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Federal Communications Commission
Office of Secretary

August 18, 2004

Ex Parte Filing

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; and *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147

Dear Ms. Dortch:

Enclosed for filing on behalf of the United States Telecom Association, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., and the Verizon telephone companies are copies of an ex parte presentation in response to EarthLink's ex parte presentation dated August 10, 2004. An additional copy is enclosed for each docket matter referenced above.

Please date-stamp and return the enclosed extra copy. Thank you for your assistance. If you have any questions, please call me at 202-326-7902.

Sincerely,

Michael Kellogg

Michael K. Kellogg

Enclosures

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The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
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Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; and *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147

Dear Chairman Powell:

On behalf of the United States Telecom Association, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., and the Verizon telephone companies, I write to urge the Commission to reject EarthLink's request[1] that the Commission stay the next phase of its line-sharing transition pending the completion of the *Triennial Review Remand* proceeding.

EarthLink's stay request is premised on the belief that, in those remand proceedings, the Commission is likely to reinstate line sharing. But the Commission could reinstate line sharing only by acting illegally and in blatant disregard of the D.C. Circuit's mandate. EarthLink should have no chance of success in urging this Commission to flout binding federal court precedent. For that reason alone, the stay should be denied.

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[1] *See* Ex Parte Letter from Donna N. Lampert & Mark J. O'Connor, Counsel for EarthLink, Inc., to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338 *et al.* (Aug. 10, 2004) ("EarthLink Letter").

Even beyond that, the equities do not support a stay. Recent market facts demonstrate that broadband competition is thriving without line sharing and that competition has *increased* significantly in the year since the Commission released the *Triennial Review Order*.[2] Prices are declining, facilities deployment over cable, wireless, and wireline platforms – soon to be joined by power lines – is growing, and subscribership is rising by nearly 2 million customers every quarter. In short, consumers are getting all the benefits of real competition. Indeed, in contrast to its opportunistic position here, in its recent SEC filings, EarthLink has highlighted the existence of vigorous broadband competition and the benefits that it has brought to the market: "The intensity of competition in the telecommunications industry has resulted in significant declines in pricing for telecommunications services that we purchase, and such declines have had a favorable effect on our operating performance."[3]

Imposing an asymmetrical network-sharing obligation on minority providers in such a competitive market only increases costs and decreases competition. That is why line sharing decreased broadband competition, and why abundant evidence, discussed below, shows that competition has increased dramatically over the past year. Indeed, the Commission properly explained just last year that line sharing hindered real, facilities-based broadband competition. In the Commission's words, line sharing "skew[ed] competitive LECs' incentives" and ran "counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets." *Triennial Review Order* ¶ 261. Recent events, including the significant recent decline in broadband prices and the increases in broadband availability and subscribership, strongly confirm the wisdom of the Commission's decision not to impose the costs of unbundling in a market that is already heavily competitive.

1. EarthLink fails to show any likelihood of success on the merits. EarthLink argues first that a stay is warranted because there is allegedly a "high likelihood" that the Commission will ultimately reinstate line sharing in its *Triennial Review Remand* proceeding.[4] In fact, there should be *no* chance that the Commission would grant such relief because it would be flatly illegal.

In vacating the Commission's line-sharing rules in *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003), the D.C. Circuit established that a

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[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 261 (2003) ("*Triennial Review Order*"), *vacated in part and remanded*, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *petitions for cert. pending*, *NARUC v. USTA*, Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004).

[3] EarthLink, Inc., Form 10-K at 10 (SEC filed Mar. 5, 2004) ("EarthLink Form 10-K").

[4] Earthlink Letter at 5.

proper impairment analysis in this context must consider all broadband alternatives, including intermodal alternatives. The court vacated the Commission's line-sharing requirement because this Commission improperly viewed the "service" that carriers seek to offer for purposes of the section 251(d)(2) impairment inquiry as limited to those provided over wireline facilities, *i.e.*, DSL services. *See id.* at 429. The D.C. Circuit found that the Commission could not lawfully employ such a test. To the court, the Commission's reading of section 251(d)(2) to permit exclusion of cable modem service and other broadband alternatives from the impairment analysis was "quite unreasonable" and inconsistent with the Supreme Court's admonition that the Commission "'cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network.'" *Id.* (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999)). In the court's damning phrase, the Commission's failure to consider intermodal alternatives in its impairment analysis constituted a "naked disregard of the competitive context." *Id.*

