BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for Competitive Classification Pursuant to Section 392.245.6, RSMo (2005) - 60-Day Petition.	))))	Case No. TO-2006-0102 Tariff File No. YI-2006-0145

SBC MISSOURI'S PRETRIAL BRIEF

SBC Missouri,[1] pursuant to the Missouri Public Service Commission's ("Commission's") September 6, 2005 Order,[2] submits this Pretrial Brief to address the issues in dispute in this proceeding.

INTRODUCTION

Section I of this Brief sets out the statutory standard for obtaining competitive classification by an incumbent local exchange company ("incumbent LEC") under the simplified process outlined in Senate Bill 237 ("SB 237"), and compares the criteria the Commission must apply under the 30-day track with the criteria under the 60-day track.

The primary differences are that (1) under the 60-day criteria, the statute requires the Commission to count not only competitors using their own facilities in whole or in part, but also competitors using other company's facilities in whole or in part – including those of the incumbent LEC (e.g., UNE-P or commercial wholesale services) – as well as competitors providing service using a third party's broadband network; and (2) under the 60-day track, the

[1] Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, will be referred to in this pleading as "SBC Missouri."
[2] Order Directing Notice, Establishing Procedural Schedule, Reserving Hearing Date, and Granting Protective Order, Case No. TO-2006-0102, issued September 6, 2005, at pp. 3, 5.

Commission is to grant competitive classification when a requesting carrier identifies the requisite number of competitors providing service in an exchange "unless it finds that such competitive classification is contrary to the public interest."

Section II discusses the burden of proof that applies in this proceeding. Through SB 237, the Legislature has charged the Commission with investigating and determining whether a requesting incumbent LEC has satisfied the statutory criteria in each exchange where competitive status is being sought. The streamlined process under the statute reflects a clear legislative determination that conferring competitive status will advance the public interest when the requisite number of competitors are providing service in an exchange. Thus, instead of the cumbersome burdens imposed by the prior statute, SB 237 only requires a requesting incumbent LEC to identify the requisite number of competitors in each exchange. Competitive status is automatically conferred in a 30-day case once the requisite number of competitors has been shown. And once the requisite number of competitors has been shown in a 60-day case, the Commission must confer competitive status "unless it finds that such competitive classification is contrary to the public interest." When a party makes such a claim in a 60-day case, that party – as the one asserting the positive of the proposition – bears the burden of proof on the issue. SBC Missouri has no burden to carry on the public interest issue.

Section III addresses how the evidence presented in this proceeding satisfies the statutory standard and requires the Commission to grant competitive classification for business and residential services in the exchanges identified by SBC Missouri in Revised Exhibits B-1 and B-2, which include exchanges not granted competitive classification in SBC Missouri's 30-day case and the additional exchanges identified by Staff in its testimony in that case:

- SBC Missouri has presented substantial evidence demonstrating that 30 exchanges for business services and 51 exchanges for residential services are

being served by multiple competitors, including CLECs providing service using UNE-P or under commercial agreements with SBC Missouri. In addition, SBC Missouri has provided evidence that these exchanges are also being served by various wireless carriers, and in most cases by one or more VoIP providers using a third party's broadband network.

- 16 of the requested exchanges (15 for business services and 1 for residence services), according to evidence provided by Staff, meet the statutory 30-day criteria.[3]

No party has presented any competent information upon which the requested competitive classifications can be denied. Although Staff and OPC oppose competitive classification for exchanges beyond the 13 Staff supports, they do so primarily based on a claim that such a grant would be against the public interest because the identified competitors are wireless providers, VoIP providers, or are CLECs providing service utilizing UNE-P (or similar wholesale services from SBC Missouri under terms commercially acceptable to both parties) and should not be counted.

But their position provides no basis for denial of competitive classification. Section 392.245.5 specifically provides that 60-day petitions are "based on competition from any entity providing local voice service in whole or in part by 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" (emphasis added). The Commission may not refuse competitive classification based on the "public interest" because it comes from providers the Legislature has expressly included. The remaining arguments advanced by Staff and OPC similarly find no support in SB 237, but are instead reprisals of

[3] Van Eschen Direct, pp. 13-14, Sch. 1. Staff, however, has recommended competitive classification be granted for only 13 of these exchanges. Staff is withholding a positive recommendation on three of these 16 exchanges because SBC Missouri did not specifically request competitive status for these exchanges in either the 30 or 60-day portions of its Petition.

arguments made under the "effective competition" standard in the statute as it existed prior to the passage of SB 237.

