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September 8, 1999

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**FILED**

SEP 8 1999

Missouri Public  
Service Commission

**RE: Case No. TO-2000-16**

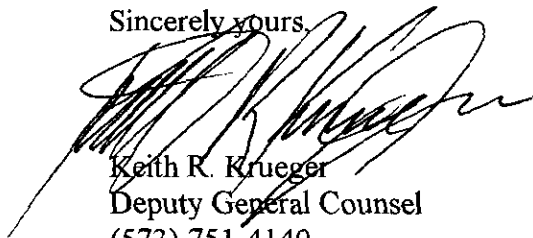
Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and fourteen (14) conformed copies of a **MOTION TO FILE COMMISSION-ORDERED INVESTIGATION REPORT**.

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,



Keith R. Krueger  
Deputy General Counsel  
(573) 751-4140  
(573) 751-9285 (Fax)

KRK:sw  
Enclosure  
cc: Counsel of Record

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

**FILED**

SEP 8 1999

Missouri Public  
Service Commission

In the Matter of the Motion to Establish a )  
Docket Investigating the IntraLATA Toll )  
Service Provisioning Practices of Missouri )  
Interexchange Carriers, Public Utility or )  
Common Carrier Duties of Interexchange )  
Carriers, Motion to Show Cause, Request )  
for Emergency Hearing, and Alternative )  
Petition for Suspension and Modification. )

Case No. TO-2000-16

**MOTION TO FILE COMMISSION-ORDERED INVESTIGATION REPORT**

**COMES NOW** the Staff of the Missouri Public Service commission ("Staff"), and for its Motion to File Commission-Ordered Investigation Report, states to the Missouri Public Service Commission ("Commission") as follows:

1. On July 9, 1999, the Mid-Missouri Group of small telephone companies ("MMG") filed a motion requesting that the Commission investigate the toll provisioning practices of interexchange carriers ("IXCs"), establish common carrier duties of IXCs, require AT&T Communications of the Southwest, Inc. (AT&T) to show cause why it should not be subject to penalties, or, in the alternative, delay the termination of the Primary Toll Carrier ("PTC") Plan.

2. On August 10, 1999, the Commission issued an Order Directing Notice, Directing Reports, and Requiring Record Collection ("Order"), in which it ordered the Staff to investigate AT&T's refusal to serve customers in Secondary Carrier ("SC") exchanges and to file a verified report of the results of its investigation. The Commission ordered the Staff to address, at the

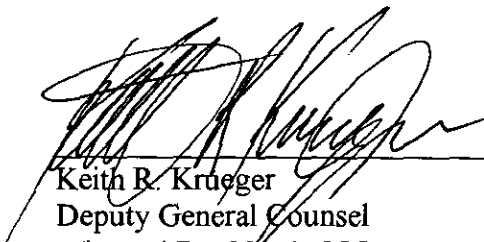
minimum, each of the four issues which were specifically identified in the Commission's August 10, 1999 Order.

3. Staff has completed its investigation into the matter and has prepared its Staff Report, which it hereby offers for filing as directed in the Order.

WHEREFORE, the Staff respectfully requests that the Commission grant the Staff's Motion and accept for filing the attached Report.

Respectfully submitted,

DANA K. JOYCE  
General Counsel

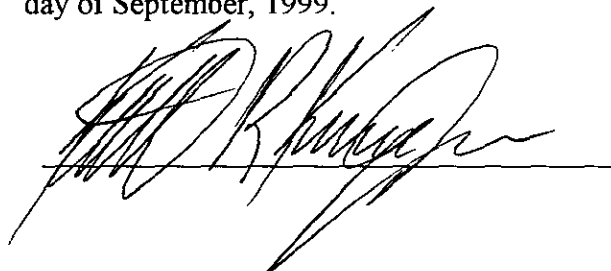
A handwritten signature in black ink, appearing to read "Keith R. Krueger", is written over a horizontal line.

Keith R. Krueger  
Deputy General Counsel  
Missouri Bar No. 23857

Attorney for the Staff of the  
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### **Certificate of Service**

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 8<sup>th</sup> day of September, 1999.