This D.C. Circuit holding – a holding that the court reiterated in *USTA v. FCC*, 359 F.3d 554, 585 (D.C. Cir. 2004) ("*USTA II*") (noting that the Commission's reliance on the existence of "substantial intermodal competition" in the *Triennial Review Order* "follow[ed] our mandate in *USTA I*"), *petitions for cert. pending*, *NARUC v. USTA*, Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004) – precludes any attempt by the Commission to reimpose line sharing now. When all competing broadband providers, including cable modem providers, are considered, as they must be, it would be fanciful to conclude that competitors are "impaired" within the meaning of section 251(d)(2) without line sharing. This Commission's own statistics continue to show that cable providers serve a substantial *majority* of broadband customers without access to UNEs. According to a Commission report issued just this June, more than 63% of residential and small business customers receiving 200 kbps per second service subscribe to cable modem, as opposed to just 34% that rely on DSL.[5] Of customers that receive more than 200 kbps in both directions, 85% use cable modem, while only 13% use DSL.[6]

Nor is facilities-based broadband investment and competition limited to cable and wireline, as EarthLink wrongly suggests.[7] The Commission itself stressed just this month that "[b]roadband Internet access services are rapidly being developed or provided over technologies *other* than wireline and cable, such as wireless and powerline."[8] And you, Chairman Powell,

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[5] *See* Indus. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of December 31, 2003*, at Table 3 (June 2004).

[6] *See id.*, Table 4.

[7] *See* Earthlink Letter at 1.

[8] Notice of Proposed Rulemaking and Declaratory Ruling, *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, FCC 04-187, ¶ 37 n.82 (rel. Aug. 9, 2004) (emphasis added); *see also* Kathleen

emphasized in June that "[w]e're beginning to see greater uses of wireless mobile broadband products, such as EvDO coming into the market place. . . . These are true commercial applications that are rapidly spreading throughout the market place."[9]

As Verizon has demonstrated in a recent filing,[10] this robust competition has led to the consumer benefits one would expect. Broadband prices are falling, with DSL providers leading the way in reducing rates and increasing download speeds.[11] Availability and subscribership are increasing as well. Verizon alone added 10 million DSL-qualified lines last year, and it intends to add another 7 million this year. Cable operators have responded in kind with promotional and targeted price reductions and by increasing data speeds (which effectively lowers the price of bandwidth).[12] Moreover, independent analysts estimate that 5.4 million residential broadband subscribers were added between the end of June 2003 and the end of March 2004, and that approximately 1.7 million residential broadband subscribers were added in the second quarter of 2004.[13]

In these circumstances, *USTA I* prevents the Commission from concluding that competitors are "impaired" without line sharing. As the D.C. Circuit has made plain, one cannot reasonably conclude that competitors are impaired when alternative facilities are "significantly deployed on a competitive basis." *USTA I*, 290 F.3d at 422. That is emphatically the case with broadband, as demonstrated by the Commission's own statistics. Accordingly, the D.C. Circuit affirmed this Commission's decision just last year *not* to mandate line sharing precisely because "intermodal competition in broadband, particularly from cable companies, means that, even if

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Q. Abernathy, Commissioner, FCC, *Promoting the Broadband Future*, Keynote Address at Supercomm Conference at 2-3 (June 22, 2004) ("As a result of the consumer benefits and efficiencies, wireline telecommunications carriers, cable operators, wireless carriers, satellite operators, electric utilities, and others are racing to build out broadband networks."), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-248688A1.pdf.

[9] Michael K. Powell, Chairman, FCC, Remarks at the Wireless Communications Association International, Washington, D.C. at 2 (June 3, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-248003A1.pdf.

[10] *See* Ex Parte Letter from Dee May, Vice President – Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338 *et al.* (July 22, 2004) ("Verizon 7/22/04 Letter").

[11] *See id.* at 3.

[12] *See, e.g.*, G. Campbell, *et al.*, Merrill Lynch, *3Q03 Broadband Update* at 2 (Nov. 3, 2003) (cable operators "are increasingly moving 'off the rate card', with market-specific pricing and increased use of promotional and bundled-price discounts specific to certain markets").

[13] *See* R. Bilotti, *et al.*, Morgan Stanley, *Broadband Update: Bundling is an Arms Race, Not a Price War* at 11, Exhibit 7 (July 8, 2004).

CLECs proved unable to compete with ILECs in the broadband market, there would still be vigorous competition from other sources." *USTA II*, 359 F.3d at 580; *see id.* at 585 ("intermodal competition from cable ensures the persistence of substantial competition in broadband").