ARGUMENT

I. THE STATUTORY STANDARD

Senate Bill No. 237 ("SB 237")[4] dramatically changes the process for determining whether the services in an exchange are to be classified as competitive. Before SB 237, the Commission was required to determine whether or not "effective competition" existed for the requested services in the designated exchanges. Under this "effective competition" standard, the Commission considered, among other things, the extent of competition in the exchange, whether pricing and other terms and conditions were comparable, whether competitors were offering functionally equivalent or substitutable services and whether the purposes and policies of Chapter 392, as set out in Section 392.185, were being advanced. Under SB 237, however, the Commission is not to determine whether "effective competition" exists and the criteria which the Commission considered in making that determination no longer apply.

Instead, SB 237 requires the Commission to apply a simple, expedited, two-track procedure when a price cap regulated ILEC seeks competitive classification for its services within one or more exchanges. Under both tracks, the statute directs the Commission to determine whether two non-affiliated entities, one of which can be a wireless provider, are providing local voice service in the exchange:

The 30-day track establishes a competitive "trigger" that focuses solely on whether two non-affiliated entities are providing "basic local telecommunications service" within an exchange:

[4] Governor Blunt signed SB 237 into law on July 14, 2005, after it was overwhelmingly passed by both the Missouri Senate (29 to 3) and House of Representatives (155 to 3). It became effective August 28, 2005.

> Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.[5]

The types of competitors that may be counted by the Commission in a 30-day case are very narrow: at least two non-affiliated competitors using their own (or an affiliate's) facilities in whole or in part to provide local voice service, where one of the providers may be a wireless carrier.

The 60-day track, on the other hand, recognizes that there are additional forms of competition and therefore directs the Commission to count additional types of competitors in determining whether two non-affiliated entities are providing local voice service. Not only must the Commission count the types of carriers eligible for counting in a 30-day case, but the Commission must also count other competitors, such as those using UNE-P or commercial wholesale services from the incumbent LEC, or those providing services over a third party's broadband network (e.g., VoIP providers). The 60-day track also accords some discretionary authority to the Commission to deny competitive classification if it determines that such a grant would be contrary to the public interest: Once a petition is filed based on competition from any entity required to be considered under the 60-day track, the statute directs that: "The commission shall approve such petition within sixty days unless it finds that such competitive classification is contrary to the public interest."[6]

[5] Section 392.245.5(6) RSMo (2005).
[6] Id.

Common Aspects of the Two Tracks for Competitive Classification. The 30-day track and the 60-day track are both contained in the same statutory subsection of SB 237 (i.e., Section 392.245.5) and share many common aspects under the statute:

- The requisite minimum number of competitors. The first paragraph of the statutory subsection adopting the new procedure for obtaining competitive classification makes clear that the Commission must classify the incumbent LEC's services (business, residential, or both), as competitive in any exchange in which two other non-affiliated entities are also providing such basic local telecommunications services within the exchange:

> Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in an exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange.[7]

  As the introductory paragraph to this new statutory subsection, it applies to both the 30 and 60-day tracks for obtaining competitive classification, which are described a few paragraphs later within the subsection.

- The Counting of competitors using their own facilities in whole or in part. The statute also requires the Commission, under both the 30 and 60-day tracks,

[7] Section 392.245.5 RSMo (2005), emphasis added.

generally to consider as a "basic local telecommunications service provider" any entity providing "local voice"[8] service "in whole or in part" over facilities in which it or one of its affiliates has an ownership interest.[9]

- The Counting of one CMRS provider. For the purposes of both the 30 and 60-day tracks, the statute provides that one commercial mobile radio service ("CMRS" or "wireless") provider is to be considered an entity providing "basic local telecommunications services" in an exchange.[10]
- The definition of "telecommunications facilities." Section 386.020(56) RSMo (2000), which applies in both the 30-day and 60-day tracks, defines "telecommunications facilities" very broadly to include, among other items, "lines, conduits, ducts, poles, wires, cables, crossarms, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service."[11] Thus, the Legislature has clearly provided that any equipment or property used to provide service is a telecommunications facility and that use of any such telecommunications facility qualifies an entity as being a provider of service in the exchange.

[8] Section 392.245.5(3) RSMo (2005) defines "local voice service" as meaning "[r]egardless of the technology used . . . two-way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo."
[9] Section 392.245.5(2) RSMo (2005).
[10] Section 392.245.5(1) RSMo (2005) (however, only one such non-affiliated provider will be counted as providing basic local telecommunications service within an exchange).
[11] Section 386.020(52) RSMo (2005).

