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

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.'S
APPLICATION FOR RECONSIDERATION AND REHEARING

COMES NOW AT&T Communications of the Southwest, Inc. ("AT&T") and submits this Application for Reconsideration and Rehearing pursuant to Sections 386.500 and 4 CSR 240-2.160. AT&T seeks reconsideration of the Commission's Report and Order, issued on August 26, 2003 in the captioned proceeding. Specifically, AT&T seeks reconsideration of the Commission's complete failure once again to address Missouri's exorbitantly high intrastate switched access rates. As this Commission has acknowledged, Missouri's intrastate switched access rates need to be reformed. In its Order, the Commission found that Missouri's switched access rates are high in comparison to costs for all of the LECs[1] and that these high rates "distort the IXC market, create disincentives for ICCs to serve certain markets, and provide opportunities for discriminatory pricing" ... and they are "anti-competitive and deter local market entry by imposing increased business expenses on new entrants.[2] The Commission's consultant,

[1] Report and Order, p. 20.
[2] Report and Order, p. 13.

hired specifically for this proceeding, testified that Missouri's access rates are significantly higher, when compared to surrounding states. Despite these findings, the Commission, once again, fails to act to establish just and reasonable, cost-based intrastate switched access charges. Even more fundamentally, the Commission failed to address the seminal question of whether it has jurisdiction to reduce the intrastate switched access rates of the incumbent local exchange carriers – an issue the parties have urged the Commission to decide. This is a question of law, not one dependent upon a review of record evidence, that should be decided, not continually avoided, by the Commission. The Commission's failure to act to address the access rates issues it specifically identified as at issue in this proceeding, after the substantial commitment of resources by the Commission Staff and parties and the Commission's acknowledgement that the rates are not cost-based, is arbitrary and capricious, is contrary to Missouri and federal law, and is not supported by the record evidence.

AT&T also seeks reconsideration and rehearing on the Commission's decision to only permit CLECs to obtain a variance from the CLEC cap on switched access rates upon a cost showing. The Commission's limitation is inconsistent with what appears to be the intent of the Commission because it significantly alters the Commission's initial ruling on the interim CLEC cap. The Commission's material change to the interim CLEC cap is unsupported by any factual or legal findings and is contrary to public interest.

A. <u>Intrastate Switched Access Charges</u>.

The Commission's decision in this case only addresses two of the many issues brought before it. The two issues addressed by the Commission's Report and Order were

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

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

The Commission failed to address the numerous issues presented by the parties relating to the incumbent local exchange carrier's intrastate switched access rates. Notably, the Commission failed to address the legal questions surrounding its jurisdiction to alter/reduce the intrastate switched access rates of the incumbent LECs operating in Missouri. It failed to address the appropriate cost methodology and other cost inputs and assumptions for determining the incumbent LEC's exact cost of access and it failed to address any mechanism for moving the incumbent's intrastate access rates to cost and for eliminating the implicit subsidies in intrastate switched access rates. These are issues that must be addressed for the Commission to implement the access reform it concedes is called for in Missouri.

On its own motion, the Commission established this case "to examine all of the issues affecting exchange access service and to establish a long-term solution which will result in just and reasonable rates for exchange access service."[3] This broad purpose was set forth in the press release issued at the start of this case (See Press Release - PSC Establishes Case to Examine Access Charges in Missouri, September 28, 2000). This broad purpose was also reiterated in virtually every Order issued in the case, including the

[3] Case No. TO-99-596, Report and Order, p. 28.

recent Report and Order.[4]

During the course of this proceeding, several parties, including the AT&T Companies, asked the Commission to clarify the scope of this proceeding. Each time, the Commission reiterated its broad goal of establishing a long term solution that would result in just and reasonable rates for exchange access service.[5] The Commission clarified that this docket includes ILECs, and that ILEC access costs are within the scope of this proceeding. In its December 12, 2000 Order Granting Clarification, the Commission stated:

> Next, Staff asks whether the Commission intends to include ILECs as well as CLECs in this case. This question should not require clarification. In its Order Establishing Case, issued on August 8. 2000, Staff was directed to compile "a list of all carriers, with their addresses, presently certificated to provide basic local telecommunications services in the state of Missouri." As stated previously, the carriers appearing on that list were all made parties hereto by the order of September 21, 2000. That list necessarily included large and small ILECs, as well as CLECs, because all are carriers certificated to provide basic local telecommunications services. SWBT opposes inclusion of the ILECs in this case. The access rates of the large ILECs have been adopted as caps on CLEC access rates in each exchange; therefore, it is appropriate to review the ILECs' cost information.[6]

SBC Missouri, Inc.'s Executive Director – Regulatory, Craig Unruh acknowledged that this case was an "access reform case" and was an appropriate vehicle for examining ILEC switched access rates[7].

