BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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

JOINT RESPONSE OF
AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.
MCI COMMUNICATIONS SERVICES, INC., AND
TELECONNECT LONG DISTANCE SERVICES AND SYSTEMS COMPANY
TO
OFFICE OF PUBLIC COUNSEL'S
MOTION FOR REHEARING

On December 13, 2005 the Commission issued its Report and Order ("Order") in the consolidated cases referenced above. The effective date of the Order was December 23, 2005. The Office of Public Counsel ("OPC") timely filed a Motion for Rehearing on December 21, 2005. AT&T Communications of the Southwest, Inc. ("AT&T"), MCI Communications Services, Inc.

(MCI), and Teleconnect Long Distance Services and Systems Company (Teleconnect) respectfully submit the following joint response to OPC's motion:

1. OPC's motion raises no issues or arguments which would support rehearing. OPC's motion contains the same rhetoric as did OPC's testimony and briefs. Just as it did in its testimony and its briefs, OPC loudly and repeatedly claims there is no evidence in the record to support approval of the fees at issue. OPC's volume and repetition cannot trump substance. OPC simply ignores the extensive and overwhelming evidence in the record provided by AT&T, MCI, Teleconnect, Sprint, and Staff and cited by the Commission that not only support the IXC's access recovery fees but that also thoroughly demonstrate that OPC's position lacks merit. Further, OPC's contentions that the Commission ignored or misunderstood OPC's evidence and arguments in the case and failed to render adequate findings and conclusions do not withstand scrutiny, as the Commission's Report and Order thoroughly examines and rejects all aspects of OPC's case.[1] OPC's arguments amount to nothing less than a refusal to accept that under Missouri law, competitive services are subject to a lesser standard of rate regulation than non-competitive services, and as such OPC's arguments merit very little response.

2. OPC's motion once again attempts to recast a web of regulation over competitive services simply by claiming that the Commission still has a mandate to ensure that rates for competitive services are just and reasonable.[2] Even though acknowledging the Legislature eliminated the requirement in § 392.500 that competitive rates should be subject to the standards of § 392.200.1, OPC argues the Commission is still *required* to ensure independent of the market that rates for competitive services are just and reasonable. On its face, OPC's argument is contrary to

[1] OPC opens its Motion for Rehearing with the generic assertion that the Commission violated due process and conducted unfair proceedings. OPC does not develop these points in its motion. Nor could it, for OPC agreed to all of the procedural steps taken in this case on remand.

[2] OPC Motion, p. 3 – 4.

accepted principles of statutory construction and contrary to administrative law principles governing the authority of administrative agencies. Section 392.500 now makes clear that *only* subsections 2 through 5 of § 392.200 are applicable to rates for competitive services. OPC's reliance on other more general sections of Chapter 392 is completely without merit, as it is beyond question that specific provisions control over general provisions.[3]

3. OPC primarily cites to § 392.185 and the requirement that the provisions of Chapter 392 should be *construed* to ensure that customers pay only reasonable charges for telecommunications services. It is only necessary to "*construe"* a provision of Chapter 392 if there is some ambiguity in that provision.[4] In this case, the Legislature has made it absolutely clear by revising §392.500 so that § 392.200.1 no longer applies to the rates for competitive services. Even if it were actually necessary to construe the Legislature's intent when it modified § 392.500, the Commission in its Order correctly determined that the Legislature intended to permit the competitive marketplace to ensure that customers pay only reasonable rates. Contrary to OPC's suggestion, there is no legislative mandate, implicit or explicit, that would permit the Commission to determine whether the rates at issue are "just and reasonable."[5] The Commission does have the authority, which it properly exercised here, to ensure that certain protections remain in place, such as protection against unreasonable discrimination. However, OPC cannot enlarge the Commission's authority, nor subvert the clear will of the Legislature, by reliance on the general policy statements in

[3] City of Kirkwood v. Allen, 399 S.W.2d 30, 34 (Mo 1966); Younger v. Missouri Public Entity Risk Mgmt. Fund, 957 S.W.2d 332, 336 (Mo. App. W.D. 1997) ("Where one provision of a statute contains general language and another provision in the same statute contains more specific language, the general language should give way to the specific.")

[4] Ste. Genevieve School Dist. v. Board of Alderman, 66 S.W.3d 6. 11 (Mo. banc 2002) ("There is no room for construction where a statute is clear and unambiguous."); Blue Springs Bowl v. Spradling, 551 S.W.2d 596, 598 (Mo. banc 1977) ("[W]here the language of a state is plain and admits of but one meaning there is no room for construction."); Lonergam v. May, 53 S.W.3d 122, 126 (Mo. W.D. 2001) ("Only when the language is ambiguous or if its plain meaning would lead to an illogical result will the court look past the plain and ordinary meaning of a statute.")

[5] OPC Motion, p. 11.