- Exclusion of prepaids and resellers. For both tracks, the statute excludes prepaid[12] service providers and resellers:

> Telecommunications companies only offering prepaid telecommunications service or only reselling telecommunications service as defined in subdivision (46) of section 386.020, RSMo, in the exchange being considered for competitive classification shall not be considered entities providing basic telecommunications service.[13]

As SBC Missouri witness Craig Unruh testified, SBC Missouri appropriately excluded any companies offering only prepaid or resold telecommunications services from its list of competitors providing either business or residential services in the requested exchanges.[14]

Differences between the 30 and 60-day tracks. While the 30 and 60-day tracks are contained in the same statutory section of SB 237, they also have several significant differences that are set out in specific subsections of the statute. These differences are critical to the Commission's appropriate processing of a 60-day case:

- Treatment of UNE-P or other wholesale provisioning. While both the 30 and 60-day tracks require the counting of competitors using their own (or an affiliate's) facilities in whole or in part to provide service, the 60-day track also requires the Commission to count competitors using the facilities of other companies, including those using the ILEC's facilities, to provide service:

> Notwithstanding any other provision of this subsection, any 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 telecommunication facilities or other facilities or the telecommunication facilities or other facilities of a

[12] The statute defines "prepaid telecommunications service" to mean "a local service for which payment is made in advance that excludes access to operator assistance and long distance services." Section 392.245.5(5) RSMo (2005).
[13] Section 392.245.5(4) RSMo (2005).
[14] Unruh Direct, p. 9, Revised Exhibits B-1 and B-2 (see footer); and Unruh Rebuttal, Revised Exhibits B-1 and B-2 (see footer).

> third party, including those of the incumbent local exchange company…[15]

- Treatment of providers using a third party's broadband network. Under the 30-day track, the statute specifically provides that providers (such as VoIP providers) which use an unaffiliated company's broadband network to provide service may not be counted:

  > A provider of local voice service that requires the use of a third party, unaffiliated broadband network[16] or dial-up Internet for the origination of local voice service shall not be considered a basic local telecommunication service provider.[17]

  But for the 60-day track, the statute specifically directs the Commission to count those providers (such as VoIP providers) which use an unaffiliated company's broadband network:

  > Notwithstanding any other provision of this subsection, any 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 telecommunication facilities or other facilities or the telecommunication 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.[18]

Despite the clear direction of the statute, Staff and OPC express the view that competitors providing service using UNE-P or wholesale service from the incumbent LEC should not be counted based on their claim that it would be contrary to the public interest to grant competitive classification using such evidence. Staff makes a similar argument with respect to wireless

[15] Section 392.245.5(6) RSMo (2005), emphasis added.
[16] This statute, for the purpose of this subsection only, defines a "broadband network" as "a connection that delivers services at speeds exceeding 200 kilobits per second in at least one direction. Section 392.245.5(2) RSMo (2005).
[17] Section 392.245.5(2) RSMo (2005).
[18] Section 392.245.5(6) RSMo (2005), emphasis added.

service and VoIP service.[19] But these positions are flatly contrary to the statute. As pointed out above, Section 392.245.5 directs the Commission to count competitors using these provisioning methods to provide service. If the Legislature did not intend for the Commission to consider these other forms of competition, it would not have created the 60-day track. The Commission may not, under the rubric of the "public interest," reject competitive classification because it comes from service providers the Legislature has directed be counted.[20]

The new requirements prescribed by SB 237 have dramatically changed the Commission's role in determining competitive classification for a price cap regulated incumbent LEC. By removing the provisions from Section 392.245 that previously required the Commission to "investigate the state of competition" and to determine whether "effective competition" exists in the exchange,[21] and replacing them with strict numerical triggers and explicit directions on what should and should not be counted under each track, the Legislature has made clear that where customers have a choice, competitive classification must be granted.

II. THE BURDEN OF PROOF

The Legislature, through SB 237, has charged the Commission with investigating and determining whether a requesting incumbent LEC has satisfied the statutory criteria for granting competitive classification to its services in a particular exchange:

> The commission shall maintain records of regulated providers of local voice service, including those regulated providers who provider local voice service over their own facilities, or through the use of facilities of another provider of local voice service. In reviewing an incumbent local exchange telephone company's request for competitive status in an exchange, the commission shall consider their own records concerning ownership of facilities and shall make all

[19] Van Eschen Direct, pp. 7-8.
[20] Although not relevant to the determination the Commission must make in this proceeding, OPC asserts that the Commission retains authority over competitive services under Section 392.200.1. OPC, however, is mistaken. SB 237 eliminated the ability of the Commission to regulate on that basis. Under Section 392.500 RSMo (2005), the application of Section 392.200 is limited to Subsections 2-5 of that section.
[21] Compare Section 392.245.5 RSMo (2000).

