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

SBC MISSOURI'S REPLY TO COVAD'S RESPONSE TO SBC MISSOURI'S PROPOSED POST-TRIENNIAL REVIEW ORDER M2A LINE SHARING APPENDIX

Southwestern Bell Telephone L.P., d/b/a SBC Missouri ("SBC Missouri"), hereby files this Reply to Covad's response regarding SBC Missouri's Post-*Triennial Review Order*[1] M2A Appendix HFPL (hereinafter, "M2A Line Sharing Appendix"). As SBC Missouri demonstrates below, Covad's criticisms directed to the proposed appendix are without merit and should be dismissed by the Commission.

SBC Missouri has met its commitment to file an updated M2A Line Sharing Appendix conforming to the Federal Communications Commission's ("FCC's") *Triennial Review Order*. Covad's several suggestions that the proposed appendix did not go far enough are without any legal basis. Contrary to Covad's claims, Section 271 of the federal Telecommunications Act of 1996 does not require that SBC Missouri provide CLECs access to the high frequency portion of the loop ("HFPL"), and in any event, neither Section 271 nor state law confers the requisite jurisdiction upon the Commission to impose such a requirement. Even apart from this lack of jurisdiction, Covad offers no basis, and indeed there is no appropriate basis, for this Commission to end-run the FCC's correct and well reasoned determination that the HFPL need

[1] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147 (FCC 03-36), rel. August 21, 2003 ("*Triennial Review Order*").

not be unbundled - particularly in light of the D.C. Circuit Court of Appeals *USTA Decision*,[2] upon which the FCC relied in making its determination.

Finally, SBC Missouri's Line Splitting proposal is sound and fully consistent with the *Triennial Review Order*, and Covad's miscellaneous operations-related criticisms should be taken up either with its SBC Account Team representatives or resolved through industry collaborative meetings in which Covad is already participating, as the FCC intended.

I. SBC MISSOURI HAS MET ITS *TRIENNIAL REVIEW ORDER* COMMITMENT.

In its September 10, 2003, Initial Comments filed in this case, SBC Missouri committed to filing a revised M2A Line Sharing Appendix reflecting the outcome of the FCC's *Triennial Review Order* and its implementing rules. On November 3, 2003, SBC Missouri did so. Consistent with SBC Missouri's Initial Comments, SBC Missouri's revised M2A Line Sharing Appendix provides for the grandfathering of line sharing arrangements in place prior to the effective date of the *Triennial Review Order* and a transitional period for new end-user customers, as specified in the *Triennial Review Order*.[3] SBC Missouri stated that upon approval of the appendix by the Commission, SBC Missouri would provide such appendix to any Missouri CLEC that currently has (or who obtains) the M2A Line Sharing Appendix.

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[2] United States Telecom Assoc. v. Federal Communications Commission, 290 F. 3d 415 (D.C. Cir. 2002) ("*USTA Decision*").

[3] By its submitting the provisions of the appendix to the Commission and making such provisions available to CLECs, SBC Missouri does not waive, but instead expressly reserves, all of its rights, remedies, and arguments with respect to the *USTA Decision*, the FCC's *Triennial Review Order*, and any other federal or state regulatory, legislative or judicial action(s) ("Government Actions") which relate to the matters addressed in the attached provisions, including, but not limited to, its intervening law rights and any legal or equitable rights of review and remedies (including agency reconsideration and court review). Accordingly, SBC Missouri reserves the right to withdraw, revise or otherwise modify its proposed provisions consistent with the Government Actions and the right to seek deletions, modifications and/or additions to the provisions prior to the provisions being incorporated into an approved and effective interconnection agreement between the parties. Following the date that these provisions are approved or are deemed to have been approved by the Commission and become effective between the parties, either party may exercise any rights it may have at law or under the intervening law clause of the parties' interconnection agreement(s) with respect to any intervening law/change in law event which impacts the agreement(s).