**MISSOURI PUBLIC SERVICE COMMISSION  
STAFF REPORT OF INVESTIGATION**

**Investigation into the IntraLATA Toll Service Provisioning Practices  
Of Missouri Interexchange Carriers  
Case No. TO-2000-16**

**Prepared by  
John VanEschen**

**September 8, 1999**

**Introduction**

The Missouri Public Service Commission ("Commission") directed its Staff ("Staff") to investigate the refusal by AT&T Communications of the Southwest, Inc. ("AT&T") to provide 1+ intraLATA toll service to customers whose basic local exchange telephone service is provided by Secondary Carriers ("SCs"). The Commission directed the Staff to investigate, at a minimum, the following four specific issues:

1. Whether under the terms of AT&T's currently effective tariffs it has an obligation to provide 1+ intraLATA service to all customers who request service where AT&T has sufficient facilities in place;
2. Whether AT&T has sufficient facilities in place throughout the state to be able to serve 1+ intraLATA customers;
3. Whether AT&T has an obligation as a common carrier or public utility to provide 1+ intraLATA service to customers who request it; and
4. Whether AT&T's offering of 1+ intraLATA toll service to customers in some exchanges and only dial around intraLATA toll service in other exchanges violates any Missouri law, particularly Section 392.200, RSMo.

This report addresses each of those four identified issues in turn. In addition, the Staff's report addresses two additional questions which the Commission did not specifically ask, but which the Staff has identified as Issues No. 5 and No. 6.

**Issue No. 1: Under the terms of AT&T's currently effective tariffs does AT&T have an obligation to provide 1+ intraLATA service to all customers who request service where AT&T has sufficient facilities in place?**

This question of obligation is predicated upon the assumption that AT&T has sufficient facilities available to provide the described services. The reasonableness of this assumption is addressed in Issue No. 2 of this Staff Report. Nevertheless, Staff will

attempt to answer this question based on the assumption that AT&T has sufficient facilities in place to provide 1+ intraLATA toll service.

AT&T currently provides telecommunications services in Missouri under ten (10) tariffs. They are:

1. P.S.C. Mo. No. 2 Local Exchange Services - Local Market Trial
2. P.S.C. Mo. No. 3 Local Exchange Services
3. P.S.C. Mo. No. 9 Private Line (Interexchange) Services
4. P.S.C. Mo. No. 10 DATAPHONE Digital Service
5. P.S.C. Mo. No. 11 Private Line (Dedicated Line) Services
6. P.S.C. Mo. No. 13 Wide Area Telecommunications Service
7. P.S.C. Mo. No. 14 Access Service
8. P.S.C. Mo. No. 15 Message Telecommunications Service.
9. P.S.C. Mo. No. 16 Switched Digital Services
10. P.S.C. Mo. No. 17 Custom Network Service.

AT&T's P.S.C. Mo. No. 15 pertains to Message Telecommunications Service. Message Telecommunications Service would include 1+ dialed long-distance service as well as other types of interexchange toll services. AT&T's P.S.C. Mo. No. 15 Message Telecommunications Service Tariff does not claim to guarantee the company will provide 1+ intraLATA toll service to any requesting customer. AT&T's P.S.C. Mo. No. 15 has the following noteworthy sections:

- Section 1.1, Application of Tariff, states that the tariff applies to Message Telecommunications Service (MTS) furnished or made available by AT&T.
- Section 1.2.2 B limits the furnishing of service to the availability of the components required, and determines the use and modifications to those components to be at AT&T's option.
- Section 1.2.4 restricts furnishing of services to the terms, conditions and limitations specified in the tariff.
- Section 1.2.5 A also stipulates that all usage is subject to the provisions of the tariff.
- Sections 1.2.11.A and 1.2.13 place restrictions on the eligibility of an applicant for service.
- Section 1.4.6 identifies tables for 2-point IntraLATA dial station calls on Sheets 34 and 42. These tables do not apply to any intraLATA toll call. The tariff pages associated with intraLATA toll tables do not address whether 1+ intraLATA toll service is provided. A subparagraph on each of these pages lists telephone numbers to access AT&T services.

Based on Staff's review, AT&T's tariff does not clearly appear to oblige AT&T to provide 1+ intraLATA service if service is requested from a potential subscriber.

