

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

FILED

AUG 06 2003

Missouri Public
Service Commission

STATE OF MISSOURI ex rel.,
ACTING PUBLIC COUNSEL
JOHN COFFMAN,

Relator,

vs.

Case No. 02CV323762

PUBLIC SERVICE COMMISSION OF THE
STATE MISSOURI, A STATE AGENCY,
AND ITS MEMBERS KELVIN SIMMONS,
CONNIE MURRAY, SHEILA LUMPE,
STEVE GAW, AND BRYAN FORBIS

IN THEIR OFFICIAL CAPACITY,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

INTRODUCTION

In its December 27, 2001 Report and Order in Case No. TO-2001-467, Respondent Missouri Public-Service Commission (Commission) determined, after an evidentiary hearing, that effective competition exists for SBC Missouri's core business services and services related thereto in SBC Missouri's Kansas City and St. Louis exchanges.¹ The Commission also found that effective competition exists for SBC Missouri's core residential services and services related thereto in SBC Missouri's Harvester and St. Charles exchanges.² Finally, the Commission found that effective competition exists in all of SBC Missouri's exchanges for Common Channel

¹ Report and Order, p. 3. (L.F., p. 1272).

² Id.

Exhibit No. 15
Case No(s) TO-2003-0281
Date 7-15-03 Rptr TL

NO. 0000 _____

Signalling/Signalling System 7 and Line Information Database services.³ Based on its determination that these services were subject to effective competition in the exchanges identified, the Commission classified these services as competitive telecommunications services pursuant to Section 392.245 RSMo. 2000.⁴

In its Report and Order, the Commission also acknowledged that certain SBC Missouri services which the Commission had previously declared transitionally competitive had automatically become classified as competitive services throughout SBC Missouri's exchanges on January 10, 1999, in accordance with Section 392.370 RSMo. 2000.⁵ These services include intraLATA private line/dedicated services, intraLATA toll services, Wide Area Telecommunications Services (WATS) and 800 services, special access services, and operator services other than Busy Line Verification and Busy Line Interrupt (including station-to-station, person-to-person, and calling card services).⁶

Relator Office of the Public Counsel (OPC) seeks review of the Commission's Report and Order, and in particular the Commission's determination of effective competition in two exchanges for SBC Missouri's core business services and related services and two other exchanges for core residential services and related services, as well as the Commission's acknowledgement of competitive classification for those services that the Commission had previously classified as transitionally competitive. The Court, having reviewed the record and the briefs presented, and having considered the oral arguments of the parties, makes these Findings of Fact, Conclusions of Law and Judgment.

³ Id.

⁴ Report and Order, pp. 52-53. (L.F. pp. 1321-1322).

⁵ Report and Order, p. 4. (L.F., p. 1273).

⁶ Id.

FINDINGS OF FACT

1. Respondent Commission is a state agency vested with jurisdiction over public utilities, including telecommunications companies, operating in Missouri. Chapters 386 and 392, RSMo. 2000.
2. Relator OPC is a state agency authorized to represent the interests of the public in any proceeding before or appeal from the Commission. Section 386.710 RSMo.
3. Intervenor Southwestern Bell Telephone, L.P., d/b/a Southwestern Bell Telephone Company (SBC Missouri) operates as a large incumbent local exchange telecommunications company as defined in Sections 386.020(22), (30) and (51) RSMo. 2000, and is subject to the jurisdiction of the Commission pursuant to Section 386.250(2) RSMo. 2000.
4. Intervenor Brooks Fiber Communications of Missouri, Inc., MCI Metro Access Transmission Services, LLC, MCI WorldCom Communications, Inc., and Intervenor NuVox Communications of Missouri, Inc. (NuVox/WorldCom) are "alternative local exchange telecommunications companies" defined in Section 386.020(1) RSMo. 2000, and subject to the jurisdiction of the Commission pursuant to Section 386.250(2) RSMo. 2000.
5. This Court has jurisdiction to review whether the Commission's determination in Case No. TO-2001-467 is reasonable and lawful pursuant to Section 386.510 RSMo. 2000.

Section 386.510 provides:

Within thirty days after the application for rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the circuit court of the county where the hearing was held or in which the commission has its principal office for a writ of certiorari or review (herein referred to as a writ of review) for the purpose of having the reasonableness or lawfulness of the original order or decision or the order or decision on rehearing inquired into or determined. The writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. On

the return day the cause shall be heard by the circuit court, unless for a good cause shown the same may be continued. No new or additional evidence may be introduced upon the hearing in the circuit court but the cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceedings. Upon the hearing the circuit court shall enter judgment either affirming or setting aside the order of the commission under review. In the case the order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action. No court in this state, except the circuit courts to the extent herein specified and the supreme court or the court of appeals on appeal, shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the executing or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties. The circuit courts of this state shall always be deemed open for the trial of suits brought to review the orders and decisions of the commission as provided in the public service commission law and the same shall be tried and determined as suits in equity. (Emphasis added).

Judicial review of an order of the Commission is limited to a review of the "reasonableness or lawfulness."⁷

6. Insofar as "reasonableness" is concerned, the courts must accept factual findings of the Commission that are supported by competent and substantial evidence on the whole record, and the court cannot substitute its findings of fact for those of the Commission.⁸ As the Missouri Supreme Court has explained:

...The public service commission is essentially an agency of the Legislature and its powers are referable to the police power of the state. It is a fact-finding body, exclusively entrusted and charged by the Legislature to deal with and determine the specialized problems arising out of the operation of public utilities. It has a staff of technical and professional experts to aid it in the accomplishment of its statutory powers. Its supervision of the public utilities of this state is a continuing one and its orders and directives with regard to any phase of the operation of any

⁷ State ex. rel. Public Water Supply District No. 2 of Jackson County, Missouri v. Tyre Burton, et al., 379 S.W.2d 593, 598 (Mo. 1964).

⁸ Id.

utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest. Courts of review perform no such function. They do not examine the record under review for the purpose of determining what order they would have made. As long as the commission acts in accord with due process of law and its findings and decisions do not run afoul of constitutional and statutory requirements and the inherent powers of the state, it is engaged in an exercise of police power of the state, with which it is not the province of the court to interfere. It is, therefore, meaningfully stated in subsection 5 of Section 536.140, as amended in 1953, "the court shall not substitute its discretion for discretion legally vested in the agency."

So it is that the judicial function neither requires nor justifies disregard of the findings of the commission. Those findings are prima facie correct under Section 386.270, and the complaining party carries the burden of making a convincing showing that they are not reasonable or lawful. Consequently, we are convinced and we hold that the clause in Section 386.510 stating that cases on review "shall be tried and determined as suits in equity", construed in the light of the over-all remedial purposes of the entire act, means no more than that when the court has determined whether an order or decision of the commission (made in the lawful exercise of its discretionary powers) is supported by competent and substantial evidence upon the whole record and is reasonable, or as is sometimes conversely stated, whether it is arbitrary or capricious or is against the overwhelming weight of the evidence, the court has performed its whole duty. (Underlined added. Italics in original opinion.)⁹

7. In reviewing the reasonableness of an order of the Commission, the Court considers the evidence in the light most favorable to the agency together with all reasonable supporting inferences; if the evidence permits either of two opposite findings, the Court must defer to the findings of the Commission.¹⁰ Only when a Commission order is clearly contrary to the overwhelming weight of the evidence may a court set it aside.¹¹ Decisions of the Commission on factual issues are presumed correct.¹² The burden of proof is on the party

⁹ State of Missouri Ex. Rel. Chicago, Rock Island & Pacific Railroad Company v. Public Service Commission of the State of Missouri, 312 S.W.2d 791, 796 (Mo. 1958).

