AT&T
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AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.'S
INITIAL POST-HEARING BRIEF

AT&T Communications of the Southwest, Inc. ("AT&T") respectfully submits its Initial Post-Hearing Brief in the above-referenced matter. This case involves Commission review of tariffs of three interexchange carriers ("IXC") that apply a specific charge to end users' bills in order to help the IXCs recover the excessive costs of intrastate access charges in Missouri. In the case of AT&T, the charge is called the In-State Connection Fee ("ISCF"). The ISCF is designed to recover a portion of the excessive intrastate switched access charges levied on AT&T by Missouri's ILECs and CLECs. AT&T originally filed its ISCF tariff application on August 14, 2001. After a series of suspensions, the Commission issued its Order Approving Tariff on December 13, 2001, effective December 22, 2001, and AT&T actually initiated billing for the ISCF in the Spring of 2002. The Office of Public Counsel ("OPC") appealed the Commission's Order, and the decision was ultimately remanded to the Commission by the Missouri Court of Appeals.[1] A more detailed procedural summary is found at pages 3 – 5 of the direct testimony of AT&T witness Daniel P. Rhinehart ("Rhinehart Direct").

I. INTRODUCTION AND SUMMARY

As noted above, the ISCF is designed to help AT&T recover a portion of the

[1] *State ex rel. Coffman v. Pub. Serv. Comm'n,* 150 S.W. 3d 92 (Mo.App.2004). (hereinafter *"Coffman")*

excessive intrastate access costs imposed on AT&T by ILECs and CLECs in Missouri. (Rhinehart Direct at 4). The ISCF is a charge associated with the provision of intrastate long distance service, which this Commission has found is a competitive service.[2] (Rhinehart Surrebuttal at 8 – 9.) As a competitive service, the rates and charges for long distance service are subject to lessened regulatory scrutiny. (*See* § 392.500 RSMo.) Nevertheless, the Missouri Court of Appeals found that such services are generally subject to the provisions of § 392.200. Furthermore, the Court of Appeals found that the arguments raised by OPC implicate subsections 2 and 3 of Sec. 392.200, and that the Commission has the discretion to apply or to not apply the "just and reasonable" standard of subsection 1 to a competitive service. The holding of the Court of Appeals is that the Commission's Order approving the AT&T ISCF tariff did not contain sufficient findings of fact and conclusions of law to support the Order, in light of the arguments raised by OPC. The Court did not address the merits of the ISCF tariff or the merits of OPC's arguments. The Court held similarly regarding the comparable tariffs of Sprint and MCI.

Consequently, AT&T and the other parties are here before the Commission on a remand of the original tariff applications. However, the outcome this time should not differ from the substantive outcome before the Commission last time, i.e., AT&T's ISCF should be allowed to remain in effect. AT&T's ISCF has been in place for over 3 years with no evidence of a customer complaint. All of the complaints leveled by OPC are baseless and reflect nothing more than a philosophical dislike for the ISCF and similar charges. OPC's arguments fall into two general categories: 1) the ISCF is allegedly unjust, unreasonable, and discriminatory because it applies even when customers have

[2] *See* Case No. TO-88-142; Transitionally competitive classification granted to AT&T in September, 1989, and full competitive classification granted in October 1993.

little or no usage, or because it allegedly is not applied in a uniform manner, and 2) the IXC's justification for the charge, i.e., recovery of excessive intrastate switched access rates is unreasonable and/or unsupported.

Missouri law makes a distinction between a "just and reasonable" requirement and a requirement that competitive tariffs not be unreasonably discriminatory, however, OPC's arguments make no such distinction and simply argue that every aspect of the ISCF tariff it finds objectionable renders the tariff unjust, unreasonable, and discriminatory. However, OPC has provided nothing more than rhetoric in support of its objections, and the evidence in this case overwhelming supports the position of the IXCs and the Staff that the ISCF, and the similar charges of Sprint and MCI, are legal. The evidence in this case demonstrates that: 1) there are many flat-rated monthly recurring charges that apply regardless of whether a customer has usage, and the ISCF applies equally to all similarly situated customers based on well-accepted class-of-service distinctions, and 2) Missouri has exceptionally high intrastate switched access charges, and flat-rated charges are popular with customers and are very common, even where underlying costs can be considered usage sensitive, and the IXC's charges essentially mirror the FCC's interstate scheme for loop cost recovery from end users.

