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, *et al.* (consolidated)

STAFF'S INITIAL BRIEF

COMES NOW the Staff of the Missouri Public Service Commission, by and through the General Counsel's Office, and states:

BACKGROUND

AT&T Communications of the Southwest, Inc. (AT&T) is a competitive interexchange (long distance) and local exchange telecommunications company pursuant to Section 392.361 RSMo 2000,[1] and all of its services available in Missouri are classified as competitive with the exception of exchange access.[2] On August 15, 2001, AT&T filed proposed tariff sheets that would permit AT&T to charge an "In-State Connection Fee" of $1.95 to presubscribed AT&T InterLATA long distance customers, excepting those who accrued less than $1.00 in charges in a given month, low income customers, and customers of AT&T's local telephone service. On September 4, 2001, OPC filed a Motion to Suspend AT&T's tariff sheets, seeking evidentiary and public hearings. After suspending the tariff sheets, the Commission held a "Question-and-Answer Session on the Record" on October 31, 2001, and subsequently ordered the parties to file pleadings stating their positions on the issues.

[1] All statutory citations in this brief are to RSMo. (2000) unless otherwise specified.

[2] *See also Office of the Public Counsel v. AT&T,* Case No. 94-86, 3 Mo. P.S.C. 384 (Oct. 3, 1993); *Investigation for Determining the Classification of AT&T Communications and its Services,* Case No. 88-143 (consolidated with 88-142), 30 Mo. P.S.C. (n.s.) 16, 29-31 (Sept. 15, 1989).

Ultimately, the Commission issued its order on December 13, 2001, approving AT&T's tariff sheets. An appeal followed that ultimately resulted in a decision from the Missouri Court of Appeals to remand the matter to the Commission to make sufficient findings of fact and conclusions of law to justify its order.

Sprint Communications Company, L.P. (Sprint) is a competitive interexchange telecommunications and local exchange company pursuant to Section 392.361 RSMo., and all of its services available in Missouri are classified as competitive with the exception of exchange access.[3] On May 30, 2002, Sprint filed proposed tariff sheets that, among other things, would permit Sprint to charge an "In State Access Recovery Charge" of $1.99 to presubscribed Sprint InterLATA long distance customers. Tariff provisions filed in a separate proceeding exempted those who had no long distance usage and Sprint Standard Weekends and Sprint Standard Weekends Option B customers from this charge. On June 13, 2002, OPC filed a Motion to Suspend Sprint's tariff sheets, seeking evidentiary and public hearings. The Commission's Staff and Sprint each filed responses to OPC's Motion to Suspend with the Commission.

Ultimately, the Commission issued its order on July 23, 2002, approving Sprint's tariff sheets. An appeal followed that ultimately resulted in a decision from the Missouri Court of Appeals to remand the matter to the Commission to make sufficient findings of fact and conclusions of law to justify its order.

MCI WorldCom Communications, Inc. (MCI) is a competitive interexchange telecommunications and local exchange company pursuant to Section 392.361, and all of its services available in Missouri are classified as competitive with the exception of exchange

[3] *See also Investigation for the purpose of determining the classification of services provided by interexchange telephone companies within the State of Missouri,* Case No. 88-142, 30 Mo. P.S.C. (n.s.) 16, 30-31 (Sept. 15, 1989).

access.[4] On August 2, 2002, MCI filed a proposed tariff sheet that would permit MCI to charge an "In State Access Recovery Fee" of $1.95 to presubscribed MCI InterLATA long distance customers, excepting those who accrued less than $1.00 in charges in a given month. On August 8, 2002, OPC filed a Motion to Suspend MCI's tariff sheet, seeking evidentiary and public hearings. The Commission's Staff and MCI each filed responses to OPC's Motion to Suspend with the Commission.

Ultimately, the Commission issued its order on August 27, 2002, approving MCI's tariff sheet. An appeal followed that ultimately resulted in a decision from the Missouri Court of Appeals to remand the matter to the Commission to make sufficient findings of fact and conclusions of law to justify its order.

