BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of an Investigation of the Actual Costs Incurred in Providing Exchange Access Service and The Access Rates to be Charged by Competitive Local Exchange Telecommunications Companies in the State of Missouri.	)))))	Case No. TR-2001-65

REPLY BRIEF OF SOUTHWESTERN BELL TELEPHONE, L.P., d/b/a SBC MISSOURI

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January 24, 2003

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COMES NOW Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (SBC Missouri), and for its Reply Brief, states to the Missouri Public Service Commission (Commission) as follows:

I. EXECUTIVE SUMMARY

As SBC Missouri described in its Initial Brief and as the Commission recognized at the outset of the hearing, this case was opened by the Commission to investigate the costs of providing switched access service in Missouri, for the specific purpose of determining the appropriate level of access rates to be charged by competitive local exchange carriers (CLECs) in Missouri.[1] This case is an outgrowth of the Commission's Report and Order in Case No. TO-99-596, where the Commission made an interim determination that, as a condition of certification and competitive classification, CLEC's access rates should be capped at the level of the incumbent local exchange carrier (LEC) in each exchange where the CLEC is certified to provide basic local service.

[1] Initial Brief of SBC Missouri, p. 4; T. 17.

Based upon a review of the Initial Briefs which have been submitted in this case,[2] it is apparent that some parties continue to attempt to turn this case into something much different than it was intended to be. However, SBC Missouri continues to believe that the Commission's primary focus in this case should be to adopt a permanent access rate cap mechanism for CLEC access rates, to replace the "interim" CLEC access rate cap solution adopted by the Commission in Case No. TO-99-596. If the Commission explores any issue beyond the CLEC access rate cap, it should limit any future proceeding to an examination of the negative impact small incumbent LECs' very high switched access rates have on customers throughout Missouri, and particularly customers located in more rural areas of Missouri. In light of the evidence presented at the hearing regarding the high level of access rates in most small incumbent LECs exchanges, and the negative impact such high access rates have on rural customers, if the Commission explores additional issues in a new proceeding, or another phase of the current case, it should investigate ways to reduce rate of return regulated incumbent LECs' high switched access rates. Only then will the Commission incent more carriers to serve rural areas, and to offer more attractive calling plans, including expanded local calling plans in rural Missouri.

As SBC Missouri suggested in its Initial Brief, after sifting through the cost evidence which was submitted at the hearing in this case and reviewing the parties' Initial Briefs, the Commission may very well ask itself what further action it can or should take in this case.[3] SBC Missouri concurs with those parties that urge the Commission to use this information for the purpose for which this case was originally established, i.e., to establish an appropriate permanent

[2] The following parties filed Initial Briefs in this case: the Commission Staff; Office of the Public Counsel (OPC); ALLTEL Missouri, Inc. (ALLTEL), AT&T Communications of the Southwest, Inc. (AT&T); MCI WorldCom Communications, Inc., MCImetro Access Transmission Services, L.L.C., and Brooks Fiber Communications of Missouri, Inc. (WorldCom); Sprint Communications Company, L.P. and Sprint Missouri, Inc. (Sprint); CenturyTel of Missouri, L.L.C and Spectra Communications Group, L.L.C. d/b/a CenturyTel (CenturyTel); and Fidelity Communication Services I, Inc., Fidelity Communication Services II, Inc., Fidelity Communication Services III, Inc., and Fidelity Cablevision, Inc. (Fidelity).

[3] Initial brief of SBC Missouri, p. 6.

mechanism to cap CLECs' access rates. On that issue, which all parties to this case agree should be resolved by the Commission, there is substantial agreement that the CLEC access rate cap mechanism adopted by the Commission on an interim basis in Case No. TO-99-596 is necessary and in the public interest, and should be adopted on a permanent basis. On the numerous remaining issues addressed by the parties, there is no such agreement. SBC Missouri does not believe any additional action can or should be taken with respect to the exchange access rates of incumbent LECs subject to price cap regulation under Section 392.245 RSMo. 2000.

II. DISCUSSION

As it did in its Initial Brief, SBC Missouri's Reply Brief will address each of the issues contained in Staff's Joint List of Issues, filed on August 15, 2002. In addition, SBC Missouri will address each of the additional issues identified by the Regulatory Law Judge at the conclusion of the hearing, including issues related to the Commission's standard protective order and the Commission's authority to modify local calling scopes, as well as several issues regarding the Commission's jurisdiction to reduce, restructure and/or rebalance switched access rates in Missouri.

1. What is the appropriate cost methodology (i.e., TSLRIC, LRIC, embedded, stand alone, etc.) to be used in determining the cost of switched access?

As SBC Missouri described in its Initial Brief, LRIC (long run incremental cost) is the appropriate methodology for the Commission to use to investigate the cost of providing exchange access service, including CLECs' costs of providing exchange access service.[4] SBC Missouri prepared its own total service LRIC (TSLRIC) cost study for the switched access service it provides in Missouri and submitted the results to the Commission in David Barch's direct

[4] Initial Brief of SBC Missouri, pp. 11-15.

testimony.[5] The results of SBC Missouri's TSLRIC study for switched access service confirms that SBC Missouri's current switched access rates in Missouri exceed SBC Missouri's TSLRIC for providing switched access service in Missouri, which is appropriate, because as SBC Missouri witness David Barch testified, TSLRIC represents the appropriate lower boundary (i.e., a price floor) for pricing purposes.[6]

As SBC Missouri described in its Initial Brief, the Commission has historically relied upon the LRIC methodology to determine the cost for telecommunications services. In fact, the Commission specifically adopted LRIC as the appropriate costing methodology for SBC Missouri in Case No. 18,309, decided in 1977. An accurate LRIC study identifies the costs an efficient firm would avoid if it would decided to discontinue, or reduce offering, a particular service. LRIC measures costs on a forward-looking basis, i.e., the cost that SBC Missouri expects to incur in the future.[7] As a result, a LRIC methodology does not recognize or attempt to measure historical embedded costs.[8] In addition, an appropriate LRIC cost study does not consider any costs shared between or among a subset of services (shared costs) or shared among all services a firm offers (common costs).[9]

Several other parties support the use of the TSLRIC costing methodology to determine a carrier's cost of providing switched access service in Missouri, including AT&T,[10] WorldCom,[11] and Sprint.[12] In addition, Staff, while not recognizing TSLRIC as the sole appropriate costing methodology, agreed that TSLRIC makes sense and is a sound basis to establish a price floor for

[5] See, Ex. 18HC, Barch Direct, Schedule DJB-1.
[6] Ex. 18, Barch Direct, p. 6.
[7] Initial Brief of SBC Missouri, p. 13.
[8] Id.
[9] Id.
[10] Initial Brief of AT&T, pp. 26-29.
[11] Initial Brief of WorldCom, p. 1.
[12] Initial Brief of Sprint, pp. 6-17.

switched access service.[13] Even OPC agrees that a TSLRIC costing methodology is appropriate to establish a price floor for switched access service.[14]

The small incumbent LEC parties in this case are the only carriers that do not support the use of a TSLRIC costing methodology to determine the cost of switched access in Missouri. For example, in their Initial Brief, STCG and Holway argue that it would be appropriate to utilize a carrier's historical, embedded costs, allocated to the intrastate jurisdiction through the application of Parts 36 and 69 of the FCC's rules, to determine the cost of providing switched access service.[15] Likewise, MITG also supports the use of an embedded cost study to determine the cost of providing switched access service in Missouri.[16] ALLTEL also suggests that its cost to provide switch access service in Missouri should be determined pursuant to Parts 36 and 69 of the FCC's rules.[17] Fidelity, which has affiliates operating as both a small incumbent LEC and a CLEC in Missouri, suggests that it is premature for the Commission to adopt a single costing methodology, but also states that to the extent costs are an issue in this case, the Commission should use actual, embedded costs to determine the cost of providing switched access service.[18]

The small incumbent LECs proposing that the Commission should utilize actual, embedded costs allocated to the intrastate jurisdiction through the application of Parts 36 and 69 of the FCC's rules recognize that this methodology, which includes an arbitrary allocation of loop costs to the cost of exchange access service, results in a much higher cost estimate than an accurate TSLRIC study produces. These parties rely upon the higher cost estimate produced by the methodology they espouse in an attempt to justify their very high intrastate switched access

[13] Initial Brief of Staff, p. 7.
[14] Initial Brief of OPC, p. 2.
[15] Initial Brief of STCG and Holway, p. 3.
[16] Initial Brief of MITG, p. 3.
[17] Initial Brief of ALLTEL, p. 9.
[18] Initial Brief of Fidelity, p. 5.

rates. As STCG and Holway point out in their Initial Brief, based upon the cost studies conducted by Mr. Schoonmaker using the actual cost methodology proposed by the small incumbent LECs, the actual cost of providing exchange access for all of the small telephone companies is approximately 92% of their total current access revenues.[19] In other words, the small incumbent LECs' intrastate access revenues, in total, only exceed their total cost of providing exchange access service by only 8%, if the FCC's Parts 36 and 69 costing methodology is used to determine their cost to provide exchange access services. As a result, STCG and Holway conclude that the small ILECs' access rates, in total, are not really excessive when compared to their total actual cost.[20]

The small incumbent LECs' analysis is fundamentally flawed. As STCG/Holway witness Robert Schoonmaker testified at the hearing, if the costing methodology proposed by the small incumbent LECs were adopted by the Commission, 19 of 37 small incumbent LECs' access rates would actually *increase* from their current high levels.[21] That is because on a company-specific basis, more than half of the small incumbent LECs' switched access rates are actually *below* the cost estimate produced by using historical embedded costs under Parts 36 and 69 of the FCC rules, which of course also include a significant allocation of local loop costs.[22] Moreover, as SBC Missouri pointed out in its Initial Brief, if the Commission adjusted small incumbent LECs' switched access rates based upon the actual cost methodology proposed by Mr. Schoonmaker, and did so on a revenue neutral basis by adjusting only the small incumbent LECs' basic local rates, several small incumbent LECs would end up with "negative" basic local rates, i.e., these

[19] Initial Brief of STCG and Holway, p. 10.
[20] Id.
[21] T. 912-913.
[22] As Mr. Schoonmaker testified at the hearing, allocation of loop costs to exchange access service is a "very substantial factor" in determining the total cost of exchange access service under his analysis, and generally exceeds 50% of the total cost. T. 903

companies would *pay* their customers to take basic local service from the company, and a number of other small incumbent LECs' local rates would be positive but extremely small.[23] Such a result highlights why the costing methodology proposed by the small incumbent LECs in this case is patently absurd and should be rejected by the Commission.

Moreover, although the small incumbent LECs' argue that the Commission should adopt an actual cost methodology consistent with Parts 36 and 69 of the FCC's rules to determine their cost to provide switched access service, these same companies do *not* propose that these costs should be recovered in the manner required by Parts 36 and 69 of the FCC rules. While the small incumbent LECs wish to rely upon the actual cost methodology utilized under the FCC rules, they propose to ignore the same FCC rules with respect to recovering those costs. Under the Parts 36 and 69 methodology advocated by the small incumbent LECs, once the cost is determined, a very significant portion of that cost is recovered from the local carrier's end-user customer, in the form of a subscriber line charge, or SLC. According to STCG witness Schoonmaker, the current maximum SLC under applicable FCC rules is $6 for residential and single business lines, and $9.20 for multiple line businesses.[24] Here, however, the small incumbent LECs do not propose to recover any portion of their costs (as determined pursuant to Parts 36 and 69 of the FCC's rules) from their local customers in the form of a SLC, as the FCC rules require. Instead, the small incumbent LECs seek to diverge from the FCC's cost recovery requirements, and instead expect interexchange carriers to foot the bill for the entire cost, in the form of continued high access rates. The small incumbent LECs cannot have it both ways.