II. BACKGROUND ON THE CURRENT ISCF

Since the Commission's approval of AT&T's original ISCF, AT&T had filed a small number of tariff revisions, including a rate increase. None of the tariff revisions were opposed by OPC. These revisions are outlined in Mr. Rhinehart's Direct Testimony. In terms of approving AT&T's ISCF, it is the presently filed tariff that is relevant and that AT&T submits is subject to the Commission's review and approval as a

result of the Court of Appeal's remand. Consequently, AT&T has included its current tariff as Schedule DPR-2 to Mr. Rhinehart's Direct Testimony.

The current ISCF is $2.49 and applies if an AT&T residential long distance customer has any AT&T billable charges and credits on their bill, including, but not limited to, monthly recurring or minimum usage charges. Customers in AT&T's Lifeline Program are exempt from the service charge and customers who have AT&T Local Phone Service are excluded from the charge. The ISCF is not applied to business customers. In addition, AT&T offers one long distance plan at $0.29 per minute, called One Rate Simple, where the ISCF does not apply. (Rhinehart Direct, at 5.) AT&T currently assesses an ISCF in Arkansas, Colorado, Florida, Idaho, Iowa, Kentucky, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming. (Id., at 7.)

Although OPC has not contended that there is an issue with customer notice of the ISCF, the subject of notice is worth mentioning. AT&T provided customer notice in advance of the initially proposed effective date of the charge back in 2001, and additional notice after Commission approval but in advance of beginning billing for the ISCF in the spring of 2002. Customers also received notice regarding the ISCF in advance of a December 2004 rate change. In addition, the ISCF is a line item on AT&T customer bills in the "Other charges and credits" section of the bill and AT&T includes the following text as part of this line item on every monthly bill:

> For an explanation of this charge, please call 1 800 333-5256 or visit http://www.consumer.att.com/instate-connectionfee

This text provides customers with a monthly reminder of the fee, and free access to resources where further explanation of the fee may be obtained. The information available via the toll-free telephone number provides a description of the fee and reasons for its imposition as well as answers to four frequently asked questions (FAQs). Customers may also contact AT&T consumer customer service directly at 1-800-222-0300 with questions about their service. (Rhinehart Direct, at 6 – 7.) Finally, as the Commission is no doubt aware, AT&T formally announced in July 2004 that it would no longer advertise or promote its consumer services, effectively beginning the process of withdrawing from the consumer (residential) telecommunications services market. (*See* Rhinehart Surrebuttal at 41.)

III. ARGUMENT

The parties agreed that the Commission should address one overarching issue in this case - - whether to reject the IXCs' tariffs - - by focusing on the specific arguments, i.e., the sub-issues, which OPC has raised in opposition to the tariffs. For AT&T's part, the issue of whether to "reject" the tariffs, as opposed to "approve" the tariffs, represents a subtle but significant semantic difference. The Court of Appeals' remand decision requires the Commission to more thoroughly explain its original rejection of OPC's arguments. Thus a new order addressing those arguments is required. Even if the Commission's order simply rejects OPC's arguments and allows the tariffs to *remain* in effect, that the Commission will, as a practical matter, "approve" the IXCs' tariffs. However, the Commission has already once approved of the basic IXC tariffs at issue in this case. Those tariffs remain in effect and, in the case of AT&T, have been in effect for over three years. From AT&T's perspective, for the status quo to change, the real

challenge presented to the Commission is a request *by OPC* to *reject* the IXCs' existing tariffs. Based on the issues raised by OPC, and the evidence, or lack thereof, presented by OPC, there is no legal basis to reject AT&T's ISCF.

I. Based on the following sub-issues, should the Commission reject the AT&T, Sprint and MCI tariffs at issue in this case?

A. Should the Commission apply the provisions of subsection 392.200.1 to the AT&T, Sprint and MCI surcharges, and if so, are the surcharges just and reasonable under subsection 392.200.1?

First, the Commission should not apply the just and reasonable standard of RSMo. § 392.200.1 to the IXCs' tariffs in this case. Second, if the Commission does decide to apply a just and reasonable standard, then the Commission should find that the IXC's tariffs are just and reasonable based on the overwhelming evidence in this case. The Court of Appeals determined that the Commission had the discretion to apply a "just and reasonable" analysis under § 392.200.1 to a competitive service.[3] (There is no debate in the record that AT&T is competitive company and the service at issue, long distance, is a competitive service.) Pursuant to the Court's decision, it was not *mandatory* for the Commission to engage in a "just and reasonable" analysis.

Moreover, as a result of SB 237, the Missouri Legislature has mandated that a "just and reasonable" analysis should not be applied to competitive service tariffs under § 392.500. By way of background, the Commission's original analysis in its December 13, 2001 Order Approving Tariff concluded that the relevant statutory provision for reviewing the ISCF tariff application is § 392.500, which governs Commission review of "a tariff that increases rates or charges of a competitive telecommunications company."[4] The Court of Appeals did not take issue with the Commission's finding on the

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[3] *Coffman,* 150 S.W.3d at 100, 102.

