BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.;
MCI COMMUNICATIONS SERVICES, INC.;
SPRINT COMMUNICATIONS COMPANY, L.P.;
AND
TELECONNECT LONG DISTANCE SERVICES AND SYSTEMS COMPANY
JOINT REPLY BRIEF

AT&T Communications of the Southwest, Inc. ("AT&T"); MCI Communications Services, Inc. ("MCI"); Sprint Communications Company, L.P. ("Sprint"); and Teleconnect Long Distance Services and Systems Company ("Teleconnect") respectfully submit their Joint Reply Brief in the above-referenced matters.

I. INTRODUCTION AND SUMMARY

Each party to these consolidated cases has provided statements of procedural history concerning the matters at issue. Further, AT&T, MCI, Sprint and Teleconnect and Staff seem to agree regarding the basic facts of the case. Namely: 1) interexchange carriers ("IXCs") named herein are all classified as competitive carriers,[1] 2) each IXC has significant discretion under Missouri statute in setting rates for its competitive services,[2] 3) intrastate switched access charges in Missouri are among the highest in the nation and are at significant multiples of comparable interstate switched access rates;[3] and 4) nation-wide long distance pricing trends have been toward simplified pricing structures favoring uniform minute-of-use pricing, often in conjunction with varying levels of flat-rate recurring elements.[4] It is in this context that the IXCs have introduced intrastate fees aimed at recovering a portion of the high, market-distorting[5] intrastate switched access charges with which they are burdened.

Also undisputed are the facts that the IXCs' intrastate access recovery fees (AT&T – In-state Connection Fee ("ISCF"), Sprint – In-State Access Recovery charge ("ISAR"), MCI and Teleconnect – Instate Access Recovery Fee, collectively hereinafter "in-state fees") have each been established following Commission procedural rules, customer notice requirements, and tariffing.[6] Each IXC's in-state fee is applicable to

---

1 Staff's Initial Brief (Staff Brief) at 1 - 3, AT&T Initial Post-Hearing Brief (AT&T Brief) at 3, Initial Brief of MCI and Teleconnect (MCI Brief) at 2, Sprint Initial Brief (Sprint Brief) at 2.

2 E.g., MCI witness Graves Surrebuttal at 4. Competitive carriers routinely modify tariffed rates, terms and conditions in filings at this Commission.

3 Rhinehart Surrebuttal at 13 and HC Schedule DPR-2. See also MCI Brief at 14 - 16 citing to Graves and this Commission's own report in case TR-2001-65. Sprint Direct Testimony of Appleby at 6.

4 MCI Brief at 8 citing to FCC acknowledgement of the trend, MCI Graves Amended Direct at 21, AT&T Rhinehart Direct at 11 and Surrebuttal at 19-20.

5 See MCI's Graves Amended Direct at 17-18 citing to this Commission's own Report and Order in Case TR-2001-65.

6 Procedural history noted in every party's briefs included acknowledgment of most or all of these facts.

residential end users with defined exceptions that are fully supported and justified in the record. None of the IXCs' in-state fees apply to business customers for reasons that are also fully justified and supported in the record.

The Office of Public Counsel ("OPC"), through its Initial Brief and the testimony of its witness steadfastly refuses to acknowledge the substantial competent evidence brought forth by the IXCs and by Staff.[7] All of the complaints leveled by OPC are baseless and reflect nothing more than a philosophical dislike for the rate designs selected by competitive IXCs. The positions taken by OPC are not supported by any evidence, but rather only by opinions that often defy logic and certainly fail to recognize long-standing (i.e., decades) utility rate design practices as well as Missouri statutory law under Chapter 392, including the law as recently modified by SB 237 on August 28, 2005.

At the very end of its Initial Brief, OPC also gratuitously raises for the first time the untenable and unsupported proposition that the IXCs should refund revenues derived from their respective in-state fees. This Reply Brief responds to OPC's Initial Brief point-by-point, showing that OPC's position should be soundly rejected and the IXCs' in-state fees affirmed.

