Lampert & O'Connor, P.C.
1750 K Street NW
Suite 600
Washington, DC 20006

Mark J. O'Connor
oconnor@l-olaw.com

Tel 202/887-6230
Fax 202/887-6231

August 10, 2004

Ms. Marlene Dortch, Secretary
Federal Communications Commission
The Portals, TW-A325
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 Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

By this letter, EarthLink responds to the Verizon letter of July 22, 2004 ("Verizon Letter") in the above-referenced dockets regarding line sharing and EarthLink's pending petition for reconsideration. Line sharing is well recognized as a substantial source of current and future competition in broadband, which well serves the public, and it is time the Commission act to preserve it. Accordingly, EarthLink requests interim relief during the pendency of its petition for reconsideration to preserve the *status quo* for line sharing.

The Verizon Letter reiterates a worn refrain: line sharing, it argues, does not contribute significantly to the state of competition and consumer choice in broadband service because incumbent LECs and cable operators compete in the retail broadband Internet access market. Boiled down, Verizon's proposition is that less competition is better than more competition and that duopoly (and, in some markets, monopoly) is "good enough" competition. Judicial and FCC precedent reject that premise,[1] however, because a duopoly leaves consumers worse off on price, service diversity, and service quality in comparison to robust competition with an abundance of competing providers.

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[1] "In a duopoly, a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger." *FTC v. H.J. Heintz*, 246 F.3d 708, 724 (D.C. Cir. 2001); *In the Matter of Application of Echostar Communications Corp*., Hearing Designation Order, 17 FCC Rcd. 20559, ¶ 100 ("courts have generally condemned mergers that result in duopoly"), ¶ 103 ("existing antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality") (2002); United States Dept. of Justice Antitrust Div. and Federal Trade Commission, *1992 Horizontal Merger Guidelines,* 57 Fed. Reg. 41552, § 0.1 (1992) ("where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist . . .").

Notably, line sharing has been a recognized success, offering the public genuine broadband choice and stimulating broadband facilities investment. A majority of the Commissioners acknowledge the significant contribution of line sharing to broadband competition. By offering Internet Service Providers ("ISPs") – entities that directly serve the broadband consumer public – a supplier that is not also a retail competitor, line sharing fosters broadband service choices that can compete on price, quality and innovation. As Chairman Powell wrote in his separate statement on the *TRO*,

> To date, line sharing is the Commission's most successful broadband policy and it has generated clear and measurable benefits for consumers. It has unquestionably given birth to important broadband suppliers. This additional facilities-based competition has directly contributed to lower prices for new broadband services.[2]

And, as Commissioner Abernathy has stated:

> ... I believe that line sharing provides substantial procompetitive benefits without unduly constraining investment by incumbent LECs. ... [T]he record suggests that line sharing spurs ILEC investment in DSL, rather than retarding it. The reason is that, by definition, line sharing is available only over legacy copper loops—there simply is no loop upgrade that incumbents are deterred from making. Thus, as we weigh the goals of competitive access and promoting investment in new facilities, the balance favors reinstatement of a line sharing obligation.[3]

Similarly, Commissioner Copps has agreed that "line sharing has made a contribution to the competitive landscape,"[4] and Commissioner Adelstein has noted that "[a]vailability of this element has made a positive contribution to the competitive landscape by enabling competitors to provide advanced services through 'line sharing' arrangements."[5] As EarthLink has noted in

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[2] *In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order, 18 FCC Rcd. 16978 (2003), ("*TRO*"), *partially vacated and remanded*, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), Separate Statement of Chairman Michael K. Powell Approving in Part and Dissenting in Part at 1-2.

[3] *TRO,* Separate Statement of Commissioner Kathleen Q. Abernathy Approving in Part and Dissenting in Part at 9.

[4] *TRO,* Separate Statement of Commissioner Michael J. Copps Approving in Part, Concurring in Part, and Dissenting in Part at 2.