¹⁰ Friendship Village of South County, et al. v. Public Service Commission of Missouri, 907 S.W.2d 339, 345 (Mo. App. 1995).

¹¹ Id.

¹² State ex. rel., U.S. Water/Lexington, et al. v. Missouri Public Service Commission, 795 S.W.2d 593, 595 (Mo. App. 1990).

seeking to set aside the order of the Commission to show by clear and satisfactory evidence that the order complained of is unreasonable or unlawful.¹³

8. An order's "lawfulness" turns on whether the Commission had the statutory authority to act as it did.¹⁴ When determining whether the Commission's order is lawful, the reviewing court exercises unrestricted, independent judgment and must correct erroneous interpretations of the law.¹⁵

9. The Commission established Case No. TO-2001-467 on March 13, 2001, in response to the Commission Staff's March 1, 2001, Motion to Open Case. In its Motion to Open Case, the Commission Staff requested that the Commission open a new case to investigate the state of competition in SBC Missouri's exchanges, pursuant to Section 392.245.5 RSMo. 2000. In its Order Establishing Case, Directing Notice, Joining Parties, and Granting Protective Order, the Commission found that a new case "should be established for the purpose of investigating the state of competition in SBC Missouri exchanges in accordance with Section 392.245, RSMo 2000."¹⁶ The Commission also made SBC Missouri and 70 competitive local exchange telecommunications companies (CLECs) parties to this case.

10. -Section 392.245.5 RSMo 2000, provides as follows:

Each telecommunications service of an incumbent local exchange telecommunications company shall be classified as competitive in any exchange in which at least one alternative local exchange telecommunications company has been certified under section 392.455 and has provided basic local telecommunications service in that exchange for at least five years, unless the commission determines, after notice and a hearing, that effective competition does not exist in the exchange for such service. The commission shall, from time to

¹³ Id.

¹⁴ Friendship Village of South County, et al. v. Public Service Commission of Missouri, 907 S.W.2d 339, 344 (Mo. App. 1995).

¹⁵ Id.

¹⁶ L.F., p. 105.

time, on its own motion or motion by an incumbent local exchange telecommunications company, investigate the state of competition in each exchange where an alternative local exchange telecommunications company has been certified to provide local exchange telecommunications service and shall determine, no later than five years following the first certification of an alternative local exchange telecommunications company in such exchange, whether effective competition exists in the exchange for the various services of the incumbent local exchange telecommunications company.

11. The Legislature provided an explicit roadmap for the Commission to determine if effective competition exists for a particular service. "Effective competition" is defined in Section 386.020(13) RSMo. 2000, and requires the Commission to consider the following factors:

- (a) The extent to which services are available from alternative providers in the relevant market;
- (b) The extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions;
- (c) The extent to which the purposes and policies of chapter 392, RSMo, including the reasonableness of rates, as set out in section 392.185, RSMo, are being advanced;
- (d) Existing economic or regulatory barriers to entry; and
- (e) Any other factors deemed relevant by the commission and necessary to implement the purposes and policies of chapter 392, RSMo.

12. Section 392.245.5 RSMo. 2000, provides that the Commission must examine the state of competition, with the intent of eliminating price cap regulation, no later than 5 years after a CLEC has been certified to provide service in an exchange.¹⁷ Communications Cable-Laying Company d/b/a Dial US became the first CLEC certificated in Missouri when its tariffs were approved by the Commission in January, 1997.¹⁸ Dial US began providing service in Springfield immediately thereafter. Competition in most other major exchanges began in the months after January, 1997 and now extends to all SBC Missouri exchanges.¹⁹

¹⁷ L.F., Ex. 16, Hughes Direct, p. 17.

¹⁸ *Id.*

¹⁹ L.F., Ex. 16, Hughes Direct, p. 26.

13. With the passage of House Bill 360 in 1987, the Missouri legislature provided the Commission with authority to begin recognizing services and service providers as competitive.²⁰ The legislature enacted procedures to allow a company to seek classification of its services or itself (as a company) as either transitionally competitive or as competitive.²¹ Companies began seeking transitionally competitive classification for services in 1987.²² Under the transitionally competitive classification, prices for services could be placed into rate bands that define a minimum and maximum price range.²³ The price for services utilizing rate bands could be adjusted within the approved bands by providing notice to the Commission within ten days of the effective date of any change.²⁴

14. Under House Bill 360, full competitive classification for services allowed use of the same rate band flexibility granted with transitionally competitive classification.²⁵ In the alternative, companies seeking to change rates for competitive services may do so outside the rate band process simply by filing notices with the Commission.²⁶ Price increases are subject to a tariff filing and notice to all affected customers ten days in advance.²⁷ Price decreases are subject to a seven day Commission notice requirement.²⁸ In addition, competitive classification

²⁰ Id.

²¹ See, Section 392.361 RSMo. 2000.

²² L.F., Ex. 16, Hughes Direct. p. 7.

²³ See, Section 392.510.1 RSMo. 2000.

²⁴ See, Section 392.510.3 RSMo. 2000.

²⁵ Id.

²⁶ See, Section 392.500 RSMo. 2000.

²⁷ See, Section 392.500(2) RSMo. 2000.

²⁸ See, Section 392.500(1) RSMo. 2000.

for telecommunications service permits a company to make a tariff filing regarding that service without cost support.²⁹

15. Under Section 392.361 RSMo. 2000, a telecommunications company seeking either transitionally competitive or competitive classification for a service must show, based upon all relevant factors, that the service is subject to sufficient competition to justify a lesser degree of regulation.³⁰ Section 392.370 RSMo. 2000, as adopted in House Bill 360, also provides that any transitionally competitive service offered by a noncompetitive local exchange telecommunications company shall be classified as competitive after a 3-year period.³¹ However, the Commission is also authorized to extend the transitionally competitive designation for designated periods.³²

16. In 1992, SBC Missouri filed a petition seeking classification of its MTS, Operator Services, WATS Service and Digital Private Line Services as transitionally competitive.³³ In its petition, SBC Missouri stated that these services met the requirements of Section 392.370.1 RSMo in that they were the same as, substitutable for, or equivalent to competitive services provided by other telecommunications carriers within its service territory.³⁴

17. In its December 21, 1992 Order in Case No. TO-93-116, the Commission found that SBC Missouri's MTS Service was substitutable for IXCs' MTS Services.³⁵ The Commission found that SBC Missouri's 800 and Maximizer® 800 service were substitutable for

²⁹ See, Section 392.370.7 RSMo. 2000.

