## *BEFORE THE PUBLIC SERVICE COMMISSION*

## *OF THE STATE OF MISSOURI*

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| 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 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Public Service Commission of Missouri, having considered the record in this case that existed before the remand by the Missouri Court of Appeals, Western District and the record since the remand as well as the briefs of the parties enters its Report and Order together with its Findings of Fact and Conclusions of Law.

## FINDINGS OF FACT

### I. AT&T

**AT&T's Proposed Tariff Revisions**

On August 14, 2001, AT&T Communications of the Southwest, Inc., an interexchange company certificated and providing long distance toll service in Missouri proposed tariff revisions that established a monthly service charge of $ 1.95 per month per account applied to AT&T customers who are presubscribed to AT&T for interLATA service. This monthly service charge is applied if a customer has $ 1.00 or more of billable charges and credits on their bill, including, but not limited to, monthly recurring charges, minimum usage, or single bill fee charges. This charge does not contribute towards the minimum monthly usage charge. Customers in AT&T's Lifeline program and Federal Price Protection Plan, as well as those customers making less than $ 1.00 worth of long distance calls a month, are exempt from this service charge. Customers who have AT&T Local Service are also excluded from this charge. AT&T sent a postcard to customers who were pre-subscribed for inter-LATA long distance, explaining that it was imposing the surcharge on them to recover access charges that it was required to pay to local exchange carriers in Missouri for the use of the local network in completing in-state long distance calls. The notice said:

> Your local telephone company in Missouri currently charges AT&T to carry your in-state long distance calls over their lines. As a result, AT&T will begin to include in your monthly bill a $ 1.95 In-State Connection Fee, starting September 15, 2001.

**OPC's Challenge of the Surcharge**

On September 4, 2001, the OPC filed a motion asking the Commission to suspend AT&T's proposed tariff and to hold evidentiary and public hearings.

OPC alleged that:

- the proposed surcharge was unjust, unreasonable, and discriminatory, in violation of **§ 392.200**, in that it imposed a surcharge "without regard to customer actual usage," meaning that customers with low-volume toll calling would be assessed the same surcharge as customers with considerable or high-volume toll calling.
- the proposed surcharge discriminates against rural customers because it exempts customers with AT&T local service, and AT&T local service is only available to customers in the St. Louis and Kansas City metropolitan areas.
- although the surcharge was described as an in-state connection fee, "it draws from a charge that applies for any billings for interstate services, too, so, effectively, they are increasing interstate rates," in violation of **§ 254(g)** of the Federal Telecommunications Act.
- the surcharge is unreasonably discriminatory because it applied only to residential customers and there was no rational basis for differentiating between residential and business customers. There is no reasonable justification or public policy reason for this discriminatory treatment.

AT&T claimed that the exemption of its local customers from the surcharge was not unreasonably discriminatory because

- "AT&T does not incur that same access expense when AT&T is both the local and the toll provider," and
- AT&T is "waiving the proposed charge to local customers in an effort to sell more services to customers."
- AT&T's proposed tariff recovers the cost of the interstate and intrastate access differential in the manner in which the costs are truly incurred. Inflating per-minute rates forces these customers to

pay a disproportionate amount relative to the actual cost of serving these customers.

- Out of competitive necessity AT&T must develop a rate structure that reduces the incentive for high volume customers to shop elsewhere.
- the proposed surcharge did not discriminate against rural customers because this non-traffic sensitive rate element is far less discriminatory than the current access that recovers non-traffic sensitive costs through traffic-sensitive, per minute rates.
- the surcharge does not discriminate against residential customers because it is a valid distinction insofar as "it is a fact that business customers pay different rates than residential customers."

## II. Sprint

### Sprint's Proposed Tariff

On May 20, 2002, Sprint proposed tariff revisions to recover access charges which Sprint was required to pay to local exchange carriers in Missouri for the use of the local network in completing an in-state long distance call. The proposed tariff created a $ 1.99 monthly recurring surcharge called the In-State Access Recovery Charge assessed monthly on all Dial 1 Sprint accounts for which local service is not provided by a Sprint company.

