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

REPLY COMMENTS OF
SOUTHWESTERN BELL TELEPHONE COMPANY
IN RESPONSE TO ORDER DIRECTING FILING

COMES NOW Southwestern Bell Telephone, L.P. d/b/a Southwestern Bell Telephone Company ("Southwestern Bell" or "SWBT") and for its Reply Comments to the Order Directing Filing issued by the Missouri Public Service Commission ("Commission ") states as follows:

1. In its June 10, 2002 Order Directing Filing, the Commission requested the parties to submit briefs assessing the impact of the May 24, 2002, decision of the United States Court of Appeals for the District of Columbia in United States Telecomms. Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002) ("USTA decision"), which expressly vacated the Federal Communications Commission's ("FCC's") Line Sharing Order.[1] These Reply Comments respond to contentions made by various parties in their responses to the Order Directing Filing.

A. ALL PARTIES RECOGNIZE THE USTA DECISION WILL NOT BECOME EFFECTIVE UNTIL AFTER ISSUANCE OF THE MANDATE.

2. In SWBT's June 20, 2002 Response to Order Directing Filing, it noted that the USTA decision would not become effective until seven days after the time for filing a Petition for Rehearing has passed (i.e., 45 days) or the Court denies a timely Petition for Rehearing. SWBT

[1] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, 14 FCC Rcd 20912 (1999) ("Line Sharing Order"), vacated and remanded, United States Telecomms Ass'n v. FCC, 290 F.3d 415 (D.C. Cir 2002) ("USTA").

Response, pp. 1-2. Accordingly, SWBT noted the mandate would not issue until at least July 15, 2002.

3. All of the parties responding to the Order Directing Filing agree that the USTA decision will not become effective until the mandate issues.[2] Absent a timely request for rehearing or a stay, the USTA decision will become effective and must be taken into consideration by this Commission.

4. Although the other parties to this proceeding urged the Commission to ignore or override the applicability of the USTA decision, such a course of action is neither lawful nor wise public policy. Instead, the appropriate response to the USTA decision is to abate this proceeding until the FCC has developed and applied an appropriate standard to determine whether line sharing must be made available under the federal Telecommunications Act of 1996 ("the Act"). SWBT's commitment to continue to offer line sharing pursuant to the Optional Line Sharing Amendment to Attachment 25: xDSL as it existed on the date of the USTA decision (May 24, 2002) will ensure that competitive local exchange companies ("CLECs") will continue to have access to line sharing until at least February 15, 2003, by which time the FCC's decision in the Triennial Review proceeding (which will likely address line sharing) should be effective.[3] As discussed below, a decision by the Commission to go forward with this proceeding and to adopt different terms and conditions for line sharing from those which were in effect on the date of the USTA decision may result in the unavailability of line sharing to CLECs prior to the anticipated effective date of the Triennial Review decision.

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[2] Supplemental Brief of AT&T Communications of the Southwest, Inc. ("AT&T Supplemental Brief"), p. 1; IP Comments In Response to Commission Request, p. 2 ("IP Comments"); Staff Brief Regarding the US Court of Appeals Decision, p. 4 ("Staff Brief"); Comments of WorldCom to the Commission's Order Directing Filing ("WorldCom Comments"), p. 1.

[3] FCC Press Release, Statement of FCC Chairman Michael Powell on the Decision by the Court of Appeals of the District of Columbia Circuit Regarding the Commission's Unbundling Rules, May 24, 2002, available at [www.fcc.gov/Speeches/Powell/Statement/2002/stmpk212.html].

B. WHEN THE USTA DECISION BECOMES EFFECTIVE, IT WILL TRIGGER CHANGE OF LAW PROVISIONS IN EXISTING INTERCONNECTION AGREEMENTS.

5. As SWBT noted in its Response to the Order Directing Filing, it will continue to abide by the terms existing interconnection agreements which provide for line sharing. SWBT Response, p. 2. Those contracts, however, also contain change of law provisions which contemplate that the agreements will be modified to conform with changes in existing law. The Optional Line Sharing Amendment to Attachment 25: xDSL of the Missouri 271 Agreement ("M2A") specifically provides for negotiations to modify the agreement to comply with a decision vacating the FCC's Line Sharing Order, with the availability of a dispute resolution process in the event the parties do not agree upon the appropriate modification. The parties which addressed this issue appear to agree that existing interconnection agreements remain in effect, subject to change of law provisions to recognize the effect of a decision vacating the Line Sharing Order. WorldCom Comments, p. 2; Staff Brief, p. 5.

