Exhibit No.: _____

Issue(s)	Access Cost
Witness/Type of Exhibit:	Meisenheimer/Rebuttal
Sponsoring Party:	Public Counsel
Case No.:	TR-2001-65

REBUTTAL TESTIMONY

OF

BARBARA A. MEISENHEIMER

Submitted on Behalf of the Office of the Public Counsel

Investigation of Exchange Access Service

Case No. TR-2001-65

August 1, 2002

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the matter of an investigation of the actual costs incurred in providing exchange access service and the access rates to be charged by competitive local exchange telecommunications companies in the State of Missouri.	)))))	Case No. TR-2001-65

AFFIDAVIT OF BARBARA A. MEISENHEIMER

STATE OF MISSOURI)
) ss
COUNTY OF COLE)

Barbara A. Meisenheimer, of lawful age and being first duly sworn, deposes and states:

1. My name is Barbara A. Meisenheimer. I am Chief Utility Economist for the Office of the Public Counsel.

2. Attached hereto and made a part hereof for all purposes is my rebuttal testimony consisting of pages 1 through 16 and Attachments 1 and 2.

3. I hereby swear and affirm that my statements contained in the attached testimony are true and correct to the best of my knowledge and belief.

Barbara A. Meisenheimer

Subscribed and sworn to me this 1st day of August, 2002.

KATHLEEN HARRISON
Notary Public - State of Missouri
County of Cole
My Commission Expires Jan. 31, 2006

Kathleen Harrison
Notary Public

My Commission expires January 31, 2006.

REBUTTAL TESTIMONY

OF

BARBARA A. MEISENHEIMER

INVESTIGATION OF EXCHANGE ACCESS SERVICE

CASE NO. TR-2001-65

INTRODUCTION

Q. PLEASE STATE YOUR NAME, TITLE, AND BUSINESS ADDRESS.

A. Barbara A. Meisenheimer, Chief Utility Economist, Office of the Public Counsel, P. O. Box 7800, Jefferson City, Missouri 65102. I am also employed as an adjunct Economics Instructor for William Woods University.

Q. HAVE YOU PREVIOUSLY FILED TESTIMONY IN THIS PROCEEDING?

A. Yes. I filed direct testimony on July 1, 2002.

Q. WHAT IS THE PURPOSE OF PUBLIC COUNSEL'S REBUTTAL TESTIMONY?

A. The purpose of my rebuttal testimony is to respond to the policy issues raised in the direct testimony of other parties to this proceeding. Additionally, Public Counsel is offering the

testimony of William Dunkel in direct response to the cost studies and testimony submitted by Staff's consultant Dr. Ben Johnson.

Q. IN PREPARATION OF YOUR TESTIMONY, WHAT DID YOU REVIEW AND RELY ON?

A. I have reviewed portions of applicable Missouri statutes, portions of materials filed in this proceeding, the direct testimony of the other parties and portions of material from access related proceedings conducted by the FCC. In addition, I relied on my experience with the CALLS proposal as a member of NASUCA and as a staff member to the Federal/State Universal Joint Board.

Q. PLEASE SUMMARIZE THE PRIMARY POINTS AND RECOMMENDATIONS RAISED IN YOUR DIRECT TESTIMONY.

A. 1) The cost of access should include elements that reflect both the facilities costs and expenses that are uniquely associated with providing access, and at least a reasonable allocation of the cost of shared facilities and expenses that are incurred to provide multiple services, including access.

2) Achieving just, reasonable, and equitable prices for services requires that all services, including access services, share the responsibility for joint and common cost recovery. Section 254(b) of the Federal Telecommunications Act of 1996 (FTA) mandates that universal service bear no more than a reasonable allocation of joint and common costs. The Commission should reject costing methods or pricing proposals that either directly or indirectly inappropriately shift cost recovery for access services to basic local service.

3) Public Counsel has concerns regarding the use of engineering models for rate setting purposes. However, the Staff's general approach of developing estimates for both incremental and stand-alone costs has value in discrediting the common claims of subsidy. Further, Public Counsel supports considering various approaches targeted at developing possible allocation methods for joint and common costs.

