Edwin J. Shimizu
Director
Federal Regulatory Affairs

Verizon Communications
1300 I Street, NW • Suite 400W
Washington, DC 20005

Phone 202-515-2536
Fax 202-336-7858
edwin.shimizu@verizon.com

December 8, 2004

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Portals
Washington, DC 20554

Re: ***Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 96-98, & 98-147**

Dear Ms. Dortch:

Verizon has demonstrated previously that the elimination of mandatory line sharing has been strongly pro-competitive, as the Commission predicted in the *Triennial Review Order*. This letter responds to arguments made recently in *ex partes* arguing that the Commission should re-impose a mandatory line-sharing requirement despite the marked development of broadband competition since the requirement was eliminated.[1]

First, arguments by Covad and Earthlink are fundamentally flawed because they fail to take into account the vigorous intermodal competition in the broadband market. As the D.C. Circuit observed, "intermodal competition in broadband, particularly from cable companies, means that, even if 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 554, 580 (D.C. Cir. 2004). For this same reason, when vacating the *Line Sharing Order*, the D.C.

[1] *See* Ex Parte letter from Praveen Goyal, Assistant General Counsel for Government Affairs, Covad Communications Company, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, WC Docket No. 04-313 (filed Nov. 19, 2004) ("Covad Ex Parte"); Ex Parte letter from Mark J. O'Connor, Lampert & O'Connor, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, WC Docket No. 04-313 (filed Nov. 24, 2004) ("EarthLink Ex Parte"); Ex Parte letter from Thomas L. Welch, Chairman, Maine PUC, to Michael Powell, Chairman, FCC, WC Docket No. 01-338 (filed Dec. 1, 2004) ("Maine PUC Ex Parte").

Circuit rebuked the Commission for failing to consider intermodal competition when it created the line-sharing UNE. *See USTA I*, 290 F.3d 415, 429 (D.C. Cir. 2002).[2] The Commission simply cannot reasonably conclude that competitors are impaired when, as in the broadband market today, alternative facilities are "significantly deployed on a competitive basis." *Id.*, 290 F.3d at 422.

The Commission's own statistics show that more than 63 percent of residential and small business customers receiving 200 kbps service subscribe to cable modem, as opposed to just 34 percent that rely on DSL.[3] Of customers that receive more than 200 kbps in both directions, 85 percent use cable modem, while only 13 percent use DSL.[4] Simply put, local telephone companies are still secondary players in this competitive market; therefore, this is not a situation in which the *competitive context* — *i.e.*, the alternatives available *to consumers* — depends on CLEC access to incumbent LEC facilities. It would be arbitrary and capricious to regulate the second-place, non-dominant DSL providers more heavily than the dominant cable companies.

Turning a blind eye to the D.C. Circuit's clear holding, EarthLink claims that these alternative facilities — cable, wireless, satellite, and broadband over power line — are closed to unaffiliated ISPs or CLECs.[5] The premise of this argument is both factually untrue and legally irrelevant. As Verizon has repeatedly documented in these proceedings, EarthLink itself has agreements in place with such varied broadband transmission providers as Time Warner, Comcast, and Bright House — not to mention BellSouth, SBC, Qwest, and Verizon — to use their networks to reach its customers.[6] EarthLink is therefore in no position to complain that it cannot make use of facilities other than line-shared DSL.[7] For example,

---

[2] The D.C. Circuit reiterated this holding in *USTA II*. *See* 359 F.3d at 585 (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*").

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

[4] *See id.* at Table 4.

[5] EarthLink Ex Parte at 2.

[6] *See* EarthLink Form 10-K at 6; EarthLink, Inc., Form 10-Q at 13 (SEC filed Aug. 9, 2004).

[7] Moreover, even if cable companies and others were to sell their broadband transmission capacity only to their own affiliated ISPs, their capacity must nevertheless be treated as part of the same market as the broadband transmission services of telephone companies and would have to be taken into account in any impairment analysis. *See, USTA I*, 290 F.3d at 429 (vacating *Line Sharing Order* because the Commission "'cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network,'" such as over cable modem facilities (quoting *AT&T Corp. v. Iowa Utils. Bd*, 525 U.S. 366, 389 (1999)); *cf.*, *e.g.*, U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 1.31 (Apr. 1997) (relevant market includes "vertically integrated firms to the extent that such inclusion accurately reflects their competitive significance in the relevant market"); *see generally* Ex Parte Letter from Dee May, Assistant Vice President, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 01-337, *et al.* (filed Nov. 13, 2003)

Verizon has negotiated and developed a specialized wholesale arrangement that EarthLink had requested to provide broadband access to EarthLink customers – and Verizon did so even though no Commission rule required Verizon to provide that service. This illustrates that carriers and ISPs alike can negotiate commercial agreements to obtain the connectivity and features they desire.