Moreover, the record reflects that line sharing is not and has never been a significant competitive factor in the marketplace: it accounts for only a tiny fraction of the broadband market. Verizon has submitted calculations based in part on the Commission's own statistics indicating that line sharing accounts for less than 1% of mass-market broadband lines.[14] In view of this minuscule market share figure, the substantial costs associated with mandatory line sharing produced no meaningful pro-competitive benefits – and the elimination of line sharing can result in no impairment to competitors.

In this regard, it is worth noting that the Commission itself has previously recognized the centrality of evidence of real facilities-based competition, including intermodal competition, to a proper impairment analysis. The Commission "agrees" that "actual marketplace evidence is the most persuasive and useful kind of evidence" and that evidence of deployment, including intermodal deployment, is highly relevant regardless of whether those alternative facilities are "available to requesting carriers on a wholesale basis." *Triennial Review Order* ¶¶ 93, 97. The Commission has thus established that reliance on actual competitive deployment "demonstrates *better than any other kind [of evidence]* what business decisions actual market participants have made regarding whether it is feasible to provide service without relying on the incumbent LEC." *Id.* ¶ 93 (emphasis added). In the Commission's own words, the relevant question when there is evidence of intermodal alternatives is whether such alternatives are "comparable in cost, quality, and maturity to incumbent LEC services." *Id.* ¶ 97. Because there is simply no tenable argument that cable modem services do not meet that standard, the Commission's own analysis precludes any impairment finding here.

Significantly, EarthLink has no substantive response to these dispositive legal points. Without even acknowledging, much less discussing, the D.C. Circuit's binding holdings, EarthLink simply asserts that this argument is a "worn refrain,"[15] as if there were some reason that ILECs should not continue to highlight the D.C. Circuit's binding legal holding in vacating the Commission's line-sharing rules. And EarthLink claims, without any statistical or other evidentiary support, that current competition is not robust enough and that there can be, at most, only two facilities-based broadband platforms.[16] Those assertions are simply wrong, as demonstrated above, and they are contrary to EarthLink's own statements to the SEC.

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[14] *See* Response of Verizon to Petitions for Reconsideration at 41-42, *Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 *et al.* (FCC filed Nov. 6, 2003).

[15] EarthLink Letter at 1.

[16] *See id.*

Even beyond the dispositive fact that intermodal competition is thriving in broadband, just last August this Commission enunciated a series of other reasons that the statute did not permit line sharing. The Commission expressly "disagree[d]" with the conclusion in the *Line Sharing Order*[17] that "purchasing a stand-alone loop would be too costly for carriers seeking to offer a broadband service." *Triennial Review Order* ¶ 258. The Commission explained that, in light of all the potential revenues to be gained in using a whole stand-alone loop, any additional costs involved in leasing a whole loop could be offset by enhanced revenue. *See id.* The Commission further concluded that the record showed that line splitting was a "viable alternative[]" for CLECs, especially given that the Commission had found repeatedly in section 271 cases that local markets around the country are open to competition. *Id.* ¶ 259. The Commission also found that, far from "level[ing] the competitive playing field," making the high-frequency part of the loop available as a UNE created inappropriate competitive incentives and "discourage[d]" innovation and facilities-based competition, contrary to the goals of the 1996 Act. *Id.* ¶¶ 260-261 (internal quotation marks omitted). Thus, regardless of the statements by individual Commissioners on which EarthLink places almost exclusive reliance, the binding order of this Commission establishes that there are multiple, independent reasons *in addition to* intermodal competition why line sharing is inconsistent with the 1996 Act.

The Commission's analysis has proven to be correct. Not only have broadband prices declined and subscribership and availability increased, but also competitors have relied on full loops to offer broadband, just as the Commission predicted they would. Covad Communications has recently announced a new "dedicated-loop ADSL" offering that, according to Covad, "is ideal for customers who rely on other modes of voice communication such as Voice over Internet Protocol (VoIP) and cell phone service" because it gives them "the option to integrate VoIP directly onto the broadband line, relieving them of the need for traditional analog telephone service from the local voice provider."[18] Indeed, more CLEC broadband customers are served through whole-loop offerings than through line sharing.[19]

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[17] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*"), *vacated and remanded*, *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003).

[18] Covad Press Release, *Covad Launches Dedicated-Loop ADSL for Consumers and Small Businesses Nationwide* (July 6, 2004), *available at* http://www.covad.com/companyinfo/pressroom/pr_2004/070604_news.shtml.

