BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Review of the Competitive Classification of the Exchanges of Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri.	))))	**Case No. TO-2007-0053**

OFFICE OF THE PUBLIC COUNSEL'S POST-HEARING BRIEF

INTRODUCTION

The focus of this case is not a checklist of companies loosely termed competitors and whether or not they provide some service broadly considered a comparable substitute in both function and price for wireline telecommunications service provided by the New AT&T (Southwestern Bell Telephone/SBC). The real focus of this case is, or at least should be, on the public interest implications and impact the continuation of competitive classification has in AT&T exchanges. AT&T and the Staff will attempt to lure the Commission into "count the competitors" as the only task this Commission is to perform under Section 392.245.5 (6) RSMo 2005 Supp. They do not address the public interest impact or considerations. Staff's report and recommendation did not address the issue and it did not examine or consider the issue.

Public Counsel pointed to real facts in the real telecommunications world in Missouri that provides the real story about competition. Public Counsel pointed to the record of rate changes, mostly increases, since price cap regulation and the rate increases made after competitive classification. These are real facts.

AT&T made assurances to customers and to the PSC that it only wanted a level playing field and that a competitive classification would mean lower rates. AT&T freed

from price caps on basic local service used the competitive classification to increase local basic service rates. This is a real fact.

These rate increases in local service, together with rate increases for nonbasic service, were filed soon after the Order in TO-2006-0102. This is a fact. This short interval between reclassification and rate increases cast serious doubt on the representations made to the PSC that there were no plans for rate increases. It is now apparent that AT&T had these plans in its back pocket although it repeatedly denied it had any such plans.

AT&T has laid down a smoke screen to hide its plan to keep the competitive status in the same way it did to get the classifications. AT&T confuses the issue with the erroneous claim that OPC wants to ignore the new law and use "effective competition" as the controlling criteria. This is an intentional misstatement of Public Counsel's position. AT&T (and sometimes Staff) makes this misleading argument over and over again at every opportunity to try to misdirect the Commission's attention from the issue.

Public Counsel has not asserted that effective competition is the sole criteria to authorize reclassification. Public Counsel recognizes that Section 392.245.5, RSMo 2000 was amended in 2005 to eliminate a finding of "effective competition" as the condition for competitive classification. The law changed to different criteria that counted the number of competitors and technology used as part of the criteria for reclassification. In the 60 day probation, the second part of the criteria for reclassification is public interest test.

Although the General Assembly no longer has "effective competition" as the sole criteria for reclassification, the definition of effective competition remains in Section

386.020 RSMo. Leaving the definition in the telecommunications law indicates that the legislature did not prohibit "effective competition" for the PSC's use in making an analysis of the public interest.

The PSC has broad discretion on what it may consider in making its public interest analysis in reviewing this classification. Effective competition is a relevant and reasonable tool-one of many-it may employ to examine the public interest effect of continuing the competitive classification. It is not the exclusive tool; it is only one in its regulatory toolbox.

ARGUMENT-The Real Story

Section 392.245.5 provides that an incumbent local exchange telecommunications company (like AT&T) increases rates for basic local telecommunications services in an exchange classified as competitive such as those classified in TO-2006-0105, the PSC must review and determine "if the conditions of this subsection for competitive classification continue to exist in the exchange … and "if the commission determines, after hearing, that such conditions no longer exist for the incumbent local exchange telecommunications company in such exchange, it shall reimpose price cap regulation."

The facts have changed. The expectations of consumers and the PSC have been ignored by AT&T's price increase. The conditions for competition that existed when the Public Service Commission granted the 60 day petition no longer exist. AT&T should be returned to price cap regulation as provided in Section 386.245, RSMo 2000 (2005).