4) Public Counsel supports retaining a cap on CLEC access rates at the level of the competing incumbents' existing rates. This support is based on the Staff's preliminary results coupled with consideration of economic efficiency and consumer impacts. Switched access service remains a locational monopoly in the State of Missouri. For the foreseeable future, maintaining a cap is reasonably necessary to protect against the imposition of unjust and unreasonable prices for switched access services.

5) Access rates should not be altered in this proceeding. The Staff's preliminary results did not support altering access rates. In addition, Missouri statutes provide clear direction regarding the mechanisms to adjust access rates for both rate-of–return and price cap regulated local exchange companies. Missouri statutes also empowers the Commission to take steps necessary to promote beneficial competition and to protect the public interest. Retaining the current cap on CLEC access rates is a necessary and reasonable step to achieve those goals.

RESPONSE TO PARTIES

Q. DR. JOHNSON CONCLUDES THAT THE COST DATA HE HAS DEVELOPED SUGGESTS THAT THE MISSOURI INTRASTATE ACCESS RATES ARE RATHER HIGH, RELATIVE TO COSTS. HE STRONGLY SUGGESTS THERE IS REASON TO BE CONCERNED THAT THE EXISTING RATES MAY BE HIGHER THAN "APPROPRIATE." DOES PUBLIC COUNSEL AGREE WITH DR. JOHNSON'S CONCLUSIONS REGARDING THE STAFF'S COST RESULTS AND THE APPROPRIATENESS OF RATES?

A. No. Dr. Johnson's conclusion that that existing rates may be higher than appropriate appear to focus on his claim that for some access rate elements, the rates that his study produced exceed his estimates for stand-alone costs. However, based Mr. Dunkel's testimony and that of other parties, the primary explanations for the unexpected and counterintuitive results upon which Dr. Johnson relies are that the Staff's cost studies do not accurately measure costs and do not accurately match those costs to revenues for the disaggregated elements. The conclusion that existing rates may be higher than "appropriate" is not based on accurate analysis and should be disregarded.

Q. DR. JOHNSON SUGGESTS ON PAGES 128 THROUGH 135 THAT RATE DATA FROM THE INTERSTATE JURISDICTION COULD BE USEFUL TO DETERMINE IF THIS PROCEEDING SHOULD LEAD INTO AN INVESTIGATION INTO POTENTIAL CHANGES IN EXISTING RATES. DO YOU BELIEVE THAT INTERSTATE ACCESS RATES SHOULD BE GIVEN WEIGHT IN DETERMINING THE APPROPRIATE INTRASTATE ACCESS RATES FOR MISSOURI'S LOCAL EXCHANGE COMPANIES?

A. No. The rates established for interstate and other states' intrastate access service do not constitute a meaningful basis for establishing Missouri rates. With due respect to the FCC, I believe that over the past several years it has increasingly pursued policies that favor carriers and provide an advantage to interstate service offerings by forcing an increasing and unreasonable burden for interstate cost recovery onto the basic local subscriber. For example, contrary to previous findings, the FCC has repeatedly increased the Subscriber Line Charge (SLC) without a cost basis and without a showing that the increases would not jeopardize affordability. Despite an interstate jurisdictional cost recovery label, SLC increases have shifted usage-based interstate cost recovery to the local customer through mandatory flat rate charges. These charges can only be avoided by complete disconnection from the local exchange network.

The FCC has facilitated, and in some cases directly approved, mechanisms such as the CALLS proposal that forced Missouri customers to pay an increasing portion of interstate costs regardless of the level of use of interstate services. A coalition of IXCs and large local exchange carriers including AT&T, BellSouth, Bell Atlantic, GTE, SBC and Sprint offered CALLS as a purported comprehensive solution for access reform. Initial negotiations regarding the terms of the agreement with the FCC were conducted in private meetings that excluded key interested parties, such as the largest trade association for competitive local telephone carriers and the National Association Of State Utility

Consumer Advocates. (See Attachment 1.) Although the coalition claimed that CALLS was the product of the negotiated agreement and a compromise among parties with divergent interests, I would suggest that the agreed upon "solution" served only the coalition's interests. As approved by the FCC, CALLS shifted interstate recovery to the basic local subscriber directly through SLC increases and indirectly through an increase in the Universal Service Fund. From CALLS, the IXCs would receive access charge reductions while the LECs would receive an increase in the SLC cap, and, eventually all the gains from previous productivity offsets. I further suggest that the FCC itself would benefit because the CALLS proposal reinforces the perception of greater competition in the interstate long distance market.

