

**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

REPLY COMMENTS OF EARTHLINK, INC.

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Summary

EarthLink urges the Commission to reinstate the line sharing UNE. Line sharing represents perhaps the best opportunity for the Commission to encourage facilities-based competition in both the broadband and the voice markets. Indeed, as commenters have pointed out, line sharing is the means for transition from circuit-switched to IP-based competitive services that will constrain pricing of the incumbent local exchange carriers (“LECs”) and cable operators as well as offer an array of new service choices for consumers. Line sharing has offered demonstrable benefits to consumers and will continue to do so.

The Commission can and should answer fully the Court’s concerns regarding line sharing unbundling raised by the *USTA I* case. The presence of retail competition from cable modem services, in this case, does not diminish the impairment of competitive LECs because cable does not offer wholesale broadband access and, with cable’s first-mover advantages, the presence of cable does not indicate a lack of barriers of entry. These are determinations the Commission has already made, which have not been questioned by the *USTA II* decision. Perhaps more importantly, and as the majority of Commissioners agree, the benefits of a line sharing UNE bring, in the words of the *USTA I* court, a “significant enhancement of competition” to the current broadband marketplace of monopoly or, at best, duopoly. Not only does line sharing represent a significant competitive option for facilities-based voice and broadband transport competition, it does not retard incumbent LEC incentives to build fiber networks since line sharing uses the existing copper loops. Moreover, the presence of line sharing, in turn, offers a competitive option for Internet Service Providers (“ISPs”) that, in turn, reduces prices and enhances service choices for consumers of retail broadband, in furtherance of the goals of Section 706 of the Act.

Finally, EarthLink reiterates that the factual predicates underlying the decision to eliminate the line sharing UNE now no longer hold true, especially given the exit of major UNE-P providers from the market following the *USTA II* decision. The speculative prospect of future VoIP services does not represent a revenue opportunity that changes that outcome, or that can be relied upon in an impairment analysis.

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Introduction

EarthLink, Inc. (“EarthLink”), by its attorneys and in response to comments filed on the *UNE NPRM*¹ in the above-referenced proceedings, files these reply comments to urge the Commission to reinstate line sharing as an unbundled network element (“UNE”). EarthLink notes that several commenters – ALTS, et. al, and Covad -- support the reinstatement of the line sharing UNE. EarthLink agrees. The facts and circumstances underlying the TRO decision have changed and the Commission has an obligation to further broadband deployment by reinstating the line sharing UNE. Those commenters that oppose a line sharing UNE – BellSouth and Ciena – have provided no salient basis for their views.

Discussion

I. Line Sharing Should Be Reinstated Consistent with the *USTA I* and *II* Decisions.

BellSouth argues that “[t]he Commission should decline any invitation to revisit the Commission’s prior unbundling decisions such as broadband and line sharing, which have been

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

affirmed by the D.C. Circuit.”² This position is untenable, as EarthLink described in its comments, because the major predicates underpinning the decision not to retain a line sharing UNE are no longer true.³

Moreover, EarthLink respectfully submits that the *USTA I* court did not proscribe the reinstatement of line sharing. Rather, the court found the Commission’s analysis lacking in, at most, two respects: first, the court found that the Commission had “completely failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite);”⁴ and, second, the court admonished that the Commission may not impose an unbundling obligation “where it had no reason to think doing so would bring on a significant enhancement of competition.”⁵ Both matters may now be addressed by the Commission consistent with the court’s rulings.

A. The Presence of Cable in the Retail Broadband Market Does Not Diminish the Fact of Impairment For Line Sharing.

As explained in EarthLink’s comments, the inclusion of the intermodal alternative into the impairment analysis, in this case cable modem service, does not diminish a finding of impairment in any manner. As the *TRO* explained, “[i]n appropriate circumstances, evidence of intermodal alternatives informs our judgment on the ‘impair’ factors described above Specifically, we will consider whether these intermodal alternatives permit a requesting carrier to serve the market, either through self-provisioning or by obtaining capacity on a wholesale

² Comments of BellSouth Corp. at 3 (Oct. 4, 2004).