6. WorldCom, however, mistakenly asserts that the change of law provisions are not triggered until after the FCC issues a revised order concerning line sharing following remand of the USTA decision, and any further appeals of that subsequent FCC Order are resolved. WorldCom Comments, p. 2. WorldCom is incorrect. Under Section 11.2 of the Optional Line Sharing Amendment to the M2A, the change of law provisions are triggered by an order modifying or affecting the Line Sharing Order. The USTA decision vacated the FCC's Line Sharing Order, and the change of law provisions may be invoked upon the issuance of the mandate by the D.C. Circuit in the USTA case. Once the mandate issues, the order on which the Optional Line Sharing Amendment is predicated will no longer be effective. Absent SWBT's voluntary commitment to continue the line sharing provisions of the Optional Amendment, those provisions would be eliminated following application of the change of law provisions.

C. ADOPTION OF REVISED TERMS AND CONDITIONS GOVERNING LINE SHARING UNDER THE M2A MAY DEPRIVE CLECs OF THE AVAILABILITY OF LINE SHARING.

7. Displaying little regard for the applicability of the USTA decision, some parties propose that the Commission act to adopt terms and conditions for line sharing that are radically different from those contained in the Optional Line Sharing Amendment to Attachment 25: xDSL of the M2A. IP urges the Commission to issue its Order prior to the issuance of the mandate,[4] in an inappropriate, and ultimately ineffective, attempt to avoid the impact of the USTA decision. Staff makes a similar proposal. Staff Comments, pp. 8-9.[5] These machinations, which amount to an overt attempt to evade the impact of the USTA decision, do not provide a proper path for the Commission to follow.

8. If the Commission now adopts terms and conditions which differ from those contained in the currently effective Optional Line Sharing Amendment to Attachment 25: xDSL of the M2A, such a decision would be unlawful. Staff itself concedes that the current record in this proceeding relies on the "presumption that the HFPL is an FCC-designated UNE." Staff Brief, p. 3. Staff further notes that there is insufficient evidence to determine whether unbundling of the high frequency portion of the loop ("HFPL") is appropriate or lawful since the proceeding was conducted in reliance on the FCC's Line Sharing Order which has been vacated by the USTA decision. Staff Brief, p. 8.

9. If the Commission proceeds to adopt terms and conditions for line sharing which are different from those contained in the Optional Line Sharing Amendment, CLECs will be

[4] IP Comments, p. 2.

[5] Staff's rationale is difficult to ascertain, since it concedes that the current "record before the Commission does not contain sufficient evidence to determine whether Missouri should require unbundling of the HFPL. Staff Comments, p. 8. Staff's Comments provide no rational basis to support going forward on a record which Staff concedes is inadequate and would ultimately become unlawful after the issuance of the mandate of the USTA decision.

subject to the change of law provisions that would eliminate the availability of line sharing. SWBT has made a good faith, voluntary commitment to continue to make line sharing available until February 15, 2003, but only under the terms of interconnection agreements that existed as of May 24, 2002, the date of the USTA decision.

10. While Staff notes that it was "reassured by SWBT" that it would honor its current line sharing and line splitting agreements until February, 2003, Staff failed to mention that SWBT expressly represented to Staff (consistent with the commitment to the FCC) that the commitment was only to the terms and conditions concerning line sharing that were in existence as of the date of the USTA decision.[6] SWBT has made no voluntary commitment to provide line sharing under any terms and conditions imposed after the date of the USTA decision. Accordingly, SWBT has not agreed to abide by the revised terms and conditions that Staff and certain CLECs have proposed in this proceeding, as those proposals go far beyond the FCC's now vacated Line Sharing Order. If the Commission were to adopt the radical revisions proposed by Staff and CLECs in lieu of the existing Optional Line Sharing Amendment, those provisions will be clearly unlawful as of the effective date of the USTA decision. Rather than the assurance of the existing interconnection agreements remaining in effect through February 15, 2003, as a result of SWBT's voluntary commitment, the radical and unlawful revisions to the agreement proposed by Staff and CLECs would ultimately result in the elimination of the availability of line sharing well prior to February 15, 2003.

[6] Staff also states that CLECs are better suited to speak to the impact of these commitments. Staff Brief, p. 5. Attached as Exhibit 1 is a press release from Covad Communications which contains a positive reaction to the SBC/SWBT commitment.