[5] *TRO,* Separate Statement of Commissioner Jonathan Adelstein Approving in Part and Dissenting in Part at 4.

its petition for reconsideration and subsequent filings, and others have agreed, since the *TRO* was adopted, the benefits of line sharing have only become more pronounced.[6]

Under the *TRO*, line sharing will no longer be available to new customers commencing on October 3, 2004 and rates for existing arrangements will double, disrupting the broadband marketplace and creating the real and immediate prospect for hundreds of thousands of broadband consumers of higher rates, consumer service disruption, diminished choice and even service discontinuation. As such, EarthLink respectfully requests the Commission issue an interim order prior to October 3, 2004, effectuating a "standstill" of the line sharing transition rules of the *TRO*[7] until the Commission has fully considered the issues pending in the reconsideration of its decision to eliminate the line sharing UNE.

The relief requested herein would be interim in nature, lasting only through the period of the Commission's current reconsideration of the line sharing decision, and would preserve the *status quo* to ensure the continued availability of line sharing for new orders at a rate of 25% of the full unbundled loop rate. As described herein, the grant of this relief will spare broadband consumers and EarthLink from the irreparable harm caused by the loss of the supply of DSL from competitive LEC providers, rate increases, service disruption and the overall reduction of much-needed competition in the broadband marketplace.

Request for Interim Relief

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[6] *See, e.g., Ex Parte* Letter from Gregg Hyde, Covad Communications Company to Marlene Dortch, Secretary, Federal Communications Commission (June 4, 2004), Docket Nos. 04-36, 04-29, 01-338, 96-98 and 98-147, Attachment at 10 ("Benefits of Line Sharing have increased, not decreased ... [Line sharing provides m]uch needed stability and continuity for CLEC broadband offerings while UNE-P/line splitting issues are resolved"); *see also* Petition for Reconsideration of EarthLink, Docket Nos. 96-98, 98-147 and 01-338, (October 2, 2003) at 10-11 (noting that line splitting is not a viable alternative); *see also Ex Parte* Letter from Mark J. O'Connor, counsel to EarthLink, Inc., to Chairman Michael K. Powell, FCC Docket Nos. 01-338, 96-98, 88-147 (July 22, 2004) at 2.

[7] *TRO*, Appendix B (revising 47 C.F.R. § 51.319). In this letter EarthLink specifically requests that the Commission freeze the transition contemplated in the *TRO* at the stage described at 47 C.F.R. § 51.319(a)(1)(i)(B)(1), during which incumbent LECs are required to provide access to the high frequency portion of a copper loop at either 25 percent of the state-approved monthly recurring rate or 25 percent of the monthly recurring rate in the relevant interconnection agreement, for access to a full copper loop. Thus, EarthLink is essentially requesting that the Commission extend the one-year period during which this arrangement otherwise would apply so that it may consider fully the public interest benefits of retaining line sharing and address the issues described in EarthLink's petition for reconsideration.

The Commission's standard for granting interim relief pending the final outcome of the agency's consideration of the case on its merits is well settled, following the four-prong test set forth by the D.C. Circuit in *Holiday Tours*[8] and *Virginia Jobbers.*[9] As the Commission has explained:

> These criteria are: (1) a likelihood of success on the merits; (2) the threat of irreparable harm absent grant of the preliminary relief; (3) the degree of injury to others if relief is granted; and (4) the issuance of the order will further the public interest. The Commission then balances these interests in order to determine an administrative response on a case-by-case basis. There is no requirement that there be a showing as to each criterion. The relative importance of the four criteria will vary depending upon the circumstances of the case. If the [Commission] finds that there is a particularly overwhelming showing in at least one of the factors, we may find that a stay is warranted notwithstanding the absence of another one of the factors.[10]

The Commission has exercised its interim relief authority in a number of contexts. For example, and similar to this case, the Commission in the *911 Interim Stay Order* granted interim relief from its rules "based on the likelihood of success on the merits of the Reconsideration Petition and the lack of injury to third parties if the Stay Request is granted."[11] Where the *Holiday Tours/Virginia Jobbers* test is met, the Commission has also granted stays of its orders or regulations pending the outcome of a petition for reconsideration or application for review.[12]

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[8] *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

[9] *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[10] *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Order, 17 FCC Rcd. 19012, ¶ 9 (WTB 2002) ("*911 Interim Stay Order*").

