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June 20, 2002

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Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65101

Re: Case Number TO-2001-440

Dear Judge Roberts:

Attached for filing with the Commission is the original and eight (8) copies of AT&T Communications of the Southwest Inc.'s Supplemental Brief in the above referenced docket.

I thank you in advance for your cooperation in bringing this to the attention of the Commission.

Very truly yours,

Michelle Bourianoff (ge)
Michelle Bourianoff

Attachment
cc: All Parties of Record

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

SUPPLEMENTAL BRIEF OF AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.

COMES NOW AT&T Communications of the Southwest, Inc. ("AT&T") and submits this its Supplemental Brief in this proceeding, and would state as follows:

1. On June 10, 2002, the Commission entered an Order requesting that the parties brief the question of what effect, if any, does the U.S. D.C. Court of Appeals decision in *United States Telecommunications Association, et al. v. Federal Communications Commission*, CC Docket No. 00-1012 (May 24, 2002) (*USTA*) have on the pending issues in this docket. AT&T submits this Supplemental Brief in response to that Order.

2. It is AT&T's position that the decision in *USTA* has little impact on the pending issues in this docket. As a preliminary matter, the D.C. Circuit opinion has not yet become effective because the mandate has not issued. In all likelihood, the mandate will not issue until after July 8, 2002.[1] Even then, the D.C. Circuit's Opinion may not

[1]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.

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."[2] 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 rehearing in which to seek *certiorari* before the United States Supreme Court.[3] Finally, the FCC may, and if not, parties to the proceeding may, seek a stay of the Mandate pending Supreme Court review.

3. Even if the mandate issues and the decision becomes effective, *USTA* will have limited impact on this proceeding. The issues in this proceeding are limited to line splitting and line sharing (but the Commission has determined that line sharing over Pronto loops is beyond the scope of this proceeding).

4. With regards to line splitting, in the *Line Sharing Reconsideration Order,*[4] the FCC made clear that the obligation to allow carriers to engage in line splitting derived from the FCC rules that "require incumbent LECs to provide competing carriers with access to unbundled loop in a manner that allows the competing carriers 'to provide any telecommunications service that can be offered by means of that network element.'"[5] The FCC specifically stated that the obligation to provide line splitting did not derive from its

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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.

[2] FED. R. APP. PROC. 41(d)(1).

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

[4] *In the Matter of Deployment of Wireline Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Third Report and Order On Reconsideration in CC Docket No. 98-147, Fourth Report and Order On Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (rel. January 19, 2001) ("*Line Sharing Reconsideration Order*").

[5] *Line Sharing Reconsideration Order* at ¶ *18.*

Line Sharing Order: "**independent of the unbundling obligations associated with the high frequency portion of the loop that are described in the *Line Sharing Order***, incumbent LECs must allow competing carriers to offer both voice and data service over a single unbundled loop."[6] To the extent that loops are available under the *UNE Remand Order*, which they are, line splitting is also available. The D.C. Circuit's opinion in *USTA* did not vacate the *UNE Remand Order*.[7] Consequently, the authority that the FCC delegated to state commissions in the *UNE Remand Order* still remains effective.[8] Moreover, the line splitting portion of the *Line Sharing Reconsideration Order* was not on appeal before the D.C. Circuit and remains unaffected by it. Thus, the D.C. Circuit opinion has no impact on the line splitting issues presently before the Commission in this docket.

5. With regards to line sharing, the impact of *USTA* is also minimal. While the *Line Sharing Order*, unlike the *UNE Remand Order*, was vacated, it was also remanded to the FCC "for further consideration in accordance with the principles outlined above." The principles outlined by the D.C. Circuit require the FCC to expressly consider the relevance of competition in broadband services from cable and satellite in determining whether the high frequency portion of the loop should be unbundled. It is premature to assume that the FCC will not require that the HFPL of the loop continue to be unbundled on remand, after appropriate consideration of the principles discussed by the D.C. Circuit.

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[6] *Id.* (emphasis added).

[7] See USTA v. FCC, No. 00-1012 and No. 00-1015 at 19 (D.C. Cir., May 24, 2002) (USTA v. FCC) ("[w]e grant the petitions for review, and remand both the Line Sharing Order and the Local Competition Order to the Commission for further consideration in accordance with the principles outlined above.") Nowhere in the decision does the D.C. Circuit vacate the UNE Remand Order.

[8] If the FCC changes the national minimum list of UNEs after the remand in a way that somehow impacts this docket, the parties can address those changes at that time.

6. Moreover, this Commission has authority under at least two additional bodies of law—FCC Rule 51.317 and the Missouri Public Service Commission Law[9]—to require line sharing in Missouri. This authority is independent of the FCC's *Line Sharing Order*.

7. The Commission has independent authority under federal law to require SWBT to provide line sharing. 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 impair" standard.[10] This authority is independent of any minimum line sharing requirements set out by the FCC in the *Line Sharing Order*. This independent authority is firmly grounded in the federal Telecommunications Act, the FCC's implementing orders, and the controlling case law. Section 251(d)(3) of the Telecommunications 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. 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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[9] Miss. Ann. Stat. § 386.250(2)(2001).

[10] *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."[11] 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.

8. 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."[12]

9. Nothing in the D.C. Circuit Opinion affects a state's right to unbundle the HFPL. In fact, the Michigan commission, relying on both federal and state law, recently ordered Ameritech to continue to provide line sharing. In a complaint case brought by several CLECs against Ameritech, the Michigan Commission ordered Ameritech to "institute procedures that allow CLECs to obtain the voice service over a LFPL when the same line is already being used to provide DSL service."[13] Where there is line sharing, Ameritech must not allow the DSL service to be disconnected if the customer changes voice service to another carrier. The Michigan commission also stated that the DC

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[11] *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*").

[12] *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.

[13] *In the Matter of the complaint of the COMPETITIVE LOCAL EXCHANGE CARRIERS ASSOCIATION OF MICHIGAN, CMC TELECOM, INC., LONG DISTANCE OF MICHIGAN, INC., MCLEODUSA TELECOMMUNICATIONS, INC., MICHTEL, INC. and the ASSOCIATION OF COMMUNICATIONS ENTERPRISES against SBC AMERITECH MICHIGAN for anti-competitive acts and acts violating the Michigan Telecommunications Act,* Cause No. U13193, Opinion and Order (June 6, 2002), at 15-16.

Circuit "remanded" the FCC line-sharing rules but that the *USTA* case did "not go so far as to hold that, as a matter of federal law, there is no obligation to provide nondiscriminatory access to the high or low frequency portion of the loop." Citing to both federal and state law prohibiting discrimination, the MPSC held as follows:

> 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 provide 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 [Michigan Telecommunications Act].[14]

The Missouri Commission should follow the Michigan commission's lead and require SWBT to continue providing access to the HFPL of the loop.

Respectfully submitted,

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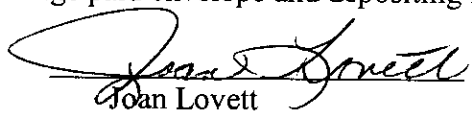
[14] *Id.* at n.7.

CERTIFICATE OF SERVICE BY MAIL

A true and correct copy of the foregoing in Docket TO-2001-440 was served upon the parties identified on the following service list on this 20th day of June, 2002 by either hand delivery or placing same in a postage paid envelope and depositing in the U.S. Mail.



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