

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange)	
Carriers)	CC Docket No. 01-338

**COMMENTS OF EARTHLINK, INC.
IN RESPONSE TO UNE NOTICE OF PROPOSED RULE-MAKING**

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Introduction and Summary

EarthLink, Inc. (“EarthLink”), by its attorneys and in response to the *UNE NPRM*¹ in the above-referenced proceedings, files these comments to urge the Commission to reinstate line sharing as an unbundled network element (“UNE”). As a majority of Commissioners agree, the line sharing UNE is vital to competition in the broadband market. Moreover, in light of the *USTA II*² decision to vacate local switching and UNE-P, the major predicate for the line sharing decision in the *TRO*³ no longer holds. It is incumbent on the Commission, therefore, to reexamine and reinstate the line sharing UNE.

¹ Order and Notice of Proposed Rulemaking, FCC 04-179 (rel. Aug. 20, 2004) (“*UNE NPRM*”).

² USTA v. FCC, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”).

³ 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 II*.

EarthLink's Petition for Reconsideration of the *TRO* line sharing decision, which is incorporated into this proceeding,⁴ has been pending before the Commission for over one year. In that time, the case for reinstatement of the line sharing UNE has grown even stronger. Given the expiration of commercial arrangements that will continue to allow new line sharing orders, EarthLink urges the Commission to act quickly to reinstate the line sharing UNE.

Discussion

I. A Majority of Commissioners Agree That Line Sharing Should Be Reinstated.

Notably, line sharing has been a recognized success, offering the public genuine broadband choice and stimulating broadband facilities investment. By offering Internet Service Providers ("ISPs") – entities that directly serve the broadband consumer public – a supplier other than a retail competitor, line sharing fosters broadband service choices that can compete on price, quality and innovation. A majority of the Commissioners acknowledge the significant contribution of line sharing to broadband competition. 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.⁵

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

⁴ *UNE NPRM*, ¶ 12 ("We first incorporate the record generated by the petitions for reconsideration and clarification of the *Triennial Review Order* . . .").

⁵ *TRO*, Separate Statement of Chairman Michael K. Powell Approving in Part and Dissenting in Part at 1-2. In August, the Chairman reiterated his continued support for line sharing, underscoring that "line sharing was a pro-competitive measure." "Rule That Lowered Broadband Prices May Be Revived," *USA Today*, August 4, 2004, at 2B.

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.⁶

Similarly, Commissioner Copps has agreed that “line sharing has made a contribution to the competitive landscape,”⁷ 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.”⁸ As EarthLink has noted in 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.⁹

Notably, since the FCC initially adopted the *TRO*, at least two other Commissioners that had voted for eliminating line sharing have now expressed support for line sharing. In response to Chairman Powell’s August 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

⁶ *TRO*, Separate Statement of Commissioner Kathleen Q. Abernathy Approving in Part and Dissenting in Part at 9.

⁷ *TRO*, Separate Statement of Commissioner Michael J. Copps Approving in Part, Concurring in Part, and Dissenting in Part at 2.

⁸ *TRO*, Separate Statement of Commissioner Jonathan Adelstein Approving in Part and Dissenting in Part at 4.

⁹ 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.

on line sharing or otherwise that the Chairman circulates to keep competition alive.”¹⁰ 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.”¹¹

II. The Predicates That Supported the *TRO* Finding of Lack of Impairment Are No Longer True.

The *TRO* (¶¶ 258-260) is predicated on three propositions to support its finding of no impairment for line sharing: (1) the availability of UNE-P competitive LECs with whom data LECs could partner and share the whole loop costs; (2) the ability to overcome the costs of the whole loop with revenues from video services; (3) and, the availability of line splitting to permit UNE-P and data LECs to share the loop costs. None of these propositions hold true.

First, 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. UNE-P has since been overturned by the D.C. Circuit’s decision in *USTA II*. 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. Indeed, AT&T is implementing its plans to withdraw from the residential local market,¹² and

¹⁰ “Powell Displeased by Leak of ‘Line Sharing’ Letter,” *TR Daily*, August 4, 2004 at 6.

¹¹ “Powell Seeks Copps, Adelstein Agreement on Interim *TRO* Rules,” *Communications Daily*, August 4, 2004 at 1.

¹² AT&T News Release, “AT&T Announces Second-Quarter 2004 Earnings, Company to Stop Investing in Traditional Consumer Services; Concentrate Efforts of Business Markets” (July 22, 2004) (“As a result of recent changes in regulatory policy governing local telephone service, AT&T will no longer be competing for local and standalone long distance (LD) customers.”).