[11] *911 Interim Stay Order*, ¶ 8.

[12] *In the Matter of Biennial Regulatory Review – Amendments of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd. 9305, ¶ 6 (1999) (FCC issues an interim stay of wireless rule pending reconsideration); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Order, 12 FCC Rcd. 15739 (1997) (same); *In the Matter of Brunson Communications, Inc. v. RCN Telecom Services, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 12883 (CSB 2000) (grant of stay pending application for review); *In re Petition of WXTV License Partnership, G.P.*, Stay Order, 14 FCC Rcd. 7935 (CSB 1999) (grant of stay pending petition for reconsideration).

The Commission has also granted an abbreviated stay of its regulations due to practical considerations of the effect on industry in light of new facts.[13] Finally, in the enforcement context, the Commission has granted interim relief retaining the *status quo* relationship between two parties[14] and a "standstill" precluding a party from further marketing of a service.[15]

All four prongs of the *Holiday Tours/Virginia Jobbers* test are met in this case, as demonstrated below.

I. There is a Substantial Likelihood of Reconsideration of the *TRO* Line Sharing Decision

The proposed relief is especially warranted given the high likelihood of success on the merits, the first prong of an inquiry as to whether the requested "standstill" should be granted. Not only are there clear indications that a majority of the FCC Commissioners now support the availability of line sharing as pro-competitive and in the public interest, the facts and circumstances that were the predicate of the FCC's *TRO* decision have either proved to be erroneous or have changed substantially.

At the time the *TRO* was adopted, there was firm support by Chairman Powell for the retention of the FCC's highly successful line sharing rules; since that time support has increased so that it is highly likely that a majority of the FCC Commissioners would now support line sharing. Thus, Chairman Powell characterized line sharing as "the Commission's most successful broadband policy," adding that it has "generated clear and measurable benefits for consumers," "has given birth to important broadband suppliers," and "has directly contributed to lower prices for new broadband services."[16] Just last week, the Chairman reiterated his continued support for line sharing, underscoring that "line sharing was a pro-competitive

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[13] *In the Matter of Revisions to Broadcast Auxiliary Services Rules in Part 74 and Conforming Technical Rules for Broadcast Auxiliary Service*, Order, 18 FCC Rcd. 7032, ¶ 4 (OET 2003) (Six month extension of the effective date of the rule is appropriate where facts came to light that were "not anticipated when the Order setting these procedures was adopted").

[14] In *the Matter of Fiber Technologies Networks, L.L.C. v. Verizon New England, Inc.*, Order, 18 FCC Rcd. 10156, ¶ 1 (EB 2003) (where parties agree to mediate "we issue a limited interim stay . . . in order to maintain the status quo").

[15] *In the Matter of AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, 13 FCC Rcd. 14508 (1998).

[16] Separate Statement of Chairman Michael K. Powell Approving in Part and Dissenting in Part, *TRO* at 1-2.

measure."[17] Similarly, Commissioner Abernathy stated that line sharing "provides substantial procompetitive benefits without unduly constraining investment" and urged that as the FCC considers its actions, "the balance favors reinstatement of a line sharing obligation."[18]

