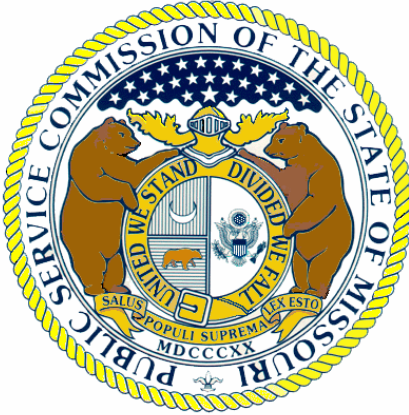


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



In the Matter of the Investigation of the State of)
Competition in the Exchanges of Southwestern Bell) **Case No. TO-2001-467**
Telephone Company.)

REPORT AND ORDER ON REMAND

Issue Date: January 25, 2007

Effective Date: February 4, 2007

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Table of Contents

Appearances.....	2
Procedural History and Overview	2
Findings of Fact.....	4
I. Pre-1996 Developments – H.B. 360/Case No. TO-93-116	5
II. Post-1996 Developments – S.B. 507/Case No. TO-2001-467	10
A. The Extent to Which Services are Available and are Functionally Equivalent or Substitutable	11
i. Private Line/Dedicated Services	12
ii. IntraLATA Special Access	14
iii. IntraLata Toll/MTS Services	14
iv. Wide Area Telecommunications Services (WATS) and 800 Services ..	16
v. Station-to-Station, Person-to-Person, and Calling Card Operator Services	17
vi. Other evidence of Effective Competition	21
B. Purposes and Policies of Chapter 392	23
C. Existing Economic or Regulatory Barriers to Entry	24
III. Post-1996 Developments – The Sprint Report and Order	25
IV. S.B. 237/Case Nos. TO-2006-0093 and TO-2006-0102	26
Conclusions of Law	27
Ordered Paragraphs.....	32

Appearances

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REGULATORY LAW JUDGE: **Nancy Dippell, Deputy Chief.**

REPORT AND ORDER ON REMAND

Syllabus: This Report and Order on Remand finds that Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri's intraLATA private line/dedicated services, intraLATA toll services, Wide Area Telecommunications Services (WATS), 800 services, special access services, station-to-station, person-to-person, and calling card operator services are classified as competitive in all of AT&T Missouri's exchanges in Missouri.

Procedural History and Overview

This case began in 2001 when the Commission opened an investigation into whether any of AT&T Missouri's¹ services in any of its exchanges could be classified as competitive under Section 392.245.5, RSMo, based on a finding of "effective competition" from alternative companies. The Commission's *Report and Order* held, *inter alia*, that

¹ AT&T Missouri was previously known as Southwestern Bell Telephone Company or SWBT.

certain services previously classified as “transitionally competitive” had converted to “competitive” status in 1999 by operation of law under Section 392.370, RSMo. Those services consist of interLATA private line/dedicated services, intraLATA toll services, WATS and 800 services, special access services, and certain operator services. The Office of the Public Counsel sought judicial review of the *Report and Order*.

The Court of Appeals determined that the Commission had misinterpreted the law. The Court stated, “When SWB[T] became subject to price-cap regulation in 1997, all its services became subject to price-cap regulation at that time, and the Commission erred in finding competitive status under the old statutes.” The Court directed:

In remanding, we ask the Commission to re-examine the competitive status of these particular services by applying the “effective competition” factors to the evidence the Commission has already accumulated with regard to these services both from the 1993 “transitionally competitive” hearing in Case No. TO-93-116 as well as from the hearing in this underlying case. Consistent with the requirements of section 392.245.5, it will be necessary for the Commission to determine whether these services are effectively competitive on an exchange-by-exchange basis. Since the original finding of transitionally competitive applied to the entire service area, we assume sufficient evidence for such a finding is available.²

On March 18, 2005, the Circuit Court of Cole County entered its Order Remanding Case wherein the Court remanded the case to the Commission for further proceedings in accordance with the Court of Appeals’ opinion.

On August 28, 2005, Senate Bill 237 became effective. Following the new provisions set out by S.B. 237, the Commission issued its orders in Case Nos. TO-2006-0093 and TO-2006-0102. In those cases, the Commission found that the

² *State of Missouri ex rel. Acting Public Counsel Coffman v. Public Service Commission*, 154 S.W.3d 316, 329 (Mo. App. W.D. 2004).

business and residential services in many of AT&T Missouri's exchanges meet the new statutory standards for competitive classification.

The Commission also conducted an investigation of the competitive status of Sprint Missouri, Inc.'s³ services in Case No. IO-2003-0281 and issued its determination in that case on December 4, 2003.

In reviewing the evidence taken during the hearing in this matter and the hearing in Case No. TO-93-116, the Commission finds sufficient evidence to make its determination. Therefore, the Commission makes the following findings of fact and conclusions of law.

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. The Commission adopts the Findings of Fact in its previous *Report and Order* except as modified by these findings.

The Court of Appeals has remanded this case to the Commission to make findings as to whether certain AT&T Missouri services were competitive under the "effective competition" analysis set out in Section 392.245.5, as it existed at the time of the

³ Sprint Missouri, Inc., is now known as Embarq Missouri, Inc., d/b/a Embarq.

Commission's 2001 *Report and Order*. Effective competition is determined by analyzing the extent to which services are available and are functionally equivalent or substitutable, whether the purposes and policies of Chapter 392 are being advanced, and an evaluation of the existing economic or regulatory barriers to entry. In making its determination of "effective competition," the Commission looks to the evidence provided in the transitionally competitive classification case, TO-93-116, and the current case, TO-2001-467.