³ *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (“changes in factual or legal circumstances may impose upon an agency an obligation to reconsider a settled policy or explain its failure to do so”); *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”).

⁴ *USTA I*, 290 F.3d at 428.

⁵ *USTA I*, 290 F.3d at 429.

basis.”⁶ Applying the intermodal alternative test – self-provisioning or wholesale access – to cable modem service is an endeavor the Commission has already engaged in, and one that the *USTA II* court chose not to challenge.⁷

First, with respect to the wholesale access factor, 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 effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market.”⁸ 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.⁹ However, 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

⁶ *TRO*, ¶ 97.

⁷ *USTA II*, 359 F.3d at 572-573 (“we observe that the Commission expressly stated that such alternatives are to be considered when evaluating impairment. . . . we reaffirm *USTA I*’s holding that the Commission cannot ignore intermodal alternatives.”).

⁸ *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). This decision is also consistent with the *TRO* holding (¶443) (again, left intact by *USTA II*) that evidence of cable deployment of switching does not diminish an impairment finding “especially since these intermodal alternatives are not generally available to new competitors.”

⁹ *TRO*, ¶ 97.

such access is possible to other entrants.”¹⁰ In the case of cable the Commission has found that it is in a unique position dissimilar to CLECs because cable has “first-mover advantages and scope economies not available to other new entrants.”¹¹ Thus, the presence of cable modem services in the retail broadband market does not diminish a finding of impairment.¹²

Indeed, the record evidence does not support a finding that the presence of cable and DSL services in the retail broadband market create competition sufficient in retail broadband to obviate the need for additional intramodal competition through line sharing in the market for wholesale broadband transport. To be sure, the evidence shows just the opposite: a state of insufficient competition and the predominance of cable and DSL in the retail market tending to monopoly and duopoly.¹³

Initially, it should be noted that a proper finding of competition in a given market depends on first defining the relevant product and geographic scope of the market,¹⁴ and then on

¹⁰ *TRO*, ¶ 98.

¹¹ *Id.*, ¶ 98.

¹² As ALTS, at al., noted, “the availability of a single intermodal competitor that has no intention of making its facilities available at wholesale to competitors cannot be deemed to satisfy the impairment standard.” Comments of ALTS, et al., at 51 (Oct. 4, 2004).

¹³ This position is entirely consistent with the holdings of the *USTA I* court. In *USTA I*, the court did make a finding of robust competition in the broadband market or even find that there was sufficient competition to support a finding of non-impairment. Indeed, it is not the role of an appellate court to make such findings. Rather, what the court held was that the Commission had entirely failed to *consider* intermodal competition in its impairment analysis, and it also took note of the Commission’s Section 706 reports indicating a level of competition in broadband. *USTA I*, 290 F.3d at 428-429. Thus, it is for the Commission, not the court, to determine whether competition is sufficient. As discussed below, the Commission’s Section 706 Reports as well as other evidence shows that there is insufficient competition in the retail broadband market, as well as the wholesale broadband transport market.

¹⁴ “The first step in assessing what regulatory requirements are appropriate for incumbent LEC-provided broadband services is to define and analyze the relevant markets in which incumbent LECs provide these services.” *In the Matter of Review of Regulatory Requirements for*

the observation of facts that comport with the relevant market definitions. Anecdotal information, and selective presentation of facts, have no place in a proper market analysis. Unfortunately, however, the incumbent LECs have failed to define the relevant product markets, both the retail broadband market and the wholesale broadband transmission market, or to properly define the correct geographic scope of the market, which FCC precedent would indicate would be “local.”¹⁵

Moreover, what facts are available demonstrate that the Commission cannot conclude that the broadband market faced by end users and ISPs is sufficiently competitive. For example:

- “The record indicates that no third parties are effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market.” *TRO*, ¶ 233.
- According to FCC data, fixed wireless and satellite hold insufficient market share (just 1.3%) to be considered serious competition to the incumbent LEC or cable operator in any relevant market.¹⁶ Even EchoStar and DirecTV have stated to the Commission that “The two companies’ current broadband offerings are expensive ‘niche’ products that are hampered by several constraints, do not even satisfy the Commission’s definition of an ‘advanced service,’ and have attracted fewer than 150,000 subscribers combined,” and, “satellite broadband today is not fully comparable to cable modem and DSL, leaving many Americans without a true broadband alternative.”¹⁷

Incumbent LEC Broadband Telecommunications Services, Notice of Proposed Rulemaking, 16 FCC Rcd. 22745, ¶ 17 (2001).

¹⁵ *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd. 6547, ¶ 74 (2001) (“[t]he relevant geographic markets for residential high-speed Internet access services are local”).

¹⁶ High-Speed Services for Internet Access: Status as of December 31, 2003, Chart 2 – High-Speed Lines by Technology (rel. June 8, 2004) (“*FCC June 2004 High-Speed Report*”); *see also*, *TRO*, ¶ 231 (“The record indicates that, at present, fixed wireless and satellite services remain nascent technologies, with limited availability, when used to provide broadband services to the mass market.”).

¹⁷ *In the Matter of Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation*, Hearing Designation Order, 17 FCC Rcd. 20559, n. 568 (2002) (quoting applicants’ reply).

- Broadband over power lines (“BPL”) is not a significant entrant in either retail or wholesale markets.¹⁸ In a May 2004 survey of alternative broadband services, Verizon was able to list only two commercial roll-outs of BPL, at least one of which was not in Verizon territory.¹⁹

Even if retail cable modem services were included in the relevant market for wholesale broadband transport (which they should not be) and/or providers of retail cable modem services were considered participants in the relevant wholesale broadband transport market (which would also be incorrect), the market still would not be competitive; rather the market so defined is at best a duopoly in which each duopolist holds market power.²⁰

¹⁸ *TRO*, ¶ 232 (“Finally, we note that other technologies that can substitute for loops in providing narrowband and broadband service are currently under development. For example, some companies are experimenting with delivering narrowband voice service via power lines. Such technologies have not been deployed beyond an experimental basis (*e.g.*, technical trials) at this time.”)(footnote omitted).

¹⁹ “Competition in the Provision of Voice Over IP and Other IP-Enabled Services,” CC Dkt. No. 04-36, at A-13 (filed May 28, 2004) (referencing BPL roll-outs in Virginia and Ohio).

²⁰ “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) (“*Merger Guidelines*”) (“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 . . .”). The Commission has held that “both economic theory and empirical studies suggest that a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market.” *In the Matter of 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620, ¶ 289 (2003); *see, In the Matter of Personal Communications Industry Ass’n*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶¶ 22, 23 (1998) (declining to find the CMRS marketplace sufficiently competitive where some of six potential competitive PCS licensees may not have begun to offer service).

- For “a typical local broadband market, the HHI ranges between approximately 5000 and 5400. The above figures indicate that the typical broadband internet market is very highly concentrated.”²¹
- Commission statistics show that 14.9% of U.S. zip codes are served by (*i.e.* receive at least a single high-speed line over any technology at any price and any quality level) just one provider and another 17.1% are served by just two providers.²²
- As of December 31, 2003, ADSL and cable accounted for 91.9% of all high-speed lines in the U.S. and for 97.5% of all high speed lines in the residential and small business market.²³ Of those ADSL lines, incumbent LECs have a 95.0% market share, with competitive LECs accounting for only 5.0%.²⁴
- Expert economic analysis shows that the market tends to monopoly or duopoly, and that “duopoly is much more likely to lead to monopoly behavior. Game theory models show that when markets are occupied by a relatively small number of competitors, performance can suffer. In many models a competitive result requires several carriers to be in the market. The price cost margin in the standard Cournot model of oligopoly interaction is inversely related to the number of

