

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

In the Matter of)	
)	
Review of 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
)	

REPLY TO OPPOSITIONS OF EARTHLINK, INC.

EarthLink, Inc. (“EarthLink”) hereby replies to the oppositions filed on its Petition for Reconsideration (“Petition”) of the Report and Order and Order on Remand (“Order”) submitted October 2, 2003, in the above-referenced proceedings. In its Petition, EarthLink urged the Commission to reconsider the elimination of line sharing as an unbundled network element (“UNE”) or, in the alternative, reinstate line sharing but permit the state regulatory commissions to conduct a more granular analysis of the status of line splitting implementation and availability to determine if such an alternative addresses impairment. As EarthLink explained, the line sharing decision was fundamentally inconsistent with the impairment analysis set forth in the Order and contravened Section 706 broadband deployment goals by undermining intramodal wholesale broadband transport alternatives. The Order misapplied the impairment standard in several ways and wrongly assumed that the decision in USTA v. FCC precluded maintaining line sharing.¹ EarthLink also urged the Commission to provide a transition mechanism that

¹ USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002).

implements an intramodal “hot cut” mechanism to transfer end user DSL connections from one carrier to another. Finally, EarthLink urged reconsideration due to the procedural irregularities that threaten the legality of the decision.

Oppositions to the Petition were filed by Catena Networks (“Catena”), BellSouth, Qwest, SBC and Verizon; no party, however, opposed EarthLink’s alternative proposal to permit state review of the line sharing UNE based on the actual line splitting deployment. These opponents, misconstrue the Court’s USTA decision and fail to address the competitive impact of the decision to eliminate line sharing, including the impact on ISPs and their customers. Based on the record, the Commission should reject these oppositions and reinstate the line sharing UNE.

I. THE USTA DECISION DOES NOT PREVENT THE COMMISSION FROM REINSTATING THE LINE SHARING UNE

While all agree that the USTA court required the Commission to consider the relevance of broadband competition from cable and to a lesser extent satellite in its line sharing impairment analysis, the opponents insist that the Court’s directive is dispositive and can be satisfied simply by acknowledging that more residential consumers have purchased cable modem high speed Internet access than have purchased ADSL high speed Internet access.² This is not responsive to the Court’s concern. First, the Court did not prejudge the outcome of the Commission’s line sharing analysis. The *Line Sharing Order* was vacated *and remanded* “for further consideration in accordance with the principles outlined above,” and the Court confirmed that the high frequency portion of the loop (“HFPL”) was properly classified as a network element.³ Contrary to the BOCs’ interpretation, this did not prevent further Commission action. As EarthLink

² Qwest at 7, BellSouth at 20, SBC at 24 and Verizon at 41.

³ USTA at 429.

explained, the FCC can and has acted upon identical directions from the D.C. Circuit.⁴

Further, the BOCs fail to address how the impairment analysis for line sharing is impacted by the evidence of current intermodal alternatives, and ignore the Court's admonition that the Commission, by making nationwide impairment decisions, did not properly address the "state of competitive impairment in any particular market."⁵ The evidence before the Commission here, and in CC Docket Nos. 02-33 and 01-337, overwhelmingly proves that satellite, terrestrial wireless providers, power line communications and cable modem providers do not offer wholesale broadband alternatives.⁶ Indeed, the Commission found that fixed wireless, satellite and power line technologies are not available for the provision of wholesale broadband transport services⁷ and the Commission has already determined that cable operators

⁴ EarthLink Petition at 10. *See, also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, 16 FCC Rcd 9151 (2001) (FCC, responding to the D.C. Circuit in *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) which vacated and remanded FCC determination that Section 251(b)(5) does not impose reciprocal compensation requirements for ISP-bound traffic, reaffirmed its determination on different grounds) and *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Fourth Report and Order*, 16 FCC Rcd 15435 (2001) (FCC revised collocation requirements after D.C. Circuit vacated and remanded requirements in *GTE v. FCC*, 205 F.3d 416 (D.C. Cir. 2000)).

⁵ *USTA* at 422.