Sprint mailed a notice of the proposed surcharge to the affected customers who are all Missouri "Dial 1 Sprint" customers presubscribed for long distance toll service, and who do not have local services provided by a Sprint company. The notice stated:

> **For customers residing in the state of Missouri, your Sprint long-distance invoice will increase by $ 1.99, due to a new monthly charge called In-State Access Recovery. This charge is based on the access charges that Sprint pays to the local phone company to utilize its local phone lines. This charge will be applied beginning on invoices dated July, 2002.**

### OPC’s Challenge to the Surcharge

On June 13, 2002, the OPC filed a motion asking the Commission to suspend Sprint's proposed tariff revisions, and to hold evidentiary and public hearings. OPC alleged that

- the proposed surcharge violated **§ 392.200** because each affected customer would pay "the same amount no matter how many toll calls are made and no matter how long the calls are."
- "the charge results in an unreasonable and prejudicial disadvantage for a class of Sprint presubscribed customers that have a low amount or no toll calling while customers with considerable toll calling are given an undue and unreasonable preference and advantage by paying the same amount per month."
- the surcharge violated **§ 254(g)** of the Federal Telecommunications Act of 1996, in that it would require Sprint customers in Missouri to pay more per minute for toll service than Sprint customers in another state.

The Staff noted that Sprint's customers "may choose to switch long distance carriers and, thereby, allow the competitive marketplace to regulate the charges."

Sprint responds that its proposed tariff should be approved for the same reasons that AT&T's proposed tariff revisions were approved.

## III. MCI and Affiliated Companies

### MCI's Proposed Tariff Revisions

On August 2, 2002, MCI submitted proposed tariff revisions which created a $ 1.95 per account per month surcharge called an Instate Access Recovery Fee assessed to residential customer. The surcharge was to recover access fees charged MCI to originate and terminate it's instate long distance calls over local companies' networks. Customers who have MCI spending of less than $1.00 during any monthly billing period will be exempt from this charge.

**OPC's Challenge to the Surcharge**

On August 8, 2002, the OPC filed a motion asking the Commission to suspend MCI's proposed tariff revisions, and hold evidentiary and public hearings.

OPC alleged that

- the proposed surcharge violated **§ 392.200** because the surcharge would be 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."
- the surcharge "results in an unreasonable and prejudicial disadvantage for a class of MCI WorldCom 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."
- the surcharge violated **§ 254(g)** of the Federal Telecommunications Act of 1996, in that the surcharge would not be levied on similarly situated customers in other states.
- between them, AT&T, Sprint, and MCI have over a 70% market share of residential customers in Missouri, making it difficult for those customers to switch to a competitor in order to avoid the surcharge.

The Staff responded that MCI's customers "may choose to switch long distance carriers and, thereby, allow the competitive marketplace to regulate the charges."

MCI responded that its proposed surcharge was similar to AT&T's and Sprint's proposed surcharges, which were approved by the Commission, and MCI should not be treated any differently.

Subsequent to the original orders approving the surcharges, AT&T and MCI and its affiliate company increased the surcharge rate from $1.95 to $2.95.

**AT&T**

The Commission finds that AT&T's instate connection fee are not just and reasonable and are discriminatory based on the following findings of fact:

1) It applies even in cases in which customers have no instate calling (Schedule 1, page 2 – BAM Rebuttal and Schedule 2, page 2 - BAM Direct (Relevant portions of DR#1 Response and DR #8 Response);

2) AT&T's reliance on the variance between instate and interstate access rates as a justification for the surcharge is an inappropriate basis for determining a reasonable cost based rate for the instate access charge because it fails to reflect that a substantial portion of interstate access costs are recovered by LECs through the Federal Subscriber Line Charge;

3) It is discriminatory in that it applies to only residential customers without adequate justification for why it should not apply to business customers. Single line business customers are required to pay the same Federal Subscriber Line Charge as residential customers. As a matter of fairness and based upon the stated purpose of the instate connection fee, AT&T has failed to provide adequate and reasonable justification for excluding business customers from the surcharge.

