

**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) **Case No. TT-2002-129**
Monthly Instate Connection Fee and Surcharge.)

In the Matter of Sprint Communications Company,)
L.P.'s Proposed Tariff to Introduce an In-State) **Case No. TT-2002-1136**
Access Recovery Charge and Make Miscellaneous)
Text Changes.)

In the Matter of MCI WorldCom Communications,)
Inc.'s Proposed Tariff to Add an In-State Access) **Case No. XT-2003-0047**
Recovery Charge and Make Miscellaneous Text)
Changes.)

In the Matter of MCI WorldCom Communications,)
Inc.'s Proposed Tariff to Increase its Intrastate) **Case No. LT-2004-0616**
Connection Fee to Recover Access Costs Charged)
by Local Telephone Companies.)

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) **Case No. XT-2004-0617**
Recover Access Costs Charged by Local)
Telephone Companies.)

OFFICE OF THE PUBLIC COUNSEL'S MOTION FOR REHEARING

The Office of the Public Counsel, pursuant to Section 386.500, *et seq.* RSMo. and 4 CSR 240-2.160, specifically sets forth the reasons warranting a rehearing and asks the Missouri Public Service Commission to grant rehearing of its REPORT AND ORDER dated December 13, 2005 and effective December 23, 2005 that denies Public Counsel's motions to reject tariff filings made by several long distance telecommunications

companies to create, or increase the amount of instate access recovery fees and surcharges for certain long distance customers.

1. Public Counsel requests rehearing because the decision is unlawful, unjust, and unreasonable and is arbitrary, capricious, unsupported by substantial and competent evidence, and is against the weight of the evidence considering the whole record, is in violation of constitutional provisions of due process, is unauthorized by law, made upon an unlawful procedure and without a fair trial, and constitutes an abuse of discretion, all as more specifically and particularly described in this motion.

2. These consolidated cases concern five separate tariffs filed by AT&T Communications of the Southwest, Inc. (Case No. TT-2002-129); MCI WorldCom Communications, Inc. (Case Nos. XT-2003-0047 and LT-2004-0616); Teleconnect Long Distance Services and Systems Company, a MCI WorldCom Company d/b/a TelecomUSA (Case No. XT-2004-0617); and Sprint Communications Company, L.P. (Case No. TT-2002-1136). The companies filed tariffs in 2001, 2002, and 2004 that implemented or increased an instate access recovery charge added to residential customer bills for long distance toll service. Public Counsel filed motions asking the Commission to reject the tariffs. The Commission rejected these motions and approved the tariffs. Public Counsel sought judicial review of the original orders establishing the instate access recover charges and the Missouri Court of Appeals reversed the PSC's orders and ordered the cases remanded to the Commission for further action. *State ex rel. Coffman v. Public Service Commission*, 150 S.W.3d 92 (Mo. App. W.D. 2004)

3. Public Counsel suggests that the Commission overlooked relevant and material matters of fact and law in its decision when it made the legal conclusion and based its decision that the “just and reasonable” requirement of Section 392.200.1 does not apply to the competitive rates offered by competitive companies that are challenged in these cases. The basis for this ruling is that the PSC said that Section 392.500, RSMo as amended by Senate Bill 237, removed the authority for the Commission to enforce the just and reasonable requirement for rates for competitive services. Nothing in SB 237’s amendment suggests that the PSC no longer has that authority.

4. The amendment provides:

“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:

(1) Any proposed decrease in rates or charges, or proposed change in any classification or tariff resulting in a decrease in rates or charges, for any competitive telecommunications service shall be permitted only upon the filing of the proposed rate, charge, classification or tariff after [seven] **one** days' notice to the commission; and

(2) Any proposed increase in rates or charges, or proposed change in any classification or tariff resulting in an increase in rates or charges, for any competitive telecommunications service shall be permitted [only upon] **ten days after** the filing of the proposed rate, charge, classification or tariff and upon notice to all potentially affected customers through a notice in each such customer's bill at least ten days prior to the date for implementation of such increase or change, or, where such customers are not billed, by an equivalent means of prior notice.

5. The phrase “Except as provided in **subsections 2 to 5 of** section 392.200” in the context of the rest of that statute does not deprive the PSC of its duty to consider the just and reasonable aspect. Section 392.185 (4) “Ensure that customers pay only reasonable charges for telecommunications service” remains unchanged as a legislative

purpose. *See also*, Section 392.190. “The provisions of sections 392.190 to 392.530 shall apply to telecommunications service between one point and another within the state of Missouri and to every telecommunications company.” SB 237 did not alter the scope of the application of these sections.