[4] Case No. TO-2001-129, Order Approving Tariff, pg. 4 of 7 (December 13, 2001).

applicability of § 392.500, only that the Commission failed to adequately address OPC's arguments as they related to the minimum requirements of § 392,200.2, .3, .4, .5 that are also applicable to competitive companies' tariff applications. As previously mentioned, the Court also found that the Commission had the discretion to also apply subsection 392.200.1.

Senate Bill 237 eliminated any application of the just and reasonable requirement in § 392.200.1 to competitive service tariffs filed under § 392.500. Previously § 392.500 applied all of § 392.200 to such competitive service tariffs (except when the Commission decided not to apply subsection .1). Senate Bill 237 modified § 392.500 so that now only subsections 2 to 5 of § 392.200 are applicable. Consequently, now the Commission cannot apply a just a reasonable standard to the ISCF tariff. Only the more specific "anti-discrimination" provisions of subsections 2 to 5 are applicable. The Missouri Legislature has clearly spoken and has limited the specific criteria that are applicable to approval of a competitive services tariff under § 392.500. Whereas previously the Commission may have had discretion to apply § 392.200.1 to the ISCF tariff, with the passage of SB 237 that discretion no longer exists.

Although AT&T believes that the Commission can no longer apply a just and reasonable standard to the ISCF tariff, out of an abundance of caution AT&T's Initial Brief will address below all of OPC's arguments that even remotely fit under the issues set forth by the parties. As noted above and in AT&T's testimony, OPC generally lumped all of its arguments under a claim that the result was "unjust, unreasonable, and discriminatory." (*E.g.,* Meisenheimer Rebuttal, at 5, l. 5.) OPC's testimony never clearly articulates which specific Missouri statutory provisions apply to each of its arguments

under § 392.200.1, .2, .3. Consequently, rather than address each of OPC's arguments first under the concept of "just and reasonable" and then under the concept of "discrimination," which is the format AT&T's testimony followed in deference to the fact that each concept involves different statutory provisions, AT&T's Initial Brief will simply focus on the two remaining statutory provisions that OPC has agreed are the relevant provisions for analyzing the ISCF tariff. (*See* Parties' List of Issues, filed August 3, 2005.)

B. Do the AT&T, Sprint and MCI surcharges at issue comply with subsections 392.200.2 and 392.200.3 RSMo.?

Before discussing OPC's arguments it is useful to set forward the basic requirements of these statutory sections (subsection 2 in relevant part):

> 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.
>
> 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 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.

These provisions were summarized by the Court of Appeals thusly: "Pursuant to § 392.200.2, [competitive] companies may not charge any customer more or less for any service than it charges any other customer; pursuant to § 392.200.3, [competitive] companies many not give any undue or unreasonable preference to any customer, or

subject any customer to any undue or unreasonable prejudice or disadvantage."[5] These statutory sections essentially ban unreasonable discrimination, and do not ban simply treating some customers differently. In that regard, the Court's summary did not include important and relevant "exceptions" or limits to these statutory provisions. The requirements of subsection 2 only apply to similarly situated customers, and different prices for the same service are clearly permissible "as authorized by this chapter" or, perhaps more realistically, except where prohibited by Chapter 392. Read literally, without the above-referenced limitations firmly in mind, subsection 2 would limit an IXC to one price for basic intrastate long distance service and would prohibit the myriad of rate plans that currently exist in the market. In addition, subsection 3 only prohibits undue or unreasonable discrimination. Subsection 3 also clearly authorizes the classification of telecommunications services into distinct classes, and the Commission has long found a distinction between "residential" and "business" classes to be just and reasonable.

With this statutory framework for reviewing AT&T's ISCF it becomes readily apparent that none of the arguments raised by OPC have merit. An examination of OPC's arguments follows:

1. The ISCF applies to customers that have no usage

OPC claims that merely because customers who have no usage are still assessed the ISCF the ISCF is unjust, unreasonably, and discriminatory. If there were any validity to this argument then the rate structure for probably hundreds of services, as well as numerous regulatory fees such as 911, Missouri Relay, and USF, would be unlawful. All of the witnesses pointed out the absurdity of OPC's argument. (*E.g.,* Rhinehart Direct at,

[5] *Coffman,* 150 S.W.3d at 100.