4) It is discriminatory in that the surcharge applies on a flat-rate basis when the purportedly high access rates are charged to the Company on a per-minute of use basis. The impact and effect of this method is that those customers who use less will pay proportionally more;

5) It effectively discriminates against rural customers who cannot qualify for the exemption as an AT&T local customer because AT&T local service offerings are targeted to metropolitan and urban areas. Rural rates comparable to urban rates are mandated by Section 254(g) of the Federal Telecommunications Act of 1996; and

6) AT&T did not demonstrate by competent and substantial evidence that the surcharge is in the public interest as required by Section 392.200, Subsections 4 (1) and 5 RSMo.

**Sprint**

**The Commission finds** that Sprint's In-State Access Recovery surcharge is unjust, unreasonable, and discriminatory based upon the following findings of facts:

1) The surcharge could apply to customers even when customers have no instate toll calling resulting in a discriminatory effect;

2) The surcharge is based upon the difference between instate access (calculated by instate access rates multiplied by national average minutes) and national average (calculated by national access rates multiplied by national average minutes) which is an inappropriate basis for determining a reasonable cost based rate for the instate access charge because it fails to reflect Missouri cost based on Missouri minutes of use;

3) It is discriminatory in that it applies to only residential customers without adequate justification for why it does not apply to business customers. The Company in response to an OPC DR #18 acknowledged that the type or class of retail customers placing calls does not impact the wholesale access service cost. This admission contradicts Sprint's statement in the tariff that characterizes the charge as being based on

access fees that Sprint pays to local phone companies. Business customers pay the SLC charged and are not exempted as they are with this surcharge.

4) It is discriminatory in that it applies on a flat-rate basis when the purportedly high access rates are charged to the Company on a per-minute of use basis. The impact and effect of using this flat rate method is that those customers who use less will pay proportionally more.

5) Sprint has failed to adduce competent and substantial evidence to demonstrate that the charge is in the public interest as required by Section 392.200, subsections 4(1) and 5, RSMo

**MCI's and Teleconnect's**

The Commission finds that MCI's and Teleconnect's instate recovery fees imposed a $1.95 monthly service charge on presubscribed residential customers that have $1.00 or more of billable charges on their bill. The carriers requested and were granted an increase to $2.95.

The Commission finds that the surcharges are unjust, unreasonable, and discriminatory based upon the following findings of facts:

1) The surcharges apply even when customers have no instate calling;

2) Although the MCI and Teleconnect cite differences between state access rates as justification for the fees, the evidence discloses that the variance of intrastate from interstate access rates has been the primary driver for the access recovery fees as well as providing the purported cost basis for the specific rates. As the Commission has previously found with AT&T, the variance between instate and interstate access rates is an inappropriate basis for determining a reasonable cost based rate for these instate recovery fees. The Commission finds that the variance calculation fails to reflect that a

substantial portion of interstate access costs are recovered by LECs through the Federal Subscriber Line Charge;

3) They are discriminatory in that they apply to only residential customers without adequate justification for why these surcharges are not applied to business customers

4) The surcharges are discriminatory in that the surcharges apply on a flat-rate basis when the purportedly high access rates are charged to the Companies on a per-minute of use basis. The impact and effect of this method is that those customers who use less will pay proportionally more;

5) The surcharges effectively discriminates against rural customers who cannot qualify for the exemption as an MCI or MCI affiliate's local customer because MCI local service, like AT&T local service offerings, are targeted to metropolitan and urban areas. Rural rates comparable to urban rates are mandated by Section 254(g) of the 1996 Act.

6) The Commission finds that MCI and Teleconnect failed to adduce competent and substantial evidence that the fee is just, reasonable and nondiscriminatory and public interest as required by Section 392.200, subsections 4(1) and 5 RSMo.