³⁰ See, Section 392.361.4 RSMo. 2000.

³¹ See, Section 392.370.1 RSMo. 2000.

³² See, Section 392.370.2 RSMo. 2000.

³³ L.F., Ex. 16, Hughes Direct. p. 10.

³⁴ Id.

³⁵ Id.

IXCs' 800 services.³⁶ The Commission found that SBC Missouri's WATS Service was substitutable for IXCs' WATS Services.³⁷ The Commission found that SBC Missouri's Digital Private Line and Special Access Services were "equivalent" services to IXC provided services -- functionally equivalent and completely interchangeable in use.³⁸ Finally, the Commission found that SBC Missouri's Operator Services were substitutable for comparable services provided by IXCs.³⁹ The Commission determined that SBC Missouri's MTS toll service, WATS, Maximizer 800, Digital Private Line, special access and Operator Services should be deemed transitionally competitive services.⁴⁰ On January 10, 1996, three years after the effective date of transitionally competitive status for these services, and before the effective date of SB 507, the Commission -- following a complaint filing by Relator OPC -- extended the transitionally competitive status for these services for an additional three years, until January 10, 1999.⁴¹ The Commission, however, took no further action to extend the transitionally competitive status of these services beyond January 10, 1999.

18. The Missouri legislature passed Senate Bill (SB) 507 in 1996. SB 507 authorized competitive local exchange carriers (CLECs) to begin providing basic local telecommunications service in competition with incumbent local exchange carriers (ILECs) such as SBC Missouri.⁴² SB 507 also included provisions to ensure a level playing field for all providers, by allowing ILECs such as SBC Missouri the opportunity to gain freedom from traditional rate of return

³⁶ Id.

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ Report and Order, p. 31 (L.F., p. 1300).

⁴² L.F., Ex. 16, Hughes Direct. pp. 13-14.

regulation.⁴³ SB 507 provided for a phased-in approach. SB 507 directed the Commission to regulate large ILECs via price cap regulation upon the initiation of local competition in the large ILEC's service area.⁴⁴ Under Section 392.245.2 RSMo 2000, a large ILEC does not "elect" to become subject to price cap regulation. Rather, Section 392.245.2 RSMo. 2000 provides that large ILECs "shall be subject to" price cap regulation once the Commission determines that an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the large ILEC's service area. On March 21, 1997, SBC Missouri asked the Commission to determine that SBC Missouri was subject to price cap regulation pursuant to Section 392.245.2 RSMo 2000.⁴⁵ In Case No. TO-97-397, the Commission made the required determination that SBC Missouri was subject to price cap regulation, effective September 26, 1997.⁴⁶

19. Under price cap regulation, as provided for in Section 392.245.4 RSMo. 2000, after January 1, 2000, the maximum allowable prices to be charged for exchange access (switched access) and basic local telecommunications services are changed annually by either the change in the telephone service component of the consumer price index (CPI-TS) for the preceding twelve months, or upon request by the company and approval of the Commission, by the change in the gross domestic product price index (GDP-PI) for the preceding twelve months, minus the productivity offset established for telecommunications service by the FCC and

⁴³ *Id.*

⁴⁴ L.F. Ex. 16, Hughes Direct, p. 14.

⁴⁵ *Id.*

⁴⁶ *Id.*

adjusted for exogenous factors.⁴⁷ In addition, a price cap regulated company can raise rates on non-basic services by a maximum of 8 percent for each of the following twelve month periods.⁴⁸

20. SBC Missouri submitted substantial evidence, that there are alternative providers who are providing functionally equivalent or substitutable services throughout SBC Missouri's Missouri exchanges, at comparable rates, terms and conditions, and have been for many years.⁴⁹ Moreover, with the advent of local competition provided under SB 507, functionally equivalent or substitutable services being provided by alternative providers have increased substantially. The Commission found in March, 2001, in Case No. TO-99-227 (the case in which it recommended to the FCC that SBC Missouri be authorized to provide long distance service in Missouri), that CLECs are currently providing basic local telecommunications service to customers in all of SBC Missouri's exchanges, and SBC Missouri has "fully opened" all of its markets to competitors.⁵⁰ In addition, LXC's provide services that are also functionally equivalent to or substitutable for some of SBC Missouri's services, including interexchange services (e.g., intraLATA Toll, 800 Services), operator and directory services, and dedicated services (e.g., private line and special access).⁵¹ Furthermore, there are a number of alternate providers of functionally equivalent or substitutable services that are not under the jurisdiction of the Commission. Some of these alternate providers include, but are not limited to, wireless carriers, cable TV providers, Internet service providers, fixed satellite providers and customer premises equipment (CPE) manufacturers.⁵²

⁴⁷ L.F., Ex. 16. Hughes Direct. p. 15.

⁴⁸ *Id.*

⁴⁹ L.F., Ex. 16. Hughes Direct. pp. 18-19.

⁵⁰ L.F., Ex. 16. Hughes Direct. p. 19.

⁵¹ *Id.*

⁵² *Id.*

21. SBC Missouri presented substantial evidence of local competition to the Commission. As of April, 2001, a conservative estimate of the local market share gained by CLECs throughout the state was over fifteen percent.⁵³ In its March 15, 2001 Order in Case No. TO-99-227 recommending approval of SBC Missouri's Section 271 application in Missouri, the Commission found that "CLECs serve approximately 12 percent of access lines in SBC Missouri territory." There are CLECs operating in all of SBC Missouri's exchanges in Missouri.⁵⁴ Furthermore, these CLECs are providing local services and related services to business and residential customers, via resale of SBC Missouri's services, the use of unbundled network elements purchased from SBC Missouri on a wholesale basis, and the use of CLECs' own facilities.⁵⁵

22. The evidence presented at the hearing was that competition is greatest in more urban areas. For example, in the St. Louis exchange, where the Commission determined that effective competition exists for business services and related services, at least 59 CLECs are providing service.⁵⁶ Fifty-one CLECs are providing service in the Kansas City exchange, the other area where the Commission determined that SBC Missouri's business services and related services were subject to effective competition.⁵⁷ Thirty-seven CLECs are providing service in SBC Missouri's St. Charles exchange, and thirty-six CLECs are providing service in SBC Missouri's Springfield Principal and MCA-1 zone.⁵⁸ The determination of market shares held by

⁵³ L.F., Ex. 16, Hughes Direct. p. 26.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ L.F., Ex. 16, Hughes Direct. Sched. 3-1.

⁵⁷ *Id.*

⁵⁸ *Id.*

competitors in the exchanges where the Commission determined effective competition exists is highly confidential, but it clearly demonstrates a very substantial level of competition.

23. With respect to specific market share for CLECs serving business and residential access lines in Missouri, the evidence presented to the Commission provided concrete and uncontroverted evidence reflecting the minimum CLEC business market share and residential market share throughout SBC Missouri's Missouri exchanges.⁵⁹ The uncontroverted evidence before the Commission was that the minimum market share for business services gained by CLECs statewide exceeded 20%.⁶⁰ In the urban areas where the Commission found SBC Missouri's core business services and related services to be competitive, the minimum level of business lines served by CLECs is even higher. As described above, the minimum market share held by competitors in the Kansas City and St. Louis exchanges is highly confidential, but it clearly demonstrates a very substantial level of competition in these exchanges.