²¹ *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules, Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd. 6722, ¶ 123 (2003). The Herfindahl-Hirschman Index, or HHI, a well-accepted measure of market concentration used by the U.S. Department of Justice and the Federal Trade Commission, is described at Section 1.5 of the *Merger Guidelines*. The HHI score is the sum of the squares of the market shares of each platform. The index divides the spectrum of market concentration into three categories: “unconcentrated” for markets with an HHI of less than 1,000; “moderately concentrated” for markets with HHI between 1,000 and 1,800; and “highly concentrated” for markets with an HHI above 1,800. *Merger Guidelines*, § 1.5. We note that the FCC data does not include non-incumbent LEC ADSL on a state-by-state basis. However, if included, it would be unlikely to change the HHI analysis in any significant way since non-incumbent LEC ADSL comprises only 5% of ADSL nationally. In fact, on a national level, with 5% non-incumbent LEC ADSL, 28.7% incumbent LEC DSL, 58% cable, and 8% “other,” the HHI is 4,312, which is still a very highly concentrated market. *FCC June 2004 High-Speed Report*, Table 5 – High-Speed Lines by Type of Provider as of December 31, 2003.

²² *FCC June 2004 High-Speed Report*, Table 12 – Percentage of Zip Codes with High-Speed Lines in Service.

²³ *FCC June 2004 High-Speed Report*, Table 1 – High Speed Lines and Table 3 – Residential and Small Business High Speed Lines.

²⁴ *FCC June 2004 High-Speed Report*, Table 5 – High-Speed Lines by Type of Provider as of December 31, 2003.

competitors. In other words, a duopoly in the broadband service market is not likely to perform competitively.”²⁵

- In several SBC states, monopoly or duopoly market power exists in many communities. For example, according to FCC data, in Arkansas, Kansas, Missouri, and Nevada, 40% or more of the zip code areas are served by just one or two providers.²⁶ It should be kept in mind that this percentage represents only the number of zip codes in a state with at least one high-speed line in service at any price, over any technology, at any level of quality. Accordingly, they likely overstate the level of competition (understate the extent of monopoly and duopoly market power) by including zip codes where one or more providers provides very few if any lines that are comparable in speed, price, or quality to the SBC-ASI DSL service.

Even where the monopoly has been reduced to a duopoly, incumbent LECs are a significant player:

- A recent study by the Leichtman Research Group shows that incumbent LEC ADSL exceeded cable in net adds for the First Quarter, 2004.²⁷
- The Pew Internet & American Life Project confirms that “DSL now has a 42% share of the home broadband market” compared with cable’s 54% share. According to the Pew Study, fixed-satellite and wireless providers captured just 3% of the market. The Pew Study also confirms the FCC data that 17% of consumers are served by just one last mile broadband provider.²⁸ Thus, incumbent LECs, including Verizon, are now roughly equal partners in the broadband duopoly/monopoly.
- According to the FCC, ADSL leads cable in several states. For example, SBC’s ADSL in California leads cable in market share: ADSL has 49.6% and cable has 41.0% of the market for high-speed lines.²⁹ In addition, the FCC’s data shows

²⁵ Declaration of Dr. Daniel Kelly, HAI, at 12, *attached to*, Comments of WorldCom, Inc., CC Dkt. No. 01-337 (March 1, 2002).

²⁶ *FCC June 2004 High-Speed Report*, Table 13 – Percentage of Zip Codes with High-Speed Lines in Service as of December 31, 2003.

²⁷ “A Record 2.3 Million Add Broadband in First Quarter of 2004,” Leichtman Research Group Press Release (May 11, 2004). This study also confirms that Covad, the only competitive provider of broadband among the top twenty providers, has approximately 5.3% of the DSL market share. *Id.*

²⁸ Pew Internet Project Data Memo, at 2 and 6 (April 2004), *found at* http://www.pewinternet.org/pdfs/PIP_Broadband04.DataMemo.pdf .

