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June 20, 2002

Secretary of the Public Service Commission
Missouri Public Service Commission
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, Missouri 65102

Re: Case No. TO-2001-440

Dear Secretary of the Commission:

Enclosed please find for filing with the Commission an original and nine (9) copies of Comments of WorldCom to the Commission's Order Directing Filing. Upon your receipt, please file stamp the extra copy received and return to the undersigned in the enclosed, self-addressed, stamped envelope. If you have any questions, please do not hesitate to contact us.

Very truly yours,

Leland B. Curtis

Leland B. Curtis

LBC:dn
Enclosures
cc. Parties of Records (W/Enclosures)

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Determination of Prices, Terms And Conditions of Line Splitting and Line Sharing)	Case No. TO-2001-440

COMMENTS OF WORLDCOM TO THE COMMISSION'S ORDER DIRECTING FILING

COMES NOW, WorldCom ("WCOM") and files these comments in response to the June 10, 2002, Order Directing Filing of the Public Service Commission (the "Commission") and respectfully states the following.

-I-

THE COMMISSION SHOULD PROCEED TO WITH THIS CASE ADDRESSING THE LINE SHARING AND LINE SPLITTING ISSUES

The D.C. Circuit Court's remand of the FCC's *Line Sharing Order*[1] in *United States Telecom Ass'n v. Federal Communications Commission*[2] should not deter the Commission from addressing the issues in this case. The Commission could (and should) proceed with its consideration of this case for several reasons. First, the D.C. Circuit's Opinion cannot become effective until the D.C. Circuit issues its Mandate, which may not occur until after July 8, 2002. Even then, the D.C. Circuit's Opinion may not become effective on July 8, 2002, because parties to the Court's Judgment have stated they may seek Supreme Court review and/or a stay pending Supreme Court review. Second, the ILECs, such as SWBT, have contractual obligations under their Interconnection Agreements to provide line sharing. Third, the Commission has independent authority to set the high frequency portion of the loop ("HFPL") UNE rate under the

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[1] In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order, CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (rel. Dec. 9, 1999) ("*Line Sharing Order*").

Telecommunications Act of 1996,[3] the FCC rules, and federal court decisions. Fourth, notwithstanding the D.C. Circuit's Opinion, CLECs are impaired without access to the line sharing UNE, and thus ILECs are required to provide the line sharing UNE. Fifth, other state commissions have determined that independent authority exists to adopt UNEs. Finally, strong public policy considerations require continued provision of the line sharing UNE. For these reasons, this Commission should continue its consideration of this case and continue to provide Missouri consumers the benefits of line sharing and line splitting.

A. The D.C. Circuit Ruling Did Not Eliminate the ILEC's Continuing Legal Obligation to Provide Line Sharing

1. The D.C. Circuit's Ruling Is Not Yet Effective

At best, the D.C. Circuit's Opinion cannot become effective until the D.C. Circuit issues its Mandate, which, in all likelihood, will not occur until after July 8, 2002.[4] Indeed, the D.C. Circuit's Opinion may not become effective on July 8, 2002 because parties to the Court's Judgment may seek rehearing of the D.C. Circuit's Opinion, which automatically "stays the mandate until disposition of the petition or motion."[5] Likewise, the FCC may, and if not, parties to the proceeding may, seek Supreme Court review of the D.C. Circuit's Opinion. Parties have 90 days from the date of the Court's Judgment, or 90 days from the denial of a petition for

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(Continued)

2 2002 WL 1040574, No. 00-1012, Slip opinion (D.C. Cir. May 24, 2002).

3 Pub. L. 104-104, Title VII, § 252(d)(1), Feb. 8, 1996, 110 Stat. 153 (codified in scattered sections of Title 47 of the United States Code) (hereinafter referred to as the "Act" or "Telecom Act").

4 Federal Rule of Appellate Procedure 41(b) provides: "The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later." Federal Rule of Appellate Procedure 40(a)(1) provides: "a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time." Accordingly, because a U.S. agency, the FCC, is a party to the D.C. Circuit's judgment, the parties have 45 days to file a petition for rehearing. The D.C. Circuit's Opinion was issued on May 24, 2002.

