

**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

**BRIEF OF STAFF**

COMES NOW the Staff of the Missouri Public Service Commission and for its brief states:

**Introduction**

AT&T Missouri is an incumbent local exchange company (ILEC) subject to the provisions of the price cap statute, Section 392.245 RSMo (2005 Supp.). Section 392.245 provides an expedited 2-track procedure when a price cap regulated ILEC seeks competitive classification for its services within one or more exchanges. The two tracks are referred to as the 30-day track and the 60-day track.

In Case No. TO-2006-0093, the Commission granted AT&T Missouri competitive classification under the 30-day track for business services in 45 exchanges and for residential services in 26 exchanges. In Case No. TO-2006-0102, the Commission granted AT&T Missouri competitive classification under the 60-day track for business services in 30 exchanges and for residential services in 51 exchanges.

Section 392.245 directs the Commission to review the conditions in competitively classified exchanges at least every two years or where an ILEC increases rates for basic local services in a competitively classified exchange.

The Staff filed a Report to initiate this case after AT&T Missouri increased the monthly rates for business basic local telecommunications service in its Rate Group B and larger

competitively classified exchanges. The Staff Report requested the Commission to review if the conditions for competitive classification continued to exist for all of AT&T Missouri's competitively classified exchanges.

The three parties to this case, the Staff, AT&T Missouri, and Public Counsel, filed a joint motion in which they stipulate that the Commission may consider in its review the verified Staff Report filed in this case as evidence to determine if competitive conditions continue to exist in the AT&T Missouri exchanges granted competitive classification under the 30-day track. The Staff and AT&T Missouri stipulated that the Staff Report demonstrates that the competitive conditions for those exchanges continue to exist and should remain classified as competitive. Public Counsel agreed not to object to the Staff's and AT&T Missouri's stipulation and will not offer evidence in opposition to that stipulation. At hearing, Public Counsel stipulated that the Staff Report can be considered as evidence. (Tr. 302-03).

### **Issue**

The parties proposed the following issue for determination by the Commission:

Section 392.245.5 (6) RSMo (2005 Supp.) provides that the Commission shall, at least every two years, or where an incumbent local exchange telecommunications company increases rates for basic local telecommunications services in an exchange classified as competitive, review those exchanges where an incumbent local exchange carrier's services have been classified as competitive, to 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 re-impose price cap regulation upon the incumbent local

exchange telecommunications company, in such exchange. Do the conditions for competitive classification continue to exist in AT&T Missouri's competitively classified exchanges?

### **Argument**

#### **30-Day Track Exchanges**

The conditions for competitive classification continue to exist in the 30-day track exchanges.

In Case No. TO-2006-0093, the Commission granted competitive classification based on the presence of at least one non-affiliated competitive local exchange carrier (CLEC) providing local voice service in whole or in part over facilities in which it or one of its affiliates has an ownership interest and the presence of at least one non-affiliated wireless carrier.

Based on a review of CLEC annual reports for 2005, the Staff confirmed the presence of a non-affiliated facilities-based CLEC providing local voice service in 44 of 45 business exchanges and 24 of 26 residential exchanges granted competitive classification under the 30-day track. Through additional investigation, the Staff confirmed the presence of a facilities-based CLEC providing local voice service in the remaining 30-day track exchanges. (Staff Report, Memorandum, pp. 4-7, Appendices C, D).

AT&T Missouri confirmed the presence of a non-affiliated wireless provider in each of the 30-day track exchanges. (Unruh Rebuttal, Ex. 5, Schedules 4 and 5).

#### **60-Day Track Exchanges**

The conditions for competitive classification continue to exist in the 60-day track exchanges.

Section 392.245.5 directs the Commission to approve a petition under the 60-day track based on competition from certain types of entities unless the Commission finds that competitive

classification is contrary to the public interest. In Case No. TO-2006-0102, the Commission granted competitive status based on the presence of at least one non-affiliated wireless carrier plus one or more of the following three criteria: (1) the presence of at least one non-affiliated CLEC providing local voice service in whole or in part over facilities in which it or one of its affiliates has an ownership interest, (2) the presence of at least one provider offering VoIP service using an unaffiliated cable television company's broadband network, (3) the presence of at least one non-affiliated entity providing local voice service using the telecommunications facilities or other facilities of a third party, including those of the incumbent local exchange company as well as providers that rely on an unaffiliated third-party Internet service. The Commission held that Staff and Public Counsel, as the parties asserting that the grant of a competitive classification would be contrary to the public interest, bore the burden of proof on that proposition. The Commission held that Staff and Public Counsel failed to show that competitive classification would be contrary to the public interest. (Report and Order, pp. 13-14).