Teleconnect Long Distance Services and Systems Company, a MCI WorldCom Company d/b/a TelecomUSA (Teleconnect), like MCI, is a competitively classified provider of interexchange telecommunications services.[5] During the period after the Commission's decisions in the three cases listed above (TT-2002-129, TT-2002-1136, and XT-2003-0047) had been issued, and while those decisions were under appeal but not stayed, Teleconnect filed a tariff sheet in its Missouri Tariff No. 1 adding an Instate Access Recovery Fee to its General Information section. The language in this tariff was identical to the language approved by the Commission for MCI's tariff in Case No. XT-2003-0047. The tariff sheet, and accordingly, the Instate Access Recovery Fee of $1.95, came into effect on December 1, 2002. It has been in

[4] *See also In re Worldcom Technologies, Inc.,* Case No. TA-98-16 (Sept. 11, 1997), where the Commission granted competitive status to the interexchange services of WorldCom Technologies, Inc.; Worldcom Technologies, Inc. was merged with MCI (and its name was changed to MCI) in *In the matter of the Application of MCI Worldcom Inc., et al.,* Case No. TM-99-588 (July 9, 1999).

[5] "Teleconnect was certificated by the Commission to provide intrastate interexchange telecommunications services on March 13, 1987 in Case No. TA-86-114. … Teleconnect is a subsidiary of Teleconnect Company, which is a subsidiary of Telecom*USA, which is a subsidiary of MCI Financial Management Corporation, which is a subsidiary of MCI Corp." Order Approving Merger, *In the Matter of the Application of MCI Telecommunications Corporation, Inc., et al.,* Case No. TM-97-274 (April 22, 1997). See also Case No. TM-90-318 (regarding MCI's acquisition of Teleconnect).

effect ever since that date, and remains in effect unless the tariff sheet containing it is either withdrawn or superseded.

MCI and Teleconnect each filed proposed tariff sheets in the late spring of 2004 to increase their Residential Instate Access Recovery Fees by $1.00. After a period of suspension, briefs, and argument, the Commission ultimately approved the tariff sheets and accompanying increases on July 22, 2004, in Case Nos. LT-2004-0616 and XT-2004-0617. The Public Counsel appealed the cases, and they reached the circuit court level before the Court of Appeals' decision remanding the initial three cases was handed down. By agreement of the parties, these two cases returned to the Commission for disposition in conjunction with the cases remanded by the Court of Appeals.

ARGUMENT

A. The Instate Access Recovery Fees Meet The Limited Requirements of Section 392.500 as well as the Requirements of Section 392.200, and Are Just and Reasonable.

The issues raised in these matters have not changed since they were raised by the parties in the 2001 and 2002 cases. "No material facts have changed since the original Commission decision that would cause Staff to change its position in this matter." Rebuttal Testimony of William L. Voight at 2, ll.20-22. The Staff renews its former recommendation that a limited review of the tariff sheets is appropriate due to the competitive nature of the interexchange telecommunications industry. The parties will all agree that the Commission has granted competitive status to each company's interexchange intrastate services. The companies have applied Instate Access Recovery Fees[6] for several years in the form of flat charges for each account in each monthly billing period, and have indicated that the purpose is to recover charges

[6] The term Instate Access Recovery Fee is used in referring to each of the companies' charges in dispute in this matter.

the companies incur "to originate and terminate [their] instate long distance calls over other companies [sic] networks."[7] By applying the Instate Access Recovery Fee to their interexchange customers, the companies place the charge squarely in the realm of competitively regulated services.

Missouri's Legislature has expressed its intent that the Commission generally exercise a lesser degree of regulation when dealing with competitive companies. *See, e.g.,* Sections 392.185(5);[8] 392.200.4(2)[9]; 392.361.4.[10] The Commission has traditionally tended not to scrutinize the rate structure of competitive long distance service providers beyond compliance with a few limited rate requirements identified in Missouri statutes – a conclusion the Staff noted in the earlier cases and the Commission, in its initial MCI Order, specifically affirmed.[11]

In applying the competitive telecommunications company analysis to the tariff sheet filings in these cases, the Commission has previously applied the provisions of Section 392.500.[12] This analysis was correctly applied. Section 392.500 sets forth the mechanism for a competitive telecommunications company to institute changes in rates for competitive telecommunications services. "Any proposed increase in rates or charges, or proposed change in any classification or tariff resulting in an increase in rates or charges," is permitted only upon: (1) the filing of the proposed rate, charge, classification or tariff with the Commission; and (2)