Notably, since the FCC initially adopted the *TRO*, at least two other Commissioners have expressed support for line sharing. In response to Chairman Powell's recent letter urging reinstatement of line sharing, Commissioner Adelstein stated that "Consumers are facing higher prices and fewer choices, and industry is desperate to understand the rules of the game. I'd welcome the opportunity to review any item on line sharing or otherwise that the Chairman circulates to keep competition alive."[19] Similarly, Commissioner Copps stated that he would "welcome an item on how to bring line sharing" and that "in light of the lethal damage this Commission has inflicted on telephone competition, goodness knows we need any kind of competitive vehicle we can find."[20]

Indeed, the likelihood that EarthLink's arguments regarding line sharing will be successful is increased given the substantial factual and legal changes in the circumstances that formed the basis of the *TRO* when it was adopted. A significant predicate for the majority's decision to eliminate line sharing was the continued availability of UNE-P to support competitive LEC voice offerings, which in turn support line splitting. UNE-P has since been overturned by the D.C. Circuit's decision in *USTA II.*[21] In light of *USTA II*, it would be unreasonable and unsupported for the FCC to rely upon the prospect of competitive data and voice LECs sharing the cost of a single loop as a basis for the elimination of line sharing.

Likewise, experience has shown that the factual assumptions underlying the *TRO's* line sharing impairment analysis were not consistent with marketplace realities. Not only have assumptions regarding video services via copper loops been shown to be unsupported,[22] the

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[17] "Rule That Lowered Broadband Prices May Be Revived," *USA Today*, August 4, 2004, at 2B.

[18] Separate Statement of Commissioner Kathleen Q. Abernathy Approving in Part and Dissenting in Part, *TRO*, at 9.

[19] "Powell Displeased by Leak of 'Line Sharing' Letter," *TR Daily*, August 4, 2004 at 6.

[20] "Powell Seeks Copps, Adelstein Agreement on Interim TRO Rules," *Communications Daily*, August 4, 2004 at 1.

[21] *See e.g.*, Separate Statement of Commissioner Jonathan S. Adelstein Approving in Part, Concurring in Part and Dissenting in Part, *TRO*, at 2-4.

[22] 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.
(footnote continued on next page)

evidence also shows that line splitting is not an available competitive alternative to line sharing. Since the *TRO*, the CHOICE Coalition and MCI have 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 competitive LECs and their end users at a competitive disadvantage *vis-à-vis* the incumbent LEC. Equally important, line splitting is limited to only that small portion of the market with local exchange service provisioned by competitive LECs, and that small portion is likely to diminish even more as the current economics of UNE-P is phased out.

Given these statements from a majority of the FCC Commissioners, and the fact that the factual and legal predicate underlying the *TRO* has changed, there is a substantial likelihood that line sharing will ultimately be reinstated when the FCC considers the merits.

II. Broadband Consumers and Competition Will Be Irreparably Harmed Without Interim Relief

The *TRO*'s current transition deadline of October 3, 2004, will have two certain impacts on broadband competition: (1) competitive LECs will no longer be able to provision new orders of wholesale DSL via line sharing; and (2) competitive LECs will pay twice the current rate to maintain existing line-shared DSL arrangements. As a result, hundreds of thousands of EarthLink's broadband consumers will face an uncertain future and will suffer the real prospect of service disruption, diminished choice, increased rates and decreased broadband competition.

Perhaps the most apparent harm is the immediate reduction in broadband service choice for new customers. EarthLink – and the retail broadband consumers it serves – will be forced to depend entirely on its retail competitors, the incumbent LECs, to supply its DSL broadband transport inputs. While there has been much talk about cable, cable operators do not make wholesale broadband transport available to independent ISPs such as EarthLink in the vast majority of markets. As the Commission well knows, with the exception of Time Warner Cable systems,, EarthLink and other independent ISPs have virtually no broadband transport access via cable systems. While EarthLink has and continues to explore all other potential platforms for broadband transport – including broadband over power lines, wireless, unlicensed wireless, and satellite, the fact remains that none offer today a commercially available service or a service to be considered as an adequate substitute for wholesale DSL.