Staff takes a different approach. As it did at the hearing, Staff continues to rely upon the proposal of its consultant, Dr. Johnson, to utilize several different costing concepts, which

[23] Initial Brief of SBC Missouri, p. 15; T. 913.
[24] T. 916.

produce a wide range of results.[25] In its Initial Brief, Staff suggests that the TSLRIC cost methodology utilized by Dr. Johnson can be relied upon as the minimum level for potentially reasonable switched access rates.[26] In that regard, Staff's proposal to utilize TSLRIC as a costing methodology to establish a price floor is consistent with the parties proposing TSLRIC as the appropriate costing methodology.[27]

Staff also suggests that a stand alone cost (SAC) methodology as proposed by Dr. Johnson should be utilized as a maximum level for potentially reasonable switched access rates.[28] Staff also suggests that two versions of fully allocated (or average total) cost methodologies would be useful to evaluate the reasonableness of existing switched access rates which fall above the minimum reasonable rates (as determined under Staff's version of TSLRIC) and below the maximum level for potentially reasonable switched access rates (as determined by Staff's stand alone costing methodology).[29]

Along with several other parties, SBC Missouri questions whether the work produced by Staff's consultant in this case has any meaningful value for the Commission in determining whether the access rate cap adopted by the Commission on an interim basis in Case No. TO-99-596 should be adopted on a permanent basis, or whether some other "permanent solution" for capping CLEC access rates is appropriate. As both SBC Missouri and Sprint pointed out, where Staff's consultant attempted to conduct a TSLRIC study, Staff's consultant failed to conduct an appropriate TSLRIC study.[30] In fact, according to Sprint, Dr. Johnson's TSLRIC cost analysis

[25] Initial Brief of Staff, p. 6.
[26] Initial Brief of Staff, p. 7.
[27] Of course, this assumes that Staff's consultant conducted an appropriate TSLRIC study. However, as several parties pointed out at the hearing and in their Initial Briefs, Staff's counsel's TSLRIC study contains serious flaws.
[28] Initial Brief of Staff, p. 7.
[29] Initial Brief of Staff, p. 8.
[30] See, Initial Brief of SBC Missouri, pp. 23-25; Initial Brief of Sprint, p. 2.

"radically underestimates" Sprint's cost of providing switched access.[31] Likewise, in its Initial Brief, SBC Missouri pointed out major flaws in Dr. Johnson's TSLRIC methodology as applied to SBC Missouri's costs.[32] The small incumbent LEC parties in this case, who as described above advocate an actual, embedded cost methodology, strongly criticize Dr. Johnson's efforts both on a TSLRIC basis and on an actual cost basis.[33] While SBC Missouri does not agree with the small incumbent LECs' proposed costing methodology, SBC Missouri agrees with the numerous parties in this case (including Sprint, OPC, STCG/Holway and MITG) that point out the fundamental flaws in each of the costing methodologies Dr. Johnson proposes to use.

While not advocating a specific methodology to determine the cost of switched access service in Missouri, in its Initial Brief, OPC states that the evidence in this case supports the conclusion that both switched access rates and basic local rates are "subsidy free."[34] OPC goes on to state that no single cost methodology can answer the question of what is the most appropriate costing methodology for the Commission to utilize in this case.[35] OPC, like Staff, suggests that switched access rates which fall between the TSLRIC estimate and the stand alone cost estimate are neither receiving a subsidy, nor are providing a subsidy to any other service, i.e., basic local service.

As SBC Missouri pointed out in its Initial Brief, the cost of basic local service is not an issue in this case.[36] In its Initial Brief, OPC again reiterates its ridiculous assertion that SBC Missouri's TSLRIC for basic local service is $1.98.[37] Even if the TSLRIC of basic local service were an issue in this case, which it is not, OPC's TSLRIC "analysis" for basic local service is

[31] Initial Brief of Sprint, p. 3.
[32] Initial Brief of SBC Missouri, pp. 22-25.
[33] Initial Brief of Staff, pp. 17-29.
[34] Initial Brief of OPC, p. 1.
[35] Id.
[36] Initial Brief of SBC Missouri, pp. 19-20.
[37] Initial Brief of OPC, p. 10.

simply wrong. As SBC Missouri described in its Initial Brief, OPC witness Dunkel is the only witness in this case who even attempts to support the outlandish proposition that a TSLRIC study of the cost of basic local service should omit the entire cost of the local loop.[38] Moreover, Mr. Dunkel's TSLRIC "methodology" to determine the cost of basic local service is inconsistent with the Commission's definition of an appropriate LRIC analysis as described in Case No. 18,309, and inconsistent with the statutory definition of long run incremental costs contained in Section 386.020(32) RSMo. 2000. OPC's assertion that basic local rates receive no subsidy from access rates simply defies logic.

OPC's argument, and to a lesser degree Staff's suggestion, that switched access rates falling below the stand alone cost estimates for exchange access service can provide no subsidy or support to other services, and in particular to the cost of basic local service, have been conclusively refuted by the economic experts testifying in this case. In its Initial Brief, Sprint explains the flaws in both Dr. Johnson's and OPC's analysis. As Sprint states in Initial Brief, Dr. Johnson's and OPC's logic "fails as a matter of elementary economics."[39] The testimony of SBC Missouri witness David Barch also points out the flaws in the "subsidy free access" claim.[40] As established by the compelling economic evidence in this case, where a firm offers multiple services which are priced above the accurate TSLRIC for the service but below their stand alone cost, the prices above TSLRIC may provide a subsidy to those services priced below TSLRIC.

Finally, although AT&T proposes that the Commission utilize TSLRIC to determine the cost of providing exchange access, AT&T also argues that TSLRIC should be used to establish the price for exchange access service.[41] In effect, AT&T argues that the TSLRIC of exchange

[38] Initial Brief of SBC Missouri, p. 20.
[39] Initial Brief of Sprint, p. 11.
[40] Ex. 19, Barch Rebuttal, p. 22.
[41] Initial Brief of AT&T, pp. 30-35.

access service should serve as both the price floor and the price cap for the service. As described in Sections 8(c) and (d) of this Reply Brief, AT&T's proposal to force SBC Missouri and other price cap regulated LECs to reduce their exchange access rates to a TSLRIC level violates the Missouri price cap statute,[42] and cannot be lawfully adopted by the Commission.

AT&T argues that pricing access at TSLRIC is necessary to prevent companies that provide both switched access services and interexchange services from engaging in a "price squeeze."[43] AT&T's argument has no evidentiary support in the record, and AT&T's attempt to raise this argument in this Initial Brief is improper. As the Commission will recall, AT&T improperly attempted to raise this very same issue in Mr. Kohly's surrebuttal testimony.[44] When AT&T offered this testimony into evidence at the hearing, SBC Missouri and STCG/Holway moved to strike the testimony on the basis that it was improper surrebuttal testimony under the Commission's rules.[45] After oral arguments on the Motions to Strike, the Commission struck all of Mr. Kohly's surrebuttal testimony on this very issue.[46]

Despite the fact that the Commission excluded the entirety of Mr. Kohly's testimony on this irrelevant subject from the evidentiary record, AT&T ignores the Commission's ruling and raises the same issue in its Initial Brief. In fact, in its Initial Brief, AT&T relies on and cites to the very same testimony which was struck by the Commission.[47] It was improper for AT&T to attempt to submit this irrelevant argument in Mr. Kohly's testimony, and it is clearly improper for AT&T to rely on this stricken testimony to support this irrelevant argument in its Initial Brief.

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[42] Section 392.245 RSMo. 2000.
[43] Initial Brief of AT&T, pp. 31-35.
[44] Ex. 48.
[45] See, T. 1001-1008.
[46] T. 1023. The testimony struck by the Commission begins on page 7, line 1 of Mr. Kohly's surrebuttal testimony, and continues through page 9, line. 1.
[47] See, Initial Brief of AT&T, p. 34, footnotes 56, 57, 58 and 59, citing to Ex. 48, Kohly Surrebuttal, pp. 8-9.

AT&T's proposal to require exchange access service to be priced at TSLRIC should be rejected by the Commission.

In summary, no party has suggested any reason why TSLRIC is not the most appropriate costing methodology to determine carriers' cost of providing switched exchange access service in Missouri, particularly where the focus of this case is to determine the appropriate level of access rates to be charged by CLECs, and the appropriate mechanism to cap those rates. The cost estimates produced by an appropriate TSLRIC costing methodology confirm that incumbent LECs' current access rates are higher than the TSLRIC for exchange access service, and it is therefore appropriate to cap CLEC access rates at the level of the incumbent LECs unless the CLEC can establish that its TSLRIC for exchange access service exceeds the capped level. The Commission should adopt, on a permanent basis, the access rate cap mechanism for CLEC access rates, to replace the interim CLEC access rate cap solution adopted by the Commission in Case No. TO-99-596.

2. Should the cost methodology (i.e., TSLRIC, LRIC, embedded, stand alone, etc.) for determining switched access costs be uniform and consistent for all Missouri LECs?

As SBC Missouri described in its Initial Brief, SBC Missouri believes that the same costing methodology -- TSLRIC -- should be used to determine the costs of all Missouri LECs, including large incumbent LECs, small incumbent LECs, and CLECs. As SBC Missouri has maintained throughout this proceeding, the Commission's Orders in this and preceding cases make it clear that this case was established to investigate the costs incurred to provide exchange access service, so as to enable the Commission to adopt a permanent CLEC access rate solution. In this phase of this case, the access rates of small incumbent LECs (the only carriers that do not agree TSLRIC is the appropriate costing standard for switched access service) are not directly at

issue. As SBC Missouri point out in its Initial Brief, there is simply no reason why the same costing methodology should not apply in a uniform manner across all telecommunications companies to investigate their cost to provide switched access service, where the only purpose of this case is to determine if capping CLEC access rates at the level of the incumbent LEC in the same exchange is an appropriate long-term solution, and in the public interest.[48]

Several parties agree that the cost methodology selected by the Commission to determine the cost to provide exchange access service should be uniform and consistent. Along with SBC Missouri, Sprint,[49] STCG and Holway,[50] WorldCom,[51] and Staff[52] agree that the cost methodology for determining exchange access costs should be uniform and consistent. If TSLRIC is used properly, i.e., as a price floor, it is clearly appropriate to utilize it as a uniform cost methodology for all Missouri LECs. Use of TSLRIC confirms that capping CLEC access rates at the level of the access rates of the incumbent LEC against which the CLEC is competing is appropriate. Moreover, if the Commission continues its investigation into the access rates of the rate of return regulated small incumbent LECs, which SBC Missouri believes the Commission should do, the Commission could utilize TSLRIC and continue to have discretion to set appropriate rate levels for small ILECs that take into account the particular circumstances facing each small incumbent LEC, as well as any other LEC. In fact, using a TSLRIC would grant the Commission more discretion as it investigates the access rates of small incumbent LECs, since it does not include an arbitrary allocation of loop costs.

The parties that do not believe the Commission should adopt a uniform and consistent cost methodology for determining switched access costs for Missouri LECs generally provide

[48] Initial Brief of SBC Missouri, p. 16.
[49] Initial Brief of Sprint, pp. 17-19.
[50] Initial Brief of STCG and Holway, p. 29.
[51] Initial Brief of WorldCom, p. 2.
[52] Initial Brief of Staff, pp. 12-13.

very little analysis on this issue, but instead rely on the general proposition that there is no reason for the Commission to adopt a "one size fits all" costing methodology in this case.[53] SBC Missouri disagrees. Based on the purposes of this case, a single costing methodology, and in particular the TSLRIC costing methodology, is appropriate, and the resulting cost estimate establishes an appropriate price floor for switched exchange access service. The TSLRIC results which have been produced by various parties in this case confirm that the interim access rate cap mechanism adopted by the Commission in Case No. TO-99-596 is appropriate, and results in access rates being capped a levels which exceed the TSLRIC estimates providing exchange access service. There is simply no reason to utilize any different costing methodology than TSLRIC given the purposes of this case.