[19] *See, e.g.*, Ex Parte Letter from Susanne Guyer, Senior Vice President – Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, at 1-2, CC Docket Nos. 01-338 *et al.* (May 19, 2003) (documenting that, as of year-end 2002, in the Verizon-East region (*i.e.*, the former Bell Atlantic region), only 20% of CLEC DSL lines were provisioned using line sharing); *see also* Covad Press Release, *FCC Grandfathers Covad Line-Sharing Customers*

The advent of VoIP over the past year itself undermines any possible rationale for line sharing. Line sharing assumes that, while the high-frequency portion of the loop is used to provide data services, the ILEC will continue to use the low-frequency portion to offer voice services. But with the advent of VoIP, voice and data are no longer carried on different wavelengths. Under such circumstances, where voice is just another application over broadband, a regime in which CLECs pay little or nothing for the high-frequency portion of the loop cannot be justified. Perpetuating line sharing in a world where voice can be provided over broadband has precisely the perverse and anti-competitive effect that the Commission condemned when it eliminated line sharing in the *Triennial Review Order* – it discourages the development of competing bundles of services, including voice, because a CLEC can demand free access to the high-frequency portion of the loop *only* if the ILEC is providing voice service over the low-frequency portion. A CLEC that is able to provide a full range of broadband services – including VoIP – should be required to take, and pay for, the entire loop, or else the incentive to develop and deploy those competing services is undermined. The advent of VoIP strengthens the Commission's conclusion in the *Triennial Review Order* that sufficient revenue opportunities exist to require data CLECs to pay for the entire loop.

The Commission may not simply disregard its conclusions in the *Triennial Review Order*, much less may it do so in the face of evidence that its policies have been enormously successful, as is the case here. As the D.C. Circuit has explained, an agency cannot "casually ignore[]" its own prior conclusions on the same issue, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), and an agency's failure to come to grips with its own prior decisions constitutes "an inexcusable departure from the essential requirement of reasoned decision making," *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (internal quotation marks omitted).

Indeed, because it is clear that broadband competition is even healthier than it was at the time of the *Triennial Review Order*, EarthLink has no serious argument that changed circumstances would justify a Commission change of course on line sharing. EarthLink does not even try to show how the Commission could reasonably reconcile its decision in 2003 that line sharing runs "counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets" with a conclusion just one year later that line sharing is now pro-competitive and furthers the goals of the 1996 Act. And EarthLink's only response to the Commission's finding that the revenues from an entire loop are sufficient to prevent impairment is to claim that video over copper has not grown rapidly, even though narrowband voice, data,

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Indefinitely (Aug. 22, 2003) ("Covad's business customers using dedicated lines account for about 60 percent of the company's revenues"); Charles Hoffman, President/CEO, Covad, Q2 2004 Covad Communications Earnings Conference Call – Final, FD (Fair Disclosure) Wire, Transcript 072704an.718 (July 27, 2004) ("It's important to remember that 68% of Covad's current revenue comes from business customers").

and VoIP were plainly the primary revenue sources the Commission was considering. *See Triennial Review Order* ¶ 258. EarthLink also asserts without proof of any kind that ILECs' OSS are not sufficient to support line splitting, even though the Commission has repeatedly reviewed and approved those systems in section 271 proceedings.[20] In sum, EarthLink's arguments are facially insufficient to overcome the abundant evidence that broadband competition has flourished in the past year, thus negating any need for the Commission to create synthetic line-sharing competition.

2. EarthLink has failed to identify any irreparable harm without interim relief. The Commission's transition plan has no effect at all on the bulk of existing Internet access customers served by line sharing because any end-user that was in place when the *Triennial Review Order* was adopted is exempted from the transition rules: CLECs will pay the same amount to serve those customers as they did on the effective date of the *Triennial Review Order* – in most cases, a charge of *zero. See Triennial Review Order* ¶ 264. Thus, EarthLink's assertion (at 7) that, as of October 3, 2004, "competitive LECs will pay twice the current rate to maintain existing line-shared DSL arrangements" is a gross exaggeration. The rate will change only for customers added in the preceding year. Furthermore, the result of the transition regime is to eliminate what the Commission correctly described as an "irrational cost advantage" over CLECs that purchase the whole loop and over the incumbent LECs themselves. *Triennial Review Order* ¶ 260. By "skew[ing] competitive LECs' incentives" to provide only DSL service, rather than a broader range of services, the previous line-sharing regime ran "counter to the [statutory] goal of encouraging competition and innovation." *Id.* ¶ 261. As the Commission itself said in opposing earlier petitions to stay the *Triennial Review Order*, "[i]t hardly amounts to irreparable injury for the Commission to remove such an unfair advantage" – and this is especially true when most existing customers have been grandfathered into the prior, irrational arrangements indefinitely.[21]

