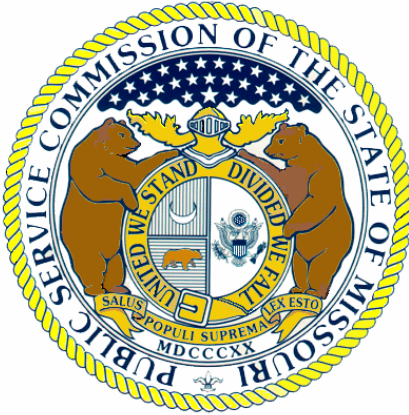


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



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

REPORT AND ORDER

Issue Date: October 25, 2005

Effective Date: October 29, 2005

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

Appearances

Leo J. Bub and **Paul G. Lane**, Attorneys at Law, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, One SBC Center, Room 3520, St. Louis, Missouri 63101, for Southwestern Bell Telephone, L.P., d/b/a SBC Missouri.

Michael F. Dandino, Deputy Public Counsel, and **Eric Martin**, Senior 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 the request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for competitive classification pursuant to Section 392.245.5, RSMo (2005), for business services, other than exchange access service, for 30¹ exchanges. The Commission also grants competitive classification

¹ The exchanges in which the company is granted competitive classification for business services are as follows: Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Chaffee, Chillicothe, De Soto, Dexter, Excelsior Springs, Farley, Gray Summit, Hannibal, Hillsboro, Kennett, Kirksville, Linn, Marionville, Marshall, Mexico, Moberly, Montgomery City, Neosho, Portage Des Sioux, Richmond, St. Clair, Union, Ware, and Webb City.

for residential services, other than exchange access service, for 51² exchanges, and denies such classification in one³ exchange. Competitive classification will permit SBC Missouri greater flexibility in pricing its services. In addition, the Commission approves the proposed tariff sheets filed to implement these classifications.

Procedural History

On August 30, 2005, SBC Missouri filed its Petition for Competitive Classification pursuant to Section 392.245.5, RSMo (2005). In its Petition, which was assigned Case No. TO-2006-0093, SBC Missouri requested that the Commission, within 30 days, classify its business and residential services in various exchanges as competitive. SBC Missouri also requested that the Commission, within 60 days, classify the business services in 26⁴ exchanges and the residential services in 49⁵ exchanges as competitive. Concurrent with the filing of its Petition, SBC Missouri filed proposed tariffs with 30-day and 60-day effective dates, reflecting the proposed grants of the requested competitive classifications.

Section 392.245.5, RSMo (2005), provides for an expedited, two-track procedure when a price-cap regulated incumbent local exchange company (ILEC) seeks competitive classification for its services within one or more exchanges. The two procedures are

² The exchanges in which the company is granted competitive classification for its residential services are as follows: Antonia, Archie, Ash Gove, Billings, Bonne Terre, Boonville, Camdenton, Cape Girardeau, Carthage, Cedar Hill, Chillicothe, Clever, De Soto, Dexter, Eldon, Excelsior Springs, Farley, Festus-Crystal City, Flat River, Fulton, Grain Valley, Gravois Mill, Gray Summit, Greenwood, Hannibal, Herculaneum-Pevely, High Ridge, Hillsboro, Imperial, Jackson, Joplin, Kennett, Kirksville, Lake Ozark-Osage Beach, Marionville, Marshall, Maxville, Mexico, Moberly, Neosho, Poplar Bluff, Portage Des Sioux, Richmond, San Antonio, Sedalia, Sikeston, St. Clair, Union, Walnut Grove, Ware, and Webb City.

³ Competitive classification is denied for the Agency exchange. This exchange is not listed on the proposed tariff and is not included in the 30 or 60-day track of the Petition.

⁴ This number was later increased to 30 by the inclusion of the Excelsior Springs Exchange, which was rejected in the 30-day case, and the three additional exchanges identified by Staff (Chaffee, Linn and Montgomery City) as meeting the 30-day criteria.