Perhaps most noteworthy in addressing the issue of AT&T's obligation to provide intraLATA toll services can be found in AT&T's P.S.C. Mo. No. 15, Section 1, 3<sup>rd</sup> Revised Sheet No. 1. This tariff page was recently revised, Tariff File No. 9901015, effective July 26, 1999. This filing deleted language in a footnote which had referenced 1+ intraLATA dialing by the customer. Staff is not aware of any other specific reference to the term "1+" intraLATA dialing in AT&T's tariffs. AT&T chose to delete a portion of this footnote. The original language implied 1+ intraLATA toll calls would be completed by the local exchange company. The footnote had formerly stated:

**Note: AT&T will only complete IntraLATA Message Telecommunications Service calls when the customer dials AT&T's Network Access Code of 1010288. IntraLATA Message Telecommunications Service calls dialed "1+" by the customer will be screened and completed by the appropriate local exchange company.**

The current language removes text indicating 1+ intraLATA traffic will be handled by the appropriate local exchange company. In addition, the revised text clarifies AT&T will complete intraLATA toll calls when a customer dials an AT&T access code. The current footnote states:

**Note: AT&T will complete IntraLATA Message Telecommunications Service calls when the customer dials AT&T's Network Access Code of 1010288.**

Therefore AT&T's existing tariff clearly indicates that customers will have access to intraLATA toll service by dialing an access code. AT&T's existing tariff does not indicate AT&T has an obligation to provide 1+ intraLATA toll service to customers requesting the service.

**Issue No. 2: Does AT&T have sufficient facilities in place throughout the state to be able to serve 1+ intraLATA customers?**

The Staff has not been able to determine with absolute certainty whether or not AT&T has enough trunk capacity to carry the additional 1+ dialed intraLATA traffic in question. Most companies will not have adequate spare capacity to handle a significant amount of additional traffic. In order to answer the question with absolute certainty, the following information is needed:

- How much unused trunk capacity does AT&T have today, at all times of the day and on every trunk route?
- How much additional traffic would AT&T be expected to handle to provide 1+ intraLATA toll service throughout the state?

In regards to trunk capacity, the trunks between SWB's tandem and AT&T's Point Of Presence (POP) are the trunks most likely to experience capacity problems.

These trunks can be leased from other companies or owned by AT&T. Such trunks reflect costs to the IXC. Leased trunks incur monthly costs for the IXC. Even if the IXC owns the trunks, certain costs are incurred on an ongoing basis to maintain the trunks. As with any business, a telephone company will attempt to minimize its costs. A valid business practice for any IXC is to minimize its costs by limiting unused trunking capacity. From the Staff's perspective, IXCs need to have the minimum capacity to complete at least 95 percent of all calls placed at any time of day.

In the past few months, AT&T has encountered some problems in two areas of Missouri in meeting the present calling requirements. In both the Warrensburg and Saint Louis communities, AT&T customers were experiencing blockages during business hours and in the evening. In both of those instances, AT&T added a large number of trunks to satisfy the needs of its customers. Unfortunately, the engineering and placement of those trunks took three or four weeks to complete in both instances. During that time customers were experiencing blockages, which are defined by fast busies (120 Pulses Per Second (PPS)), or recordings. In general, AT&T has a present capacity to provide service for its own interLATA and interstate customers, but not enough capacity to provide service for an additional service load.

Spare fiber does not easily translate into spare trunk capacity. It is a common misconception that Interexchange Carriers (IXCs) have a significant amount of spare fiber that can easily be put into use. Facilities-based IXCs can have a large amount of "dark fiber." In order to use dark fiber to transmit telephone calls, trunking equipment must be installed and available in both the originating and terminating central offices, as well as equipment along the cable route. The installation of this equipment requires a significant amount of engineering and expense. In other words, spare fibers do not easily translate into spare trunk capacity.

Besides determining the availability of spare trunking capacity, additional information is needed regarding quantifying the amount of additional traffic that AT&T is expected to handle. Such information can be based on determining how many customers will be expected to subscribe to AT&T's 1+ intraLATA toll service and the additional traffic these customers will generate.

The additional intraLATA traffic AT&T is expected to handle appears to be significant. Staff has gathered some information from the secondary carriers concerning the percentages of their customers that have presubscribed to AT&T for their interLATA service. For the small secondary carriers, a significant number of customers have chosen AT&T as their interLATA carrier. Typically customers, when given the option, retain the same carrier for both interLATA and intraLATA services. Although toll calling can vary by exchange, the toll traffic experienced by other IXCs indicates that intraLATA toll calling may comprise approximately 25 percent of a carrier's total interexchange toll traffic.