MCI has announced that “[w]ithout access to those [UNE-P] facilities, MCI and others simply cannot continue to offer lower prices and residential services.”¹³

Second, the proposition that revenues from video services via copper loops would contribute to a competitive LEC’s ability to recoup the costs of the full loop has been shown to be unsupported. Indeed, the Commission’s recent Tenth Video Competition Report¹⁴ shows that even incumbent LECs generally do not offer video services via copper loops. Rather, at best, they are partnering with satellite television providers to offer video services or have announced plans for video services via fiber deployment. The Commission itself has acknowledged the speculative and limited nature of video applications using the telephony network,¹⁵ which could not possibly substitute as market evidence to examine impairment and “increased revenue opportunities” as the line sharing portion of the *TRO* (§ 258) asserts.¹⁶ Such a speculative possibility of future video revenues via a copper loop does not meet the articulated “impairment” standard, which looks only to revenues “that a competitor *can reasonably expect* to gain over the facilities,” and where such findings are based on “*evidence* of the revenue opportunities

¹³ MCI News, “MCI Reacts to Triennial Review Ruling” (March 2, 2004). *See also*, TR Daily, “Z-Tel to Cease New Residential Business in Eight States” (June 22, 2004).

¹⁴ 19 FCC Rcd. 1606, ¶ 116 (2004).

¹⁵ Indeed, at the time of the *TRO*, the Commission’s most recent *Video Programming Competition Report* had concluded that video over ADSL “remain[s] in the trial stage.” *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, 17 FCC Rcd. 26901, ¶ 98 (2003).

¹⁶ *Compare with*, *TRO*, ¶ 93 (“actual marketplace evidence is the most persuasive and useful kind of evidence” in an impairment analysis), *and*, *TRO*, ¶ 98 (if “there are limitation on the number or types of customers that can be served by a particular technology, we will consider whether an entrant could use this technology profitably to target only those customers that can be served by the alternative technology.”).

available.”¹⁷ A hypothesized and unsupported “revenue opportunity” from video, therefore, has no proper place in the impairment analysis.

Third, the 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 incumbent local exchange carrier’s (“ILEC”) operations support systems 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 ILEC.¹⁸ 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 are phased out.

Moreover, the *TRO* establishes a policy approach of bifurcating UNE obligations between the ILEC “legacy” network (e.g., copper loops) and the ILEC “new” network (e.g., fiber-to-the home).¹⁹ The Commission explains that its Section 706 obligation to ensure deployment of advanced telecommunications capability warrants different treatment of existing loop plant and new loop plant.²⁰ The *TRO* asserts that, consistent with the “at a minimum”

¹⁷ *TRO*, ¶ 100 (emphasis added).

¹⁸ Emergency Joint Petition for Stay by the Choice Coalition, CC Docket Nos. 01-338, 96-98, 98-147 (Aug. 27, 2003); Letter from Kimberly Scardino, MCI, to Marlene Dortch, FCC, CC Docket Nos. 01-338, 96-98, 98-147, WC Docket Nos. 03-167, 03-138 (Sept. 5, 2003).

¹⁹ The Commission notes, “excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology.... At the same time, continued unbundling for the network elements provided over current facilities appears to be necessary in many areas under section 251 of the Act, especially with respect to mass market customers.” *TRO*, ¶ 3.

²⁰ “Therefore our obligation to encourage infrastructure investment tied to legacy loops is more squarely driven by facilitating competition and promoting innovation. Because the incumbent LEC has already made the most significant infrastructure investment, *i.e.*, deployed the loop to

statutory language, implementation of Section 706 broadband deployment goals supports this bifurcated approach.²¹

As EarthLink noted in its reconsideration petition, the *TRO*, however, fails to follow through on that approach with respect to line sharing. As the *TRO*'s policy explains, the legacy rules should continue to apply to the copper loop and there is no basis, or explanation in the *TRO*, to conclude that the HFPL (of the copper loop) should somehow be treated differently. Indeed, since the Commission has weighed broadband deployment goals so heavily, the case is even stronger for maintaining the line sharing UNE. Line sharing affirmatively promotes the Section 706 mandate by allowing competitive local exchange carriers ("CLECs") to lease the HFPL of existing copper loop, to deploy the CLECs' own DSLAM facilities, and to offer competitive DSL services on a wholesale basis to ISPs. This alternative to the ILEC's wholesale DSL offerings, in turn, allows ISPs to offer competitive broadband information services to consumers,²² including at speeds and technical characteristics that may be different from the ILECs.

the customer's premises, we seek, through our unbundling rules to encourage both intramodal and intermodal carriers (in addition to incumbent LECs) to enter the broadband mass market and make infrastructure investments in equipment. In addition, we seek to promote the deployment of equipment that can unleash the full potential of the embedded copper loop plant so that consumers can experience enhanced broadband capabilities before the mass deployment of fiber loops." *TRO*, ¶244.

²¹ *TRO*, ¶¶ 172-177.

²² Wholesale DSL provisioning to ISPs will "stimulate the development and deployment of broadband services to residential markets in furtherance of the Commission's mandate to encourage the deployment of advanced telecommunications capability to all Americans." *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order*, 14 FCC Rcd. 19237, ¶20 (1999).