I. Pre-1996 Developments – H.B. 360/Case No. TO-93-116

House Bill 360, passed in 1987, directed the Commission to reduce regulatory requirements as competition expanded in the various telecommunications markets. With the passage of H.B. 360, the Missouri legislature provided the Commission with the authority to begin recognizing services and service providers as competitive. The legislature enacted procedures to allow a company to seek classification as either transitionally competitive or as competitive. Companies began seeking transitionally competitive classification for services in 1987.⁴

In September 1992, AT&T Missouri filed a petition seeking classification of its own Digital Private Line and Special Access Services, Message Toll Service (MTS), 800 and Maximizer[®] 800 services, WATS, and certain Operator Services (i.e., Station-to-Station, Person-to-Person and Calling Card) as transitionally competitive.⁵ In its petition, AT&T Missouri stated that these services met the requirements of Section 392.370.1 in that

⁴ Ex. 16, Hughes Direct, p. 7. All references to exhibits and testimony herein shall mean to refer to exhibits and testimony admitted into the record in Case No. TO-2001-467 unless otherwise indicated.

⁵ Ex. 16, Hughes Direct, p. 10.

they were the same as, substitutable for, or equivalent to competitive services provided by other telecommunications carriers within its service territory.⁶

In its resulting December 21, 1992 *AT&T Missouri Reclassification Order*, the Commission granted AT&T Missouri's petition.⁷ The Commission first found that while an earlier *IXC Service Classification Order*⁸ had spoken "largely in terms of interLATA service," not intraLATA service, the Commission nevertheless "was addressing a *statewide* market."⁹ Thus, focusing on the first element of Section 392.370.1, the Commission found that "[t]he services for which [AT&T Missouri] is seeking transitionally competitive classifications were addressed and found to be subject to sufficient competition to justify a lesser degree of regulation in [the *IXC Service Classification Order*]."¹⁰

Focusing on the second element of Section 392.370.1, the Commission found that AT&T Missouri's Digital Private Line and Special Access Services were "equivalent" services to IXCs' provided services.¹¹ It noted that "[t]he private line services and virtual private networks (VPNs) of IXCs, including those IXCs considered competitive access providers (CAPs), have been classified as competitive by the Commission."¹² It found that services "which are functionally equivalent and completely interchangeable in use are

⁶ Ex. 16, Hughes Direct, p. 10.

⁷ See, *In the Matter of Southwestern Bell Telephone Company's application for classification of certain services as transitionally competitive*, Case No. TO-93-116, Report and Order, December 21, 1992, 1992 Mo. PSC LEXIS 23 ("AT&T Missouri Reclassification Order"), p. 4 (emphasis added).

⁸ Case No. TO-88-142, issued September 15, 1989.

⁹ *AT&T Missouri Reclassification Order*, p. 11. (emphasis added).

¹⁰ *AT&T Missouri Reclassification Order*, p. 12.

¹¹ *AT&T Missouri Reclassification Order*, pp. 31-33.

¹² *AT&T Missouri Reclassification Order*, p. 31.

equivalent under the statute”¹³ and that “[b]ased upon the finding that the dedicated private line services of IXCs and [AT&T Missouri’s] dedicated private line services and special access service are equivalent, the Commission will classify these [AT&T Missouri] services as [transitionally competitive].”¹⁴

In addition, the Commission found that AT&T Missouri’s MTS was substitutable for IXCs’ state-wide MTS Service.¹⁵ Noting, among other things, that “[t]here are at least seventy IXCs authorized to provide intraLATA MTS[,]”¹⁶ the Commission recounted the extensive evidence that AT&T Missouri’s MTS and the IXCs’ MTS are substitutable: “Customer acceptance of one service for another as indicated by market share, customer perceptions that the services are substitutable, economic analysis of the markets, the number of providers in the market, the revenues generated by each provider, all provide important information. In this instance, none of the criteria individually is determinative, but when all are considered they indicate that IXC MTS and [AT&T Missouri] MTS are substitutable services for purposes of complying with Section 392.370 and the Commission will grant [AT&T Missouri transitionally competitive] classification for its MTS service.”¹⁷

The Commission also found that AT&T Missouri’s 800 and Maximizer® 800 services were substitutable for IXCs’ 800 service.¹⁸ The Commission noted that 59 IXCs provided 800 service and that “[t]hese 800 services have all been classified as competitive

¹³ *AT&T Missouri Reclassification Order*, p. 32.

¹⁴ *AT&T Missouri Reclassification Order*, p. 33.

¹⁵ *AT&T Missouri Reclassification Order*, pp. 18-24.

¹⁶ *AT&T Missouri Reclassification Order*, p. 19.

¹⁷ *AT&T Missouri Reclassification Order*, p. 24.

¹⁸ *AT&T Missouri Reclassification Order*.

and are being provided within [AT&T Missouri's] service territory.¹⁹ The Commission determined "that [AT&T Missouri's] 800 services and the IXCs' are substitutable for each other and that because of [AT&T Missouri's] restriction to intraLATA, [AT&T Missouri's] 800 services could arguably be found to be an inferior product for those customers seeking a statewide 800 service." The Commission classified the two 800 services of [AT&T Missouri] as transitionally competitive. The Commission also noted that "without the . . . restriction these services would be at least equivalent."²⁰ The restriction referenced by the Commission was removed in 2001.²¹

The Commission further found that AT&T Missouri's WATS Service was substitutable for the IXCs' WATS Service.²² The Commission noted that 60 IXCs had tariffs in place to provide WATS and that "[t]hese IXC WATS services have been classified as competitive and are provided both intraLATA and interLATA."²³ The Commission determined that "[c]ustomer acceptance of the IXC services as a suitable alternative to [AT&T Missouri] WATS is demonstrated by the decrease in hours, lines and revenue of [AT&T Missouri] while IXCs' volumes have increased and the market has expanded." The Commission therefore classified AT&T Missouri's WATS as transitionally competitive.²⁴

¹⁹ *AT&T Missouri Reclassification Order*, p. 26.

²⁰ *AT&T Missouri Reclassification Order*, p. 26.

²¹ *Joint Application by S.B.C Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri*, Memorandum Opinion and Order, 16 FCC Rcd 20719 (2001).

²² *AT&T Missouri Reclassification Order*, pp. 28-29.

²³ *AT&T Missouri Reclassification Order*, p. 28.

²⁴ *AT&T Missouri Reclassification Order*, p. 29.