7) The evidence demonstrates that the Companies position is that any level of state access rates above interstate rates is excessive and that they regard anything other than complete interstate/intrastate parity would not induce them to rescind the instate recovery fees. (BAM Schedule 12, 13 and 14; MCI's and Teleconnect's responses to OPC data requests) The Commission finds that this is an unfair and unreasonable basis for imposing a surcharge on the Missouri customers since many factors, including the

SLC paid by the consumer, must be considered in using interstate access rates in comparison to intrastate access rates.

**Findings as to all Carriers**

The Commission finds that the number of competitors in and of itself is nothing more than a fact that a certain number of IXCs have obtained certificates of service authority. It says nothing of where the companies provide services, the competition these companies offer, whether or not these companies actually offer services or serve any customers, or the strength and durability of the companies. The number does not indicate they serve only one set of customers (business or residential) or both.

The Commission finds that competition does not make an unfair and unreasonable charge fair and reasonable and does not excuse a discriminatory charge. The Commission finds that merely because the customer can change companies is not justification for PSC approval of unjust, unreasonable and discriminatory charges. Public policy and the public interest demand reasonable and nondiscriminatory charges notwithstanding the lack or presence of competition. The Commission finds that Section 392.200, RSMo contains no excuse for competition and does not give these companies authority to impose unjust, unreasonable and discriminatory charges.

The Commission further finds that competition from other carriers who have not imposed a access recovery surcharge has not acted to protect residential customers and to curb a significant increases of a dollar per month in AT&T's and the MCI family of companies' surcharges within 2 years of the original request. Therefore the Commission finds that there is a clear indication that competition has not protected the ratepayers and the public interest and therefore these unjust, and unreasonable, and discriminatory fees should be rejected and terminated and the tariffs disapproved.

The Commission finds that companies have failed to justify a reasonable cost basis for just assessing residential customers. The Commission finds that companies have failed to adduce evidence comparing the access costs associated with serving residential versus business customers. The Commission finds that companies in fact used non-cost based considerations. The Commission finds that marketing was the justification to charge residential customers, but allow business customers to escape this special cost recovery fee. The Commission finds that AT&T, Sprint and MCI have not identified evidence of any class cost differential associated with the total instate access rates charged to the companies in Missouri. No such class cost studies were identified or relied upon. The Commission finds that Sprint's witness (Direct p. 12) concludes that marketing techniques justify the exclusion of business customers from the surcharge, but failed to give the factual basis for his opinion. (Ex. 9, p. 13-14) On that basis the Commission finds that conclusion as not credible.

The Commission finds that companies have failed to justify the exemption of their local customers from the surcharge based upon any lawful and reasonable basis. The Commission finds that the companies have failed to justify the exemption of their business customers from the surcharge based upon any lawful and reasonable basis. The access charge paid by the long distance carriers to an LEC are likely the same if made/received by a business customer or if made/received by a residential customer. The Commission finds that the companies have not produced facts that would provide a reasonable and just basis to treat these two customer classes differently. The Commission finds that these exemptions are unequal treatment and undue preferences prohibited by Section 392.200, RSMo and are discriminatory.

The Commission finds that the surcharges result in unreasonable and prejudicial disadvantages for a class of the carriers' presubscribed customers that have a low toll call

volume or no toll calling while customers with considerable toll calling are given an undue and unreasonable preference and advantage by paying the same amount per month. The Commission finds 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. The Commission finds that low volume users are paying a disproportionate share of the access cost recovery when their usage has no bearing on the amount of recovery these customers are expected to contribute.

The Commission finds that Schedule 15 of OPC witness Meisenheimer's Rebuttal Testimony (Ex. 9) clear evidence of the absurd results and the discriminatory effects on the consumer if the instate access recovery surcharges sought by these companies are approved

## CONCLUSIONS OF LAW

1. The Commission had jurisdiction in this case pursuant to its general authority over the carriers as a telecommunications company under Section 386.250, and Sections 392.200, 392.230.3, 392.185, 386.320, 386.330, RSMo 2000.