Surrebuttal at 23 - 24; Voight Surrebuttal at 2, Appleby Direct at 8.) Basic local service, which is not a measured service and is charged for even if a customer makes no calls in a month, is the best example of how wrong OPC's argument is. Customers pay a flat rate for basic local service whether they use it or not and that rate structure for basic local service has never been found to be unjust, unreasonable, or discriminatory in violation of § 392.200 (OPC never explains how subsections .2 or .3 might be implicated, and AT&T does not believe that they are). The record demonstrates that flat-rated pricing is increasingly popular with customers (Rhinehart Direct at 11, Surrebuttal at 20, 49) and a flat-rated structure avoids penalizing high volume users of toll services. (Voight Surrebuttal at 5.) OPC's testimony never explains why the ISCF should be treated differently than the myriad other flat-rated charges that are prevalent in the telecommunications market.

2. The ISCF only applies to residential customers

OPC's arguments here can best be summed up as follows: 1) based on the stated reason for the ISCF, which is to recover excessive intrastate access costs, "fairness and reason" dictate that the ISCF should apply to business customers, and 2) the IXCs have not provided a cost justification for the different treatment of residential and business customers. (Meisenheimer Rebuttal, at 13 – 14.) Ms. Meisenheimer complained in her testimony that the IXCs had not provided "hard evidence" comparing access cost differences between residential and business customers. As AT&T pointed out in Mr. Rhinehart's Surrebuttal Testimony, OPC's Rebuttal Testimony routinely failed to represent to the Commission certain facts that contradicted OPC's arguments - - facts which AT&T provided in discovery responses to OPC prior to the filing of OPC's

rebuttal testimony. (Rhinehart Surrebuttal at 25 – 26.) AT&T provided a lengthy explanation of how access costs for business customers can and do vary in ways that are inapplicable to residential customers, such as the use of non-usage sensitive special access by business customers, and in ways that may potentially be applicable to both residential and business customers but where the percentage occurrence might vary by class, e.g., whether or not AT&T is the customer's local service provider as well as long distance provider. AT&T's evidence demonstrates that business customers can cause AT&T to incur less access costs than residential customers. The point made by Mr. Rhinehart's testimony is that there are many obvious scenarios that can and do cause access costs incurred by IXCs to vary between customer classes, even if AT&T has not produced a class-specific cost study. Moreover, to the best of AT&T's knowledge, such a cost justification has never been required for the existing difference in long distance or local rates between residential and business services, and OPC has not explained why such a cost justification should be required now for the ISCF but not for all other charges that vary by class.

In addition, a "cost justification" is not simply a matter of AT&T's underlying cost, nor is cost the only justification that AT&T provided for this different class treatment. Business customers have also historically paid significantly higher toll rates than residential customers. (Rhinehart Surrebuttal at 17 – 18, 28; Voight Surrebuttal at 3.) Combined with lower access costs for business customers in some instances, this higher revenue generated by business customers diminishes the need for IXCs to recover excessive switched access costs from business customers. As a result, AT&T's rationale for the ISCF, which is recovery of excessive intrastate access charges, is perfectly

consistent with not applying the ISCF to business customers as a class. If OPC is concerned about "fairness" in addition to a cost justification, the higher rates that business customers already pay for long distance makes excluding such customers from the ISCF more than fair.

Finally, while AT&T is a competitive IXC with a single certificate of authority to do business in Missouri, the Consumer (i.e., residential) and Business segments of the company operate as separate units, with different business strategies and different market realities. (Rhinehart Surrebuttal at 27.) Clearly the Commission should eschew any outcome that would essentially require it to micromanage the business strategy of a competitive company providing a service as highly competitive as long distance. Absent much more patently objectionable disparate treatment than *the long standing class distinction between residential and business services,* there is no public policy served by overriding a legitimate business decision by AT&T to exclude business customers from the ISCF. Recent statutory changes as a result of SB 237 demonstrate that business and residential customers are distinct customer classes (*See* §§ 392.200.8 and 392.245.5), and therefore the statute recognizes that such classes are just and reasonable for purposes of distinguishing between different types of telecommunication services. Section 392.200.3 makes clear that different rates are statutorily authorized for different classes.

As Staff has pointed out, OPC has previously never argued that the higher rates charged to business customers compared to residential customers amounts to undue discrimination. (Voight Surrebuttal at 3.) OPC's arguments completely ignore regulatory precedent and AT&T's evidence, which includes facts that should have been obvious to an expert in the field of telecommunications, e.g., the greater revenue

generated by business customers (which Staff implicitly noted when discussing the higher rates for business customers) and the reduced access costs resulting from the use of special access by medium to large business customers. Rather than providing credible evidence explaining how excluding business customers from the ISCF violates any specific statutory provision OPC rhetorically argues that the IXCs have not provided any evidence, while at the same time OPC conveniently ignores the solid evidence the IXCs have provided. This is a strategy by OPC that will not support rejection of the ISCF nor withstand legal review.