6. Public Counsel suggests that the Commission overlooked relevant and material matters of fact and law in its decision when it made its decision that the access recovery charge was just and reasonable when there was no evidence adduced how the charge bears a reasonable relationship to its stated purpose to recover access charges on intrastate calls paid to local telephone companies to use their local phone lines. The surcharge is not a fee for a service, but is admitted to be a cost recovery device to recover “excessive” Missouri intrastate access rates paid by the carriers. However, the PSC did not examine the nexus between the purpose and the application of the recovery charge to only a part of the class of residential customers (those not the IXC’s local customers) and to only a part of the class of all customers who cause the IXCs to incur the so called “excessive” access charges (residential) while exempting business members of that same class.

7. The PSC did not consider the lack of a reasonable relationship between the incidence on whom the charge falls upon and stated purpose to recover the access charges the carriers pay to the local telephone companies. Based upon the stated purpose of the charge and who pays the charge, it is unjust, unreasonable, and discriminatory without a justifiable basis. The 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, Mo. Sup., 327 Mo. 318, 36 S.W.2d*

947, 950, The record does not contain such evidence and the order does not make these required finding of facts.

8. The PSC's decision is not supported by substantial and competent evidence in the record. There was no evidence to show that the operation of toll service to residential customers and other non exempt customers or low volume or rural customers was different in any material respect than the toll service provided to exempt customers, business customers and high volume and urban customers of the carriers. As such there is no evidence to support a reasonable and fair basis and a logical and equitable justification to treat these ratepayers any differently. In addition, the PSC failed to make any specific findings of fact that demonstrate that such discrimination was not unlawful or unreasonable and was consistent with the holdings in *State ex rel. City of St. Louis v. Public Service Commission, Mo. Sup., 327 Mo. 318, 36 S.W.2d 947, 950,*

9. Persons receiving similar service under similar circumstances cannot be charged for that service in an arbitrary, designed, dissimilar manner. . *State ex rel. DePaul Hospital School of Nursing v. PSC, 464 SW2d 737 (Mo App 1970); State ex rel. McKittrick v. Public Service Comm., 352 Mo. 29, 175 S.W.2d 857 (1943).*

10. The Commission confuses Public Counsel's objection to the recovery of a usage sensitive charge by a flat rate fee as an attack on all flat rates. Public Counsel position is that the use of a non-usage sensitive charge to specifically recover a specific cost incurred by the company on a usage basis is unreasonable and unjust. Just because other services are charged on a flat rate does not in itself justify this surcharge; each determination of reasonableness, justness and discriminatory effect must be made on its own facts and a broad brush cannot cover all surcharges. Each residential customer pays

the same amount no matter how many toll calls are made and no matter how long the calls are. The Commission's conclusion ("there is no reason to believe that this flat rate is any more discriminatory than any other flat rate that is commonly charged by a telecommunications company for other services.") lacks any factual findings to support that bald conclusion. The companies failed to adduce evidence to justify discrimination.

11. Public Counsel suggests that the Commission overlooked relevant and material matters of fact and law in its decision when it held that the access recovery charge was just and reasonable. There is no evidence in the record to support that holding. Public Counsel's second and fifth arguments are not based on a contention that the companies improperly calculated the amount of the access recovery fees, but rather the very methodology used is arbitrary, unjust, unreasonable in that the methods used have little relationship to proof that Missouri access rates are "excessive" and that the charge to customers to recover specific costs are reasonably related to the purpose and the costs. This special assessment to recover costs is not the charge for a service, but a cost recovery device that has little logical connection to its purpose.

12. The flat rated charge distorts the true cost of service to the consumer by using an indirect means to raise rates (and recover a cost of doing business) via a surcharge on a cost element that is already part of the existing per minute rate. The access recovery charge increases the effective price paid per minute by residential customers. The separate and distinct line item charge is in reality a rate increase dressed up in different terminology to disguise its true effect. This flat rate charge unfairly inflates the effective per minute rate and hides the true cost to the consumer. The Commission failed to look at the impact of the access recovery surcharge and the

resultant effective price as an indicator of the discriminatory impact of the proposed tariff.