> inquiries as are necessary and appropriate from regulated providers of local voice service to determine the extent and presence of regulated local voice providers in an exchange.[22]

The streamlined process established by SB 237 reflects a clear legislative determination that conferring competitive status will advance the public interest when the requisite number of competitors are providing service in an exchange. Previously, the statute required the Commission to "investigate the state of competition" and to "determine whether effective competition exists in the exchange."[23] Under that standard, the Commission considered, among other things, the extent to which services were available from alternate providers in the exchange, whether pricing and other terms and conditions of service were reasonably comparable, and whether competitors were offering functionally equivalent or substitutable services.

SB 237, however, replaced that subjective standard with strict triggers that focus on the number of competitive providers in an exchange. Now, a requesting incumbent LEC need only identify the requisite number of competitors in each exchange (or ask the Commission to examine its own records and to conduct necessary and appropriate inquiries of regulated providers). Once the requisite number of competitors have been identified in a 30-day case, competitive status is automatically conferred. In a 60-day case once the requisite number of competitors have been identified, the Commission must confer competitive status "unless it finds that such competitive classification is contrary to the public interest."

Staff and OPC claim that SBC Missouri has the burden to demonstrate that granting competitive classification will not be contrary to the public interest.[24] This claim is incorrect. In

[22] Section 392.245.5(6) RSMo (2000), emphasis added.
[23] Compare Section 392.245.5 RSMo (2000).
[24] Van Eschen Direct, pp. 18-19, 27, Meisenheimer Rebuttal, p. 11.

the event a party in a 60-day case asserts that a grant of a competitive classification would be contrary to the public interest, that party – as the one asserting the proposition – bears the burden of proof on this issue. Quoting the Missouri Supreme Court, the Commission explained this in Case No. TO-2006-0093, in an Order issued just ten days ago:

> The law in this state as to the burden of proof is clear and designed to assure that hearings on contested matters provide the parties with predictable rules of procedure. The party asserting the positive of a proposition bears the burden of proving that proposition.[25]

Here, Staff and OPC have asserted the claim that granting competitive classification in any exchanges beyond the 13 they support would be contrary to the public interest. Staff and OPC therefore have the burden of proof on this issue. Nothing in SB 237 requires a requesting incumbent ILEC to make a public interest showing. Under the statute, SBC Missouri has no burden to carry on the public interest issue.[26]

III. THE STATUTORY STANDARDS FOR COMPETITIVE CLASSIFICATION HAVE BEEN MET

SBC Missouri seeks a competitive classification under the 60-day track for business services in 30[27] of its 160 exchanges. And it seeks a competitive classification for residential services in 51[28] of those 160 exchanges.[29] Although Staff and OPC only support competitive

[25] In the Matter of the Request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for Competitive Classification pursuant to Section 392.234.6, RSMo 2005 – 30-day petition, Case No. TO-2006-0093, Report and Order, Issued September 26, 2005, at p. 26, quoting Dycus vs. Cross, 869 SW 2nd 745, 749 (Mo. banc 1994).
[26] Even if it had the burden of proof, SBC Missouri would have satisfied by citing the requisite number of competitors and noting the Legislature's determination that competitive classification was the preferred approach.
[27] SBC Missouri originally requested competitive classification under the 60-day track for business services in 26 exchanges. The four additional exchanges are the Excelsior Springs exchange, which was rejected for competitive classification in the 30-day case; and the Chaffee, Linn and Montgomery City exchanges, which SBC Missouri did not list either in its 30 or 60-day case, but which Staff identified - - based on information unavailable to SBC Missouri - - as satisfying the 30-day criteria. Unruh Rebuttal, pp. 7-9.
[28] SBC Missouri originally requested competitive classification under the 60-day track for residential services in 49 exchanges. The two additional exchanges are the San Antonio and Sikeston exchanges, which were rejected for competitive classification in the 30-day case. Unruh Rebuttal, pp. 7-9.
[29] SBC Missouri also requested competitive classification for any additional exchanges where the Commission's investigation revealed the statutory criteria were met. (SBC Missouri Petition, para. 21).

classification for 13 exchanges (12 for business services and one for residential services),[30] the evidence SBC Missouri has provided more than sufficiently demonstrates that competitive classification must be granted for the specified services in all of the requested exchanges.