⁵ This number was later increased to 51 by the inclusion of the San Antonio and Sikeston exchanges, which were rejected in the 30-day case.

designed as a 30-day track and a 60-day track. By a notice issued September 2, the Commission notified the parties that Case No. TO-2006-0093 would address the portions of the Petition regarding the 30-day track.⁶ By a separate order issued the same day, the Commission opened the present case, TO-2006-0102, to address the portions of the Petition regarding the 60-day track.

Because of the need to proceed expeditiously, the Commission issued an order on September 6, directing its Data Center to send notice of SBC Missouri's application and setting an intervention deadline. The Commission later issued an additional notice and extended the intervention deadline. No party filed an application to intervene.

During the week of October 3, the Commission conducted local public hearings in Carthage, Union, Excelsior Springs, Kennett, Marshall, Hannibal, Kirksville, Mexico, and Moberly, Missouri, for the public to offer comments to the Commission. The Commission conducted an evidentiary hearing on October 12 and 13. SBC Missouri filed Post-hearing Exhibits 8 and 9(HC) on October 18. On October 19, Staff filed Post-hearing Exhibit 11 and the parties filed post-hearing briefs. SBC Missouri filed its comments to Exhibit 11 on October 21. Post-hearing Exhibits 8, 9(HC), and 11 are hereby received into the record.

⁶ In its Report and Order in Case No. TO-2006-0093, the Commission transferred consideration of competitive classification for business services in the exchanges of Chaffee, Excelsior Spring, Linn, and Montgomery City to the present case, TO-2006-0102. As SBC Missouri had originally requested competitive classification for business services in 26 exchanges, the addition of these four exchanges raised the company's request to 30 exchanges. The Commission also transferred consideration of the residential services in the Joplin and Sikeston exchanges to Case No. TO-2006-0102, which raised SBC Missouri's request from 49 to 51 exchanges.

Overview:

On July 14, 2005, Senate Bill No. 237⁷ was signed into law; the statutory changes in the bill became effective on August 28, 2005. Senate Bill No. 237 (S.B. 237) changes the process under the price cap statute⁸ 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.

Under S.B. 237, the Commission is now required to apply an expedited, two-track procedure when a price-cap-regulated ILEC seeks competitive classification for its services within one or more exchanges. The 30-day track establishes a competitive “trigger” that focuses solely on the number of carriers providing “basic local telecommunications service” within an exchange. Under the 30-day track, 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, using their own or an affiliate’s facilities in whole or in part, are providing “basic local telecommunications service” within that exchange.⁹

⁷ 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).

⁸ Section 392.245, RSMo 2000.

⁹ Section 392.245.5, RSMo (2005).

Under the 60-day track, in addition to the specified competitive triggers found in the 30-day track, the statute permits a price cap regulated ILEC to seek competitive classification based on competition from other entities providing “local voice service.” That is, the 60-day track recognizes competition from local voice providers that use the ILEC’s facilities or a third party’s facilities, in addition to recognizing competition from entities providing local service using their own facilities in whole or in part. The statute requires the Commission to grant competitive classification within 60 days unless it determines that such classification is contrary to the public interest.¹⁰

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.

Discussion:

Southwestern Bell Telephone, L.P., is a Texas limited partnership, with its principal Missouri office at One SBC Center, Room 3520, St. Louis, Missouri 63101.¹¹ 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.¹²

¹⁰ Section 392.245.5, RSMo (2005).

¹¹ SBC Missouri’s verified Petition, para. 10.

¹² SBC Missouri’s verified Petition, para. 10, and see Case No. IN-2003-0247.

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 those phrases are defined in Section 386.020, RSMo 2000.

SBC Missouri's Petition requests, under the 60-day track, competitive classification in 30 exchanges¹³ for business services and 51 exchanges¹⁴ for residential services. These exchanges are listed on the company's proposed tariff revisions. SBC Missouri later attempted to add the Agency exchange to the list of exchanges in which it requests competitive classification for residential services.

1. *The Agency Exchange*

The Commission will not grant competitive classification for residential services for the Agency exchange. SBC Missouri did not include the Agency exchange in the 30-day or the 60-day track of the company's original application, and consequently, it was not included in the Commission's notices regarding this case. As discussed in the Conclusions of Law section of this order, the Commission finds that issues of fundamental fairness require that SBC Missouri name, in its Petition, all exchanges in which it seeks competitive classification.