⁶ *See* Letter from Kenneth R. Boley, on behalf of EarthLink, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 02-33, 98-10, 95-20, 01-337 (April 29, 2003). Verizon itself explained that the proper market for analysis was the wholesale broadband transport service market. *See* Letter from Scott Randolph, Verizon, to Marlene Dortch, Secretary, FCC, CC Dkt. Nos. 02-33, 95-20, 98-10, 01-337 (Sept. 3, 2003), Declaration of Dennis Carleton and Hal Sider at 2 (defining the proper market as "wholesale broadband transport services" and explaining that ILECs are duopolists, but not monopolists, in that market).

⁷ Order at ¶¶ 231-233.

do not provide transmission services at wholesale.⁸ Thus, at least until fulsome intermodal competition exists, line sharing remains the only practical alternative for CLECs to provide competitive wholesale broadband transport which, in turn, allows consumers to purchase information services from their choice of hundreds of ISPs.⁹

Verizon further claims that the elimination of line sharing has resulted in the decline of broadband prices.¹⁰ However, the prospect that CLECs will exit the wholesale DSL market has emboldened some BOCs to engage in illegal cross subsidy and price squeeze¹¹ where wholesale DSL services are priced above-cost and retail rates are decreased.¹² The BOCs' efforts to eliminate their wholesale DSL competitors, to the detriment of ISPs and their customers, or to force them into uneconomic and unproven business ventures in order to compete, cannot be justified by the USTA decision. CLECs must be encouraged to remain in the DSL wholesale market to ensure that wholesale DSL competition survives and the facts confirm that their ability to do so is impaired without access to line sharing.

⁸ Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 51 (2002) (footnotes omitted), *vacated on other grounds*, Brand X v. FCC (9th Cir. Oct. 6, 2003).

⁹ The Commission's statistics also reveal that for a substantial number of consumers, there is no assurance that even retail broadband competition will serve to protect them from the lack of competitive alternatives in the wholesale broadband market. *See High Speed Services for Internet Access: Status as of December 31, 2002*, FCC Wireline Competition Bureau (rel. June 10, 2003) at Table 12.

¹⁰ Verizon at 43.

¹¹ For example, ISPs in California recently filed an antitrust case against SBC on the grounds that SBC was engaging in an illegal price squeeze against its ISP competitors by pricing its own retail offerings at levels that leave no margin or negative margin for ISPs purchasing SBC's DSL wholesale service. *See* <http://www.siliconvalley.com/mld/siliconvalley/6379260.htm>

¹² *See* Letter from Kenneth R. Boley, on behalf of EarthLink, to Marlene Dortch, Secretary, FCC, CC Dkt Nos. 02-33, 98-10, 95-20, 01-337 (Oct. 10, 2003).

II. LINE SHARING TRANSITION MUST ADDRESS REAL CONSUMER ISSUES OF DISRUPTION AND DISCONTINUANCE OF DSL SERVICE

EarthLink's proposal for a transition plan that takes into account the consumers directly affected by the consequences of the elimination of line sharing – the ISPs and their end user customers – was not substantively challenged in the BOC oppositions. Rather, the BOCs make various assertions about the CLEC transition plan adopted, but collectively do not address the public interest concerns raised in the EarthLink Petition.¹³

While the BOCs generally assert that there is time to plan and/or that processes should be in place to do so, none explain what processes are in place to transition thousands of end-user subscribers from one data LEC to another, which is exactly what is needed before the Order's CLEC transition rule goes into effect to end the viability of line sharing. Nor do the BOCs explain how the passage of time under the current transition plan would motivate either the ILEC or the failing data LEC to formulate and implement such a "hot cut" transition plan.

Contrary to the ill-tempered *ipse dixit* of Verizon's lawyers,¹⁴ every customer of data LECs has an urgent need for a process in place *as soon as possible*, in order to lower the growing risk of a stranded customer base. It is irresponsible to characterize this as a delaying tactic. Rather, as the data LECs are pushed off of line sharing, the public interest demands a reliable process that avoids discontinuance of service, which would harm consumers as well as ISPs.

Moreover, as EarthLink's petition set forth, the reason the current transition rule does not

¹³ See SBC at 23 n. 65 (stating that the transition is "generous" and no issues have arisen); Qwest at 9 n. 33 (stating that the transition allows "sufficient time to plan"); BellSouth at 22 (BellSouth alleges it has a process in place "such that disconnect time [for the end user] is minimized", but provides no explanation of this process).