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[4] *See* Order Establishing Case and Adopting Protective Order, August 8, 2000, p. 1; Order Granting Clarification, December 12, 2000, p. 1; Order Directing Filing, March 5, 2001, p. 1; Order Adding Parties And Directing Notice, Sept. 21, 2001, p. 1; Order Adopting Procedural Schedule, Clarifying the Scope of this Proceeding, and Concerning Motion to Waive Service Requirement and Motion to Compel Discovery, March 15, 2002, p. 1; Order Directing Filing, June 16, 2003.

[5] *See* Order Adopting Procedural Schedule, Clarifying the Scope of this Proceeding, and Concerning Motion to Waive Service Requirement and Motion to Compel Discovery, March 15, 2002, p. 1, *Order Granting Clarification*, December 12, 2000, p. 1.

[6] Order on Clarification, December 12,2000, p. 2.1

[7] Case No. TO-98-329, Testimony of Craig Unruh, Trans. p. 3672

Based upon the Commission's representations regarding the scope of this case, the parties participating in this case spent significant resources addressing the issues not related to the CLEC cap on switched access that were put before the Commission. The Commission authorized the retention of a consultant by its Staff, spending over $250,000 to analyze Missouri intrastate switched access rates and to compile cost data from all local exchange carriers – a cost that will be borne by all regulated industries in Missouri. Many of the smaller incumbent local exchange carriers retained outside consultants as well as legal counsel. The cost of these consultants will almost certainly be passed onto customers, including IXC, via access rates.

The Commission failure to address these numerous other issues relating to incumbent local exchange carrier's switched access rates is arbitrary and capricious and contrary to the record evidence. It is wasteful to the state budget and to the finances of companies competing in Missouri and a waste of the parties time and resources to open a case for an express purpose, to take evidence from the parties on the issues, to acknowledge there is a problem that needs to be addressed and to take no action to address the problem.

In addition, state and federal law mandates that access rates be cost based. Missouri telecommunications law recognizes long run incremental cost or "LRIC" as the appropriate costing methodology.[8] As a result, the Commission has historically used

[8] See Section 386.020(32 and 392.245.9 RSMo.

LRIC as a means to assess the cost of telecommunications service, including access service in Missouri.[9]

The federal Act requires that network elements and interconnection prices must be based on cost.[10] Section 252(d)(1)(a)(i) mandates that the rates for interconnection and network elements shall be based on cost. The FCC has directed that costs, as that term is used in the Act, shall mean forward-looking costs. Indeed, federal law *requires* cost-based rates for intrastate access services. Section 251(b)(5) of the Telecommunications Act of 1996, 47 U.S.C. § 251(b)(5), requires LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications," and section 252(d)(2) requires that such rates be cost-based. *See* 47 U.S.C. § 251(d)(2); *Local Competition Order*, 11 FCC Rcd. 15499, ¶ 1054 (1996). Until recently, the FCC construed section 251(b)(5) as applying only to local traffic. However, following a remand from the U.S. Court of Appeals for the D.C. Circuit, the FCC recognized section 251(b)(5) to require, subject to section 251(g) (which temporarily "grandfathered" certain pre-existing requirements), "reciprocal compensation for transport and termination of all telecommunications traffic – *i.e.*, whenever a local exchange carrier exchanges telecommunications traffic with another carrier." *ISP Remand Order*, 16 FCC Rcd., 9151, ¶¶ 32, 46 (2001); *see id.* ¶ 35 (section 251(b)(5) could not be limited to "local" traffic in part because "the 1996 Act changed the historic relationship between the states and the federal government with respect to pricing matters." As the FCC has long

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[9] *In the Matter of the Cost of Service Study of Southwestern Bell Telephone Company*, Case No. 18, 309, Report and Order, dated May 27, 1977; *In the Matter of the Tariffs Filed by Sprint Missouri, Inc.*, Case No. TR-2002-251 (Order, dated December 26, 2001.

[10] 47 U.S.C. § 252(d)(1).

recognized, exchange access services, including intrastate switched access services, are telecommunications services, *see Local Competition Order*, CITE, ¶ 356 (1996) ("exchange access and interexchange services are telecommunications services"), and are thus within the scope of section 251(b)(5).[11]

Further, Missouri and federal law also mandate that implicit subsidies be made explicit. Section 392.248 provides that a fund shall be established in order to "ensure just, reasonable, and affordable rates for reasonably comparable essential local telecommunications services" and requires that the Missouri USF must be consistent with the rules and obligations established by the FCC in implementing the requirements of the Federal Act.[12] Section 254(b) of the Act also requires the elimination of implicit subsidies or support and the shifting, where necessary of such subsidy or support to explicit, competitively neutral support mechanisms.