2. The Commission has clear jurisdiction, authority, and duty to supervise and investigate the actions of telecommunications companies operating in Missouri (Section 386.250 (2); Section 386.320; Section 386.330 (1), RSMo) and to assure that all charges made or demanded by any telecommunications company for any service rendered are just and reasonable, are not discriminatory, and are not deaveraged by geography. (Section 392.200, RSMo) The PSC improperly restricted its jurisdiction, authority and duty to carry out the purposes of Chapter 392, RSMo to promote universally available and widely affordable telecommunications services (Section 392.185 (1) ), to ensure that customers pay only reasonable charges for telecommunications service (Section 392.185

(4)), to promote parity of urban and rural telecommunications services (Section 392.185 (7)), and to allow full and fair competition to function when consistent with the "protection of ratepayers and otherwise consistent with the public interest." (Section 392.185 (6))

3. Section 392.200.3 RSMo provides:

> "No telecommunications company shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever except that telecommunications messages may be classified into such classes as are just and reasonable, and different rates may be charged for the different classes of messages."

4. Section 392.200, RSMo 2000, subsection 2 provides in pertinent part:

> "No telecommunications company shall directly or indirectly or by any special rate, rebate, drawback or other device or method charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered with respect to telecommunications or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect to telecommunications under the same or substantially the same circumstances and conditions."

5. The record does not contain sufficient evidence to show how and in what manner this discriminatory method of assessing a cost recovery charge is reasonable and proper and in the public interest. The record lacks a sufficient showing that this discrimination and the recovery of these costs in this manner is 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).

6. Persons receiving similar service under similar circumstances cannot be charged for such service in an arbitrary, designed, dissimilar manner. Courts which have been called upon to review this matter have made a distinction between the cost of providing service not previously provided and source of service. *U.S. Steel Corp. v. Com., Public U. Com'n*, 37 Pa. Commw. 195, 390 A.2d 849 (1978); *Mountain States Legal Fn. v. Utah Pub. Serv.*, 636 P.2d 1047 (Utah 1981); *Utilities Com. v. Mead Corp.*, 238 N.C. 451, 78 S.E.2d 290 (1953); ***State ex rel. DePaul Hosp. S. of N. v. Public Serv. Com'n, 464 S.W.2d 737 (Mo. App. 1970)***; *State ex rel. McKittrick v. Public Service Comm.*, 352 Mo. 29, 175 S.W.2d 857 (1943).

7. The basis of the charge of discrimination is the higher rate charged to it while a lower rate was charged to others who received substantially the same service. Section 392.200 forbids discrimination in charges for doing a like or contemporaneous service with respect to communication by telephone under the same or substantially the same circumstances and conditions. Complainant claimed that it was charged a much higher rate than was charged other customers (under the hotel rate) who received substantially the same services under substantially the same circumstances and conditions. *State ex rel. DePaul Hospital School of Nursing v. PSC*, 464 SW2d 737 (Mo App 1970).

8. *In* ***State ex rel. City of St. Louis v. Public Service Commission, Mo. Sup., 327 Mo. 318, 36 S.W.2d 947, 950,*** it was said that arbitrary discriminations alone are unjust but, if the difference in rates be based upon a reasonable and fair difference in conditions which equitably and logically justify a different rate, it is not an unjust discrimination. In the instant case the overwhelming weight of the evidence is to the effect that the toll

service rendered to residential and business customers and local service customers and local service customers of other LECs was of like character and under virtually the same conditions as those provided in the carriers' service to exempt or high volume customers, as well as to those other customers mentioned in evidence. However, the surcharges were only applied to the subclass of customers without reasonable basis.

9. An order of the **Public Service Commission** must be based upon competent and substantial evidence. ***State ex rel. Public Service Commission*** *v. Shain,* ***Mo.*** *Sup., 342* ***Mo.*** *867, 119 S.W.2d 220, 222.* There is no substantial evidence of record tending 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.

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 14th day of November 2005 to the following attorneys of record:

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