Nor is it at all clear that "competitive LECs will no longer be able to provision new orders of wholesale DSL via line sharing" as of October 3, as EarthLink asserts (at 7). Negotiations are underway among ILECs and CLECs to continue line-sharing arrangements on negotiated terms and conditions. In the *Triennial Review Order*, the Commission "strongly encourage[d] the parties to commence negotiations as soon as possible so that a long-term arrangement is reached and reliance on the shorter-term default mechanism" for transitioning away from line sharing would be "unnecessary." *Triennial Review Order* ¶ 265. Some of these negotiations have already born fruit: Qwest, for example, already has agreements in place with various CLECs, including Covad, to continue line sharing (and, as noted below, EarthLink also already has agreements in place with RBOCs and cable companies to reach its customers over

[20] *See* Verizon 7/22/04 Letter at 4 n.15.

[21] Opposition of the FCC to Covad's Motion for Stay Pending Review at 11, *USTA v. FCC*, Nos. 03-1310 *et al.* (D.C. Cir. filed Oct. 9, 2003) ("FCC Stay Opp.").

their networks even in the absence of line sharing). These examples provide reason to be optimistic that other negotiated agreements will follow if the Commission leaves its transition mechanism in place. By contrast, extending the period in which new mandatory line-sharing arrangements may be added would undercut investment and remove incentives to negotiate. Why should data CLECs make concessions to reach market-based deals (or take the risks necessary to deploy their own facilities) if the Commission indicates that they will still be able to obtain access to the high-frequency portion of the loop at artificially low rates?

Even in the absence of negotiated agreements for line sharing, however, CLECs could provide broadband either over a dedicated loop or via line splitting. *See Triennial Review Order* ¶¶ 260, 265. Covad, for example, has touted the virtues of line splitting and the relative unimportance of line sharing. In the wake of the *Triennial Review Order*, Covad claimed to be " 'in a unique position to continue driving increased DSL adoption throughout the United States' " because of the availability of line splitting.[22] And, as discussed above, Covad has recently stressed its stand-alone loop DSL offering.

As this new offering demonstrates, the advent of VoIP undermines the assumption on which line sharing was initially based – namely, that the ILEC would continue to use the low-frequency portion of the loop to provide voice service (and would continue to derive revenue from that use). Moreover, as noted, *most* CLEC DSL revenues come from customers served via dedicated loops rather than by line sharing, and this revenue stream is utterly unaffected by the Commission's line-sharing transition. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) ("Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the [petitioner]'s business.").

If CLECs are not likely to suffer any irreparable injury, there is even less prospect that EarthLink itself would suffer any harm under the Commission's current transition plan. Although EarthLink expresses distaste at relying on incumbent LECs for wholesale DSL, it *already* has agreements in place with BellSouth, SBC, Qwest, and Verizon to use their networks to reach its customers.[23] Hence, there is no reasonable prospect that EarthLink will be unable to continue to serve as many customers via DSL as it desires. And it bears repeating that DSL is *not* the only mode through which EarthLink reaches its customers. Although EarthLink complains (at 7) that it has had difficulty gaining access to cable modem networks, it acknowledges that Time Warner has opened its system to unaffiliated ISPs. And, although it neglects to mention them here, EarthLink also has agreements to provide broadband services

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[22] Covad Press Release, *Covad Extends Partnership with MCI; New Line Splitting Partnership Enables MCI to Combine Local and Long Distance Services With Covad's DSL High-Speed Internet Services* (Sept. 2, 2003) (quoting Charlie Hoffman, Covad President/CEO), *available at* http://www.covad.com/companyinfo/pressroom/pr_2003/090203_press.shtml.

[23] *See* EarthLink Form 10-K at 6.

over Comcast and Bright House networks.[24] Hence, EarthLink faces no threat of harm whatsoever, let alone *irreparable* harm. In view of these alternative suppliers of wholesale broadband transmission, EarthLink's assertion (at 8) that "hundreds of thousands of EarthLink's broadband customers could be stranded" is grotesque hyperbole. To the contrary, not a *single* customer will be "stranded" after October 3 if the Commission allows its transition to proceed. Most existing customers will be grandfathered under their current arrangements, and those customers added in the last year will continue to be served at only 50% of the cost of an unbundled loop.