3. The ISCF is not applied to AT&T's local customers

It is truly difficult to believe that OPC genuinely objects to this "exemption" in AT&T's ISCF tariff. OPC does not seem serious in its opposition inasmuch as it devotes barely 9 lines of testimony to this argument. Obviously OPC's real objective is not to get the exemption eliminated so that AT&T's local customers have to pay the ISCF, but rather it is to stretch for any basis on which the Commission might reject the ISCF tariff. As with most of its arguments, OPC's testimony provides a simple rhetorical assertion that facially different treatment is *per se* discriminatory and then signs off by claiming that the IXCs have provided no support for the differing treatment. And again, OPC has ignored obvious regulatory precedent and the other parties' evidence. OPC's position fails to acknowledge the importance and consumer acceptance of service bundling in today's telephone environment. (Voight Surrebuttal at 4.) There are sound business reasons for providing discounts to customers who purchase bundles, such as customer retention, not to mention that the Commission routinely approves tariffed discounts for bundled offers. (Appleby Direct at 11 – 12.)

Finally, in addition to it being obvious that IXC's avoid access costs when long distance calls originate from or terminate to the IXC's local customer, there is ample evidence in the record of a cost justification for exempting customers who also purchase their local service from the IXC's CLEC affiliate. (*E.g.,* Rhinehart Direct at 15, Surrebuttal at 41 – 42; Graves Direct at 20, Surrebuttal at 8.) OPC simply ignored the fact that an IXC's access costs for a local customer of its CLEC affiliate are about half the access costs of a standalone long distance customer. First OPC erroneously argues that the ISCF is unjust and unreasonable because AT&T has allegedly failed to provide a cost justification for a residential/business class distinction, yet when there is an obvious and indisputable cost justification for a distinction within the same class (residential) OPC ignores the justification entirely and argues that the exemption for local residential customers is simply unjust, unreasonable, and discriminatory. There is no credibility to OPC's inconsistent and contradictory positions.

4. The impact on rural customers

OPC argues that because AT&T does not provide local service everywhere in the state it is discriminatory for AT&T to exempt its local customers, as that allegedly discriminates against presumptively rural customers in the locations where AT&T does not provide local service. It is true that AT&T does not provide residential service statewide, but it is also true that is there is no legal requirement for AT&T to do so. Furthermore, where AT&T does provide local service, it does so equally to all customers without regard to the rural, suburban, or urban setting. There is no evidence in the record that AT&T has targeted urban over rural customers in offering local service, and AT&T's tariff clearly provides for local service in all SBC Missouri exchanges. (Rhinehart

Surrebuttal at 40 – 41.) Any long distance customer who does not purchase local service from AT&T is not eligible for the exemption, regardless of where they live, whether urban or rural. Obviously AT&T has previously targeted its local service offerings where both regulatory and market conditions made it prudent to do so, and OPC's testimony totally fails to take account of these conditions that are beyond AT&T's control; including the fact that the federal Telecommunications Act of 1996 (the "Act") provided threshold exemptions from interconnection and unbundling obligations for rural ILECs. (Id.; Voight Surrebuttal at 4.) Finally, OPC's testimony makes a specious reference to § 254(g) of the Act (Meisenheimer Rebuttal at 6), but provides absolutely no explanation nor evidence for how this federal requirement is being violated. Regardless of the fact that OPC's reference to § 254(g) merits no serious consideration, if the Commission is interested, then Mr. Rhinehart's Surrebuttal Testimony explains at length how the ISCF does not violate § 254(g) and how OPC's "argument" about § 254(g) is totally misplaced.

5. The impact on low volume users

OPC's argument is that because all non-exempt residential AT&T long distance customers have to pay the ISCF, and because the ISCF is flat-rated, low volume customers are discriminated against because they pay "proportionately more" than high volume users. (Meishenheimer Rebuttal at 5 – 6.) This argument is essentially the argument OPC raised with regard to customers who have no usage, and is equally facetious. Section 392.200.5 explicitly authorizes volume discounts and the tariffs of Missouri IXCs routinely reflect price discounts given to volume users. (Voight Surrebuttal at 3.) As Staff's testimony pointed out, there is simply nothing discriminatory about a rate structure that charges less as usage increases. (Id.) Indeed, it

is practically a staple of the American economy that the more you use of a product the lower the unit price you can obtain. Once again, OPC's attack on the ISCF is tantamount to an attack on all calling plans with a flat-rate component, yet OPC never explains why monthly recurring and minimum usage charges are acceptable for all of the myriad calling plans currently in place but the ISCF is *not* acceptable. That is because there is no meaningful distinction between the ISCF and other flat-rated charges, and flat-rated charges are a big reality in the telecommunications marketplace today. (Rhinehart Direct at 11, Surrebuttal at 46.)

