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November 24, 2004

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

Re: *Ex Parte* Presentation – *Review of the Section 251 Unbundling Obligations of Incumbent LECs* (CC Docket Nos. 01-338, 96-98, 98-147); *Unbundled Access to Network Elements* (WC Docket 04-313)

Dear Ms. Dortch:

On November 23, 2004, Jennifer Phurrough and the undersigned, on behalf of EarthLink, Inc., met with Mr. Christopher Killian and William Scher of the Commission's Office of General Counsel regarding the above-referenced dockets. EarthLink discussed the points on the attached bullet sheet, which was distributed to Commission staff. In addition, EarthLink noted that the FCC's recent Section 271 broadband forbearance order related primarily to incentives of incumbent LECs to ensure future development of intermodal competition, but that, in assessing impairment and line sharing, the Commission's analysis should instead involve current market conditions. EarthLink noted that, in addition to promoting broadband access competition, a line sharing UNE order would also contribute to voice competition by enabling VOIP competition, especially if the FCC is not inclined to regulate extensively the facilities used for VOIP. EarthLink also noted that the question of contributions of line sharing to the competitive landscape is one of fact, and that a majority of the Commissioners have agreed line sharing has contributed to broadband competition. EarthLink stated that if the Commission finds that line sharing contributes to competition, that order would satisfy judicial review.

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

Respectfully submitted,

/s/

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

USTA I The Commission “failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite).” 290 F.3d at 428.

What the Court could have meant by this:

- Facilities competition could give CLECs another source to obtain access to end-users.
 - **But cable is not available to CLECs. TRO, ¶ 233.**
- Competition may possibly be evidence of lack of barriers to entry, i.e., CLECs can build their own networks.
 - **However, cable has “first mover” advantages. TRO, ¶ 98.**
- If some competition is available to consumers, then line sharing must deliver a public good, i.e., “bring on a significant enhancement of competition.” 290 F.3d at 429.
 - **Today’s wholesale broadband access market is not competitive.**
 - **Today’s retail broadband market is a duopoly, not a competitive market.**
 - **Line sharing enables VOIP competition.**

USTA II Balancing Test: “[E]ven in the face of some CLEC *impairment*, in light of evidence that unbundling would skew *investment incentives* in undesirable ways and that *intermodal competition* from cable ensures the persistent of substantial competition in broadband” the court held the Commission’s determination regarding line sharing was “reasonable.” 359 F.3d. at 585, *emphasis added*.

The Court on Investment Incentives:

- Commission based its decision on ability to use entire loop for voice, video and data, which “would offset the costs associated with purchasing the entire loop” and the ability of CLECs to “obtain broadband frequencies from other CLECs through line-splitting.” 359 F.3d. at 584.
 - **But loops can’t be used to offer video services with voice and data.**
 - **Elimination of UNE-P renders line splitting practically unavailable.**
- Line sharing increases investment incentives:
 - **Line sharing CLECs are facilities-based; they invest in their own equipment.**
 - **This enhances the level of competition and provides consumers with more variety and better prices.**

The Court on Intermodal Competition

- “Although noting that intermodal competition was not ‘dispositive’ in the impairment analysis, the Commission found that it lessened any competitive benefits associated with line sharing.” 359 F.3d. at 585.
 - **The Court did not make a finding of robust competition.**
 - **The Court found that FCC concluded that “at least *in the future*, line sharing is not essential to maintain robust competition in this market . . . ” 359 F.3d. at 585.**
 - **Competitive benefits of line sharing are clear in the record**
 - **Robust intermodal competition is not yet developed in today’s market.**