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Rather, at best, they are partnering with satellite television providers to offer video services or have announced plans for video services via fiber deployment.

Significantly, if EarthLink is required to obtain DSL transport for its broadband customers solely from the incumbent LECs, it would lose much-needed redundancy in its last-mile transport facilities for new broadband orders. While today EarthLink's broadband customers are spread among DSL transport suppliers, ensuring that a network outage or service disruption does not impact its entire customer base, EarthLink would face the prospect that a service outage or network failure would affect all DSL customers in the region. From an engineering perspective, total reliance on the incumbent LEC last-mile DSL facilities would cause further harm by placing EarthLink and its broadband customers at the mercy of incumbent LEC architecture decisions, service upgrades, and roll-out plans, further harming broadband competition and decreasing likelihood of service innovation and attendant investment. Moreover, experience has shown that if incumbent LECs – with whom EarthLink competes for retail broadband consumers – are its only wholesale DSL vendors, they undoubtedly will continue to impose terms of service and related changes that materially harm EarthLink's relationship with its customers and/or its ability to roll out innovative services.[23]

The economic consequences of the October 3, 2004 deadline will also create for EarthLink the substantial risk of irreparable harm to its existing subscriber base of hundreds of thousands of DSL-based customers that today receive DSL via a line sharing arrangement. Indeed, Covad and several other competitive LECs providing line sharing have already stated that, even under the transition process, "many, if not all, Petitioners could be forced to exit the consumer line shared broadband business entirely, and limit their product offerings to expensive, niche business services, either with much higher profit margins or that do not use the line sharing UNE at all."[24] This economic strain on the competitive LEC to discontinue line sharing arrangements will be quite real. Competitive LECs face a doubling of their loop costs while their incumbent LEC counterparts face $0 loop costs assigned to DSL operations. Furthermore, competitive LECs must discontinue servicing new orders. This will create immediate uncertainty as to the continuation of competitive DSL supply and a genuine risk that hundreds of thousands of EarthLink's broadband customers could be stranded and without service.[25] Indeed,

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[23] *See, e.g.*, Verizon Transmittal No. 465 (July 2, 2004) (proposing that Verizon would not provide wholesale DSL service unless the line is also used for Verizon local voice service). Such restriction effectively undermines the emergence of competitive VoIP, as consumers would still be required to purchase traditional incumbent LEC voice.

[24] Emergency Petition for Stay by the CHOICE Coalition, CC Dkt. Nos. 01-338, 96-98, 98-147, at 44 (filed Aug. 27, 2003).

[25] *In the Matter of CBS Communications Services, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 4471, ¶ 19 (1998) (irreparable injury shown where petitioner "could suffer immediate harm to its ability to keep its subscriber base and attract new customers" and where the "case involves potential economic loss that may not be recoverable").

as EarthLink has pointed out repeatedly, there is no industry mechanism for EarthLink to transition the DSL loops which support such end users from competitive LEC facilities to the incumbent LEC facilities.

These consequences will harm broadband consumers and broadband competition. EarthLink – as the broadband provider for these consumers – will suffer the business consequences of customer confusion and dissatisfaction over increased rates, diminished service, and lost opportunities as it seeks to serve its broadband retail consumers. Such loss of goodwill also indisputably constitutes irreparable harm.[26]

III. No Other Party Will Suffer Cognizable Harm If Interim Relief Is Granted

The third prong of the test for providing interim relief requires an evaluation of "the degree of injury to other parties if relief is granted."[27] Here, while the requested relief would impact incumbent LECs,[28] they cannot lay legitimate claim to harm as they are currently receiving compensation for the line sharing UNE at rates that are often higher than the rates that have been fully adjudicated by state regulatory entities to be fair, fully compensatory using the economic analysis approved by the FCC, and in the public interest.