A. SBC Missouri's Evidence. SBC Missouri bases its Petition for competitive classification under the 60-day review procedure on competition reflected in four exhibits. SBC Missouri updated these exhibits to include exchanges not granted competitive classification in SBC Missouri's 30-day case and the additional exchanges identified by Staff.[31] These exhibits identify the exchanges for which SBC Missouri seeks competitive classification under the 60-day criteria and identifies more than the requisite number of competitors providing local voice service[32] on which SBC Missouri relies to meet the statutory criteria and the source of that information:

> Revised Exhibit B-1, which identifies for each SBC Missouri exchange for which competitive classification is being sought under the 60-day trigger, the minimum number of carriers providing local voice service to business customers using each of the following methods of providing service:
>
> - Use of wholesale services from SBC Missouri (i.e., replacement for UNE-P) under a commercial agreement;
> - UNE-P from SBC Missouri;
> - Wireless carrier;
> - VoIP provider using a third party's broadband network.
>
> Revised Exhibit B-2, which identifies for each SBC Missouri exchange for which competitive classification is being sought under the 60-day trigger, the minimum number of carriers providing local voice service to residential customers using each of the following methods of providing service:

[30] Van Eschen Direct, pp. 13-14; Van Eschen Rebuttal, pp. 9-10.
[31] The original version of these Exhibits were attached to SBC Missouri's Petition for Competitive Classification filed August 30, 2005. Updated versions were incorporated into SBC Missouri witness Craig A. Unruh's Direct testimony filed September 19, 2005, and also into Mr. Unruh's Rebuttal testimony filed October 3, 2005.
[32] SBC Missouri excluded Cingular from the 30-day trigger review because the statute requires the trigger company to be a non-affiliated entity. SBC Missouri also excluded the AT&T companies from its review, even though AT&T remains a competitor. SBC Missouri chose to exclude the AT&T companies from its analysis to avoid issues that parties might raise given the pending acquisition of AT&T by SBC Communications. (Unruh Direct, pp. 10-11).

- Use of wholesale services from SBC Missouri (i.e., replacement for UNE-P) under a commercial agreement;
- UNE-P from SBC Missouri;
- Wireless carrier;
- VoIP provider using a third party's broadband network.

Revised Exhibit B-3, which is a map geographically depicting the exchanges identified in Revised Exhibit B-1;

Revised Exhibit B-4, which is a map geographically depicting the exchanges identified in Revised Exhibit B-2.

The data in Revised Exhibits B-1, B-2, B-3 and B-4 reflect only the minimum number of competitors in each of the designated exchanges since there may be additional competitors who are providing service in the exchange.[33] In each exchange, the number of competitors far exceed the requirements for competitive classification.

As SBC Missouri witness Mr. Unruh certified, SBC Missouri developed the count of certain CLEC competitors in Revised Exhibits B-1 and B-2 from its internal billing records. Specifically, SBC Missouri confirmed through its internal wholesale billing records that it was providing and billing the CLECs listed in these exhibits for UNE-P or commercial wholesale services, which they use to provide local telecommunications on a retail basis to business or residential customers in each requested exchange. In Unruh Revised Schedules 2(HC) and 3(HC), SBC Missouri named the specific CLEC competitors providing service via each method

[33] For example, SBC Missouri has focused only on six of the over 400 carriers that offer VoIP service and only counts the VoIP providers in exchanges where cable modem service is available (i.e., excluding DSL) and only if the customer in that exchange can port their telephone number or obtain a new local telephone number in the exchange; it relies only on wireless carriers who use their own facilities (ignoring Mobile Virtual Network Operators, or MVNOs, such as Virgin Mobile); and it does not include any competitive services currently being offered by AT&T or its affiliates, prepaid carriers or resellers. The information presented also excludes SBC Missouri affiliates such as Cingular. Unruh Direct, p. 9.

in each requested exchange. In nearly all the requested exchanges, there are multiple CLECs actively providing service in competition with SBC Missouri via UNE-P or commercial arrangements (for business services, two exchanges had two CLECs listed, while a third have between 10 and 12 of these types of providers; for residential services, six exchanges had between three and four CLECs listed with nearly three-quarters having between 8 and 11).[34]

SBC Missouri identified wireless carrier competitors in each exchange through Let'sTalk.com, a publicly available website that lists, for any Zip Code entered, the wireless carriers providing service in that area and various wireless rate plans offered by each carrier.[35] There are at least two providers of wireless service in each exchange in which competitive classification has been requested by SBC Missouri, thus satisfying one prong of the competitive classification criteria (for both the business and residential exchanges, the vast majority of exchanges have three or four, and with some having as many as five).[36] Under the statute, only one such provider is to be counted in determining whether competitive classification is to be granted.

Further, Revised Exhibits B-1 and B-2 also identify a number of providers of VoIP service which rely on the broadband network of a third party cable television network. The vast majority of exchanges reflect one or more such VoIP providers for both residential and business services.

