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June 26, 2002

Secretary of the Public Service Commission
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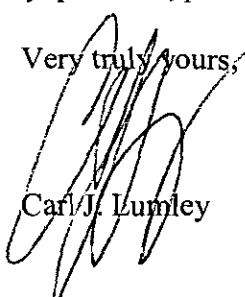
Via Federal Express
833736654467

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 Reply 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,


Carl J. Lumley

CJL:dn
Enclosures
cc. Parties of Record (W/Enclosures)

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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 WORLDCOM TO THE COMMISSION'S ORDER
DIRECTING FILING

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

WCOM will reply to the comments of Southwestern Bell ("SWBT") addressing the impact of the recent D.C. Circuit Court of Appeals decision.¹

I. THE COMMISSION HAS THE AUTHORITY TO ESTABLISH A PERMANENT HFPL RATE, AND SHOULD PROCEED TO DO SO, NOTWITHSTANDING THE RECENT D.C. CIRCUIT DECISION

As a matter of law, policy, and administrative efficiency, WCOM respectfully urges the Commission to proceed with this case. The Commission has ample authority to set a permanent HFPL rate. SWBT's requests to abate this proceeding lack merit and should be rejected. Despite SWBT's arguments to the contrary, the Commission has authority under state and federal law to address the issues in this case, notwithstanding the D.C. Circuit opinion.

A. SWBT Incorrectly Asserts that the Commission Does Not Have Authority Under Federal and State Law to Set an HFPL Rate

On pages 4-8 of its comments, SWBT argues that the D.C. Circuit opinion removes any authority for this Commission to establish a permanent HFPL rate in this proceeding. WCOM demonstrated comprehensively on pages 3-9 of its comments why SWBT is wrong. To

summarize that discussion, the Commission has authority under federal and state law—the Telecom Act of 1996 and FCC Rule 51.317 and sections 392.200.3, 386.250(2), 392.470, 392.185, 386.250(7), and 392.451.3 RSMo—to require line sharing and to set an HFPL rate in Missouri.² This authority is independent of the FCC’s *Line Sharing Order*.³

Specifically, the implication of SWBT’s argument on pages 5-6 of its comments that the FCC’s *Line Sharing Order* preempts independent state action is incorrect. As WCOM explained on pages 3-5 of its Comments, the Commission’s independent authority to establish a permanent price for the HFPL 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.⁴

(Continued)

¹ *United States Telecom Ass’n v. Federal Communications Commission*, 2002 WL 1040574, No. 00-1012, Slip opinion (D.C. Cir. May 24, 2002).

² WCOM Comments, at 3-5. See Staff Brief Regarding the U.S. Court of Appeals Decision, at 5-7.

³ *Id.* Indeed, the D.C. Circuit arguably did not vacate the *Line Sharing Order*. The ordering paragraphs of the D.C. Circuit’s opinion say nothing about vacating the *Line Sharing Order*. The D.C. Circuit’s mandate will flesh out the specific impact of its decision. If the mandate, which is expected sometime after July 8, reflects the ordering paragraphs, then the *Line Sharing Order* will remain intact pending the FCC’s remand. If that occurs, this Commission will have jurisdiction under FCC Rule 51.317, state law, and the *Line Sharing Order* to establish a permanent HFPL rate. And even if the *Line Sharing Order* is vacated, the D.C. Circuit clearly did not vacate Rule 51.317 or the *UNE Remand Order*. Thus, as discussed below, state authority to add additional unbundling obligations consistent with the Act remains intact, regardless of the status of the *Line Sharing Order*.

⁴ “This part” is “Part II – Development of Competitive Markets,” including 47 U.S.C §§ 251-261.

Further, 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 advanced services."⁵ Accordingly, the Telecom Act and the FCC's implementing orders clearly authorize the Commission to establish unbundling obligations, including line sharing, even if such UNEs were to exceed the FCC's currently effective minimum requirements at a national level. Thus, because 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."⁶ 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."⁷

⁵ *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*").

⁶ *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.

⁷ *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.