¹³ The exchanges in which the company requests competitive classification for business services are as follows: Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Chaffee, Chillicothe, De Soto, Dexter, Excelsior Springs, Farley, Gray Summit, Hannibal, Hillsboro, Kennett, Kirksville, Linn, Marionville, Marshall, Mexico, Moberly, Montgomery City, Neosho, Portage Des Sioux, Richmond, St. Clair, Union, Ware, and Webb City.

¹⁴ The exchanges in which the company requests competitive classification for residential services are as follows: Antonia, Archie, Ash Gove, Billings, Bonne Terre, Boonville, Camdenton, Cape Girardeau, Carthage, Cedar Hill, Chillicothe, Clever, De Soto, Dexter, Eldon, Excelsior Springs, Farley, Festus-Crystal City, Flat River, Fulton, Grain Valley, Gravois Mill, Gray Summit, Greenwood, Hannibal, Herculaneum-Pevely, High Ridge, Hillsboro, Imperial, Jackson, Joplin, Kennett, Kirksville, Lake Ozark-Osage Beach, Marionville, Marshall, Maxville, Mexico, Moberly, Neosho, Poplar Bluff, Portage Des Sioux, Richmond, San Antonio, Sedalia, Sikeston, St. Clair, Union, Walnut Grove, Ware, and Webb City.

2. *The Other Exchanges*

SBC Missouri bases its Petition for competitive classification under the 60-day review procedure on competition reflected in various exhibits. SBC Missouri updated these exhibits to include exchanges not granted competitive classification in SBC Missouri's 30-day case and the additional exchanges identified by Staff.¹⁵ These exhibits identify the exchanges for which SBC Missouri seeks competitive classification under the 60-day criteria and identify more than the requisite number of competitors providing local voice service¹⁶ on which SBC Missouri relies to meet the statutory criteria and the source of that information.

SBC Missouri indicates that the data in Revised Exhibits B-1, B-2, B-3 and B-4 reflect only the minimum number of competitors in each of the designated exchanges since there may be additional competitors who are providing service in the exchange.¹⁷ In each exchange, the number of competitors exceeds the statutory requirements for competitive classification.

¹⁵ The original versions of these exhibits were attached to SBC Missouri's Petition for Competitive Classification filed August 30. Updated versions were incorporated into SBC Missouri witness Craig A. Unruh's Direct Testimony filed on September 19, and also into Mr. Unruh's Rebuttal Testimony filed on October 3.

¹⁶ SBC Missouri states that it excluded Cingular from the 30-day trigger review because the statute requires the trigger company to be a non-affiliated entity. SBC Missouri also indicates that it excluded the AT&T companies from its review, even though AT&T remains a competitor. SBC Missouri states that it chose to exclude the AT&T companies from its analysis to avoid issues that parties might raise given the pending acquisition of AT&T by SBC Communications. (Unruh Direct Testimony, pp. 9-10).

¹⁷ For example, SBC Missouri indicates that it has focused only on six of the hundreds of carriers that offer VoIP service and only counts the VoIP providers in exchanges where cable modem service is available (*i.e.*, excluding DSL) and only if the customer in that exchange can port their telephone number or obtain a new local telephone number in the exchange. SBC Missouri relies only on wireless carriers who use their own facilities (ignoring Mobile Virtual Network Operators, or MVNOs, such as Virgin Mobile), and it does not include any competitive services currently being offered by AT&T or its affiliates, prepaid carriers or resellers. The information presented also excludes SBC Missouri affiliates such as Cingular. (Unruh Direct Testimony, p. 9).