In addition, SBC Missouri has presented further evidence demonstrating that residential services in the Sikeston exchange should be classified as competitive. Based on the Commission's Report and Order in the 30-day case, it appears competitive classification was

[34] Unruh Rebuttal, Revised Exhibits B-1 and B-2, and Revised Schedules 2(HC) and 3(HC).
[35] SBC Missouri also identified the service areas of certain local wireless carriers through their websites.
[36] Id.

rejected based on a mistaken understanding that SBC Missouri based its request on Big River Telephone Company providing residential service in that exchange through the use of UNE-P. As SBC Missouri witness Craig Unruh testified here, the Commission's understanding was incorrect. SBC Missouri did not request competitive classification in its 30-day case for the Sikeston (or any other exchange) based on the presence of competitors using UNE-P. Its request in the 30-day case for residential service in the Sikeston exchange was based on directory listings placed by Big River from its own NPA NXX, establishing that Big River was using its own facilities to provide service. SBC Missouri has recently reviewed migration orders for the Sikeston exchange and found that SBC Missouri has recently completed several migration orders for a CLEC that ported Sikeston residential telephone numbers to its own switch. These orders demonstrate that the CLEC is using its own facilities in whole or in part to provide service to residential customers in the Sikeston exchange.[37]

SBC Missouri's evidence satisfies the 60-day criteria in the statute because it shows for each exchange listed in Revised Exhibit B-1 for business services and for each exchange listed in Revised Exhibit B-2 for residential services that:

- There is competition from at least two CLECs 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 LEC within the meaning of Section 392.245.5(6).

- Although the criteria has been met based on two CLECs having been identified, SBC Missouri also showed that there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1).

[37] Unruh Rebuttal, p. 11, and Unruh Schedule 4(HC) providing samples of the migration orders. In addition, SBC Missouri presented information demonstrating that there are several competitors for residential service in the Sikeston exchange. Id., Schedule 3(HC), p. 707.

- In the majority of exchanges, there is at least one provider offering business and/or residential VoIP service using an unaffiliated cable television company's broadband network.

On the basis of this showing, SBC Missouri is entitled to a grant of competitive classification for the requested exchanges.

B. Staff's Evidence. In the course of Staff's investigation during the 30-day case (Case No. TO-2006-0093), Staff identified 16 additional exchanges (15 for business services and one for residential services) that were not listed by SBC Missouri, but which met the 30-day statutory criteria for granting competitive classification for business or residential service (or both) in the requested exchanges. Staff was able to make this showing because it had access to data, such as confidential CLEC annual reports, which were unavailable to SBC Missouri. Staff testified that the following SBC Missouri additional exchanges qualify for competitive classification under the 30-day criteria:

Exchange	Carrier	Type of Service
Joplin	McLeodUSA	Residence
Archie	MCImetro	Business
Ash Grove	NuVox	Business
Billings	NuVox	Business
Boonville	MCImetro	Business
Carthage	MCImetro	Business
Cedar Hill	MCImetro	Business
Chaffee	MCImetro	Business
Farley	McLeodUSA, NuVox	Business
Linn	MCImetro	Business
Marshall	MCImetro	Business
Mexico	MCImetro, McLeodUSA	Business
Moberly	MCImetro	Business
Montgomery City	MCImetro	Business
St. Clair	MCImetro	Business
Union	MCImetro	Business[38]

[38] See, Van Eschen Direct, pp. 13-14, Sch. 1.

Staff based this positive recommendation on the presence of at least one non-affiliated entity providing local voice service in whole or in part over facilities in which it or one of its affiliates has an ownership interest. With respect to the CLEC competitors, Staff's evidence was based on a review of confidential CLEC annual reports filed with the Commission and telephone calls to some CLECs to discuss their reports.[39] SBC Missouri has also identified at least one wireless provider offering business and residential service within the exchanges using its own facilities in whole or in part.

Staff's use of such data for this case and the Commission's grant of competitive classification based on that data are entirely appropriate because SB 237 requires the Commission to maintain and consider its own records concerning the methods carriers whom it regulates use to provide local voice services in an exchange; and it requires the Commission to consider such records in reviewing an ILEC's request for competitive status:

> . . . The commission shall maintain records of regulated providers of local voice service, including those regulated providers who provide local voice service over their own facilities, or through the use of facilities of another provider of local voice service. In reviewing an incumbent local exchange telephone company's request for competitive status in an exchange, the commission shall consider their own records concerning ownership of facilities. . . .[40]

However, because SBC Missouri had not identified these exchanges as part of its 30-day case, Staff opposed competitive classification being granted there. But since SBC Missouri did list 13 of these exchanges (twelve for business services and one for residential service) in the 60-day portion of its Petition, Staff now recommends approval of the 13 exchanges during the 60-day case.

[39] Van Eschen Direct, pp. 2, 12-13, Sch. 1, Van Eschen Rebuttal, pp. 9-10.
[40] Section 392.245.5(6) RSMo (2005).