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[7] Quotation from the MCI and Teleconnect Tariff Sheets, in the Instate Access Recovery Fee sections.
[8] Section 392.185 states "The provisions of this chapter [392] shall be construed to: … (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;".
[9] Section 392.200.4(2) states "It is the intent of this act* to bring the benefits of competition to all customers and to ensure that incumbent and alternative local exchange telecommunications companies have the opportunity to price and market *telecommunications* services to all prospective customers in any geographic area in which they compete." *"This act" refers to S.B. 507, 1996.
[10] Section 392.361.4 states: "If, after following the procedures required under subsection 2 of this section, the commission determines that a telecommunications service is subject to sufficient competition to justify a *lesser degree of regulation* and that such lesser regulation is consistent with the protection of ratepayers and promotes the public interest it may, by order, classify (1) The subject telecommunications service offered by a telecommunications company as a competitive telecommunications service;" (emphasis supplied).
[11] AT&T Order, at 2; Sprint Order, at 6; MCI Order, at 2.
[12] AT&T Order, at 3-4; Sprint Order, at 6; MCI Order, at 3.

upon notice to all potentially affected customers through a notice in each affected customer's bill at least ten days prior to the date when the company proposes to implement the increase (or an equivalent means for unbilled customers). Section 392.500(2). The provisions of this section apply equally to the replacement tariff sheets before the Commission now.

In each of the prior initial cases, the Commission found that the tariff sheet filings complied with the provisions of Section 392.500(2). (AT&T Order at 3 ("Has AT&T complied with the statutory provisions governing the filing of tariffs by a competitive telecommunications company? The Commission answers yes … [t]he filing of a tariff that increases rates or charges of a competitive telecommunications company is governed by Section 392.500(2)."); Sprint Order at 4 ("The Commission finds that Sprint has complied with the technical requirements of Section 392.500(2)"); MCI Order at 3 ("The Commission finds that MCI WorldCom has complied with the technical requirements of Section 392.500(2)"). No additional evidence has been provided to support an alternative conclusion.

The Commission also should renew its initial findings that no exception to the application of the Section 392.500(2) provisions was present.[13] Even if a company fulfills the requirements of Section 392.500(2), a proposal to enact rate changes must fail if the proposal falls within the prohibitions enumerated in Section 392.200.[14,15] The proposed Instate Access Recovery Fees meet those statutory requirements and should not fail. The Instate Access Recovery Fees should not fail because (i) the proposed tariffs were just and reasonable; (ii) customers did pay the same amount for the same service given to other customers; (iii) no undue or unreasonable preference

[13] AT&T Order, at 4.

[14] Prohibitions include those against undue and unreasonable preference or advantage; geographic area or other market segmentation; and delay in receipt, transmittal and delivery of communications from other telecommunications carriers.

[15] Senate Bill 237 in the 2005 legislative session amended this section, and these amendments went into effect on August 28, 2005. An amendment to Section 392.500 removed the application of Section 392.200.1 (regarding justness and reasonableness of rates) from proposed rate changes in rates or charges for competitive telecommunications services.

or advantage was given to any customer; (iv) no geographic deaveraging of rates occurred; and (v) the company did not violate its duty to transmit without delay the messages of other telephone companies.[16] All of these conclusions regarding the exceptions to Section 392.500(2) stem from an initial finding that the services subject to increased charges in the proposed tariff pages are competitive telecommunications services. The Commission should renew this finding and reach the conclusion that follows: the Instate Access Recovery Fees are permitted by law.

In addition to the previous findings of the Commission addressing the provisions of Section 392.500, Staff also recommends the Commission address the justness and reasonableness of the charges as requested by the Office of Public Counsel. These charges, in Staff's opinion, are just and reasonable. In support of the justness and reasonableness of the surcharges, Staff's expert witness opines that (1) adequate customer notice was provided;[17] (2) similar surcharges have been implemented in other jurisdictions;[18] (3) such surcharges, where customers incur monthly fees that have little or nothing to do with actual usage, are common in the industry;[19] (4) Missouri has relatively high exchange access rates;[20] (5) competitive necessity dictates that long distance carriers develop a rate structure that reduces the incentive for high

[16] AT&T Order, at 4. Sprint Order, at 4-6. MCI Order, at 3-4.