13. Public Counsel suggests that the Commission overlooked relevant and material matters of fact and law in its decision when it held that the access recovery charge was just and reasonable even though this flat rate surcharge is applied to residential customers with little or no usage of in-state long distance service who pay the same charge as high volume users with significant number and minutes of in-state calling. This results in an undue and unreasonable preference and advantage to those high volume customers and an unreasonable prejudice and disadvantage to low volume users of in-state calling, all in violation of Sections 392.220.2 and .3, RSMo.

14. The Commission's approval of the instate access cost recovery surcharges unfairly assesses customers with no long distance charges or de minimus charges, or customers with only interstate toll charges. This is discriminatory, unreasonable, and unjust in that customers who do not cause carriers to incur instate access charges or have little usage still bear the burden of the access cost recovery. These customers are making a disproportionate contribution to the cost recovery. The PSC recognized that this was the effect of the surcharges, but held that this does not indicate that “the surcharge is in any way unjust or unreasonable. It merely indicates that the surcharges are flat rates. . . .

Thus the fact that the access recovery fees in question are flat rates is not a basis for finding them to be unjust or unreasonable.” The issue is that this charge has the effect of making customers pay a special charge for a specific purpose in an arbitrary and unreasonable manner and where there is no basis to recover these costs from these customers.

15. The Commission overlooked relevant and material matters of fact and law in its decision when it held that the access recovery charge was just and reasonable when the tariff only applies to residential customers and unreasonably exempts business service customers. Business customers cause IXCs to incur access costs but are exempt from the recovery of those costs. The evidence was that there was no difference in the access fees charged for calls by business and residential customers. Therefore, the PSC's ruling that differences between the cost for switched access that a long distance carrier will incur for service to business customers and to residential customers does not justify total exemption. This unreasonable and discriminatory exemption shifts the whole burden of recovering access costs to residential customers even though business customers contribute to the access cost burden.

16. The Commission overlooked relevant and material matters of fact and law in its order when it held that the access recovery charge was just and reasonable and not discriminatory because the surcharge is a flat rate non-usage sensitive charge to recover a cost paid by the company (access charges) that are incurred on a usage sensitive basis. The effect of the surcharge is that high volume users pay the same as non traffic generating customers or customers with very low number of calls and minutes of use. Low volume users pay a disproportionate share of the access cost recovery when usage has no bearing on the amount of recovery these customers are expected to contribute. The access recovery charge is discriminatory because it is applied as a flat rate without regard to the type, amount and duration of toll calls and the resultant access charges incurred by the company, if any.

17. The charge results in an unreasonable and prejudicial disadvantage for presubscribed customers that have a low amount or no toll calling. Customers with considerable toll calling are given an undue and unreasonable preference and advantage by paying the same amount per month as those customers with low volume in violation of Section 392.200.3 RSMo. and Section 392.200.2, RSMo 2000. The PSC's order fails to resolve and justify this unlawful and unreasonable discrimination.

18. The Report and Order does not make specific findings and state how and in what manner this discriminatory method of assessing a cost recovery charge is reasonable and proper and in the public interest. There was no findings of fact or competent and substantial evidence that this discrimination and the recovery of these costs in this manner is based upon reasonable and fair conditions which equitably and logically justify this tariffed rate. *State ex rel. DePaul Hospital School of Nursing v. PSC*, 464 SW2d 737 (Mo App 1970).

19. The decision does not make specific findings of any differences in charges that are based upon differences in service and have some reasonable relationship in the amount of difference. *State ex rel. Laundry, Inc. v. Public Service Commission*, 34 SW 2d 37, 45 (Mo 1931).

20. The decision does not make specific findings of any difference in rates where the difference is "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)

21. The decision fails to provide reasonable justifications related to differences in toll service and for the assessment of residential customers while exempting business customers based upon reasonable and fair conditions.

22. The PSC's conclusion that the access rates charged by Missouri companies are higher than such rates in other states does not justify the surcharge and does not provide any material and reasonable basis for the proposed manner of assessing and exempting customers.

