

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

In the Matter of the Investigation of the)	
State of Competition in the Exchanges of)	Case No. TO-2001-467
Southwestern Bell Telephone Company.)	

**OFFICE OF THE PUBLIC COUNSEL’S RESPONSE TO
AT&T MISSOURI’S MOTION TO DISMISS**

The Office of the Public Counsel states the following in response to AT&T Missouri’s Motion to Dismiss:

1. The Office of the Public Counsel concurs in the reply of NuVox Communications of Missouri, Inc. (NuVox), XO Communications Services, Inc. f/k/a XO Missouri, Inc. (XO), MCImetro Access Transmission Services, LLC and MCI Communications Services, Inc. f/k/a MCI WorldCom Communications, Inc. (MCI) to AT&T Missouri’s Motion to Dismiss. AT&T cannot simply ignore the outcome of the Court of Appeals decision and nullify its effect. To do so would deprive the ratepayers of their judicial remedy and a successful outcome and decision from the Court of Appeals.

2. AT&T is incorrect about the lawfulness of the existing rates in exchanges without a competitive classification because the Court of Appeals reversed the PSC’s decision holding competitive classification by operation of law. At the motion’s paragraph 10, AT&T claims:

“With regard to those exchanges where business and/or residential services have not yet been declared to be competitive, the current tariff prices remain lawful and any future proposed rate changes must comply with applicable law at the time AT&T Missouri proposes any such price change. In those exchanges where the relevant business or residential services have not been declared competitive, any future price changes for

services, including those subject to the remand, must comply with the price cap statute.”

However, the existing rates do not enjoy the presumption of correctness. The Court of Appeals reversed and remanded the Commission’s decision that certain services were competitive by operation of law under Section 392.370, RSMo. and said that the determination of a competitive status must be made based upon Section 392.245. The Court of Appeals issued its mandate on March 3, 2005, and the Cole County Circuit Court issued its mandate on March 18, 2005.

Section 386.490 3. provides that “Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission, **unless such order be unauthorized by this law or any other law** or be in violation of a provision of the constitution of the state or of the United States.” (emphasis supplied) Public Counsel successfully carried out its burden under Section 386.430 to have the PSC’s decision declared unlawful.

Any change of rates in violation of the price cap was without legal authority since the competitive classification was unlawful and not authorized by the applicable statute. AT&T cannot gain the benefits of the PSC’s erroneous legal conclusion and thereby negate the judicial decision. The Commission and AT&T must comply with the Court’s declaration of the law no matter how many or few customers are affected.

3. Public Counsel objects to any outcome that does not require AT&T to return the rates for the services at issue back to the price cap level as of the PSC’s order

effective date in the exchanges still classified as price cap regulated. AT&T has no authority to treat those services in those exchange other than price cap regulated.

4. Public Counsel departs from the CLECs' view in that it does not believe the price cap rates for nonbasic services are entitled to any time or annual price adjustment. Increases not made are waived. See, *State ex rel. Sprint Missouri, Inc. v. PSC*, 165 S.W.3d 160 (Mo banc 2005). Public Counsel asks the Commission to order AT&T to roll back the rates to the appropriate price cap levels for these services in the exchanges not designated by the PSC as competitive under SB 357. It further supports the CLECs' recommendation that the PSC Staff review the rates for strict compliance with the price cap law and the Court of Appeals' decision and file a report with the Commission.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

/s/ Michael F. Dandino

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically transmitted, mailed or hand-delivered to all counsel of record on this 21st day of December 2005.

/s/ Michael F. Dandino
