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) – 30-day Petition.	))))	**Case No. TO-2006-0093** Tariff File No. Yl-2006-0144

OPINION OF COMMISSIONER ROBERT M. CLAYTON III DISSENTING, IN PART, AND CONCURRING, IN PART

This Commissioner dissents with the majority's Report and Order granting competitive status in certain of the applicant's exchanges pursuant to the newly revised §392.245, RSMo., 2005.[1] This Commissioner believes that there is a lack of evidence to support the findings that all of the exchanges listed by SBC meet the statutory criteria for competitive classification. This Commissioner does, however, concur with how the majority decided issues involving a number of the exchanges in question, whether in making a finding of adequate competitive presence or in delaying the decision for additional evidence. This dissent will set out the points with which this Commissioner agrees and disagrees.

PROCEDURAL CONCERNS

This case is the second[2] to be brought before the Commission regarding the newly crafted statute for large incumbent local telephone providers to request competitive classification and subsequent pricing deregulation. The statute in question, §392.245, sets out the mechanism whereby a company may request that classification and the type of evidence necessary to make the determination.

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[1] All statutory references are made to Revised Statutes of Missouri, 2005.

[2] *See, In Re Sprint*, Case No. IO-2006-0092.

First, while this Commissioner appreciates the need for setting time lines and encouraging prompt rulings, this Commissioner has noted[3] that the schedule for adjudicating such a case is unusually short. The case must be filed, prosecuted and decided within 30 days. This is not enough time to make a thorough examination of the evidence and fully evaluate the information supplied by the company and by the Commission staff.

Secondly, the type of information the parties have supplied is simply inadequate for the Commission to make a supportable decision addressing the presence of competition in each exchange. Much of the evidence has been second-hand or third-hand information, unverifiable and untested. The Commission cannot cross-examine a webpage or a phone directory. Without an adequate review of the record, some customers may face an unfriendly marketplace without enough competitive forces to protect them.

Some have argued that business and official records can be added to the record, subject to authentication and adequate foundation, but much of that evidence is out of date. The Commission's Annual Reports used by Staff consist of 2004 data. Much has occurred in telecommunications in recent years, casting doubt on the relevance of such documents, including the recently issued *USTA II* and *Brand X* Supreme Court decisions, the FCC's *Triennial Review Remand Order*, the mergers of large nationwide carriers (SBC-AT&T, Sprint-Nextel, Verizon-MCI), Universal Service Fund and ETC Reform, new FCC Orders relating to billing, intercarrier compensation and enhanced records exchange rules, not to mention the Telecom Act of 2006 and additional proposals at both the state and federal level. Each of these events has resulted in change to the competitive landscape and serve to cast doubt on the accuracy and relevance of the 2004 data in question.

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[3] *See*, Opinion of Commissioner Clayton, Case No. IO-2006-0092.

Thirdly, this Commissioner is concerned with the definitions presented by the parties and the suggested intent of the legislature. It is this Commissioner's opinion that the General Assembly intended to open up only those exchanges in which competition is present and multiple providers available for hire by customers. Regulation stands in the place of competition when there is an absence of competition in the marketplace or when one provider may act without discipline from competitive pressures. When consumers have a choice of services and providers, less regulation is needed in the marketplace. The majority's interpretation of the statute deregulates the market when the market may not be ready.

CONCURRENCE

This Commissioner concurs with the majority that competent and substantial evidence established that certain exchanges met the criteria allowing SBC to be free from pricing regulation. Although there is a question as to the admissibility of certain types of evidence and whether a number of the pieces of evidence carried enough weight to support the majority's Report and Order, this Commissioner was satisfied that two competitors are providing some level of basic local telecommunications service in the following exchanges:

Competitive Classification for Residential Services:

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

Competitive Classification for Business Services:

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

This Commissioner also agrees with the majority's decision to withhold judgment on a number of exchanges not specifically named in the applicant's petition. The decision on those exchanges will be made in the 60-day in Case No. TO-2006-0102. The competitors, customers and potential intervenors should be given a full opportunity to participate in the case and the analysis of the evidence. The concept of due process requires such notice and deliberation, especially in light of the shortened timelines. The following exchanges will be reviewed in the next case:

For Residential Services: Joplin.

For Business Services:

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

DISSENT

With regard to the remaining exchanges in SBC's request, this Commissioner was not satisfied with the sufficiency or quality of the evidence to show that the statutory criteria were met which, in turn, failed to convince this Commissioner that enough competition was present in the given exchanges. These remaining exchanges can be grouped into two categories for lack of competitive presence: lack of wireline competition or lack of evidence of wireless competition.

A. Lack of Wireline Competition

This Commissioner believes that certain exchanges lack an alternative wireline provider operating in the exchange. These exchanges include the following:

For Residential Services: San Antonio and Sikeston.[4]

For Business Services: Bonne Terre, Excelsior Springs and Marble Hill.[5]

The statute requires that the competitive provider be offering "local voice" service "in whole or in part" over facilities in which it or one of its affiliates has an ownership interest. One of the few disputes among the parties, including Staff, Office of Public Counsel and SBC, is defining the phrase "in whole or in part."