Finally, the Commission found that certain of AT&T Missouri's Operator Services (i.e., Station-to-Station, Person-to-Person and Calling Card) were substitutable for comparable services provided by IXC's.²⁵ It noted that "[t]here are eight IXC's which offer only credit card billing and there are thirty-one IXC's which offer station to station, person to person, and credit card billing."²⁶ Relying primarily upon, among other things, evidence indicating that "[c]ustomer perception that the services are substitutable" and that "IXC operator services providers market their products as substitutable for [AT&T Missouri's] services[.]"²⁷ the Commission determined that these factors demonstrate "that IXC operator services and [AT&T Missouri] operator services (Station to Station, Person to Person and Calling Card) are substitutable." Thus, the Commission classified those services as transitionally competitive.²⁸

In keeping with the Court of Appeals' direction, the Commission finds that each of the above evidence and findings made in the *AT&T Missouri Reclassification Order* are relevant and probative to a determination that each of the services meet the "effective competition" factors identified in Section 386.020(13), discussed in greater detail below.

Since its 1992 *AT&T Missouri Reclassification Order*, the Commission has routinely classified CLECs as competitive carriers when approving each CLEC's basic local certification.²⁹ IXC's are also routinely classified as competitive carriers in Missouri.³⁰ With

²⁵ *AT&T Missouri Reclassification Order*, pp. 34-39.

²⁶ *AT&T Missouri Reclassification Order*, p. 34.

²⁷ *AT&T Missouri Reclassification Order*, pp. 37-38.

²⁸ *AT&T Missouri Reclassification Order*, p. 39.

²⁹ Ex. 16, Hughes Direct, p. 12.

³⁰ Ex. 16, Hughes Direct, p. 13.

a competitive carrier classification, CLECs and IXCs are able to change their prices (up or down) on short notice to the Commission without the need of providing cost support for the change.³¹

II. Post-1996 Developments – S.B. 507/Case No. TO-2001-467

In 1996 Senate Bill 507 was enacted. S.B. 507 authorized CLECs to begin providing basic local telecommunications service in competition with ILECs. S.B. 507 also included provisions which allowed ILECs the opportunity to no longer be regulated by traditional rate of return regulation. S.B. 507 provided for a phased-in approach.

Under Section 392.245.2, a large ILEC becomes subject to price cap regulation when an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service, and is providing such service, in any part of a large ILEC's service area. In Case No. TO-97-397, the Commission approved AT&T Missouri as a price cap regulated company, effective September 26, 1997.³²

S.B. 507 also contemplated that after the initiation of competition in an ILEC's exchange, price cap regulation could be eliminated. Section 392.245.5, RSMo 2000, directed the Commission to determine "whether effective competition exists *in the exchange* for the various services of the incumbent local exchange telecommunications company."³³

³¹ Ex. 16, Hughes Direct, p. 13.

³² Ex. 16, Hughes Direct, p. 14.

³³ Emphasis added.

The services previously found to be transitionally competitive are not the type of services provided on an exchange-by-exchange basis. Nor are the competitive providers providing those services that way. Rather, those services are provided on a statewide basis. The services and providers are equally available, as the evidence in not only this case, but also Case No. TO-93-116 shows. Staff agreed that the Commission should confirm a competitive classification for these services pursuant to Section 392.200.8,³⁴ and no party presented any evidence supporting a different conclusion. Because each of the services was competitive on a statewide basis, they necessarily were competitive in each exchange. Thus, as explained more fully below, the Commission specifically finds that for each of the services which are the subject of this case on remand, effective competition existed in all exchanges for these services both when the Commission issued its *Report and Order* in this case and when the Court of Appeals issued its mandate. Further, the evidence establishes that these services should be classified as competitive in all of AT&T Missouri's exchanges pursuant to Section 392.245.5.³⁵

In making its determination of effective competition, the Commission examined the following factors for each service as provided by the legislature.

A. The Extent to Which Services are Available and are Functionally Equivalent or Substitutable

The first two factors which the Commission must consider when determining whether "effective competition" exists for AT&T Missouri's services are "the extent to which services are available from alternative providers in the relevant market," and "the extent to

³⁴ Ex. 18, Voight Rebuttal, pp. 3-4, 54, 65-67, 73-74.

³⁵ These services are more fully described above in connection with Case No. TO-93-116 and in the Commission's December 27, 2001 *Report and Order*, p. 29.

which these services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions.” For the reasons explained above in connection with H.B. 360/Case No. TO-93-116, and described in the remainder of these Findings of Fact, the Commission finds that for each of the services which are the subject of this case on remand, there existed alternative providers who were providing functionally equivalent or substitutable services throughout AT&T Missouri’s exchanges, at comparable rates, terms and conditions, both when the Commission issued its December 27, 2001 *Report and Order* and the Court of Appeals issued its March 3, 2005, mandate in this case.

i. Private Line/Dedicated Services

The Commission recognized the existence of competition for each of the services at issue in its December 1992 *AT&T Missouri Reclassification Order*, when it found that services provided by IXCs were “equivalent” and completely interchangeable with AT&T Missouri’s services, and thus classified AT&T Missouri’s private line services as transitionally competitive.³⁶

Other evidence demonstrates that competition in the private line market has existed for years. Significant competition in the retail intraLATA private line market in Missouri dates back to the emergence of competitive access providers (CAPs) in the mid-1980s. CAPs initially focused on providing alternative access to long distance companies. They also targeted commercial business customers as they completed their fiber ring build-outs and gained access to multi-tenant buildings with their own facilities. In the late 1980s, the major interexchange carriers also began to compete for retail intraLATA

³⁶ *AT&T Missouri Reclassification Order*, pp. 29-33; Ex. 3, DeHahn Direct, p. 6; Ex. 16, Hughes Direct, pp. 9-10.

private line services as they bid on data networks covering intrastate services as well as interstate long haul services.³⁷

Undisputed evidence at the hearing showed that many alternative providers such as AT&T Communications of the Southwest, Inc., Sprint, MCI, and numerous CLECs offer nonswitched, dedicated private line type services, and the services and functionality they provide are substitutable for or functionally equivalent to AT&T Missouri's private line services. These alternatives, against which AT&T Missouri competes, are either not regulated by the Commission or at least not price regulated in the same manner as AT&T Missouri.³⁸

In addition to direct competition for traditional private line services, there are many service providers in the marketplace offering a variety of networking solutions, with different technologies, that can meet the same transport needs as AT&T Missouri's wireline private line services. For example, traditional private line networks, such as those offered by AT&T Missouri and numerous other providers, are rapidly being replaced by fast-packet, frame relay and cell relay services. Internet based access for branch offices or small businesses are being used to substitute for analog and DS0 private line circuits as customers are increasingly sending files via the Internet, rather than incurring the monthly expense of maintaining a private line circuit. The availability of fixed wireless CPE solutions also has been displacing wireline DS1s in campus settings, such as school districts, in the education market.³⁹

³⁷ Ex. 3, DeHahn Direct, p. 5.