5 FED. R. APP. PROC. 41(d)(1).

rehearing in which to seek *certiorari* before the United States Supreme Court.[6] Finally, the FCC may, and if not, parties to the proceeding may seek a stay of the Mandate pending Supreme Court review.

2. ILECs Have Continuing Contractual Obligations to Provide Line Sharing UNEs Pursuant to Their Interconnection Agreements

The D.C. Circuit's Opinion does not automatically affect the ILECs' contractual obligation to provide line sharing UNEs to CLECs. The line sharing appendices in CLECs' interconnection agreements remain binding and in force unless and until the ILECs invoke "change of law" provisions to alter contractual provisions to reflect the effect of the D.C. Circuit's Opinion. Clearly, the ILECs may not invoke such change of law provisions until the D.C. Circuit's Opinion becomes final. The D.C. Circuit's Opinion remanded the *Line Sharing Order* back to the FCC to reexamine whether CLECs are "impaired" without access to line sharing as a UNE considering the existence of intermodal competition. There will be no change in law unless the FCC decides on remand (in the Triennial Review Docket) that line sharing is not a UNE. Even then, there is no change of law until the FCC's Order in the Triennial Review Docket becomes final and unappealable. Accordingly, any "change of law" would occur in the distant future.

B. The *Line Sharing Order* Is Not the Sole Basis Upon Which States Can Order ILECs to Provide Line Sharing as a UNE

1. This Commission Has Independent Authority to Set the HFPL UNE Rate

The Commission has authority under FCC Rule 51.317 to require line sharing and to set TELRIC-based rates. This authority is independent of the FCC's *Line Sharing Order*. The

[6] U.S. SUP. CT. R. 13.1 and 13.3.

Commission has independent authority under federal law to set the HFPL UNE rate in this proceeding. FCC Rule 51.317 and the *UNE Remand Order* authorize this Commission to unbundle the ILECs' networks beyond the FCC's minimum list of UNEs upon an independent finding that such unbundling meets the "necessary and impaired" standard.[7] This authority is independent of any minimum line sharing requirements set out by the FCC in the *Line Sharing Order*. Thus, the Commission has the independent authority to require ILECs to provide line sharing in Missouri *and* the corresponding authority to set an HFPL rate in this proceeding.

This independent authority is firmly grounded in the Telecom Act, the FCC's implementing orders, and the controlling case law. Section 251(d)(3) of the Telecom Act provides that the FCC shall not preclude the enforcement of any state commission regulation, order or policy that (A) establishes access and interconnection obligations of ILECs; (B) is consistent with the requirements of § 251; and (C) does not substantially prevent implementation of this section and the purposes of §§ 251-261. Similarly, § 261(b) of the Telecom Act states:

> Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulation after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.[8]

On the specific issue of line sharing, the FCC's *Advanced Services Order* states "nothing in the Act, our rules, or case law precludes states from mandating line sharing, regardless of whether the incumbent LEC offers line sharing to itself or others, and regardless of whether it offers

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[7] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, ¶ 153 (rel. November 5, 1999) ("*UNE Remand Order*") (finding that § 251(d)(3) provides state commissions with the ability to establish additional unbundling obligations); *id.* ¶ 155 ("[s]ection 51.317 of the Commission's rules codifies the standards state commissions must apply to add elements to the national list of network elements we adopt in this order...[m]odification of this rule will enable state commissions to add additional unbundling obligations consistent with sections 251(d)(3)(B) and (C) of the Act").

advanced services."[9] Accordingly, the Telecom Act and the FCC's implementing orders clearly authorize this Commission to establish unbundling obligations, including line sharing, that may exceed the FCC's currently effective minimum requirements. If the Commission has the independent authority to require line sharing, the Commission has the corresponding authority to set an HFPL rate in this proceeding.