23. The Commission overlooked relevant and material matters of fact and law in its decision when it indicates that because of the number of competitors for long distance service and other available technologies the surcharges are just and reasonable. The Commission failed to consider the purposes of the telecommunications law set out in Section 392.185, RSMo. With this decision on these surcharges, the PSC delegates all protection of the consumer to the companies and the marketplace. The PSC erroneously ruled that since customers can avoid the surcharge by changing carriers or going wireless, there is no need to protect the consumer and no need for the PSC to exercise its jurisdiction. Competitive options or the availability of plans without a surcharge does not justify unjust, unreasonable and discriminatory charges. Section 392.185, RSMo serves as a ban on unjust and unreasonable and unlawful charges; unjust, unreasonable and discriminatory charges are not acceptable for the protection of the ratepayer and for the protection of the public interest even if the customer can go to another carrier for its long distance service.

24. The PSC's decision is inconsistent with its statutory duty to serve the public interest under Section 392.185 (4) and (6), RSMo to protect the consumer. The

Commission cannot ignore its duty in Section 392.185 (4) to “Ensure that customers pay only reasonable charges for telecommunications service” by stating that it need not review the charges since customers can go somewhere else. Likewise, the Commission cannot completely delegate to competition the protection of consumers when the emphasis of Section 392.185 (6) is to allow competition to “function as a substitute for regulation **when consistent with the protection of the ratepayers and otherwise consistent with the public interest.**” Protection of ratepayers and the promotion of the public interest is paramount to the functioning of competition.

25. The protection offered by “full and fair competition” occurs only when there is widespread knowledge and information readily available for consumers to investigate alternatives and understand the price and service variations offered by the firms in the marketplace. Inclusion of the surcharges as line-item charges rather than as part of the rate prevents the consumer from making an informed choice. While long distance carriers now market plans to consumers at a fixed rate per minute or a fixed monthly rate, these plans do not identify and include the intrastate recovery access charge so consumers do not always learn the true price of the plan.

26. The statutes do not exempt ratepayers without the time or knowledge required to search for alternatives and without the awareness, education, commercial or purchasing sophistication, health, ability, and intelligence or mental capacity from protection from unreasonable, unjust and discriminatory pricing schemes. The decision deprives these ratepayers of their lawful protection.

27. The Commission overlooked relevant and material issues of law and fact when it failed to consider and determine that the effect of the surcharges was to

discriminate against Missouri residential customers as compared to customers in other states in violation of Section 254 (g) of the Federal Telecommunications Act of 1996. As shown by OPC's evidence in the record, the access recovery charge is applied to all 1+ presubscribed residential customers without regard to whether the customer's calls are interstate or intrastate. When the tariff surcharge is applied to interstate calls, the result is to effectively price Missouri interstate calls higher than interstate calls in other states that are not assessed an instate access recovery charge or are assessed a charge lower than \$2.95. The Commission's decision does not consider this significant objection to the tariff based on federal law.

28. The surcharges result in unjust, unreasonable, and discriminatory treatment based on geographic areas. If a long distance carrier is not available to provide local service in a rural area, the customers in that area are assessed a surcharge while customers in an urban area that the company has chosen to provide local service are exempt.

29. The order of the Commission failed to make adequate findings of fact and conclusions of law. The order in this case does not inform a reviewing court of the basic findings on which the Commission's ultimate findings rest. The conclusory nature of the order is insufficient to show the basis of the decision. The order must contain unequivocal, affirmative findings of fact so that a reviewing court is able to determine whether the order is supported by substantial and competent evidence without combing the PSC's evidentiary record. *Noranda Aluminum, Inc. v. PSC*, 24 S.W.3d 342, 245-6 (Mo. App. 2000). The order does not contain the findings of fact required by Section 386.500 and Section 386.510, RSMo and MO. Const. (1945 as amended 1976) Article V

section 18. The Order does not make findings of fact to support its conclusory statement that the tariff is just and reasonable. The Order does not make any findings that shows that the discriminatory treatment of residential, low volume or rural customers is justified and proper and adequately supported in the law. The lack of findings of fact to support the conclusions of the Commission regarding the approval of these surcharges is fatal to the Report and Order. *St. ex rel. Acting Public Counsel v. Public Service Commission*, 121 S.W.3d 534 (Mo. App., W.D. 2003).

For the foregoing reasons, Public Counsel asks the Commission to rehear the case and reject the tariffs on grounds that the surcharges are unlawful, unjust and unreasonable and discriminatory and contrary to the public interest and for such further and additional relief as may be necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was emailed, mailed or hand delivered this 21st day of December 2005 to the following attorneys of record:

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