D. ASSUMING THE COMMISSION HAS THE AUTHORITY TO IMPOSE LINE SHARING UNDER FEDERAL AND/OR STATE LAW, THERE IS NO EVIDENTIARY RECORD IN THE CURRENT PROCEEDING TO SUPPORT IMPOSITION OF LINE SHARING.

11. Certain CLECs and Staff assert the Commission has independent authority under the Act and/or State law to impose line sharing obligations on SWBT. As discussed in the following section, SWBT disagrees that the Commission has authority to impose line sharing obligations that are inconsistent with federal law. No state commission has the authority to impose a line sharing obligation that has been declared to be beyond the scope of the Act by the USTA decision.

12. Regardless of whether the Commission has independent authority under the Act and/or State law to impose a line sharing obligation on SWBT, it is beyond argument that the record does not support the adoption of such an order here. Even Staff, one of the primary proponents of the "independent authority" argument, concedes, as it must, that there is "insufficient evidence" to support the imposition of such a requirement in this proceeding. Staff noted:

> Since the parties were previously addressing a UNE that was already included on the FCC's minimum list, the parties did not offer evidence regarding the necessity of unbundling the HFPL or the impairment that would occur if the HFPL is not unbundled. Therefore, the record before the Commission does not contain sufficient evidence to determine whether Missouri should require unbundling of the HFPL. If the Commission wishes to consider unbundling the HFPL, the Staff recommends that the Commission implement a new proceeding or accept additional evidence for that purpose.[7]

13. The USTA decision made clear that a UNE could not be created under the Act without a proper impairment analysis which considers, at a minimum: (1) an analysis of specific product and geographic markets; (2) that mere cost disparities do not establish impairment; and (3) the substantial costs which accompany unbundling, including the reduced incentives to invest in

[7] Staff Brief, p. 8.

innovation and new technology. The burden, of course, of demonstrating that impairment rests with the requesting carrier under Section 251(d)(2) of the Act.[8] As Staff concedes, the evidence in this case does not address these critical standards as required by the USTA decision. The current proceeding simply does not support the imposition of an unbundling requirement from an evidentiary perspective, even assuming the Commission has such authority in the first instance.

14. Nor does it make sense to proceed with an additional evidentiary phase in this proceeding to develop a record to support imposition of an unbundling obligation. With the FCC's Line Sharing Order having been vacated, there is no clear impairment test for the Commission to apply. Moreover, any decision must conform with the FCC's impairment analysis which will be conducted in the course of the Triennial Review proceeding. Unless this Commission has sufficient vision to predict with certainty what standard will be ultimately adopted by the FCC, it makes no sense to conduct an additional proceeding prior to the FCC's determination in the Triennial Review proceeding.

E. THE COMMISSION DOES NOT HAVE AUTHORITY UNDER FEDERAL OR STATE LAW TO IMPOSE ADDITIONAL UNBUNDLING OBLIGATIONS.

15. Several parties to this proceeding argue that the Commission has independent authority under the Act or State law to impose additional unbundling obligations.[9] These parties primarily cite Rule 51.317 and the UNE Remand Order. Whatever authority a state commission has to impose additional unbundling obligations, however, it cannot be exercised in any manner that is inconsistent with the Act or applicable FCC regulation.

> In . . . imposing conditions upon the parties [interconnection] agreement, a State commission shall (1) ensure that such resolution and conditions meet the

[8] See also, AT&T Corp. v. Iowa Utilities Bd., 195 S.Ct. 721, 736 (1999)

[9] Staff Brief, pp. 5-8; IP Comments, pp. 2-4; WorldCom Comments, pp. 2-5; AT&T Supplemental Brief, pp. 4-5; Comments of the Office of the Public Counsel, p. 1.

> requirements of Section 251 of this title, including the regulations prescribed by the Commission pursuant to Section 251.[10]

Section 251(d)(3) preserves the authority of a state commission to establish access and interconnection obligations of local carriers, but only where it is otherwise consistent with Section 251 and does not substantially prevent implementation of the requirements of Section 251. Similarly, Section 261(c) of the Act permits state commissions to impose additional requirements on telecommunications carriers, but only where such state requirements are (1) necessary to further competition and (2) not inconsistent with the Act or applicable FCC rules.[11]

16. In upholding the FCC's jurisdictional authority to make rules governing matters to which the 1996 Act applies, the Supreme Court made clear that

> the question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange.