Staff's unwillingness to give a positive recommendation on the remaining three of these exchanges because SBC Missouri's Petition did not include them in its "request" for competitive classification is improper.[41] The statute does not allow competitive classification to be withheld on this basis. SBC 237 requires the Commission to go beyond the data carriers provide it in the ordinary course of business and pro-actively seek other necessary and appropriate data from carriers it regulates as part of its investigation:

> . . . In reviewing an incumbent local exchange telephone company's request for competitive status in an exchange, the commission . . . shall make all inquiries as are necessary and appropriate from regulated providers of local voice service to determine the extent and presence of regulated local voice providers in an exchange.[42]

Moreover, SBC Missouri did request the Commission to grant competitive classification for any exchange where the Commission's own investigation identified that a competitive classification should be granted.[43] In addition, from a practical standpoint, the Commission should grant competitive classification for these exchanges because the Commission now knows that they meet the 30-day criteria as well as the 60-day criteria. Requiring a new case to be filed would only waste the Commission's and other parties' resources.

C. Staff and OPC's Oppositions. Apart from the 13 exchanges they agree meet the 30-day criteria (and therefore have given a positive recommendation on them), Staff and OPC oppose competitive classification of SBC Missouri's services in all of the remaining exchanges for which relief has been sought.

Staff and OPC base their opposition on their assertion that such a grant of competitive classification would be contrary to public interest because the CLEC competitors identified by

[41] The three exchanges are Chaffee, Linn and Montgomery City (all for business service).
[42] Section 392.245.5(6) RSMo (2005).
[43] See, SBC Missouri's Petition, para. 21.

SBC Missouri are only providing service utilizing UNE-P or similar commercial wholesale service from SBC Missouri and should not be counted.[44] Staff also makes a similar argument with respect to the wireless and VoIP competitors SBC Missouri identified.[45]

In taking this position, however, Staff and OPC fail to follow the statute. They improperly disregard clear directives in SB 237 by ignoring competition from CLECs that are not using their own facilities in whole or in part, competition from wireless carriers and competition from VoIP providers in the 60-day analysis. The statute specifically requires the Commission to recognize competition from:

> Any entity providing local voice service in whole or in part by using its own telecommunications facilities or other facilities <u>whether telecommunication 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.</u>[46]

As reflected in SB 237's creation of the separate 60-day track, the Legislature recognized that there are other forms of competition in the market beyond that from entities that use their own facilities in whole or in part to provide service. And the marketplace validates this legislative assumption. As SBC Missouri witness Craig Unruh testified, there are CLECs that choose to use SBC Missouri's facilities rather than use their own. In every exchange at issue in this case, at least two CLECs have chosen to use either UNE-P or a commercial arrangement rather than its own switching facilities which it is actively using in other exchanges. Every service provider has a choice of how they provision service to their customers. How a carrier exercises that choice does not make it any less of a competitor capable of serving customers in an exchange.[47]

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[44] Van Eschen Direct, p. 2, Meisenheimer Rebuttal, pp. 14-15.
[45] Van Eschen Direct, pp. 20-23.
[46] Section 392.245.5 RSMo (2005), emphasis added.
[47] Unruh Direct, p. 12.

Other carriers choose to compete without using their own switching facilities in any exchanges. For example, Sage has chosen to enter into a seven-year commercial agreement with SBC Missouri to purchase a UNE-P replacement service under which Sage uses SBC Missouri's services (e.g., loops and switching) to enable Sage to provide service on a retail basis to its customers. For its own business reasons, Sage has chosen to take this approach rather than deploying its own facilities (e.g., its own switches).[48] And contrary to OPC's objection to counting Sage, any claim that it limits its customers to SBC Missouri's customers with existing service (i.e., does not sell new service) has little, if any impact on the availability of its service to customers. If Sage does refrain from establishing new service for customers, it does so only for its own administrative convenience. Sage simply instructs the customer seeking to establish new service to order it from the incumbent LEC then move that service to Sage. Other companies have also signed similar long-term commercial agreements with SBC Missouri and OPC presented no evidence that those other carriers engaged in this practice.[49]

Despite SB 237's clear directive, Staff opposes counting competitors providing service using UNE-P or commercial wholesale service from an ILEC because Staff questions whether these provisioning methods are "reasonable alternatives" to a CLEC's provision of service using its own facilities.[50] Staff raises similar questions with respect to wireless service and VoIP service, claiming that few customers will actually switch their landline telephone service to wireless or VoIP service if the consumer is expected to pay more for local voice service,[51] or if

[48] Id., pp. 12-13.
[49] Unruh Direct, pp. 12-13.
[50] Van Eschen Rebuttal, pp. 2-3.
[51] Van Eschen Rebuttal. p. 7.

the quality of service is perceived to be inferior.[52] Staff also questions the ability of these provisioning methods to hold the incumbent LEC's prices in check.[53]

But Staff's positions are inconsistent with the statute. As pointed out above, Section 392.245.5 directs the Commission under the 60-day track to count competitors using these provisioning methods to provide service. Neither Staff nor the Commission can override the express direction of the Legislature, and Staff's "concerns" do not provide any legitimate or sufficient basis for the Commission to find that granting SBC Missouri's request for competitive classification is contrary to the public interest.