24. With respect to CLEC activity in the residential local services market, the uncontroverted evidence before the Commission was that in both the Harvester and St. Charles exchanges, the minimum CLEC residential market share is very substantial.

25. At the hearing in this case, SBC Missouri also presented evidence that in the preceding 18 months, SBC Missouri experienced a declining trend for retail access lines.⁶¹ Over the past 3 quarters, SBC Missouri has experienced a decrease in the total number of retail lines in service.⁶² During this same time period, the number of CLEC lines continued to grow.⁶³

⁵⁹ See L.F., Ex. 17HC, Hughes Surrebuttal, Schedules 5-1 HC through 5-4 HC and 6-1 HC through 6-4 HC.

⁶⁰ L.F., Ex. 17 HC, Hughes Surrebuttal, p. 8.

⁶¹ L.F., Ex. 17, Hughes Surrebuttal, p. 14.

⁶² *Id.*

⁶³ *Id.*

26. There was also substantial evidence presented to the Commission regarding the impact of the Internet on competition. Cable TV providers have also been making upgrades necessary to make their cable plant capable of providing two-way service, which paves the way for telephony over cable.⁶⁴ The Commission appropriately considered non-traditional forms of functionally equivalent services which are available throughout SBC Missouri's Missouri exchanges, in connection with its evaluation of whether SBC Missouri's services are subject to effective competition.

27. There was substantial evidence before the Commission regarding the lack of entry barriers. There are over 600 interexchange carriers providing interexchange service in Missouri.⁶⁵ There are over 60 CLECs providing a wide range of services, including basic local services, in Missouri.⁶⁶ On both a wholesale and retail level, alternative providers are offering services which are functionally equivalent or substitutable at comparable rates, terms and conditions. In addition, the availability of resale and unbundled network elements (UNEs), including combinations of UNEs, provide effective ways for CLECs to enter the market with little capital investment.⁶⁷

28. On December 27, 2001, the Commission issued its Report and Order in this case. In its Report and Order, the Commission found that effective competition exists for the following SBC Missouri services, and as a result, these services should be designated as competitive: SBC Missouri's core business switched services, business line-related services, directory assistance services and the operator services of Busy Line Verification and Busy Line Interrupt for business

⁶⁴ Id.

⁶⁵ L.F., Ex. 16, Hughes Direct, p. 22.

⁶⁶ Id.

⁶⁷ Id.

customers in the St. Louis and Kansas City exchanges.⁶⁸ The Commission also found that effective competition exists for SBC Missouri's residential access line services, residential access line-related services, Optional Metropolitan Calling Area service, directory assistance services and the operator services of Busy Line Verification and Busy Line Interrupt for residential customers in SBC Missouri's Harvester and St. Charles exchanges.⁶⁹ Finally, the Commission found that effective competition exists in all of SBC Missouri's Missouri exchanges for Common Channel Signaling/Signaling System 7 (SS7) and Line Information Database (LIDB) services.⁷⁰

29. In its Report and Order, the Commission also recognized that certain SBC Missouri services which the Commission had previously declared transitionally competitive had automatically become classified as competitive services throughout SBC Missouri's Missouri exchanges on January 10, 1999, in accordance with Section 392.370 RSMo. 2000.⁷¹ These services include intraLATA private line/dedicated services, intraLATA toll (MTS) services, Wide Area Telecommunications Services (WATS) and 800 services, special access services, and operator services other than Busy Line Verification and Busy Line Interrupt (including station-to-station, person-to-person, and calling card services).⁷² In addition, the Commission determined that Section 392.200.8 RSMo. 2000 authorizes SBC Missouri to price high capacity exchange access line services and Plexar services on an individual customer basis (ICB).⁷³

⁶⁸ Report and Order, p. 3. (L.F., p. 1272).

⁶⁹ Id.

⁷⁰ Id. Relator OPC does not challenge this determination.

⁷¹ Report and Order, p. 4. (L.F., p. 1273).

⁷² Id.

⁷³ Id.

Finally, the Commission determined that SBC Missouri's Local Plus and switched access services are not subject to effective competition in any SBC Missouri exchange.⁷⁴

CONCLUSIONS OF LAW

30. Relator OPC contends that the Commission "applied the wrong provisions of Chapter 392, RSMo and overlooked the relevant and material facts when it ruled that services that were classified as transitionally competitive in Case No. TO-93-116 are now competitive services by operation of law under Section 392.370, RSMo 2000."⁷⁵ OPC contends that because SBC Missouri has been subject to price cap regulation pursuant to Section 392.245 RSMo. 2000 since November 18, 1997, the Commission could no longer utilize the "classification process designed for rate of return companies under Sections 392.361 and 392.370, RSMo."⁷⁶ OPC, along with intervenors NuVox and the WorldCom companies, claim that the two systems of regulation are not compatible and cannot be intermixed.⁷⁷

31. OPC claims that because SBC Missouri is now subject to price-cap regulation under Section 392.245 RSMo. 2000, the Commission is now precluded as a matter of law from recognizing and confirming that SBC Missouri's intraLATA private line/dedicated services, intraLATA toll services, WATS and 800 services, special access services, station-to-station, person-to-person and calling card services had been found by the Commission in 1993 to be transitionally competitive. In addition, OPC claims that the Commission is precluded as a matter of law from confirming that following the initial three-year period of transitionally competitive status required under Section 392.370.1 RSMo. 2000, and the three-year extension of that status

⁷⁴ *Id.*

⁷⁵ Initial Brief of OPC, p.6.

⁷⁶ Initial Brief of OPC, p. 6.

⁷⁷ Initial Brief of OPC, p. 8.

ordered by the Commission in January, 1996 pursuant to Section 392.370.2 RSMo. 2000, these services automatically became classified as a "competitive telecommunications service" pursuant to Section 392.370.1 RSMo. 2000.

32. The Court concludes that although the Missouri legislature did not expressly repeal Sections 392.361 and 370 RSMo. 2000 when it enacted Section 392.245 RSMo. 2000, and although the legislature did not limit the applicability of Sections 392.361 and 370 RSMo. 2000 to telecommunications companies not subject to price cap regulation under Section 392.245 RSMo. 2000, the two regimes are directly inconsistent with each other.

33. In summary, this Court concludes, as a matter of law, that the Missouri legislature intended to restrict the application of the mechanism contained in Section 392.361 RSMo. 2000 for having services offered by a noncompetitive telecommunications company classified as transitionally competitive, and the mechanism contained in Section 392.370 RSMo. 2000 for a transitionally competitive service offered by a noncompetitive telecommunications company to automatically become classified as competitive after the passage of three (3) years (and up to two additional three (3)-year extensions). The Court also concludes that even where the Commission had already determined, prior to the enactment of Section 392.245 RSMo. 2000, that certain services offered by a noncompetitive telecommunications company should be classified as "transitionally competitive," the legislature intended that the enactment of Section 392.245 RSMo. 2000, supplants that determination, and determinations made by the Commission under the provisions of Sections 392.361 and 370 RSMo. 2000 no longer apply to a telecommunications company that becomes subject to price cap regulation under Section 392.245 RSMo. 2000 prior to the expiration of "transitionally competitive" status.

