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 392.245.6 RSMo (2005) – 60 day petition	))))	**Case No. TO-2006-0102**

DISSENTING OPINION OF COMMISSIONERS STEVE GAW AND ROBERT M. CLAYTON III

In its Report and Order in the above-captioned proceeding, the majority has granted competitive classification to 30 business exchanges and 51 residential exchanges of SBC Missouri ("SBC") that were not previously price deregulated in SBC's 30-day competitive classification filing.[1] Of these exchanges, the Report and Order provides for competitive classification for 16 business and 3 residential exchanges that had been previously transferred from the 30-day proceeding on the basis that proper notice had not been given to any entities that may be affected by a Commission order to grant competitive classification.[2]

As was mentioned in the Report and Order in the 30-day proceeding, the standard to be applied in determining whether a particular service in a particular exchange should be granted

[1] See, *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, Report and Order issued September 26, 2005. ("30-day proceeding"). As the Commission noted in that Order, "[t]he Commission finds that fundamental fairness and due process require that SBC Missouri specifically identify the exchanges in its original petition so that interested parties have a meaningful opportunity to intervene and respond to the application. Therefore, the Commission will not consider SBC Missouri's request for competitive classification for business services in the 15 (sic) exchanges that are not listed in the 30-day portion of SBC Missouri's Petition. The Commission will, however, transfer these exchanges to Case No. TO-2006-0102, where they will be evaluated pursuant to the 60-day track of Section 392.245.5." *Report and Order* at page 10. The Commission made a similar finding for the 3 residential exchanges transferred to this proceeding. See, *Report and Order* at page 19.

[2] There was initially some confusion whether the majority actually rejected competitive classification for business services in 15 or 16 exchanges and transferred consideration of those exchanges to the current 60-day proceeding. This confusion is caused by conflicting ordered paragraphs regarding the status of business services in the Moberly exchange in the initial 30-day Report and Order. Ordered paragraph 3 granted competitive status for business services in the Moberly exchange. On the other hand, ordered paragraph 5 specifically rejected competitive classification for the same Moberly exchange. As a subsequent Notice of Correction indicates, ordered paragraph should not have included the Moberly exchange. Therefore, business services for the Moberly exchange were transferred with 15 other exchanges and considered in the instant proceeding. The practical effect of this contradiction and correction is not important since the majority subsequently granted competitive status for business services in the Moberly exchange in the 60-day proceeding.

competitive classification in a 30-day proceeding is very objective and is based largely upon the simple counting of various competitors.

> Under S.B. 237, the focus is solely on the number of carriers providing "basic local telecommunications service" within an exchange. 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 are also providing "basic local telecommunications service" within an exchange.
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> For the purpose of the 30-day investigation, one commercial mobile radio service ("CMRS" or "wireless") provider is to be considered an entity providing "basic local telecommunications services" in an exchange. 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.[3]

Recognizing its requirement that the service of such competitors be based upon telecommunications owned "in whole or in part" by the competitor or its affiliate, the General Assembly implicitly excluded UNE-P providers from consideration in the 30-day proceeding.[4] Moreover, the General Assembly, based upon the "in whole or in part" standard, explicitly precluded other competitors from consideration in the 30-day proceeding including: (1) VoIP providers relying on third-party broadband access (Section 392.245.5(2)); (2) telecommunications resellers (Section 392.245.5(4)); and (3) prepaid telecommunications providers (Section 392.245.5(5)).

In the 60-day proceeding addressed in the instant Report and Order, the General Assembly broadens the Commission's consideration to all types of telecommunications competitors, but also includes a subjective and esoteric "contrary to the public interest" standard.

> [A]ny incumbent local exchange company may petition the commission for competitive classification within an exchange based on competition from any entity providing local voice service in whole or in part by using its own telecommunications facilities or other facilities or the telecommunications facilities or other facilities of a third party, including those of the incumbent local

[3] 30-day proceeding Report and Order at page 6.