3. Should loop costs be included in the determination of the cost of switched access, and if so, at what level?

As SBC Missouri explained in its Initial Brief, no portion of the cost of the local loop should be included in the TSLRIC of providing exchange access service.[54] Loop costs are not a direct, incremental cost of providing switched access service. Including any portion of local loop costs as a cost of providing switched access service is inconsistent with fundamental LRIC principles of economic cost causation.[55] Moreover, including any portion of the cost of the local loop in a TSLRIC study of exchange access service would be inconsistent with the Commission definition of an appropriate LRIC analysis as described in Case No. 18,309, and inconsistent with the statutory definition of LRIC contained in Section 386.020(32) RSMo. 2000.[56]

[53] See, Initial Brief of ALLTEL, p. 10; Initial Brief of CenturyTel, p. 4; Initial Brief of Fidelity, p. 5.
[54] Initial Brief of SBC Missouri, p. 16.
[55] Id.
[56] Initial Brief of SBC Missouri, pp. 16-20.

Several parties agree with SBC Missouri that the cost of the local loop should not be included in a TSLRIC study for exchange access service. For example, Sprint agrees that in an accurate TSLRIC study for exchange access service, no portion of the cost of the local loop should be included in the cost.[57] In addition, although they propose that the TSLRIC results be used for an unlawful purpose, both AT&T and WorldCom agree that loop costs should not be included in a TSLRIC study.[58] Moreover, although both Staff and OPC contend in their Initial Brief that loop costs should be included in the determination of the costs of switched access service, at the hearing in this case, witnesses for Staff and OPC conceded that an appropriate TSLRIC study for exchange access service should not include any allocation of loop costs.[59] Thus, if the Commission determines that TSLRIC is the appropriate costing methodology for the purposes of this case to determine the cost of switched access in Missouri, Staff and OPC agree that no portion of the cost of the local loop should be included in the TSLRIC study.

As SBC Missouri pointed out in its Initial Brief, and as several other parties acknowledge in their Initial Briefs, parties arguing for the inclusion of all or a portion of loop costs in the cost of exchange access service fundamentally confuse cost *causation* with cost *recovery.*[60] Although OPC acknowledges that no portion of loop costs should be included in a TSLRIC analysis, OPC also states that:

> It is vital to include in the cost of access not only the direct facility costs and expenses that are uniquely associated with switched access, but also at least a reasonable allocation of the costs and expenses for those facilities that allow the company to provide multiple services, including switched access.[61]

[57] Initial Brief of Sprint, p. 19.
[58] Initial Brief of AT&T, p. 39; Initial Brief of WorldCom, p. 3.
[59] See, T. 456 (Meisenheimer); T. 361 (Dunkel); and T. 110 (Johnson).
[60] Initial Brief of SBC Missouri, p. 18; Initial Brief of Sprint, pp. 19-24.
[61] Initial Brief of OPC, pp. 7-8.

OPC goes on to state that "legal authorities have condemned a pricing method that excludes the appropriate allocation of joint and common costs to each services that uses the shared network."[62] OPC's statements confirm that it is mixing cost causation with cost recovery (i.e., pricing) principles. Cost causation is directly relevant and applicable to a TSLRIC analysis, and forecloses any portion of loop costs from being considered in the determination of the TSLRIC for exchange access service. How the Commission sets rates above the TSLRIC level for that service in order to recover the cost of that service or any other service is simply not relevant to an appropriate TSLRIC analysis.

As described above, the small incumbent LECs argue that the Commission should adopt an embedded cost methodology as provided in Parts 36 and 69 of the FCC's interstate rules, to determine the intrastate cost of exchange access service. The FCC's Parts 36 and 69 costing methodology allocates a portion of the cost of the loop to the cost of switched access service.[63] These parties argue that since the FCC's Parts 36 and 69 rules include a portion of the cost of the loop for interstate purposes, a portion of the cost of the loop should also be included for determining the cost of switched access service on an intrastate basis.[64]

As described above, the small incumbent LECs urge the Commission to adopt a different costing standard (embedded costs allocated to the intrastate switched access service through selected application of Parts 36 and 69 of the FCC's Rules), in an attempt to justify their high switched access rates. These companies' position on allocating loop costs to the cost of providing switched access service serves the same misguided purpose. Their primary motivation in this case is to justify their current switched access rates, whether that means proposing that the cost of switched access be determined utilizing an embedded cost methodology, or "allocating" costs

[62] Initial Brief of OPC, p. 8.
[63] Initial Brief of STCG and Holway, pp. 30-32; Initial Brief of Fidelity, p. 6; Initial Brief of ALLTEL, p.10.
[64] Initial Brief of STCG and Holway, p. 31; Initial Brief of ALLTEL, p. 10.

associated with the local loop to switched access service. The small incumbent LECs acknowledge that any such allocation of loop costs is "arbitrary" and "subjective."[65]

Moreover, the small incumbent LECs' proposal to utilize Parts 36 and 69 of the FCC's rules is selective, inasmuch as the small incumbent LECs do not propose to recover their costs pursuant to the methodology contained in the same FCC rules. Under the FCC's cost recovery rules, a significant portion of the cost of the local loop is recovered through an end-user charge paid directly by a carrier's end-user customer. Here, however, the small incumbent LECs seek to avoid the cost *recovery* mechanism required by the FCC's rules, and instead, propose to recover their costs as determined pursuant to Parts 36 and 69 of the FCC 's rules through high switched access rates

The Commission should not allocate or include any portion of loop costs in the TSLRIC analysis for exchange access service. As described above and in SBC Missouri's Initial Brief, any allocation or inclusion of loop costs in a TSLRIC analysis would be inconsistent with the Commission's decision in Case No. 18,309, the statutory definition of LRIC, and sound economic analysis. Moreover, it is unnecessary to allocate the loop to switched access services. The proper use of a LRIC analysis is to set a price floor, and the Commission retains the discretion to set small ILEC switched access rates above this floor, taking into account the particular circumstances facing each small ILEC. Where a small incumbent LEC's basic local rates and/or vertical service rates are low, the Commission may choose to set switched access rates closer to LRIC, while switched access rates for a CLEC with relatively high basic local and vertical service rates may be set more significantly above the LRIC level. In any event, inclusion of loop costs in the cost to provide switched access service is arbitrary and inappropriate.

[65] See, Initial Brief of SBC Missouri, p. 19; Initial Brief of AT&T, p. 41; T. 797-798 (Larsen); T. 860 (Warriner); T. 906 (Schoonmaker).

4. What are the appropriate assumptions and/or the appropriate values for inputs?

As SBC Missouri pointed out in its Initial Brief, SBC Missouri's switched access rates are not an issue in this proceeding.[66] SBC Missouri conducted a TSLRIC study for its switched access service and submitted the results in this proceeding to compare against CLECs' costs, in order to confirm that the capping mechanism for CLEC access rates (upon which competitive classification for the CLECs is conditioned) continues to be appropriate and in the public interest. As a result, SBC Missouri did not fully address every input utilized in Staff's consultant's TSLRIC study for switched access service in its Initial Brief. However, in its testimony and at the hearing in this case, SBC Missouri did submit, for illustrative purposes, the results of its own TSLRIC study, as well as a description of the methodology employed in the study. SBC Missouri also identified some of the input values or methodology choices utilized by Staff's consultant, Dr. Johnson, with which it disagreed.[67]

Consistent with SBC Missouri's view of the scope of this case, most parties did not address cost inputs in their Initial Brief. For example, OPC, ALLTEL, AT&T, WorldCom, CenturyTel, STCG and MITG did not address detailed inputs in their Initial Brief. If the Commission determines that it is appropriate to move forward with another phase of this case, and the Commission determines that it would be appropriate to review the inputs into each company's TSLRIC cost study, SBC Missouri would participate fully in such a future phase, and address each of Staff's proposed inputs, as well as SBC Missouri's proposed inputs, in detail. As most companies recognize, however, in this phase of this case, such a company-specific detailed analysis of input values would serve no purpose.

[66] Initial Brief of SBC Missouri, p. 22.
[67] Initial Brief of SBC Missouri, pp. 23-25.

5. Is the current capping mechanism for intrastate CLEC access rates appropriate and in the public interest?

As SBC Missouri explained in its Initial Brief, since 1996, SBC Missouri has consistently taken the position that the most appropriate permanent solution to permit CLECs' switched access services to be classified as competitive and for CLECs to be classified as "competitive" telecommunications companies pursuant to Section 392.361 RSMo. 2000, is to condition each CLEC's competitive classification on a cap on its switched access rates, on a statewide basis, at the level of SBC Missouri's switched access rates, which are the lowest of any large incumbent LEC in the State of Missouri.[68] However, SBC Missouri recognizes that the Commission appears to prefer to condition CLECs' competitive classification on capping CLECs' switched access rates at the level of those of the incumbent LEC against which the CLEC competes in an exchange, which is the interim solution adopted by the Commission in Case No. TO-99-596.[69] While SBC Missouri continues to believe that capping CLECs' access rates at the level of SBC Missouri's switched access rates would be better, SBC Missouri believes it would be reasonable to continue the status quo, and adopt, on a permanent basis, the exchange-specific cap on CLEC access rates adopted by the Commission on an interim basis in Case No. TO-99-596.

There is nearly unanimous agreement on this issue. The Commission Staff,[70] OPC,[71] ALLTEL,[72] AT&T,[73] WorldCom,[74] Sprint,[75] CenturyTel,[76] and STCG[77] agree with SBC Missouri that the current, interim capping mechanism applicable to CLECs' intrastate switched

[68] Initial Brief of SBC Missouri, p. 26..
[69] Id.
[70] Initial Brief of Staff, pp. 20-21.
[71] Initial Brief of OPC, p. 11.
[72] Initial Brief of ALLTEL, p. 12.
[73] Initial Brief of AT&T, pp. 46-47.
[74] Initial Brief of WorldCom, p. 4.
[75] Initial Brief of Sprint, p. 36.
[76] Initial Brief of CenturyTel, p. 5.
[77] Initial Brief of STCG and Holway, pp. 34-35.

access rates is reasonable and in the public interest, assuming the CLEC wishes to be classified as a competitive telecommunications company under Section 392.361.3 RSMo. 2000. The evidence in this case is clear and compelling -- CLECs' switched access rates have been capped for several years now, and as the Commission is aware, there are many dozens of CLECs serving hundreds of thousands of lines in Missouri. No CLEC presented any testimony in this case that the access rate cap adopted in Case No. TO-99-596 dissuaded them from entering the local market in Missouri. In fact, dozens of CLECs have voluntarily agreed to cap their switched access rates in their basic local certification cases, as a condition of receiving competitive classification from the Commission.

As SBC Missouri pointed out in its Initial Brief, imposing a cap on CLEC access rates is pro-competitive, since it allows a CLEC to be classified as a "competitive" telecommunications company and to operate with significantly reduced regulatory oversight.[78] The access rate cap mechanism adopted on an interim basis in Case No. TO-99-596 places a reasonable cap on the rates a CLEC can charge for its switched access services, which according to several parties constitute a "locational monopoly." By capping CLECs' access rates, the Commission can lawfully grant CLECs' requests to be classified as a "competitive" telecommunications company pursuant to Section 392.361.3 RSMo. 2000. Without such a cap, the Commission could not lawfully classify any CLEC as a "competitive" telecommunications company, since all services being offered by CLECs could not be considered competitive telecommunications services.

