BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of AT&T Communications of the Southwest Inc.'s Proposed Tariff to Establish a Monthly Instate Connection Fee and Surcharge.	)))	**Case No. TT-2002-129**
In the Matter of Sprint Communications Company, L.P.'s Proposed Tariff to Introduce an In-State Access Recovery Charge and Make Miscellaneous Text Changes.	))))	**Case No. TT-2002-1136**
In the Matter of MCI WorldCom Communications, Inc.'s Proposed Tariff to Add an In-State Access Recovery Charge and Make Miscellaneous Text Changes.	))))	**Case No. XT-2003-0047**
In the Matter of MCI WorldCom Communications, Inc.'s Proposed Tariff to Increase its Intrastate Connection Fee to Recover Access Costs Charged by Local Telephone Companies.	))))	**Case No. LT-2004-0616**
In Re the Matter of Teleconnect Long Distance Services and Systems Company, a MCI WorldCom Company d/b/a TelecomUSA's Proposed Tariff to Increase its Intrastate Connection Fee to Recover Access Costs Charged by Local Telephone Companies.	))))))	**Case No. XT-2004-0617**

OFFICE OF THE PUBLIC COUNSEL'S REPLY BRIEF

On remand from the Court of Appeals and the Circuit Court, the Public Service Commission's duty is the same at it was when these cases first arose: to make a decision based upon the competent and substantial evidence in the record on whether the access recovery surcharges proposed by these long distance companies are just and reasonable and not discriminatory as provided in Section 392.200, RSMo. As discussed in its Initial Brief, Public Counsel suggests that the record does not support a finding that the surcharges are just and reasonable and not discriminatory. Nothing in the carriers' briefs

have demonstrated that there is competent and substantial evidence to support either a just and reasonable finding or a finding that the disparate treatment of some customers of these carriers with the imposition of the surcharges is not a form of discrimination prohibited by Section 392.200, RSMo.

Just And Reasonable

Competition does not excuse arbitrary, unjust and unreasonable action

The carriers rely heavily on their status as competitive companies in a competitive market for "proof" that the surcharges are just and reasonable. Competition does not make an unfair and unreasonable charge just and reasonable solely on grounds that the customer has some other choice. The public interest requires some measure of oversight to insure that companies operating in the marketplace do not overreach, treat consumers unfairly, act unreasonably or violate the rights of consumers.

The carriers point to Senate Bill 237 amendment to Section 392.500, RSMo as authority to exclude PSC review of competitive service rates for just and reasonableness. (392.500. Except as provided in ***subsections 2 to 5 of*** section 392.200, proposed changes in rates or charges, or any classification or tariff provision affecting rates or charges, for any competitive telecommunications service, shall be treated pursuant to this section as follows: ….. ***amendment in bold and italics***) The plain reading of that statute does not support that position.

Section 392.185, RSMo identifies the goals and legislative intent of all telecom laws and remain unchanged; just and reasonable rates and the promotion of competition when consistent with the protection of the ratepayers and public interest are still the expressions of the legislature's purpose The exclusion of any review places these

companies outside the PSC's jurisdiction to carry out these purposes under its authority to ensure just and reasonable rates even under the most egregious and unreasonable circumstances.

To carry out its statutory duties and effectuate the legislative policy objectives embodied therein, the commission must supervise, regulate and control the public utilities within its jurisdiction. *Kansas City Power & Light Co. v. Midland Realty Co., 93 S.W.2d 954 (banc 1936),* Aff'd, *300 U.S. 109, 57 S.Ct. 345* (1937). The ultimate purpose of ratemaking is to fix a rate which is just and reasonable both to the utility and to its customers. *State ex rel. Valley Sewage Co. v. Public Service Comm'n, 515 S.W.2d 845, 851 (Mo.App.1974).*

The Commission's oversight and authority to suspend and investigate compliance with the law is an essential power of the PSC to carryout the legislative purpose of Chapters 386 and 392, RSMo. In Case No. TO-99- 596, *In re Competitive Local Exchange Telecommunication Companies*, June 13, 2000, the Commission identified the scope of its jurisdiction and duty:

> "In construing Chapter 392, including Section 392.361.3, the Commission must be mindful of the contents of Section 392.185, RSMo Supp. 1999, which has been set out in part above. In addition to reasonable prices and the protection of ratepayers, that section provides that the purpose of the chapter is to "[p]ermit flexible regulation of competitive telecommunications companies and competitive telecommunications services[.]" Section 392.185(5), RSMo Supp. 1999. Additionally, Section 392.200.4(2), RSMo Supp. 1999, declares that "[i]t is the intent of this act to bring the benefits of competition to all customers[.]"

Arbitrary rates are unjust and unreasonable

In *State ex rel. Sprint Spectrum v. Mo. PSC*, 112 SW 3d 20, 27-28, the Court held that a two cents adder surcharge for wireless carriers' use of the local telephone

companies' loop to terminate wireless calls lacked evidentiary support that the surcharge bears a calculable relationship to the wireless use of the loop facilities. Rejecting the testimony that this type of surcharge has been used in the past to establish the current validity or justification for the $.02 adder, the Court found the surcharge was neither just nor reasonable and held it was an "arbitrary determination" based on the need to have the wireless companies "make some contribution" to the unspecified overall costs of the network facilities.

As Ms Meisenheimer discusses in her testimony, the surcharge has no relationship to the access costs incurred, is based on comparisons with the interstate access rates and does not take into consideration the role of the Federal Subscriber Line Charge in those interstate rates. Meisenheimer's Rebuttal Testimony (Ex. 9), p. 13-16. The surcharges do not have a calculable relationship, but are merely an arbitrary assignment of a cost to residential customers in Missouri to "make some contribution" to the unsubstantiated claim of "excessive" access rates.

The courts have said that utility tariffs when properly approved have the force and effect of law and the principles of statutory construction should be employed to apply them. *State ex rel. Laundry, Inc. v. Public Service Commission*, 34 SW 2d 37, 43-45 (Mo 1931) Just as there must be some reasonable connection between the purpose of legislation and the effect of the legislation, Public Counsel suggests that there must be some reasonable and equitable connection between the purpose of this special surcharge designed for a specific purpose and the burden placed on the customer. *State ex rel. Laundry, Inc. v. Public Service Commission, supra.* The surcharges fail.

Given the stated purpose of the surcharge it is simply unfair and unreasonable to assess it to residential customers and exempt business customers. In a like manner, it is unfair and unreasonable to make a low volume toll customer pay the same as a high volume toll customer when access charges accrue based on minutes of use. Local customers of the carriers who call customers of independent small companies alleged to have "excessive" access rates cause the carriers to incur the same termination access charges; therefore, the exemption is unfair and unreasonable.

Discriminatory

Given that the surcharges apply to residential customers and exempts the carriers' local service customers, the PSC must determine whether the carriers presented evidence that reasonably justifies this disparate treatment of residential and business customers, urban and rural customers, and the carrier's local service customers and its other residential toll customers based upon reasonable and fair conditions which equitably and logically justify these tariffed rates. *State ex rel. DePaul Hospital School of Nursing v. PSC*, 464 SW2d 737 (Mo App 1970).

Because the carriers have identified that recovery of "excessive" access costs incurred in Missouri by its Missouri toll customers as the specific objective of the surcharge, before approval can be granted, the PSC must identify evidence in the record that is based upon reasonable and fair conditions which equitably and logically justify that high volume users pay the same as non-traffic generating customers or customers with very low number of calls and few minutes of use. Because the courts and the statutes demand that persons receiving similar service under similar circumstances cannot be charged for such service in an arbitrary, designed, dissimilar manner, the carriers'

evidence must demonstrate reasonable and fair conditions which equitably and logically justify low volume users pay a disproportionate share of the access cost recovery when their usage has no nexus with the amount of recovery these customers are expected to contribute. The evidence does not provide that support.