There is no dispute if a provider is offering service on a "full facilities-based" system, meaning that the service is offered "in whole" on the competitor's own system. However, Staff has argued that an alternative provider must meet a "minimum threshold" of owning a certain amount of

[4] The majority did not declare these exchanges competitive and this Commissioner concurs in that result. However, for purposes of consistency and clarity, the exchanges are grouped together because they should be treated in the same manner.

[5] The majority found that Bonne Terre and Marble Hill were competitive, but did not find competition in the exchange of Excelsior Springs. These exchanges are grouped together based on the same reasoning.

its system. Staff argues that "in part" requires a company be providing service on a UNE-L[6] basis. In such a circumstance, a provider uses its own switch in conjunction with the incumbent's "loop," the connection from the switch to the customer's premises. In the converse, Staff argues that as an alternative that the competitor could also own its own loop and use the switch of another party to satisfy its standard of facilities ownership. Staff asserts that such a "minimal threshold" is necessary because a competitor must own a sufficient amount of its facilities to achieve independence from the incumbent. If a competitor is not adequately insulated from the facilities or business plan of the incumbent, the competitor cannot act as a disciplining force in the marketplace. SBC, in contrast, has interpreted that competitor ownership of any amount of equipment or facilities as defined in §386.020(52), satisfies the statute.

This Commissioner believes that the General Assembly intended that the competitor own more than a billing office, a single piece of real estate or a cross-arm telephone pole. There must be a sufficient amount of facilities owned by the competitor to fully afford an amount of independence to provide service independently, and competitively, with the incumbent. Staff makes a compelling argument for its "minimum threshold" and this Commissioner agrees.

Therefore, this Commissioner dissents in the finding of competition for the above-referenced exchanges based on a lack of presence of an alternative, wireline competitor in the exchange. In the San Antonio exchange, the evidence indicated the presence of a UNE-P provider, but insufficient evidence to support a finding of any other wireline competition. In Sikeston and Marble Hill, there

[6] Unbundled Network Element-Loops. *See, In the Matter of Unbundled Access to Network Elements*, WC Docket 04-313, Order on Remand, ("Triennial Review Remand Order") released February 4, 2005, at ¶200.

was some evidence that Big River Telephone is providing some type of local service but the evidence did not support the finding of the "minimum threshold" suggested by Staff. Finally, in Excelsior Springs, it was not clear in the record whether any customers were being served in the exchange. This Commissioner does not believe the General Assembly intended that such minimal competitive presence in a community would lead to pricing deregulation.

B. Inadequate Presence of Wireless Local Service

The second category for which this Commissioner dissents is with regard to wireless service offered in an exchange and the use of that provider in the analysis for competitive status. Competitive classification should be denied based on lack of competitive wireless presence in the following exchanges:

For Residential Services: Farmington, Pacific, Smithville and Washington.

For Business Services:

Bonne Terre	Clever	Excelsior Springs	Farmington
Flat River	Grain Valley	Greenwood	Pacific
Smithville	Washington		

In each of these exchanges, the applicant has used §392.245.5(1), in compiling the list of competition by referencing one wireless provider. The applicant supplied a limited amount of information regarding the presence of a wireless carrier in an exchange, and in many cases the evidence to support the assertion was a review of a website called "LetsTalk.com." Supposedly a review of that website shows that a customer can receive wireless service in that area or exchange. Staff indicated its concurrence by scanning websites of the wireless companies, the FCC wireless webpage and the Missouri Office of Administration 9-1-1 availability website.

Wireless or CMRS providers may be counted in the analysis of reclassifying an exchange as competitive. "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". §392.245.5(1). The statute does not appear to describe a specific level of service in a given exchange. If one were to strictly construe the reading of the statute, any CMRS provider should be counted regardless of whether it actually provides any level of service in the subject exchange. The only requirement is that it must be "providing basic local telecommunications service. . ." within the exchange.

The definition of "basic local telecommunications service"[7] is very loosely defined in that the language "any of the following" would permit even the least amount of service offering as falling under the definition. The options range from having a single cell tower in a remote corner of the

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[7] "Basic local telecommunications service," pursuant to §386.020(4), is defined as two-way switched voice service within a local calling scope as determined by the commission comprised of any of the following services and their recurring and nonrecurring charges:

(a) Multiparty, single line, including installation, touchtone dialing, and any applicable mileage or zone charges;

(b) Assistance programs for installation of, or access to, basic local telecommunications services for qualifying economically disadvantaged or disabled customers or both, including, but not limited to, lifeline services and link-up Missouri services for low-income customers or dual-party relay service for the hearing impaired and speech impaired;

(c) Access to local emergency services including, but not limited to, 911 service established by local authorities;

(d) Access to basic local operator services;

(e) Access to basic local directory assistance;

(f) Standard intercept service;

(g) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission;

(h) One standard white pages directory listing.

Basic local telecommunications service does not include optional toll free calling outside a local calling scope but within a community of interest, available for an additional monthly fee or the offering or provision of basic local telecommunications service at private shared-tenant service locations.

exchange and serving one customer to a full offering of services including local service, local phone numbers and local offices promoting, and supporting, the offered service.