No CLEC presented any evidence at the hearing in this case that a cap on CLEC switched access rates was not in the public interest or not reasonable. In addition, as SBC Missouri pointed out in its Initial Brief, although CLECs had every opportunity to do so, no CLEC presented any evidence in this case to demonstrate that its cost to provide switched access is

[78] Initial Brief of SBC Missouri, p. 28.

above the costs of any incumbent LEC with which the CLEC is competing in an exchange.[79] Moreover, CLECs' almost complete lack of participation in this case strongly suggests that CLECs have no issue with the existing interim cap on their access rates.

Only one party, Fidelity, suggests that the current interim cap on CLEC access rates is not in the public interest.[80] Fidelity suggests that a "rigid" cap on CLEC access rates is not necessary to protect the public interest.[81] Fidelity also suggests that CLEC access rates above the capped level should be permitted, unless the Commission or other parties can show that access rates in excess of the cap are unreasonable. Given that Fidelity affiliates operate as both a small incumbent LEC and a CLEC, it is not surprising that Fidelity now proposes to scrap the access rate capping mechanism which has worked well to prevent runaway CLEC access rates.

Fidelity does not cite to any support in the evidentiary record for its argument that CLECs should be permitted to set access rates at any level unless some other party can show that these rates are unreasonable. The reason Fidelity does not cite to any evidentiary support is that none exists. Fidelity did not present any evidence on this issue at the hearing, nor did any other CLEC, or any other party for that matter. Moreover, Fidelity's argument completely ignores the fact that CLECs have been awarded competitive classification under Section 392.361 RSMo. 2000 without meeting the criteria for all services to be classified as competitive, based solely upon the existence of the access rate capping mechanism. Fidelity's argument that the cap should be scrapped, and the Commission should instead adopt a presumption that CLEC access rates, no matter how high, are reasonable unless the Commission or some other party establishes that the CLEC's access rates are unreasonable, is absurd. The cap is necessary because CLECs all seek to be classified as a competitive telecommunications company pursuant to Section

[79] Initial Brief of SBC Missouri, p. 27.
[80] Initial Brief of Fidelity, p. 6.
[81] Id.

392.361 RSMo. 2000. Moreover, CLECs have their own cost data, and if a CLEC believes its cost data establishes the basis for access rates in excess of the capped level, the burden should be on the CLEC to establish these rates.

In its Initial brief, Fidelity argues that CLECs should be free to set their own access rates, and that the market will effectively control what CLECs can charge for switched access services.[82] If CLECs have a locational monopoly when providing switched access service, and Fidelity concedes this to be true,[83] the market simply cannot provide a solution. That is why the cap was instituted in the first place, i.e., to permit CLECs the benefit of a competitive classification even though they failed to meet the necessary statutory qualifications for competitive classification.

Based upon the overwhelming evidence presented at the hearing in this case, and the view of nearly every party addressing this issue in their Initial Briefs, SBC Missouri urges the Commission to adopt, on a permanent basis, the current interim capping mechanism for intrastate CLEC access rates adopted in Case No. TO-99-596. This capping mechanism is appropriate and in the public interest.

6. Are there circumstances where a CLEC should not be bound by the cap on switched access rates?

In its Initial Brief, SBC Missouri explained that there has been no evidence presented in this case which would suggest that there are general circumstances where a CLEC should not be bound by a cap on its intrastate switched access rates, assuming the CLEC wishes to remain classified as a competitive telecommunications company under Section 392.361.3 RSMo.

[82] Initial Brief of Fidelity, p. 7.
[83] Initial Brief of Fidelity, p. 3.

2000.[84] The CLEC rate cap mechanism adopted by the Commission on an interim basis in Case No. TO-99-596 does contain a limited exception, however. It permits CLECs to establish switched access rates in excess of the capped level if the CLEC can establish that rates in excess of the cap are cost justified.[85] SBC Missouri believes that this is the only situation where a CLEC should not be bound by the cap on switched access rates.

SBC Missouri believes that in most situations, CLECs will not be able to cost justify access rates in excess of the capped level. SBC Missouri acknowledges that a CLEC serving customers via its own switch or other facilities could attempt to justify switched access rates in excess of the level of the incumbent LEC based on its own TSLRIC analysis. However, no CLEC has yet sought to cost justify switched access rates in excess of the cap in Missouri since the Commission first started granting basic local certifications to CLECs. A CLEC providing service utilizing unbundled network elements (UNEs) in part (e.g., an unbundled loop with the CLEC's own switching) or exclusively (e.g., the UNE-Platform or UNE-P) obtained from SBC Missouri would certainly not be able to cost justify switched access rates in excess of the capped level, given the price of UNEs which CLECs currently can utilize to obtain access to the piece-parts of SBC Missouri's network. As long as CLECs can obtain UNEs from SBC Missouri at such low levels, CLECs will not be able to demonstrate that switched access rates should be set at a level higher than the cap.

A few parties suggest additional exceptions to the access rate cap mechanism adopted by the Commission on an interim basis in Case No. TO-99-596. For example, AT&T and WorldCom suggest that where an incumbent LEC receives Missouri universal service fund (MoUSF) support and uses this support to reduce its switched access rates, the CLEC should not

[84] Initial Brief of SBC Missouri, pp. 29-30.
[85] See, e.g., Initial Brief of Staff, p. 21; Initial Brief of ALLTEL, p. 12; Initial Brief of AT&T, p. 47; Initial Brief of WorldCom, p. 4; Initial Brief of CenturyTel, p.5.

be required to lower its switched access rates to meet the new lower level of the incumbent LEC's access rates, as the interim capping mechanism adopted by the Commission in Case No. TO. 99-596 would otherwise require.[86] AT&T and WorldCom argue that in this situation, the CLEC should not be required to reduce its switched access rates because MoUSF support would not be available to CLECs.[87] This proposed loophole should clearly be rejected by the Commission.

As both AT&T and WorldCom are aware, CLECs are eligible to receive MoUSF high cost support under Section 392.248 RSMo. 2000 and the Commission's MoUSF rules.[88] There is no prohibition on a CLEC satisfying the statutory requirements to qualify for MoUSF high cost support. The MoUSF statute expressly conditions the availability of high cost support on a carrier having "carrier of last resort" obligations.[89] Moreover, the MoUSF rules adopted by the Commission provide an express mechanism to permit CLECs to receive such designation.[90] If the incumbent LEC in an exchange reduces its switched access rates based on the receipt of MoUSF high cost support or any other reason, the CLECs operating in that exchange should also be required to reduce their switched access rates, as required under the interim rate capping mechanism adopted by the Commission in Case No. TO-99-596. Of course, if the CLEC can cost justify access rates in excess of the capped level, the current capping mechanism permits the CLEC to seek Commission approval of access rates which exceed the capped level.

In its Initial Brief, AT&T also argues that the Commission should adopt a reciprocal terminating access scheme, which according to AT&T, would permit a CLEC, at its discretion, to assess a different and higher terminating access rate for terminating interexchange traffic,

[86] See, Initial Brief of AT&T, pp. 47-48; Initial Brief of WorldCom, p. 4.
[87] Id.
[88] See, Section 392.248.4(1)(a); 4 CSR 240-31.040.
[89] See, Section 392.248.4(1)(a).
[90] See, 4 CSR 240-31.040(2)(B).

based on the terminating access rate charged by the LEC in the exchange where the interexchange call originated.[91] AT&T argues that such a scheme would promote "revenue symmetry" by permitting a CLEC to charge a higher access rate based upon the access rate being charged by an incumbent LEC in a different exchange.[92] AT&T also argues that this scheme would provide a powerful incentive for incumbents to reduce their terminating access rates.[93]

AT&T first raised this proposed exception in its surrebuttal testimony, so there is not an extensive evidentiary record before the Commission in this case regarding the details of how this proposal would work. SBC Missouri does not believe AT&T has presented enough information regarding the details of its "reciprocal access" proposal to support the proposal. In its Initial Brief, AT&T appears to suggest that the reciprocal terminating access scheme would only be available to CLECs, and not the incumbent LEC with which the CLEC competes in a particular exchange. If that is AT&T's proposal it clearly would unlawfully discriminate against the incumbent LEC. AT&T witness Kohly agreed that the justification presented by AT&T for adopting a reciprocal terminating access rate scheme would apply equally to SBC Missouri.[94] At the hearing in this case, conducted in September 2002, AT&T witness Kohly admitted that he had "not thought about the ILEC perspective,"[95] and that it "could apply to Southwestern Bell as well."[96] Now, over three months after the hearing has concluded, AT&T has apparently still not thought about whether the reciprocal terminating access scheme it is proposing would apply to an incumbent LEC, since AT&T did not mention incumbent LEC eligibility when discussing its proposal in its Initial Brief. If AT&T has thought about it further, it has apparently concluded

[91] Initial Brief of AT&T, pp. 48-50.
[92] Initial Brief of AT&T, p. 49.
[93] Id.
[94] T. 1052.
[95] T. 1052-1053.
[96] T. 1052.

that this scheme would only be available to benefit CLECs, since AT&T only discusses its reciprocal terminating access rate proposal in connection with CLECs. As a result, SBC Missouri must assume that AT&T is not willing to open this proposal to the benefit of all similarly situated LECs in an exchange. AT&T still has provided no rationale for excluding incumbent LECs from participating in its proposal.

SBC Missouri also has concerns that AT&T's proposal has not been completely explored, even by its sole proponent. For example, SBC Missouri witness Craig Unruh pointed out several practical difficulties that would be encountered if the Commission attempted to implement AT&T's reciprocal access rate proposal, including difficulties with traffic from small incumbent LECs and their long distance affiliates, and identifying certain carriers' traffic.[97] On cross-examination, AT&T witness Kohly testified that he had not thought through all possible scenarios, and that some details would have to be worked out in the "tariff process."[98] In addition, AT&T does not explain how its proposal would be consistent with the requirements of the price cap statute, at least for incumbent LECs subject to price cap regulation under Section 392.245 RSMo. 2000. This uncertainty strongly suggests that if, contrary to SBC Missouri's recommendation, the Commission wishes to pursue this concept further, it should be addressed, in detail, in a subsequent phase of this case.

Throughout this proceeding, SBC Missouri has advocated that the Commission should focus on incenting carriers with higher access rates to reduce those access rates, not permit carriers with lower tariffed (or capped) switched access rates to sometimes charge higher terminating access rates. In any event, since AT&T's proposal is clearly at the conceptual stage at this point, if the Commission is inclined to pursue AT&T's reciprocal terminating access rate

[97] T. 619-620 (Unruh).
[98] T. 1062 (Kohly).

proposal in further detail, it would be appropriate to do so in another phase of this case, where the details of AT&T's proposal can be fleshed out accordingly.

Finally, STCG and Holway, along with Fidelity, suggest that the Commission should consider a "rural exemption" to the rate capping mechanism adopted by the Commission in Case No. TO-99-596.[99] This rural exemption would permit CLECs -- including primarily CLEC affiliates of small incumbent LECs -- to set their access rates at a higher level than that of the large incumbent LEC serving the rural exchange, without any cost justification for the higher rates, and still be classified as a competitive telecommunications company. Fidelity did not address this issue in any testimony, nor did it address this issue at the hearing. STCG/Holway addressed this proposed exception in testimony,[100] but did not address it in their Initial Brief. At the hearing, however, Mr. Schoonmaker could not identify which exchanges of SBC Missouri (or any other large incumbent LEC) would be considered "rural."[101] In addition, Mr. Schoonmaker argued that although the TSLRIC studies presented in this case established that the large incumbent LECs' access rates exceeded TSLRIC, CLEC affiliates of small incumbent LECs should be permitted to charge even higher exchange access rates in those exchanges, with absolutely no cost justification.[102] The Commission should reject this proposed exemption on the basis that it is designed solely to permit small incumbent LECs' CLEC affiliates to charge excessive access rates in rural Missouri.

