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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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 Dockets No. 98-147
	)	

REPLY COMMENTS OF EARTHLINK, INC.

EarthLink, Inc., by its attorneys, hereby replies to the comments in the above-captioned rulemaking proceeding reviewing the Commission's policies on unbundled network elements ("UNEs").[1] Specifically, EarthLink urges the Commission to continue to require the provision of line-sharing as a UNE. Elimination of the line sharing UNE would gravely impact EarthLink's existing broadband customer base, and would hamper its ability to serve the residential, home office and small business DSL customers that rely on its services.[2]

EarthLink is a national Internet Service Provider ("ISP") providing broadband Internet access to over 500,000 end-user subscribers, most of whom access the Internet

[1] Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, FCC No. 01-361 (rel. Dec. 20, 2001) ("NPRM").

[2] *See,* Letter from Charles Hoffman, President and CEO, Covad Communications Company, and Charles Garry Betty, President and CEO, EarthLink, Inc., to Michael Powell, Chairman, Federal Communications Commission (June 12, 2002) (attached to *ex parte* notice filed by Florence Grasso, Covad, on June 13, 2002).

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using DSL technology running over the high-frequency portion of the local loop. Many of these customers have no alternative technology to DSL for high-speed Internet connections.

EarthLink is able to provide this high-speed Internet access to its end-users because it purchases wholesale DSL transport from either an incumbent or, where available, a competitive local exchange carrier ("CLEC"). CLECs obtain such access by purchasing the line-share UNE from the incumbent LEC. This allows the CLEC to provide DSL service over the high-frequency portion of the loop, while the incumbent LEC (or, in the case of line-splitting, a different CLEC) provides local voice service over the low-frequency portion of the loop. EarthLink uses the wholesale DSL transport as an input to offer to end-users its high-speed Internet access service over DSL.

In this proceeding, the Commission is reviewing its requirement, among others, that incumbent LECs make available to CLECs line sharing as a UNE. The *Line Sharing Order*[3] establishing that requirement was recently remanded to the Commission by the U.S. Court of Appeals for the District of Columbia Circuit,[4] and the Commission stayed the mandate of that decision by filing a timely petition for rehearing.[5] Whatever the ultimate resolution of the D.C. Circuit decision, the Commission should retain the line-sharing UNE. Not only did the D.C. Circuit leave intact the FCC's authority to require

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[3] *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, 15 FCC Rcd 3696 (1999) (*"Line Sharing Order"*).

[4] *United States Telecom Ass'n. v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA v. FCC*").

[5] Petition for Rehearing or Rehearing *En Banc*, *USTA v. FCC*, Nos. 00-1012, *et al.*, and 00-1015 *et al.*, United States Court of Appeals for the District of Columbia Circuit (July 8, 2002).

line sharing, it affirmed such authority when it rejected petitioners' claim that the Commission illegally changed a prior decision that "a portion of the spectrum of a loop cannot qualify as a 'network element.'"[6] Accordingly, Verizon's argument that the Communications Act prohibits the Commission from "characterizing the high-frequency portion of the loop as a network element" is incorrect.[7]

If the line-sharing UNE were eliminated, CLECs such as Covad would be unable to offer DSL transmission services to ISPs serving end-users unless they leased an entirely separate local loop from the incumbent. Such a requirement would not only be inefficient (the low-frequency portion of the loop would remain unused unless the customer purchased additional services), but it would also be much more expensive to the CLEC, and thus to EarthLink and its end-user subscribers.[8] EarthLink would be left with little choice but to purchase wholesale DSL transport just from the incumbent LEC.

CLECs that attempted to continue to provide DSL transport by leasing the entire local loop from the incumbent LEC would suffer from inherent disadvantages. While the CLEC paid the incumbent LEC for the full local loop, the incumbent would provide its own high-speed Internet access service over DSL that *shared the loop* with the incumbent's local phone service. In other words, the incumbent's DSL transport, and its affiliated ISP that used that transport to provide high-speed Internet access, would enjoy the efficiencies of line-sharing, while the CLEC, its customer ISPs and their end-user

[6] *USTA v. FCC*, 290 F.3d at 430.
[7] Verizon Comments (April 5, 2002) at 82 (*citing* 47 U.S.C. § 153(29)).
[8] *See* Covad Comments (April 5, 2002) at 38-45.

customers would not.[9] The resulting difference in costs[10] and provisioning[11] would be an enormous and discriminatory advantage in favor of the incumbent LEC, and substantially "impair" the ability of competitive LECs to offer wholesale DSL service.[12]

The elimination of the line-sharing UNE would likely drive EarthLink, *and any business or individual that wished to purchase DSL services in the United States*, to obtain such service from the incumbent LEC—there would be no alternative provider. As EarthLink has explained in detail in its filings in other proceedings, other technologies such as cable modem service, satellite, and wireless have little competitive impact on wholesale DSL.[13] While CLECs currently offer some intramodal competition to incumbent LECs in some markets, eliminating the line-sharing UNE would do away with even that foothold for competition.[14]

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[9] *See* Comments of the People of the State of California and the California Public Utilities Commission (April 5, 2002) at 19 ("Removing this requirement would require the CLEC to buy UNE loops while the ILEC affiliate could provide the same service at lower cost because of its ability to share the loop costs with the ILEC.")

[10] There are cost differences because the line sharing rates are considerably less than the costs of procuring a second line.

[11] In addition to increased costs, the process of ordering and provisioning a new second line, including wiring of such line, may entail more time and complexity than ordering a line-sharing UNE.

[12] The *USTA v. FCC* decision requiring the Commission to consider the state of competition in the market in applying the "impair" standard does not change the result of the analysis, because intermodal competition for last-mile broadband connectivity is extremely weak. *USTA v. FCC*, 290 F.3d at 429; *See, e.g.,* Reply Comments of the People of the State of California and the California Public Utilities Commission, CC Docket No. 01-337 (April 22, 2002) at Appendix A (45% of Californians who live in cities with broadband service have access to DSL service but not to cable modem service.).

[13] *See, e.g.,* Comments of EarthLink, Inc., CC Docket No. 01-337 (March 1, 2002) at 9-14.

[14] The Supreme Court recently recognized the competitive importance of unbundling high-cost elements such as, in this case, the high-frequency portion of the local loop: "[C]ompetition as to 'unshared' elements may, in many cases, only be possible if

In order to preserve the option of obtaining wholesale DSL transport from CLECs, rather than having no DSL alternative to the services of incumbent LECs, EarthLink urges the Commission to retain the line-sharing UNE.

Respectfully Submitted,

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incumbents simultaneously share with entrants some costly-to-duplicate elements jointly necessary to provide a desired telecommunications service." *Verizon Communications Inc. v. FCC,* 122 S.Ct. 1646, 1672 n.27 (2002).

Certificate of Service

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