II. GENERAL REBUTTAL TO OPC

OPC's Argument in its Initial Brief falls into eight often overlapping claims and subclaims. The claims are: 1) the IXCs' evidence does not provide a justification for disparate treatment of ratepayers, 2) surcharges are not just and reasonable; 3) surcharges are discriminatory. Subclaims related to these three principal claims are that: 1) it is

[7] OPC's Initial Brief at 2 suggests that AT&T's present in-state fee rate is $2.95. The correct current rate assessed by AT&T is $2.49. See Rhinehart Direct at 5.

discriminatory to apply in-state fees to customers with no in-state calling; 2) variance between in-state and interstate access rates is an inappropriate basis for determining a reasonable cost-based rate for the in-state fee because it fails to reflect that a substantial portion of the interstate access costs are recovered by local exchange carriers ("LECs") through the federal Subscriber Line Charge; 3) it is discriminatory to apply the in-state fee to only residential customers; 4) it is discriminatory to apply the in-state fee on a flat rate basis when access rates are charged to the IXCs on a per-minute of use basis; and 5) it is discriminatory against rural customers who cannot qualify for an exemption from the in-state fee as a local customer of the IXC. None of these claims and subclaims withstands scrutiny and each should be rejected.

OPC suggests that the IXCs have failed to provide competent and substantial evidence. Indeed, OPC's primary argument appears to simply be that the IXCs have not provided "relevant and material evidence," or "competent and substantial evidence," or a "reasonable and lawful justification," and have not "equitably and logically" justified their in-state fee tariffs.[8] OPC's strategy seems to be that if it simply repeats enough times the assertion that the IXCs have not provided sufficient evidence then the Commission will magically ignore the extensive and credible evidence in this record that overwhelmingly supports the IXCs' tariffs. OPC can only make such arguments because it completely ignores the IXCs' evidence. Apparently OPC also did not bother to read the IXCs' or Staff witness qualifications. AT&T's Rhinehart has 26 years of telecom experience.[9] MCI's Graves has 12.[10] Sprint's Appleby has 16 years.[11] Staff's Voight

---

8 OPC Initial Brief at 2.
9 Rhinehart Direct at 1-2.
10 Graves Amended Direct at 1.
11 Appleby Direct at 1.

has 20 years of telecom experience of which 12 years have been in the regulatory field.[12] Each of these more-than-competent witnesses provided extensive sworn testimony and evidence in support of Commission approval of the in-state access fees.

- **OPC Claim No 1: Evidence must support justification for disparate treatment of ratepayers (OPC Brief at 13 to 14)**

In the introduction to its Initial Brief, OPC cites to three relatively old cases (two of the decisions are positively ancient) for the proposition that "arbitrary discriminations are unjust" and that there must be some reasonable basis to treat customers differently.[13] There is nothing remarkable about these cases, as the decisions generally reflect the law currently codified in subsections 392.200.2 and .3. OPC does not advance its case nor prove anything simply by citing to these cases. Later on in its Initial Brief, OPC excerpts the relevant provisions of subsections 392.200.2 and .3,[14] which OPC has agreed is the relevant law for purposes of the issues to be decided by the Commission. However, OPC never addresses the actual statutory language at issue and never addresses the "law." The law only prohibits "undue or unreasonable prejudice or disadvantage," it permits different treatment for different classes of customers, and it only requires similar treatment of similarly situated customers. OPC never discusses these statutory provisions, and ignores the IXCs' evidence demonstrating compliance with the law.

The IXCs showed that similarly situated customers are treated similarly – no illegal disparate treatment exists. Stand-alone residential long distance customers are

---

[12] Voight Direct at 2.

[13] OPC Initial Brief at 3. *State ex rel. Laundry, Inc. v. Public Service Commission*, 34 SW 2d 37, 45 (Mo 1931); *State ex rel. City of St. Louis v. Public Service Commission*, 36 SW2d 947, 950 (Mo 1931); *State ex rel. DePaul Hospital School of Nursing v. PSC*, 464 SW2d 737, 740 (Mo App 1970).