The CALLS Order imposed higher SLCs on customers to recover cost previously recovered in the PIC charge paid by IXCs. Additionally, the CALLS Order diverts the historic benefits of the "X-factor" (which represents cost savings associated with productivity gains) away from the carrier common line element that flowed to consumers through relatively lower SLCs. Instead, this productivity benefit first flows to IXCs by reducing the traffic sensitive switching and transport access rate elements. Once the IXC rate reductions are achieved, the productivity gains net of inflation will simply be assumed to be zero and any actual benefit from productivity will directly flow to the bottom line of the LECs.

In addition to altering interstate rates, the FCC accepted the Coalition's request to add $650 million to the Universal Service Fund to implement access reductions. Consistent with the Coalition's recommendation, the FCC sanctioned this "settlement" without formally consulting the Universal Service Joint Board, which was created specifically to advise the FCC on matters related to universal service, and without full participation by interested consumer groups. Upon review, the courts found the $650 million to be

arbitrary and remanded this part of the order to the FCC. Despite the remand and the obvious link to universal service, the FCC, to date, has not referred issues related to the $650 million Universal Service Fund increase to the Universal Service Joint Board.

Public Counsel believes that it is obvious that, despite a lack of an adequate cost basis, the FCC favors shifting more cost recovery to the customer through mandatory charges the customer must pay for basic service. Therefore, the Missouri Commission should exercise its judgment independently on the basis of Missouri-specific information.

Q. AS PART OF THE CALLS PROPOSAL, DID THE IXCS PROMISE RATE REDUCTIONS ASSOCIATED WITH THE IMPLEMENTATION OF ACCESS RATE REDUCTIONS?

A. AT&T and Sprint did promise to flow through some rate reductions. However, to my knowledge, any alleged net flow-through has not been verified. The Commission should also note that within days after the FCC approved the CALLS plan, AT&T filed for increases in its basic schedule rates. (See Attachment 2.)

Q. DO YOU BELIEVE THAT THE FCC'S ACTIONS TO REDUCE INTERSTATE ACCESS RATES WITHOUT AN ADEQUATE COST JUSTIFICATION CONFLICT WITH STATE COMMISSIONS' EFFORTS TO ADOPT POLICIES CONSISTENT WITH STATE LAW AND THE FEDERAL TELECOMMUNICATIONS ACT?

A. Yes. In numerous proceedings before this Commission, parties have proffered interstate access rate levels as a benchmark for arguing that Missouri rates are inappropriate and excessive. This concept has been reinforced by other states which, in lemming-like fashion, followed the FCC's policy decision to reduce access without adequate cost

justification. Public Counsel recognizes that there is significant pressure on the Missouri Commission to mirror the interstate access rates and follow the lead of other states to make similarly based access reductions. However, this is not the appropriate model for the Missouri Commission's policy decisions regarding access rates. Missouri law charges the Commission with the responsibility to establish just and reasonable rates. Section 392.200, RSMo. and 392.185, RSMo. Congress charged the Missouri Commission with enforcing Section 254(k) of the Telecommunications Act, independent of decisions made by other states or the FCC. It mandated "...the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide these services." (FTA, Section 254(k) The Commission established this docket to investigate access costs based upon cost studies and other reliable and persuasive evidence of costs. That should remain the focus of this proceeding. Public Counsel supports the Missouri Commission's decision to evaluate costs prior to adopting proposals that would modify access rates with a potential impact on local rates.