§ 392.185. Nor can OPC avoid its prior admission that "the competitive marketplace determines to what extent the carrier will seek to recover all or any part of [its] costs in its rates."[6]

4. OPC also cites to § 392.190, which applies the provisions of §§ 392.190 – 392.530 to all Missouri intrastate telecommunications services.[7] OPC argues that "SB 237 did not alter the scope of the application of these sections." But OPC completely ignores that SB 237 unquestionably altered the scope of § 392.500, and in turn altered the scope (or application) of § 392.200.1. As noted above, OPC's argument would nullify the Legislature's decision to eliminate the application of § 392.200.1 to competitive rates. Beyond that, OPC's argument concerning § 392.190 is simply a random "shotgun" approach to rehearing, suggesting that some other provision in §§ 392.190 – 392.530 *requires* competitive rates to meet a just and reasonable standard. OPC, however, fails to identify any such provision and has not met its burden to support its request for rehearing.

5. OPC also attempts to attack the Commission's rejection of OPC's claim that the IXCs' access recovery fees are not just and reasonable on the merits (the Commission analyzed this claim even though it was not required to do so because § 392.200.1 no longer applies to the rates for competitive services).[8] OPC claims that the Commission "overlooked relevant and material matters of fact and law in its decision," and that there is no evidence to support the Commission's holding that the access recovery fees are just and reasonable. OPC uses this superficial boilerplate claim throughout its motion. But in every instance, the Order contradicts OPC's assertions by citations to record evidence demonstrating the justifications (even though none is required) for these access recovery fees, including: (a) the cost differences between business and residential customer classes; (b) the historical and legal recognition of distinct business and residential customer classes that justifies different rates for the distinct classes; (c) the reasonableness of flat rates in general and of

[6] Graves Amended Direct, Ex 5, p. 11-12 and Schedule AG-2.
[7] OPC Motion, p. 4.
[8] OPC Motion, p. 6.

the flat rate structure specifically used for these access recovery fees; and (d) the cost justification for exempting an IXC's local customers.[9] This overwhelming evidence, ignored by OPC, rebuts all of its arguments. Simply repeating the claim that these access recovery fees are unjust, unreasonable, and discriminatory, as OPC does here, does not make it so.

6. OPC has also resorted to arguing issues it waived and to referencing matters outside the record. For example, OPC now argues that imposing access recovery fees as a surcharge "prevents the customer from making an informed choice."[10] OPC asserts that the IXC's long distance plans do not "identify and include" the access recovery fees "so consumers do not always learn the true price of the plan." But OPC witness Meisenheimer's rebuttal testimony never once raised the issue of consumer notice, consumer confusion, or the inability of consumers to make an informed choice. Nor did OPC include an issue on customer notice or customer information when the parties jointly submitted a list of issue statements. To the contrary, OPC tacitly admitted that the IXCs have complied with truth-in-billing requirements.[11] Accordingly, OPC has waived any arguments about customer notice and confusion. Nevertheless, the record contains substantial evidence that the IXCs have complied with all Commission procedural and notice requirements for approval of these tariffs.[12]

7. Similarly, OPC now attempts to belatedly argue that the fees violate Section 254(g) of the Federal Telecommunications Act of 1996. OPC did not ask to include this federal issue in the list of issues for the Commission to decide and OPC has waived this argument. Moreover, although Ms. Meisenheimer's rebuttal testimony contained one sentence about compliance with Section

[9] *See* Report and Order and record cites therein, p. 7 – 10.
[10] OPC Motion, p. 11, ¶ 25.
[11] Meisenheimer Rebuttal, Ex 9, p. 13; Graves Surrebuttal, Ex 6, p. 7.
[12] *See* Rhinehart Direct, Ex. 1, p. 4 – 6; Appleby Direct, Ex 3, p. 3-5; Graves Amended Direct, Ex 5, p. 3-6, 21-22; Voight Rebuttal, Ex 8, p. 6-7.

254(g), her argument presented an issue of discrimination against rural customers,[13] which was expressly rejected by the Commission based on the record evidence.[14] Now in its motion, OPC suggests a violation of interstate long distance rate averaging requirements. Again, OPC has waived any such arguments. Nevertheless, such an argument is devoid of merit, as this case concerns intrastate rates, not interstate rates.

8. OPC's arguments in this case are frivolous. Twenty eight states besides Missouri have approved access recovery fees. In no other state has an IXC or the state utility commission been required to expend resources on challenges to such a fee for a competitive service like intrastate long distance. OPC apparently wishes that consumers would have no choice of telecommunications providers, and long distance telecommunications companies would have their rates and earnings regulated and limited as if they were monopolies. The law, and the marketplace, have changed, and the Commission's Order accurately reflects the record in this case as well the current law and the realities of the current marketplace. OPC has provided no reason for the Commission to change its Order and turn back the clock. OPC's motion for rehearing should be denied.

WHEREFORE, AT&T Communications of the Southwest, Inc., MCI Communications Services, Inc., and Teleconnect Long Distance Services and Systems Company pray the Commission to deny OPC's motion for rehearing.

[13] Meisenheimer Rebuttal, Ex. 9, p. 6.
[14] Report and Order, p. 18-19. (Rhinehart Direct, Ex 1, p. 13; Rhinehart Surrebuttal, Ex 2, p. 40-44; Appleby Direct, Ex 3, p. 14-15; Graves Amended Direct, Ex. 5, p. 21; Voight Surrebuttal, Ex 8, p. 4).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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