[14] OPC Initial Brief at 21.

assessed the in-state fee with few exceptions.[15] Exemption from the in-state fee for some stand-alone long distance customers is justified on public policy grounds (e.g., eligibility for IXC lifeline program),[16] customer election of a higher-rate service that expressly does not charge the in-state fee,[17] or exemption related to low or no use.[18] Local dial tone customers of the IXCs are not "similarly situated" to stand-alone long distance customers and are not charged the in-state fee because switched access costs incurred by the IXCs for these customers are less (i.e., there is a cost-based difference between these customers and other customers)[19] and because discounting of bundled offers is both common in the industry and is routinely approved by this Commission.[20] The discounts afforded to customers who purchase bundles is not a form of unreasonable discrimination. Similarly situated urban, suburban and rural consumers face identical rates for long distance service.[21] In addition, it is fair and reasonable to not apply these in-state fees to business customers. Missouri statutes expressly permit distinctions between customer classes, and there have been decades-long differences in pricing of services between residential and business classes of customers.[22] Further, it should go without saying that residential customers are not similarly situated to business customers. Exclusion of business customers from assessment of the in-state fee is justified on the basis of cost differences[23] and on the basis of the higher rates generally imposed on business customers (that

---

15 Graves Amended Direct at 19, Rhinehart Direct at 4, Appleby Direct at 10 and 13.
16 Rhinehart Direct at 13.
17 Rhinehart Direct at 5.
18 Graves Amended Direct at 19, Appleby Direct at 13.
19 Graves Direct at 20, Graves Surrebuttal at 8, Rhinehart Direct at 15, Rhinehart Surrebuttal at 25-27.
20 Appleby Direct at 11-12.
21 Rhinehart Direct at 13, Rhinehart Surrebuttal at 44.
22 "Section 392.300.3 permits class distinctions, and the business/residential distinction is one of the oldest and most common in the telecommunications field." Staff Brief at 9. See also Rhinehart Direct at 14, Rhinehart Surrebuttal at 37-38.
23 Rhinehart Surrebuttal at 25-26 quoting from AT&T response to Public Counsel information request that explained the substantial differences in access costs between residential and business customers.

mitigate high switched access costs compared to residential rates).[24] Where disparate treatment exists among customer groups, the IXCs have shown the differences to be reasonable and legal.

Claim No. 2: Surcharges are not just and reasonable (OPC Brief at 14 to 15)

Recent statutory changes implemented as part of SB 237 no longer permit the Commission to consider a "just and reasonable" standard for the in-state fees at issue in this case.[25] Nevertheless, evidence was provided that conclusively shows that the in-state fees imposed by the IXCs recover substantially less than the average excess intrastate cost imposed on the IXCs.[26] The IXCs showed that prices in the consumer long distance market have dropped significantly in recent years[27] and that market forces have pushed the IXC industry toward flat-rate fees for uniformly priced buckets of minutes.[28] How an IXC recovers its costs of service is a matter of rate design that should be within its managerial purview. The rate design options available to an IXC when intrastate switched access costs are higher than interstate switched access costs include the assessment of higher intrastate minute-of-use rates or additional in-state fees. The IXCs in this case have established services with rates and fees that take into consideration both costs and market forces.[29]

---

[24] Rhinehart Surrebuttal at 17 – 20.

[25] MCI Brief at 27-29, AT&T Brief at 7-8, Staff Brief at 6, n 15.

[26] AT&T Rhinehart Direct at 9, Rhinehart Surrebuttal at 24 (AT&T's ISCF has been set at a level "calculably related to average per-customer excess intrastate switched access cost."), Sprint Appleby Direct at 7 and updated in Surrebuttal at 3 and HC Surrebuttal Schedule JAA#1 to reflect computations based on Missouri intrastate factors only... MCI Graves Amended Direct, p. 15-21.

[27] Rhinehart Surrebuttal at 31 and Surrebuttal Schedule DPR-4. See also Trends in Telephone Service, April 2005 at http://www.fcc.gov/wcb/trends.htm Table 13.4. Graves Amended Direct, p. 8-10.

[28] Rhinehart Surrebuttal at 19 - 20 and 49, Graves Amended Direct at 8.

[29] Graves Amended Direct at 8 citing to FCC report. See also Rhinehart Direct at 5 explaining how AT&T developed a service called AT&T One Rate Simple to meet the needs of customers wishing to avoid AT&T's in-state fee.