²⁹ *FCC June 2004 High-Speed Report*, Table 7 – High-Speed Lines By Technology as of December 30, 2003.

that ADSL deployment leads cable modem deployment in the BellSouth state of Georgia by almost 10%.³⁰

Moreover, while the Commission's precedent suggests that the relevant geographic market is local,³¹ there is no adequate data in this record on broadband service competition at the local level. As indicated by the FCC's data cited above, however, the state of broadband competition varies widely from one locality to another. Indeed, in the Commission's still on-going proceeding addressing the appropriate regulatory classification for wireline broadband services, the State of California and the California Public Utilities Commission entered into the record the following findings:

- “In California, SBC, and other incumbent LECs, continue to be the sole providers of broadband transmission service to nearly half of all residential customers in the state who have access to broadband service.”³²
- “California does not believe that the current state of intermodal broadband competition can be described as effective, price constraining competition. At best, there currently is a duopoly of the incumbent LEC and the cable modem provider. But for many customers, *i.e.*, residential customers who do not have access to cable broadband and the majority of small and medium sized business customers, the incumbent LEC is the sole provider of broadband services. As a result of active regulatory actions in California, competitive LECs were able to provide DSL services in California earlier than elsewhere. However, in the last two years, much of that competition has evaporated as competitors offering DSL services in competition with the incumbent LEC have exited the market. While there were three major wholesale providers of DSL service in competition with

³⁰ *FCC June 2004 High-Speed Report*, Table 7 – High-Speed Lines By Technology as of December 30, 2003.

³¹ *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee, Memorandum Opinion and Order*, 16 FCC Rcd. 6547, ¶ 74 (2001) (“[t]he relevant geographic markets for residential high-speed Internet access services are local”).

³² Reply Comments of the People of the State of California and the California Public Utilities Commission, CC Docket Nos. 02-33, 95-20, 98-10, at 2 (filed July 1, 2002).

Pacific Bell/SBC in 1997, currently only one major non-ILEC provides DSL service in California, and SBC/Pacific owns equity in that company.”³³

- “Forty-five percent of California’s population with broadband access (including vast majority of San Francisco, San Jose, Long Beach, Oakland, and Stockton) can only get DSL service and cannot get cable modem service.”³⁴
- “According to an internal study by the CPUC staff, 35% of Californians live in communities where DSL is the only broadband service choice, while 21% of Californians live in communities that have neither cable modem nor DSL service. Only 30% of the state’s population live in communities where both DSL and cable modem services are available. Because of DSL’s lower upgrade cost and faster upgrade time frames, incumbent LECs may continue to dominate in providing broadband services in California.”³⁵
- “Currently, one of three California residents live in areas where DSL service is the sole means of gaining broadband transport to an ISP. The incumbent LECs are the dominant, and in many cases, the exclusive provider of broadband service in California. Certain customers in discrete metropolitan areas may also obtain transport to the Internet from cable operators via a cable modem transmission service over cable facilities; however, in California, primarily because of the substantial cost in upgrading cable facilities to provide cable modem service, such service is limited to certain suburban areas with spotty coverage in downtown urban areas. Other transport methods of accessing the Internet use wireless, broadcast, and unlicensed spectrum technologies. These technologies for transport to the Internet, however, are not widely available to California customers as a viable alternative to either DSL service or cable modem service.”³⁶

California is not an isolated case. BellSouth’s market power is a matter of adjudicated fact by two state public service commissions. Specifically, in November 2003, the Georgia Public Service Commission found that “BellSouth possesses market power in Georgia’s high speed internet market,”³⁷ due in part to the finding that “BellSouth’s [market] power in having

³³ Reply Comments of the State of California and the California Public Utilities Commission, CC Dkt. 01-337 at 12 (filed April 22, 2002) (footnotes omitted).

³⁴ *Id.* at 17.

³⁵ *Id.*, at 14-15. *See also, id.*, Appendix A (pie chart of DSL, cable and other in California).

³⁶ Comments of California, CC Dkt. 02-33 at 5-6 (filed May 3, 2002).