Ironically, while Covad was the only CLEC that raised any objection to SBC Missouri's proposed conforming changes, Covad does not even operate under the M2A Line Sharing Appendix. Rather, Covad and SBC Missouri have agreed to alternate line sharing provisions which are set forth in the 13-State Amendment approved by this Commission on March 2, 2001, under which the parties (including SBC Missouri's ILEC affiliates) have agreed to operate on a 13-State basis (in each SBC state in which Covad has or obtains an interconnection agreement). Moreover, Covad does not argue that SBC Missouri's proposed appendix fails to accurately reflect the *Triennial Review Order*'s "grandfathering" or "new user" provisions. Instead, Covad criticizes the appendix because it does not require continued, indefinite unbundled access to the HFPL in the first instance, a requirement which, according to Covad, stems from either Section 271 or Missouri state law.

Covad's claims are nothing more than an improper attempt to collaterally attack the FCC's finding in its *Triennial Review Order* that the HFPL is not a UNE. Moreover, the issue in this proceeding is not whether the HFPL should be unbundled, as that issue has been squarely addressed by the FCC. Rather, the issue is whether SBC Missouri's proposed changes to the M2A Line Sharing Appendix indeed conform to the FCC's *Triennial Review Order*. Given that no CLEC, including Covad, raised any claim that SBC Missouri's proposed language does not conform to the *Triennial Review Order*, the Commission should adopt SBC Missouri's proposed Post-*Triennial Review Order* Line Sharing Appendix for purposes of the M2A to replace and supersede the existing interim line sharing terms and conditions set forth in the Optional Line Sharing Appendix to the M2A.

II. SECTION 271 OF THE FEDERAL ACT DOES NOT REQUIRE SBC MISSOURI TO PROVIDE ACCESS TO THE HFPL, NOR DOES IT PROVIDE A GRANT OF AUTHORITY TO THE COMMISSION TO IMPOSE SUCH A REQUIREMENT.

Covad argues that SBC Missouri is obligated to provide CLECs with HFPL access pursuant to Section 271 of the federal Act. Covad thoroughly misreads the law.

Section 271 of the Act does not contain any requirement that an ILEC make available the HFPL as a prerequisite to meeting the 271 checklist or to continue to be authorized to provide in-region interLATA long-distance services in Missouri. While Section 271(c)(2)(B) lists certain network elements which must be provided, access to the HFPL is not included within the list. And, with respect to the loop in particular, Section 271(c)(2)(B) only requires that a Bell Operating Company ("BOC") make available "(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services." Both pre- and post-*Triennial Review Order*, SBC Missouri made available and continues to make available local loop transmission. Therefore, even assuming Section 271 created some sort of independent unbundling obligation and that this Commission had jurisdiction to regulate the matter (neither of which is the case), SBC Missouri is fully in compliance with the requirement that it make available local loop transmission under Section 271 of the Act.

In addition, the D.C. Circuit's *USTA Decision* compels the conclusion that, once the FCC determines that carriers are not impaired without unbundled access to an element, an ILEC (including a BOC) is not required to provide that same element as a Section 271 Competitive Checklist item. In its prior 271 Orders, the FCC, in determining whether the BOCs had satisfied the 271 Competitive Checklist items 4-6 and 10, looked no further than the BOCs' compliance with section 251 and conducted no independent analysis of the obligations under section 271. Moreover, any finding by the FCC that an ILEC is not required to unbundle a network element (e.g., the HFPL) as a result of a finding of no impairment clearly

demonstrates that the market is "irrevocably open to competition," the standard used in reviewing a BOC's 271 application. Therefore, Section 271 of the Act cannot be read to independently require the unbundling of a network element that the FCC has already found need not be unbundled to accomplish the goals and objectives of the Act.

With respect to the *Triennial Review Order*, a close reading makes plain that the FCC did not impose an obligation to unbundle the HFPL under Section 271. The FCC did not refer to the HFPL in any of the passages quoted by Covad, nor did it make any finding (of fact or otherwise), reach any conclusion (of law or otherwise) or issue any implementing rule purporting to require a BOC to provide CLECs with access to the HFPL pursuant to Section 271 of the federal Act.