[99] See, T.895-897 (Schoonmaker); Initial Brief of Fidelity, p. 7.
[100] See, T. 895-897, 920-922 (Schoonmaker); Ex. 43, Schoonmaker Surrebuttal, pp. 6-7.
[101] T. 920-922.
[102] T. 924.

7. What, if any, course of action can or should the Commission take with respect to switched access as a result of this case?

In its Initial Brief, SBC Missouri described why the Commission's actions in this phase of this case should be narrowly focused on addressing the purpose for which this case was established, i.e., to adopt, on a permanent basis, the capping mechanism applicable to CLECs' switched access rates which the Commission adopted on an interim basis in Case No. TO-99-596.[103] The overwhelming evidence presented in this case, along with CLECs' lack of participation in this case, establishes that capping CLECs' access rates in the manner required by the Commission in Case No. TO-99-596 continues to be in the public interest. In their Initial Briefs, several other parties agree that at a minimum, the Commission should adopt, on a permanent basis, the capping mechanism adopted by the Commission on an interim basis in Case No. TO-99-596. Parties supporting this view include OPC,[104] ALLTEL,[105] AT&T,[106] and Sprint.[107]

Continuing its efforts to expand the scope of this case beyond what was envisioned by the Commission when it opened this case, Staff suggests that the Commission should "adopt" Staff's cost studies submitted in this case.[108] SBC Missouri believes that would be a mistake. As described above, and in the Initial Briefs filed by numerous other parties, Staff's cost studies submitted in this case are of little or no benefit to the Commission, except to the extent that Staff's cost studies also confirm that the CLEC access rate cap mechanism adopted in Case No. TO-99-596 should be adopted on a permanent basis. However, there are so many irregularities in Staff's proposed cost studies, and the purposes for which Staff and its consultant suggest they

[103] Initial Brief of SBC Missouri, p. 31.
[104] Initial Brief of OPC, pp. 11-12.
[105] Initial Brief of ALLTEL, p. 12.
[106] Initial Brief of AT&T, p. 50.
[107] Initial Brief of Sprint, pp. 38-39.
[108] Initial Brief of Staff, p. 22.

should be used, that the best course of action with respect to these studies would be for the Commission to disregard them.

Staff also recommends that the Commission initiate a second phase of this case to determine "whether the current switched access rates are just and reasonable, taking into consideration the actual costs incurred, and to explore all possible solutions if the Commission determines that rate adjustments are necessary."[109] Staff suggests that based on Dr. Johnson's testimony, a subsequent proceeding is appropriate to "further explore the access rate problem."[110]

Staff's proposal misses the mark and would be unlawful, at least with respect to incumbent LECs subject to price cap regulation under Section 392.245 RSMo. 2000. This case was initiated as a spin off case from Case No. TO-99-596 to develop an evidentiary record with regard to the cost of providing exchange access service in Missouri, in order to determine a long term solution with respect to capping CLEC access rates. This case was not opened to investigate the reasonableness of any incumbent LEC's exchange access charges. The cost evidence which has been developed in this case confirms that for rate of return regulated small incumbent LECs, access rates far exceed the TSLRIC of providing exchange access service. If Staff intends to limit the scope of any subsequent phase of this case to examining the switched access rates of small incumbent LECs which are subject to rate of return regulation (and not price cap regulation), SBC Missouri agrees that a subsequent phase of this case may be appropriate. However, as described in detail below, the Commission clearly does not have jurisdiction under Section 392.245 (the Missouri price cap statute) to reduce the switched access rates of any price cap regulated LEC, below the maximum allowable prices established in Section 392.245 RSMo. 2000.

[109] Initial Brief of Staff, p. 22.
[110] Id.

AT&T suggests that the Commission should move to implement a cost-based pricing system for switched access services.[111] AT&T also suggests that the Commission's long term goal should be to price switched access services at TSLRIC for all companies.[112] AT&T suggests that the Commission should replace the carrier common line element in the switched access rates interexchange carriers currently pay with a flat surcharge, which would be paid by local exchange carriers' end-users. AT&T suggests that this step could be initiated quickly.[113] AT&T also suggests that for incumbent LECs currently regulated under price cap regulation, the Commission has discretion to alter or restructure price cap regulated LECs' access rates, as well as any other rates that the Commission concludes are no longer "just and reasonable."[114] AT&T goes on to state that the Commission has the authority to require the restructuring of price cap regulated companies' rates via revenue neutral off setting rate changes, end-user surcharges or explicit support from the MoUSF.[115]

AT&T's proposal to eliminate the carrier common line rate element and replace it with a end-user surcharge is nothing more than AT&T's attempt to significantly reduce its cost of providing interexchange service, and to shift this cost out of the access rates it pays local exchange carriers and onto end-user local customers. Under AT&T's proposal, interexchange carriers would no longer be responsible for paying carrier common line charges to the local exchange carrier providing basic local service to the end-user. Instead, under AT&T's proposal, local customers (instead of AT&T) would be on the hook for a new surcharge, and AT&T would be free to pocket the money it formerly paid in carrier common line rates. SBC Missouri does

[111] See, Initial Brief of AT&T, pp. 50-55.
[112] Id.
[113] Id.
[114] Id.
[115] Id.

not believe the purpose of this case is to reduce AT&T's cost of doing business, which is the primary reason AT&T proposes to eliminate the carrier common line rate element.

AT&T also proposes to replace the revenues associated with the carrier common line rate elements with support from the MoUSF. As SBC Missouri has addressed on several previous occasions, the MoUSF statute, Section 392.248 RSMo. 2000, explicitly identifies the limited purposes for which MoUSF high cost support may be used. Pursuant to Section 392.248.2 RSMo. 2000, funds from the MoUSF may only be used:

> (1) To ensure the provision of reasonably comparable essential local telecommunications service, as that definition may be updated by the commission by rule, throughout the state including high-cost areas, at just, reasonable and affordable rates;
> (2) To assist low-income customers and disabled customers in obtaining affordable essential telecommunications services; and
> (3) To pay the reasonable, audited costs of administering the universal service fund.

Reducing the amount of access charges interexchange carriers such as AT&T must pay is <u>not</u> one of the permitted purposes of MoUSF high cost support under the statute.[116]

AT&T goes so far as to suggest that for price cap regulated local exchange carriers, the Commission should ignore the clear limits on its authority to reduce rates under Section 392.245 RSMo. 2000, and move to reduce all companies' switched access rates down to the level of the TSLRIC for switched access services per each element. AT&T goes on to suggest that any "revenue shortfall" caused by the Commission's unlawful actions (at least with respect to price cap regulated companies), could be offset with support from the MoUSF. Not only does the Commission lack the authority to reduce price cap regulated companies' exchange access rates

[116] SBC Missouri notes that the existing Commission rules governing the MoUSF high cost fund contemplates a revenue neutral offset to the receipt of any high cost funds. <u>See</u>, 4 CSR 240-31.040(6)(B). But this offset comes into existence <u>only</u> when a carrier is entitled to receive high cost funds under one of the permissible uses identified in Section 392.248.2 RSMo. 2000. In the MoUSF proceeding, SBC Missouri has repeatedly explained that a high cost fund is not necessary at this time as Missouri has achieved universal service as demonstrated by its high rate of penetration of essential local service (>95%) at very low rates. The MoUSF high cost fund simply cannot be used to reduce the level of access charges.

outside of Section 392.245 RSMo. 2000, the Commission may not use MoUSF high cost support in a manner which does not comply with Section 392.248 RSMo. 2000. In this case, two "wrongs" clearly do not make a "right." AT&T's proposal is blatantly illegal. It would also be extremely poor policy, as SBC Missouri has explained in great detail in the MoUSF proceedings, because it would result in the local customers of SBC Missouri funding the bulk of the reductions in switched access rates of other companies.

SBC Missouri continues to believe that the Commission's actions in this case should be measured. Other than adopting the rate cap mechanism for CLEC access rates, which the Commission adopted on an interim basis in Case No. TO-99-596, and continuing the investigation into rate of return regulated small incumbent LECs' switched access rates, the Commission need not take any further action in this phase of the case. With respect to price cap regulated companies such as SBC Missouri, the Commission should not, and as described below cannot lawfully, take any action to require SBC Missouri to reduce or restructure its switched access rates in this or any other case. The price cap statute limits the Commission's authority with respect to the rates for SBC Missouri's services, including exchange access service, and establishes as a matter of law "maximum allowable prices" price cap regulated companies can charge for each service.[117] However, given the impact that high access rates have on the services offered throughout the state, including in rural Missouri, the Commission should consider ways to reduce these high access rates to provide incentives for expanded competition and new services to emerge in the marketplace.

[117] See, Section 392.245.1 RSMo. 2000.

8. Additional issues raised by the Commission

At the conclusion of the hearing in this case, the Regulatory Law Judge asked the parties to address several additional issues. Along with SBC Missouri, several parties addressed these issues in their Initial Briefs, and SBC Missouri will respond to each of these issues below.

a. Should the Commission modify its standard protective order for any future phases of this case?

SBC Missouri addressed this issue in detail in its Initial Brief.[118] SBC Missouri will not repeat its argument as to why the Commission should not modify its Standard Protective Order for any future phases of this case in its Reply Brief. SBC Missouri will, however, respond briefly to the arguments contained in several parties' Initial Briefs regarding this issue. In summary, however, no party arguing in favor of modifications to the Commission's Standard Protective Order has raised any compelling reason which supports such a drastic modification.

Staff is one of the parties that supports modification of the Commission's Protective Order for any future phases of this case.[119] Staff states that it is essential for local exchange and interexchange carriers to have an opportunity to analyze and respond to Staff's cost studies.[120] Staff goes on to state that "unfortunately for the interexchange companies, all of the exchange access cost information is in the hands of the local carriers."[121] Staff concludes that it "was hopeful that the parties could enter into agreements that would allow disclosure of highly confidential data to interested parties with the understanding that the disclosed data would not be used outside of the case."[122]

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[118] See, Initial Brief of SBC Missouri, pp. 33-39.
[119] Initial Brief of Staff, p. 33.
[120] Initial Brief of Staff, p. 33.
[121] Id.
[122] Id.

As SBC Missouri described in its Initial Brief, neither AT&T nor any other interexchange carrier has been prevented from viewing any of the highly confidential cost information SBC Missouri submitted in this case. As the Commission is aware, there have been limited previous occasions where SBC Missouri has permitted a small group of internal CLEC regulatory employees to review highly confidential cost study data during UNE cost proceedings. This exception was agreed to with regard to employees who could certify that they were not involved in retail marketing, pricing, procurement, strategic analysis or planning. To permit this accommodation, SBC Missouri entered into a separate, supplemental nondisclosure agreement with the CLEC to put appropriate safeguards in place to support this limited access to highly confidential cost study information.

This supplemental nondisclosure agreement was first negotiated by SBC Missouri and AT&T, and was used without incident in AT&T interconnection arbitration case, Case No. TO-2001-455. The supplemental agreement has also been used without incident in subsequent UNE proceedings such as Case Nos. TO-2001-438 and TO-2001-439. In fact, SBC Missouri entered into such an arrangement with another party in this case, and *offered to make the exact same arrangements in this case with AT&T*. AT&T, however, did not pursue SBC Missouri's offer to provide access to its highly confidential information. Instead, AT&T waited over a year after this case was opened, and after SBC Missouri and other parties had disclosed voluminous highly confidential costing information to Staff's consultant, to argue that the Commission should scrap its Standard Protective Order in this case. The Commission rightly rejected AT&T's arguments to modify the Standard Protective Order before the hearing in this case,[123] and should reject it again. As the Commission noted when it rejected AT&T's argument to modify the Standard

[123] See, Order Regarding Protective Order and Regarding Procedural Schedule, Case No. TR-2001-65, issued July 8, 2002.