³⁸ Ex. 3, DeHahn Direct, pp. 2, 5-11 and Schedules 1 and 2.

³⁹ Ex. 3, DeHahn Direct, pp. 8-9.

ii. IntraLATA Special Access

The additional considerations reflected in the findings of fact directed to private line services equally demonstrate that competition in the special access market has existed for years.⁴⁰ AT&T Missouri's and Staff's testimony, and the Commission's discussion in its 1992 *AT&T Missouri Reclassification Order* directed to the category of private line services, specifically included special access, i.e., nonswitched High-Capacity Service.⁴¹

iii. IntraLATA Toll/MTS Services

Competition in the intraLATA toll market has existed for many years. Competition has existed in the intraLATA toll market since July 24, 1986, when the Commission authorized intraLATA toll competition in Missouri.⁴² There, the Commission found that intraLATA toll competition was in the public interest and would result in new and improved services, lower prices and faster responses to customers' needs.⁴³

The record also establishes that there are many regulated providers, including IXCs and CLECs and unregulated/nontraditional providers (such as wireless and Internet providers) offering interexchange services that are functionally equivalent to and/or substitutable for AT&T Missouri's intraLATA toll services.⁴⁴ Evidence in this case demonstrated that there were over 600 interexchange carriers certified to provide intrastate

⁴⁰ These services are more fully described above in connection with Case No. TO-93-116 and in the Commission's December 27, 2001, *Report and Order*, in Case No. TO-2001-467. *Report and Order*, pp. 53-56.

⁴¹ Ex. 7, Douglas Direct, pp. 6-9; Ex. 3, DeHahn Direct, pp. 5-11; Voight Rebuttal, pp. 4, 54; *AT&T Missouri Reclassification Order*, pp. 29-33.

⁴² Case No. TO-94-222, et al., *Report and Order*, issued July 24, 1986.

⁴³ *Id.*; Ex. 16, Hughes Direct, p. 5.

⁴⁴ Ex. 9, Jablonski Direct, pp. 3, 6-10.

interexchange service in Missouri.⁴⁵ The intraLATA toll services provided by these companies and other IXC's are equivalent to or substitutable for AT&T Missouri's intraLATA toll service, in that all these services provide customers with the ability to place intraLATA toll calls.⁴⁶ This large number of certified IXC's indicates that customer choices are widely available and reflects the relative ease of entry for firms wishing to enter the intraLATA toll market.⁴⁷

With the July 1999 implementation of intraLATA presubscription, IXC's began offering their customers the ability to make intraLATA toll calls without dialing extra digits. (Even prior to presubscription, customers had the ability to program their PBX's and key systems to automatically route intraLATA toll calls to the IXC of their choice or to dial around the incumbents' interLATA toll services by using 10XXX dialing. Now, customers can dial around using 10XXX to use the IXC of their choice, even if they retain AT&T Missouri as their 1+ intraLATA toll provider.)⁴⁸ The evidence showed, in every AT&T Missouri exchange, a minimum of 73 IXC's available to be selected by the customer as a 1+ intraLATA toll provider. Thus, robust competition exists for AT&T Missouri's intraLATA toll services.⁴⁹

In addition to more traditional forms of competition from IXC's and CLECs, AT&T Missouri's customers have several nontraditional choices for intraLATA toll. These include wireless service, prepaid telephone cards, and the Internet. The ability to make free, or at

⁴⁵ Ex. 9, Jablonski Direct, p. 6 and Schedule 2.

⁴⁶ Ex. 9, Jablonski Direct, p. 9.

⁴⁷ Ex. 9, Jablonski Direct, pp. 6-7.

⁴⁸ Ex. 9, Jablonski Direct, p. 7.

⁴⁹ Ex. 9, Jablonski Direct, p. 9 and Schedule 3, which is a list of the number of IXC's that are available in each AT&T Missouri exchange.

least very inexpensive, calls to other people outside a person's local calling scope, but within the LATA, makes Internet telephony an attractive substitute for AT&T Missouri's intraLATA toll service.⁵⁰

iv. Wide Area Telecommunications Services (WATS) and 800 Services

Competition has long existed in the WATS and 800 service markets. IXC's are the dominant WATS and 800 service competitors. The evidence indicated over 600 certified IXC's authorized to provide interexchange services in Missouri. As part of their interexchange services, IXC's typically provide WATS and 800 services to customers. CLEC's can also offer WATS and 800 service. These services provided by IXC's and CLEC's are functionally equivalent to and substitutable for AT&T Missouri's WATS and 800 service. This large number of certified companies indicates that customer choices are available and reflects the relative ease of entry for firms wishing to enter the WATS and 800 markets.⁵¹

In addition to IXC's and CLEC's, WATS and 800 service faces competition from nontraditional competitors. Many companies are utilizing various e-commerce methods to communicate with their customers. For instance, consumers can purchase airplane tickets, rent cars, or check the balance on their credit card via the Internet, making calls to a company's 800 number unnecessary.⁵²

⁵⁰ Ex. 9, Jablonski Direct, pp. 8-9.

⁵¹ Ex. 9, Jablonski Direct, p. 16.