The *SBC Four-State 271 Order*[4] likewise lends no support to Covad whatsoever. For purposes of SBC's Section 271 application, the FCC evaluated "whether SBC provides nondiscriminatory access to the network elements identified under the former unbundling rules."[5] (emphasis added). In other words, insofar as the HFPL and line splitting are concerned, the FCC's evaluation was conducted under the rules which had been vacated by the *USTA Decision*. On the other hand, the FCC emphasized that "on a going forward basis, SBC must comply with all of the Commission's rules implementing the requirements of sections 251 and 252 upon the due dates specified by those rules."[6] Consequently, SBC Missouri must comply with the rules prescribed in the *Triennial Review Order* (which became effective on October 2, 2003), and that order no longer requires that the HFPL be made available as a UNE

[4] In the Matter of Joint Application by SBC Communications, Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc. for Authorization To Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin, WC Docket No. 03-167, Memorandum Opinion and Order, 2003 FCC Lexis 5712, rel. October 15, 2003 ("*SBC Four-State 271 Order*").

[5] *SBC Four-State 271 Order*, ¶ 11.

[6] *SBC Four-State 271 Order*, ¶ 11.

(although SBC Missouri will continue to offer access to the HFPL in accordance with the transition mechanisms established by the FCC).

Even if Section 271 required unbundling of the HFPL, which it most certainly does not, this Commission would not have the authority to implement any such requirement. Under the Act, that function would fall to the FCC, not to the Commission. In the words of a recent federal court decision, Section 271 "contemplates only a consulting, and perhaps investigatory, role for state commissions[,]" and no more.[7] This Commission fully discharged its limited Section 271-related responsibilities when, after devoting extensive time and effort, it performed the consultative function contemplated by Section 271(d)(2)(B) of the Act in connection with SBC Missouri's Section 271 application.

Section 271 enforcement authority lies with the FCC alone. Covad virtually admits as much when it says that SBC Missouri must provide nondiscriminatory access to the HFPL "if SBC desires to continue to provide in-region long distance service in Missouri."[8] It is settled that "[i]n the event a BOC has already received section 271 authorization, section 271(d)(6) grants the Commission [i.e., the FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271."[9] (emphasis added).

In sum, Covad's reading of Section 271, the *Triennial Review Order* and the *SBC Four-State 271 Order* is plainly incorrect. The FCC has already determined that the HFPL is not a UNE, and Section 271 does not provide a basis for the Commission to do what Covad requests. Regardless, the federal Act places in the hands of the FCC alone the authority to decide the

[7] Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission, 2003 U.S. Dist. LEXIS 6452 (S.D. Ind. Mar. 11, 2003), at p. 7.
[8] Covad Response, p. 3.
[9] *Triennial Review Order*, ¶ 665.

obligations of a BOC (such as SBC Missouri) under section 271. On either ground, Covad's Section 271 assertion must be rejected.

III. MISSOURI LAW AFFORDS NO BASIS ON WHICH TO ORDER SBC MISSOURI TO PROVIDE CLECS ACCESS TO THE HFPL.

Covad asserts, once again, that the Commission has "independent authority under state law to unbundle the HFPL."[10] However, it offers nothing new in support of that proposition other than selected passages from Missouri statutes that long predate the passage of SB 507 in 1996 which first authorized local competition.

As an initial matter, there is no Missouri statute which requires unbundling of any of the elements of a BOC's or ILEC's network, much less unbundling of the HFPL. Moreover, none of the statutes cited by Covad give competitors the extraordinary right to lay claim to an ILEC's network or facilities. Nor can one rely on statutes passed when local competition was prohibited to support a claim many years later that unbundling in favor of competitors is somehow required. While some states may have purported to enact unbundling requirements, Missouri's legislature did not do so.[11]

In any event, the FCC's rules, and principles of federal pre-emption, would preclude any such exercise of authority, even if such authority were found to exist in the first instance. FCC Rule 51.319 addresses "specific unbundling requirements" and it identifies precisely what the FCC determined in its TRO relative to line sharing:

> Line Sharing. Beginning on the effective date of the Commission's Triennial Review Order, the high frequency portion of a copper loop shall no longer be required to be provided as an unbundled network element, subject to the

[10] Covad Response, p. 4.