The Direct Testimony of Craig A. Unruh, SBC Missouri's Executive Director-Regulatory, further supports SBC Missouri's Request for Competitive Classification. He explained that SBC Missouri developed the count of certain CLEC competitors in Revised Exhibits B-1 and B-2 from its internal billing records. Specifically, SBC Missouri confirmed through its internal wholesale billing records that it was providing and billing the CLECs listed in these exhibits for UNE-P or commercial wholesale services, which they use to provide local telecommunications on a retail basis to business or residential customers in each requested exchange. In Unruh Revised Schedules 2(HC) and 3(HC), SBC Missouri named the specific CLEC competitors providing service via each method in each requested exchange. In nearly all the requested exchanges, there are multiple CLECs actively providing service in competition with SBC Missouri via UNE-P or commercial arrangements.¹⁸ For business services, two exchanges had two CLECs listed, many have between 10 and 12 of these types of providers; for residential services, six exchanges had between three and four CLECs listed, with nearly three-quarters having between 8 and 11 of these providers.¹⁹

SBC Missouri identified wireless carrier competitors in each exchange through Let'sTalk.com, a publicly available website that lists, for any zip code entered, the wireless carriers providing service in that area and various wireless rate plans offered by each carrier. SBC Missouri also identified the service areas of certain local wireless carriers through their websites. There are at least two providers of wireless service²⁰ in each exchange in which competitive classification has been requested by SBC Missouri, thus

¹⁸ Unruh Rebuttal Testimony, Revised Exhibits B-1 and B-2, and Revised Schedules 2(HC) and 3(HC).

¹⁹ Id.

²⁰ Id.

satisfying one prong of the competitive classification criteria. For both the business and residential exchanges, the vast majority of exchanges have three or four, and with some having as many as five wireless providers.²¹

Further, Revised Exhibits B-1 and B-2 also identify a number of providers of VoIP service that rely on the broadband network of a third party cable television network. The vast majority of exchanges reflect one or more such VoIP providers for both residential and business services.

The evidence satisfies the 60-day criteria in the statute because it shows for each exchange listed in Revised Exhibit B-1 for business services and for each exchange listed in Revised Exhibit B-2 for residential services that:

- There is competition from at least two CLECs 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 LEC within the meaning of Section 392.245.5(6).
- There is also at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1).
- In the majority of exchanges, there is at least one provider offering business and/or residential VoIP service using an unaffiliated cable television company’s broadband network.

No persuasive evidence has been presented showing that these representations are inaccurate and the Commission finds that the evidence presented shows the provision of local voice service that meets the statutory criteria for competitive classification. The Commission finds that SBC Missouri is entitled to a grant of competitive classification for the requested exchanges, except for residential services for the Agency exchange.

²¹ Id.

The Amended Direct Testimony of John Van Eschen, the Manager of the Telecommunications Department, along with his testimony, describe Staff's investigation, where it identified 17 additional exchanges (15 for business services and two for residential services) that were not listed by SBC Missouri in its original 60-day request but which Staff believes meet the 30-day statutory criteria for granting competitive classification for business or residential service (or both) in the requested exchanges.²² In its investigation, Staff used data, such as confidential CLEC annual reports, that was unavailable to SBC Missouri. Staff testified that for residential services, the Joplin and Sikeston exchanges qualify for competitive classification under the 30-day criteria, and that for business services, the exchanges of Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Chaffee, Farley, Linn, Marshall, Mexico, Moberly, Montgomery City, St. Clair, and Union meet the criteria.

Staff based this positive recommendation, in part, on the presence of at least one non-affiliated entity providing local voice service in whole or in part over facilities in which it or one of its affiliates has an ownership interest. With respect to the CLEC competitors, Staff's evidence was based on a review of confidential CLEC annual reports filed with the Commission and telephone calls to some CLECs to discuss their reports.²³ SBC Missouri has also identified at least one wireless provider offering business and residential service within the exchanges using its own facilities in whole or in part. For these 17 exchanges, Staff's evidence provides additional verification that the statutory criteria have been met for

²² See also Van Eschen's Amended Direct Testimony.

²³ Van Eschen Amended Direct Testimony, pp. 2, 12-13, Sch. 1, and Van Eschen Rebuttal Testimony, pp. 9-10.

granting competitive classification for the requested business or residential services in those exchanges.