34. Turning to the Commission's determinations regarding effective competition, Relator OPC also contends that the Commission's determination that effective competition exists in SBC Missouri's Kansas City and St. Louis exchanges for core business switched services, business line-related services, directory assistance services for business customers, and the operator services of Busy Line Verification and Busy Line Interrupt for business customers (core business services), and that effective competition exists in SBC Missouri's St. Charles and Harvester exchanges for residential access line services, residential access line-related services, Optional Metropolitan Calling Area service, directory assistance service for residential customers, and Busy Line Verification and Busy Line Interrupt for residential customers (core residential services), "is unlawful, unreasonable, unjust, arbitrary and capricious, is not supported by competent and substantial evidence on the whole record, and constitutes an abuse of discretion."⁷⁸ Despite this laundry list of claimed deficiencies in the Commission's determination, OPC relies primarily on a single factor never mentioned in any applicable statute -- its claim that the uncontroverted and substantial competitive activity has not exerted any influence on SBC Missouri's prices -- to challenge the lawfulness and reasonableness of the Commission's determinations. NuVox/WorldCom also complain that SBC Missouri did not present any evidence that competition has had "any specific impact" on SBC Missouri's prices.⁷⁹

35. As described below, the Commission's determination that SBC Missouri's core business services and related services face effective competition (evaluated using the statutorily mandated factors contained in Section 386.020(13) RSMo. 2000), and should be classified as competitive services in the St. Louis and Kansas City exchanges, and that SBC Missouri's core

⁷⁸ Initial Brief of OPC, pp. 10, 14.

⁷⁹ Joint Brief of NuVox/WorldCom, pp. 8, 13.

residential services and related services face effective competition (evaluated using the same statutory factors), and should be classified as competitive services in the St. Charles and Harvester exchanges, is both lawful and reasonable, and is fully supported by substantial evidence considered by the Commission. After considering all of the evidence regarding effective competition in these exchanges, the Commission determined that two categories of services -- in two exchanges for core business services and two exchanges for core residential services -- were subject to effective competition and should be classified as competitive. The evidence of effective competition was more than sufficient to support the Commission's determination of effective competition for SBC Missouri's business services in the St. Louis and Kansas City exchanges, and residential services in the Harvester and St. Charles exchanges.

36. As the Commission pointed out in its Report and Order, the Missouri legislature specifically identified the factors the Commission was required to consider to determine whether effective competition exists on an exchange by exchange basis for SBC Missouri's services.⁸⁰ As described above, in Section 386.020 (13) RSMo, 2000, and in the Commission's Report and Order, these factors include:

- (a) The extent to which services are available from alternative providers in the relevant market;
- (b) The extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions;
- (c) The extent to which the purposes and policies of Chapter 392, RSMo, including the reasonableness of rates, as set out in Section 392.185, RSMo, are being advanced;
- (d) Existing economic or regulatory barriers to entry; and
- (e) Any other factors deemed relevant by the Commission and necessary to implement the purposes and policies of Chapter 392, RSMo.

⁸⁰ Report and Order, p. 9 (L.F., p. 1278).

37. As reflected in the Commission's Report and Order, the Commission initially explained its understanding of the factors set forth in Section 386.020(13) RSMo. 2000.⁸¹ Each of the five factors listed in Section 386.020(13) were identified and described in general terms. The Commission then applied its analysis of these factors relevant to a finding of effective competition to the individual services offered by SBC Missouri in specific exchanges.⁸² When the Commission's Report and Order is reviewed in its entirety, as it must be, including the sections where the Commission considered the existence of effective competition on a service by service basis in each exchange, it is clear that the Commission's determination that SBC Missouri's core business services are subject to effective competition in the Kansas City and St. Louis exchanges, and the Commission's determination that SBC Missouri's core residential services are subject to effective competition in the St. Charles and Harvester exchanges, is lawful and reasonable, and supported by competent evidence.

38. As reflected in its Report and Order in this case, the Commission considered each of the five effective competition factors listed in Section 386.020(13) RSMo. 2000, and considered substantial evidence relating to each of these five factors, when it correctly determined that SBC Missouri's core business services face effective competition, and should therefore be classified as competitive services, in SBC Missouri's Kansas City and St. Louis exchanges. When the Commission's general analysis of these five factors is considered in connection with its very specific analysis relating to distinct services in distinct exchanges, it is clear that the Commission's determination is lawful and reasonable.

⁸¹ Report and Order, pp. 9-20 (L.F., pp. 1278-1289).

⁸² Report and Order, pp. 20-54 (L.F., pp. 1289-1323).

39. In its initial, "global" analysis of the first Section 386.020(13) effective competition factor (the extent to which services are available from alternative providers in the relevant market), the Commission described both the number of competitors and the market share obtained by these competitors.⁸³ The Commission noted that competition was greatest in the more urbanized areas, with at least 59 CLECs providing basic local service in the St. Louis exchange⁸⁴ and at least 51 CLECs providing basic local service in the Kansas City exchange,⁸⁵ where the Commission ultimately determined SBC Missouri's core business services face effective competition and should be classified as competitive services. The Commission also noted generally that business access line market share loss was not evenly distributed throughout SBC Missouri's 160 Missouri exchanges.⁸⁶ The Commission noted that in some exchanges, business access line market share loss was substantial, although not sufficient standing alone to find effective competition.⁸⁷ The Commission went on to explain that the evidence presented by SBC Missouri regarding the business access line market share loss, while substantial in several exchanges, may nevertheless *understate* the actual competitive line losses.⁸⁸

40. In considering SBC Missouri's core business services specifically,⁸⁹ the Commission applied the first effective competition factor and found that SBC Missouri had

⁸³ Report and Order, pp. 12-15 (L.F., pp. 1281-1284).

⁸⁴ Report and Order, p. 13 (L.F., p. 1282).

⁸⁵ Id.

⁸⁶ Report and Order, p. 14 (L.F., p. 1283).

⁸⁷ Id.

⁸⁸ Report and Order, pp. 14-15 (L.F., pp. 1283-1284).