[17] See also Direct Testimony of James A. Appleby, p.4, ll.2-3 (customers were provided notice which allowed them to choose another provider); Exhibit JAA#1 to Direct Testimony of James A. Appleby; Direct Testimony of Daniel P. Rhinehart, p.6, ll. 8-10 (provided notice twice).

[18] See also Direct Testimony of James A. Appleby, p. 7, ll. 14-16 (Sprint has similar charge in 17 other states); Direct Testimony of Daniel P. Rhinehart, p. 7, ll.21-26 (AT&T similar charge in 28 other states); Amended Direct Testimony of Andrew M. Graves, p.18, ll. 13-18 (MCI has similar charge in 32 other states).

[19] See also Amended Direct Testimony of Andrew M. Graves, p.18, ll.21-23 (commonplace to have multiple rate elements for various services); Direct Testimony of Daniel P. Rhinehart, p.11, ll.7-8 (flat charges for service have been a staple of telecommunications services for decades); Surrebuttal Testimony of Daniel P. Rhinehart, p.24, ll.8-9.

[20] See also Direct Testimony of James A. Appleby, p.6, ll.7-10 (average cost of intrastate access in Missouri is 247% and 243% of national average in July 2002 and December 2004 respectively); Surrebuttal Testimony of Daniel P. Rhinehart, p.13, ll. 17-19 (Missouri intrastate access rates are almost three times nationwide intrastate average; ten times the nationwide interstate average).

volume customers to shop elsewhere;[21] (6) alternatives exist that permit subscribers to avoid the surcharges;[22] (7) market-based behavior may substitute for regulation in this situation to ensure that the rates are reasonable;[23] and (8) customers may compare providers with one another and are free to choose another provider if they object to the surcharges.[24] Rebuttal Testimony of William Voight, pages 3-6; Surrebuttal Testimony of William Voight, pages 2, 5 and 11. At the level the companies have proposed to set their Instate Access Recovery Fees, Staff considers them to be reasonable. Rebuttal Testimony of William Voight at 6.

B. The Instate Access Recovery Fees Do Not Unduly Discriminate.

Further, the surcharges comply with Sections 392.200.2 and 392.200.3. The pertinent portion of subsection 392.200.2 states:

> 2. 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. …

Subsection 392.300.3 states:

> 3. 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

[21] See also Amended Direct Testimony of Andrew M. Graves, p.15, ll. 9-17 (uniform base rates for national marketing purposes).

[22] See also Direct Testimony of James A. Appleby, p.9, ll. 3-7 (wireless and VOIP offerings); p. 10, ll.12-15 (alternatives to presubscribed lines); Direct Testimony of Daniel P. Rhinehart, p.5, l.12 (One Rate Simple Plan); p. 9, ll.5-8 (can choose another provider); Surrebuttal Testimony of Daniel P. Rhinehart, p.11, l.22 (subscribe to AT&T local service).

[23] See also Amended Direct Testimony of Andrew M. Graves, p.15, ll.4-5 (MCI and Teleconnect regularly monitor the market to ensure their rates remain competitive); Surrebuttal Testimony of Daniel P. Rhinehart, p.31, l.9 through p.32, l.6 (costs have fallen, revenues have fallen, rates have fallen).

[24] See also Amended Direct Testimony of Andrew M. Graves, p.12, ll.10-22 (describing methods of comparison and information available); Surrebuttal Testimony of James A. Appleby, p.4, ll.6-21 (discussing ease of switching carriers and sources of information).

> 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.