Continuing the competitive classification in the 60-day petition is contrary to the public interest. (Barbara A. Meisenheimer Direct, 2, 4). A competitive classification that

results in circumstances that are contrary to the goals established by Section 392.185, RSMo, should be set aside and the services returned to price cap regulation. (BAM Direct 9)

Under Section 386.245.5, RSMo, the Commission must consider the public interest implications of the classification just as required in the original 60-day reclassification petition case. It must determine if "***such competitive classification is contrary to the public interest.***"

The PSC must consider all relevant factors affecting the public interest like it considers all relevant rate making elements in fixing rates. *State ex rel. Utility Consumers Council, Inc. v. Public Service Commission. 585S.W.2d 41, 49 (Mo 1979); State ex rel. Laclede Gas Co. v. Pub. Serv.Comm'n, 535 S.W.2d 561 (Mo. App. 1976)*

The key changes in the Missouri and national telecommunications sectors are circumstances that are relevant factors in public interest analysis The PSC should look at the impact of these real facts as a reflection of the real status of competition.

1. AT&T increased prices for basic local service in many of the exchanges that were reclassified in the first 60-day petition case. (BAM Direct 7). AT&T's price cap increases do not advance the goals of telecommunication legislative intent and purpose and are inconsistent with Section 392.185(1) (4) and (6) (BAM Surr. 14-16)

2. The extent and strength of competition. (BAM Direct 12-13)

    i. The Staff's updated investigation continues to show that AT&T has little to no local facilities based competition. (BAM

Surr.6-7) The lack of facilities based competition indicates competition may not be there for the long haul. This indicates that competitors remain dependent on AT&T facilities and resale services and do not make an investment in Missouri's telecom infrastructure.

ii. The number of "competitors" that still provide local services in those exchanges has dwindled and those remaining do not have the relative strength as compared to AT&T. (BAM Surr.6-7)

iii. The new trend shows a net loss in lines served by competitive CLECs for both residential and business customers.

3. Recent events in the telecommunications industry have had a significant impact on competitive environment.

i. Since the reclassification, Missouri customers have seen their choices of competitive alternatives dwindle or become diluted through AT&T's acquisition of the legacy AT&T and BellSouth. These acquisitions combined with the Ameritech and Pac West, created a formidable incumbent RBOC provider with dominant market power and extraordinary technical, legal, political and financial resources. (BAM Direct, 10-11; Surr 14-16). Add to this, the entry info the intra state toll business, the total ownership of Cingular cellular and favorable court and FCC decisions have transformed AT&T from the proverbial 800 pound gorilla to a two ton tiger that is dominating competition.

ii. There is little to no local facilities-based competition and weak facilities- based competition so that in many of the exchanges there

has been no growth or negative growth in facility-based CLEC lines. (BAM Surr 6-7)

4. Beware of wireless providers as wireline competition. Public Counsel has provided data on gaps in coverage for all requesting customers in the exchanges. Local basic service is ubiquitous, reliable and readily available in all parts of all exchanges. (BAM Direct, 14-15: Surr. 8)

5. The Commission and customers were told by AT&T that competitive classification in these exchanges means that prices will decrease and local service prices will not increase because of competition. If only AT&T's could act like a CLEC, the benefits of competition, including lower prices, will come to these customers. These reasonable expectations fueled by AT&T have not materialized. The real evidence is that price increases were made shortly after reclassification. (BAM Direct, 16-17; Surr 8-10)

6. Dissatisfied customers have no real choice of local service. AT&T's market dominance and monopoly in wireline telephony has pushed the available number of "competing" local providers into a corner that no longer contains comparable companies. (BAM Direct, 18: Surr 14-16) Competition is so weak that comparables have little to no impact of AT&T's market position and price discipline. Competition has not protected ratepayers by providing real choices and lower prices. Continuation of this competition with this outcome is contrary to public policy. Regulation acts as a substitute for competition to protect consumer. *May Dep't Stores Co. v. Union Electric Light & Power Co., 341 Mo.*

299, 107 S.W.2d 41, 48 (1937), Public dissatisfaction and political and regulatory pressure has not restrained price increases as represented by AT&T. (BAM 11-19)

BURDEN OF PROOF

The party asserting the positive of a proposition bears the burden of proving that proposition. *Dycus v. Cross, 869 S.W. 2d 745, 749 (Mo. Banc 1994)* AT&T has the burden of proof to show that "the conditions of this subsection for competitive classification continue to exist in the exchange". Because the competition count is not at issue here, the other condition of this service for competitive classification must be examined and the PSC must determine whether or not continuation is "contrary to public interest". AT&T must adduce evidence to show that the same conditions that led the PSC to grant competitive status continue to exist. If those conditions exist, then AT&T may keep its competitive status. If the PSC finds that these conditions do not exist, price cap regulation is reimposed.