⁵² Ex. 9, Jablonski Direct, pp. 16-17.

v. **Station-to-Station, Person-to-Person and Calling Card Operator Services**

The evidence demonstrated numerous competitive alternatives to AT&T Missouri's operator services which are available throughout AT&T Missouri's exchanges.⁵³ These alternatives are provided by numerous local and toll telecommunication providers, as well as wireless service providers, specialized operator service providers, pay telephone providers, prepaid and post-paid calling card providers and others.⁵⁴ Considering both function and price, end-users throughout Missouri have substitutable and functionally equivalent alternatives for operator services, offered by numerous providers, including cellular telephone service, pre-paid calling cards, and personal 800 numbers. These services compete directly with AT&T Missouri's operator services.⁵⁵

For example, "00" service was established as a dialing pattern in order to route calls to the operator of a customer's presubscribed interexchange carrier.⁵⁶ "00" service may be used to provide end-users throughout the state of Missouri with the complete range of calling card, third number billing, collect and person-to-person calling options, as well as other types of operator assistance, such as busy line, verify and interrupt services, and call completion services. The evidence showed over 600 interexchange service providers certificated to provide service in Missouri.⁵⁷

The evidence also showed that competitive alternatives are offered by MCI and Sprint. MCI's 1-800-Collect Service is also available to all end-users throughout Missouri,

⁵³ Ex. 5, Moore Direct. p. 21.

⁵⁴ Ex. 5, Moore Direct. p. 21.

⁵⁵ Ex. 5, Moore Direct, p. 22.

⁵⁶ Ex. 5, Moore Direct, p. 22.

⁵⁷ Ex. 5, Moore Direct, p. 22.

irrespective of their choice of local or toll carrier.⁵⁸ This service provides end-users the ability to make collect calls from anywhere in the United States. Callers also have access to a complete range of other services including calling cards, bill to a third number, person-to-person service, line status verification, and busy interrupt. Sprint's 1-800-2Sprint is similar to the MCI competitive alternatives.⁵⁹ Both MCI and Sprint extensively promote their operator services, which compete directly with AT&T Missouri's operator services.⁶⁰

Operator services, including collect, bill-to-a-third-number, person-to-person service, line status verification, and busy interrupt are also available from wireless carriers throughout Missouri. Typically, wireless customers access their wireless carrier's operator services by dialing "0" from their wireless phone.⁶¹ Moreover, wireless service, itself, has become a significant, competitive alternative to operator services, particularly for operator services originating from pay telephones.⁶² Before wireless services became ubiquitous, customers who are away from their home or business telephone frequently used the alternative billing arrangements through operator services to place calls.⁶³

Another competitive alternative for operator services is "0+" and "0-" services from pay telephones.⁶⁴ Pay telephone providers have the option of selecting the operator service provider of their choice for specific pay telephone locations.⁶⁵ Customers can, in

⁵⁸ Ex. 5, Moore Direct, p. 22.

⁵⁹ Ex. 5, Moore Direct, pp. 22-23.

⁶⁰ Ex. 5, Moore Direct, p. 23: See Scheds. 10-11.

⁶¹ Ex. 5, Moore Direct, p. 23.

⁶² Ex. 5, Moore Direct, p. 23.

⁶³ Ex. 5, Moore Direct, p. 23.

⁶⁴ Ex. 5, Moore Direct, p. 24.

⁶⁵ Ex. 5, Moore Direct, p. 24.

effect, choose an operator service provider through their choice of a payphone provider.⁶⁶ Prepaid calling cards have also become an increasingly popular choice for alternative billing arrangements historically provided by operator service providers.⁶⁷ Prepaid calling cards are sold at a variety of outlets.⁶⁸ Live or automated operator assistant is typically available as required to assist in call completion relating to prepaid calling cards.⁶⁹ Prepaid cards are frequently branded in the name of well known retail establishments, and are offered by all major telecommunication carriers, as well as hundreds of other lesser known companies.⁷⁰ Examples of prepaid card providers were provided in Schedule 12 to Ms. Moore's direct testimony in the prior proceedings in this case.

Finally, irrespective of the presubscribed carrier on a particular telephone line, end-users can always reach the operator service provide of their choice by dialing "10-10-XXX-00." The XXX selected by the end-user routes the call to the appropriate IXC.⁷¹ Many telecommunication carriers, including MCI and Sprint also offer personal 800 numbers. These numbers function as a competitive alternative to one type of operator services, i.e., collect calls.⁷²

Most if not all of the competitive alternatives described above are available to an end-user customer, irrespective of whether that customer is an AT&T Missouri local customer or a CLEC's local customer. However, if the customer is a CLEC local customer,

⁶⁶ Ex. 5, Moore Direct, p. 24.

⁶⁷ Ex. 5, Moore Direct, p. 24.

⁶⁸ Ex. 5, Moore Direct, p. 24.

⁶⁹ Ex. 5, Moore Direct, p. 25.

⁷⁰ Ex. 5, Moore Direct, p. 25.

⁷¹ Ex. 5, Moore Direct, p. 25.

⁷² Ex. 5, Moore Direct, p. 26.

the customer will likely also have a competitive alternative of operator services provided by that CLEC.⁷³ Moreover, operator services are provided by facilities-based interexchange carriers, resale and switched-base CLECs and specialized operator service providers that utilize their own facilities to provide operator services directly to end-users or other providers, pay telephone providers, and places of public accommodation. All of these operator services directly compete with AT&T Missouri's operator services throughout Missouri, and offer substitutable or functionally equivalent operator services to the operator services provided by AT&T Missouri.

The FCC has found the operator services market place to be competitive.⁷⁴ In its *UNE Remand Order*, the FCC eliminated operator services from the list of unbundled network elements based on the competitive nature of the operator services market place.⁷⁵ In the *UNE Remand Order*, the FCC stated that incumbent LECs "need not provide access to its operator services and directory assistance as an unbundled network element."⁷⁶ The evidence also demonstrated that operator services had been price deregulated in Arkansas, Texas and Kansas, among other states.⁷⁷

Finally, the evidence demonstrated that the highly competitive nature of the operator services market place had directly impacted AT&T Missouri's operator services call volumes. The evidence showed that since 1996, AT&T Missouri's operator services

⁷³ Ex. 5, Moore Direct, p. 26.