⁸⁹ Report and Order, pp. 21-25 (L.F., pp. 1290-1294).

experienced a substantial market share loss for core business services in the Kansas City and St. Louis exchanges.⁹⁰ The Commission clearly did not determine, however, that the substantial market share loss for core business services in the Kansas City and St. Louis exchanges alone justified a finding of effective competition, as the Commission went on to apply the remaining effective competition factors denominated in Section 386.020(13) RSMo. 2000.⁹¹

41. In its initial, "global" analysis of the second Section 386.020(13) effective competition factor (the extent to which the services of alternate providers are functionally equivalent or substitutable at comparable rates, terms and conditions), the Commission considered whether services from non-regulated services, including wireless carriers, cable TV providers, Internet service providers, fixed satellite providers, and customer premises equipment manufacturers should be treated as "functionally equivalent or substitutable."⁹² While finding it appropriate to consider such alternative providers, the Commission determined that the information presented by SBC Missouri was not sufficiently Missouri-specific or exchange-specific.⁹³ Accordingly, with respect to these alternative providers, the Commission found that SBC Missouri had not produced evidence of the impact on SBC Missouri's pricing or product strategies or plans.⁹⁴

42. The Commission's statements regarding lack of price discipline appear to be directed to its "global" analysis of SBC Missouri's claim that all of its services in all of its exchanges should be deemed competitive.⁹⁵ In its analysis of the specific exchanges where the

⁹⁰ Report and Order, p. 22 (L.F., p. 1291).

⁹¹ Report and Order, pp. 22-27 (L.F., pp. 1291-1296).

⁹² Id.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Report and Order, pp. 19-20 (L.F., pp. 1288-1289).

Commission found effective competition exists for core business services, the Commission clearly determined that alternative providers were providing substantial competition through services which were functionally equivalent or substitutable, at comparable rates, terms and conditions. Accordingly, the Commission determined that competitive offerings of equivalent services at comparable prices restrained SBC Missouri's pricing. Moreover, the Missouri legislature has specifically empowered the Commission to reimpose price cap limitations of the Commission if the Commission subsequently determines that effective competition no longer exists.⁹⁶

43. In its specific analysis of the second statutory effective competition factor as it applies to SBC Missouri's core business services, the Commission noted that SBC Missouri's market share loss in the Kansas City and St. Louis exchanges was a direct result of alternative providers providing substitutable or functionally equivalent services in these exchanges.⁹⁷ The testimony introduced by SBC Missouri at the Commission hearing supports this finding, as SBC Missouri established both the vast number of providers, and the prices charged for comparable services had resulted in a substantial market share loss.⁹⁸ The Commission found that competitors had utilized pricing strategies to obtain a substantial share of the market.⁹⁹

44. In its initial, "global" analysis of the third Section 386.020(13) effective competition factor (the extent to which the purposes and policies of Chapter 392, RSMo., including the reasonableness of rates as set out in Section 392.185 RSMo., are being advanced),

⁹⁶ See Section 392.245.5 RSMo. 2000.

⁹⁷ Report and Order, p. 22 (L.F., p. 12911).

⁹⁸ Id.

⁹⁹ Id.

the Commission referred to its earlier recital of the purposes and policies of Chapter 392, as set out in Section 392.185 RSMo. 2000:

- (1) Promote universally available and widely affordable telecommunications services;
- (2) Maintain and advance the efficiency and availability of telecommunications services;
- (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;
- (4) Ensure that customers pay only reasonable charges for telecommunications services;
- (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;
- (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;
- (7) Promote parity of urban and rural telecommunications services;
- (8) Promote economic, educational, health care and cultural enhancements; and
- (9) Protect consumer privacy.

45. The Commission noted that one of the purposes of Chapter 392 is that "customers pay only reasonable charges for the telecommunications service."¹⁰⁰ The Commission also found generally that "full and fair competition acts as a substitute for regulation by exerting discipline on prices and moving those prices toward economic cost" as described in Section 392.185(6).¹⁰¹ The Commission also indicated that customers benefit from more competition

¹⁰⁰ Report and Order, pp. 16-17 (L.F., pp. 1285-1286).

¹⁰¹ Id.

because of competitors' ability to quickly adapt to a changing marketplace, and because competition will move prices toward costs, which result in reasonable prices.¹⁰²

46. In its specific analysis of the third statutory effective competition factor as applied to SBC Missouri core business services, the Commission made several specific findings that are consistent with this factor and the underlying purposes of Chapter 392. As described above, the Commission noted that SBC Missouri's market share loss for core business services in the Kansas City and St. Louis exchanges was due to a large number of alternative providers providing substitutable or functionally equivalent services.¹⁰³ The Commission also noted evidence submitted by the Commission Staff indicating the presence of CLEC-owned fiber networks within 1000 feet of a significant quantity of business (and residential) customers in the Kansas City and St. Louis exchanges.¹⁰⁴ The Commission also referred to the evidence submitted in this case regarding the large number of CLECs actually providing both resale and facilities-based service in the Kansas City and St. Louis exchanges, the large number of CLECs certified to do business in these two exchanges, and the comparative longevity of the companies doing business in these two exchanges.¹⁰⁵ All of this evidence advances one or more of the purposes of Chapter 392, as set forth above and in Section 392.185 RSMo. 2000, and was appropriately considered by the Commission.

47. In its initial, "global" analysis of the fourth Section 386.020(13) effective competition factor (existing economic or regulatory barriers to entry), the Commission noted that the evidence submitted by SBC Missouri regarding the number of companies that have become

¹⁰² Id.

¹⁰³ Report and Order, p. 22 (L.F., p. 1291).

¹⁰⁴ Id.

¹⁰⁵ Id.

certificated and have approved tariffs is relevant to analyzing barriers to entry and the overall status of competition.¹⁰⁶ The Commission also stated that such evidence, *standing alone*, did not persuade the Commission that effective competition exists.¹⁰⁷ The Commission also explained that the evidence presented at the hearing regarding the availability of resale and unbundled network elements,¹⁰⁸ both of which are available for CLECs to serve customers in every SBC Missouri exchange in Missouri, provide an effective way for CLECs to enter the market with little capital investment.¹⁰⁹ The Commission referred to the "multitude" of CLECs actually providing service in Missouri, and concluded that based on this evidence, "it is clear that the regulatory barriers that once prevented competitors from offering alternatives in the marketplace are disappearing."¹¹⁰

48. The Commission also found that its decision in Case No. TO-99-227, in which the Commission determined that SBC Missouri had fully complied with the requirements of Section 271 of the federal Telecommunications Act of 1996, and that SBC Missouri's local markets were "open to competition" was relevant.¹¹¹ Again, the Commission indicated that this finding, *standing alone*, is not equivalent to a finding of effective competition.¹¹²

49. In its specific analysis of the fourth statutory effective competition factor as applied to SBC Missouri's core business services, as described above, the Commission indicated

¹⁰⁶ Report and Order, p. 17 (L.F., p. 1286).

¹⁰⁷ Id.

¹⁰⁸ Unbundled Network Elements, or UNEs, refer to individual pieces of SBC Missouri's network that CLECs may obtain from SBC Missouri at Commission-approved wholesale rates, and which are used by CLECs to provide basic local services in direct competition with SBC Missouri.

¹⁰⁹ Id.

¹¹⁰ Report and Order, pp. 17-18 (L.F., pp. 1286-1287).

¹¹¹ Report and Order, p. 18 (L.F., p. 1287).

