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June 9, 1989

Mr. Harvey G. Hubbs
Secretary
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

**Re: Case No. TR-89-239 - In the matter of International
Telecharge, Inc.'s tariff filing for operator services.**

Dear Mr. Hubbs:

Enclosed for filing in the above-captioned case is an original and fourteen (14) conformed copies of Staff's Response to International Telecharge Inc.'s Motion for Shortened Effective Date. Copies have been sent this date to counsel of record for International Telecharge and the Office of Public Counsel.

Thank you for your cooperation in this matter.

Sincerely,

Charles Brent Stewart
Assistant General Counsel

CBS:nsh

Enclosures

cc: Richard S. Brownlee, III
Office of Public Counsel

FILED
JUN 9 1989
PUBLIC SERVICE COMMISSION

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of)
International Telecharge Inc.'s) Case No. TR-89-239
Tariff Filing for Operator)
Services.)

FILED
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PUBLIC SERVICE COMMISSION

STAFF'S RESPONSE TO INTERNATIONAL TELECHARGE INC.'S
MOTION FOR SHORTENED EFFECTIVE DATE

Comes now the Staff of the Missouri Public Service Commission (Staff) and states the following in Response to International Telecharge Inc.'s (ITI's) Motion For Shortened Effective Date for ITI Tariff Sheets 1 through 40:

I. PROCEDURAL HISTORY

By Report and Order issued on April 17, 1989, in Case No. TA-88-218 (as consolidated), the Commission rejected ITI's proposed operator services tariffs in part because ITI's operator services were not provided ancillary to toll service. (Report and Order, pp. 7-11). ITI's tariffs were rejected even though ITI's proposed rates purported to mirror the rates charged by AT&T.

Prior to the April 25, 1989 effective date of said Report and Order, and prior to the Commission's denial of ITI's Application For Rehearing, ITI sought and received from the Cole County Circuit Court a temporary restraining order of the Commission's original decision. This temporary restraining order was issued by the Cole County Circuit Court, even though no injunction bond was posted as required by Civil Rule 92.02(c), and expired by its own terms when the Commission denied ITI's Application For Rehearing on April 28, 1989.

On May 1, 1989, ITI petitioned the Cole County Circuit Court, pursuant to Sections 386.510 et seq. RSMo 1986, for a Writ of Review and Stay of the Commission's decision in Case No. TA-88-218. See Attachment 1. The Court issued its Writ of Review on May 3, 1989, the appeal being docketed as Case No. CV189-506cc.¹ See Attachment 2.

¹American Operator Services Inc. and the Missouri Independent Payphone Association also have appealed the Commission's decision.

On May 12, 1989, the Court held oral argument on ITI's Motion For Stay. Also on May 12, 1989, approximately two hours before oral argument began in the Court, ITI attempted to file revised operator services tariffs with the Secretary of the Commission. These tariffs were rejected for filing, however, because they bore a May 12, 1989 effective date, contrary to Section 392.220 RSMo Supp. 1988 and 4 CSR 240-30.010.

After the Court received briefs on the stay issue from ITI, the Office of the Public Counsel, and the Commission, the Court held further oral argument on May 26, 1989. Later that day the Court issued its Order Granting Partial Stay with said stay secured by a \$1,000.00 suspension bond. See Attachment 3.

On May 30, 1989, the Secretary of the Commission received ITI Tariff Sheets 1 through 40 along with ITI's Motion For Shortened Effective Date For Good Cause Shown. This case has been docketed as Case No. TR-89-239. These tariffs apparently are identical to the tariffs which ITI attempted to file on May 12, 1989 except that the May 30, 1989 tariff sheets bear no effective date. In essence, the May 30, 1989 tariffs propose rates for intraLATA and interLATA operator services which reflect current AT&T rates in addition to containing all the conditions imposed by the Commission on Teleconnect Company, Dial U.S., and Dial U.S.A. in Case No. TA-88-218, with the notable exception of the condition regarding billing for traffic aggregator location surcharges.

In its Motion For Shortened Effective Date For Good Cause Shown, ITI alleges, inter alia, that: 1) the tariff's effective date is left blank pending the outcome of ITI's Motion; 2) the rates proposed in ITI's tariffs reflect rates for intrastate operator services which previously have been approved by the Commission for AT&T; 3) ITI's tariffs comply with all but one of the conditions enunciated in Case No. TA-88-218; and 4) ITI's tariffs have been filed in order to comply with the Cole County Circuit Court's Order Granting Partial Stay.