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 378 n.6 (1999), decision on remand, Iowa Utils. Bd. v. FCC, 219 F.3d 744 (8th Cir. 2000), aff'd in part, rev'd in part sub nom. Verizon Communications, Inc. v. FCC, 122 S. Ct. 1646 (2002). The Court also made clear that, "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." Id.[12]

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[10] 47 U.S.C Section 252(c) (see also, 47 U.S.C. Section 251(d)(3) (State commission regulations and orders must be consistent with other requirements of Section 251); 47 U.S.C. Section 251(d) requiring the FCC to establish regulation setting forth what network elements must be unbundled, and providing the "necessary" standard or proprietary elements, and "impair" for nonproprietary elements.

[11] 47 U.S.C. Section 261(c).

[12] See also GTE North, Inc. v. Strand, 209 F.3d 909, 923 (6th Cir.), cert. denied, 121 S. Ct. 380 (2000) (statue commissions "play such a critical role in administering the [federal Act's] regulatory framework that they must operate strictly within the confines of the statute" (emphasis added)).

17. The Courts of Appeals have consistently relied on the Supreme Court's observation to conclude that, when arbitrating interconnection agreements, state commissions are voluntarily participating in a federal regulatory scheme and deriving their authority to act not from state law but from the Communications Act itself. See, e.g., MCI Telecomms. Corp. v. Bell Atlantic-Pennsylvania, 271 F.3d 491, 510 (3d Cir. 2001) ("Because Congress validly terminated the states' role in regulating local telephone competition and, having done so, then permitted the states to resume a role in that process, the . . . state commission's authority to regulate comes from § 252(b) and (e), not from its own sovereign authority"), cert. denied 531 U.S. 1132 (2001); MCI Telecomms. Corp. v. Illinois Bell Tel. Co., 222 F.3d 323, 343 (7th Cir. 2000) ("With the 1996 Telecommunications Act, Congress has created a complex federal regulatory scheme for many aspects of the telecommunications industry. . . . Congress, exercising its authority to regulate commerce has precluded all other regulation except on its terms. . . . [T]he states are not merely acting in an area regulated by Congress; they are now voluntarily regulating on behalf of Congress. . . . Their authority to act was derived from provisions of the Act and not from their own sovereign authority" (emphasis in original)), cert. denied, 121 S. Ct. 896 (2001); MCI Telecomms. Corp. v. Public Serv. Comm'n, 216 F.3d 929, 938 (10th Cir. 2000) ("with the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity"), cert. denied, 531 U.S. 1183 (2001); AT&T Communications v. BellSouth Telecomms., Inc., 238 F.3d 636, 646 (5th Cir. 2001) ("Congress, by enacting the 1996 Act pursuant to its commerce power, validly preempted the states' power to regulate local telecommunications competition. Accordingly, Congress established a federal system headed by the FCC to regulate local telecommunications competition. The Act permissibly offers state regulatory agencies a limited mission, which they may accept or decline: to apply federal law and regulations as arbitrators and ancillary regulations within the

federal system and on behalf of Congress" (citations omitted)). As the Third Circuit succinctly stated, "[r]egulating local telecommunications competition under the 1996 Act no longer is . . . an 'otherwise lawful' or 'otherwise permissible' activity for a state. Rather, it is an activity in which states and state commissions are not entitled to engage except by the express leave of Congress." MCI Telecomms. v. Bell Atlantic-Pennsylvania, 271 F.3d at 510.

18 The 1996 Act expressly assigns to the FCC the task of "determining what network elements should be made available for purposes of" satisfying the requirement that an incumbent local exchange carrier provide to competitive local exchange carriers nondiscriminatory access to network elements on an unbundled basis. See 47 U.S.C. § 251(d)(2). Although the FCC's implementation of this requirement may not preclude the enforcement of any state regulation or policy that "is consistent with the requirements of this section" and "does not substantially prevent implementation" of the purposes and requirements of the Act, id. § 251(d)(3), the FCC's determination of which network elements go on (and which elements stay off) the list of elements to be unbundled is a question of federal policy to which states must adhere.

19. In his concurring opinion in AT&T Corp. v. Iowa Utilities Board, Justice Breyer wrote that "the statute's unbundling requirements, read in light of the Act's basic purposes, require balance. Regulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risks costs that, in terms of the Act's objectives, may make the game not worth the candle." As the Court recognized, section 251(d)(2) "requires the FCC to apply some limiting standard, rationally related to the goals of the Act," when deciding what elements to put on the list. Id. at 388. And ordering blanket access to all network elements is inconsistent with the requirement that the FCC consider whether the failure to provide access to a particular network element would "impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47

U.S.C. § 251(d)(2)(B). As the Court recognized, "[w]e cannot avoid the conclusion that, if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided." Id. at 390.