¹⁴ See, Verizon at 53 (name-calling the EarthLink transition proposal "a transparent and shameless delaying tactic").

address the greater consumer issue is likely because the rulemaking process was flawed and exclusionary. No party seriously contends otherwise. Indeed, while Catena recognizes that the post-Sunshine *ex parte* contacts “included meetings or conversations from both ILEC representatives and competitive [data LEC] representatives,”¹⁵ the significant point is that other interested parties, including consumers and ISPs, were excluded from participation in the process. The process was not an open rulemaking proceeding, as contemplated by the Commission’s procedures, the APA, and the Sunshine Act. Similarly, SBC is mistaken when it asserts that “a compromise among the Commissioners provides no basis for relief”¹⁶ even where this compromise was not stated or explained in the Order and, therefore, not subject to judicial review.¹⁷ Rather, the APA requires the agency to explain the actual decision made, both to ensure the decision is within the agency’s statutory limits and to protect the right of interested parties to meaningful judicial review of that decision (including compromises).¹⁸

III. THE ORDER FAILED TO RECOGNIZE THAT THE CONSUMER BENEFITS OF LINE SHARING OUTWEIGH THE COSTS

The BOC oppositions rationalize the elimination of line sharing by vaguely asserting that line sharing “would bring no significant benefit to broadband competition.”¹⁹ Four of the five

¹⁵ Catena at 7.

¹⁶ SBC at 29.

¹⁷ Further, as EarthLink’s Petition (at 23-24) explained and no opposition contests, a compromise of one UNE violates the plain language of Section 251(d), which contemplates that UNE impairment will be evaluated on the merits of each UNE and not as part of a barter for collections of UNEs. 47 U.S.C. § 251(d).

¹⁸ *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

¹⁹ SBC at 24; *see also* Verizon at 41-42 (“Line sharing is not and has never been a significant competitive factor in the marketplace . . .”). While Verizon (at 41) also claims that the Commission’s decision was “fully justified in light of the evidence in the record” Verizon filed

Commissioners disagree with that view, however, and Chairman Powell characterized line sharing as the “most successful broadband policy” providing “additional facilities-based competition [that] has directly contributed to lower prices for new broadband services.”²⁰

Indeed, the Order does not challenge that line sharing contributes to the competitive broadband market.²¹ Further, just two weeks ago, the FCC’s Chief Economist reiterated that “line sharing had resulted in ‘dramatic price reductions and dramatic jumps in DSL deployment.’ For every DSL line shared, the ILECs deployed 4 DSL lines of their own...”²² The simple fact is that EarthLink and other ISPs serve hundreds of thousands of customers using CLEC line sharing arrangements. The elimination of this alternative, without even sufficient “hot cut” processes to move such customers to another provider, will virtually eliminate competition in the wholesale broadband transport market.

Moreover, while Verizon and Catena claim that eliminating the line sharing UNE furthers

post-Sunshine *on May 19, 2003*, it is impossible for such evidence to have factored into the Commission decision made three months prior *on February 20, 2003*.

²⁰ Separate Statement of Chairman Michael K. Powell Approving in Part and Dissenting in Part, CC Dkt. No. 01-338 (rel. Feb. 20, 2003). *See also*, Separate Statement of Commissioner Kathleen Q. Abernathy Approving in Part and Dissenting in Part, CC Dkt. No. 01-338 (rel. Feb. 20, 2003) (“...I believe that line sharing provides substantial procompetitive benefits without unduly constraining investment by incumbent LECs.”); Separate Statement of Commissioner Michael J. Copps Approving in Part, Concurring in Part and Dissenting in Part, CC Dkt. No. 01-338 (rel. Feb. 20, 2003) (“I believe that line sharing has made a contribution to the competitive landscape.”) and Separate Statement of Commissioner Jonathan S. Adelstein Approving in Part, Concurring in Part, Dissenting in Part, CC Dkt. No. 01-338 (rel. Feb. 20, 2003) (“Availability of this element has made a positive contribution to the competitive landscape by enabling competitors to provide advanced services through ‘line sharing’ arrangements.”).