Customer usage can vary from month to month, and a high volume user one month can be a low volume user another month. A customer with consistently low usage, if they are making a decision based simply on price (which is a big assumption), will probably not choose AT&T for standalone long distance service, or may choose AT&T's One Rate Simple plan that does not include the ISCF. It has been repeatedly emphasized by Staff and all of the IXC parties that long distance is a highly competitive market. (*E.g.,* Rhinehart Direct at 8 – 9, Surrebuttal at 8 – 9, 32 – 33, Schedule DPR-5 showing continuing market share decline by traditional IXCs with the entry of SBC into the long distance market; Voight Surrebuttal at 11 – 12, September 7, 2001 Staff Response and Recommendation noting that customers can change providers if they do not like the ISCF.)

Consequently, while there is nothing discriminatory, unreasonable, or unjust about AT&T imposing a flat-rated charge (whether it's the ISCF or some other charge or rate), competition does serve to assist customers who want to avoid AT&T's flat-rated charge. Customers can choose a usage-sensitive-only rate plan from AT&T (One Rate

Simple) or from another IXC, including the choice of not presubscribing to an IXC, or they can choose a wireless provider or Voice Over Internet Provider (where broadband access is available), or they can use prepaid long distance cards. (Rhinehart Surrebuttal at 33.) However, as noted above in the discussion regarding customers with no usage, there is simply nothing unjust, unreasonable, or discriminatory about the use of a flat-rate structure, and OPC has not provided any evidence that distinguishes the ISCF from all the other flat-rate charges in the market today.

Moreover, low volume users can hardly be characterized as a "protected class," for lack of a better term. (What is a "low volume user" anyway? OPC never defines the term.) The fact that there are so many flat-rated charges in the telecommunications industry, including for basic local service, demonstrates that the Commission previously has never been concerned about the affects of flat rates on "low volume users." In addition, the ISCF rate is charged equally to all [non-exempt] users regardless of their usage. Such an approach is consistent with the requirements of § 392.200.2, .3, which are concerned with treating customers the same unless the carrier seeks and can justify a different treatment between customers. AT&T is not seeking approval of a tariff that explicitly treats some end-user group or segment, whether it be low volume users or end users with blue eyes, differently from other end-users. The statute does not require carriers to treat every customer differently based on some criteria specified by the customer (or by OPC). The presumption is that all customers are the same unless the carrier attempts to treat some of them differently, but that is not what AT&T is trying to do with its flat-rated charge. To adopt OPC's logic regarding what the statute prohibits, the Commission would also have to find that every existing usage-sensitive charge, i.e.,

every per minute-of-use charge or per use charge (e.g., directory assistance) is unjust, unreasonable, and discriminatory against high volume users. Under OPC's logic all carriers are in a Catch-22 if they try to apply a consistent rate structure to a customer class, because any rate structure they uniformly impose is going to be unjust, unreasonable, and discriminatory against *somebody* in that class, either the high volume users or the low volume users. This kind of absurd result demonstrates the lack of credibility in OPC's position.

6. The underlying rationale for the ISCF

Although OPC has attacked AT&T's underlying rationale for the ISCF, which is the recovery of excessive intrastate access charges, OPC's attack does not provide a basis for rejecting the ISCF tariff. As discussed above, the "just and reasonable" requirement of § 392.200.1 no longer applies to tariff approval for competitive services under §392.500. As also demonstrated above, the ISCF tariff is not discriminatory in violation of either subsection 2 or 3 of § 392.200, which are the only statutory sections OPC identified for the parties' agreed List of Issues. As long as the ISCF does not run afoul of any particular statutory prohibition, specifically those found in subsections 2 through 5 of § 392.200, then there is no requirement for AT&T to "justify" the ISCF or provide a rationale for imposing the charge. Section 392.500 applies a very streamlined and limited set of criteria to competitive tariffs, and nowhere does it, or any other applicable statutory provision, require a competitive carrier to justify its tariffs beyond the requirements of subsections 392.200.2, .3, .4, .5.. Imagine the result of OPC's position that requires a "justification": a simple rate increase of $0.10 that presents no other statutory concerns and where notice is properly provided, will require a justification or

rationale from the carrier in order to be approved, and that rationale can be attacked and used to hold up a rate increase for a competitive service. This would be the outcome of OPC's position even though the statute clearly contemplates an expedited approval process for competitive service rate increases. This has not been the Commission's interpretation of § 392.500 to date, that is, the Commission has never required that when there are no other statutory concerns a competitive carrier still has to have a "good reason" for its tariff application.