20. In striking down the FCC's latest attempt to justify its list of network elements to be unbundled, the USTA decision made the same point about the need for balance:

> Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities. At the same time — the plus that the Commission focuses on single-mindedly — a broad mandate can facilitate competition by eliminating the need for separate construction of facilities where such construction would be wasteful. Justice Breyer concluded that fulfillment of the Act's purposes therefore called for "balance" between these competing concerns. A cost disparity approach that links "impairment" to universal characteristics, rather than ones linked (in some degree) to natural monopoly, can hardly be said to strike such a balance. The Local Competition Order reflects little Commission effort to pin "impairment" to cost differentials based on characteristics that would make genuinely competitive provision of an element's function wasteful.

USTA, 290 F.3d at 427 (citations omitted). The D.C. Circuit struck down the FCC's rules because it had applied the statutory standard of impairment as if it meant only that unbundling was required any time the requesting carrier faced costs that were higher than the incumbent's. "Because the Commission's concept of 'impairing' cost disparities is so broad and unrooted in any analysis of the competing values at stake in implementation of the Act," the FCC's unbundling rules were unreasonable. Id. at 428.

21. On remand, the FCC will, once again, have an opportunity to strike an appropriate balance between avoiding wasteful duplication of facilities, on one hand, and imposing costs in the form of disincentives to innovate and of managing the shared use of common facilities, on the other hand. The USTA court rejected the FCC's prior attempt to define the appropriate list of

network elements to be unbundled precisely because the FCC failed to strike any balance at all: the FCC's

> entire argument about expanding competition and investment boils down to the Commission's expression of its belief that in this area more unbundling is better. But Congress did not authorize so open-ended a judgment. It made "impairment" the touchstone. . . . [T]o the extent that the Commission orders access to UNEs in circumstances where there is little or no reason to think that its absence will genuinely impair competition that might otherwise occur, we believe it must point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible.

USTA, 290 F.3d at 425.

22. The balance that the FCC must strike on remand will reflect a policy judgment about the appropriate amount of unbundling, and states will be powerless under the Supremacy Clause to frustrate or disregard this federal policy. As the Supreme Court has recognized, where Congress or a federal agency has made a specific "policy judgment" as to how "the law's congressionally mandated objectives" would "best be promoted," states are not at liberty to deviate from those "deliberately imposed" federal prerogatives. Geier v. American Honda Motor Co., 529 U.S. 861, 872, 881 (2000). In other words, where federal law sets forth a legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns. See, e.g., Fidelity Fed'l Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 155 (1982). (a federal regulation that "consciously has chosen not to mandate" particular action preempts state law that would deprive an industry "of the 'flexibility' given it by [federal law]").

23. A federal agency's decision not to regulate can have as much preemptive force as one that affirmatively chooses to regulate. So, for example, where a decision not to require the unbundling of a particular element – or to require unbundling only under certain conditions – "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to

the policy of the statute," that decision preempts any inconsistent state regulation or requirement. Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 774 (1947); Ray v. Atlantic Richfield Co., 435 U.S. 151, 178 (1978); United States v. Locke, 529 U.S. 89, 110 (2000); cf. Freightliner Corp. v. Myrick, 514 U.S. 280, 286 (1995). In light of what the USTA court has now said about the need to take into account the costs of unbundling when determining which elements belong on the list and which do not, any decision not to include an element on the list (or, indeed, to require the satisfaction of certain conditions before placing an element on the list) is an integral part of the federal policy purporting to balance these competing interests. And that policy will preempt any state law or legal requirement purporting to strike a different balance.