²¹ *See* Order at ¶ 263 (questioning whether alternative platforms may make the broadband market less “heavily dependent” on line sharing, but not questioning the Commission’s prior findings on the importance of line sharing).

²² Communications Daily at 10 (Oct. 20, 2003).

Section 706 goals,²³ this position contradicts the Order. For the ILEC “legacy network,” the Order explained that the Commission sought to “*encourage . . . intramodal . . . carriers . . . to enter the broadband mass market*” and to “*unleash the full potential of the embedded copper loop . . .*”²⁴ As applied to the HFPL of the copper loop, Section 706 considerations should have tilted the Commission’s preference toward an retaining the HFPL UNE to promote additional intramodal broadband competition; instead, the Commission set high hopes on line splitting and an inexplicable preference for a bundled voice-and-data service offering.²⁵ The BOC oppositions offer no rationale or justification for the broadband contradictions of the Order.

Finally, the oppositions do not seriously contest that it was error for the Commission to have included video service revenues in the impairment analysis. Order, ¶ 258. Indeed, both SBC and Verizon appear to concede that the impairment analysis should not have looked to video revenues.²⁶ Recent press reports confirm the FCC’s most recent *Video Competition Report* findings²⁷ that even ILECs’ video service offerings via copper lines are, at best, in the development stages.²⁸ Hypothetical video revenue is certainly not relevant in the impairment analysis which should look only to revenues “that a competitor can *reasonably be expected to*

²³ Verizon at 44-45; Catena at 2-3.

²⁴ Order at ¶244 (emphasis added).

²⁵ Order at ¶ 260.

²⁶ SBC at 26 (conceding “[t]hat video services might be speculative”) and 27 (leaving out potential and speculative video revenues, and focusing on “the prospect of obtaining revenue from voice and additional data revenues over the local loop.”); Verizon at 50 (asserting that EarthLink “quibbles” over video revenues, but not defending the FCC finding of video as a valid revenue source).

²⁷ EarthLink Petition at 7.

²⁸ “At USTA, Vendors Search for Compelling Video Solutions,” *Telephony*, at 16 (Oct. 27, 2003) (ILEC vendors “searching for a solution that gives carriers a [video] service . . .”).

gain over the facilities” based on “*evidence* of the revenue opportunities *available*.”²⁹ Moreover, neither the Order nor the oppositions cite even a single example of a copper loop-based video service that could have formed the basis for the Commission’s analysis.

IV. THE FCC’S ANALYSIS OF COMPETITIVE ALTERNATIVES WAS INSUFFICIENT TO ELIMINATE LINE SHARING

The BOC and Catena also argue that line splitting is a viable alternative to line sharing today and that the UNE price of line sharing is not reasonable.³⁰ Yet, only BellSouth even claims to have the necessary processes in place to support line splitting; there is nothing in the record to indicate that such processes are available on a nationwide basis to justify the elimination of line sharing. While SBC repeats the Order’s conclusion that “improved OSS” will be developed “as needed,”³¹ this underscores that no effective processes currently exist. SBC further advises the Commission to rely on evidence compiled in the Section 271 process regarding the availability of line splitting.³² As EarthLink pointed out in its Petition, while the Commission noted that the Section 271 process was relevant to the elimination of line sharing, it refused to give similar weight to the Section 271 approvals in other parts of the Order.³³

Verizon incorrectly claims that EarthLink is advocating free access to the HFPL, crying

²⁹ Order at ¶ 100 (emphasis added).

³⁰ Qwest at 8-9, SBC at 27-29, Verizon at 51-52, BellSouth at 21-22, and Catena at 4-5. SBC quotes several Covad press statements as verification that line splitting is a viable alternative to line sharing. These statements were made after the FCC announced that line sharing had been eliminated. When the Order was released and the details of the FCC’s decision finally revealed, Covad sought a stay and filed an appeal of the decision.

³¹ SBC at 28.

³² SBC at 29.

³³ EarthLink Petition at 5.

CERTIFICATE OF SERVICE

I, Helena A. Rogozinski, hereby certify that on this seventeenth day of November 2003, copies of the foregoing document were served upon the following parties via hand delivery or First Class Mail:

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