The additional intraLATA traffic AT&T might be expected to carry appears significant. Staff has gathered some information from the secondary carriers concerning



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Regardless of the actual percentage increase in traffic AT&T would be expected to handle, the additional traffic appears to be significant. This additional traffic would need to be analyzed by busy hour for each exchange. AT&T's current busy hours would need to be compared with the busy hours of the additional intraLATA toll traffic. If the additional intraLATA traffic increases the traffic flowing through the busy hour, trunking capacity needs to be examined. Such analysis requires close scrutiny of traffic data. At this time, Staff has been unable to obtain the data for such an analysis. In this regard, it is difficult to accurately determine if AT&T has sufficient facilities to provide 1+ intraLATA toll service to all customers requesting AT&T's service. Staff reasonably concludes AT&T probably does not have sufficient facilities to provide such service.

**Issue No. 3: Does AT&T have an obligation as a common carrier or public utility to provide 1+ intraLATA service to customers who request it?**

AT&T does not have an obligation "as a common carrier or public utility" to provide 1+ intraLATA service to customers who request it, as MMG contended in the motion it filed to establish this docket. The Staff comes to this conclusion as a result of three facts:

1. The term "common carrier" is not statutorily recognized in Missouri, so there is no statutory burden that is imposed upon AT&T or any IXC as a "common carrier";
2. Although the term "public utility" is defined by statute, the statutes do not impose any specific obligation upon AT&T or any IXC as a "public utility," other than to state that public utilities are subject to regulation by the commission; and
3. No other statutes can be found, and no cases can be found in which a court or the Commission has ruled that AT&T or any IXC is obliged to provide 1+ intraLATA service to customers who request it.

The Staff addressed essentially the same question as is posed above in the brief it filed with the Commission on June 4, 1999, in Case No. TO-99-254, *In the Matter of an Investigation Concerning the Primary Toll Carrier Plan and IntraLATA Dialing Parity*. The Staff believes that brief contains an accurate and true statement of the law on this subject, and it hereby reiterates the positions it asserted at pages 41-43 of that brief.

In its motion to establish the docket in this case, MMG stated that the Commission directed that SCs inform their customers that "AT&T would provide service if the customer requested it." MMG further stated: "This direction ordered by the Commission was also premised upon the IXCs status as public utilities or common carriers, with commensurate obligation to make intraLATA toll service ubiquitously available."

MMG did not say where the Commission stated that its order was "premiered" upon the IXC's "status"; nor did it cite any statutory or case law authority that establishes the "commensurate obligation" to make intraLATA toll service ubiquitously available. Staff has searched for such authority, but has found none.

#### *Common Carriers.*

Neither Section 386.020, RSMo, nor any other statute in Chapters 386 or 392, RSMo contains any definition of the term "common carrier." Section 386.020 did include a definition of "common carrier" until 1996, but the definition pertained only to companies that transported *materials or people*, and it had nothing whatsoever to do with telephone companies. This definition was deleted from the statute in 1996 by Senate Bill 780.

To the best of Staff's knowledge, the term "common carrier" does not appear anywhere in the text of any of the statutes in Chapters 386 or 392, either. A similar term, "common carriage," is used in Section 392.455, RSMo 1999 Supp., but it is there used in reference to basic local telecommunications service, and not to long-distance service. AT&T cannot have a statutory obligation to do anything as a "common carrier," if the term "common carrier" is not even statutorily recognized.

"Common carrier" is defined in federal telecommunications law, at 47 U.S.C. Section 153 (h). It is there defined to mean "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy," with exceptions not relevant here. AT&T is engaged in interstate communication by wire, so it is a "common carrier" under federal law. But that fact is meaningless in this case, because this case has nothing to do with interstate communication, and Missouri's regulation of AT&T does not depend upon the fact that AT&T meets this definition.

#### *Public Utilities.*

The term "public utility" is defined in Section 386.020 (42), RSMo Supp 1999, to include "every ... telecommunications company ..." so AT&T is a "public utility." This statutory definition goes on to say that "each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter."

The fact that AT&T is a "public utility" is of no avail to MMG, however, because Staff has not found any statutory provision that imposes on "public utilities" the "obligation to make intraLATA toll service ubiquitously available," as MMG contended in its motion.

Despite a diligent search, the Staff has not been able to find any case that specifically identifies a telecommunications company as a "common carrier," or is germane to the question of whether either a "common carrier" or a "public utility" has a duty to provide 1+ intraLATA toll service to customers who request it.

