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July 22, 2004

Ms. Marlene Dortch, Secretary
Federal Communications Commission
The Portals, TW-A325
445 12th Street, SW
Washington, D.C. 20554

Re: *Ex Parte* Presentation – Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; CC Docket No.s 01-338, 96-98, 98-147

Dear Ms. Dortch:

In accordance with the Commission's *ex parte* rules, attached please find a written *ex parte* letter filed electronically this day in the above-referenced dockets. Please do not hesitate to call me if you have any questions.

Respectfully submitted,

/s/

Mark J. O'Connor
Counsel for EarthLink, Inc.

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July 22, 2004

Via Electronic Filing and Facsimile

Chairman Michael K. Powell
Federal Communications Commission
Eighth Floor
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Presentation - Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; CC Docket No.s 01-338, 96-98, 98-147

Dear Chairman Powell:

EarthLink urges the Commission to include the issue of reinstating line sharing as an unbundled network element (UNE) in the upcoming Notice of Proposed Rulemaking on UNE rules. A major predicate to the elimination of line sharing – the emergence of data LEC and UNE-P voice LEC offerings via a whole loop – is now overturned by the D.C. Circuit's decision in USTA v. FCC, 359 F.3d 554 (2004) (USTA II). The inclusion of the line sharing issues in the upcoming Notice will allow the Commission to consider a refreshed and up-to-date record on the merits of the line sharing UNE, including the current viability of voice and data CLEC offerings and the availability of line splitting.

As an initial matter, and as you noted in your dissent to the initial Order¹, line sharing has been a remarkable note of competitive success in the arena of “last mile” broadband facilities generally characterized by monopoly or, at best, duopoly providers of service. Consistent with the Section 706 broadband deployment goals, line sharing has enabled facilities-based competitive LECs such as Covad to deliver competitive broadband telecommunications services to Internet service providers (ISPs) such as EarthLink which, in turn, serve hundreds of thousands of residential and business end-users. Line sharing is technically feasible and, indeed, makes more efficient use of existing copper loops that consumers have bought and paid for over the years from incumbent LECs. Elimination of line sharing on the “old wire” copper loops strikes a blow to broadband competition.

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order*, 18 FCC Rcd. 16978 (2003) (“Order”)

The USTA II decision inflicts a likely fatal blow to business plans of competitive data and voice LECs who wish to share the cost of a single loop, as contemplated in the Order. Without UNE-P as a viable option, line splitting can no longer bear the weight it was given in the Order (§ 260) as a long-term competitive alternative to line sharing. Similarly, the compromise struck of “line sharing for UNE-P” also no longer holds, and to best serve the public interest, the Commission should now bring back some certain competition with line sharing. We note that while the D.C. Circuit found that the decision to eliminate the line sharing UNE was not arbitrary or capricious, the Commission is not foreclosed from reconsidering or revisiting this aspect of the Order.

Further, several developments show that the facts underlying the Order's line sharing impairment analysis are not as was assumed, warranting renewed examination of the holdings of the Order. First, the impairment analysis of the Order (§ 258) asserts without substantiation that CLECs could recoup the costs of purchasing a full loop by offering video services. This is demonstrably false. Indeed, the Commission's recent Tenth Video Competition Report, 19 FCC Rcd. 1606, § 116 (2004) shows that even incumbent LECs generally do not offer video services via copper loops. Rather, BOCs are partnering with satellite television providers to offer video services or have announced plans for video services via fiber deployment, access to which competitive LECs are denied in the Order.

The evidence also shows that line splitting is not an available competitive alternative to line sharing. While the Order (§ 259) relied on a single press release as the basis for the viability of line splitting, the CHOICE Coalition and MCI have since offered detailed evidence in the record that line splitting is not a functional substitute for line sharing, and that the BOCs' OSS for line splitting creates unnecessary costs, delays, administrative burdens, and discriminatory treatment which places CLECs and their end users at a competitive disadvantage *vis-à-vis* the incumbent LEC. Perhaps equally important, line splitting is limited to only that small portion of the market with local exchange service provisioned by CLECs, and that small portion is likely to diminish even more as the current economics of UNE-P is phased out.

Finally, if the Commission does not reinstate line sharing, it should better protect existing end users in the transition process. As Covad has recently noted, the October transition deadline is inappropriate and will disserve an orderly transition. Further, there is no “hot cut” process to transition the hundreds of thousands of end users on line sharing to the incumbent LEC when the CLEC decides to discontinue line-shared DSL. The transitional pricing, therefore, should be held in abeyance until industry develops a manner to transition end users without loss or interruption of DSL service to hundreds of thousands of end users.

■ Lampert & O'Connor, P.C.

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In accordance with the Commission's *ex parte* rules, one copy of this letter has been filed electronically in each of the above-referenced dockets.

Sincerely,

/s/

Mark J. O'Connor
Counsel for EarthLink, Inc.

CC (*via facsimile*):

Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Kevin J. Martin
Christopher Libertelli
Jessica Rosenworcel
Scott K. Bergmann
Matthew Brill
Daniel Gonzalez
William Maher
Brent M. Olson
Jeremy Miller