While the *TRO* properly recognizes the need to maintain UNE access to the legacy local loop,²³ the *TRO* provides no basis to deny access to the HFPL of the legacy local loop. To the contrary, the Commission acknowledges that there are no alternatives to the local loop and that the competitive provision of DSL transmission services has fostered both facilities-based telecommunications competition as well as information services competition.²⁴ Only time will tell whether declining to regulate “new” fiber ILEC networks spurs investment as the Commission hopes; however, eliminating access to legacy facilities that provide broadband services today is directly contrary to stated broadband goals.

III. BOC Objections to the Line Sharing UNE Are Not Valid

In a recent *ex parte* presentation,²⁵ USTA and the BOCs wrongly claim that reinstatement of the line sharing UNE would be illegal in light of the D.C. Circuit’s holding in *USTA I*.²⁶ What the Court faulted the Commission for in *USTA I* – the failure to take into account the presence of cable modem service in the broadband marketplace -- can be addressed fully, using the same framework and factual conclusions developed in the *TRO*. Notably, the court did not compel a particular outcome but rather only required the Commission to consider how cable might or might not affect the Commission’s analysis.

While cable might have theoretically been relevant under an impairment analysis if it offered wholesale access to CLECs, it is clear that cable makes no such offering in the marketplace today. As the Commission found, “[t]he record indicates that no third parties are

²³ *TRO*, ¶ 248.

²⁴ *Id.*, ¶233.

²⁵ Letter of Michael Kellogg to Chairman Michael Powell, CC Dkt. No.s 01-338, 96-98, 98-147 (Aug. 18, 2004).

²⁶ USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002) (“*USTA I*”).

effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market.”²⁷

Thus, under an impairment analysis, the only remaining relevance of cable’s deployment would be as evidence of a lack of barrier to entry for CLECs to build competing facilities to the incumbent LEC. However, the Commission’s impairment framework recognizes that evidence of intermodal alternatives has its limits: “We may give less weight to intermodal alternatives that do not contribute to the creation of a wholesale market in accessing the customer or do not provide evidence that self-deployment of such access is possible to other entrants.”²⁸ In the case of cable, the existence of cable deployment does not diminish the fact that CLECs face strong barriers to entry. As the Commission has found, cable is in a unique position dissimilar to CLECs because cable has “first-mover advantages and scope economies not available to other new entrants.” Thus, the presence of cable modem services in the retail broadband market is not determinative for the impairment analysis of line sharing.²⁹

Therefore, the Commission has both the authority and the obligation to reinstate line sharing in light of the facts showing that the impairment analysis offered in the *TRO* is no longer valid. As the D.C. Circuit has explained, “changes in factual or legal circumstances may impose

²⁷ *TRO*, ¶ 233. Similarly, the Commission has also concluded that cable operators do not provide transmission service at wholesale: “[n]one of the foregoing business models by which cable operators provide cable modem service appears to include the offering of any transmission service by a cable operator to an ISP or other information service provider.” *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) (subsequent history and footnotes omitted).

²⁸ *TRO*, ¶ 98.

²⁹ *Id.*, ¶ 98.

upon an agency an obligation to reconsider a settled policy or explain its failure to do so.”³⁰

Indeed, it is the holding of the *USTA II* court that the Commission (not the court) has exclusive authority to examine the facts and render a decision of impairment,³¹ and to determine that line sharing should be reinstated. Despite the ILEC’s suggestions, the Court did not obviate the Commission’s jurisdiction to do so,³² nor did the court substitute itself as fact-finder or decision-maker for purposes of the impairment test.³³

³⁰ Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992). *See also*, Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752, 767 (6th Cir. 1995) (“where the factual assumptions which support an agency rule are no longer valid, agencies ordinarily must reexamine their approach”).

³¹ *USTA II*, 359 F.3d at 565 (“§251(d)(2) instructs ‘the Commission’ to ‘determine[]’ which network elements shall be made available to CLECs on an unbundled basis”).

³² Illinois Public Telecommunications Ass’n v. FCC, 123 F.3d 693, 693 (D.C. Cir. 1997) (“Thus we have vacated FCC rules even when we have ‘not foreclosed the possibility that the Commission may develop a convincing rationale’ for re-adopting the same rule on remand,” *citing*, Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1173 (D.C. Cir. 1994). In this case, the *USTA I* court expressly held open the possibility of FCC reinstatement of the line sharing UNE. *USTA I*, 290 F.3d at 429 (“[o]bviously any order unbundling the high frequency portion of the loop should also not be tainted by the sort of error . . .”).

³³ Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (“Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.”); Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985) (“The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on that inquiry.”); SEC v. Chenery Corp., 318 U.S. 80, 88 (1943) (“a judicial judgment cannot be made to do service for an administrative judgment”).

Conclusion

For the foregoing reasons, and for the reasons developed in the EarthLink petition for reconsideration and subsequent filings, EarthLink urges the Commission to reinstate the line sharing UNE.

Respectfully submitted,

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