24. The Supreme Court recently recognized the importance of ensuring the supremacy of federal law in striking a balance among competing policy objectives. The Court preempted a state legal requirement that conflicted with the Department of Transportation's federal safety guidelines because the state requirement upset the careful federal balance that the Department's regulation had achieved. Geier, 529 U.S. at 874-86. The Department had sought in its federal motor vehicle safety standard to strike a balance between safety, on one hand, and other objectives such as lowering costs, overcoming technical safety problems, encouraging technological development, and winning widespread consumer acceptance, on the other hand. Id. at 875. Petitioners in Geier had claimed that a state legal requirement mandating the use of airbags over all other passive restraints was consistent with the federal safety standards. But just as the USTA court rejected the view that the federal Communications Act permitted the agency simply to conclude that "more unbundling is better," USTA, 290 F.3d at 425, the Supreme Court rejected petitioner's position that the federal policy was "the more airbags, and the sooner, the better." Geier, 539 U.S. at 874. Because the state legal requirement "required [automobile] manufacturers . . . to install airbags rather than other passive restraint systems, such as automatic belts or passive

interiors," it "stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed." Id. at 881. Because the state law "would have stood 'as an obstacle to the accomplishment and execution of' the important means-related federal objectives" that were central to the federal policy, the Supreme Court preempted the state law. Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941) and citing De la Cuesta, 458 U.S. at 156).[13]

25. In Locke, the Supreme Court considered the argument that a state regulation could not be preempted because it was "similar to federal requirements." 529 U.S. at 115. But "[t]his is an incorrect statement of the law. It is not always a sufficient answer to a claim of pre-emption to say that state rules supplement, or even mirror, federal requirements." Id. Instead,

> [t]he appropriate inquiry still remains whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are consistent with concurrent state regulation. On this point, Justice Holmes' later observation is relevant: "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." Charleston & Western Carolina R. Co. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915).

Locke, 529 U.S. at 115.

26. Only Staff makes any serious attempt to claim that the Commission has independent authority under Missouri law to impose unbundling of the HFPL.[14] As discussed above, any state law purporting to authorize such "independent authority" would be preempted. But, in any case, Staff is incorrect, because the state-law provisions on which it attempts to rely are inapplicable. Nothing in Sections 386.250(2) or 392.470 RSMo 2000 even purport to grant this extraordinary power to require a telecommunications company to permit a competitor to have

[13] In De la Cuesta, the Supreme Court preempted a state law that limited the availability of an option that the federal agency considered essential to ensure its ultimate objectives. See 458 U.S. at 156.

[14] AT&T makes a cursory claim of such State authority, but provides no analysis in support of that claim other than a reference to Section 386.250(2) in a single footnote with no further elaboration. AT&T Brief, p. 4, n. 9.

unbundled access to its network. In fact, the statutory provisions cited by Staff are those which existed prior to the time that local competition was even permitted by statute. Section 392.470 was promulgated in 1987 to remedy the failure of interexchange carriers to obtain intrastate certification and to pay intrastate access charges, and permits imposition of payment conditions in the certification process. It provides no basis to require an incumbent company, which existed prior to the Public Service Commission law and is exempt from the certification process, to allow its competitors the use of its facilities to compete. Indeed, when SB 507 was promulgated and local competition in Missouri first permitted, no provision was made with regard to unbundling even though the legislature had the Act as a guide.

27. Staff also cites to Section 392.451.3, a provision which was enacted in SB 507. The State Legislature promulgated this provision in order to ensure that the Commission would give appropriate consideration to the rural exemption contained in the Act. Staff's claim that this provision implies the grant of unbundling authority similar to that in Section 251 of the Act borders on the absurd; if the Legislature had intended to grant to the Commission the same extraordinary powers as are contained in Section 251 of the Act, it would and could have done so as the Act preceded SB 507. The fact that no comparable provision to Section 251 was included in SB 507 is rather clear evidence that the Commission does not have such powers under State law.

F. THE COMMISSION HAS NO AUTHORITY TO ORDER UNBUNDLING OF THE HFPL TO PREVENT DISCRIMINATION.

28. As discussed above, state commissions have no residual state-law authority to act with respect to any matter addressed by the 1996 Act, including, specifically, the unbundling of network elements. See Iowa Utils. Bd., 525 U.S. at 378 n.6. To the extent, then, that state commissions have any ability to add to or subtract from the national list of unbundled network

elements, such authority must come from federal law. In the UNE Remand Order, the FCC concluded as follows: "We believe that section 251(d)(3) grants state commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list, as long as they meet the requirements of section 251 and the national policy framework instituted in this Order." Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd 3696, 3768, ¶ 154 (1999). But "the national policy framework instituted" in the UNE Remand Order was expressly repudiated by the D.C. Circuit; there is no way for a state commission lawfully to impose additional unbundling obligations now that the FCC's "national policy framework" (to which such additional unbundling obligations must adhere) has been invalidated. At the very least, until the FCC establishes a lawful "national policy framework" — one that takes seriously the admonition that "unbundling is not an unqualified good," USTA, 290 F.3d at 429 — states simply have no authority to modify at all the list of unbundled network elements.