II. ARGUMENT

The Commission conceivably has four options regarding ITI's May 30, 1989 tariffs. The Commission could: 1) approve the tariffs; 2) suspend the tariffs and set the matter for hearing; 3) reject the tariffs; or 4) dismiss Case No. TR-89-239 because the Writ of Review and Order Granting Partial Stay, issued in Case No. CV189-506cc, precludes the Commission from exercising jurisdiction over ITI's operator services tariffs pending a determination of the merits on appeal. For the reasons set forth below, the Staff recommends that the Commission dismiss Case No. TR-89-239.

A. Option One: Approval

The Commission should not approve ITI's May 30, 1989 tariffs. Aside from some minor adjustments made to mirror current AT&T rates, and the inclusion of minor revisions adopting all of the Case No. TA-88-218 conditions, (except for the condition regarding billing for traffic aggregator location surcharges), ITI's May 30, 1989 tariffs are substantially the same as those previously rejected by the Commission as not being in the public interest. Not only would Case No. CV189-506cc be rendered moot if ITI's tariffs are now approved, but by proposing to continue billing traffic aggregator surcharges in its "new" tariffs, ITI continues to ignore the Commission's concern for the end user of operator services. Moreover, there is no reason to believe that ITI has somehow transformed itself from an Alternative Operator Service Company into an interexchange company, which provides operator services ancillary to toll service, between the time that the Commission issued its original decision and today. (See Report and Order, pp. 7-11).

These reasons alone make approval of ITI's May 30, 1989 operator services tariffs an unacceptable alternative.² There exists,

²The Staff has examined ITI's May 30, 1989 tariffs to see if ITI's proposed 1+ service could somehow be segregated, and ultimately approved, independent of ITI's proposed 0+ services. In Staff's opinion, the two types of services are so intertwined under the tariffs' terms that approval of ITI's 1+ services would be impossible at this time.

however, another compelling, but basic, reason to reject the approval option which, when applied, is equally persuasive against the suspension and the rejection options as well. The Commission is precluded by law from exercising any further jurisdiction over ITI's operator services tariffs due to the Writ of Review and the Order Granting Partial Stay issued by the Cole County Circuit Court in Case No. CV189-506cc.

The question of whether ITI should be permitted to provide intrastate operator services is at the very heart of ITI's appeal. Both ITI, in its Petition For Writ of Review, and the Cole County Circuit Court, in its Order Granting Partial Stay, clearly have stated that the Commission's Report and Order in Case No. TA-88-218 precluded ITI from submitting additional operator services tariffs for the Commission's consideration. See Attachment 1, p. 2; Attachment 3, pp. 1-2. Upon issuance of a writ of review, the Commission loses jurisdiction over the matters to be determined by the Court on appeal. Section 386.510 RSMo 1986; State ex rel. Campbell Iron Co. v. PSC, 296 S.W. 998 (Mo. banc 1927). For the Commission now to attempt to approve, suspend, or reject ITI's May 30, 1989 operator services tariffs while Case No. CV187-506cc remains undecided on judicial review invades the judicial review function reserved by statute to the courts.

Finally, the Cole County Circuit Court's Order Granting Partial Stay, contrary to ITI's apparent belief, does not by its terms direct the Commission to approve ITI's now pending tariffs nor does it direct ITI to make any tariff filing. ITI argued to the Court during the Stay proceedings that ITI was not required by law to receive Commission approval of its tariffs to continue operations.³ Assuming, arguendo, that ITI was correct, the Commission need not now take any further action regarding ITI since ITI current operations are "lawful" under the umbrella of the Court's stay. In any event, the Court's

³This issue, too, may be the subject of an appeal involving Case No. CV189-506cc, should a party decide to appeal the Circuit Court's Order Granting Partial Stay.

stay order was designed to merely preserve the status quo, i.e., ITI would be able to continue its operations, unlawful or not, pending a final decision by the Court on the merits of the appeal.

Additionally, the terms of the Court's Order Granting Partial Stay imposing the requirements that ITI charge only AT&T rates and that ITI comply with the Case No. TA-88-218 conditions as a condition of the Court granting the stay, in no way explicitly directs the Commission to approve tariffs to that effect, pending appeal or otherwise. Since the Court in effect rejected the Commission's argument that ITI was operating unlawfully, the Court's apparent intent was to not require any further Commission action regarding ITI.