[4] *Id.* at page 15. "Therefore, this Commission will not rely on the presence of any UNE-P competitor not currently in the process of converting to partial or full facilities-based in accordance with the provisions of the TRRO and recent decisions of this Commission, to meet the requirements of Section 392.245.5(2)."

> exchange company as well as providers that rely on an unaffiliated third-party Internet service. The commission shall approve such petition within sixty days unless it finds that such competitive classification is contrary to the public interest.[5]

Thus, where the 30-day standard did not permit the consideration of certain VoIP providers, telecommunications resellers, UNE-P providers and prepaid telecommunications providers, these entities may now be considered by the Commission in the 60-day proceeding. The presence of these competitors may be sufficient for the Commission to grant competitive classification in a certain exchange for a certain service so long as that grant of competitive classification is not "contrary to the public interest." The General Assembly did not provide, in the context of SB 237, further definition to the "contrary to the public interest" standard to be applied by the Commission. Noticeably, the majority also did not give any definition to the "contrary to the public interest" standard.

While SB 237 does not provide clarification for any determination of the public interest, such a standard was expressed in previous telecommunications legislation. Section 392.185, passed as part of the 1996 rewrite of the Chapter 392, provides nine specific purposes underlying the Missouri Telecommunications Law. Foremost to any consideration of the public interest test to be used in a 60-day proceeding is subsection 6 which provides that one purpose of Chapter 392 is to "[a]llow 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." (emphasis added). Given this clear expression of public interest (i.e., the determination of whether competition can act as a substitute for regulation in the protection of ratepayers), the Commission's duty under the 60-day standard becomes clearer.

In its Report and Order, the majority expressly relies upon SBC Revised Exhibits B-1 through B-4. In these exhibits, SBC documents on an exchange basis the various competitors which it claims support a finding that competitive classification is "not contrary to the public

[5] Section 392.245.5(6) RSMo 2005 (emphasis added).

interest." These exhibits rely almost entirely on the existence of wireless entities[6], CLECs using commercial arrangements, UNE-P providers and VoIP providers that rely upon third party broadband connections. The majority claims that the mere recitation of these type of providers is sufficient to grant competitive classification because "no persuasive evidence has been presented showing that these representations are inaccurate." Therefore, the Commission concludes that "SBC Missouri is entitled to a grant of competitive classification for the requested exchanges."

This Commission has an obligation to look beyond the superficial evidence provided by SBC in coming to a conclusion in this case. The General Assembly believed that the Commission would utilize the expertise that exists in this agency and ensure that the public interest was tested prior to making a determination in a 60-day filing. In examining the evidence, a finding of "contrary to the public interest" is not only possible, but, in our opinion, mandated based solely on the nature of the competitors identified by SBC, the competitive situation of these competitors, and the public interest standard expressed in Section 392.185.

As was mentioned, SBC relies upon the existence of: (1) wireless entities; (2) UNE-P providers; (3) CLECs using commercial arrangements; and (4) VoIP providers that rely upon third party broadband connections. For the reasons expressed herein, none of these types of competitors can provide the competitive presence to "function as a substitute for regulation" and ensure the "protection of ratepayers" against SBC's exercise of market power.

Wireless Entities: Although the General Assembly recognized the presence of wireless competition, it clearly recognized that the sole existence of such competitors is not sufficient to protect the ratepayers from the ILEC's exercise of market power and function as a substitute for

[6] Interestingly, no one raised a concern with the Commission's reliance upon blatant hearsay evidence in its finding of wireless competition. As mentioned in the majority's decision, SBC identified its wireless carrier competitors in each exchange through Let'sTalk.com. In a time when much is made regarding the quality of evidence provided by certain parties, the majority used hearsay evidence found on the internet and lacking the support of any witness with first-hand knowledge as its basis for finding the presence of wireless competitors.