[11] Covad does not argue that the provisions of Missouri law grant the Commission any greater authority than that conferred on the FCC by Sections 251/252 of the federal Act. Yet, the FCC did not embark on issuing unbundling rules until the Telecommunications Act of 1996 amended the Communications Act of 1934. It is counterintuitive to think that the Commission could proceed in similar fashion without the aid of similar legislative authority.

> transitional line sharing conditions in paragraphs (a)(1)(i)(A) and (a)(1)(i)(B).[12] (emphasis added)

The FCC has made a national finding, based on a full record and its implementation of federal policy, that the HFPL cannot be required to be unbundled and that doing so would undermine the goals of the 1996 Act.[13] It is difficult to imagine a better case for preemption than a state commission imposing the very requirement that a federal agency, to which Congress gave supreme authority over the matter at issue, has just found to violate federal law and policy. The FCC reached the same conclusion in the *Triennial Review Order*, finding that "[the FCC] is charged with implementing the Act and [the FCC's] purposes are fully consistent with the Act's purposes" and that FCC rules "clearly ha[ve] preemptive effect" over inconsistent state law.[14]

While Section 251(d)(3) of the Act preserves certain state authority, this authority is "limited to state unbundling actions that are consistent with the requirements of section 251 and do not 'substantially prevent' the implementation of the federal regulatory regime."[15] (emphasis original). There can be little doubt that Covad's request of this Commission invites it to "substantially prevent" implementation of the FCC's federal line sharing rule in Missouri. The FCC may well have contemplated just such an invitation when it stated:

> "If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we

[12] Rule 51.319(a)(1)(i), reprinted at *Triennial Review Order*, Appendix B (Final Rules), pp. 7-8.
[13] *Triennial Review Order*, ¶¶ 260-61 (unbundling of the HFPL "would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets"; by contrast, "not requiring the HFPL to be separately unbundled creates better competitive incentives than the alternatives").
[14] *Triennial Review Order*, ¶ 193 & n.614; accord, *Fidelity Federal Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153-54 (1982) (federal agency decisions "have no less preemptive effect" than federal statutes).
[15] *Triennial Review Order*, ¶ 193.

> believe it unlikely that such decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of section 251(d)(3)(C)."[16]

In conclusion, the Commission cannot lawfully invoke any purported state law grounds to end-run the FCC's HFPL determination. Missouri law does not provide the Commission with authority to require that access to the HFPL be provided to CLECs and even if it did, any such finding would be preempted. Indeed, exercising such authority in the manner requested by Covad would not merely "substantially prevent" implementation of the FCC's HFPL rule in Missouri, it would gut the FCC's rule entirely.

IV. REIMPOSITION OF AN HFPL UNBUNDLING REQUIREMENT WOULD FRUSTRATE THE POLICIES ADVANCED BY THE *TRIENNIAL REVIEW ORDER*.

Covad does not articulate any reason why the HFPL must be unbundled in order to provide its customers broadband services. That is no doubt because Covad's reasons would likely be the same as those already rejected by the FCC in its *Triennial Review Order*. Furthermore, the FCC noted that advocates for reinstating unbundled access to the HFPL "generally reiterat[ed] the same reasons that were offered in the [FCC's] original line sharing proceeding in 1999[,]"[17] which resulted in rules vacated by the D.C. Circuit Court of Appeals in the *USTA Decision*.[18]

Additionally, the FCC noted that commenters had not argued that it is technically infeasible to provide xDSL service over a stand-alone loop nor had they argued that it is technically infeasible to provide xDSL service over a line split loop (i.e., a loop shared by two CLECs – one offering voice service and the second offering xDSL service). Here, as in the *Triennial Review* proceeding, Covad fails to provide any evidence of technical infeasibility.

[16] *Triennial Review Order*, ¶ 195.
[17] *Triennial Review Order*, ¶ 255.
[18] *USTA Decision,* 290 F. 3d at 429.