Q. DO YOU BELIEVE THAT INTRASTATE ACCESS RATES SHOULD VARY AMOUNG STATES?

A. Yes. It must be recognized that access costs and, in turn access rates, may be lower in some states and for some carriers where the characteristics of local exchange service exhibit greater economies than in Missouri. In addition, there may be state specific factors that justify rate variations across states.

Q. PLEASE RESPOND TO THE TO THE CONCLUSIONS AND COST RESULTS PRESENTED BY STCG.

A. I agree with Mr. Schoonmaker's conclusion that in this investigation there is no evidence to support claims that access in general is overpriced. Further, I agree that setting company specific access rates should be addressed on a case-by-case basis with due considerations to customer impact and other relevant factors. Although STCG is not proposing that the STCG method be used in this proceeding to set specific rates, I want to make a point about the study clear. Public Counsel does not believe that STCG's method of allocating instate non-traffic sensitive costs is more appropriate than the Base Case method Mr. Schoonmaker also presents in his testimony. In the USF proceeding, Mr. Schoonmaker and I disagreed on an exact apportionment of joint and common cost. However, I believe that we would both acknowledge that, within some range, the choice of an exact apportionment is primarily a matter of judgment and discretion. Reducing the responsibility of access rates to recover the company's revenue requirement may threaten universal service goals for small rate of return companies that primarily derive revenue from two sources: access rates and basic local service rates. If the Commission decides to rely upon evidence in this proceeding as guidelines to establish company specific access rates in future rate cases, Public Counsel recommends that the Commission consider both the Base Case and STCG method to develop company specific access rates.

Q. PLEASE RESPOND TO THE TO THE CONCLUSIONS AND COST RESULTS PRESENTED BY MR. WARINNER ON BEHALF OF HOLWAY, KLM, IAMO AND GREEN HILLS TELEPHONE COMPANIES.

A. I agree with Mr. Warinner that the cost models in this proceeding tend to support the current access rates. I also share his concern that access reductions may not result in

lower end user rates to Missouri customers. Based on the lukewarm commitments for flow through promised to the FCC in response to CALLS and the vague commitment to flow through offered by IXCs in the Missouri USF proceeding, I believe that the Commission should have little confidence that IXC customers will see rate reductions as a result of reduced access rates. Given the state of the telecommunications industry today, companies may not be disposed to reduce revenues after expenses are reduced.

I strongly disagree with Mr. Warinner's proposal that ILECs should be allowed to implement revenue neutral access rate adjustments based on their choice of model results in this proceeding. Mr. Warinner's own testimony demonstrates that if local rates were adjusted to achieve revenue neutrality the local rate impact could vary greatly depending on whether a company chose to price access at stand-alone or incremental costs. Even if a more moderate adjustment were proposed, the change should be considered in a rate proceeding where some of the very issues Mr. Warinner identified such as calling scope and local rate impacts should be considered. Mr. Warinner's recommendation also does not address whether this revenue neutral rebalancing proposal may violate the statutory restrictions on rebalancing by price cap regulated companies.

Finally, Mr. Warinner identifies two additional potential mechanisms related to instate cost recovery: an instate SLC and use of State Universal Service funding to facilitate access reductions. Public Counsel strongly opposes both of these mechanisms. First, access usage is not an essential local service and, therefore, cannot be supported by the Universal Service Fund. Second, there is no reason to implement a state SLC. As demonstrated by the experience with SLCs at the federal level, they serve as a mechanism to give carriers guaranteed revenue recovery and to act as a vehicle to shift costs away from competitive forces. SLCs are not beneficial to consumers. As Mr. Warriner points out, a new SLC will be perceived by consumers as an increase in the

basic local rate. In my opinion, that is effectively what SLCs are. I also agree with Mr Larsen, testifying on behalf of MITG, that while both instate SLCs and state USF funded access reductions effectively increase local rates neither mechanism provides any guarantee that access reductions will flow back to customers in the form of toll rate reductions.

Q. PLEASE COMMENT ON MR. UNRUH'S TESTIMONY ON BEHALF OF SWBT.

A. It appears that although SWBT would prefer that CLEC access rates be capped at SWBT's rates for all service territories in Missouri, SWBT does not oppose maintaining the status quo. This is consistent with Public Counsel's recommendation included in my direct testimony.