⁷⁴ Ex. 5, Moore Direct, p. 28.

⁷⁵ Ex. 5, Moore Direct, p. 28.

⁷⁶ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 9698, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), para. 442.

⁷⁷ Ex. 5, Moore Direct, p. 28.

call volumes had declined 71 percent.⁷⁸ This decline can be directly attributed to competitive alternatives that exist in the market place, described above.⁷⁹

vi. Other Evidence of Effective Competition

With the advent of local competition under S.B. 507, functionally equivalent or substitutable services being provided by alternative providers have increased substantially. As this Commission found in Case No. TO-99-227, CLECs are currently providing service to customers in all of AT&T Missouri's exchanges.⁸⁰ In addition, IXCs provide services that are also functionally equivalent to or substitutable for some of AT&T Missouri's services, including interexchange services (e.g., interLATA Toll, 800 Services), operator and directory services, and dedicated services (e.g., private line and special access).⁸¹ Furthermore, there are a number of alternate providers of functionally equivalent or substitutable services that are not under the jurisdiction of this Commission. Some of these alternate providers include, but are not limited to, wireless carriers, cable TV providers, Internet service providers, fixed satellite providers and customer premises equipment manufacturers.⁸²

Other indicators likewise demonstrate effective competition. Neither Section 392.245.5 nor 386.020(13) required any quantitative market share loss test to determine whether "effective competition" existed for AT&T Missouri's services in Missouri. Nevertheless, the record in this case reflects AT&T Missouri's belief that there were

⁷⁸ Ex. 6(HC), Moore Surrebuttal(HC), Sched. 1(HC).

⁷⁹ Ex. 6, Moore Surrebuttal, p. 6.

⁸⁰ Ex. 16, Hughes Direct, p. 19.

⁸¹ Ex. 16, Hughes Direct, p. 19.

⁸² Ex. 16, Hughes Direct, p. 19.

facilities-based CLECs in more than 80 percent of AT&T Missouri's exchanges in Missouri.⁸³ AT&T Missouri presented evidence that for the period from the first quarter of 1998 through the second quarter of 2001, E-911 listings had increased 8,546 percent and the growth in "ported" numbers was 26,392 percent.⁸⁴

Attached to AT&T Missouri witness Thomas Hughes' Surrebuttal Testimony as Schedules 1-1, 1-2 and 1-3 were maps identifying the number of active CLECs competing in each AT&T Missouri exchange throughout Missouri. These maps depict the extensive level of CLEC competition faced by AT&T Missouri throughout its Missouri exchanges. In his Surrebuttal Testimony, Mr. Hughes also identified, by exchange, the total lines served by AT&T Missouri, and the minimum number of lines served by CLECs.⁸⁵ The Commission finds that the lines identified as CLEC lines by Mr. Hughes represent only a minimum number and, therefore, CLEC market share is likely greater than reported in Mr. Hughes' Schedules.⁸⁶ The reason for this is simple. AT&T Missouri knows when a CLEC resells AT&T Missouri's service and when a CLEC purchases unbundled network elements from AT&T Missouri. Additionally, AT&T Missouri can identify the number of E-911 listings that CLECs place in 911 databases, but as Mr. Hughes and Dr. Aron explained in their testimony, the number of CLEC E-911 listings likely significantly understates the number of access lines served by facilities-based CLECs.⁸⁷ For example, only outbound lines have

⁸³ Ex. 16, Hughes Direct, p. 27.

⁸⁴ Ex. 17, Hughes Surrebuttal, p. 7.

⁸⁵ Ex. 17 HC, Hughes Surrebuttal, Schedule 4-1, 4-2, 4-3 and 4-4 HC.

⁸⁶ Ex. 17 HC, Hughes Surrebuttal, pp. 5-6.

⁸⁷ Ex. 17 HC, Hughes Surrebuttal, pp. 5-6; Ex. 2, Aron Surrebuttal, p. 16.

911 listings associated with them.⁸⁸ Complex voice services may be only partially represented in the E-911 database.⁸⁹ DSL and cable modem lines may not be reported in the E-911 database.⁹⁰ Furthermore, AT&T Missouri does not know the number of lines served by CLECs utilizing only CLEC facilities.⁹¹

Additional evidence of effective competition from CLECs was produced by AT&T Missouri. Over the 18-month period prior to November 2001, AT&T Missouri had experienced a declining trend for retail access lines.⁹² Over the three quarters prior to November 2001, AT&T Missouri had experienced a decrease in the total number of retail lines sold.⁹³ During this same time period, the number of CLEC lines continued to grow.⁹⁴ In addition, there were 23 CLEC switches deployed throughout the state of Missouri, and these switches deployed by CLECs in Missouri had the capacity to serve 100 percent of AT&T Missouri's customers.⁹⁵

B. Purposes and Policies of Chapter 392

The third factor which the Commission is required to consider in connection with its evaluation of whether effective competition exists is the extent to which the purposes and policies of Chapter 392, RSMo, including the reasonableness of rates, as set out in Section 392.185, are being advanced. The Commission finds that for each of the services

⁸⁸ Ex. 17 HC, Hughes Surrebuttal, pp. 5-6; Ex. 2, Aron Surrebuttal, p. 16.

⁸⁹ Ex. 17 HC, Hughes Surrebuttal, pp. 5-6; Ex. 2, Aron Surrebuttal, p. 16.

⁹⁰ Ex. 17 HC, Hughes Surrebuttal, p. 6.

⁹¹ Ex. 17HC, Hughes Surrebuttal, p. 6.

⁹² Ex. 17, Hughes Surrebuttal, p. 14.

⁹³ Ex. 17, Hughes Surrebuttal, p. 14.

⁹⁴ Ex. 17, Hughes Surrebuttal, p. 14.

⁹⁵ Ex. 17, Hughes Surrebuttal, p. 14.

which are the subject of this case on remand, both when the Commission issued its *Report and Order* and the Court of Appeals issued its mandate in this case, competitive classification advances the purposes and policies of Chapter 392, including: the reasonableness of rates, as set out in Section 392.185; that there are no economic or regulatory barriers to entry that prevent competitors from offering alternatives to these services anywhere in AT&T Missouri's exchanges; and that competitive classification would be consistent with certain other deregulatory factors deemed relevant by the Commission.

