BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

In the Matter of	)	
	)	
Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers	)))))	WC Docket No. 03-173

COMMENTS OF THE PUBLIC SERVICE
COMMISSION OF THE STATE OF MISSOURI

The Public Service Commission of the State of Missouri ("MoPSC") offers the following comments in response to the Federal Communication Commission's ("Commission") September 10, 2003, Notice of Proposed Rulemaking (NPRM) issued in the above docketed case. The NPRM seeks comment on the rules applicable to the pricing of unbundled network elements (UNEs) pursuant to Section 252(d)(1) of the Communications Act of 1934 as amended by the Telecommunications Act of 1996. The NPRM also seeks comments on whether the UNE pricing methodology, which bases UNE prices on Total Element Long Run Incremental Cost (TELRIC), is working as intended and whether it is conducive to efficient facilities investment. As noted by the Commission, the existing rules are general in nature and the NPRM seeks comment on ways to make them more specific.

In paragraph 39 of the NPRM, the Commission seeks comment on how it can empirically measure and test UNE rates to determine whether those rates are sending appropriate signals for competitive entry and investment. It is the opinion of the MoPSC that it is a difficult task to test the appropriateness of UNE prices and whether or not they are sending the correct investment and entry signals to the competitive telecommunications market. If the correct investment and entry signals

are being sent, then vibrant competition should be the observable result. Determining whether competition exists and measuring the level of that competition is an arduous and ambiguous task. Missouri statutes contain provisions to assist the MoPSC in examining the status of effective competition. Section 386.020(13) RSMo requires the Commission to determine whether effective competition exists based on the following considerations:

> (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

In making its determination whether effective competition exists, the MoPSC is also guided by Section 392.185 RSMo, which indicates that the provisions of the telecommunications-specific statute, Chapter 392, are to be construed to:

> (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 service;
> (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.

In 2001, the MoPSC established Case No. TO-2001-467 (competition case) to review the status of competition in all Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (SBC) exchanges. In accordance with Missouri statutes, the MoPSC must determine whether effective competition exists for each telecommunications service of an incumbent local exchange carrier (ILEC) in each of the company's exchanges where an alternative local exchange telecommunications company has been certified.[1] The MoPSC completed its review and issued its Report and Order on December 27, 2001 with an effective date of January 6, 2002[2].

In the competition case, the MoPSC noted that competitors were not providing service equally throughout all of SBC's exchanges. The MoPSC stated that SBC provides basic local telecommunications in 160 exchanges in Missouri, but competition is greatest in heavily urbanized areas.[3] Specifically addressing basic local service, the MoPSC found a substantial number of business customers are being provided functionally equivalent or substitutable basic local service from widely available competitive local exchange carrier (CLEC) owned facilities in the St. Louis and Kansas City exchanges.[4] The MoPSC also found a substantial number of residential customers are being provided functionally equivalent or substitutable basic local service from widely available CLEC-owned cable telecommunications facilities in the St. Charles and Harvester exchanges.[5] Where the MoPSC found effective competition exists for basic local service, the MoPSC also found effective competition exists for all of the other telecommunications services in those exchanges. In the remaining exchanges, the MoPSC found

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[1] 392.245.5 RSMo 2000

[2] The MoPSC Report and Order was affirmed, in part, and reversed, in part, by the Circuit Court of Cole County, Missouri, in *State of Missouri ex rel. Acting Public Counsel John Coffman vs. Public Service Commission of the State of Missouri* in Case No. 02CV323762. The Report and Order was affirmed as to all relevant sections cited here. The Circuit Court's Judgment is subject to appeal to the Missouri Court of Appeals.

[3] Report and Order. *In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company.* Case No. TO-2001-467. Issued December 27, 2001. Page 13.

[4] Id at page 23.

[5] Id at page 33.

that competition from widely available CLEC-owned facilities did not exist for business or residential basic local service.

The MoPSC recently completed a similar proceeding for Sprint Missouri, Inc. In this proceeding, Case No. IO-2003-0281, the Commission found that business and residential core access line services and business and residential access line-related services offered in the Kearney, Rolla and Norborne exchanges should be classified as competitive for Sprint Missouri, Inc. d/b/a Sprint. In all other Sprint exchanges, those services are not competitive and remain subject to price cap regulation.

As further evidence of the status of competition in Missouri, the MoPSC submits the following statistics. Under Missouri statutes, a large ILEC (as defined in Missouri statutes) is eligible to be price cap regulated when an alternative local exchange telecommunications carrier has been certificated to provide basic local telecommunications services, and is providing such service, in any part of the ILEC's service area. Missouri has four carriers subject to price cap regulation under Section 392.245 of the revised Missouri statutes. These carriers cover approximately 91 percent of the access lines in Missouri. Another 37 ILECs comprise the remaining telephone access lines in Missouri.

There are approximately 80 CLECs certificated to provide service in Missouri. For these comments, "certificated" means that the company has received approval from the MoPSC to offer basic local telecommunications service, has approved tariffs on file with the MoPSC, and has negotiated and approved interconnection agreements on file with the MoPSC. Of these carriers, 35 are certificated as facilities-based providers. Thirty-three of the certificated carriers provide prepaid service only. Of the certificated carriers, 53 are certificated to provide service in SBC territory, 17 are certificated to provide service in CenturyTel of Missouri, LLC territory, 14

are certificated to provide service in Spectra Communications Group, LLC d/b/a CenturyTel territory and 15 are certificated to provide service in Sprint Missouri, Inc. territory. Two CLECs are certificated to provide prepaid local service in small ILEC exchanges in Missouri.