Q. PLEASE GIVE YOUR COMMENTS IN RESPONSE TO MR BARCH'S TESTIMONY ON BEHALF OF SWBT.

A. Mr. Barch's LRIC results provide additional support for the conclusion reached by Staff and Public Counsel that access is priced above incremental cost and, therefore, is not receiving a subsidy. However, SWBT chose not to introduce an appropriate stand alone cost study in this proceeding so SWBT's approach cannot support claims that access subsidizes other services. The only cost study that SWBT submitted in this case allocates 0% of loop cost to access. Therefore, SWBT's cost study provides no meaningful insight into the practical problem of determining the actual cost of access or an appropriate rate for access because it does not include a study that allocates loop cost based on the purpose to which those facilities are put.

Joint use of the telecommunications network supports a shared cost allocation to all services that makes use of that network. Here are brief highlights of key authorities recognizing this principle.

U.S. Supreme Court:

> While the difficulty in making *an* exact apportionment of the Property is apparent, and extreme nicety *is* not required, only reasonable measures being essential (citations omitted) **it is quite another matter to ignore altogether the actual uses to which the property is put.** It is obvious that, unless an apportionment is made, the intrastate service to which the exchange property is allocated will bear an undue burden-to what extent is a matter of controversy. We think this subject requires further consideration, **to the end that by some practical method the different uses of the property may be recognized and the return properly attributable** to the intrastate service may be ascertained accordingly. (Emphasis added). Smith v. Illinois Bell Telephone, 282 U.S. 131, 150-151 (1930).

Federal Communications Commission:

> **Interstate access** is typically **provided using the same loops** and line cards **that are used to provide local service. The costs of these elements are, therefore, common** to the provision of both local and long-distance services. (Emphasis added). ¶ 237 Universal Service Order.

National Association of Regulatory Utility Commissioners:

> **Interexchange carriers should pay a portion of the NTS loop cost because they use the LEC's loop to provide their services. (Emphasis added).** Initial Comments of the National Association of Regulatory Utility Commissions, CC Docket No. 96-262 et al., January 29, 1997, page 13.

U.S. Congress:

> ...the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of **facilities used to provide those services**. (Emphasis added). 42 U.S.C. § 254 (k).

Public Service Commission of Missouri:

> Since both **local exchange service and toll service make use of the local loop, both services should contribute to the cost** of the local loop. (Emphasis added). RE: SWBT Co., 26 Mo. P.S.C. (N.S.) 344, 380 (1983).

While there are other examples of the statement of this public policy principle, it is plain that providing access customers with free use of the loop by proposing that 0% of loop cost is associated with access service violates both appropriate costing principles and common sense. It is undeniable that services other than basic local service are provided over the loop. If access was truly "costless," then IXCs would not be willing to pay any access charges. Without the LEC's loop, toll carriers would have to incur costs to build or purchase substitute facilities to originate and terminate toll calls. To serve the typical residential and business customer, IXCs choose not to use substitute facilities because such facilities are not cost free. Instead the IXCs recognize that there is an opportunity cost of not using the LEC's loop facilities, and so incur the cost of buying access as an intermediate good used in the production of their toll service.

Q. MR. BARCH ASSERTS THAT LOOP COSTS ARE DIRECTLY INCREMENTAL ONLY TO THE PROVISION OF BASIC LOCAL SERVICE. DO YOU AGREE WITH HIS ASSERTION?