ITI's allegation in paragraph 6 of its Motion, where ITI claims it has made this tariff filing to comply with the Court's Order Granting Partial Stay, misrepresents the Court's intent and represents just another disingenuous attempt by ITI to circumvent the regulatory and judicial processes. In fact, ITI first attempted to make this same tariff filing on May 12, 1989 -- long before the Court granted the stay. The process of judicial review of Commission decisions provides ITI sufficient opportunity to test the lawfulness and reasonableness of the Commission's decision. If ITI ultimately prevails on appeal, the Commission necessarily will be ordered to take further action in the case on remand, otherwise the Commission's original decision will stand. In the interim, the Court, and not the Commission, is required to further adjudge the matter.

The Commission, therefore, should not now be lured into taking some action that could be construed as extrajurisdictional nor should the Commission feel obligated at this point to revisit the claims and issues already determined in Case No. TA-88-218.

B. Option Two: Suspension

In addition to the jurisdictional problems mentioned above, suspension of the tariffs and setting the matter for hearing pursuant to Sections 392.220 and 392.230 RSMo Supp. 1988 should be rejected as an option. There is no reason to relitigate before the Commission issues which already have been decided and which are currently before the Court on appeal. Setting a hearing would be fruitless and would

constitute a waste of valuable time and resources since it is unlikely that the Commission will somehow change its determination regarding ITI absent a ruling on the merits from the Court. Moreover, even if the Commission would decide to suspend the tariffs and set a hearing in an effort to postpone a Commission determination, the Commission would be required by statute to act within eleven months or face the possibility of ITI's tariffs becoming effective by operation of law.

For these reasons, the Commission should not suspend ITI's tariffs and set the matter for hearing.

C. Option Three: Rejection

Should the Commission decide to overlook the jurisdictional issues and proceed, rejection of ITI's May 30, 1989 operator services tariffs represents a possible, if not the best, option. Rejection of the tariffs would be consistent with the Commission's prior decision; rejection also at least would quickly put the matter back in the Cole County Circuit Court, assuming of course that ITI would seek an appeal of the Commission's action. The main factor weighing against this option, however, is the possibility that the Cole County Circuit Court might view the Commission's action of assuming jurisdiction and then rejecting the tariffs as somehow being in violation of the Court's authority. The Court might view such Commission action as being in clear contravention of the Court's order staying the Commission's Report and Order as it pertains to ITI and the Court's intent to preserve the status quo, lawful or otherwise, as of May 26, 1989.

D. Option Four: Dismissal

In Staff's view, dismissing Case No. TR-89-239 on the grounds that Case No. CV189-506cc precludes the Commission from taking any further action in regard to ITI's operator services tariffs pending appeal, makes the most sense for the Commission at this time. A dismissal on these grounds minimizes the risk of the Commission taking any action which might be construed as an interference with the Circuit Court's authority over Case No. TA-88-218 while at the same time it avoids all of the practical and legal problems which no doubt would arise if the Commission decided to approve, suspend, or reject ITI's May 30, 1989 tariffs. While it is likely that ITI will appeal

the dismissal, the burden then would be shifted to ITI to prove to the Court that the Commission was somehow required to take an action, or actions, which would either render moot the issues in Case No. CV189-506cc or which would, no doubt, create a second appeal docket involving the very same issues now before the Court.

CONCLUSION

For all the foregoing reasons, the Staff recommends that the Commission dismiss Case No. TR-89-239 on the grounds that Case No. CV189-506cc, and the Court's Order Granting Partial Stay issued therein, precludes the Commission from acting upon ITI's tariffs at this time. Not only is there no good cause to shorten the effective date of ITI's "new" tariffs, there is no good cause to do anything but dismiss Case No. TR-89-239.⁴ Case No. TA-88-218 now is properly within the jurisdiction of the Cole County Circuit Court and the Commission should resist ITI's apparent attempt to bypass the regulatory and judicial review processes established by law.

Respectfully submitted,

Charles Brent Stewart

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all parties of record on this 9TH day of JUNE, 1989.

Charles Brent Stewart

⁴Presumably, the tariffs are intended by ITI to become effective by operation of law 30 days after May 30, 1989 if the Commission fails to act. ITI's position in this regard may be arguable at best since the tariffs themselves bear no effective date. However, prudence would seem to require a prompt ruling by the Commission in any event.