Reviewing courts have repeatedly upheld this broad interpretation of the independent unbundling and ratemaking authority of state commissions. At the highest level, the U.S. Supreme Court reviewed and implicitly approved independent state authority pursuant to FCC Rule 51.317. In *AT&T Corp. v. Iowa Utilities Bd.*, the Supreme Court noted that "[i]f a requesting carrier wants access to additional elements, it may petition the state commission, which can make other elements available on a case-by-case basis."[10] This implicit affirmation is entirely consistent with the Ninth Circuit's more explicit affirmation in *MCI v. US West*:

> The [FCC] is charged with the responsibility of promulgating regulations necessary to implement the Act itself, but the Act reserves to states the ability to impose additional requirements so long as the requirements are consistent with the Act and "further competition."[11]

Accordingly, as confirmed by Supreme Court and Ninth Circuit precedent, this Commission has the federal authority—independent of the *Line Sharing Order*—to impose additional unbundling requirements, including line sharing, and to set an HFPL rate in this proceeding.

(Continued)

8 "This part" is "Part II – Development of Competitive Markets," including 47 U.S.C §§ 251-261.

9 *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, FCC 98-48, ¶ 98 (rel. Mar. 31, 1999) ("*Advanced Services Order*").

10 *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 388 (1999) (*AT&T v. IUB*). While the Supreme Court remanded FCC Rule 51.319 (the necessary and impair standard) back to the FCC for further justification, it did *not* remand or note with any disfavor FCC Rule 51.317.

11 *MCI Telecommunications Corp. v. US West Comm.*, 204 F.3d 1262, 1265 (9th Cir. 2000) (*MCI v. US West*); *cert denied Qwest v. MCI WORLDCOM Network Services*, 531 U.S. 1001 (2000) (citing 47 U.S.C. § 251(d)); *see also* 47 C.F.R. § 51.317.

2. CLECs Are Impaired Without Access To The Line Sharing UNE

As demonstrated in Section B.1, above, the Commission has independent authority under federal and state law to unbundle and price the HFPL.

a. Discrimination in Favor of the ILECs' Affiliates and Subsidiaries

In addition to the ten factors set forth by the FCC to evaluate impairment of CLECs, the Commission should also consider another key factor: the fact that the ILECs' data affiliates/subsidiaries can, and indeed are, line sharing with the ILEC.[12] Section 251(c)(3) of the Telecom Act requires ILECs to provide "non-discriminatory access to network elements on an unbundled basis at any technically feasible point at rates, terms and conditions that are just, reasonable, and nondiscriminatory." Thus, so long as the ILECs are able to use the HFPL to provide DSL-based services, CLECs are entitled to access the HFPL. If the ILEC has a separate data affiliate (*e.g.*, ASI) that leases the HFPL like other CLECs, then the Commission can easily ensure that nonaffiliated CLECs have access to the HFPL on the same terms as the ILEC data affiliate. If, however, the ILECs dissolve the separate affiliate structure (as SBC may very well do in the near future), then the Commission may have little insight into the terms and conditions under which the ILEC uses the HFPL for its own operations. Thus, the Commission should require that the HFPL be made available as a UNE, and should set reasonable terms and conditions for the UNE in order to ensure that CLECs will not be disadvantaged compared to the ILECs' own operations.

[12] SBC Advanced Services, Inc. ("ASI")

b. Supplementing the Record and Maintaining Line Sharing During Any Remand Proceedings

As explained above, the Commission can move forward under its independent authority to establish an HFPL UNE rate in this proceeding. If, however, the Commission decides that it needs additional facts to enter an independent finding that CLECs are impaired without access to the HFPL UNE, then the Commission should order a limited reopening of this proceeding for the purpose of admitting evidence on the expanded impair standard enunciated by the D.C. Circuit's Opinion.