A. No, he is incorrect. The loop is not incremental to any service. An assumption that costs are caused by the basic local customer and therefore incremental to basic local service

ignores the role of the entrepreneur, the firm's decision-maker, in causing costs. A true examination of causation would reveal that the cost of a local loop as physical plant is incurred when phone company executives make a decision to incur the cost of installing loop plant along a particular route to satisfy some anticipated demand for telecommunications services. The plant may be dedicated to a particular neighborhood or house or the plant might serve a broader class of customers or geographic area. The decisions that led to the act of installing the facilities were made by a provider of services. These decisions can be seen as the proximate cause of the cost. In making the decision, the entrepreneur made an investment and assumed risk. For both, he expected an appropriate return. Subsequently, if consumers do not decide to buy the house, or purchase telephone service, or do not purchase the quantity of services originally anticipated, the plant will sit idle. If they decide to purchase service, it will be utilized. The typical customer who purchases telecommunications services has little to do with the level of loop investment or the costs incurred. Cost causation justifies that the telephone company pay for constructing the facilities. However, it does not necessitate full recovery of the cost directly from a segment or even the full base of service customers.

Another problem with Mr Barch's view of causation is that it focuses narrowly on a customer's desire to obtain basic local service. Customers demand the ability to make and receive both local and long distance telephone calls and to enjoy the various ancillary services that carriers can provide. In fact, for some customers who live in rural areas, a desire to use toll service may be the compelling reason to subscribe. Local service may be of no value except in conjunction with the actual use of toll and other services.

Q. WHY DO SOME TELECOMMUNICATIONS PROVIDERS CONTINUE TO INSIST THAT COST CAUSATION REQUIRES THAT THE BASIC LOCAL SUBSCRIBER SHOULDER THE ENTIRE COST OF THE LOOP IN THE FACE OF SUBSTANTIAL EVIDENCE AND SIGNIFICANT REGULATORY DECISIONS TO THE CONTRARY?

A. I believe that the preoccupation with cost causation in the telecommunications industry is a result of regulated pricing of services. The key element explaining the fervor to use cost causation to saddle the entirety of loop costs on the basic subscriber is that it justifies a pricing policy that is particularly attractive to telecommunications firms.

Quite unique to basic local telecommunications service and some other utility services is the degree to which consumers tend to have inelastic demand (price insensitive demand) for the service and little choice of providers. The overwhelming majority of telephone subscribers are served by a multi-product monopoly provider of local service. Competitive pressure in its other markets and the continuation of a captive local ratepayer provides an incentive to shift the burden of cost recovery to the local customer, thereby supporting artificially low industry costs in the more competitive markets. Flowing through illusionary cost reductions to the more competitive markets by way of targeted price reductions directed toward subscribers with relatively more elastic demand (price sensitive demand) will act to stimulate the quantity demanded and increase revenue in the competitive markets while avoiding the risk associated with non recovery of costs. The incentive to justify cost shifts from the more competitive telecommunications service markets to the monopolized local exchange market is strong motivation to characterize loop cost as incremental to basic local service.

Q. PLEASE COMMENT ON MR. FARRAR'S TESTIMONY ON BEHALF OF SPRINT?

A. I disagree with his assertion that the FCC's Forward-Looking Economic Cost (FLEC) standard is the only appropriate standard to determine the cost of switched access. The Missouri Commission is not bound in setting instate retail rates by the FCC's choice of a FLEC standard adopted primarily for the purpose of determining intercompany compensation between competing local carriers under the Act. The purpose of this proceeding is not to determine the cost of unbundled network elements leased by one company from another. Likewise, this is not a case involving application of a specific aspect of the price cap statute to local exchange carriers. Instead, the primary focus of this proceeding is to evaluate the actual cost of providing access and the Commission has discretion regarding the standards for costing and pricing that it believes produce just and reasonable rates. Differing costing techniques provide different insight into cost related issues. For example, Sprint submitted only one cost study in this proceeding. Since it is a measure of incremental cost it can used to support the conclusion that Sprint access is not subsidized if price exceeds costs. As was true for SWBT's single submission, this cost study does not include measures of stand-alone costs. It allocates 0% of loop cost to access. Therefore, like SWBT's cost study, it provides no meaningful insight into the practical problem of determining the actual cost of access or in establishing an appropriate rate for access because it does not include a study that allocates loop cost based on the purpose to which those facilities are put.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes, it does.