COMPETITION FAILED TO BRING LOWER RATES

The promise that granting AT&T competitive status benefits the public has quickly been exposed as an empty promise. The fear of consumer advocates has been that competition would not be significant or robust enough to act as a counter balance to the incumbent telephone company's virtual monopoly, especially for residential customers. The unleashing of a monopoly or duopoly that can raise and lower prices for a captive customer base unencumbered by price regulation or by real competition from significant and robust competitors does not benefit the customer and is contrary to the public

interest. Continuation of that status only compounds the adverse effect on customers and the public interest.

Competition has failed to act as that counter weight to price escalations when price caps are lifted. On October 25, 2005, the Commission issued its Report and Order, *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) – 60-day Petition,* (Case No.TO-2006-0102) that classified a number of AT&T exchanges as competitive, thereby ending price cap controls over local basic service rates and nonbasic service rates. Public Counsel argued against the reclassifications as contrary to the public interest citing lack of robust and major competitors that can exert some price discipline on AT&T and that competition from other technologies was not substitutable or comparable in price, service, coverage, and reliability. Competitors were competitors in name only. The PSC limited its role to a "competitor counting" function and avoided an evaluation of the public interest condition in the statute by falling back on an erroneous assignment of the burden of proof.

Before the dust settled on that Report and Order, AT&T increased its basic rates for residential services and business services in certain exchanges designated as competitive under Section 392.245.6, RSMo 2000 (as amended 2005). This triggered the review of competitive status provisions in Section 392.245, RSMo.

The continuation investigation and review includes a revisiting of the public interest condition as that was part of the original considerations.

The evidence here shows the erosion, if not demise, of competition in these exchanges less than a year after the reclassification. The increases in these exchanges are

inconsistent with the often promised benefits of competition of lower prices, better service, and more choices for consumers.

Public Counsel suggests that these increases are symptoms of a dilution of competition and meaningful choice of local carriers in Missouri. Mergers and acquisitions has transformed SBC into an industry giant. The proverbial 800 pound gorilla has become the two ton tiger, dominating the "level playing field" as its playground.

Public Counsel fears that this environment is no longer competitive as it relates to the local basic telephone customer and the customer that wants reliable, affordable, and high quality telephone service without having to purchase services that the customer does not want, does not need, or cannot afford.

The purpose of Missouri's telecommunications law in Chapter 392, RSMo, including Section 392.245, RSMo , is to ensure that customers pay only reasonable charges for telecommunications service (Section 392.185 (4)) and that full and fair competition is allowed to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest. (Section 392.185 (6), RSMo.) These purposes are circumvented when competition is just a list of companies that can offer some type of communication service is present and has two customers in the exchange. These purposes are rejected when the underlying facts—who are these competitors, are they robust, how many customers and what class of customers are served—are ignored in the public interest analysis.

As Public Counsel witness Meisenheimer relates (Direct, 5-6), AT&T aggressively raised its rates above the level permitted under price caps. Business

customers in metropolitan exchanges, usually considered subject to greater competition than residential areas, saw a $1.00 month increase in basic service rates. Residential customers saw increases of 14% to 19%. When freed from price restrictions, AT&T has made it a practice to increase rates. (See, SWBT PRICE CHANGE SUMMARY)

Under price cap regulation, SBC has not shown any "price discipline" for its regulated services that was the consequence of local competition. Every year, SBC has taken the opportunity to increase nonbasic service rates by up to 8% and has only made reductions in local basic service rates in response to its duty to implement reductions due to CPI-TS;

After almost 10 years of competition, AT&T's market share should be less than the monopoly 100%. But the market share of competitors is minimal after more than a decade of competition. CLECs have made only nominal entry into the residential market and no CLEC has come to the forefront to challenge AT&T's market dominance. CLECs in the aggregate do not approach AT&T's customer numbers.