**Issue No. 4: Does AT&T's offering of 1+ intraLATA toll services to customers in some exchanges and only dial around intraLATA toll service in other exchanges violate any Missouri law, particularly Section 392.200, RSMo?**

Section 392.200, RSMo does not contain any provision that explicitly prohibits AT&T from offering intraLATA toll services as it proposes to do. The question of whether the statute implicitly prohibits this, or whether this pattern of service violates the spirit of the law is more difficult to answer. However, after careful line-by-line analysis of the statute, the Staff concludes that there is nothing in the statute to prevent AT&T from offering intraLATA service in this manner, either.

Unfortunately, Staff has not found any statute or precedent that provides a clear answer to the question, as posed. It is always difficult to prove a negative. The burden of showing that AT&T's conduct is illegal should rest upon those who claim it is illegal, but neither MMG nor STCG has cited any statute or case law in support of their argument that AT&T's conduct is illegal.

Staff's subsection-by-subsection analysis of the provisions of Section 392.200 follows.

*Subsection 392.200.1, RSMo.*

Reduced to its essence, this subsection contains two directives to AT&T and every telecommunications company: 1) the company's instrumentalities must be "adequate"; and 2) its charges must be "just and reasonable."

The first directive is found in the first sentence: "Every telecommunications company shall furnish ... such instrumentalities and facilities as shall be in all respects just and reasonable." The second directive is found in the second sentence: "All charges made and demanded by any telecommunications company ... shall be just and reasonable." The third sentence merely reinforces the second directive.

It is impossible to imagine that the legislature, in enacting this statute (which has been virtually unchanged since 1939), intended to require any company to provide any *additional* services or to serve any *additional* customers. It merely requires that a

company utilize facilities that are "adequate" for "its business," and to impose charges that are "just and reasonable."

*Subsection 392.200.2, RSMo.*

This subsection imposes on AT&T a duty to not charge one customer a different rate than it charges another customer for providing the same or similar services as are provided to the first customer. It pertains only to existing customers. There is no hint that it should have any relevance to anyone who is not a customer.

An abbreviated version of the first sentence reads: "No telecommunications company shall ... charge ... a greater or less compensation for any service ... than it charges ... from any other person ... for doing a like and contemporaneous service ... under ... substantially the same circumstances and conditions." This sentence pertains only to price discrimination between customers.

The question of whether 1+ intraLATA service and dial-around intraLATA service are "like and contemporaneous service[s] ... under ... substantially the same circumstances and conditions" has not been definitively resolved. The Commission addressed a similar question in Case No. TO-93-116, *In the matter of Southwestern Bell Telephone Company's application for classification of certain services as transitionally competitive*. In that case the Commission had to determine whether SWB's message toll service was "the same, substitutable or equivalent" to the intraLATA toll services then offered by IXC's.

The Commission concluded that "the same" meant identical, and "equivalent," although very close to identical, was not quite as restrictive or precise. After an extended and insightful discussion of the term "substitutable," the Commission determined that the intraLATA services offered by IXC's (obtained by dialing around) were substitutable for the intraLATA services provided by SWB (obtained by dialing 1+).

The question at issue in this case is not quite the same as that which was presented in Case No. TO-93-116, but it is very similar. In the present case, the issue is whether 1+ intraLATA service and dial-around service are "like and contemporaneous service[s] ... under ... substantially the same circumstances and conditions," whereas in Case No. TO-93-116, the issue was whether the two services were "substitutable" for one another.

Staff believes that this issue creates the most doubt as to whether AT&T is obligated, by Section 392.200 to provide 1+ intraLATA toll service.

The second and third sentences of this Subsection 392.200.2 are permissive, not restrictive: they authorize promotional programs for telecom services and economy telephone service offerings. The fourth and fifth sentences apply only to LECs, and not to AT&T's long-distance offerings.

*Subsection 392.200.3, RSMo.*

The implications of this subsection are just a little less clear than the implications of Subsections 1 and 2. The substance of the subsection is: "No telecommunications company shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality ..."

On its face, though, this subsection appears to prohibit giving a preference to one *customer* over another; it does not pertain to comparisons between customers and noncustomers. The subsection also speaks of a preference or advantage that is *undue or unreasonable*. If, as AT&T claims, it would lose money by providing 1+ services for intraLATA calls, it is difficult to conclude that its refusal to serve these customers creates a preference or advantage that is undue or unreasonable.

The Staff concludes that this subsection applies to discrimination between customers of AT&T, but does not compel AT&T to serve new customers at a loss.