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[11] Section 251(g) does not exempt the intrastate access rates at issue from cost-based pricing. Section 251(g) provides that LECs "shall provide exchange access ... in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission ... ." 47 U.S.C. § 251(g). As the D.C. Circuit has held, this provision is a simple grandfathering provision that applies to the specifically referenced federal regulations and policies. *See WorldCom v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002). Even if "Congress did not intend all access charges to move to cost-based pricing, at least not immediately," *CompTel v. FCC*, 117 F.3d 1068, 1072 (8th Cir. 1997), section 251(g) does not extend to intrastate access rates, and certainly not to *intraLATA* access rates: Those rates were not, prior to February 8, 1996, governed by "any court order, consent decree, or regulation, order or policy of the *Commission*" that imposed "equal access and nondiscriminatory interconnection restrictions and obligations." 47 U.S.C. § 251(g) (emphasis added). Although the FCC has admitted that section 251(g) does not expressly apply to intrastate access charges, it has opined that general Congressional intentions would support applying the approach to intrastate rates. *See ISP Remand Order*, 16 FCC Rcd. at ¶ 35 & n.66. Since then, however, the D.C. Circuit has authoritatively construed section 251(g) as a grandfathering provision that must be read strictly in accord with its terms. *See WorldCom*, 288 F.3d at 433-34. In the absence of a definitive FCC ruling that actually justifies an expansive interpretation of section 251(g) against controlling court precedent to the contrary, the PSC is bound by the clear language of the statute.

[12] Section 392.248.1. In addition, the Commission may adopt "additional definitions and standards it believes are necessary to preserve and advance universal service in the State of Missouri." *Id.*

In addition to being contrary to the legal obligation imposed by Missouri law, the PSC Order is contrary to federal obligations. Section 254(k) of the Telecommunications Act of 1996, 47 U.S.C. § 254(k), imposes two separate federal duties. The first requires that "[a] telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition." In this case, the record clearly establishes that switched access services are priced substantially above cost with the intent and effect of subsidizing various other services, including local telephone services, that are subject to competition. Alerted to the ILECs' ongoing violation of this federal requirement by the extensive evidence established in this proceeding, the PSC cannot now accede to or collude in the violation by simply failing to act to reduce or prevent the prohibited cross-subsidization. The second duty is imposed directly on "States, with respect to intrastate services," *see* 47 U.S.C. § 254(k), and confirms that the PSC must take affirmative actions to implement cost-based rates to preserve universal service, such as that required by the Missouri USF law.

The Commission's decision fails to address any of these statutory requirements and instead improperly maintains the existing scheme of implicit subsidies contained in Missouri's access rates

For these reasons, the Commission's failure to address the incumbent LEC's intrastate switched access rates – rates the Commission acknowledges are excessive and are not cost-based—is arbitrary and capricious, contrary to and not supported by the record and is contrary to Missouri and federal law. AT&T urges the Commission to address the legal issues surrounding the Commission's jurisdiction to require reductions or offsets in the intrastate switched access rates for the local exchange carriers in

Missouri and to implement the state and federal statutory requirements by removing implicit subsidies from access rates and ensuring that such rates are cost-based.

B. Cap On CLEC Access Rates.

The Report and Order states that,"[h]aving considered the evidence and the arguments of the parties, the Commission will make the interim cap permanent."[13] However, the Commission did not make the interim cap permanent. Instead, without any record support or legal justification, the Commission limited the instances where CLECs may seek a variance to the cap to situations where the CLEC can demonstrate that such a variance is cost justified.[14]

The interim cap referenced in the Order was the cap imposed in Case No. TO-99-596. The interim cap limited CLEC exchange access rates at the level of access rates of the directly competing ILEC. As part of that cap, the Commission allowed CLECs to petition the Commission to set rates in excess of the cap. Under the interim cap, CLECs could seek a variance to the cap on a case-by-case basis. The Commission's decision in Case No. TO-99-596 specifically rejected the proposal that exceptions to the cap be limited to cost. As stated in the Commission's Report and Order in Case No. TO-99-596,

> While all of the parties agreed that a CLEC may petition the Commission for authority to set rates in excess of the cap, they did not agree on the standard by which such petitions should be determined. Some of the parties argued that such rates must be cost-justified, while others suggested a more flexible, case-by-case analysis. The Commission concludes that Chapter 392, RSMo, requires that any such petitions be determined on a case-by-case basis. While costs are one important factor to be considered, that chapter mandates the consideration of other factors as well. *See* Section 392.185, RSMo Supp. 1999.

[13] Report and Order, p. 20.
[14] Report and Order, pp. 20-21.

While the Commission states that its intent is to retain the existing interim cap, the Commission's ruling fails to do so. Instead, the Commission materially alters the interim cap by limiting variance to the cap to those instances where a CLEC demonstrates that higher access rates are cost justified. The Commission's decision is contrary to the record: no party disputed the continued application of the interim cap. Even more fundamentally, the Commission makes no factual finding that justifies the change in the interim cap. Nor does the Commission cite to any change in Section 392.185 or provide any other legal basis that would alter its initial conclusion that Missouri law "mandates consideration of other factors as well." The Commission's decision to change the cap is without any justification and is in error. It is arbitrary and capricious and unsupported by the record. For these reason, AT&T requests the Commission reconsider its decision and continue to allow exceptions to the CLEC cap to be decided on a case-by-case basis as it originally ordered under the interim cap.

Dated this 4th day of September, 2003.

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CERTIFICATE OF SERVICE
(TR-2001-65)

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