¹¹² Id.

that in addition to SBC Missouri's loss of market share for core business services in the Kansas City and St. Louis exchanges, the Commission also relied on the number of carriers, including resellers, actually providing both resale and facilities-based service in these two exchanges, the "overwhelming" number of carriers certified to do business in these two exchanges, the comparative longevity of these companies and the presence of CLEC-owned fiber networks in these exchanges.¹¹³ The Commission lawfully and reasonably concluded that these factors establish that there are no existing economic or regulatory barriers to CLEC entry into the core business services market place in SBC Missouri's Kansas City and St. Louis exchanges.

50. Finally, in its "global" analysis of the final, "catch-all" effective competition factor under Section 386.020(13) RSMo. 2000, the Commission indicated that it also considered alternative services that are not regulated by the Commission, including e-mail, cable broadband, and mobile phones. The Commission noted that the evidence presented regarding the generalized presence of such alternative communications throughout the state did not, in the absence of CLEC-owned, facilities-based competition, constitute persuasive evidence of effective competition.¹¹⁴ The Commission also noted SBC Missouri's testimony regarding the customer benefits of additional pricing flexibility, which would "increase SBC Missouri's ability to restructure services and offer value-added packaging."¹¹⁵ In its specific analysis relating to core business services, the Commission noted that specific evidence of facilities based CLEC competition in the St. Louis and Kansas City exchanges had been presented, and that based on

¹¹³ Report and Order, p. 22 (L.R., p. 1291).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

"all" of the relevant factors, effective competition exists for SBC Missouri's core business services in the Kansas City and St. Louis exchanges.¹¹⁶

51. The Commission's analysis of effective competition throughout SBC Missouri's exchanges, as set forth in the Commission's Report and Order, reflects that the Commission engaged in a detailed analysis and weighing of each of the five effective competition factors identified by the Missouri legislature in Section 386.020(13) RSMo. 2000. The Commission's analysis included both a general analysis of these five factors, as well as an analysis of these five factors as applied to SBC Missouri's core business services on an exchange basis. The Commission acted consistent with the provisions of Sections 386.020(13) and 392.245 RSMo. 2000. When viewed in its entirety, it is clear that the Commission's Report and Order, and specifically the Commission's determination that SBC Missouri's core business services face effective competition and should be classified as competitive in SBC Missouri's Kansas City and St. Louis exchanges, is lawful, reasonable, and fully supported by competent evidence.

52. As with the Commission's analysis and application of the five statutory effective competition factors to SBC Missouri's core business services, the Commission appropriately considered each of the five effective competition factors listed in Section 386.020(13) RSMo. 2000, and considered substantial evidence relating to each of these five factors, when it determined that SBC Missouri's core residential services face effective competition, and should therefore be classified as competitive services, in SBC Missouri's St. Charles and Harvester, Missouri exchanges. As described below, the Commission's general analysis of these five factors in conjunction with its very specific analysis relating to distinct services in distinct exchanges, conform the Commission's determination that SBC Missouri's core residential

¹¹⁶ Report and Order, p. 22 (L.F., p. 129)).

services face effective competition in two of SBC Missouri's 160 exchanges in Missouri, and that these services should be classified as competitive services in those two exchanges, is both lawful and reasonable, and supported by substantial and competent evidence.

53. In its general analysis of the first statutory effective competition factor, the Commission found that after reviewing the evidence of competitive activity provided by SBC Missouri, including the "percent of market share lost by SBC Missouri to its competitors in each exchange,"¹¹⁷ with the exception of two exchanges (i.e., SBC Missouri's St. Charles and Harvester exchanges), CLECs are not providing a "substantial" percentage of the residential local service in SBC Missouri exchanges.¹¹⁸ As described above, the Commission also explained that the evidence presented by SBC Missouri regarding the residential access line market share loss, while substantial in just two exchanges, may actually *understate* the actual competitive line losses.¹¹⁹ Nevertheless, the Commission also found that SBC Missouri's estimates for the minimum number of access lines being served by competitors for residential customers were reasonable, reflecting the *minimum* CLEC residential market share throughout SBC Missouri's exchanges.¹²⁰

54. - In considering the first effective competition factor and applying it to SBC Missouri's core residential services specifically,¹²¹ the Commission found that SBC Missouri had experienced a "substantial" market share loss for core residential services in both the St. Charles and Harvester exchanges.¹²² The Commission also noted that the evidence presented by SBC

¹¹⁷ Report and Order, p. 14 (L.F., p. 1283).

¹¹⁸ Id.

¹¹⁹ Report and Order, pp. 14-15 (L.F., pp. 1283-1284).

¹²⁰ Report and Order, p. 15 (L.F., p. 1284).

¹²¹ Report and Order, pp. 31-35 (L.F., pp. 1300-1304).

¹²² Report and Order, p. 32 (L.F., p. 1301).

Missouri shows that there are 27 CLECs serving customers in SBC Missouri's Harvester exchange, and 31 CLECs serving customers in SBC Missouri's St. Charles exchange.¹²³

55. Relator OPC contends the Commission made no finding that the effective competition it found existed in the St. Charles and Harvester exchanges is "viable for the long run" or is more than a "trial program."¹²⁴ The Missouri legislature established the factors the Commission was required to utilize to determine effective competition and the Commission, utilizing the criteria mandated by the legislature, made the express finding that SBC Missouri had demonstrated the existence of effective competition in these two exchanges. Section 386.020(13) RSMo. 2000 does not require the Commission to make the finding OPC demands. In any event, the Missouri legislature has specifically empowered the Commission in Section 392.245.5 RSMo. 2000 to eliminate a competitive classification if the Commission subsequently determines that effective competition no longer exists.¹²⁵ If this were to occur, price cap regulation would be reimposed.¹²⁶

56. In its initial, "global" analysis of the second Section 386.020(13) effective competition factor the Commission considered whether services from non-regulated services, including wireless carriers, cable TV providers, Internet service providers, fixed satellite providers, and customer premises equipment manufacturers should be treated as "functionally equivalent or substitutable."¹²⁷ As described above, the Commission found it appropriate to

¹²³ *Id.*

¹²⁴ Initial Brief of OPC, p. 15.

¹²⁵ See Section 392.245.5 RSMo. 2000.

¹²⁶ *Id.*

¹²⁷ *Id.*

consider these types of services.¹²⁸ Consistent with its more general analysis in this section of its Report and Order, the Commission found that the evidence presented at the hearing did not establish that these alternative providers provide "functionally equivalent or substitutable" services for "all" of SBC Missouri's regulated service offerings throughout SBC Missouri's Missouri exchanges.¹²⁹ As with its general analysis of this factor applicable to SBC Missouri's core business services, the Commission found that SBC Missouri had not produced evidence of the impact alternative providers had on SBC Missouri's pricing or product strategies.¹³⁰ The Commission did not make this finding with regard to SBC Missouri's services generally, or with respect to SBC Missouri's core residential services specifically.

57. In its specific analysis of the second effective competition factor as applied to SBC Missouri's core residential services, the Commission found that "a substantial number of residential customers are being provided functionally equivalent or substitutable basic local service from widely available CLEC-owned cable telephony facilities in the St. Charles and Harvester exchanges."¹³¹ The Commission's Report and Order makes it clear that SBC Missouri's loss of "a substantial market share of residential customers in those exchanges" was a direct result of alternative providers providing substitutable or functionally equivalent services in SBC Missouri's St. Charles and Harvester exchanges.¹³² The evidence submitted by SBC Missouri at the Commission hearing established that the residential services of alternative providers actually operating in SBC Missouri's St. Charles and Harvester exchanges are

¹²⁸ Report and Order, p. 16 (L.F., p. 1285).