The affected incumbent LECs currently provide line sharing and have done so since the Commission issued the *Line Sharing Order* in 1999.[29] Notably, this line sharing *status quo* does not cause an "injury." To the contrary, incumbent LECs have thrived in provisioning DSL services.[30] Moreover, while incumbent LECs may argue that any competition in the wholesale DSL transport market is itself an "injury," such an argument would contravene long-standing public policy in favor of fostering competition. Public policy favors competition because of the

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[26] *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 20 (1st Cir. 1996) ("injury to goodwill and reputation is not easily measured" and is the "kind of harm [that] is often held to be irreparable").

[27] *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d at 925.

[28] 47 U.S.C. § 251(c)(3).

[29] *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket Nos. 98-147, 96-98, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999).

[30] *See, e.g.,* Verizon News Release, "Verizon Communications Reports 6% Second-Quarter Revenue Growth, Led by Wireless Revenue Growth of 25%" (July 27, 2004) (quoting Verizon chairman and CEO as saying "We also made headway in offsetting an anticipated decline in traditional wireline revenues with new revenues from broadband DSL ...").

benefits it brings to consumers; there is no valid argument that the Commission ought to deny the requested relief because incumbent LECs might experience the "injury" of more competition.

Neither is there a basis for incumbent LECs to argue that they are injured because the price for the line sharing UNE is too low to allow full recovery of costs. As set forth in the FCC's rules, the current rate for the line sharing UNE is 25 percent of the full loop rate[31] – a rate that is much higher than that set by many state regulators as the appropriate rate for the line sharing UNE.[32] Under the requested relief, this is the price that would continue in effect during the interim period. While incumbent LECs may believe these rates are insufficient, as long as the states have set their rates using a lawful methodology and reasonably find they are fair and compensatory to the incumbent LEC, there can be no argument that requiring the provision of the UNE at that rate somehow "injures" the incumbent LEC. Thus, there is no cognizable "injury to other parties" that would result if the Commission grants the relief requested herein.

IV. The Public Interest Favors Interim Relief

Finally, the relief requested herein – maintaining the *status quo* by continuing to make line sharing available for new customers and ensuring continued broadband competition for consumers – is modest, but its positive impact on the public interest would be significant. As noted above, the benefits of "the Commission's most successful broadband policy" are tangible.[33] Without line sharing, facilities-based DSL competition will no longer exist and broadband consumers will be the victims as they suffer diminished choice, decreased service options, lost innovation and increased prices. This request asks that the Commission avert such harm and act to serve the strong public interest in continuing to afford the broadband public this highly desirable and beneficial choice.

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[31] 47 C.F.R. § 51.319(a)(1)(i)(B)(1).

[32] *See, e.g., Interim Opinion Establishing a Permanent Rate for the High-Frequency Portion of the Loop,* California Public Utilities Commission, Decision 03-01-077 (Jan. 30, 2003) at 31 ("The ILECs have stated to both this Commission and the FCC that they recover the cost of the loop through tariffed services. ... We do not find convincing their more recent assertions that they do not recover the costs of the loop from the tariffed services. Further, since the ILECs recover the cost of the loop from tariffed services, we are justified in setting a $0 rate for the HFPL.").

[33] *TRO*, Separate Statement of Chairman Michael K. Powell Approving in Part and Dissenting in Part at 1-2.

Accordingly and for the above reasons, EarthLink respectfully requests that the Commission issue a "standstill" of the line sharing transition before October 3, 2004, and continuing until the Commission reaches final resolution of the issues set forth in EarthLink's petition for reconsideration.

Pursuant to the Commission's rules, one copy of this letter is being filed electronically in each of the above-referenced dockets for inclusion in the public record. Please do not hesitate to contact us if you have any questions.

Respectfully submitted,

/s/

Donna N. Lampert
Mark J. O'Connor
Counsel for EarthLink, Inc.

cc: Chairman Michael K. Powell
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
Michelle Carey
Tom Navin
Brent M. Olson
Jeremy Miller
Pam Arluk