*Subsection 392.200.4, RSMo.*

This subsection consists of three paragraphs. None of them prohibits AT&T's current course of conduct.

*Paragraph (1).* The first sentence of Paragraph (1) provides: "No telecommunications company may define a telecommunications service as a different telecommunications service based on the geographic area or other market segmentation ..." except with an approved tariff. The second sentence merely describes the procedure for obtaining approval of a tariff.

It would appear that this paragraph would only apply to a situation where a company provides the same or similar services to different customers, but improperly characterizes the services it provides to one group as different from the services it provides to the second group. In the present case, AT&T would be providing services to one group of customers, and providing *no* services to a second group of customers.

Even if the paragraph does apply to AT&T's refusal to serve the "noncustomers," this paragraph prohibits AT&T's proposed conduct only if: 1) 1+ intraLATA service is in fact the same service as is dial-around intraLATA service; and 2) AT&T classifies the services differently solely on the basis of geographic area or other market segmentation. The Staff believes these two services are, in fact, slightly different from one another. But more importantly, AT&T's refusal to provide 1+ intraLATA service is not based on "geographic area"; nor is it based on "other market segmentation." It is, instead, based upon the costs that AT&T must incur in order to provide this service.

It may be argued that the costs that AT&T incurs in providing 1+ intraLATA service are the same as the costs that AT&T incurs in providing dial-around intraLATA service. But AT&T claims that in providing 1+ intraLATA service to most SC

exchanges, it will lose money on every call that it carries. On the other hand, in providing dial-around intraLATA service, it will lose the same amount of money on those same calls, but these losses will be at least partially offset by profits it makes on calls originating in other exchanges, so that the average cost it incurs in providing dial-around service will be less, and its profits will be greater.

*Paragraph (2).* It appears that Paragraph (2) only applies to the regulation of LECs, and not to the regulation of AT&T's long-distance services.

The first sentence provides: "It is the intent of this act to bring the benefits of competition to all customers and to ensure that incumbent and alternative local exchange telecommunications companies have [certain opportunities]." LECs are mentioned in this sentence, but IXC's, such as AT&T's long-distance service, are not. One cannot infer that IXC's, even though not mentioned, are still subjected to regulation by this sentence.

The second sentence of this paragraph, which includes Subparagraphs (a), (b), and (c) lends support to this conclusion. It pertains only to "incumbent local exchange telecommunications compan[ies]" and to "alternative local exchange telecommunications compan[ies]," and to the manner in which the Commission must process the tariffs these companies file. It does not mention or refer to IXC's at all. This suggests that the legislature intended to promote opportunities for LECs, not by regulating the IXC's, but by easing the procedural burden that is imposed on LECs when they file tariffs.

*Paragraph 3.* This is a permissive provision, not a restrictive one. It tells when and how the Commission may define one telecommunications service as different from another based upon geographic area or other market. It is essentially an exception to the provisions of Paragraph 1.

The condensed paragraph reads: "The commission ... may ... define a telecommunications service ... as a different telecommunications service dependent upon the geographic area or other market ... only upon a finding, based on clear and convincing evidence ..."

*Subsection 392.200.5, RSMo.*

The first sentence of this subsection provides: "No telecommunications company may charge a different price per minute ... for the same, substitutable, or equivalent interexchange telecommunications service provided over the same or equivalent distance between two points ... [without an approved tariff]."

This, again, pertains to price discrimination between similarly situated customers who purchase similar services. But AT&T does not propose to charge a *different* rate for 1+ intraLATA service than it charges for dial-around intraLATA service; rather, it proposes not to provide the 1+ intraLATA service at all. This sentence does not contain any provision that compels them to provide 1+ intraLATA service.

The remaining three sentences of this subsection are merely designed to implement the provisions of the first sentence, and do not limit AT&T in any way.

*Subsections 392.200.6 – 392.200.9, RSMo.*

None of these subsections is relevant to AT&T's proposal now under consideration. Subsection 6 requires companies to transmit phone messages without delay. Subsection 7 allows the Commission to impose the limits within which messages may be delivered without charge. Subsection 8 authorizes customer-specific pricing for certain services. Subsection 9 allows the Commission to redraw the boundaries of local exchanges.