Based on a review of CLEC annual reports for 2005, the Staff confirmed the presence of at least three non-affiliated CLECs providing local voice service in each of the 60-day track exchanges. (Van Eschen, Rebuttal, Ex. 1, Schedules 1 and 2).

AT&T Missouri confirmed the presence of a non-affiliated wireless provider in each of the 60-day track exchanges and a VoIP provider in all but one of the 60-day track exchanges. (Unruh Rebuttal, Ex. 5, Schedules 2 and 3).

Public Counsel asserts that continued competitive classification of the 60-day track exchanges would be contrary to the public interest in light of present circumstances. (Meisenheimer Direct, Ex. 3, p. 4).

Section 386.550 states, “In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.” In a later proceeding where a party asks the Commission to determine that a previous order is no longer in the public interest, the party must assert a change in circumstances; otherwise, the party would be making a prohibited collateral attack on the previous final order. *State ex rel. Ozark Border Electric Cooperative v. Public Service Commission*, 924 S.W. 2d 597, 601 (Mo. banc 1996). In the present case, Public Counsel--as the party seeking a Commission determination that competitive conditions no longer exist--must assert a change in circumstances to avoid making a prohibited collateral attack on the Commission’s decision in Case No. TO-2006-0102. 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). Accordingly, Public Counsel bears the burden of proving the positive of its proposition that a change in circumstances makes continued competitive classification contrary to the public interest.

Public Counsel identifies two changes in circumstances. First, AT&T has increased basic local rates to business and residential customers in competitive exchanges. (Meisenheimer Direct, Ex. 3, p. 5). Second, Public Counsel claims that the “SBC/AT&T merger and MCI’s acquisition by Verizon has significantly altered competitive conditions for the new AT&T. The available choices of facility based CLEC services have dwindled.” (Ex. 3, p. 10).

Neither change in circumstance proves that a continued competitive classification for the 60-day exchanges is contrary to the public interest. The legislature is presumed, when enacting a statute, to intend a logical result, and courts endeavor to avoid unreasonable and illogical results. *Teague v. Missouri Gaming Commission*, 127 S.W. 3d 679, 687 (Mo. App. W.D. 2003). Because Section 392.245.5 authorizes the local exchange telecommunications company to adjust

its rates for competitive services upward or downward as it determines appropriate in its competitive environment, it is illogical to suggest that such a rate increase is such a change in condition as would make the competitive classification contrary to the public interest. Second, a reduction in facility based CLEC services is not a sufficient change in circumstance under the 60-day track analysis given that a CLEC need not be facility based to be counted under the 60-day track and given the plethora of other providers in each of the 60-day exchanges.

Public Counsel's objection seems to be directed toward competitive classification, in general, and not toward the specific issue of whether the conditions for competitive classification exist in an exchange. First, it appears that Public Counsel did not conduct an exchange-specific analysis. (Meisenheimer, Tr. 146). Second, Public Counsel's witness would not agree that Rate Group A 60-day track exchanges, which had not received rate increases, should continue to retain competitive classification. (Meisenheimer, Tr.72). Third, even though Public Counsel did not challenge the continued classification of the 30-day track exchanges, Public Counsel's witness would not agree that those 60-day track exchanges that now qualify for competitive classification under the 30-day track should continue to retain competitive classification. (Meisenheimer, Tr. 80-81).

### **Conclusion**

The record demonstrates the presence of one facilities-based CLEC and one wireless carrier in each of the 30-day track exchanges. Similarly, the record demonstrates the presence of at least three CLECs and at least one wireless carrier in each of the 60-day track exchanges. Public Counsel has failed to show that continued competitive classification of the 60-day track exchanges is contrary to the public interest.

WHEREFORE, the Staff requests the Commission to find that the conditions for competitive classification continue to exist in all of AT&T Missouri's competitively classified exchanges.

Respectfully submitted,

/s/ William K. Haas

William K. Haas  
Deputy General Counsel  
Missouri Bar No. 28701

Attorney for the Staff of the  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102  
(573) 751-7510 (Telephone)  
(573) 751-9285 (Fax)  
[william.haas@psc.mo.gov](mailto:william.haas@psc.mo.gov)

### **Certificate of Service**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to the following counsel this 18<sup>th</sup> day of April 2007.

/s/ William K. Haas