However, AT&T has provided ample justification for its ISCF and, as with all of its arguments, OPC has ignored AT&T's evidence. Mr. Rhinehart's Direct Testimony explained how AT&T calculated its "excess" switched access costs in Missouri, i.e., they are the access costs in excess of the costs imposed by comparable interstate switched access costs. (Rhinehart Direct at 10.) This was done by finding the difference between AT&T's average intrastate access costs per minute for Missouri and AT&T's average interstate access costs per minute of use for Missouri. Then the difference is multiplied by the average monthly intrastate minutes used by AT&T's customers. Mr. Rhinehart explained that the average excess intrastate monthly access cost per AT&T customer is nearly twice the current ISCF rate of $2.49. Prior to OPC filing its rebuttal testimony, AT&T provided to OPC its actual computations used to support its claim of excess intrastate access costs in response to a data request. (Rhinehart Surrebuttal at 22 – 23.) The information provided to OPC was also included as Schedule DPR-3 (HC and NP) to Mr. Rhinehart's Surrebuttal Testimony. In its rebuttal testimony OPC completely ignored this evidence that supports AT&T's rationale for the ISCF, but this information is in the record.

AT&T's evidence demonstrates that there is a significant and calculable difference between intrastate and interstate access costs. This is further born out by the evidence in the record regarding how Missouri's intrastate access rates are extremely high when compared to other states' intrastate access rates. Currently Missouri has the third highest average intrastate switched access rates in the country, and those average Missouri intrastate rates are almost three times higher than the nation-wide intrastate average. (Rhinehart Surrebuttal at 13.) A comparative chart of other states' average intrastate access rates is in the record as Schedule DPR-2 (HC and NP) to Mr. Rhinehart's Surrebuttal Testimony.

In addition, the record is replete with evidence of the enormous difference between Missouri's intrastate access rates and much lower interstate access rates. (Id., Voight Surrebuttal at 6, noting that in some cases intrastate rates are 2,028 percent higher than interstate rates, and 8 – 10.) Both Mr. Rhinehart and Staff witness Voight also take Ms. Meishenheimer to task for her attempt in rebuttal testimony to selectively reference other witnesses' testimony out of context (without citation) from Case No. TR-2001-65, which examined the cost of providing intrastate switched access. (*See* Meisenheimer Rebuttal at 15 – 16.) Staff points out that in TR-2001-65 Staff witness Dr. Ben Johnson clearly expressed concerns about access rates exceeding costs, and did a comparison demonstrating that for Missouri's major ILECs the difference between their intrastate access rates and interstate access rates ranged from 313% to 2,028%. (Voight Surrebuttal at 8 – 9.) Mr. Rhinehart cited to the Commision's actual findings in the case that Missouri's intrastate access rates are "high" and in fact "distort the IXC market" and are "anti-competitive." (Rhinehart Surrebuttal at 15 – 16). He also cited publicly available

data demonstrating that Missouri loop costs are not excessively high when compared to the national average, which supports a view that Missouri's high intrastate access rates grossly exceed any cost justification. (Rhinehart Surrebuttal at 14.)

OPC's rebuttal testimony notwithstanding, there can be no dispute that Missouri's intrastate access rates are high compared to any reasonable measure. OPC's real argument is that any difference between interstate and intrastate access rates "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" ("SLC"). (Meisenheimer Rebuttal at 5.) Ms. Meisenheimer repeats this statement a couple of times, but she never explains what she means by this. However, to the extent that she is arguing that the SLC helps recover some of the loop costs previously recovered through interstate access charges, that argument actually supports implementation of AT&T's ISCF. The FCC decided to reform the interstate access regime by reducing some usage sensitive access charges and replacing then with a flat-rated SLC, which more accurately reflects the non-usage sensitive cost structure of the local loop used for terminating long distance calls. In order to replace the loop cost recovery that was previously accomplished by the usage-sensitive interstate Carrier Common Line ("CCL") access charge, the SLC is imposed by LECs on end users rather than on IXCs. Similarly, when IXCs pay for loop cost recovery through access charges they must pass those costs on to consumers. AT&T has chosen to recover some of those costs through a flat-rated charge, the ISCF, which is a near-perfect parallel to the SLC. (Rhinehart Rebuttal at 24.) In the final analysis, all costs are paid by end users. The FCC has found that the use of the SLC

is perfectly reasonable rate design for cost recovery. Just because AT&T and not the ILEC is imposing the ISCF on customers does not make the ISCF unreasonable.