One issue merits special attention, namely, the continuation of line sharing during any limited remand of the line sharing issues. CLECs currently provide DSL-based service on line-shared loops to thousands of customers in Missouri. Disconnection of those circuits or discontinuation of line sharing on a prospective basis would be an economic and regulatory nightmare. The Commission must use its general regulatory authority discussed above, to require SWBT to continue providing line sharing during the pendancy of the limited remand. Indeed, any discontinuation of SWBT's obligations under various interconnection agreements would constitute a breach of the governing interconnection agreements. The harm of such an action would be magnified even further by the fact that the ILECs' data subsidiaries/affiliates would presumably continue to benefit from line sharing during the same time period.

WCOM is aware that SBC sent a letter to FCC Chairman Powell, stating that SBC "will continue to provide the high frequency portion of the loop (HFPL) UNEs, loop conditioning and splitters on a line at a time basis at least until February 15, 2003 pursuant to current agreements." While SBC couches its actions as providing "additional certainty," its commitment beyond February 15, 2003 is anything but certain. This concern is underscored by the fact that SBC also states in its letter that it "is also willing to work with CLECs to develop mutually acceptable line-

sharing related market-based solutions and prices that could be implemented before or after February 15th." The fact that SBC is raising the specter of "market-based" prices for services that other commissions have already determined to be UNEs—and, thus, priced at TELRIC—provides little long term comfort for CLECs attempting to enter the nascent DSL market.

C. Other States Have Exercised Authority to Establish Additional UNEs[13]

Notwithstanding the D.C. Circuit's Opinion, this Commission has the independent state law authority to unbundle and price the HFPL. The Michigan Public Service Commission stated, "Although the decision in United States Telecom Ass'n v Federal Communications Comm, opinion of the United States Court of Appeals for the District of Columbia Circuit, decided May 24, 2002 (Docket No. 00-1012 et al.), remanded the Federal Communications Commission's line-sharing rules, it did not go so far as to hold that, as a matter of federal law, there is no obligation to provided nondiscriminatory access to the high- or low- frequency portions of the loop. Moreover, the holding does not affect the Commission's authority with respect to line sharing under Section 305 and other provisions of the MTA."

1. The Minnesota PUC Used its Authority to Order Unbundling of Line Sharing Before the FCC.

Not only do states have the authority to add UNEs to the list promulgated by the FCC, states have ordered UNEs even before the FCC adopted them. For example, the State of Minnesota ordered the line sharing UNE prior to its adoption by the FCC.[14] Although the Minnesota PUC noted its authority pursuant to Section 251(c) and Section 706(a) of the Act to

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[13] In the matter of the complaint of the Competitive Local Exchange Carriers Association of Michigan, CMC Telecom, Inc., et al., against SBC Ameritech Michigan for anti-competitive acts and acts violating the Michigan Telecommunications Act, Case No. U-13193 and can be found at: http://cis.state.mi.us/mpsc/orders/comm/2002/u-13193b.pdf.

[14] *In the Matter of a Commission Initiated Investigation into the Practices of Incumbent Local Exchange Companies Regarding Shared Line Access*; Docket No. P-999/CI-99-678 (Oct. 8, 1999) ("*Minnesota Line Sharing Order*").

mandate line sharing, the "Commission decline[d] to rule on these possible sources of authority under Federal Law, having found adequate state authority for its actions herein."

2. The Texas PUC has Repeatedly Exercised its Authority to Order Unbundling of Additional UNEs.

The Texas PUC has not only unbundled UNEs in addition to those promulgated by the FCC, but has informed the FCC that it "strongly believes that State regulatory agencies are better positioned to conduct a detailed review of additional unbundling requirements for their state."[15] As set forth in its recent Reply Comments to the FCC:

> [T]he Texas PUC has had occasion to expand the original list of UNEs. For example, the Texas PUC determined that dark fiber and sub loops constituted UNEs at a time when those elements were not included on the national list, thereby increasing an incumbent's unbundling obligations while also increasing competitor's choice of UNEs in Texas.[16]

Likewise, "[t]he Texas PUC concluded, among other things, that local switching should be available to CLECs on an unbundled basis without restriction, as should operator service and directory assistance."[17] Finally, the Texas PUC was the first of several PUCs to order unbundling of the ILEC owned splitter in the line-splitting context. [18] In sum, the Texas PUC unbundled UNEs independent of the FCC and has required ILECs to unbundle UNEs to a greater

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15 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Notice of Proposed Rulemaking, Reply Comments of the Public Utility Commission of Texas (May 9, 2002) ("Reply Comments of the Texas PUC"), at 5.