EarthLink's claim (at 8) that the Commission's transition rules would cost it "much-needed redundancy in its last-mile transport facilities" is specious. Not only does it ignore the availability of cable modem and other intermodal suppliers of broadband transport, but it also mistakenly assumes that line sharing provides redundancy. In a line-sharing arrangement, CLECs rely on the same facilities that the ILEC uses to provide broadband. An ILEC network outage today would be just as disruptive to customers served via line sharing as to those served via ILEC DSL. The supposed redundancy provided by CLECs riding ILEC loops is illusory.

3. The proposed interim relief would harm ILECs. EarthLink is quite wrong to claim (at 9) that the "line sharing *status quo* does not cause an 'injury.'" The line-sharing UNE is an illegal and unjustified encroachment on the property rights of incumbent LECs. The Commission has yet to articulate a rationale for the line-sharing UNE that has survived judicial scrutiny. In opposing petitions to stay the *Triennial Review Order*, the Commission told the D.C. Circuit less than a year ago that, "[t]o the degree the Commission reinstated any of the line sharing rules, it did so only to facilitate the transition away from line sharing."[25] The point is not only that the price of the UNE is too low; it is that no ILEC should have to provision the UNE at all, other than on voluntarily negotiated terms, in the absence of an impairment finding – a finding that, in the current circumstances, cannot lawfully be made.

Moreover, supporting line sharing in its current form imposes significant costs on ILECs. Complicated and expensive OSS solutions for line sharing must be maintained for relatively few orders. The continued imposition of these inefficiencies on ILECS also constitutes cognizable harm.

4. The proposed interim relief is not in the public interest. As noted above, the record reflects that line sharing accounts for less than 1% of mass-market broadband lines. These stark market share figures, plus "the fact that broadband service is actually available through another network platform and may potentially be available through additional platforms," serve to "alleviate any concern that competition in the broadband market may be

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[24] *See id.*; EarthLink, Inc., Form 10-Q at 13 (SEC filed Aug. 9, 2004).

[25] FCC Stay Opp. at 9.

heavily dependent upon" line sharing, as the Commission correctly found. *Triennial Review Order* ¶ 263. Accordingly, "the costs of [line sharing] outweigh the benefits"; indeed, it is the *unavailability* of mandatory line sharing that "will encourage the deployment of new technologies." *Id.* This is in part because requiring incumbents to provide access to the whole loop "creates better competitive incentives" than requiring separate unbundling of the high-frequency portion of the loop. *Id.* ¶ 260. Conversely, requiring line sharing "discourage[s] innovative arrangements" between carriers and "greater product differentiation" among broadband offerings. *Id.* ¶ 261. It follows that any delay in eliminating line sharing would simply impose unnecessary costs and impede innovation.

Moreover, as the Commission has recognized, a fundamental goal of the 1996 Act was to encourage competing carriers to deploy their own facilities in order fully to unleash the incentives of incumbents and competitors alike to develop innovative service and pricing options to the benefit of consumers.[26] There is no way to deploy *only* the high-frequency portion of a loop; facilities-based competitors would have to deploy (and pay for) the whole loop. By making available the same kind of facility that a CLEC would deploy itself in order to compete, unbundling the stand-alone loop supports Congress's goal of encouraging facilities-based competition. In contrast, allowing CLECs to free-ride on part of the loop undermines any incentive carriers might have to deploy their own facilities, and thus subverts the purpose of the Act.

Finally, as noted above, since the Commission announced an end to line sharing, DSL prices have actually fallen and other broadband providers have responded with targeted discounts and improved service offerings. Delaying the elimination of line sharing threatens these positive trends in the marketplace, to the detriment of consumers.

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[26] *See, e.g.*, *Triennial Review Order* ¶ 70 ("facilities-based competition serves the Act's overall goals"); Notice of Proposed Rulemaking and Notice of Inquiry, and Third Further Notice of Proposed Rulemaking, *Promotion of Competitive Networks in Local Telecommunications Markets*, 14 FCC Rcd 12673, ¶ 4 (1999) ("only facilities-based competition" can "fully unleash competing providers' abilities and incentives to innovate, both technologically and in service development, packaging, and pricing").

Respectfully submitted,

Michael Kellogg

Michael K. Kellogg

cc: Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Christopher Libertelli
Jessica Rosenworcel
Scott K. Bergmann
Matthew Brill
Daniel Gonzalez
Michelle Carey
Tom Navin
Jeremy Milller
Pam Arluk