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May 31, 2000

STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH, CONCURRING IN PART AND DISSENTING IN PART

Re: *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service, Report and Order, CC Docket Nos. 96-262, 94-1, 99-249, 96-45.*

The current structure of interstate access charges is irrational, and substantial revision of the Commission's access charge rules is needed. At present, the price of access to the local exchange carriers' networks bears very little relation to the way in which the costs of access are actually incurred - per-minute charges for access are far higher than they should be, whereas fixed charges are artificially low. As substitutes for traditional circuit-switched long-distance services, such as packet-switched Internet-based telephony, become more widely available, the regulatory distortions created by the Commission's rules are increasingly untenable.

Today's restructure of the access charge regime takes some steps in the right direction, and I concur in those aspects of this decision that permit price-cap local exchange carriers more fully to recover the fixed costs of the local loop through flat-rated charges. Indeed, I would have moved even more aggressively in this regard. I write separately, however, to express my profound disagreement with three aspects of this order.

The Process Through Which this Order Was Adopted Was Fundamentally Defective. This order is a product of a proposal that was originally submitted last summer by the Coalition for Affordable Local and Long Distance Service ("CALLS"). The Commission sought comment on this proposal last fall. *See* Notice of Proposed Rulemaking, *Access Charge Reform, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, CC Docket Nos. 92-262, 94-1, 99-249, 96-45 (Sept. 15, 1999).

In ordinary circumstances, the Commission would simply have rendered a decision on the CALLS proposal based on comments submitted by interested parties. The course the Commission took here, however, was very different. In the early part of this year, apparently prompted by objections to the original CALLS proposal raised by groups purporting to represent consumer interests, the Commission, acting chiefly through the Common Carrier Bureau, held a series of meetings with a select group of some - but by no means all - of the parties with interests in this proceeding. The substance of what was discussed at these meetings was not publicly disclosed. And a number of parties with interests in the outcome of this proceeding, including the Ad Hoc Telecommunications Users Committee, Time Warner Telecom, and the Association for Local Telecommunications Services, were not allowed to participate.

The Commission evidently refereed the negotiations at these meetings, and a "modified" CALLS proposal was reached near the end of February. Although this order announces that this "modified proposal" was put forth by members of the Coalition, *see* Order ¶ 1, it is undeniable that the proposal was a product of the negotiations that took place between the Commission and those parties that were allowed to participate in the negotiations - that is, members of the Coalition and some groups that purport to represent the interests of residential and small-business consumers. The Coalition's "modified proposal" simply memorialized aspects of the agreement that was reached between these parties and the Commission in the course of the meetings held in January and February of this year.

Even more dismaying, however, is what the "modified proposal" does not disclose. At some point in

Attachment 1

the course of the CALLS negotiations, proceedings that were unrelated to the issue of access charge reform became part of the negotiations. Incumbent local exchange carrier members of the Coalition apparently contended that they could not commit to certain modifications of the CALLS proposal unless they had confidence that two separate matters - a depreciation waiver item [(1)]

and the pending special access proceeding, which concerns the circumstances in which carriers may purchase combinations of unbundled loops and transport network elements[(2)] - *would* be resolved favorably to them. As a consequence, part of the final agreement reached by the participants to the CALLS negotiations concerned these two separate matters. With respect to this depreciation item, the Bureau agreed to recommend to the Commission that it approve the waiver that is the subject of this Notice and terminate the CPR audits. Additionally, the Bureau agreed to recommend to the Commission that it "clarify" the existing rules regarding special access and defer further rulemaking until 2001. The linkage between these unrelated items and the CALLS docket was very clear - at least internally. To brief the Commissioners and their staff regarding the outcome of the CALLS negotiations, the Bureau distributed briefing sheets outlining the incumbent carriers' concerns and making plain that the depreciation and special access matters had become a key part of the CALLS package. Nothing in this order, however, tells the public of this connection between this order and these other dockets.

In my view, the process by which the original CALLS proposal was modified is fundamentally inconsistent with principles of neutrality and transparency that must govern agency decisionmaking. By participating in the CALLS negotiations, the Commission plainly reached a view as to how the CALLS proceeding should be resolved, and its review of the comments it subsequently received regarding the "modified proposal" could not have been uninfluenced by the role it had played earlier. In addition, it was entirely improper for the Commission to have permitted the unrelated matters of depreciation and special access become part of the negotiations.