That is hardly surprising, given that Covad announced plans earlier this year to offer ADSL service to "more of AT&T's 50 million consumer customers" through line splitting.[19] Thus, the FCC determined that "[w]e thus do not find credible Covad's argument that the [FCC's] previous findings, that there are no third-party alternatives to the incumbent LEC's HFPL, remains valid."[20] Covad's pleading filed with this Commission addresses none of these points.

Covad also does not address the FCC's finding that "allowing competitive LECs unbundled access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled creates better competitive incentives than the alternatives."[21] As the FCC explained, allowing CLECs unbundled access to the whole loop and to line splitting (but not requiring the HFPL to be separately unbundled) puts CLECs using the HFPL "in a more fair competitive position with respect to other competitive LECs and to the incumbent LECs" because "[e]ach carrier faces the same loop costs and, if it wished, each can partner with another carrier to provide service over the HFPL alone or the low frequency portion of the loop alone as it wishes."[22]

Finally, Covad's proposal, if adopted, would be contrary to the FCC's purpose in declassifying the HFPL as a UNE, which was to encourage the deployment of advanced telecommunications capabilities in accordance with Section 706 of the Act. Attempting to apply Section 271 or Missouri's state regulatory statutes to impose unbundling obligations to the same facilities the FCC has said need *not* be unbundled for purposes of Section 251 would not only disrupt the competitive balance the FCC sought to strike in its *Triennial Review Order*, it would also create great regulatory and competitive uncertainty, and would thus

[19] *Triennial Review Order*, ¶ 259.
[20] *Triennial Review Order*, n. 767.
[21] *Triennial Review Order*, ¶ 260.
[22] *Triennial Review Order*, ¶ 260.

frustrate the core goal of the *Triennial Review Order*: the desire to facilitate the widespread deployment of broadband infrastructure.

The FCC reasoned – after careful consideration of broad-based industry comment, not just that of one CLEC – that reimposition of line sharing rules is unjustified as an economic, competitive and public policy matter:

> "[R]ules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service to mass market consumers, rather than a voice-only service or, perhaps more importantly, a bundled voice and xDSL service offering. In addition, readopting our line sharing rules on a permanent basis would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings. We find that such results would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets."[23]

In sum, even apart from the legal considerations that clearly preclude any attempt to mandate access to the HFPL beyond the transitional mechanisms contained in the *Triennial Review Order*, Covad has utterly failed to supply any reason why this Commission should do so.

V. COVAD'S LINE SPLITTING CLAIM IS WITHOUT MERIT.

Covad takes no issue with respect to SBC Missouri's proposed specific edits to Section 4.5 of Appendix HFPL to the M2A Line Sharing Appendix. Rather, it claims that these revisions "fall well short of implementing the FCC's requirements" and asks that SBC Missouri be required, "at the very least, to successfully resolve" a laundry list of alleged "issues."[24]

The Commission need not and should not attempt to address fact-specific disputes within the context of updating an M2A appendix. In fact, as noted above,

[23] *Triennial Review Order*, ¶ 261.
[24] Covad Response, p. 7.

Covad does not operate under the M2A, nor any of the M2A line sharing or xDSL language at issue. In addition, Covad previously arbitrated in Missouri the xDSL provisions set forth in its Missouri Interconnection Agreement and did not request to negotiate or arbitrate in the context of that proceeding any line splitting issues. Further, Covad has not requested to negotiate line splitting terms for purposes of its Missouri Interconnection Agreement. For these reasons, Covad should first be directed to its SBC Account Team representatives and/or negotiations team so as to attempt a business-to-business resolution, and may not appropriately draw upon the Commission's and other parties' resources in the context of this proceeding.[25]

Alternatively, or in addition to efforts made at the account team level, Covad should be directed to the collaborative process. The FCC itself expressly encouraged ILECs and CLECs "to use existing state commission collaboratives and change management processes to address OSS modifications that are necessary to support line splitting."[26] The SBC ILECs held an industry-wide line splitting collaborative session on November 6 and 7, 2003, which Covad attended, and a follow-up line splitting collaborative session is planned for December 4 and 5, 2003.