**Issue No. 5: Did the Commission order AT&T to provide 1+ intraLATA toll service?**

MMG has repeatedly stated or implied in its motion to establish the docket in this case that the Commission has ordered AT&T to provide 1+ intraLATA toll service, and that AT&T has failed to comply with this order.<sup>1</sup> MMG even argues that AT&T ought to be subjected to massive penalties of up to \$2000 per offense for each SC customer for each day AT&T refuses to provide 1+ intraLATA service. It is impossible to even guess how much this penalty might amount to, but Staff is sure that it would amount to a lot of money. MMG further argues that each officer, agent, or employee of AT&T who assists in this noncompliance may be personally liable for one year's imprisonment and a fine of \$1000, or both.

The Commission has never *ordered* AT&T to provide 1+ intraLATA toll. Rather, it merely ordered the LECs to inform their customers that AT&T *would provide* 1+ intraLATA toll if the LEC's customers requested that it do so.

*Report and Order in Case No. TO-99-254.*

In the "Findings of Fact" section of its Report and Order in Case No. TO-99-254 ("the PTC Case"), the Commission made the following statement: "Since AT&T serves, on average, about seventy percent of the customers in SC exchanges, the Commission determined that it was in the public interest that customers be given notice that specifically stated that they would not be assigned to AT&T, but that AT&T would provide service if the customer requested it of AT&T directly." That language does not amount to an order that AT&T provide 1+ intraLATA toll service, for it did not order AT&T to do anything. Rather, it was an order to the LECs to inform their customers of

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<sup>1</sup> See, for example, in paragraph 13: "The July 1, 1999 letter of AT&T contradicts and refuses to accept an Order in a docket before this Commission in which AT&T (sic) was a party in a contested case proceeding"; also, in paragraph 14: "havoc ... was solely created by the actions of AT&T which are in direct contradiction to a binding Order of the Missouri Public Service Commission"; and, in paragraph 15: "AT&T's violation and knowing refusal to comply with the commission's Order ..."

what Matthew Kohly, AT&T's witness in the PTC Case, stated that AT&T *then intended* to do.

The "Conclusions of Law" section of the Report and Order in Case No. TO-99-254 does not include any statement that bears directly on AT&T's obligation to provide 1+ intraLATA toll service.

The closest that the "Ordered" section of the Report and Order comes to a statement on the issue is where the Commission orders, in Paragraph 1, that the PTC plan shall continue in modified form as discussed in the Reports and Order that implement the dialing parity plans filed by LECs.

*Reports and Orders in ILP Plan Implementation Cases.*

These Reports and Orders did not order AT&T to provide 1+ intraLATA toll service, either. The Report and Order in Case No. TO-99-524, regarding implementation of Alma Telephone Company's ILP Plan, is representative. It uses language that is identical to that used in other ILP Implementation Plan cases.

In the "Findings of Fact" section of this Report and Order, the Commission prescribed the form of notice that Alma Telephone Company would have to send to its customers. This notice included, as a footnote, the following: "Even though AT&T is not on the attached list, it will carry these calls if you request it." Again, this does not amount to an order that AT&T do anything. The "Conclusions of Law" section of the Report and Order states only that the Commission has determined that Alma's Plan should be approved as modified. The "Ordered" section of the Report and Order states, in Paragraph 1, that Alma's Plan "is approved with the modifications discussed herein," and in Paragraph 8, that Alma "shall notify its customers, as discussed herein, of the availability of intraLATA toll dialing parity." However the Commission did not order AT&T to provide 1+ intraLATA toll.

**Issue No. 6: Does AT&T have an obligation, as a "carrier of last resort," to provide 1+ intraLATA toll service?**

AT&T maintained in the PTC Case that it is the "carrier of last resort" with regard to the provision of interLATA toll services within the state of Missouri. However it claimed that it is not the "carrier of last resort" with regard to intraLATA toll services. The latter obligation has been shared by the "joint venture" of the PTCs and the SCs, AT&T argued.

AT&T rested its claim on the provisions of Section 392.460, RSMo 1994, which provides in full as follows:

"No telecommunications company authorized by the commission to provide or offer basic local or basic interexchange telecommunications service within the



state of Missouri on January 1, 1984, shall abandon such service until and unless it shall demonstrate, and the commission finds, after notice and hearing, that such abandonment will not deprive any customers of basic local or basic interexchange telecommunications service or access thereto and is not otherwise contrary to the public interest."

AT&T concluded that this statute applied to it, because AT&T was providing basic interexchange telecommunications services in Missouri on January 1, 1984.