Section 392.185 outlines that the provision of telecommunications services should be maintained and advanced. An important purpose specified in the statute is to allow for full and fair competition to function as a substitute for regulation.⁹⁶ The statute the Commission is implementing in this proceeding is the mechanism that legislators gave to the Commission to permit this express purpose to be achieved.

C. Existing Economic or Regulatory Barriers to Entry

The fourth factor which the Commission is required to consider in its evaluation of whether effective competition exists is existing economic or regulatory barriers to entry. As noted above, AT&T Missouri is providing competing carriers nondiscriminatory access to all of the checklist items contained in the federal Act, and thus, each of these carriers has a meaningful opportunity to compete with AT&T Missouri. Furthermore, given the multitude of providers providing functionally equivalent or substitutable services that are described in the testimony of AT&T Missouri's witnesses in this case, it is clear that there are no barriers to entry that are preventing competitors from offering alternatives in the market place.⁹⁷

⁹⁶ Section 392.185(6).

⁹⁷ Ex. 16, Hughes Direct, pp. 21-22.

The Commission's findings in Case No. TO-99-227 concerning AT&T Missouri's compliance with Section 271 of the Act are instructive in this regard. In that case, the Commission determined that AT&T Missouri had complied with the Act, and that AT&T Missouri's local markets were open to competition. In its March 15, 2001 Order the Commission determined that AT&T Missouri had met the "competitive checklist" requirements set forth by Section 271 of the Act⁹⁸ and, in particular, that AT&T Missouri "is providing competing carriers with all of the requisite checklist items in a nondiscriminatory fashion."⁹⁹

III. Post-1996 Developments - The Sprint Report and Order

On December 4, 2003, the Commission issued its *Sprint Report and Order*¹⁰⁰ in which it concluded, among other things, that several services that are the subject of this case (i.e., intraLATA private line services, intraLATA toll services, WATS, and 800 services) and which are likewise provided by Sprint throughout its Missouri exchanges are subject to effective *statewide* competition. The Commission also determined that those services may be classified as competitive pursuant to Section 392.245 and are no longer subject to price cap regulation. The Commission relied on the existence of statewide, not exchange-specific, competition for these services and granted Sprint competitive classification for them in all of its Missouri exchanges.

⁹⁸ Case No. TO-99-227, *In the Matter of the Determination of Prices, Terms, and Conditions of Line Splitting and Line Sharing* (issued March 15, 2001) (*Mo PSC 271 Order*), p. 6.

⁹⁹ *Mo PSC 271 Order*, p. 91.

¹⁰⁰ In the Matter of the Investigation of the State of Competition in the Exchanges of Sprint Missouri, Inc., Case No. IO-2003-0281, December 4, 2003 ("*Sprint Report and Order*"), pp. 2, 23.

Just as the existence of statewide competition supports the determination of effective competition in Sprint's exchanges, the same statewide competition supports a finding of effective competition for the same services in all of AT&T Missouri's exchanges. The conclusions in the *Sprint Report and Order* mirror those the Commission should reach based on the evidence adduced and the conclusions reached by the Commission in its *AT&T Missouri Reclassification Order* and its Report and Order in this case. Equally important, Sprint retains the competitive classifications it obtained in the *Sprint Report and Order*, even though, as is discussed below, Section 392.245 (the statute on which Sprint relied) has been amended and even though Sprint (like AT&T Missouri) also has a number of exchanges which qualify as competitive under the new law.¹⁰¹

IV. S.B. 237/Case Nos. TO-2006-0093 and TO-2006-0102

In 2005, the legislature revised the law relating to competitive classification. On August 28, 2005, S.B. 237 became effective. Following the passage of S.B. 237, AT&T Missouri applied for competitive classification pursuant to its various provisions. In Case No. TO-2006-0093, the Commission determined that competitive classification should be granted for business services in 45 AT&T Missouri exchanges and residential services in 26 AT&T Missouri exchanges. In Case No. TO-2006-0102, the Commission determined that competitive classification should be granted for business services in an additional

¹⁰¹ See, e.g., Embarq Missouri, Inc. P.S.C. MO.-No. 22, General Exchange Tariff, Third Revised Page 23 and P.S.C. MO.-No. 23, Message Telecommunications Service, Statement of Service Classifications, Sixth Revised Page 36 (both referencing competitive service classifications "pursuant to [the Commission's] Order of December 4, 2003, in Case No. IO-2003-0281").

30 AT&T Missouri exchanges (i.e. 75 in total) and for residential services in an additional 51 AT&T Missouri exchanges (i.e. 77 in total).

Consequently, pursuant to Section 392.245.5, RSMo Cum. Supp. 2005, all of the AT&T Missouri business services other than exchange access are deemed competitive in the 75 exchanges where basic local business services have been declared competitive and all residential services other than exchange access are deemed competitive in the 77 exchanges where basic local residential have been declared competitive. These exchanges, and the applicable type of competitive classification associated with each, are listed on Exhibit 1 to AT&T Missouri's proposed findings of fact and conclusions of law attached to this order.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law. The Commission adopts its conclusions of law as determined in its previous Report and Order except with regard to the transitionally competitive services in accordance with the mandate of the Court. For the reasons presented herein, the Commission determines that the services at issue are competitive on a statewide basis pursuant to the criteria in Section 392.245.5, RSMo, as it existed when the mandate issued.

The Commission rejects the CLECs' and OPC's assertion that AT&T Missouri should be directed to file revised tariffs to revise its prices to the extent necessary to comply with the maximum prices that existed as of the effective date of the Commission's *Report and Order*, subject to any intervening adjustments to such maximum prices under the price cap statute.