The fundamental premise for both statutory sections is that similarly situated customers should be treated similarly, but telecommunications companies may create different classifications and charge different rates if it is just and reasonable to do so. The Staff disagrees with the Office of Public Counsel's allegations that the charges are unduly discriminatory. Initially, it is worthy to note that differences in charges may exist, though they must be reasonable. *State ex rel. Laundry v. Public Serv. Comm'n,* 34 S.W.2d 37, 45 (Mo.1931). Section 392.200.3 permits class distinctions, and the business/residential distinction is one of the oldest and most common in the telecommunications field.[25] The service charge applies equally to all customers who use more than one dollar a month in service. The only customers who are exempted are low volume customers and/or subscribers to certain CLEC affiliate services. There is no indication that customers with plans containing minimum payments will be charged, as voiced in the Public Counsel's Motion, if they make no calls. Rather than viewing the case from the perspective that all users of $1.00 or more in phone service are a special class being discriminated against through the tariff, a more appropriate way to consider the case is that all of each company's customers are subject to the charge except those who do not use the service and thus do not generate the charges the company seeks to recover through this tariff in the first place.

In this case, the surcharges do not unduly discriminate (1) between residential and business customers, as customers in these categories pay different rates from one another in virtually all facets of the telecommunications industry; (2) between high and low volume

[25] See, e.g., Surrebuttal Testimony of Daniel P. Rhinehart, pp. 18-19 (distinguishing between business and residential service); 25-26 (service may be provided by different means, different arrays of services, different scenarios to provide service to classes of customers); 27, ll.18-19 (class of service pricing as a cornerstone of telecommunications pricing); 37-38.

customers because volume discounts are statutorily authorized[26] and are routinely provided; (3) between urban and rural customers because marketplace realities find that service bundling is widely accepted and not all carriers provide both local and long distance throughout the state. Surrebuttal Testimony of William Voight, pages 3-4.

OPC also alleges the proposed tariff sheets violate Section 254(g) of the Federal Telecommunications Act of 1996 (47 U.S.C. 254(g)).[27] That provision effectively prohibits interexchange rate discrimination between rural and high cost area subscribers and urban subscribers, as well as discrimination between subscribers in different states. Nothing on the face of the tariff filings indicates the proposed charges will do so: the tariff sheets make no mention of rural, high cost, or urban distinctions, nor do they reference charges to customers in other states. Moreover, Section 254(g) addresses "interstate interexchange telecommunications services." Quite simply, the rates subject to the Commission's jurisdiction, and before it in these cases, are *intra*-state rates, not *inter*-state rates, and on its face, Section 254(g) does not apply to *intra*-state rates.

Importantly, as the Commission is well aware, customers have the ability to switch service providers. Several hundred long distance companies currently hold Commission certificates to provide service in Missouri, so customers can always change to one that does not apply this surcharge. For example, a minimum of 74 carriers offer 1+ service in each

[26] See Section 392.200.5.

[27] Section 254(g) states: "Interexchange and interstate services. Within 6 months after February 8, 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State." The FCC's rule at 47 C.F.R 64.1801 virtually restates the two sentences of the statute.

Southwestern Bell Telephone Company exchange in Missouri.[28] In short, if customers feel they are being "penalized" by remaining with the carriers in this case for their service, they can choose to switch carriers.

So long as they comply with the applicable requirements of Section 392.200, tariff sheets filed by a company may be an adequate record for Commission review. Section 392.500(2). The tariff sheets before the Commission in this case have complied with that statute, and may and should be approved.

Concluding that the appropriate analysis of tariff sheets enacting access recovery charges should be within the Section 392.500 framework, and that the tariff sheets complied with the requirements of Section 392.500, the Commission properly approved the tariff sheets in its previous orders in these cases and would act reasonably if it approves the tariff sheets again.

WHEREFORE, the Staff recommends that the Commission overrule the Office of the Public Counsel's Motion and approve the tariff sheets before it for consideration in these cases.

[28] Rebuttal Testimony of William L. Voight, Case No. TO-2001-467 (Aug. 9, 2001), at 66, relying on information provided by Southwestern Bell Telephone Company. See also Direct Testimony of James A. Appleby, p.2, ll.18-20; Amended Direct Testimony of Andrew M. Graves, p.10, ll.22-23 (the Commission's own Annual Report reflects the existence of 88 CLECs and 495 IXCs authorized to offer service).

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 7th day of October 2005.

/s/ David A. Meyer

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