The Staff agrees that AT&T was providing "basic interexchange telecommunications service" (as that term is defined in Section 386.020, RSMo) on January 1, 1984. However, Section 392.460 does not use the term "carrier of last resort," and it does not mandate that AT&T serve new customers or that it provide any new kind of service. It only prohibits a telecommunications company that provides basic interexchange telecommunications service, such as AT&T, from *abandoning* such service without a notice and hearing. The purpose of the statute is not to require companies to provide new types of services, but to prohibit AT&T (and others) from abandoning the services they already provide.

The term "carrier of last resort" is defined in Section 386.020 (6), RSMo, as follows:

"'Carrier of last resort,' any telecommunications company which is obligated to offer *basic local telecommunications service* to all customers who request service in a geographic area defined by the commission and cannot abandon this obligation without approval from the commission." (Emphasis added)

Section 392.180, RSMo Supp 1999 provides that the provisions of Section 386.020, RSMo Supp 1999 defining phrases shall apply to and determine the meaning of all such phrases as used in Sections 392.160 through 392.360. There is no other definition of the term "carrier of last resort" in either Chapter 386 or Chapter 392. It therefore appears that the above definition is the only one that may be applied to the Commission's regulation of telecommunications companies. Under this definition, the term "carrier of last resort" may only be applied to companies that provide basic local telecommunications service, so it does not include AT&T's long-distance service.

The term "carrier of last resort" is also used, though not defined, in Section 392.248.5, RSMo Supp 1999. However in that statute the term is only applied to those who provide "essential local telecommunications service," so it does not apply to AT&T's long-distance service, either.

The Staff concludes that Missouri's statutes do not impose any obligation on AT&T, as a "carrier of last resort," to provide any new kind of long distance telephone service.

There is other statutory support for the contention that AT&T may not withdraw services after it begins to offer them. For example, Section 392.200.4 (2), RSMo Supp 1999 provides, in part, that "It is the intent of this act to bring the benefits of competition to all customers ..." And Section 392.185, RSMo Supp 1999 provides that "The provisions of this chapter shall be construed to: (1) Promote universally available and widely affordable telecommunications services ..."

Finally, Section 392.410, RSMo Supp 1999 provides that the certificate of convenience and necessity issued to any "telecommunications company" shall remain in full force and effect unless modified by the Commission. It then adds:

"Any such carrier, however, prior to *substantially altering the nature or scope of services provided* under a certificate of public convenience and necessity, or adding or expanding services beyond the authority contained in such certificate, shall apply for a certificate of service authority for such alterations or additions pursuant to the provisions of this section." (Emphasis supplied)

A telecommunications company is therefore prohibited from substantially altering its services, it may not discriminate between customers in the services that it does provide, and it may be prohibited from exiting a market without approval of the Commission, but that is not what is at issue in this investigation. The Staff can find no statute that would require AT&T to offer a new service, such as 1+ intraLATA toll service.

### **Conclusion**

It is impossible to know with certainty whether AT&T has sufficient facilities in place throughout Missouri to serve 1+ intraLATA toll customers, for we cannot know where the customers would come from, when they would call and what volume of business they would generate. However Staff concludes, based on its experience in the industry, that AT&T does not have sufficient facilities to carry the calls that would be expected.

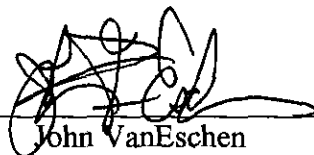
Even if AT&T could carry these calls, Staff can find no legal basis for requiring it to do so. AT&T has not filed any tariff that requires it to carry such calls. Staff cannot find any statute or case law that imposes a duty on AT&T as a common carrier or public utility to provide 1+ intraLATA toll service. And although AT&T is prohibited from discriminating between customers, and may be prohibited from exiting a market after it begins providing services, neither Section 392.200, RSMo Supp 1999, nor any other law requires AT&T to offer a service that it is not now providing.

AFFIDAVIT OF JOHN VANESCHEN

STATE OF MISSOURI

COUNTY OF COLE

John VanEschen, of lawful age, on his oath states: that he prepared the foregoing Staff Report, consisting of \_\_\_ pages, to be presented in the above case; that he has knowledge of the matters set forth in such report; and that the information contained in the report is true to the best of his knowledge, information and belief.

  
John VanEschen

Subscribed and sworn to before me this 8<sup>th</sup> day of September, 1999.

  
Notary Public

Joyce C. Neuner  
Notary Public, State of Missouri  
County of Osage  
My Commission Expires: 06/18/2001

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