³⁷ *Petition of MCI Metro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration*, Georgia Public Service Commission, Order on Complaint, Docket No. 11901-U, at 6 (Nov. 13, 2003).

an overwhelming majority of DSL lines in Georgia is greater than it would be if DSL was not expanding its lead over cable in the relevant market.”³⁸ Similarly, in December 2002, the Louisiana Public Service Commission found that BellSouth was the dominant DSL provider in the state.³⁹ Thus, given the more localized finds of several states, it can hardly be appropriate for the Commission to find competition in local markets, including those of Verizon, without specific facts that verify the state of competition in those markets.

Further, even if one were to move from a local geographic market and conduct an HHI analysis using FCC data on either a national or a state-by-state basis, the broadband market (which includes all broadband lines, regardless of whether they are offered at wholesale to independent ISPs) is currently far more concentrated than a market with an HHI score of 1,800, which is the score the Department of Justice considers indicative of a “highly concentrated” market:

³⁸ *Id.*, at 14.

³⁹ *In re: BellSouth’s Provision of ADSL Service to End-users over CLEC Loops*, Louisiana Public Service Commission, Order R-26173, at 7 (Dec. 18, 2002).

HHI Analysis of the Broadband Market in SBC States Using FCC Data⁴⁰

State	ADSL (%)	Cable (%)	Other (%)	HHI
Nationwide	33.7	58.3	8.1	4,593.6
Arkansas	38.2	54.6	7.2	4,496.3
California	49.6	41.0	9.5	4,226.2
Connecticut	37.7	58.6	3.8	4,864.8
Illinois	42.8	45.4	11.8	4,031.4
Indiana	30.9	61.3	7.8	4,773.9
Kansas	23.9	70.0	6.1	5,504.7
Michigan	20.6	72.0	7.4	5,663.7
Missouri	41.5	50.5	8.0	4,338.7
Nevada	24.7	*	*	Not known
Ohio	31.1	61.1	7.8	4,760.0
Oklahoma	37.0	*	*	Not known
Texas	40.1	53.0	6.9	4,465.6
Wisconsin	24.6	68.4	7.0	5,337.5

HHI Analysis of the Broadband Market in Verizon States Using FCC Data

State	ADSL (%)	Cable (%)	Other (%)	HHI
Delaware	*	*	4.8	Not known
District of Columbia	50.1	*	*	Not known
Maine	17.9	*	*	Not known
Maryland	26.5	66.7	6.9	5,193.1
Massachusetts	25.0	69.4	5.5	5,477.5
New Hampshire	15.8	79.4	4.8	6,577.5
New Jersey	22.8	70.7	6.6	5,554.1
New York	22.0	70.6	7.4	5,522.3
Pennsylvania	29.3	64.0	6.7	4,998.9
Rhode Island	*	*	3.7	Not known
Virginia	20.2	72.3	7.6	5,684.5
West Virginia	*	77.3	*	Not known

* Data withheld by FCC to maintain firm confidentiality

⁴⁰ State data are based on *FCC June 2004 High-Speed Report*, Table 7 – High-Speed Lines By Technology as of December 30, 2003, and national data are based on *FCC June 2004 High-Speed Report*, Chart 2—High-Speed Lines by Technology.

As the HHI analysis indicates, even when retail broadband lines are included, the market is extremely concentrated, which strongly indicates the absence of effective competition.

B. Line Sharing Significantly Enhances Competition in Broadband and Voice Telephony.

In responding to the court and on review of the record evidence, the Commission should have every “reason to think” that the line sharing UNE provides “a significant enhancement of competition.”⁴¹ It is a matter of record, and as EarthLink explained in its comments, a majority of the Commissioners clearly agree that line sharing contributes significantly to broadband competition. In addition, the record includes the specific work of Covad’s economic experts on this very issue, showing that “gains in consumer surplus for residential and small business customers from the FCC line sharing rules for the next four years (2003-2006) are at least . . . over \$ 1.6 billion.”⁴²

As ALTS pointed out, line sharing has a number of specific positive contributions to both the broadband market and the market for voice services. ALTS has provided specific examples of smaller competitive LECs, including members of the CHOICE Coalition, that rely on line sharing to deliver broadband access to rural areas: “unless the Commission wishes to redline the nation – ensuring broadband services are only available to consumers and small businesses in major urban areas – it must reinstate line sharing.”⁴³ Further, as both ALTS and Covad pointed out: “[i]n the wake of the UNE-P fallout resulting from the D.C. Circuit’s decision in *USTA II*, it is not clear what other pathway exists to robust residential voice competition apart from VoIP

⁴¹ *USTA II*, 359 F.3d at 429.