Mr. Rhinehart provides a thorough explanation regarding how the ISCF is consistent with the true cost structure of the local loop, and how the ISCF is entirely consistent with the FCC's interstate access regime. (Rhinehart Surrebuttal at 20 – 22, *see also* Voight Surrebuttal at 7, favorably comparing IXC cost recovery via flat-rated charges to ILEC cost recovery via the SLC.) Missouri law does not prohibit such an approach by competitive carriers, and OPC has even compared AT&T's ISCF to the SLC. (Tr., pg. 41, October 31, 2001 Q&A Session with Commissioners, Case No. TT-2002-129; Voight Surrebuttal at 2.) Again, AT&T does not need to provide a rationale for a competitive service rate element like the ISCF, but if the FCC has found a flat-rated SLC to be a just and reasonable rate element for loop cost recovery then AT&T's ISCF is undoubtedly just and reasonable.

IV. CONCLUSION

The Missouri Public Service Commission previously approved AT&T's ISCF over three years ago. One of the arguments in support of approving the ISCF, the state of competition in the long distance market, has become even stronger in the past three years. As noted above, the Court of Appeals did not pass judgment on the merits of the ISCF or on the merits of OPC's arguments. The Court simply found that the Commission had not articulated the basic facts from which it reached its conclusion that there is a reasonable justification for the ISCF tariff's [alleged] disparate treatment of residential, low volume, and rural customers.[6] The facts rebutting OPC's arguments where there in 2001, and they are in the record now, and they can readily be summed up for an order in this case:

[6] 150 S.W.3d 102.

1) Residential customers: The Commission has long accepted that a distinction between residential and business classes is just and reasonable, and differing rates for differing classes is permitted by statute. Chapter 392 itself evinces a legislative recognition that business and residential class distinctions are just and reasonable. In addition, the record demonstrates that there are legitimate cost and market differences regarding the provision of long distance services to residential and business customers, which justifies the AT&T's decision not to impose the ISCF on business customers. For example, many business customers are able to use special access services, which reduce AT&T's costs of switched access. In addition, business long distance retail rates are higher than residential long distance retail rates. Therefore, the need to impose the ISCF on residential customer is demonstrably greater than the need to impose it on business customers.

2) Low volume customers: The record demonstrates that the use of flat-rated charges is commonplace in the telecommunications industry. Such a rate structure has never before been considered to be discriminatory against low volume users of any flat-rated service. If such a rate structure where inherently discriminatory it presumably would have been prohibited by the Legislature, but there have been decades of legislative acceptance of this type of rate structure. Such a rate structure is not facially nor actually discriminatory, as the effect of a flat-rate structure is entirely dependent upon the customer's own usage, which the customer controls. High volume customers benefit from a flat-rate structure, and a customer who uses a low volume of service one month may use a high volume the next month, and vice versa. There is no evidence in the record that there is such a thing as a "class" of low volume users, or evidence of what

constitutes a "low volume" or evidence of at what point a low volume customer is being discriminated against. Indeed, a low volume customer may nevertheless believe that the service obtained from AT&T is a good value and meets the customer's needs. Consequently, not only is the ISCF not discriminatory as to "low volume customers," but competition in the long distance market ensures that the customer can make a decision regarding whether the effects of a flat rate are detrimental or beneficial to the customer, and it is the customer who is in the best position to make that decision, not this Commission.

3) Rural customers / exemption for local customers: There is no evidence in the record of discrimination against rural customers. AT&T is not required to provide local service on a statewide basis, and the evidence in the record demonstrates that AT&T provides local service across the SBC ILEC territory without regard to rural, suburban, or urban designations. Any AT&T residential standalone long distance customer is ineligible for the local service exemption from the ISCF if they do not take local service from AT&T, regardless of whether that customer is in a rural or urban location. The Commission finds it beneficial to consumers that AT&T provides this exemption, and AT&T's local customers generate only half of the intrastate access costs of a standalone long distance customer, which justifies the exemption.

Above are the plain and simple rebuttals to OPC's incredible and unsupported arguments in opposition to the ISCF. There is no legal requirement for AT&T to further justify its ISCF tariff or to demonstrate that the tariff is just and reasonable, although the record is full of evidence that demonstrates the tariff is just and reasonable. In conclusion, there is no legal basis for rejecting AT&T's ISCF tariff.

Respectfully Submitted,

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Certificate of Service

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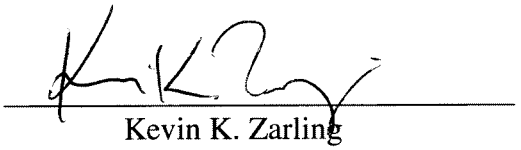

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