Section 392.200 (2) and (3), RSMo do not exclude the pricing policies and rates of competitive companies and competitive services. That is a legal conclusion and factual finding that the carriers cannot escape or avoid.

The Court of Appeals was unequivocal that the orders that approve these surcharges must be based upon evidence and articulate the factual basis for its conclusion that the alleged disparate treatment of residential, low volume, and rural customers was not a violation of § 392.200.2 and .3 and that articulate the factual basis for the Commission's conclusion that the proposed tariff revisions are just and reasonable.

The evidence necessary to justify disparate treatment must: demonstrate:

(1) The difference in treatment is not arbitrary.

(2) Any differences in charges must be based upon differences in service and there must be some reasonable relationship in the amount of difference. *State ex rel. Laundry, Inc. v. Public Service Commission*, 34 SW 2d 37, 45 (Mo 1931). The carriers have failed to adduce evidence that the service provided to residential customers subjected to the surcharge is any different from the service provided the exempt customers that bears some relationship to the cost recovery of access rates and would justify any additional charge above the per minute rate.

(3) Any difference in rates must be "based upon a reasonable and fair difference in conditions which equitably and logically justify a different rate…." *State ex rel.*

City of St. Louis v. Public Service Commission, 36 SW2d 947, 950 (Mo 1931); *State ex rel. DePaul Hospital School of Nursing v. PSC*, 464 SW2d 737, 740 (Mo App 1970). There is no evidence that justifies the surcharge applied to residential customers based upon any reasonable or fair difference in conditions.

There is no cast-iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service, must have "some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination." *State ex rel. Laundry, Inc. v. Public Service Commission*, 34 SW 2d 37, 44-45 (Mo 1931) The carriers have not demonstrated any evidence that provides a reasonable justification why residential customers should bear the sole burden of recovery of Missouri access charges through a surcharge while the carriers' local customers and business customers escape this cost recovery scheme.

A utility may have two or more rates for different characters of service, but to have two or more rates for the *same* service is the thing forbidden by the non-discrimination statute. *State ex rel. McKittrick* ***v.*** *Missouri Public Service Commission*, 175 S.W.2d 857, 866 (Mo 1943); *DePaul, supra.* The surcharge is not for an additional service, but for the same service, but different customers are charged a higher rate through the surcharge than other customers.

Conclusion

Public Counsel asks the Commission to protect the customers from this arbitrary pricing scheme that works to discriminate against Missouri residential customers. These

customers have been assessed a charge not for service, but to recover costs attributable to the entire class of long distance customers, not just residential long distance customers. The surcharge must be viewed for what it is: a separate rate for the same service without justification for its imposition and without a reasonable justification for the difference in the rate (the surcharge versus no surcharge).

Public Counsel urges the Commission to reject the tariffs as unjust, unreasonable, and discriminatory and, further, asks the Commission to commence remedial action to refund or credit the customers for the invalid surcharges, or in the alternative, to open an investigation into possible remedies to make the ratepayers whole for the exaction of these invalid rates.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

/s/ Michael F. Dandino

BY:_____

Michael F. Dandino (24590)
Deputy Public Counsel
P.O. Box 2230
Jefferson City, MO 65102
(573) 751-4857
(573) 751-5559
Fax (573) 751-5562
email: mike.dandino@ded.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was emailed, mailed or hand delivered this 3rd day of November 2005 to the following attorneys of record:

General Counsel
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

Paul DeFord
Lathrop & Gage
2345 Grand Boulevard, Suite 2500
Kansas City, MO 64108

Kevin Zarling
AT&T Communications of the Southwest
919 Congress Street, Suite 900
Austin, TX 78701

Carl Lumley
Curtis, Oetting, Heinz, Garrett & Soule
130 S Bemiston, Suite 200
St. Louis, MO 63105

Kenneth Schifman
Sprint
6450 Sprint Parkway
MS: KSOPHN0212-2A303
Overland Park, KS 66251

Brett Leopold
Sprint
6450 Sprint Parkway
MS: KSOPHN0212-2A353
Overland Park, KS 66251

/s/ Michael F. Dandino