regulation.[7] In the business sector, wireless service is an inadequate substitute for wireline service because of quality of service concerns as well as the need for business customers to have a directory listing as well as to be included in directory assistance. In the residential sector, wireless acts as a poor substitute because of ongoing E-911 concerns, inadequate wireless coverage, inability to use wireless for dial-up internet access, and exclusion from directories and directory assistance. For all these reasons, while customers have demonstrated a desire for the convenience of wireless service, they have also demonstrated an unwillingness to eliminate their wireline connection. As one recent study indicates "at least 94% of wireless users also maintain their traditional wireline telephone service." As this study then concludes, "whatever nominal amount of substitution may be taking place, it is clearly not sufficient to constrain ILEC market power and ILEC prices."[8] As such, wireless service today generally acts as an addition to, not a substitute for, wireline service. Its use and availability have an impact principally on the use of landline long distance service, not as a control of prices for basic local wireline services.

UNE-P Providers: Upon the passage of the '96 Telecom Act and the subsequent promulgation of rules by the FCC, numerous competitive providers sought and were granted the ability to lease, at TELRIC rates, all unbundled elements necessary to provide local telecommunications service. These elements were subsequently combined and local service identical in quality to that of the ILEC was then available to competitors. This method of providing service was labeled the unbundled network element platform ("UNE-P"). Recognizing that the use of UNE-P did not require large amounts of capital in order to enter a

[7] In fact, the General Assembly while demanding the presence of two competitors for the consideration of any 30-day competitive filing, have limited the Commission to only counting one wireless provider as a competitor. Clearly, the General Assembly recognized the inherent limitations of wireless services and the inability of these services, no matter the number of wireless providers, to provide competitive presence to replace the function of regulation.

[8] *Confronting Telecom Industry Consolidation – A Regulatory Agenda for Dealing with the Implosion of Competition*, National Association of State Utility Consumer Advocates, published April 2005.

market, many competitors relied upon this market entry strategy prior to installing switches and other telecommunications facilities.

Recently, the FCC issued its Triennial Review Remand Order which called for the complete elimination of local switching and, therefore, the provision of UNE-P service. Although the Order provided for a transition mechanism, all UNE-P service is scheduled for elimination by March 11, 2006. Clearly, the existence of local exchange service based upon TELRIC-based UNE-P service is short-lived. This service will no longer exist in five months. Therefore the ability of these providers to protect the ratepayer from the exercise of market power and act as a substitute for competition is non-existent.

CLECs with Commercial Arrangements: Upon the scheduled elimination of TELRIC-based UNE-P service, many CLECs entered into commercial arrangements by which they could still receive UNE-Platform service. Unlike UNE-P service, however, these commercial arrangements were not at TELRIC rates, but instead at higher negotiated wholesale rates, thus reducing the CLECs margin and ability to effectively compete against the incumbent. Furthermore and perhaps more importantly to the situation at hand, the continued provision of UNE-Platform service through a commercial arrangement is not guaranteed by the existence of certain rules and regulations. That is to say, the continued provision of UNE-Platform service by the ILEC through a commercial agreement is subject only to the protections offered by contract law. And, upon the expiration of the initial commercial agreement, the continued availability of the UNE-Platform will be subject only to the whim and caprice of SBC.

Clearly, any decision to grant SBC competitive classification based upon the existence of commercial arrangements with certain CLECs is very questionable. While these CLECs may temporarily have the access to the elements necessary to provide local service, it is highly questionable whether these CLECs will have the margins necessary to discipline SBC in the event the incumbent attempts to exercise market power. Furthermore, because these

arrangements have a defined expiration date and the decision to grant competitive classification is effectively permanent in nature, these CLECs do not offer any real price discipline for SBC.[9]

VoIP Providers Relying on Third-Party Broadband Access: Like wireless service, the General Assembly recognized the problem with relying upon third-party dependent VoIP providers as a protection against ILEC exercise of market power. Unlike wireless service, however, the General Assembly saw such little competitive pressure from these type of providers that it specifically precluded the Commission from considering such providers in its 30-day determination.[10] Such preclusion is undoubtedly based upon the recognition that such providers are, without the ability to directly access the customer, subject to third-parties for their mere existence in the market. It seems highly questionable, therefore, given the General Assembly's expressed preclusion against considering such tenuous competitors in the 30-day filing, that the majority would find the presence of such competitors in anyway protective of ratepayers.