When the MoPSC determines an exchange or a particular service is effectively competitive, the rates offered by the incumbent local telephone company within the exchange, or for a particular service, are no longer bound by price cap regulation. In other words, the Missouri legislature relies on the competitive market to safeguard the public interest and discipline a telephone company's output and pricing decisions. There are a relatively small number of effectively competitive services and exchanges considering that there are approximately 80 certificated CLECs authorized to serve in 91% of Missouri's exchanges. Clearly, evidence shows that competition is emerging, but is far from ubiquitous. If a particular market were competitive, the MoPSC would conclude that signals for competitive entry and investment must be appropriate.

The Commission's goal to set prices in such a way as to send efficient entry and investment signals to competitors can only continue to encourage competition in local telecommunications markets. In addition, setting UNE prices so that ILECs have an opportunity to recover forward-looking costs of provisioning service meets the goals of the 1996 Telecommunications Act. Setting UNE prices any higher than cost could discourage competition and encourage inefficient investment, setting prices any lower than cost may risk confiscating ILEC property.

Due to pending UNE cases the MoPSC is not in the position to comment on specific adjustments that could be made to TELRIC, but offers the following general comments:

- The Commission's rules should focus on the transparency and verifiability of cost studies. These objectives are of the utmost importance to allow state commissions to review and verify costs. The MoPSC recommends the Commission retain these essentials requirements. Additionally, the MoPSC encourages the Commission to ensure that its adopted UNE pricing rules clearly exclude the costs associated with technology to which CLECs have limited access, such as hybrid copper/fiber loops.
- As noted in Paragraph 58 of the NPRM, "A central principle of the current UNE pricing rules is that competitive LECs should not pay UNE rates that compensate incumbent LECs for past inefficiencies." The MoPSC asserts that departure from the Commission's principle would send the wrong investment signals in a still asymmetrical telecommunications market. In fact, allowing ILECs to be compensated for past inefficiencies could encourage future inefficiencies. Therefore, the pricing rules should ensure ILECs and CLECs both have incentive to invest efficiently in network infrastructure.
- The MoPSC submits that it would not be any more difficult to construct a cost model of the existing network than to construct a cost model of an efficient hypothetical network. Past studies reviewed by the MoPSC already use samples of existing network components in order to estimate the cost of UNEs.[6] TELRIC should not artificially restrict forward pricing by using unrealistic assumptions about the network.
- The MoPSC respectfully encourages the Commission to consider the effect of customers switching to full facilities-based competitors on the incumbent's network fill. Assuming that costs are constant, as customers leave the ILEC network the same costs will have to

be spread across a smaller customer base. *Ceteris paribus*, as customers leave the ILEC network, the future prices of UNEs could rise due to decreasing network fill.

- The Commission seeks comments on the relationship between unbundling rules and the risk of stranded investment. Specifically, the local competition order suggested that the availability of long-term contracts might reduce the risk of stranded investment.[7] In Missouri, UNEs are currently purchased through Interconnection Agreements, which typically expire after three years. The MoPSC is not aware of any other long-term UNE contracts. Recent changes in Missouri law allow for retail term contracts of up to five (5) years for all telecommunications providers in the state.[8] Since CLECs now have the ability to retain customers using long-term contracts, they might be more willing to enter into long-term wholesale contracts or provision their own facilities.
- The NPRM asks for comment regarding whether allowing non-recurring costs (NRCs) for every activity related to a CLEC order would provide sufficient incentive for ILECs to use mechanized processes when it is efficient to do so. In addition to the goals the Commission has established for its TELRIC rules, the MoPSC urges the Commission to ensure that its rules are written in a manner that promotes efficiency. Allowing NRCs for every activity will certainly erect a barrier to entry. The MoPSC urges the Commission to ensure that any efficiency gained through the charging of NRCs outweighs the barrier to entry that such charges could impose.

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[6] Report and Order, *In the matter of AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company, Case No. TO-97-40. Issued July 31, 1997. Attachment C, Page 19.*
[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket number 96-98,* (Local Competition Order) 11 FCC Rcd at 15849, Para 687.
[8] 392.200.10 RSMo

- The Commission's current practice, which requires de-averaged UNE rates even in markets where retail rates are not similarly de-averaged, has resulted in significant competition in business markets, but has resulted in limited residential competition. Since the Commission first authorized local exchange telephone competition in 1997, there have been approximately 80 companies authorized by the MoPSC to provide telecommunications service in competition with the traditional incumbent local exchange carriers. As of July 2003, it is estimated that competitors serve approximately 314,000 business access lines in Missouri and approximately 136,000 residential access lines in Missouri, or approximately 25 percent and 6 percent, respectively, of Missouri's total access lines. At this time, the MoPSC suggests that problems resulting from a departure in the current practice of averaging/de-averaging UNE rates when retail rates are not similarly de-averaged could outweigh any benefits the Commission seeks to attain.

In summary, evidence shows that competition is emerging in Missouri's local telephone marketplace, but it is far from ubiquitous. In addition to the goals the Commission has established for its TELRIC rules, the MoPSC urges the Commission to ensure that its rules are written in a manner that promotes efficiency. Further, the Commission's UNE pricing objectives should remain unaltered.

Respectfully submitted,

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