OPC attempts to discount the level of competition faced by the IXCs[30] but provides no empirical evidence in support of its position. In contrast MCI provided extensive evidence of long distance service offers from competitors.[31] OPC ignores the Commission's own findings that at least 74 interexchange competitors offer 1+ long distance in every SBC exchange.[32] Significantly, AT&T showed that it has suffered significant declines in the number of customers served and minutes of use carried in recent years.[33] Public record information from the FCC bears out AT&T's empirical evidence for Sprint and MCI as well.[34] The IXCs operate daily in the real world of profit and loss, market share and intense competition, and must design their services to meet customer demand and maximize utilization of their networks. The IXCs have provided substantial and credible evidence of these market place realities and how the use of an in-state fee is a reasonable response to those realities. In contrast, OPC has offered nothing more than unsupported rhetorical assertions that marketplace realities should be ignored and that the in-state fees are simply "unfair." Although the Commission is now statutorily precluded from considering whether the in-state fees are "just and reasonable,"

---

30 OPC Brief at 15 "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." Yet, AT&T provided compelling evidence of the dramatic overall decline in revenue per minute since its ISCF was introduced over 3 years ago. Rhinehart Surrebuttal at 31 – 32, and HC Surrebuttal Schedule DPR 4. *See also* MCI Initial Brief at 7 – 10. It is beyond belief that any person even remotely involved in the telecommunications industry over the last few years would be unaware of the massive revenue declines experienced by traditional IXCs during that time, as well as the corresponding layoffs and other efforts by IXCs to reduce costs as a result of the competitive pressures in the long distance market. To paraphrase an old adage, OPC refuses to see the "forest" of long distance competition that is no doubt obvious to everyone else, and instead OPC questions whether there are even trees in the forest! However, over 10 years ago OPC stipulated to the fact that the long distance services provided by AT&T and MCI are fully competitive and deserving of the lesser regulation afforded competitive services by Missouri statutes. There is no basis in this docket for OPC to now question the strength of that competition.

31 See Graves Amended Direct at 8-11 and Schedule 3.

32 Graves Amended Direct at 11.

33 Rhinehart Surrebuttal at 32 - 33 and Schedule DPR-5.

34 Id.

the only credible evidence in the record amply demonstrates that the in-state fees are just and reasonable.

- **Claim No. 3: Surcharges are discriminatory (OPC Brief at 15 to 17)**

Contrary to OPC's claim, and in spite of the fact that a cost justification is not required for these in-state fees, the IXCs have provided a cost-based justification for the disparate treatment of residential ratepayers. The IXCs' in-state fees recover substantially less than the total average excess intrastate switched access costs imposed on them.[35] Class of service distinctions in pricing are a legal and long-standing pricing tool in telecommunications.[36] Thus, the fact that only residential customers are assessed cannot and should not be viewed as discriminatory. Further, business long distance rates are higher than residential long distance rates, mitigating any cost-based need for an in-state fee on business long distance subscribers.[37] Another cost-based consideration includes the fact that higher volume business customers have options, including the use of special dedicated access on one or both ends of calls placed to or from their places of business in Missouri, that effectively avoid the high switched access charges that simply cannot be avoided in the stand-alone consumer long distance marketplace.[38]

The relevant statutes, subsections 392.200.2 and 392.200.3 RSMo, must be considered. OPC's proposed extremist construction of subsection 2 would limit an IXC to one price for basic intrastate long distance service and would prohibit the myriad of rate plans currently existing in the market. In addition, subsection 3 only prohibits undue

---

[35] Appleby Surrebuttal at 3, Rhinehart Surrebuttal HC Schedule DPR-3. Graves Amended Direct, p. 15-21.

[36] Rhinehart Surrebuttal at 27, 29, and 37; Appleby Direct at 13; Graves Amended Direct at 20.

[37] Rhinehart Surrebuttal at 17 - 20.

[38] OPC's statement at 16 that the IXCs have acknowledged that access paid by an IXC is the same whether the end user is a residential or business customer is misplaced. The statement *may* be true when comparing single-line business customers to residential customers, but for high volume business customers the claim by OPC is patently false. Rhinehart Surrebuttal, at 25 – 27.

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 and not discriminatory.

OPC's suggestion that "reason and fairness" should dictate that all customers should be subject to an in-state fee has no basis in law or precedent. Indeed, SB 237 endorsed again the legitimacy of having distinct pricing plans for residential and business customers. Revised Section 392.245 now directs the Commission to separately consider the markets for service to residential versus business customers. OPC's solution to its perception of the evils of in-state fees is for the Commission to ignore clear legislative intent and decades of ratemaking practices that establish the reasonableness and non-discriminatory nature of distinctions between residential and business classes.

