

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

In the Matter of the Request of Southwestern Bell    )  
Telephone, L.P., d/b/a SBC Missouri, for            )    Case No. TO-2006-0102  
Competitive Classification Pursuant to Section    )    Tariff File No. YL-2006-0145  
392.245.6, RSMo (2005) – 60 day Petition.            )

**STAFF’S PRETRIAL BRIEF, LIST OF WITNESSES, AND  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**COMES NOW** the Staff of the Missouri Public Service Commission and for its pretrial filing states:

**Pretrial Brief**

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, as amended by Senate Bill 237. This case generally involves SBC Missouri’s request under the 60-day track of Section 392.245.5. This case also involves certain exchanges that qualify for competitive classification under the 30-day track criteria but which were not specifically requested in SBC Missouri’s request under the 30-day track in Case No. TO-2006-0093.

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

customers. Under the 60-day track, a price cap regulated incumbent local exchange company (ILEC) may petition the Commission for competitive classification within an exchange based on competition from any entity providing local voice service in whole or in part by using its own telecommunications facilities or other facilities or the telecommunications facilities or other facilities of a third party, including those of the ILEC as well as providers that rely on an unaffiliated third-party Internet service. The Commission shall approve the petition within sixty days unless it finds that such competitive classification is contrary to the public interest.

The Missouri Supreme Court has stated that “[t]he law in this state as to the burden of proof is clear and designed to assure that hearings on contested matters provide the parties with predictable rules of procedure. The party asserting the positive of a proposition bears the burden of proving that proposition.” *Dycus v. Cross*, 869 S.W. 2d 745,749 (Mo. banc 1994)

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

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

SBC Missouri asserts that competitive classification is not contrary to the public interest. Therefore, SBC Missouri has the burden of proof.

SBC Missouri's testimony concerning its request under the 60-day track merely counts other entities providing communication services in a given exchange. (Unruh Direct Testimony). SBC Missouri failed and refused to present evidence on whether its requested competitive classification under the 60-day track is contrary to the public interest.

### **List of Witnesses**

The Staff will call John Van Eschen.

### **Proposed Findings of Fact**

1. SBC Missouri is an ILEC that is regulated under Section 392.245 RSMo, the Price Cap Statute.

2. An unaffiliated commercial mobile service provider as identified in 47 U.S.C. Section 332 (d)(1) and 47 C.F.R. Parts 22 or 24 is providing service in each of the following exchanges. Also, an unaffiliated wireline company is providing local voice service through its own switch, or loops, or both, to the specified customer class in the following exchanges.

Residential: Joplin

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

(Van Eschen Direct Testimony, p. 13; Van Eschen Rebuttal Testimony, p. 10)

3. The only evidence addressing whether competitive classification under the 60-day track is contrary to the public interest was presented by the Staff. The Staff's testimony was that competitive classification under the 60-day track is contrary to the public interest. (Van Eschen Direct Testimony, pp. 16-24)

### **Proposed Conclusions of Law**

1. Section 392.245.5 RSMo, as amended by Senate Bill 237, provides in relevant part:

5. Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in an exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange. For purposes of this subsection:

(1) Commercial mobile service providers as identified in 47 U.S.C. Section 332(d)(1) and 47 C.F.R. Parts 22 or 24 shall be considered as entities providing basic local telecommunications service, provided that only one such non-affiliated provider shall be considered as providing basic local telecommunications service within an exchange;

(2) Any entity providing local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest shall be considered as a basic local telecommunications service provider regardless of whether such entity is subject to regulation by the commission. A

provider of local voice service that requires the use of a third party, unaffiliated broadband network or dial-up Internet network for the origination of local voice service shall not be considered a basic local telecommunications service provider. For purposes of this subsection only, a broadband network is defined as a connection that delivers services at speeds exceeding two hundred kilobits per second in at least one direction;

(3) Regardless of the technology utilized, local voice service shall mean 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;

(4) Telecommunications companies only offering prepaid telecommunications service or only reselling telecommunications service as defined in subdivision (46) of section 386.020, RSMo, in the exchange being considered for competitive classification shall not be considered entities providing basic telecommunications service; and

(5) Prepaid telecommunications service shall mean a local service for which payment is made in advance that excludes access to operator assistance and long distance service;

(6) 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 service, as competitive within such exchange.

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. The commission shall maintain records of regulated providers of local voice service, including those regulated providers who provide local voice service over their own facilities, or through the use of facilities of another provider of local voice service. In reviewing an incumbent local exchange telephone company's request for competitive status in an exchange, the commission shall consider their own records concerning ownership of facilities and shall make all inquiries as are necessary and appropriate from regulated providers of local voice service to determine the extent and presences of regulated local voice providers in an exchange. If the services of an incumbent local exchange telecommunications company are classified as competitive under this subsection, the local exchange telecommunications company may thereafter adjust its rates for such competitive services upward or downward as it determines appropriate in its competitive environment, upon filing tariff which shall become effective within the timelines identified in section 392.500.

2. The Missouri Supreme Court has stated that “[t]he law in this state as to the burden of proof is clear and designed to assure that hearings on contested matters provide the

parties with predictable rules of procedure. The party asserting the positive of a proposition bears the burden of proving that proposition.” *Dycus v. Cross*, 869 S.W. 2d 745, 749 (Mo. banc 1994). SBC Missouri asserts under the 30-day track that there are the requisite number of entities providing basic local service to business or residential customers, or both, in an exchange. SBC Missouri asserts that a competitive classification under the 60-day track is not contrary to the public interest. Therefore, SBC Missouri has the burden of proof.

3. SBC Missouri has failed to meet its burden of proof that approving competitive classification for any additional exchanges under the 60-day track is not contrary to the public interest.

### **Conclusion**

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

Respectfully submitted,

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### **Certificate of Service**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 6<sup>th</sup> day of October 2005.

/s/ William K. Haas

William K. Haas