LOCAL BASIC SERVICE RATE INCREASES SHOW THAT AT&T HAS MISLEAD CUSTOMERS AND THE COMMISSION ON ITS PLANS UNDER COMPETITIVE STATUS

Notwithstanding AT&T's denial that it never promised not to raise rates, the evidence is clear that AT&T told customers and the PSC that competition will bring lower rates.

At the public hearing in TO-2006-102, Excelsior Springs, Mayor Parker was questioned by the Chairman concerning his understanding of reclassifying AT&T:

MAYOR PARKER
I am -- I am a user of SBC at home as well as
8 in the business, and I'd like to see you have an opportunity
9 to help my community by lowering our rates to our residents.
10 And by the classification, the competitive classification, I
11 think we can do that.
CHAIRMAN DAVIS: Are you aware that SBC is currently price cap
3 regulated?
4 MR. PARKER: No, I was not.
5 CHAIRMAN DAVIS: Okay. So right now, they
6 can't -- can't raise rates on their basic local services, but
7 on certain services that are defined as competitive, they
8 can -- could raise their rates under the old statute, I
9 believe it was up to eight percent a year, and under the new
10 statute, it's now, I believe, five percent a year. Are you
11 aware that SBC has -- has been consistently raising those
12 rates for those -- those services?
13 MR. PARKER: No, sir, I was not.
14 CHAIRMAN DAVIS: And, you know, I mean, do you
15 think that if SBC is granted competitive classification in
16 your area, that they will, in fact, lower rates?
17 MR. PARKER: That's what I've been assured.
18 CHAIRMAN DAVIS: That's what you've been
19 assured? Who assured you of that?
MR. PARKER: By different people that are in
21 the SBC service, that they want to be competitive, and for
22 them to be competitive, if they have a competitive
23 classification, that we, in fact, could be offered a lower
24 rate.
Tr.33-34, 36

In his concurring opinion in TO-2006-0201, Chairman Davis also made it clear that AT&T made commitments on price increases:

> Once competitive classification is granted, the only remaining duty of this commission is to closely monitor competition and prices in the given exchanges. This commission takes that charge very seriously and there is no doubt in this commissioner's mind that our staff will zealously perform its duties in this area. To grant a company with the market power of SBC Missouri the unfettered discretion to raise or lower rates causes this commissioner some concern about what might happen when circumstances change and no elected or appointed officials are left to remember the representations made by SBC Missouri to the Governor, the General Assembly or even the Missouri Public Service Commission. Hopefully, competition will thrive in the marketplace and SBC Missouri will prove that this fear is unfounded.

At page 3.

The Chairman continued on about the less than candid stance AT&T had taken in its effort to undermine the public hearings:

> It is also my earnest hope that in the future SBC Missouri will be more forthright in the presentation of legal evidence to this commission and in its communications with the public. This commissioner found it particularly troubling, where 30-day and 60-day time limits applied, that SBC Missouri would attempt to present evidence in such a way as to not notify its competitors of its filing for competitive classification in a given exchange. AT 3-4
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> Further, in advance of the local public hearings, SBC Missouri representatives attempted to obtain local public support for their application by telling customers that granting their competitive classification request would allow them to lower their rates, but it is apparent from the record that SBC Missouri never communicated to any of these consumers whose support they were eliciting that rates could ever go up as a result of this commission granting their request. In conclusion, SBC Missouri was entitled to win this case as a matter of law, but their conduct only reinforced the belief that further regulatory oversight of SBC Missouri is necessary to protect consumers.
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CONCLUSION

As Chairman Davis said,"… their conduct only reinforced the belief that further regulatory oversight of SBC Missouri is necessary to protect consumers." Public counsel asks the commission to find that continuation of the competitive status does not meet the public interest test and price cap regulation should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, emailed and/or hand delivered this 18th day of April, 2007 to the following attorneys of record:

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