Protective Order prior to the hearing, the cost data in this case "is designated 'Highly Confidential' because access to it may well confer an unfair competitive advantage upon a competitor."[124] AT&T is hardly in a position to complain that it did not have sufficient access to costing information in this case, when in fact it did have such access.

Furthermore, AT&T had an equal opportunity in this case to produce its own cost study using its own internal costing experts to establish the cost of providing switched access service. To the extent that AT&T's cost study would have included appropriately classified highly confidential information as defined in the Commission's Standard Protective Order, that information would be subject to the exact same protection afforded other parties' highly confidential information. Finally, AT&T also could have engaged an outside consultant, as it has in numerous other regulatory proceedings in Missouri, and as other parties did in this case, who would have had unfettered access to review highly confidential cost information submitted by all other parties. Staff's argument that interexchange carriers did not have sufficient access to highly confidential costing information simply holds no water.

AT&T argues that the Commission should replace its Standard Protective Order with a protective order more to AT&T's liking.[125] AT&T argues that based upon the testimony at the hearing in this case, there is no justification for maintaining the multi-level confidentiality scheme currently employed in the Standard Protective Order.[126] AT&T directly misrepresents the testimony of SBC Missouri witness David Barch. On page 24 of its Initial Brief, AT&T states as follows:

> Specifically, SWBT witness Barch conceded that AT&T in-house experts have been permitted to review SWBT's cost studies in other states, subject to the protective order.

[124] Id., p. 5.
[125] Initial Brief of AT&T, pp. 24-26.
[126] Initial Brief of AT&T, p.24.

AT&T supported this alleged statement with a citation to page 689 of the transcript from this hearing.[127] However, the transcript reflects that AT&T has misstated Mr. Barch's testimony:

> Q. And are you aware that in-house experts are allowed access to the cost studies in proceedings outside of Missouri?
>
> A. That may or may not be true. I know it seemingly varies by state.
>
> Q. In SBC territory?
>
> A. Again, my experience in the few other SBC states, there seems to be some distinctions among those states as to the confidentiality statements and levels of confidentiality.
>
> Q. And that wasn't my question. My question was -- and let's be precise. Have AT&T in-house counsel reviewed your cost studies in other SBC states:
>
> A. In other proceedings in other states, yes, subject to the protective order in that proceeding, I believe that has occurred.
>
> Q. And are you aware of any other SBC state that has a protective order that has a highly confidential category and a proprietary category of protection?
>
> A. I know not whether any and all SB -- I guess any other SBC state has or has not that -- that distinction.[128]

As reflected in the transcript, SBC Missouri witness Barch agreed that "AT&T in-house counsel" had reviewed SBC cost studies in other SBC states. Of course, under the Commission's Standard Protective Order, in-house attorneys are equally permitted to review Highly Confidential information in Missouri.

Some other parties also suggest that the Commission's Standard Protective Order should be modified.[129] However, these parties do not address the undisputed fact that the Commission's Standard Protective Order issued in this case and countless other cases has stood the test of time

[127] Initial Brief of AT&T, p. 25.
[128] T. 689 (Barch).
[129] See, e.g., Initial Brief of Sprint, pp. 43-45; Initial Brief of WorldCom, pp. 11-12.

as a highly effective tool which carefully balances the needs of both the party seeking disclosure of competitively sensitive company-specific cost information, and the party producing such information. The provisions of the Standard Protective Order ensure reasonable access to highly sensitive cost and marketing information to competitors who would not otherwise have any right to review such material, but under conditions which protect the legitimate competitive interests of the producing party. In short, the Commission's Standard Protective Order has not hobbled the regulatory process in Missouri, but rather has allowed the regulatory process to work effectively in Missouri.

As SBC Missouri pointed out in it Initial Brief, it is also interesting to note that the Standard Protective Order is willingly utilized by CLECs when it is their confidential information that would be subject to disclosure.[130] In Case No. TW-2003-0053, in which the Commission is examining the impact of bankruptcy filings by telecommunications companies, WorldCom sought and received the Standard Protective Order to protect its own highly confidential information. This conduct underscores the usefulness of the Commission's Standard Protective Order, which reflects the proper balance between the parties producing confidential material and the use of that material in regulatory proceedings by others.

Finally, in their Initial Briefs, several parties support the continued use of the Commission's Standard Protective Order in future phases of this case. For example, ALLTEL states as follows:

> While truly being one of the parties most directly impacted by the operation of the Commission's standard protective order in this matter, ALLTEL is not prepared to suggest that the standard protective order must be modified.[131]

[130] Initial Brief of SBC Missouri, p. 38.
[131] Initial Brief of ALLTEL, p. 24.

Likewise, STCG and Holway agree that the Commission should maintain the Standard Protective Order.[132] As STCG and Holway point out in their Initial Brief, the Commission's standard protective order has been used for many years and has served the parties well in Missouri. STCG and Holway recognize that in certain situations, limited viewing by internal cost witnesses as proposed by SBC Missouri may be appropriate.[133] SBC Missouri agrees, and that is why SBC Missouri made that proposal in this case to AT&T and other parties.

No party has established that the Commission should scrap or modify its Standard Protective Order in future phases of this case. On the contrary, the evidence in this case, as well common sense, indicates that the Commission should remain vigilant to retain the legitimate protections available to all regulatory parties afforded the most competitively sensitive information. If the Commission determines that future phases of this case are necessary, the Commission should retain the Standard Protective Order it previously adopted in this case, including the availability of separate "Highly Confidential" and "Proprietary" classifications.

b. Does the Commission have authority to modify existing local calling scopes?

As SBC Missouri described in its Initial Brief, the Commission does not have authority to mandate changes to existing local calling scopes or exchange boundaries, unless the companies serving the affected exchanges approve of the alteration.[134] Most parties that addressed this issue in their Initial Briefs question the Commission's authority to mandate changes to existing local calling scopes without the consent of the affected companies.[135]

[132] Initial Brief of STCG and Holway, p. 50.
[133] Id.
[134] Initial Brief of SBC Missouri, pp. 39-40.
[135] See, Initial Brief of WorldCom, p. 10; Initial Brief of Sprint, p. 42; Initial Brief of CenturyTel, pp. 15-16; Initial Brief of STCG and Holway, pp. 46-50.

The only party that appears to support the proposition that the Commission does have authority to modify existing local calling scopes is Staff.[136] In its Initial Brief, Staff states that in its opinion, the Commission "has the authority to alter calling scopes for purposes of access charge reform."[137] Staff relies on Section 392.200.7 RSMo. 2000, which provides as follows:

> The Commission shall have power to provide the limits within which telecommunications messages shall be delivered without extra charge.

Staff also relies on the definition of basic local telecommunications service contained in Section 386.020(4) RSMo. 2000, which Staff quotes as follows:

> . . . two-way switched voice service within **a local calling scope as determined by the commission** comprised of any of the following services and their recurring and nonrecurring charges . . . [emphasis in Staff's Initial Brief].[138]

Section 392.200.9 RSMo. 2000, which was enacted as part of Senate Bill 507, provides as follows:

> 9. This act* shall not be construed to prohibit the commission, upon determining that it is in the public interest, from altering local exchange boundaries, provided that the incumbent local exchange telecommunications company or companies serving each exchange for which the boundaries are altered provide notice to the commission that the companies approve the alteration of exchange boundaries.

This provision, which Staff ignores, clearly prohibits the Commission from mandating a change in exchange boundaries if the companies affected by the changed boundary do not agree to the alteration. The definition of "exchange" in Section 386.020(16) makes it clear that this provision precludes revisions in local calling scopes. "Exchange" is defined as "a geographical area for the administration of telecommunications services, established and described by the tariff of a telecommunications company providing basic local telecommunications service."[139] Any required local calling scope change would impact the exchange area established and defined in a

[136] See, Initial Brief of Staff, p. 32.
[137] Id.
[138] Initial Brief of Staff, p. 32.
[139] Section 386.020(16) RSMo. 2000 (emphasis added).

company's tariff, and consent to the change is required. As nearly every party (except Staff) agrees, the Commission does not have statutory authority to mandate changes to existing local calling scopes or exchanges, unless the affected companies agree.

Staff's position suffers from at least two infirmities. First, under its construction, the Commission could alter local calling scopes at will so long as it did not change the exchange boundaries. This would essentially render Section 392.200.9 meaningless, and legislation cannot be construed in such a way as to render any provision a nullity. It is clear that Section 392.200.9 is intended to prevent changes in local calling scopes without the consent of the company or companies involved, and Staff has not offered a different interpretation. Second, the construction proposed by Staff would raise single issue ratemaking concerns as an increase to a local calling scope would result in a reduction in toll revenue as interexchange calls are arbitrarily converted to local calls. The Commission is not authorized to effect a reduction in a company's revenue without considering all relevant factors of service.[140] While, as noted in other sections of this Reply Brief, the Commission could avoid the single issue ratemaking concern with regard to rate of return companies by an offsetting increase to local rates, the Commission's ability to increase local rates for price cap companies beyond the maximum allowable price appears to be foreclosed by Section 392.245 RSMo. 2000.

c. Whether the Commission has the jurisdiction to direct an ILEC regulated under "price-cap regulation" pursuant to Section 392.245 RSMo. 2000, to reduce its switched access rates?

As SBC Missouri explained in its Initial Brief, the Commission has no authority to order SBC Missouri, or any other incumbent LEC subject to price cap regulation under Section

[140] See, State ex rel. Office of Public Counsel v. Public Service Commission, 858 S.W.2d 806 (Mo.App. 1993); State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo. banc 1979).

392.245 RSMo. 2000, to lower its switched access rates.[141] Under Section 392.245 RSMo. 2000, the Missouri legislature authorized price cap regulation to govern the prices charged by incumbent local exchange telecommunications companies. Under price cap regulation, "maximum allowable prices" for telecommunications services are established.[142] The initial maximum allowable prices for a price cap regulated company are those which were in effect on December 31st of the year prior to the year in which the incumbent LEC became subject to price cap regulation.[143] Incumbent local exchange companies subject to price cap regulation are free to raise or lower their prices for a service as they deem appropriate, subject to the requirement that the price not exceed the maximum allowable price established by Section 392.245.4(5) RSMo 2000. Under the statute, it is the price cap regulated company, and not the Commission, which determines the price to be charged, subject only to the maximum allowable price. Under Section 392.245.2 RSMo. 2000, price cap regulation is mandatory for large incumbent LECs once the threshold criteria contained in the statute is met. Under Section 392.245.2 RSMo. 2000, price cap regulation is optional for small incumbent LECs, who may elect to be regulated under price cap regulation once the same threshold criteria applicable to large incumbent LECs is met.

On September 26, 1997, in Case No. TO-97-397, the Commission confirmed that SBC Missouri[144] had met the threshold criteria required for SBC Missouri to be subject to price cap regulation under Section 392.245.2 RSMo. 2000, and as a result, the initial "maximum allowable prices" established for SBC Missouri were those rates in effect on December 31, 1996 (i.e., December thirty-first of the year (1996) preceding the year (1997) in which SBC Missouri first met the threshold criteria to be subject to price cap regulation). Since that time, the maximum

[141] Initial Brief of SBC Missouri, p. 41.
[142] Section 392.245.1 RSMo. 2000.
[143] See, Section 392.245.3 RSMo. 2000.
[144] The determination by the Commission was made with respect to Southwestern Bell Telephone Company, the predecessor to Southwestern Bell Telephone, L.P. d/b/a SBC Missouri.

allowable prices for basic local and switched exchange access telecommunications services have increased or decreased with changes in the CPI-TS, pursuant to the provisions of Section 392.245.4(1)(a).