Contrary to OPC's arguments, customers assessed the in-state fee are not "disadvantaged" or "treated worse than those customers who are exempted from the surcharge." One might argue the opposite. Business customers pay higher local and long distance rates and are not assessed the in-state fee.[39] Customers must expend many additional dollars to purchase local dial tone service from the IXC's CLEC affiliate in order to avoid the in-state fee. Further, the Commission should not lose sight of the fact that switched access costs incurred by the IXC are significantly less when also providing local service to an end user. Thus, not charging the in-state fee to IXC local customers has cost-based support.[40] IXC stand-alone long distance customers may avoid AT&T's

---

[39] Voight Surrebuttal at 3. Also see Commission findings in Case No. TR-2001-65 quoted at Rhinehart Surrebuttal at 15 - 16. See also discussion of relative residential and business rates in Rhinehart Surrebuttal at 17 - 20.

[40] Rhinehart Direct at 15, Appleby Direct at 10 - 11. Graves Amended Direct, p. 20.

in-state fee if they subscribe to a service with a high minute of use rate.[41]

It is an undisputed fact that there are a multitude of long distance services and plans in the marketplace today with varying monthly recurring charges and minute-of-use rates.[42] The plans are designed to provide customers with a selection of long distance service that will meet their needs based on their patterns of use. Yet, these differing rate plans, by OPC's way of thinking, are discriminatory on their face because one customer is treated differently from another. Clearly this is an illogical and absurd argument on the part of OPC. What this discussion simply shows is that the "discrimination" alleged by OPC is nothing new and is neither "undue" nor "unreasonable" discrimination that is prohibited by subsection 392.200.3.

- **Subclaim No. 1: It is discriminatory to apply in-state fees to customers with no in-state calling (OPC Brief at 17, 18, and 19)**

OPC claims that merely because customers who have no usage in a particular month are still assessed the in-state fee, the in-state fee is unjust, unreasonable, and discriminatory. OPC never explains how it finds any difference between the flat-rated in-state fees and the flat-rate structure for a myriad of other telecommunications services.[43] Similarly, OPC never explains why the in-state fees should be considered unlawful, but numerous regulatory fees such as 911, Missouri Relay, and USF, are not. By extension of OPC's argument, every flat-rate priced service would be unlawful. OPC's argument is absurd and should be rejected out of hand.[44] The record demonstrates that flat-rated

---

41 Rhinehart Direct at 5.

42 See Graves Amended Direct Schedule AG-3 showing multiple publicly available sources of comparisons of residential long distance calling plans.

43 E.g. local dial tone, vertical calling features, directory listings.

44 Rhinehart Surrebuttal at 34; Voight Surrebuttal at 2.

pricing is increasingly popular with customers[45] and a flat-rated structure avoids penalizing high volume users of toll services.[46]

- **Subclaim No. 2: The variance between in-state and interstate access rates is an inappropriate basis for determining a reasonable cost-based rate for the in-state fee. (OPC Brief at 17, 18, and 19 to 20)**

As noted above, the IXCs do not need to provide a cost justification for their in-state fees, and the rates for competitive services do not need to be "cost-based." Indeed, no "justification" at all is required, so long as the in-state fees do not violate the requirements of Sections 392.500 and 392.200.2 - .5. However, the IXCs have provided a sound justification for their in-state fees based on Missouri's extremely high intrastate switched access rates. There can be no dispute that Missouri's intrastate access rates are high compared to any reasonable measure.[47] OPC argues without explanation 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").[48] As was explained in AT&T's Initial Brief, the flat-rated SLC helps recover from end users loop costs previously recovered through usage-sensitive interstate switched access charges assessed on IXCs.[49] This parallelism to the IXCs' in-state fees is striking and demonstrates that the difference between interstate and Missouri intrastate switched access rates, including the federal

---

45 Rhinehart Direct at 11, Surrebuttal at 20, 49. Graves Amended Direct, p. 8-10.

46 Voight Surrebuttal at 5.

47 Appleby Direct at 6 (Missouri intrastate switched access charges were 243% of the national average for all intrastate switched access charges in December 2004), Rhinehart Surrebuttal at 13 (Only New Mexico and South Dakota have higher intrastate switched access charges), Graves Direct at 17 - 18 quoting from the Commission's Report and Order in Case No. TR-2001-65 stating Missouri intrastate switched access charges "distort" the interexchange carrier market and are "anticompetitive."