Staff and the Office of Public Counsel argue that it would be contrary to the public interest to grant SBC Missouri competitive status for business and residential services in the requested exchanges. Neither Staff nor Public Counsel, however, provided substantial and competent evidence showing that such competitive classification would be contrary to the public interest.

Conclusions of Law

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

Jurisdiction:

SBC Missouri is a “local exchange telecommunications company” and a “public utility” within the intendments of Section 386.020, RSMo. The Commission has jurisdiction over this matter pursuant to Section 392.245.5, RSMo (2005). This statutory provision requires the Commission, within 60 days, to determine whether the requisite number of entities are 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 unless the Commission finds that such competitive classification is contrary to the public interest.²⁴

The Controlling Statutes:

In pertinent part, Section 392.245.5, RSMo (2005), provides:

Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange

²⁴ Section 392.245.5(6), RSMo (2005).

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.

As the introductory paragraph, this applies to both the 30 and 60-day tracks for obtaining competitive classification.

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.²⁵ The statute provides that one commercial mobile radio service (“CMRS” or “wireless”) provider is to be considered an entity providing “basic local telecommunications services” in an exchange.²⁶ In addition, the statute excludes prepaid service providers and resellers.²⁷

The statute provides that certain additional providers of telecommunications services shall be counted under the 60-day track:

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 facilities of the telecommunications facilities or other facilities of a third party, including those of the incumbent local exchange

²⁵ Section 392.245.5(2), RSMo (2005).

²⁶ Section 392.245.5(1), RSMo (2005).

²⁷ Section 392.245.5(4), RSMo (2005).

company as well as providers that rely on an unaffiliated third-party Internet service.”

Thus, under the 60-day track, the Commission counts as competitors those using the facilities of other companies, including those using the ILEC’s facilities, and those providers (such as VoIP providers) that use an unaffiliated company’s broadband network.

The Commission must also maintain and consider its own records concerning the regulated carriers who provide local voice service over their own facilities, or through the use of the facilities of another provider of local voice service.²⁸

Section 386.020(52) 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.”

Burden of Proof:

The Missouri Supreme Court has stated that “[t]he law in this state as to the burden of proof is clear and designed to assure that hearings on contested matters provide the parties with predictable rules of procedure. The party asserting the positive of a preposition bears the burden of proving that preposition.”²⁹ SBC Missouri asserts that there are the requisite numbers of entities providing local voice service to business or residential customers, or both, in the specified exchanges. Therefore, SBC Missouri has the burden of proof on this issue, and excluding the Agency exchange, the company has met this burden.

²⁸ Section 392.245.5(6), RSMo (2005).

²⁹ Dycus v. Cross, 869 S.W.2d 745, 749 (Mo. Banc 1994).

Section 392.245.5(6), RSMo (2005), provides that the Commission “shall approve such petition within sixty days unless it finds that such competitive classification is contrary to the public interest.” [Emphasis added.] Here, the parties asserting that the grant of a competitive classification would be contrary to the public interest – Staff and Public Counsel – bear the burden of proof. Neither Staff nor Public Counsel provided sufficient competent and substantial evidence to show that granting competitive classification in the requested exchanges would be contrary to the public interest.

Discussion:

1. The Agency Exchange

The Commission finds that issues of fundamental fairness require that SBC Missouri name, in its Petition, all exchanges in which it seeks competitive classification. Without this requirement, adequate notice cannot be provided and potentially interested entities or persons are denied a meaningful opportunity to intervene in the proceeding or object to the application. SBC Missouri did not request competitive classification of its residential services in the Agency exchange in either the 30-day track or the 60-day track. Consequently, the notices issued by the Commission do not mention the Agency exchange. For these reasons, the Commission will deny SBC Missouri’s request that competitive classification be granted for residential services in the Agency exchange.

2. *The Other Exchanges*

The Commission concludes that the evidence SBC Missouri presented, discussed in the Findings of Fact above, satisfies the 60-day criteria in the statute because the evidence shows, for the requested exchanges,³⁰ that:

- There is at least one non-affiliated CLEC providing “local voice” service in whole or in part over facilities in which it or one 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).
- There is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1).
- In the majority of exchanges, there is at least one provider offering business and/or residential VoIP service using an unaffiliated cable television company’s broadband network.

