTH: Okay. Just to make it clear,
9 Exhibits 1, 2, 3, 4, 5, 6, 7 were all offered and
10 received. Exhibit 8 SBC will be providing, and Exhibit 9
11 SBC will also be providing post hearing.

12 Now, yesterday we had talked about perhaps
13 having those documents due on the 17th. SBC, was that
14 your understanding?

15 MR. BUB: Well, we initially talked about
16 them being due the 18th because Staff had until the 19th,
17 and you said if there was a problem we could discuss
18 making it the 19th. And then internally we think we can
19 commit to the 18th, but then yesterday at the end of the
20 day we talked about the 17th. We prefer the 18th, but if
21 we can get it done by the 17th, we will, but I think the
22 18th is probably more realistic for us.

23 JUDGE RUTH: Then I'll set it as the 18th,
24 and if it turns out there's a problem, I'll expect SBC to
25 notify me.

1 MR. BUB: We will, your Honor. Thank you.

2 JUDGE RUTH: Then Exhibit 10HC was also
3 received into the record. Exhibit 11 will be coming from
4 Staff. And Exhibit 12, SBC's filing from this week, has
5 also been received. Are there any other documents that
6 the parties suggest be admitted into the record?

7 Public Counsel?

8 MR. DANDINO: No, your Honor.

9 JUDGE RUTH: Staff?

10 MR. HAAS: No, your Honor.

11 JUDGE RUTH: And SBC?

12 MR. BUB: No, your Honor. Thank you.

13 JUDGE RUTH: Okay. The transcript should
14 be submitted tomorrow. Talk to the court reporter if you
15 want an electronic copy, because if it's submitted late in
16 the day, it will not be copied and put into EFIS until
17 Monday.

18 The briefing schedule. Are the parties
19 agreeable to having their -- one round, it's one round of
20 briefs. Excuse me. Would you be able to provide those no
21 later than the 18th?

22 MR. DANDINO: What day is that?

23 JUDGE RUTH: It's a Tuesday. And actually
24 let me change that. We'll make it the 19th. That means
25 that there won't be a lot of time to look at whatever

1 Staff files on the 19th, but if they file it early, you
2 might be able to include some of that. I don't want to
3 get the Briefs really any later, though, for the
4 Commissioners to be able to use them in any of their
5 discussions. It turns out that they may not have an
6 agenda on the 20th, but they may call a special agenda for
7 this case, perhaps Friday the 21st or even Monday the
8 24th. And again, I'd like them to have the Briefs.

9 MR. BUB: Your Honor, could you remind me,
10 Staff's filing on the 19th, is there -- what time is that
11 coming in? Was there a time, noon?

12 JUDGE RUTH: There wasn't -- I suggested
13 that, but Staff indicates that they don't feel they can
14 get it in any before five o'clock.

15 MR. BUB: So then our brief could be
16 filed --

17 JUDGE RUTH: In the evening?

18 MR. BUB: -- in the evening.

19 Okay. That's where I was going.

20 JUDGE RUTH: And again, if Staff can get
21 that information sooner, even if they file it in two
22 portions, that might be helpful. You can do it in
23 Part 1 and Part 2. But I'd like the Briefs at least by
24 the time I come in the next morning.

25 MR. BUB: Just want to make sure it was

1 okay to file them after nine o'clock.

2 JUDGE RUTH: Yes. Public Counsel, did you
3 have something to add?

4 MR. DANDINO: Just a question, your Honor.
5 The objection to -- or the objection -- or that there's
6 the notice of a response to any of these filings is due by
7 nine o'clock the next -- the day after?

8 JUDGE RUTH: Yes. Yes. Actually, no.
9 I'll make it -- the ones that come in earlier, if they
10 come in on the 18th, then actually make the objections, if
11 any, due on the 20th. That would still give you a couple
12 of days.

13 MR. DANDINO: Objections due on the 20th,
14 but the notice is due --

15 JUDGE RUTH: I won't make you do a notice
16 for the others. The Commission has some particular
17 interest -- some of the Commissioners have some particular
18 interest in what Staff will be filing, and I want warning
19 before I put too much of it in drafts as to whether or not
20 there will be objections. That's why I've asked -- I
21 don't want to wait and find out that there's objections to
22 that one on the 21st. So that's why if you file the
23 notice, I'll know that it's coming.

24 MR. DANDINO: Now I'm confused. The notice
25 of objections to what the Staff files on the 20th?

1 They're filing on the 19th? I'm sorry.

2 JUDGE RUTH: Correct. They're filing it on
3 the 19th.

4 MR. DANDINO: And the objection has to
5 be -- the objections itself have to be filed on the 20th?

6 JUDGE RUTH: No. This is the one where you
7 have until nine o'clock just to let me know that an
8 objection is coming, because -- and then you have to the
9 21st to file the actual objections. The other late-filed
10 exhibits are actually coming in hopefully on the 18th,
11 which means you will actually file your objections on the
12 20th. You don't have to give me notice, but this way on
13 the 20th I'll either have all objections or for this last
14 one that's coming in, Staff's, I'll at least know
15 something's coming.

16 MR. DANDINO: And the Briefs are due on the
17 19th?

18 JUDGE RUTH: I realize that makes it
19 awkward, but, you know, and if the parties run into
20 problems you're welcome to file a motion to change that.
21 But at this point I hate to make the Briefs any later when
22 I don't know for sure if there will even be objections.
23 If there are objections to those late-filed exhibits, I
24 would be more agreeable to extending the deadline on the
25 Brief.

1 Okay. Are there any other matters that
2 need to be addressed before we adjourn?

3 (No response.)

4 JUDGE RUTH: Okay. Seeing none, the
5 hearing is concluded. Thank you very much.

6 WHEREUPON, the hearing of this case was
7 concluded.

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