48 OPC Initial Brief at 17.

49 AT&T Initial Brief at 22. See also Rhinehart Surrebuttal at 20-22.

interstate SLC, is relevant to and provides additional justification for the IXCs' in-state fees.[50] The presence of the interstate SLC actually supports the IXCs' in-state fees because those fees address the *differences, or variance,* between the interstate and intrastate access regimes. Interstate SLC revenue does not in any way offset intrastate switched access charges imposed on and paid by the IXCs. Obviously, the FCC does not view the flat-rated SLC as unjust, unreasonable, or discriminatory against end users and this Commission should likewise continue to view the IXCs' in-state fees favorably.

- **Subclaim No. 3: It is discriminatory to apply the in-state fee to only residential customers (OPC Brief at 17, 18 to 19, and 20)**

OPC's arguments here can best be summed up as follows: 1) based on the stated reason for the in-state fees (i.e., to recover excessive intrastate access costs), "reason and fairness" dictate that the in-state fees should apply to business customers, and 2) the IXCs have not provided a cost justification for the different treatment of residential and business customers. As already discussed above, the Commission should not consider "fairness" in the establishment of the in-state fee rate, as "fairness" is not a legal standard to which the IXCs may be held when considering "class of service" distinctions. Indeed, business customers have been discriminated against through higher pricing for decades as part of the legal and long-standing "class of service" distinction. Neither should the Commission abandon "reason" and attempt to subvert statutorily permissible rate design by competitive carriers. As demonstrated by the IXCs, there is adequate "reason" to assess residential customers the in-state fee and not assess business customers. There are identifiable cost differences between the classes, especially for high-volume business

[50] It is important to note that the IXCs do not receive any of the interstate SLC revenue billed by the LECs.

customers.[51] Business long distance rates are higher than for residential customers, thus reducing any need for an in-state fee for business customers.[52] And, as noted in the context of discussing cost differences for large customers, business services are inherently more complex and meet significantly more diverse needs through differing rate designs and physical facilities.[53] As a result, IXC recovery of excessive intrastate access charges is perfectly consistent with not applying the in-state fee to business customers as a class.

Rather than providing credible evidence explaining how excluding business customers from the in-state fee violates any specific statutory provision, OPC simply rhetorically argues that the IXCs have not provided any evidence to justify the exemption. Yet, 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 IXCs' in-state fees nor withstand legal review.

- **Subclaim No. 4: It is discriminatory to apply the in-state fee on a flat rate basis (OPC Brief at 17 to 18, 19, and 20)**

OPC's argument is that because all non-exempt residential long distance customers have to pay the in-state fee, and because the in-state fee is flat-rated, low volume customers are discriminated against because they pay "proportionately more" than high volume users. Section 392.200.5 explicitly authorizes volume discounts, and the tariffs of Missouri IXCs routinely reflect price discounts given to high volume users.[54] There is simply nothing discriminatory about a rate structure that charges less as

[51] Rhinehart Surrebuttal at 25 – 26.
[52] Rhinehart Surrebuttal at 17 – 18, 28; Voight Surrebuttal at 3. Graves Amended Direct, p. 20.
[53] Rhinehart Surrebuttal at 25 – 26.
[54] Voight Surrebuttal at 3.

usage increases.[55] Once again, OPC's attack on the IXCs' in-state fees 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 an in-state fee somehow is *not* acceptable. The reason OPC cannot provide an explanation for its irrational and inconsistent position is that there is no meaningful distinction between the IXCs' in-state fees and other flat-rated charges that have been the norm in the telecommunications market for years, and flat-rated charges are a big reality in the telecommunications marketplace today.[56] Finally, as discussed above, the FCC's implementation of the flat-rated SLC is a perfect parallel to the IXCs' implementation of their flat-rated in-state fees in Missouri. The federal SLC is imposed on end users regardless of the amount of their interstate long distance calling and it certainly is not viewed by the FCC as discriminatory.

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 IXCs' in-state fees from all the other lawful flat-rate charges in the market today.

- **Subclaim No. 5: It is discriminatory against rural customers who cannot qualify for an exemption from the in-state fee as a local customer of the IXC. (OPC Brief at 18 and 20)**

OPC argues that because IXCs do not provide local service everywhere in the state it is discriminatory for them to exempt their local customers, as that allegedly discriminates against presumptively rural customers in the locations where IXCs do not provide local service. It is true that IXCs do not provide residential service statewide, but it is also true that is there is no legal requirement for any IXC to do so. Furthermore, where, for

---

[55] Id. See also Appleby Surrebuttal at 2-3 (other industries utilize flat-rate pricing), Rhinehart Surrebuttal at 39-40, 49; Graves Surrebuttal at 2-3.