In addition, the Commission determines that in the majority of exchanges, there is at least one provider offering business and/or residential VoIP service using an unaffiliated cable television company’s broad-band network.

The Commission notes that with respect to certain exchanges for which Staff has withheld a positive recommendation for competitive classification, it has done so because Staff (and Public Counsel) asserts that such a grant of competitive classification would be contrary to public interest because the CLEC competitors identified by SBC Missouri are only providing service utilizing UNE-P or similar commercial wholesale service from SBC

³⁰ For a list of the exchanges in which SBC Missouri requests competitive classification for business services, see footnote 13. See footnote 14 for a list of the exchanges in which SBC Missouri requests competitive classification for residential services.

Missouri and should not be counted.³¹ Staff also makes a similar argument with respect to the wireless and VoIP competitors SBC Missouri identified.³²

In taking this position, however, Staff and Public Counsel fail to follow the statute.

The statute specifically recognizes 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.³³

As reflected in S.B. 237's creation of the separate 60-day track, the Legislature determined that there are other forms of competition in the market beyond that from entities that use their own facilities in whole or in part to provide service. However, the statute does also provide that the Commission "shall approve such petition within sixty days unless it finds that such competitive classification is contrary to the public interest."³⁴

Staff asserts that granting competitive classification in any exchanges except the 17³⁵ that it supports would be contrary to the public. Although Staff and Public Counsel contend that SBC Missouri bears the burden of proving that such classification is in the public interest, they are incorrect. As noted above, Staff and Public Counsel have the burden of proof on this issue; neither Staff nor Public Counsel has met this burden. Staff attempted to support its claim that competitive classification is contrary to the public interest, but it did so only through vague references to what it sees as flaws in the services

³¹ Van Eschen Amended Direct Testimony, p. 2, and Meisenheimer Rebuttal Testimony, pp. 14-15.

³² Van Eschen Amended Direct Testimony, pp. 20-25.

³³ Section 392.245.5, RSMo (2005), emphasis added.

³⁴ Id.

³⁵ Staff supports competitive classification in the exchanges of Joplin and Sikeston for residential services, and in Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Chaffee, Farley, Linn, Marshall, Mexico, Moberly, Montgomery City, St. Clair, and Union, for business services.

of alternative providers such as wireless and VoIP companies, and providers who use the incumbent's facilities on either a UNE-P basis or through commercial agreements.³⁶ Staff opposes counting competitors providing service using UNE-P or commercial wholesale service from an ILEC because Staff questions whether these provisioning methods are "reasonable alternatives" to a CLEC's provision of service using its own facilities.³⁷ Staff raises similar questions with respect to wireless service and VoIP service, claiming that few customers will actually switch their landline telephone service to wireless or VoIP service if the consumer is expected to pay more for local voice service,³⁸ or if the quality of service is perceived to be inferior.³⁹ Staff also questions the ability of these provisioning methods to hold the incumbent LEC's prices in check.⁴⁰ Nonetheless, Staff failed to provide competent and substantial evidence on these issues, and thus, failed to show that the requested grant of competitive classification is contrary to the public interest. Likewise, Public Counsel failed to provide competent and substantial evidence showing that granting competitive classification in the requested exchanges is contrary to the public interest.

In addition, neither Staff nor Public Counsel has presented substantial information showing that SBC Missouri's evidence concerning the exchanges for which SBC Missouri requests competitive classification is inaccurate and the Commission finds that the company's evidence is accurate and correct and demonstrates that the statutory criteria for competitive classification have been met. With respect to the 17 exchanges

³⁶ Van Eschen Amended Direct Testimony, pp. 20-29.

³⁷ Van Eschen Rebuttal Testimony, pp. 2-3.

³⁸ Van Eschen Rebuttal Testimony, p. 7.

³⁹ Van Eschen Rebuttal Testimony, p. 6.