Under Section 392.245.6 RSMo. 2000, the Commission retains jurisdiction "over quality and conditions of service or to relieve telecommunications companies from the obligation to comply with Commission rules relating to minimum basic local and interexchange telecommunications service." However, under subsection 7 of Section 392.245 RSMo. 2000, a telecommunications company subject to price cap regulation "shall not be subject to regulation under subsection 1 of section 392.240," i.e., rate of return regulation.

Nearly all parties to this case agree that under price cap regulation as established by Section 392.245 RSMo. 2000, the Commission has no authority to direct an incumbent LEC subject to price cap regulation to reduce its switched access rates. For example, in its Initial Brief, ALLTEL agrees that the Commission lacks statutory authority to direct a price cap regulated company to reduce or restructure its switched access rates, except as provided in Section 392.245 RSMo. 2000.[145] Likewise, WorldCom states in its Initial Brief that "it is unlikely that the Commission has jurisdiction to order a price cap regulated company to reduce its access charges."[146] Sprint states that the Commission does not have discretion to alter the maximum allowable prices permitted under the price cap statute.[147] CenturyTel agrees that the Commission lacks statutory authority to direct a price cap regulated company to reduce or restructure switched access rates, unless Section 392.245 RSMo. 2000 is followed.[148] MITG and STCG and Holway agree that the Commission does not have authority to order SBC Missouri or

[145] Initial Brief of ALLTEL, p. 15.
[146] Initial Brief of WorldCom, p.5.
[147] Initial Brief of Sprint, pp. 38-39.
[148] Initial Brief of CenturyTel, p. 7.

any other incumbent LEC subject to price cap regulation under Section 392.245 RSMo. 2000 to lower switched access rates.[149] As STCG and Holway point out in their Initial Brief, Section 392.245.4 RSMo. 2000 sets out very specific methods by which maximum allowable prices for both exchange access and basic local telecommunications service shall be changed annually.[150]

The only parties that even attempt to argue that the Commission may have jurisdiction to direct an ILEC regulated under price cap regulation pursuant to Section 392.245 RSMo. 2000 to reduce its switched access rates are AT&T and Staff. AT&T argues that "[B]y enacting Section 392.245, the legislature did not intend for the Commission to lose its power to enforce Section 392.200."[151] AT&T also argues that:

> Even though the legislature may have established a method for the Commission to ensure the reasonableness of rates by setting 'maximum allowable rates' it did not divest the Commission of its other proven ways of insuring reasonable and just rates.[152]

AT&T's then goes on to quote several of the general statutory purposes of Chapter 392 of the Missouri statutes,[153] and argues that the price cap statute cannot be "interpreted" to "forbid the Commission from meeting its overall purpose of ensuring that customers are charged only reasonable rates."[154] Contrary to AT&T's argument, however, the price cap statute needs no "interpretation." It is only by *ignoring* the very specific provisions of Section 392.245 RSMo. 2000, that AT&T attempts this rewrite of Missouri law.

Section 392.185 RSMo. 2000, which sets forth the general purposes of Chapter 392, must be read in harmony with, not in conflict with Section 392.245 RSMo. 2000. The general provisions contained in Section 392.185 RSMo. 2000 do <u>not</u> give the Commission authority to

[149] Initial Brief of MITG, p. 13; Initial Brief of STCG and Holway, p. 41.
[150] Initial Brief of STCG and Holway, p. 41.
[151] Initial Brief of AT&T, p. 15.
[152] Initial Brief of AT&T, p. 15.
[153] <u>See</u>, Section 392.185(1)-(9) RSMo. 2000.
[154] Initial Brief of AT&T, p. 15.

ignore the requirements of Section 392.245 RSMo. 2000. Section 392.185 provides general statements of intent; these general statements cannot override clear legislative mandates. Anthony v Downs Amusement Co., 205 S.W.2d 925, 929 (Mo. App. 1947); Hoover v. Abell, 231 S.W.2d 217, 221 (Mo. App. 1950). Only where a statute is ambiguous may the purpose and intent of the statute be considered. Risk Control Associates v. Melahn, 822 S.W.2d 531, 534 (Mo. 1991). Even then, the plain language of the statute may not be ignored. State v. Pretended Consolidated School District No. 1, 223 S.W.2d 489, 488 (Mo. banc 1979). Here, the mandatory obligations of Section 392.245.2 are clear and unambiguous. AT&T may not resort to its own interpretation of policy statements in Section 392.185 to override the legislative mandate that price cap regulation shall be used when the statutory criteria is satisfied.

Moreover, price cap regulation directly supports the purposes of Chapter 392 of the Missouri statutes. For example, price cap regulation certainly promotes "universally available and widely affordable telecommunications services."[155] Price cap regulation also ensures that "customers pay only reasonable charges for telecommunications services."[156] Price cap regulation is a step toward allowing "full and fair competition to function as a substitute for regulation."[157] Clearly, price cap regulation, as an interim step toward competitive classification for all telecommunications companies in Missouri, supports the purposes of Chapter 392 as defined in Section 392.185 RSMo. 2000.

In its Initial Brief, AT&T quotes many subsections of the price cap statute, Section 392.245 RSMo. 2000, but ignores subsection 2, which with regard to large incumbent LECs provides as follows:

[155] See, Section 392.185(1) RSMo. 2000.
[156] See, Section 392.185(4) RSMo. 2000.
[157] See, Section 392.185(6) RSMo. 2000.

> A large incumbent local exchange telecommunications company shall be subject to regulation under this section upon a determination by the commission that an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the large incumbent company's service area.

The mandate of the legislature that price cap regulation shall be utilized when certain conditions are met cannot be overridden by claims that the Commission has "discretion"[158] to ignore the legislative requirements. When the legislature tells the Commission that it "shall" utilize price cap regulation once specific conditions are met, then the Commission must follow that directive. Once the Commission confirmed in Case No. TO-97-397 that SBC Missouri had met the conditions contained in Section 392.245.2 RSMo. 2000, SBC Missouri was subject to price cap regulation under Section 392.245 RSMo. 2000, and pursuant to subsection 7 of Section 392.245 RSMo. 2000, SBC Missouri was no longer subject to rate of return regulation under Section 392.240 RSMo. 2000.

Staff also questions whether the Commission retains authority under Chapter 392 to reduce the switched access rates of an incumbent LEC regulated under price cap regulation pursuant to Section 392.245 RSMo. 2000.[159] Staff asserts that the price cap statutes "create an ambiguity in regard to the just and reasonableness of a price cap regulated ILEC's rates."[160] Staff states that "an argument" can be made that "the Commission retains the authority to declare any unjust and unreasonable rate charged by a telecommunications carrier to be unlawful, including switched access charges.[161] Staff acknowledges that the:

> price cap statutes are silent, however, on the Commission's authority to change the ILEC's rates in addition to the methods outlined in the statutes. It could be argued that this lack of expressed authority to alter price cap company rates

[158] Initial Brief of AT&T, p. 16.
[159] Initial Brief of Staff, pp. 23-26.
[160] Initial Brief of Staff, p. 27.
[161] Initial Brief of Staff, p. 23.

> indicates that the legislature did not intend to given the Commission such authority.[162]

Staff counters this argument by quoting Section 392.200.1 RSMo. 2000, which requires all charges to be "just and reasonable and not more than allowed by law or by order or decision of the commission."[163]

Staff's argument that the price cap statute is silent on the Commission's authority to change price cap regulated ILEC's rates, and that this silence somehow authorizes the Commission to ignore the provisions of Section 392.245 RSMo. 2000, holds no water. There is no evidence that the Missouri legislature intended that the Commission could ignore the mandatory provisions of Section 392.245 RSMo. 2000 and investigate individual rates of a price cap regulated incumbent LEC under some other section of Chapter 392. Section 392.245 RSMo. 2000 contains a comprehensive and mandatory regulatory framework for price cap regulation in Missouri. Section 392.245.3 RSMo. 2000 establishes "maximum allowable prices." Section 392.245.4(5) and .11 permits the price cap regulated company, not the Commission, to set its rates at any level so long as the rates do not exceed the maximum lawful prices. If the Missouri legislature had intended for the Commission to retain jurisdiction to review rates of a price cap regulated incumbent LEC under some other statutory provision, including Section 392.200.1 RSMo. 2000, it could have said so in Section 392.245 RSMo. 2000. Had it done so, however, it would have rendered the price cap framework mandated in Section 392.245 RSMo. 2000 essentially meaningless.

Under Section 392.245.3, the initial maximum allowable prices for a price cap regulated company are those in effect December 31 of the year prior to the determination that price cap regulation apply. The law does not say that the Commission must first determine that the

[162] Initial Brief of Staff, p. 24.
[163] Initial Brief of Staff, p. 25.

December 31st rates are "just and reasonable." Nor does the law provide that the maximum allowable prices can be reduced below the December 31st level upon a finding that those rates are not "just and reasonable." The very purpose of price cap regulation was to establish a new method of determining just and reasonable rates. The statue accepts that the current rate levels of a particular company are just and reasonable and are established as the "maximum allowable prices" once the statutory conditions are satisfied.

The legislature's determination that the initial maximum allowable prices are those which were in effect on December 31st of the year prior to the price cap determination confirms that the legislature did not anticipate or authorize the Commission to conduct a review of the incumbent LEC's rates at the time price cap regulation was implemented. In its September 16, 1997, Report and Order in Case No. TO-97-397, the Commission specifically found that there was nothing ambiguous in Section 392.245.2 RSMo., or which would authorize the Commission to examine SBC Missouri's rates to determine if they were "just, reasonable and lawful" one last time prior to confirming that SBC Missouri was subject to price cap regulation.[164] If the Commission did not have authority to examine the "maximum allowable prices" of SBC Missouri at that time, it certainly has acquired no new authority to do so now. The plain language of Section 392.245 RSMo. 2000, as well as the Commission's Report and Order in Case No. TO-97-397, establish that there is no ambiguity in Section 392.245 RSMo. 2000, and SBC Missouri's "maximum allowable prices" are established solely pursuant to Section 392.245 RSMo. 2000.

The legislative requirement that initial maximum allowable prices are those which were in effect on the prior December 31st specifically avoids a determination of whether current rates are "just and reasonable." The Commission obviously does not have the authority to engage in retroactive ratemaking to determine that the rates in existence on December 31, 1996 were

[164] Report and Order, Case No. TO-97-397, at 18-19.

unreasonable or unjust; the Commission can only make a prospective determination. State ex rel. Utility Consumers Council of Missouri Inc. v. Public Service Commission, 585 S.W.2d 41, 58 (Mo. banc 1979). But the Commission cannot make a prospective determination here, since the statute specifically provides that the rates which were in effect on December 31 of the prior year are those which become the initial maximum allowable prices.

d. Whether the Commission has the jurisdiction to direct an ILEC regulated under "price-cap regulation" pursuant to Section 392.245, RSMo 2000, to restructure its switched access rates?

As SBC Missouri described in its Initial Brief, the Commission does not have authority to alter the maximum allowable prices established pursuant to Section 392.245 RSMo. 2000. As a result, SBC Missouri does not believe the Commission has authority under Section 392.245 RSMo. 2000 to require an ILEC regulated under price cap regulation to "restructure" its switched access rates.[165] As SBC Missouri pointed out in its Initial Brief, nothing in Section 392.245 RSMo. 2000 grants the Commission any authority to require a company subject to price cap regulation to restructure its switched access rate elements.[166] Sprint,[167] MITG,[168] and STCG[169] all agree that the Commission does not have jurisdiction to direct an ILEC regulated under price cap regulation pursuant to Section 392.245 RSMo. 2000 to restructure its switched access rate elements. Without any analysis, WorldCom labels this a "closer call."[170] Staff again professes its uncertainty, but concedes that Commission authority to require a price cap regulated ILEC to restructure its switched access rates "may not be possible."[171]

[165] Initial Brief of SBC Missouri, p. 46.
[166] Id.
[167] Initial Brief of Sprint, p 40.
[168] Initial Brief of MITG, p. 13.
[169] Initial Brief of STCG, p. 42.
[170] Initial Brief of WorldCom, p. 6.
[171] Initial Brief of Staff, p. 27.