[56] Rhinehart Direct at 11, Rhinehart Surrebuttal at 46. Graves Amended Direct, p. 8-10, 16, 21.

example, 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 the IXCs' CLEC affiliates have targeted urban over rural customers in offering local service.[57] Any long distance customer who does not purchase local service from an IXCs' local affiliate is not eligible for the exemption, regardless of where they live, whether urban or rural.[58] Obviously, IXCs have previously targeted 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 the IXCs' control; including the fact that the federal Telecommunications Act of 1996 (the "Act") provided threshold exemptions from interconnection and unbundling obligations for rural ILECs.[59]

III. RATE REFUNDS CANNOT BE ORDERED

OPC gratuitously suggests at the end of its Initial Brief that the Commission should direct the IXCs to refund monies collected pursuant to the tariffs that have been in effect throughout these proceedings. OPC provides no citation of authority in support of its request. No such request is framed by the issues presented by the parties. The Commission should simply disregard OPC's cavalier words.

Given that the IXCs are constitutionally entitled to retain all monies collected pursuant to effective tariffs, it truly is outrageous for OPC to treat this subject in such a frivolous manner. It is beyond debate that the Commission has no authority to provide the refund that OPC mentions. Even when courts have reversed Commission decisions

---

[57] Rhinehart Surrebuttal at 40 - 41. Graves Surrebuttal, p. 4.

[58] Rhinehart Direct at 13, Rhinehart Surrebuttal at 44, Graves Amended Direct at 21, Graves Surrebuttal at 4.

[59] AT&T Initial Brief at 16, Rhinehart Surrebuttal at 41.

approving tariffs, they have held that there can be no retroactive remedy for rates collected pursuant thereto. In State ex rel Util. Consumers Council v. PSC, 585 SW2d 41 (MO. 1979), the Missouri Supreme Court made it clear that such relief is not available. The Court stated that the Commission "may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process." The Court added: "This does not mean that the utilities have received a windfall profit of the amounts illegally[60] collected." The Court concluded that the utilities were entitled to be paid for their services, and "while the amounts they would have collected may not exactly match those collected under the [disputed tariff], to order a refund of the latter amounts would clearly be confiscatory, and to order an offset of this refund by what a 'reasonable rate' would have been would be (retroactive) rate making at the order of this court, something we cannot do."[61] Thus, it is well-established that the Commission cannot order a retroactive refund as untenably requested by OPC.

IV. CONCLUSION

OPC has provided nothing more than rhetoric in support of its objections to the IXCs' tariffs, and the evidence in this case overwhelmingly supports the position of the IXCs and the Staff that the IXCs' in-state fees are legal.

The evidence in this case demonstrates that: 1) the in-state fees apply equally to all similarly situated customers based on well-accepted long-standing class-of-service distinctions, 2) there is no evidence in the record of discrimination against rural

---

[60] The Court had already ruled that the Commission illegally approved tariffs with a fuel adjustment clause.

[61] The Court did order refunds of amounts collected pursuant to retroactive ratemaking by the Commission, but there is no retroactive aspect to the surcharges at issue in this case.

customers, 3) the in-state fees implemented by the IXCs bear a calculable relationship to the average excess costs incurred by the IXCs, 4) Missouri has exceptionally high intrastate switched access charges, 5) there are many flat-rated monthly recurring charges that apply regardless of whether a customer has usage, 6) flat-rated charges are popular with customers and are very common, even where underlying costs can be considered usage sensitive, 7) the IXCs' in-state fees essentially mirror the FCC's interstate scheme for loop cost recovery from end users, 8) 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, 9) 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 IXCs' decision not to impose the in-state fee on business customers.

The Court of Appeals did not pass judgment on the merits of the IXCs' in-state fees 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 in-state fee tariffs' [alleged] disparate treatment of residential, low volume, and rural customers.[62]

The IXCs conduct business in a highly competitive market. The surcharges are lawful parts of the companies' discretionary competitive pricing structures. Particularly in light of the changes in law effectuated by SB 237, the Commission should abide by its repeated prior decisions to approve these surcharges. It is time to bring these lengthy proceedings to an end with a clear set of findings and conclusions that will satisfy the Court of Appeals.