16 Reply Comments of the Texas PUC, at 9, (citing *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops Agreement between MFS Communications Company, Inc. and Southwestern Bell Telephone Company*, Docket No. 16189, *et al.* Award as sections III.A.4 and III.A.6 (Nov. 8, 1996)).

17 *Id.* at 2, (citing *Petition of MCIMetro Access Transmission Services LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996*, Docket No. 24542 (May 1, 2002)).

18 *Petition of IP Communications Corporation to Establish Expedited Public Utility Commission of Texas Oversight Concerning Line Sharing Issues*, Docket No. 22168 and *Petition of Covad Communications Company and Rhythms Links, Inc. Against Southwestern Bell Telephone Company for Post-Interconnection Dispute Resolution and Arbitration Under the Telecommunications Act of 1996 Regarding Rates, Terms, Conditions and Related Arrangements for Line Sharing*, Docket No. 22469, Final Arbitration Award (July 13, 2001).

degree than that ordered by the FCC. This Commission can, and should, follow the pro-competitive example set by the Texas PUC.[19]

3. The Vermont Supreme Court Has Recently Confirmed the Authority of the Vermont Public Service Board to Order Additional Unbundling Requirements.

The Vermont Supreme Court recently affirmed the Vermont Public Service Board's ("PSB's") authority to impose additional unbundling obligations upon Verizon as part of a condition to its approval of the merger between Bell Atlantic Vermont (BAVT) and NYNEX.[20] The Court held that the PSB has the power under Vermont law to order nondiscriminatory access to combinations of UNEs not currently combined, and that this power under state law is in no way preempted by Federal law. The Vermont Supreme Court stated, "Regardless of whether 47 C.F.R. sec. 51.315(c) is valid, there is nothing [in] this regulation, or any other, or in the Act itself that prevents a state from requiring BAVT to provide combinations of UNEs. For even if we assume that federal law does not require such combinations, and we assume that sec. 51.315(c) remains invalid as per *Iowa Utilities*, nothing in federal law *prohibits* the PSB [from] ordering such combinations to facilitate competition in local markets."[21] The Court therefore concluded that, "Thus, we hold that this element of the PSB's order is not inconsistent with the Act and is therefore not preempted by federal law."[22] The power of this Commission to confirm Verizon's obligation to provide CLC's line sharing and set the price for the HFPL is certainly not inconsistent with the Act.p

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19 At its June 6th Open Meeting, the Texas commissioners orally indicated their intent to proceed with a state unbundling case to examine line sharing and NGDLC issues under FCC Rule 51.317. The Texas PUC is going to issue a procedural order shortly requesting briefing on the proper standards that it should use in light of the DC Circuit's opinion.

20 *In re Petition of Verizon New England Inc. d/b/a Verizon Vermont*, 795 A.2d 1196 (Vt. 2002).

21 795 A.2d, at 1204.

22 *Id.*

D. Strong Public Policy Considerations Require Continued Provision of Line Sharing to CLECs

In addition to the compelling legal and factual bases discussed above, sound public policy requires that the Commission proceed to unbundle and price the HFPL. This Commission should encourage competition in the DSL market, which, by any account, is in its infancy, even when compared to competition in the local telecommunications market. The Commission has the opportunity in this proceeding to bring some certainty to the developing DSL market in Missouri and it should use this as an opportunity to do so.

WHEREFORE, WCOM respectfully urges the Commission to proceed with this Case using the independent authority granted to it for the reasons discussed above.

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Certificate of Service

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 20th day of June, 2002, via facsimile and by placing same in the U.S. Mail, postage paid.

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