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

SWBT also argues on pages 6-8 of its comments that the Commission should not proceed under its independent authority to set a permanent rate for use of the HFPL because the D.C. Circuit's opinion establishes a stricter test of impairment. SWBT's argument is misleading, as the D.C. Circuit instead requested a more detailed, not necessarily a stricter, test of impairment. WCOM noted on pages 6-7 of its Comments that CLECs are impaired without access to the HFPL, even if the Commission elects to proceed to unbundle the HFPL under FCC Rule 51.317 rather than its own independent state authority. Additional evidence is appropriate for the Commission to consider whether CLECs are impaired, if it chooses to proceed under FCC Rule 51.317, but it is not necessary under its own independent state authority.

In addition, SWBT's focus on the impairment standard misses another key point—that existing UNEs must be priced at total element long run incremental cost ("TELRIC") levels. Accordingly, given the Commission's independent authority to unbundle the HFPL *and* given the ILECs' commitments to provide the HFPL during the pendency of the FCC's remand proceedings, the Commission should establish a TELRIC-based HFPL rate.

B. The Commission Should Move Forward with the Current Proceeding

Although SWBT's request to halt or abate this proceeding may be viewed as merely maintaining the "status quo," in reality it is asking the Commission to deviate from the status quo, and to regress. The Commission has put significant time and effort into this proceeding. It is inefficient to put the proceeding on hold and then attempt to resume at some indefinite date when the record will likely be cold for all parties and the Commission.

Further, delaying a final decision on a permanent HFPL rate only succeeds in prolonging the uncertainty of having no decision. It is likely to be a long time before the status of the D.C. Circuit's decision is resolved, the FCC finishes its Triennial Review and issues an order concerning the line sharing UNE, and the likely legal challenges are completed. Over the course of the inevitably long delay, there is no guarantee that SWBT will keep its promise to continue to provide line sharing. Thus, in the interests of efficiency and sound public policy, the Commission should move forward to set permanent rates for the HFPL.

1. SWBT's current commitments are insufficient

SWBT commits to continue providing line sharing on a "voluntary" basis during the pendency of the FCC's Triennial Review. (Significantly, the parties have focused only on line sharing and not on line splitting because the D.C. Circuit decision does not even apply to line splitting.) While those commitments are important first steps, they are insufficient. As a preliminary matter, CLECs need a binding order from the Commission requiring SWBT to provide competitors with line sharing during (and after) the FCC's Triennial Review proceeding. Otherwise, SWBT could backtrack on its "voluntary commitments" once the credible threat of independent state action was removed.

Finally, SWBT is likely urging the Commission to rely on "voluntary commitments" because it believes it could ultimately charge a non-TELRIC rate for line sharing and other broadband related UNEs (*e.g.*, Project Pronto and PARTS). WCOM respectfully reminds the Commission that SWBT has attempted to limit access to its entire Project Pronto offering. The Commission can ensure the availability of broadband UNEs at TELRIC prices in Missouri only

by exercising the independent unbundling authority that WCOM highlights above and in its Comments.⁸

2. CLECs and line sharing customers will be harmed if the HFPL rate is not set now

The Commission must not exacerbate the harm by further delaying the implementation of a permanent HFPL rate. Abating this proceeding will inject uncertainty with respect to CLECs ability to provide DSL services in Missouri.

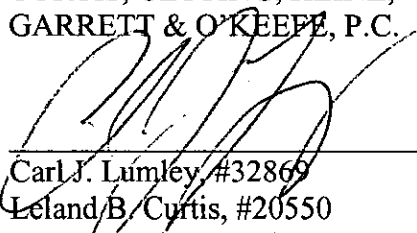
C. The Commission Should Issue a Decision on the HFPL Rate in the Interests of Administrative Efficiency

The Commission should not, as SWBT suggests, wait until the FCC issues a decision in its Triennial Review. Indeed, in the interest of administrative efficiency, the Commission should act now and proceed with this case. Deciding this case and setting a TELRIC-based HFPL rate now would be a good use of resources. Waiting to re-open the record a year (or more) from now would be an unnecessary waste of the parties' and the Commission's resources. After such a lapse of time, the parties and the Commission would be starting with a cold record. Thus, economy of resources calls for proceeding with this case now, rather than waiting and duplicating the hard work already undertaken.


WHEREFORE, WCOM requests the Commission to proceed with this case in accordance with WCOM's Comments.

⁸ WCOM's Comments, at 3-10.

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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 26 day of June, 2002, by placing same in the U.S. Mail, postage paid.

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