The Court of Appeals' decision did not address the rates for any service offered by AT&T Missouri, nor did it direct the Commission to review any rate for service offered by AT&T Missouri. Instead, the Court of Appeals directed the Commission to consider whether the services at issue should have been classified as competitive pursuant to the "effective competition" standard of Section 392.245.5. Furthermore, since no rates were established in Case No. TO-2001-467 and the appeal did not address the rates for any service, it would not have been appropriate for the Court to address rates. Moreover, rates for the services that are the subject of this proceeding were changed in subsequent tariff filings over the last several years, none of which were the subject of any appeal or any request for stay by either the CLECs or any other party.

As a result of the Commission's decisions in Case Nos. TO-2006-0093 and TO-2006-0102, the vast majority of AT&T Missouri's lines have now been declared competitive. Clearly, any Commission action that would purport to require rate adjustments could not be imposed in exchanges which have been declared to be competitive under the provisions of S.B. 237.

Under Section 392.361, enacted as part of H.B. 360, a telecommunications company seeking either transitionally competitive or competitive classification is required to show, based upon all relevant factors, that the service is subject to sufficient competition to justify a lesser degree of regulation. Once a service is found to be competitive or transitionally competitive, the Commission must classify the same telecommunications services of another company as transitionally competitive or competitive by relying on the finding of fact made in the original proceedings.¹⁰² Under Section 392.370.1, the petitioning

¹⁰² Section 392.370, RSMo.

telecommunications company is required to show: (1) an order had been issued under 392.361 that finds the service has been classified as competitive or transitionally competitive; (2) that the service of the petitioning company is the same as, substitutable for, or equivalent to the service classified as either transitionally competitive or competitive; and (3) the competitive or transitionally competitive service is authorized to be provided in the petitioning company's service area.

Under Section 392.245.5, RSMo, as it existed at the time of the Commission's 2001 *Report and Order* and the mandate of the Court of Appeals, the Commission was required to determine whether effective competition exists for each telecommunications service of AT&T Missouri in each of its exchanges. Prior to amendment, the first two sentences of subsection 5 of this statute read:

Each telecommunications service of an incumbent local exchange telecommunications company shall be classified as competitive in any exchange in which at least one alternative local exchange telecommunications company has been certified under Section 392.455 and has provided basic local telecommunications service in that exchange for at least five years, unless the Commission determines, after notice and a hearing, that effective competition does not exist in the exchange for such service. The commission shall, from time to time, on its own motion or motion by an incumbent local exchange telecommunications company, investigate the state of competition in each exchange where an alternative local exchange telecommunication company has been certified to provide local exchange telecommunications service and shall determine, no later than five years following the first certification of an alternative local exchange telecommunications company in such exchange, whether effective competition exists in the exchange for the various services of the incumbent local exchange telecommunications company.

Senate Bill 237, Laws 2005, amended Section 392.245.5 to create an expedited two-track procedure when a price cap regulated local exchange company seeks competitive classification for its services within one or more exchanges. Amended Section 392.245 takes away a price cap regulated telecommunications company's right to a

competitive classification of its services in those exchanges where the services face effective competition. This is a substantive statute. Substantive statutes have prospective application. *Pierce v. State Dept. of Social Services*, 969 S.W.2d 814, 822-23 (Mo. App. W.D. 1998). Therefore, the Commission applies the prior version of Section 392.245 to its determination in this case.

Section 386.020(13) provides:

(13) "Effective competition" shall be determined by the commission based on:

(a) The extent to which services are available from alternative providers in the relevant market;

(b) The extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions;

(c) The extent to which the purposes and policies of chapter 392, RSMo, including the reasonableness of rates, as set out in section 392.185, RSMo, are being advanced;

(d) Existing economic or regulatory barriers to entry; and

(e) Any other factors deemed relevant by the commission and necessary to implement the purposes and policies of chapter 392, RSMo;

Section 392.185 states that the provisions of this chapter shall be construed to:

(1) Promote universally available and widely affordable telecommunications services;

(2) Maintain and advance the efficiency and availability of telecommunications services;

(3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;

(4) Ensure that customers pay only reasonable charges for telecommunications service;

(5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;

(6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;

- (7) Promote parity of urban and rural telecommunications services;
- (8) Promote economic, educational, health care and cultural enhancements; and
- (9) Protect consumer privacy.

Although Section 392.245.5, as it existed at the time of the Court's mandate, requires the Commission to make a determination of effective competition on an exchange basis, the services at issue are not exchange services. Rather, those services are offered on a statewide basis. The Commission has found, after analyzing each of the relevant factors, that effective competition existed for each of the services on a statewide basis at the time of the Commission's 2001 *Report and Order* and at the time of the Court's mandate. Thus, it follows that these services were also under effective competition in each exchange. Therefore, the Commission determines that effective competition exists for AT&T Missouri's intraLATA private line/dedicated services, intraLATA toll services, WATS and 800 services, special access services, and station-to-station, person-to-person, and calling card operator services.

These services remain classified as competitive even after the 2006 legislative changes to Section 392.245. AT&T Missouri's intraLATA private line/dedicated services, intraLATA toll services, WATS and 800 services, special access services, and station-to-station, person-to-person, and calling card operator services, shall be classified as competitive in all of AT&T Missouri's exchanges pursuant to Section 392.245.

IT IS ORDERED THAT:

1. The Report and Order issued on December 27, 2001, is readopted by the Commission except as modified by the additional findings of fact and conclusions of law set out in this Report and Order on Remand in compliance with the mandate of the Court.
2. Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri's intraLATA private line/dedicated services are classified as competitive in all of its Missouri exchanges.
3. Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri's intraLATA toll services are classified as competitive in all of its Missouri exchanges.
4. Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri's Wide Area Telecommunications Services (WATS) and 800 services are classified as competitive in all of its Missouri exchanges.
5. Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri's special access services are classified as competitive in all of its Missouri exchanges.
6. Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri's station-to-station, person-to-person and calling card operator services are classified as competitive in all of its Missouri exchanges.

7. This Report and Order on Remand shall become effective on February 4, 2007.

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., Murray, and Appling, CC., concur;
Gaw and Clayton, CC., concur, with separate
concurring opinion(s) to follow;
and certify compliance with the provisions
of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 25th day of January, 2007.