29. Once the FCC establishes on remand a valid methodology for determining whether or not a particular element satisfies the Act's unbundling standards, that methodology will need to satisfy the USTA court's requirement that the FCC strike an appropriate balance between avoiding wasteful duplication of facilities, on one hand, and "spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities," USTA, 290 F.3d at 427, on the other hand. It is difficult to conceive how a state commission's adding to the list of unbundled network elements could ever be consistent with the federal balance that the USTA decision now requires. To be sure, when the "national policy framework" meant nothing other than "more unbundling is better," id. at 425, a state commission's decision to add to the list of unbundled

31. In any event, IP is wrong in its assertion regarding non-discriminatory access. SWBT's affiliate SBC Advanced Solutions, Inc ("SBC-ASI") has access to the HFPL under the same terms and conditions as all other CLECs. Further, SWBT's affiliate has access to the Project Pronto architecture under the Broadband Service agreement which is equally available to all other CLECs. IP's claims of discrimination are invalid and lack any evidentiary support.

CONCLUSION

32. Contrary to the claims of various parties to this proceeding, the Commission should abate the current proceeding pending resolution of the line sharing issues by the FCC in the Triennial Review proceedings. This course will provide the best assurance that CLECs will continue to have access to line sharing, as SWBT has committed to comply with interconnection agreements concerning line sharing which were in effect on the date of the USTA decision until February 15, 2003, by which time the decision in the FCC's Triennial Review proceeding is expected to be effective. Any other course of action would run a substantial risk that the Commission would adopt an unlawful requirement concerning line sharing that would ultimately result in CLECs not having line sharing available to them during the interim transition period while the FCC considers the issue on remand.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.

BY Paul G. Lane /TM

PAUL G. LANE #27011
LEO J. BUB #34326
ANTHONY K. CONROY #35199
MIMI B. MACDONALD #37606
Attorneys for Southwestern Bell Telephone L.P.
One SBC Center, Room 3520
St. Louis, Missouri 63101
314-235-4300 (Telephone)\314-247-0014 (Facsimile)
paul.lane@sbc.com

Exhibit 1

FOR IMMEDIATE RELEASE

Press Contact
Martha Sessums
650-222-4372
msessums@covad.com

Investor Relations Contact
Greg Tornga
408-434-2130
InvestorRelations@covad.com

Pinkston Group Contact
Christian Pinkston
202-423-6611
pinkston@pinkstongroup.com

SBC LINE SHARING COMMITMENT ASSURES AVAILABILITY OF CONSUMER SERVICES FOR COVAD

Covad Applauds SBC's Pledge to Internet Customers Who Will Benefit From High-Speed Access

Santa Clara, Calif. (June 19, 2002) - Covad Communications (OTCBB: COVD), said today that an announcement by SBC Communications to maintain present line sharing agreements with its wholesale customers adds a crucial measure of assurance for broadband distribution within the Covad network. SBC's commitment extends until the Federal Communications Commission (FCC) issues its final decision with respect to line sharing.

This latest market development, coupled with existing obligations imposed on Verizon by the FCC, assures line sharing service to Covad's current and future customers in both Verizon and SBC regions. Further, contractual agreements with all four of the regional phone companies provide greater security for DSL subscribers who choose Covad as their broadband provider.

Covad, the leading national broadband service provider utilizing DSL (Digital Subscriber Line) technology, sees the SBC announcement as one that reduces uncertainty in the regulatory environment and supports SBC's pledge to "foster a positive business climate" and to maintain the best possible relationships with its wholesale customers.

"As Covad prepares to launch its new, more affordable DSL service nationwide, we see SBC's line sharing announcement as an open door to robust broadband growth," said Charles Hoffman, CEO and president of Covad. 'Today SBC Communications provided a much needed measure of assurance to hundreds of thousands of high-speed Internet customers who depend on their Internet access for work, play or school."

In addition to its agreement with SBC Communications, Covad believes that its contractual agreements with the other Bell companies provide for Covad's ongoing access to line shared loops. Covad believes today's announcement by SBC reflects a market trend in how the other Bell companies will respond to the issue of line sharing.

"With their letter to the FCC and a public commitment to line sharing, SBC Communications set a market trend today," said Hoffman. "It is clear that SBC has recognized the value of its wholesale customer network. We applaud SBC for this decision to continue to work closely with their wholesale customers to provide the best broadband services available."