---

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

Respectfully Submitted,

Kevin K. Zarling, TX Bar #2249300
AT&T Communications of the Southwest, Inc.
919 Congress, Suite 900
Austin, Texas 78701-2444
(512) 370-2010
(512) 370-2096 (FAX)
kzarling@lga.att.com

NEWMAN, COMLEY & RUTH P.C.

By: by permission

Mark. W. Comley Bar #28847
601 Monroe Street, Suite 301
P .O. Box 537
Jefferson City, MO 65102-0537
(573) 634-2266
(573) 636-3306 FAX

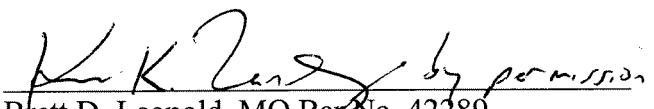
ATTORNEYS FOR AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.

CURTIS, HEINZ,
GARRETT & O'KEEFE, P.C.

by permission

Carl J. Lumley, #32869
Leland B. Curtis, #20550
130 S. Bemiston, Suite 200
St. Louis, Missouri 63105
(314) 725-8788
(314) 725-8789 (FAX)
clumley@lawfirmemail.com
lcurtis@lawfirmemail.com

ATTORNEYS FOR MCI COMMUNICATIONS SERVICES, INC. AND TELECONNECT LONG DISTANCE SERVICES AND SYSTEMS CO.



Brett D. Leopold, MO Bar No. 42289
Kenneth A. Schifman, MO Bar No. 42287
Mailstop: KSOPHN0212-2A353
6450 Sprint Parkway
Overland Park, Kansas 66251
Tele: 913-315-9155
Fax: 913-523-9630
Email: brett.d.leopold@sprint.com

ATTORNEYS FOR SPRINT COMMUNICATIONS COMPANY, L.P.

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed this 3rd day of November 2005 to the following:

Dana K. Joyce
Missouri Public Service Commission
PO Box 360
200 Madison Street, Suite 800
Jefferson City, MO 65102
GenCounsel@psc.mo.gov

David A. Meyer, Missouri Bar No. 46620
Senior Counsel
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-8706 (Telephone)
(573) 751-9285 (Fax)
david.meyer@psc.mo.gov

ATTORNEY FOR THE STAFF OF THE MISSOURI PUBLIC SERVICE COMM'N

Michael Dandino, Missouri Bar No. 24590
Senior Public Counsel
Office of the Public Counsel
P. O. Box 2200
Jefferson City, MO 65102
(573) 751-5559 (Telephone)
(573) 751-5562 (Fax)
mdandino@ded.mo.gov

ATTORNEY FOR THE OFFICE OF THE PUBLIC COUNSEL

Carl J. Lumley, #32869
Leland B. Curtis, #20550
130 S. Bemiston, Suite 200
St. Louis, Missouri 63105
(314) 725-8788
(314) 725-8789 (FAX)
clumley@lawfirmemail.com
lcurtis@lawfirmemail.com

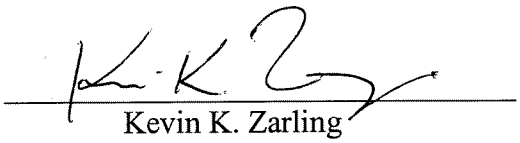
ATTORNEYS FOR MCI COMMUNICATIONS SERVICES, INC. AND TELECONNECT LONG DISTANCE SERVICES AND SYSTEMS CO.

Brett D. Leopold, MO Bar No. 42289
6450 Sprint Parkway
Mailstop: KSOPHN0212-2A353
Overland Park, Kansas 66251
Tele: 913-315-9155
Fax: 913-523-9630
Email: brett.d.leopold@sprint.com

ATTORNEY FOR SPRINT COMMUNICATIONS COMPANY, L.P.

Kenneth A. Schifman, MO Bar No. 42287
Mailstop: KSOPHN0212-2A303
6450 Sprint Parkway
Overland Park, Kansas 66251
Tele: 913-315-9783
Fax: 913-523-9827
Email: kenneth.schifman@sprint.com

ATTORNEY FOR SPRINT COMMUNICATIONS COMPANY, L.P.



Kevin K. Zarling