The new statute provides an additional requirement for all types of service, including CMRS service. In parsing the relevant statutes, carriers that may be considered when evaluating an exchange must be "providing basic local telecommunications service to . . . customers within the exchange." In addition, § 392.245.5(3) requires that, "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 §386.020" (emphasis added). That section defines "basic local telecommunications service" as "two-way switched voice service ***within a local calling scope*** as determined by the commission comprised of any of the following services . . ." (emphasis added) § 386.020(4). This definition recognizes boundaries of a "two-way" service within a "local calling scope."

Lastly, the new statutory language of §392.245 provides additional guidance, by what terms are not referenced. The term "interexchange telecommunications service," which is defined as "service between points in ***two or more exchanges,***" (emphasis added) §386.020(24), also known as long distance or toll calling service, is not mentioned in the new section.

If Customer A lives in a given exchange and wishes to exclusively use wireless service, it constitutes local service only if wireline customers in that exchange can call Customer A as a local call. The only meaning that can be given to "capable of receiving calls from a basic local telecommunications service provider" is to assume that the wireline calling party only has access to local service and is not capable of making long-distance or toll calls. The only way a CMRS provider (or any other potential competitor) can count as a competitor under §392.245.5, is if the

incumbent local exchange carrier has rated the call in its switch as a local call. This is usually, but not always, done by the assignment of a specific "NXX" (the three-digit number that associates the telephone number with the exchange), depending on the vintage and capabilities of the local switch. Additionally, the rating of the call as local can be accomplished through different types of interconnections or interconnection agreements. It should be noted that the rating of such a number as local or non-local is almost entirely within the purview of the entity seeking competitive classification in the exchange. If a wireline customer wishes to dial a neighbor's wireless phone, the number for which has been procured from a different community or different "NXX," then the call is a long distance call and must be routed through an interexchange carrier. That wireless customer is actually receiving the call from an interexchange carrier and is not capable of receiving calls from the basic local service provider.

In reviewing the evidence supplied by the parties, the record was largely deficient of reference to whether the competing wireless carrier provided service to customers in those exchanges or whether it was even able to assign locally-rated numbers in a customer's home exchange. Only after Commission inquiries did the parties offer evidence of local wireless phone numbers or local wireless presence in some of the exchanges. In some of the exchanges where no local phone numbers were identified, Staff established the presence of Extended Area Service (EAS)[8] routes which enabled local, toll free calling to another exchange. Additionally, Staff illustrated how EAS

[8] "Extended Area Service" known as EAS is defined as "[a] novel name for a larger than normal local telephone calling area. The local phone company extends it subscribers the option of paying less per month for a small calling area and paying extra per individual call outside that area (i.e. the extended area), or paying more per month flat rate but having a larger calling area (i.e. having extended area service)." Harry Newton, *Newton's Telecom Dictionary*, p. 413 (10th Ed. 1996).

routes could also be used in connection with Metropolitan Calling Area[9] territories to permit unlimited local calling. Staff identified another possible explanation for toll free local calling through the use of different types of interconnections, however, no evidence was presented for any of these exchanges regarding the existence of such interconnections. This material is possessed by phone companies and not by the Staff.

In the exchanges listed above, wireless customers do not have the choice or option of a local phone number or local service. These exchanges do not have an EAS route to send the call, toll free, through another adjacent exchange. Even in suburban communities within MCA territories, there was insufficient evidence to establish the ability of a customer to connect a local call within the respective community. While it is generally assumed that there are more wireless services and providers in metropolitan areas, the evidence did not establish that a single provider held itself out to each community as a local services provider.

The statute, being brand-new, does contain some confusing and possibly conflicting provisions. It is incumbent on this Commission to read the sections within the statute harmoniously whenever possible, and to give meaning to all the sections of the statute. There is no evidence in the record that CMRS carriers are providing service in the exchanges at issue, and there is no evidence in the record that a provider of basic local service (and nothing else) can complete a call to users of that CMRS service. This Commission should require a level of service for those customers that is comparable to the wireline service before granting competitive classification. This is especially the

[9] *See, In the Matter of the Establishment of a Plan for Expanded Calling Scopes in Metropolitan and Outstate Exchanges*, Report and Order, Case No. TO-92-306, for definition of Metropolitan Calling Areas (MCA).

case in rural areas with far fewer competitive choices.

CONCLUSION

In conclusion, the Commission should demand that the parties supply competent, direct, first-hand knowledge-based evidence in pre-filed testimony and at hearing. The Report and Order should not be based on hearsay information retrieved from webpages and telephone listings, from advertisements and data taken from out-of-date reports filed by third parties. The evidence must establish the statutorily required number of basic local service providers serving customers in each exchange. Only after a comprehensive review of direct evidence, based on first-hand knowledge, establishing the presence of competition in an exchange, should the Commission unleash the applicant's unbridled pricing "flexibility."

For the foregoing reasons, this Commissioner respectfully dissents.

Respectfully submitted,

Robert M. Clayton III
Commissioner

Dated at Jefferson City, Missouri,
on this 10th day of November 2005.