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About Covad Communications

Covad is the leading national broadband service provider of high-speed Internet and network access utilizing Digital Subscriber Line (DSL) technology. It offers DSL, T1, managed security, IP and dial-up services directly through Covad and through Internet Service Providers, value-added resellers, telecommunications carriers and affinity groups to small and medium-sized businesses and home users. Covad services are currently available across the United States in 94 of the top Metropolitan Statistical Areas (MSAs). Covad's network currently covers more than 40 million homes and business and reaches approximately 40 to 45 percent of all US homes and businesses. Corporate headquarters is located at 3420 Central Expressway, Santa Clara, CA 95051. Telephone: 1-888-GO-COVAD. Web Site: www.covad.com.

Safe Harbor Statement under the Private Securities Litigation Reform Act of 1995:

The statements contained in this press release that are not historical facts are "forward-looking statements," including statements concerning Covad's anticipated growth, expected court rulings, regulatory developments, ability to purchase line shared loops, revenue expectations, anticipated reductions of costs and losses, expected reductions in cash usage, ability to continue as a going concern, sufficiency of Covad's cash on hand, additional capital requirements, ability to secure additional financing, ability to become cash flow positive and achieve profitability and the statements made by the president and CEO and the executive vice president and general counsel and the assumptions underlying such statements. Actual events or results may differ materially as a result of risks facing Covad or actual results differing from the assumptions underlying such statements. Such risks and assumptions include, but are not limited to, Covad's ability to continue as a going concern, to continue to service and support its customers, to successfully market its services to current and new customers, to manage the consolidation of sales to a fewer number of wholesale customers, to successfully migrate end users, Covad's ability to generate customer demand, to achieve acceptable pricing, to respond to competition, to develop and maintain strategic relationships, to manage growth, to receive timely payment from customers, to access regions and negotiate suitable interconnection agreements, all in a timely manner, at reasonable costs and on satisfactory terms and conditions, as well as regulatory, legislative, and judicial developments and the absence of an adverse result in litigation against Covad. All forward-looking statements are expressly qualified in their entirety by the "Risk Factors" and other cautionary statements included in Covad's SEC Annual Report on Form 10-K for the year ended December 31, 2001 and its Report on Form 10-Q for the period ended March 31, 2002.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties on the Service List by first-class, postage prepaid, U.S. Mail, e-mail or via hand-delivery on June 27, 2002.

Paul G. Lane /TM
Paul G. Lane

DAN JOYCE
MISSOURI PUBLIC SERVICE COMMISSION
PO BOX 360
JEFFERSON CITY, MO 65102

MICHAEL F. DANDINO
OFFICE OF THE PUBLIC COUNSEL
PO BOX 7800
JEFFERSON CITY, MO 65102

LISA CREIGHTON HENDRICKS
SPRINT COMMUNICATIONS COMPANY L.P.
6450 SPRINT PARKWAY, BLDG. 14
MAIL STOP KSOPHN0212-2A253
OVERLAND PARK, KS 66251

REBECCA B. DECOOK
AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.,
1875 LAWRENCE ST., STE. 1575
DENVER, CO 80202

MARK W. COMLEY
CATHLEEN A. MARTIN
NEWMAN COMLEY & RUTH
P.O. BOX 537
JEFFERSON CITY, MO 65102

MICHELLE BOURIANOFF
AT&T COMMUNICATIONS OF THE SOUTHWEST, INC
919 CONGRESS, SUITE 1500
AUSTIN, TX 78701

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

DAVID J. STUEVEN
IP COMMUNICATIONS CORPORATION
1512 POPLAR AVENUE
KANSAS CITY, MO 64127

STEPHEN F. MORRIS
MCI TELECOMMUNICATIONS CORP.
701 BRAZOS, SUITE 600
AUSTIN, TX 78701

CARL J. LUMLEY
LELAND B. CURTIS
CURTIS OETTING HEINZ GARRETT & SOULE, P.C.
130 S. BEMISTON, SUITE 200
ST. LOUIS, MO 63105

CAROL KEITH
NUVOX COMMUNICATIONS
16090 SWINGLEY RIDGE ROAD, SUITE 500
CHESTERFIELD, MO 63006

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

J. STEVE WEBER
ATTORNEY FOR AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.
101 W. MCCARTY, SUITE 216
JEFFERSON CITY, MO 65101