OPC also attempts to portray large business customers as the "prime targets for competition" and expresses the concern that "competitors have not actively sought the small business customer or residential customer to the same extent."[54] OPC's concern is misplaced. OPC has provided no data to substantiate this claim. Moreover, it is contrary to the evidence that has been presented. In 19 of the 30 exchanges for which SBC Missouri seeks competitive status for its business services, there are more than 12 competitors.[55] In 37 of the 51 exchanges for which SBC Missouri seeks competitive status for its residential exchanges, there are at least 12 competitors.[56] Given the small size of these exchanges, it should be clear that SBC Missouri's competitors are not limiting themselves to large business customers.

Staff also raises the concern that if the Commission grants competitive status based on competition from UNE-P providers and providers using a commercial agreement, competition from resale providers could also trigger competitive status.[57] This concern too is misplaced.

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[52] Van Eschen Rebuttal, p. 6.
[53] Van Eschen Rebuttal, p. 7.
[54] Meisenheimer Rebuttal, p. 2.
[55] Unruh Rebuttal, Revised Exhibits B-1 and B-3; and Revised Schedule 2(HC).
[56] Unruh Rebuttal, Revised Exhibits B-2 and B-4; and Revised Schedule 3(HC).
[57] Van Eschen Rebuttal, p. 7.

Resale is a very distinct provisioning method and that differs significantly from the provision of service using UNE-P or commercial wholesale agreement. Under resale, the CLEC purchases a finished telecommunication service from the incumbent for resale, as is, to the CLEC's retail customers. The service is the same as the incumbent's, but sold under the CLEC's brand. The wholesale price to the CLEC for resold service is tied to the incumbent's retail price (the wholesale price is derived by applying a negotiated or arbitrated wholesale discount – i.e., a percentage discount -- to the incumbent's retail price).[58] UNE-P and commercial wholesale services, on the other hand, are purchased by the CLEC as network elements that the CLEC fashions into its own retail service. The prices for such elements are unrelated to the incumbent's retail service pricing. The legislature clearly understood these material provisioning differences as it required the Commission to give each very different consideration: the statute specifically requires the Commission to consider providers utilizing UNE-P or commercial wholesale services in the 60-day track, and to ignore resale providers.[59]

The remaining objections advanced by Staff and OPC also fail to pass statutory muster. Staff proposes that the Commission not grant competitive classification because it may be difficult to retract in the future, or because it may impinge on the Commission's ability to control prices in areas where it might wish to order expanded local calling. But the Legislature has set the standard for reviewing grants of competitive classification and those provisions control. The Legislature has also determined that where competitive classification is granted, the ILEC controls pricing decisions. The Commission may not refuse to grant competitive classification because it dislikes the Legislature's policy determination on this point.

[58] See 47 USC Section 252(d)3.
[59] Section 392.245.5(4).

OPC wants the Commission to (1) examine the "quantity and quality" of competition, (2) evaluate whether SBC Missouri might seek to raise prices, and (3) consider whether granting competitive classification is consistent with the goals of Section 392.185. These considerations were factors under the "effective competitive" standard that preceded the passage of SB 237, but no longer apply under the new statute. OPC cannot reinstate the factors which the Legislature has expressly withdrawn. OPC has made clear its dislike for the Legislature's determinations, but OPC's dislike provides no basis for the Commission to ignore the new statute and continue to apply the old.

CONCLUSION

Based on this evidentiary showing, the Commission, in furtherance of the competitive policies articulated by the Legislature, is bound by the standards set out in SB 237 to grant the requested competitive classifications for SBC Missouri's business and residential services in the exchanges listed in Revised Exhibits B-1 and B-2 within the 60-day statutory timeframe.

Respectfully submitted,

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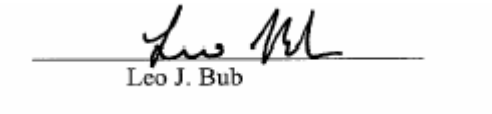
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties by e-mail on October 6, 2005.



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