⁴² Declaration of Steven Siwek and Su Sun, CC Dkt. No. 01-338, 98-147, and 96-98, ¶ 135 (November 2002), *attached to*, Letter of Jason Oxman, Covad, to Magalie Salas, Secretary, FCC, CC Dkt. No. 01-338, 98-147, and 96-98 (November 20, 2002).

⁴³ Comments of ALTS, et al., at 46-47 (Oct. 4, 2004).

services offered over competitive facilities-based broadband networks;”⁴⁴ “line sharing is the most practical and reliable method of providing a transition from narrowband voice telephone to VOIP-based broadband telephony;” and “[l]ine sharing also is not dependent on [ILEC] hot cuts.”⁴⁵

Line sharing also greatly improves the ability of independent ISPs to innovate and offer a plethora of information services to the American public. With a line sharing competitive LEC as partner, ISPs and application providers can rely on the fact that the competitive LEC does not have entrenched economic interests to protect, such as interests against ISP voice or video service deployment. The elimination of line sharing, however, forces ISPs like EarthLink to rely even more heavily on the wholesale DSL services of their major competitors in the retail broadband market, the incumbent LECs. With the inherent incentives and enhanced ability to discriminate against independent ISPs, incumbent LECs are granted an upper hand in the retail broadband market vis-à-vis other ISPs, because access to customers then becomes more tenuous and subject to incumbent LEC demands, reasonable or not. This, in turn, limits investment of ISPs and applications providers in new and possible “killer” applications. As the FCC noted in the *Advanced Services Second R&O*, the advanced services deployment goals of the 1996 Act are facilitated when ISPs have access to broadband transport “at the lowest possible price” so that “consumers ultimately benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services.”⁴⁶

⁴⁴ Comments of Covad Communications Company, at 52 (Oct. 4, 2004).

⁴⁵ Comments of ALTS, et al. at 50 (Oct. 4, 2004)

⁴⁶ *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order*, 14 FCC Rcd. 19237, ¶ 20 (1999) (“*Advanced Services Second R&O*”) (emphasis added). As the Commission explained to the D.C. Circuit, wholesale DSL arrangements to ISPs, “in turn, would allow ISPs to package affordable DSL-based-Internet

Further, in the absence of regulation, incumbent LECs have every incentive to raise rates of rival ISPs or otherwise to discriminate against unaffiliated ISPs, because the incumbents actively compete against ISPs through their affiliates. The ability of the line sharing LEC to act as a “spoiler” to inflated wholesale broadband access rates provides a market-based incentive for all broadband components to be priced closer to competitive levels, which ultimately redounds to the American consumer’s benefit. Thus, just as the Commission has noted the importance of furthering Section 706 goals in its impairment analysis,⁴⁷ line sharing plays a key role to broadband ISP services competition that is yet another basis for reinstatement of the line sharing UNE.

II. VoIP via UNE-L is Too Speculative to be Considered in the Impairment Analysis.

While recognizing that UNE-P providers are no longer a realistic opportunity, Ciena asserts, however, that voice over IP service would provide competitive LECs with the necessary voice revenue stream to overcome the costs of the purchase of the whole loop.⁴⁸ EarthLink believes that VoIP represents a potential revenue stream that is far too speculative at this time to be given much weight, if any, in an impairment analysis. Current estimates of VoIP deployment vary but indicate that it is not yet a fully developed or deployed service,⁴⁹ with total U.S.

services to residential and business end-users, and advance the goal of Section 706 to encourage deployment of advanced telecommunications capability to all Americans.” Brief of the Federal Communications Commission, D.C. Cir. Case No. 00-1144, at 9 (filed Dec. 22, 2000) (FCC’s brief in support of the appeal of the *Advanced Services Second R&O*)

⁴⁷ *TRO*, ¶ 173 (FCC “will continue to weigh factors that may be relevant to a particular unbundling determination, but . . . will do so with an eye to the specific goals of the Act”).

