

**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)
Classification Pursuant to Section 392.245.6,)
RSMo (2005) – 60-day Petition)

Case No. TO-2006-0102

CONCURRING OPINION OF CHAIRMAN JEFF DAVIS

This commissioner concurs with the result reached in the Report and Order in the above-referenced case and merely wishes to supply additional comments in support thereof.

This is a case of first-impression before this commission whereby an incumbent local exchange company has applied for competitive classification in an exchange pursuant to the provisions of the 60-day competitive classification law found in Section 392.245.5(6), a new law passed in the 2005 Session of the Missouri General Assembly.

The standard of review for determining competitive classification in these cases is found in Section 392.245.5(6), RSMo Supp. 2005, which states in pertinent part:

Notwithstanding any other provision of this subsection, any incumbent local exchange company may petition the commission for competitive classification within an exchange based on competition from any entity providing local voice service in whole or in part by using its own telecommunications facilities or other facilities or the telecommunications facilities or other facilities of a third party, including those of the incumbent local exchange company as well as providers that rely on an unaffiliated third-party Internet service. **The commission shall approve such petition within sixty days unless it finds that such competitive classification is contrary to the public interest.**” (Emphasis added.)

This statute establishes a two-pronged test: First, it places the burden of proof on the petitioner to prove competition exists in the relevant exchanges and, once that

burden has been met, the commission looks to the second prong of the test, which is simply whether or not competitive classification is contrary the public interest. This is the only reason the commission can deny such a request under the statute.

The record indicates SBC Missouri presented evidence that competition exists in each one of the exchanges from wireless carriers, VOIP providers and other competitors having commercial agreements and/or UNE-P agreements. There were arguments made to the contrary that some or all of these services do not constitute effective competition, but the statute listed above does not require competition to be effective. It merely requires the presence of competition and there is no requirement that competitors obtain a certain market share or that their competition be of a certain quality.

Once SBC Missouri demonstrated that competition existed in each of the listed exchanges, the burden shifted to any party asserting that SBC Missouri's request was contrary to the public interest. The record in this case, as noted in the Report and Order as well as in Commissioner Appling's concurrence, shows that there is little, if any, competent evidence demonstrating that granting the SBC Missouri request would be contrary to the public interest. To require SBC Missouri to prove that its application was not "contrary to the public interest" would defy logic and the plain meaning of the statute. Accordingly, the only decision this commission could reach was that SBC Missouri's entire request be granted.

Although not discussed in the Report and Order, it is worth noting that Senate Bill 237, the foundation of the legal debate in this case, was passed by near unanimous, bi-partisan majorities in both houses of the Missouri General Assembly. We can only

presume that the elected representatives know the will of the people and that we are acting in the best interest of the people of this state by faithfully interpreting this law, despite any perceived shortcomings in the construction thereof or the adjudication process.

Once competitive classification is granted, the only remaining duty of this commission is to closely monitor competition and prices in the given exchanges. This commission takes that charge very seriously and there is no doubt in this commissioner's mind that our staff will zealously perform its duties in this area. To grant a company with the market power of SBC Missouri the unfettered discretion to raise or lower rates causes this commissioner some concern about what might happen when circumstances change and no elected or appointed officials are left to remember the representations made by SBC Missouri to the Governor, the General Assembly or even the Missouri Public Service Commission. Hopefully, competition will thrive in the marketplace and SBC Missouri will prove that this fear is unfounded.

In any event, those concerned about SBC Missouri's dominance and pricing power in the market should find some consolation in that staff is required to issue a report on competition no later than every two years and that, at any time, staff or the Office of Public Counsel can file a complaint alleging that competitive classification for a particular exchange is no longer in the public interest.

It is also my earnest hope that in the future SBC Missouri will be more forthright in the presentation of legal evidence to this commission and in its communications with the public. This commissioner found it particularly troubling, where 30-day and 60-day time limits applied, that SBC Missouri would attempt to present evidence in such a way

as to not notify its competitors of its filing for competitive classification in a given exchange. Further, in advance of the local public hearings, SBC Missouri representatives attempted to obtain local public support for their application by telling customers that granting their competitive classification request would allow them to lower their rates, but it is apparent from the record that SBC Missouri never communicated to any of these consumers whose support they were eliciting that rates could ever go up as a result of this commission granting their request. In conclusion, SBC Missouri was entitled to win this case as a matter of law, but their conduct only reinforced the belief that further regulatory oversight of SBC Missouri is necessary to protect consumers.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeffrey A. Davis". The signature is written in a cursive, flowing style.

Jeff Davis
Chairman

Dated at Jefferson City, Missouri
on this 27th day of October, 2005.