VI. CONCLUSION

Stripped to its core, Covad's arguments are nothing more than an improper attempt to expand the scope of this proceeding and collaterally attack the FCC's finding in its *Triennial Review Order* that the HFPL is not a UNE. Neither Section 271 nor Missouri law affords this Commission the jurisdiction to do so, and even assuming otherwise, any such finding would be

[25] In fact, SBC Missouri and Covad, in the context of their 13-State interconnection agreement amendment, have agreed to an alternate method of resolving disputes between the companies, which precludes either party from raising/addressing disputes with respect to the other party before regulatory bodies.
[26] *Triennial Review Order*, ¶ 252.

preempted by the FCC's *Triennial Review Order* and its implementing rules. Neither Covad, nor any other CLEC, raised any concerns or proposed modifications with the revised contract language SBC Missouri has filed in this proceeding to conform the M2A Optional Line Sharing Appendix with the FCC's *Triennial Review Order*. Accordingly, SBC Missouri urges the Commission once again to adopt SBC Missouri's proposed M2A Post-*Triennial Review Order* Line Sharing Appendix, as it was presented on November 3, for purposes of the M2A to replace and supersede the existing interim line sharing terms and conditions set forth in the Optional Line Sharing Appendix to the M2A.

Respectfully submitted,

Southwestern Bell Telephone, L.P.,
d/b/a SBC Missouri

BY 

PAUL G. LANE #27011
LEO J. BUB #34326
ROBERT J. GRYZMALA #32454
MIMI B. MACDONALD #37606
Attorneys for SBC Missouri
One SBC Center, Room 3516
St. Louis, Missouri 63101
314-235-6060 (Telephone)
314-247-0014 (Facsimile)
robert.gryzmala@sbc.com

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served on all counsel of record by electronic mail on November 24, 2003.

Robert J. Gryzmala

DAN JOYCE
GENERAL COUNSEL
MISSOURI PUBLIC SERVICE COMMISSION
P. O. BOX 360
JEFFERSON CITY, MO 65102

MARY ANN (GARR) YOUNG
WILLIAM D. STEINMEIER P.C.
2301 TOWER DRIVE
P.O. BOX 104595
JEFFERSON CITY, MO 65110-4595

MICHAEL DANDINO
OFFICE OF THE PUBLIC COUNSEL
P.O. BOX 7800
JEFFERSON CITY, MO 65102

MARK COMLEY/CATHLEEN MARTIN
NEWMAN, COMLEY & RUTH, P.C.
601 MONROE STREET, SUITE 301
P.O. BOX 537
JEFFERSON CITY, MO 65102

PAUL GARDNER
GOLLER, GARDNER & FEATHER
131 EAST HIGH STREET
JEFFERSON CITY, MO 65101

CAROL KEITH
NUVOX COMMUNICATIONS OF MISSOURI
16090 SWINGLEY RIDGE ROAD
SUITE 500
CHESTERFIELD, MO 63017

LISA CREIGHTON HENDRICKS
SPRINT
6450 SPRINT PARKWAY.
KSOPHN0212-2A253
OVERLAND PARK, KS 66251

MICHELLE S. BOURIANOFF
KEVIN ZARLING
AT&T COMMUNICATIONS
919 CONGRESS, SUITE 900
AUSTIN, TX 78701

PAUL S. DEFORD
LATHROP & GAGE, L.C.
2345 GRAND BOULEVARD
SUITE 2800
KANSAS CITY, MO 64108

STEPHEN F. MORRIS
WORLDCOM COMMUNICATIONS
701 BRAZOS, SUITE 600
AUSTIN, TX 78701

DAVID J. STUEVEN
IP COMMUNICATIONS CORP.
6405 METCALF, SUITE 120
OVERLAND PARK, KS 66202

SHELDON K. STOCK/JASON L. ROSS
GREENSFELDER, HEMKER & GALE, P.C.
10 S. BROADWAY, SUITE 2000
ST. LOUIS, MO 63102-1774

CARL LUMELY
CURTIS, OETTING, HEINZ, GARRETT & SOULE, P.C.
130 SOUTH BEMISTON, STE. 200
CLAYTON, MO 63105