⁴⁸ Comments of Ciena Corporation, at 11-12 (Oct. 4, 2004).

⁴⁹ Remarks of Michael K. Powell, Chairman, FCC, Voice on the Net Conference (October 19, 2004) (“the Yankee Group estimates that there will be 1 million VoIP subscribers by the end of 2004, up from just 131,000 last year”); “U.S. VoIP Ranking by Subscriber: Q2 2004,” *found at*, www.isp-planet.com/research/rankings/2004/voip_q22004.html (Oct. 18, 2004) (free VoIP service providers Skype and CallWave have 10.3 million customers, while pay VoIP services of

subscribership estimates varying widely. Indeed, current VoIP services are predominantly not a full-scale replacement of wireline local exchange services,⁵⁰ due to service quality issues, lack of a 911 service replacement, other issues.⁵¹ These services are likely to generate lower revenue opportunities than traditional local telephony service and are used primarily as much-cheaper substitute for long distance and international calling service. While the number of subscribers offered VoIP via a UNE-L platform is not known, it is substantially lower than VoIP deployment generally.⁵²

Moreover, the Commission has yet to settle such business-critical issues as the assessment of interstate and intrastate access charges, universal service charges, and the role of state and federal regulation, all of which could have a significant impact on the viability of any DSL-based VoIP offering. Such a speculative possibility of VoIP revenues does not meet the

Vonage, CableVision and Charter collectively have 421,000 subscribers. “As long as some major players are not reporting subscriber totals, growth, and churn, we will not know for certain how sound this business is.”; “Talk is Cheap Using Internet Long Distance,” Washington Post.com (Sept. 14, 2004) (“The number of VOIP users in the United States, now fewer than 1 million, is expected to soar in the next three years.”); “Residential VOIP Will Boom, Says Study,” lightreading.com/document.asp?doc_id+52620&print=true (May 12, 2004) (Sullivan and Frost study “predicts that the number of residential VOIP subscribers in the U.S. and Canada will rise from 100,000 last year to 12 million in 2007”); “Internet Phone-Service Firms Charge Less, Offer New Options,” Boston Globe (July 29, 2004) (“Though precise figures are hard to come by, analysts say the number of VoIP customers has grown to more than 1 million.”).

⁵⁰ Indeed, Covad points out that it will “trial in select markets next year” its “line-powered voice capability (LPV) which . . . will provide residential customers with POTS-replacement services augmented by VOIP-enabled advanced services bundled with DSL.” Comments of Covad Communications at 37 (Oct. 4, 2004).

⁵¹ “The Price of VoIP’s Thriftiness,” CNET News.com (July 19, 2004) (“If you have a home alarm system, need to dial 911, use TiVo or simply want your phone number included in the phone book, you’re likely to be out of luck” when moving from traditional phone service to VoIP) “Talk is Cheap Using Internet Long-Distance,” WashingtonPost.com (Sept. 14, 2004) (“Potential [VoIP] problems including not having a fully functioning 911 capability and losing service during a blackout, as well as the uncertain stability of the small companies and the VOIP’s main providers.”).

⁵² *TRO*, ¶ 99 (“actual marketplace evidence shows whether new entrants, as a practical matter, have surmounted barriers to entry in the relevant market”).

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 available.*”⁵³

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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⁵³ *TRO*, ¶ 100 (emphasis added).

CERTIFICATE OF SERVICE

I, Arista Salimi, state that copies of the foregoing “Reply Comments of EarthLink, Inc.” were submitted electronically to the FCC Secretary and sent via regular mail, this day, Tuesday, October 19, 2004, to the following:

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