If the Bureau thought it would be helpful to narrow the differences between the various parties with interests in this docket in advance of a formal rulemaking proceeding, it could legally have done so by following the framework set forth in the Negotiated Rulemaking Act, 5 U.S.C. § 561 *et seq*. This statute provides for the formation of a committee that will, with the assistance of the relevant agency, negotiate to reach a consensus on a given issue. 5 U.S.C. § 563. An agency that undertakes a negotiated rulemaking must publish in the Federal Register a notice that, among other things, (1) announces the establishment of the committee; (2) describes the issues and scope of the rule to be developed; and (3) proposes a list of persons that will participate on the committee. 5 U.S.C. § 564 (a). In addition, the agency must give persons with interests that will be affected by the new rule an opportunity to apply to participate in the negotiated rulemaking process. *Id.* § 564(b). If the committee reaches a consensus, the statute requires it to transmit to the agency that established the committee a report on a proposed rule. *Id.* § 566(f). Significantly, although the agency may nominate a federal employee to facilitate the committee's negotiations, "[a] person designated to represent the agency in substantive issues *may not* serve as facilitator or otherwise chair the committee." *Id.* § 566 (c) (emphasis added).

None of those procedures was followed here. The public generally was not notified that the CALLS negotiations were taking place, nor were a number of parties that wished to be included in these negotiations permitted to participate. Not surprisingly, the final CALLS deal does not reflect the views of parties that were not included in the CALLS negotiations, such as the Ad Hoc Telecommunications Users Committee. For example, Ad Hoc has pointed out, in its comments and in a series of *ex parte* presentations to the Commission, that the retention of the multi-line business presubcribed interexchange carrier charge (or "PICC") imposes substantial costs on multi-line business consumers. *See, e.g.*, Letter from James S. Blasak to Harold Furchtgott-Roth (May 23, 2000). Ad Hoc contended that the multi-line business PICC is often marked up by long-distance carriers, with the result that business subscribers pay more than they otherwise would. It therefore proposed that the multi-line business PICC be consolidated with the multi-line business subscriber line charge (or "SLC") and billed directly from the price-cap LEC to the end-user, to avoid a mark-up

realize in access charge reductions and that they will make various rate plans available to different types of consumers. The Commission orders Sprint and AT&T to comply with all the supposedly "voluntary" commitments they have made in these letters. *See* Order ¶ 247.

In my view, the Commission lacks the power to regulate AT&T's and Sprint's rates in this manner. As the Commission recognized in 1996, the long-distance market is a competitive one, and the Commission therefore no longer regulates the rates of any long-distance carrier. Order, *Motion of AT&T To Be Classified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1996). In a competitive market, it is consumers - through their buying power - who tell carriers whether their rates are reasonable or not. Government regulation is no longer warranted. I therefore do not see how, even if these carriers fail to live up to their "commitment" letters, the Commission could possibly find these carriers' rates "unjust" or "unreasonable."

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1. *See* Further Notice of Proposed Rulemaking,*1998 Biennial Regulatory Review -- Review Of Depreciation Requirements For Incumbent Local Exchange Carriers, Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit, et al.*, CC Docket Nos. 98-137, 99-117 (Rel. Apr. 3, 2000).

2. *See, e.g.*, Supplemental Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98 (rel. Nov. 24, 1999).*

3. Even under the Negotiated Rulemaking Act, however, the Bureau could not have promised that this Commission would abide by the negotiated rulemaking committee's consensus. *See USA Group Loan Servs. Inc. v. Riley*, 82 F.3d 708, 714 (7th Cir. 1996).

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FOR IMMEDIATE RELEASE:
June 7, 2000

Statement of FCC Chairman William E. Kennard
Regarding AT&T Rate Increase

AT&T promised to pass on savings to all consumers. Their new rate plan does not do that. It is in our order and I am going to enforce it.

AT&T promised to tell their consumers which plan would be most cost effective for them. This was not done. I will also hold AT&T to this commitment.

- FCC -

Attachment 2