¹²⁹ Id.

¹³⁰ Id.

¹³¹ Report and Order, p. 32 (L.F., p. 1301).

¹³² Id.

functionally equivalent or substitutable, at comparable rates, terms and conditions, for the residential services offered by SBC Missouri in those same exchanges. The substantial market share achieved by CLECs serving residential customers in these two exchanges provides additional evidence that CLECs are providing functionally equivalent or substitutable services at comparable rates, terms and conditions. The Commission's findings on this factor are clearly lawful and reasonable, and supported by the evidence.

58. As described above, in its initial, "global" analysis of the third statutory effective competition factor, as applied to SBC Missouri's residential services, the Commission referred to its earlier recital of the purposes and policies of Chapter 392, as set out in Section 392.185 RSMo. 2000. The Commission noted that one of the purposes of Chapter 392 is that "customers pay only reasonable charges for the telecommunications service."¹³³ The Commission also noted that "full and fair competition acts as a substitute for regulation by exerting discipline on prices and moving those prices toward economic cost" as described in Section 392.185(6).¹³⁴ The Commission also indicated that customers benefit from competition because of competitors' ability to quickly adapt to a changing marketplace and because competition results in reasonable prices.¹³⁵

59. In its specific analysis of the third statutory effective competition factor as applied to SBC Missouri's core residential services, the Commission made several specific findings that are consistent with this factor. As described above, the Commission found that SBC Missouri's "substantial" market share loss for its core residential services in the Harvester and St. Charles exchanges was due to a large number of competitors, providing functionally equivalent or

¹³³ Report and Order p. 17 (L.F., p. 1286).

¹³⁴ Id.

¹³⁵ Id.

substitutable basic local service in these two exchanges.¹³⁶ The Commission specifically recognized the "widely available CLEC-owned cable telephony facilities in the St. Charles and Harvester exchanges."¹³⁷ The Commission also noted that there are 27 CLECs serving customers in the Harvester exchange and 31 CLECs serving customers in the St. Charles exchange.¹³⁸ All of this evidence is relevant to the advancement of the purposes and policies of Chapter 392, as set out in Section 392.185 RSMo. 2000, and was appropriately considered by the Commission in its evaluation of this effective competition factor.

60. In its initial, "global" analysis of the fourth statutory effective competition factor, as applied to SBC Missouri's residential services, the Commission noted that the evidence submitted by SBC Missouri regarding the number of companies that have become certificated and have approved tariffs is relevant to analyzing barriers to entry and the overall status of competition.¹³⁹ The Commission also explained that the evidence presented at the hearing regarding the availability of resale and unbundled network elements--which are available for CLECs to serve customers in every SBC Missouri exchange in Missouri--provide an effective way for CLECs to enter the market with little capital investment.¹⁴⁰ The Commission referred to the "multitude" of CLECs actually providing service in Missouri, and stated that based on this evidence, "it is clear that the regulatory barriers that once prevented competitors from offering alternatives in the marketplace are disappearing."¹⁴¹ The Commission also indicated that another relevant factor was its decision in Case No. TO-99-227, in which the Commission determined

¹³⁶ Report and Order, p. 32 (L.F., p. 1301).

¹³⁷ Id.

¹³⁸ Id.

¹³⁹ Report and Order, p. 17 (L.F., p. 1286).

¹⁴⁰ Id.

¹⁴¹ Report and Order, pp. 17-18 (L.F., pp. 1286-1287).

that SBC Missouri had fully complied with the requirements of Section 271 of the federal Telecommunications Act of 1996, and found that SBC Missouri's local markets were "open to competition."¹⁴²

61. In its specific analysis of the fourth statutory effective competition as applied to SBC Missouri's core residential services, the Commission noted that in addition to SBC Missouri's "substantial" loss of market share of residential customers in the St. Charles and Harvester exchanges, there are 27 CLECs serving customers in the Harvester exchange, and 31 CLECs serving customers in the St. Charles exchange, in addition to the "widely available CLEC-owned cable telephony facilities in the St. Charles and Harvester exchanges."¹⁴³ The Commission also indicated that it relied upon the number of carriers, including resellers, actually providing service in these two exchanges, the large number of carriers certified to do business in these exchanges, the comparative longevity of those companies, and the presence of CLEC-owned facilities in these two exchanges, to determine that effective competition exists for SBC Missouri's core residential services in the Harvester and St. Charles exchanges.¹⁴⁴

62. Finally, in its "global" analysis of the final, "catch-all" statutory effective competition factor, as applied to SBC Missouri's residential services, the Commission indicated that it also considered alternative services that are not regulated by the Commission, including e-mail, cable broadband, and mobile phones as "other factors" under Section 386.020(13)(e) RSMo. 2000.¹⁴⁵ The Commission noted that the evidence presented regarding the generalized presence of such alternative communications throughout the state did not, in the absence of

¹⁴² Report and Order, p. 18 (L.F., p. 1287).

¹⁴³ Report and Order, p. 32 (L.F., p. 1301).

¹⁴⁴ Report and Order, p. 33 (L.F., p. 1302).

¹⁴⁵ Report and Order, p. 19 (L.F., p. 1288).

CLEC-owned, facilities-based competition, constitute persuasive evidence of effective competition.¹⁴⁶ The Commission also noted SBC Missouri's testimony regarding the customer benefits of additional pricing flexibility, which would "increase SBC Missouri's ability to restructure services and offer value-added packaging."¹⁴⁷ In its specific analysis of the final statutory effective competition factor as it applies to SBC Missouri's core residential services, the Commission noted that facilities based competition was present in the St. Charles and Harvester exchanges and provided further proof of the existence of effective competition.¹⁴⁸

63. As it did with respect to its analysis of core business services, the Commission's Report and Order in this case reflects that the Commission engaged in a detailed analysis and application of each of the five effective competition factors identified by the Missouri legislature in Section 386.020(13) RSMo. 2000 to SBC Missouri's core residential services, as it was required to do under Section 392.245 RSMo. 2000. The Commission's analysis included both a general analysis of these five factors, as well as an analysis of the five statutory effective competition factors applied to SBC Missouri's core residential services on an individual exchange basis. The Commission weighed these various factors and exercised its discretion in determining that the evidence established effective competition exists for SBC Missouri's residential services in the St. Charles and Harvester exchanges. When viewed in its entirety, it is clear that the Commission's Report and Order, and specifically the Commission's determination that SBC Missouri's core residential services face effective competition and should be classified as competitive in SBC Missouri's Harvester and St. Charles exchanges, is lawful, reasonable, and supported by competent and substantial evidence.

¹⁴⁶ Id.

¹⁴⁷ Id.

¹⁴⁸ Report and Order, p. 32 (L.F., p. 1301).