The day to day existence of third-party dependent VoIP providers is readily apparent. For instance, suppose that the VoIP provider delivers telecommunications service for $25 / month. By definition, the customer must also pay for a third-party broadband connection that may cost approximately $30 / month.[11] Therefore, the customer faces a total monthly telecommunications / internet bill of $55 / month. While the VoIP provider may be able to

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[9] Section 392.245(13) provides for the Commission to monitor the average rate for nonwireless basic local telecommunications services following the passage of SB 237 and to report its findings to the General Assembly. Presumably, upon a showing of an increase in such rates, the General Assembly could choose to re-regulate these competitively classified ILECs. The obvious question then becomes whether these ILECs are merely subjected again to price cap regulation at the inflated price effectuated during the time period in which the ILEC operated without any price regulation. In this event, the competitive classification is effectively permanent.

[10] See, Section 392.245.5(2) RSMo 2005.

[11] Recognizing that ILECs have been unwilling, to date, to provide stand-alone or "naked" DSL, this broadband connection will typically take the form of cable modem service. The refusal on the part of ILECs to provide such a stand-alone broadband connection is undoubtedly based upon their attempts to undermine the viability of the third-party dependent VoIP provider. Since the time the Commission considered this matter, however, the FCC has approved the proposed SBC – AT&T merger. In that order, the FCC approved a merger condition offered by SBC to provide naked DSL. Consistent with the previously discussed hesitation of ILECs to provide such a service, SBC only offered to provide this service for two years. As such, the viability of such third-party dependent VoIP providers is still very much in doubt.

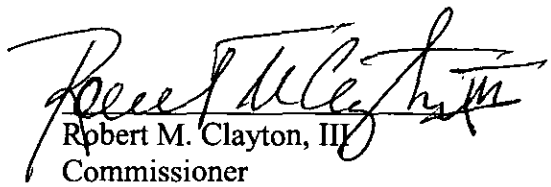
currently compete given such a cost structure, such competition is solely dependent on the continued availability and cost stability of the cable provider's broadband connection. Once faced with an increase in the cost of the broadband connection and / or a decrease in the price of the ILEC's local service offering (e.g., predatory pricing), no matter how temporary, the VoIP's existence becomes, at best, day to day. As stated previously, reliance upon such providers to prevent the ILEC's exercise of market power is highly questionable.

Conclusion: In order to adequately understand the state of competition in an exchange it is important to examine the market share of SBC as compared to its competitors. In the most recent SBC effective competition case which was heard earlier this year, none of the exchanges in this case had significant market share from any other "competitor". Without a fair existing competitive environment, granting competitive status is more likely to hurt competition than to aid it.

As the above discussion indicates, the majority's reliance upon the SBC recital of various competitors is misplaced. SBC's argument, that the loss of access lines to such competitors is indicative of competition, is weak at best. These access lines were not necessarily lost to anyone. A significant number of access line losses may merely reflect the transition of dual lines for dial-up internet access to a single broadband connection. None of the competitors in this case, either singularly or as a group, present the ability to prevent SBC's exercise of market power once granted. Furthermore, there is evidence that SBC has such substantial market power in the exchanges in question that price discipline will only occur at the whim of SBC. As such, this grant of competitive classification is harmful to the ratepayer and, under any definition, contrary to the public interest. As such, we dissent from the majority's Report and Order.

Respectfully Submitted

Steve Gaw
Commissioner



Robert M. Clayton, III
Commissioner

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