Only AT&T claims that the Commission has full authority to direct an ILEC regulated under price cap regulation pursuant to Section 392.245 RSMo. 2000 to restructure its switched access rates. Based upon its faulty reasoning as described in the preceding sections of this Reply Brief, AT&T claims that Section 392.245 RSMo. 2000 "does not prohibit, expressly or by inference, the authority of the Commission to order a restructuring of a company's rates in connection with the correction (in this case a reduction) of an unjust or unreasonable rate."[172]

AT&T appears to take the position that unless some action is expressly prohibited by Section 392.245 RSMo. 2000, the Commission may take action with respect to the rates of a price cap regulated incumbent LEC which is directly inconsistent with the mandatory provisions of Section 392.245 RSMo. 2000, as well as the underlying purpose of that statute. AT&T's position has no merit.

As described above, Section 392.245 RSMo. 2000 establishes "maximum allowable prices" for telecommunications services offered by an incumbent local exchange telecommunications company. The statute also provides the express framework under which the maximum allowable prices established by the Missouri legislature may be either increased or decreased. Under Sections 392.245.4(5) and 392.245.11, the price cap regulated company is given the authority to set its rates at any level which does not exceed the maximum allowable price. The statute does not permit the Commission to set rates above the maximum allowable price or to require rates to be set below the applicable maximum allowable price established by the price cap statute. Yet that is exactly what AT&T urges the Commission to do. If the Missouri legislature had intended to grant the Commission authority to set rates above or below the maximum allowable prices established by the price cap statute, so long as exceptions were implemented on a revenue neutral basis, the legislature clearly could have provided for this in the

[172] Initial Brief of AT&T, p. 16.

price cap statute. The legislature created no such exception and neither AT&T nor the Commission may now do so by implication or for the sake of convenience.

e. Whether an ILEC regulated under "price-cap regulation" pursuant to Section 392.245, RSMo 2000, may voluntarily reduce its switched access rates?

As SBC Missouri pointed out in its Initial Brief, under Sections 392.245.4(5) and 392.245.11 RSMo. 2000, an incumbent LEC subject to price cap regulation may voluntarily reduce the rates for any of its services below the "maximum allowable price" established by Section 392.245 RSMo. 2000, so long as the incumbent LEC does so in a manner which is consistent with Section 392.200 RSMo. 2000. Every party that addressed this issue in its Initial Briefs agrees that incumbent LECs subject to price cap regulation may voluntarily reduce the rates for any of its services.[173]

f. Whether an ILEC regulated under "price-cap regulation" pursuant to Section 392.245, RSMo 2000, may voluntarily restructure its switched access rates?

As SBC Missouri described in its Initial Brief, as long as the "maximum allowable prices" established under Section 392.245 RSMo. 2000 are not exceeded, incumbent LECs subject to price cap regulation under Section 392.245 RSMo. 2000 have flexibility to voluntarily restructure their switched access rates.[174] Based on the Initial Briefs filed by the parties in this matter, it appears that there may be some confusion as to what is meant by "restructure" switched access rates. For example, in the section of its Initial Brief addressing this issue, AT&T points to Sections 392.245.8 and .9 RSMo. 2000, which permit certain incumbent local exchange telecommunications companies subject to price cap regulation to exercise a certain

[173] See, e.g., Initial Brief of AT&T, p. 20; Initial Brief of WorldCom, pp. 6-7; Initial Brief of Sprint, p. 41.
[174] Initial Brief of SBC Missouri, p. 46.

amount of "price rebalancing" by increasing their local rates and reducing their intrastate access rates. If an incumbent LEC is eligible for this revision (i.e., if the incumbent LEC's intrastate access rates exceeded 150% of its interstate access rates as of December 31 of the year preceding the year in which the LEC became subject to price cap regulation), under subsection 9 of Section 392.245 RSMo. 2000, this incumbent LEC may offset the revenue loss resulting from the switched access rate reduction by increasing its monthly maximum allowable prices for basic local service subject to express limitations contained in the statute.[175] SBC Missouri agrees that those price cap regulated incumbent LECs which meet the requirements of Sections 392.245.8 and .9 may rebalance their rates as described in the statute. SBC Missouri, however, does not meet the requirements of the statute and may not rebalance its rates pursuant to these statutory provisions.

Sprint, on the other hand, interprets "restructure" to mean "adding or subtracting specific rate elements or adding or subtracting the amounts attributable to specific rate elements that make up switched access charges.[176] In its Initial Brief, Sprint claims that there is nothing to prevent an ILEC regulated under price cap regulation from voluntarily restructuring its switched access rates "as long as it is done on a competitive neutral and revenue neutral basis."[177] To the extent Sprint is proposing that a price cap regulated incumbent LEC may increase rates above the maximum allowable prices, SBC Missouri disagrees. Even on a revenue neutral basis, a price cap regulated incumbent LEC may not exceed the maximum allowable prices.

[175] As SBC Missouri described in its Initial Brief, this limited exception to the price cap regulatory regime enacted by the Missouri legislature in Senate Bill 507 is not applicable to SBC Missouri, because at the time SBC Missouri became eligible for price cap regulation, SBC Missouri's intrastate access rates did not exceed 150% of its interstate access rates.
[176] Initial Brief of Sprint, p. 41.
[177] Id.

g. Whether the Commission has the jurisdiction to direct an ILEC that is regulated under rate of return regulation to reduce its switched access rates without conducting a full rate case?

As SBC Missouri described in its Initial Brief, SBC Missouri does not believe that the Commission has authority to direct an incumbent LEC subject to rate of return regulation to reduce its intrastate switched access rates without conducting an evidentiary hearing at which the rates for all of the company's services, and the company's overall earnings, are considered.[178] However, the Commission could permit a revenue neutral restructuring in which the rates for switched access services of a rate of return regulated LEC are reduced while the rates for other services are increased to recoup the lost revenue.[179]

Most parties agree that the Commission does not have jurisdiction to direct an ILEC regulated under rate of return regulation to reduce its switched access rates without conducting an evidentiary hearing.[180] The only parties which appear to take a contrary position are AT&T and WorldCom.[181] For the reasons set forth in SBC Missouri's Initial Brief, AT&T and WorldCom are wrong.[182]

h. Whether the Commission has the jurisdiction to direct an ILEC that is regulated under rate of return regulation to restructure its switched access rates without conducting a full rate case?

As SBC Missouri described in its Initial Brief, SBC Missouri does not believe that the Commission may direct an incumbent LEC subject to rate of return regulation to reduce its intrastate switched access rates without conducting an evidentiary hearing at which the rates for

[178] Initial Brief of SBC Missouri, p. 47.
[179] Id.
[180] See, e.g., Initial Brief of ALLTEL, p. 19; Initial Brief of Staff, p. 29; Initial Brief of CenturyTel, pp. 11-13; Initial Brief of MITG, p. 15; and Initial Brief of STCG and Holway, pp. 43-44.
[181] See, Initial Brief of AT&T, p. 22; Initial Brief of WorldCom, p. 8.
[182] Initial Brief of SBC Missouri, pp. 46-47.

all of the company's services, and the company's overall earnings, are considered.[183] However, as SBC Missouri pointed out, the Commission could permit a revenue neutral restructuring in which the rates for switched access services of a rate of return LEC are reduced while the rates for other services are increased to recoup the lost revenue.[184]

There appears to be general consensus among the parties addressing this issue in their Initial Briefs that the Commission could direct an ILEC that is regulated under rate of return regulation to restructure its switched access rates without conducting a full rate case, so long as the Commission maintained and ensured revenue neutrality.[185] SBC Missouri's position is consistent with the position of the parties that address this issue in their Initial Briefs.

i. Whether an ILEC that is regulated under rate of return regulation may voluntarily reduce its switched access rates without filing a full rate case?

As SBC Missouri described in its Initial Brief, an incumbent LEC subject to traditional rate of return regulation may voluntarily propose to reduce its switched access rates through a tariff filing. No party addressing this issue in their Initial Briefs took a contrary position.

j. Whether an ILEC that is regulated under rate of return regulation may voluntarily restructure its switched access rates without filing a full rate case?

As SBC Missouri described in its Initial Brief, an incumbent LEC subject to traditional rate of return regulation may voluntarily propose to reduce its switched access rates through a tariff filing. If the "restructure" involves an increase to rates, then an examination of all relevant factors is appropriate.

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[183] Initial Brief of SBC Missouri, p. 47.
[184] Id.
[185] See, e.g., Initial Brief of AT&T, p. 22; Initial Brief of WorldCom, p. 8; Initial Brief of CenturyTel, pp. 13-14; Initial Brief of ALLTEL, pp. 21-22. Staff may not agree. See, Initial Brief of Staff, pp. 29-30.

k. Whether the Commission has jurisdiction to direct a CLEC to reduce its switched access rates?

l. Whether the Commission has jurisdiction to direct a CLEC to restructure its switched access rates?

As SBC Missouri described in its Initial Brief, all CLECs seeking an initial basic local certification from the Commission routinely request that all of their services, including switched access service, be classified as competitive telecommunications services, and that the company be classified as a competitive telecommunications company pursuant to Section 392.361.3 RSMo. 2000.[186] Competitive classification essentially eliminates regulatory oversight of a CLEC's rates.[187] The Commission exercises its jurisdiction over CLEC access rates when it conditions "competitive classification" for CLECs on their agreement to cap their switched access rates. Among the parties addressing these issues in their Initial Briefs, there appears to be no question that the Commission has the authority to impose a cap on CLEC's access rates as a condition of competitive classification. Once the Commission conditions a CLEC's competitive classification upon the CLEC agreeing to cap its access rates, the Commission retains jurisdiction over CLECs' rates to enforce the condition. Apart from enforcement of the condition, as a practical matter the Commission exercises very little regulatory oversight of competitively classified CLECs.

III. CONCLUSION

Based on the evidence which has been submitted in this case, and the Briefs which have been submitted to the Commission, the Commission should determine that TSLRIC is the appropriate methodology to determine the cost of switched access. The Commission should also find that the CLEC access rate cap mechanism it adopted on an interim basis in Case No. TO-99-

[186] Initial Brief of SBC Missouri, p. 48.
[187] Id.

596 should be adopted on a permanent basis for all Missouri CLECs. Based on the evidence presented, the Commission should also consider continuing its investigation, either in another phase of this case or in a new case established for that purpose, into the very high level of switched access rates of small incumbent LECs that are not subject to price cap regulation.

Respectfully submitted,

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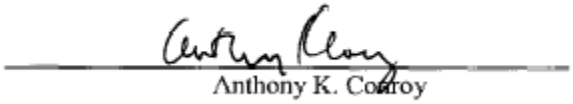
CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served on all counsel of record by electronic mail on January 24, 2003. Notice of this filing was provided to all parties not represented by counsel, by first class, postage prepaid U. S. Mail.



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January 24, 2003

TO: UNREPRESENTED PARTIES
CASE NO. TR-2001-65

Pursuant to the Missouri Public Service Commission's (Commission's) March 14, 2002, Order Adopting Procedural Schedule, Clarifying the Scope of This Proceeding, and Concerning Motion to Waive Service Requirement and Motion to Compel Discovery, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (SBC Missouri) hereby notifies parties not represented by counsel that SBC Missouri filed its Reply Brief in the above-referenced case on January 24, 2003, with the Commission as a public document. Any unrepresented party may obtain a copy of this Reply Brief upon request at no cost.

Very truly yours,

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