⁴⁰ Van Eschen Rebuttal Testimony, p. 7.

found by Staff to satisfy the 30-day criteria, the Commission credits Staff's evidence and concludes that such evidence also demonstrates that the statutory criteria has been met for these exchanges.

Thus, the Commission determines that SBC Missouri shall be granted competitive classification for business services for the following 30 exchanges:

Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Chaffee, Chillicothe, De Soto, Dexter, Excelsior Springs, Farley, Gray Summit, Hannibal, Hillsboro, Kennett, Kirksville, Linn, Marionville, Marshall, Mexico, Moberly, Montgomery City, Neosho, Portage Des Sioux, Richmond, St. Clair, Union, Ware, and Webb City.

In addition, the Commission determines that SBC Missouri is granted competitive classification for residential services for the following 51 exchanges:

Antonia, Archie, Ash Gove, Billings, Bonne Terre, Boonville, Camdenton, Cape Girardeau, Carthage, Cedar Hill, Chillicothe, Clever, De Soto, Dexter, Eldon, Excelsior Springs, Farley, Festus-Crystal City, Flat River, Fulton, Grain Valley, Gravois Mill, Gray Summit, Greenwood, Hannibal, Herculaneum-Pevely, High Ridge, Hillsboro, Imperial, Jackson, Joplin, Kennett, Kirksville, Lake Ozark-Osage Beach, Marionville, Marshall, Maxville, Mexico, Moberly, Neosho, Poplar Bluff, Portage Des Sioux, Richmond, San Antonio, Sedalia, Sikeston, St. Clair, Union, Walnut Grove, Ware, and Webb City.

IT IS THEREFORE ORDERED:

1. That Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, is granted competitive classification for business services for the following 30 exchanges:

Archie, Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Chaffee, Chillicothe, De Soto, Dexter, Excelsior Springs, Farley, Gray Summit, Hannibal, Hillsboro, Kennett, Kirksville, Linn, Marionville, Marshall, Mexico, Moberly, Montgomery City, Neosho, Portage Des Sioux, Richmond, St. Clair, Union, Ware, and Webb City.

2. That Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, is granted competitive classification for residential services for the following 51 exchanges:

Antonia, Archie, Ash Gove, Billings, Bonne Terre, Boonville, Camdenton, Cape Girardeau, Carthage, Cedar Hill, Chillicothe, Clever, De Soto, Dexter, Eldon, Excelsior Springs, Farley, Festus-Crystal City, Flat River, Fulton, Grain Valley, Gravois Mill, Gray Summit, Greenwood, Hannibal, Herculaneum-Pevely, High Ridge, Hillsboro, Imperial, Jackson, Joplin, Kennett, Kirksville, Lake Ozark-Osage Beach, Marionville, Marshall, Maxville, Mexico, Moberly, Neosho, Poplar Bluff, Portage Des Sioux, Richmond, San Antonio, Sedalia, Sikeston, St. Clair, Union, Walnut Grove, Ware, and Webb City.

3. That the proposed tariff revisions (Tariff File No. YI-2006-0145), filed by Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, to P.S.C. Mo-No 35, General Exchange Tariff, Section 32.1, 1st Revised Sheet 2, reflecting the reclassification of SBC Missouri's business services in the exchanges listed in the tariff, are approved.

4. That the proposed tariff revisions (Tariff File No. YI-2006-0145), filed by Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, to P.S.C. Mo-No 35, General Exchange Tariff, Section 32.2, 1st Revised Sheet 4, reflecting the reclassification of SBC Missouri's residential services in the exchanges listed in the tariff, are approved.

5. That the request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for competitive classification for residential services in the Agency exchange is denied.

6. That Post-hearing Exhibits 8, 9(HC), and 11 are received into the record.

7. That all other motions not specifically ruled upon by the Commission are denied and that any objections not specifically ruled upon are overruled.

8. That this Report and Order shall become effective on October 29, 2005.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., and Appling, C., concur,
with separate concurring opinions to follow;
Murray, C., concurs;
Gaw and Clayton, CC., dissent, with
separate dissenting opinions to follow;
and certify compliance with the provisions
of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 25th day of October, 2005.