Second, line sharing inevitably saddles incumbent LECs with significant costs without producing any meaningful offsetting gains for the overall broadband market or for consumers. These costs include not only the "tangled management inherent in shared use of a common resource," *USTA I*, 290 F.3d at 429, but also the concrete costs of maintaining systems to provision, accept orders, track, and bill multiple CLECs for line sharing services, and of training employees to manage all these systems and relationships while meeting the technical challenges of operating the network in a line-shared environment. None of these costs would be covered in a regime of line sharing with a regulated price set at or near zero.

EarthLink's suggestion that the many costs and disadvantages associated with line sharing might somehow be justified because CLEC DSL brings some sort of competitive benefit cannot be squared with the factual record in this proceeding. The overwhelming evidence in the record demonstrates that CLEC DSL has been competitively insignificant, and that the elimination of line sharing has benefited consumers and competition. The record demonstrates that line sharing accounts for less than 1 percent of mass-market broadband lines.[8] In view of this fact, the costs associated with mandatory line sharing produced no meaningful pro-competitive benefits.

Third, the elimination of line sharing, by contrast, has produced substantial consumer benefits, which would be lost if the Commission were to reverse course. Since the Commission announced the elimination of line sharing in February 2003, broadband competition has flourished and prices have fallen, thus refuting the dire predictions of EarthLink and Covad that competition would suffer and prices would rise. Relying on the de-regulatory promises made when the Commission announced its *Triennial Review Order*, Verizon has significantly increased the reach of its DSL services, investing more than $600 million and adding 10 million new DSL lines in 2003 alone, with plans to add 7 million more customers by the end of 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).[9] They have also expanded their broadband coverage, so that

---

(collecting authority and Commission precedent for including self-suppliers in the relevant market for transmission capacity).

[8] *See, e.g.*, Response of Verizon to Petitions for Reconsideration, CC Docket Nos. 01-338, *et al.* at 41-42 (filed Nov. 6, 2003).

[9] *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").

approximately 90 percent of U.S. households are now able to obtain a broadband connection from a provider other than their incumbent local telephone company, principally their cable company.[10]

Under these circumstances, the Commission cannot lawfully find impairment or reinstate mandatory line sharing as a UNE. Covad's and EarthLink's arguments to the contrary are meritless and cannot be squared with the record in these proceedings, which shows markedly increased broadband competition and deployment in the absence of line sharing.

Fourth, EarthLink also suggests without explanation that the elimination of UNE-P somehow affects the availability of line-splitting and therefore bears on the Commission's line-sharing decision.[11] In fact, however, the continued availability of unbundled loops preserves the opportunity for companies to negotiate line-splitting arrangements. Furthermore, the Commission did not even mention UNE-P in connection with its decision to eliminate line sharing, let alone posit the continued availability of UNE-P as a basis for its decision. Line sharing was eliminated out of due regard for intermodal competition and to avoid "skew[ing] competitive LECs' incentives toward providing a broadband-only service to mass market consumers, rather than a voice-only service or, perhaps more importantly, a bundled voice and xDSL service offering." *Triennial Review Order,* 18 FCC Rcd 16978, ¶ 261 (2003). Significantly, as discussed below, the advent of Voice-over-Internet-Protocol ("VoIP") gives CLECs a *greater* ability to provide a bundled voice and xDSL offering. And in any event, CLECs are free to negotiate commercial line-sharing arrangements with incumbents or others, as evidenced by the fact that Verizon currently has 12 interim contracts in place that permit unaffiliated parties, including Covad, to engage in line sharing despite the elimination of the line-sharing UNE and is actively negotiating long term agreements with several CLECs. Once again, commercial negotiations can give CLECs the connectivity and features they desire even in the absence of mandatory line sharing or of UNE-P.

Fifth, the fundamental premise underlying the Commission's decision not to reimpose mandatory line sharing – that "the increased operational and economic costs of a stand-alone loop . . . are offset by the increased revenue opportunities afforded by the whole loop" – is more true now than ever. *Id.* ¶ 258. VoIP now makes it much easier and less expensive for CLECs to provide those combined services because they need not invest in circuit switches and other related voice-specific hardware and support systems in order to earn voice revenues. By providing a new CLEC revenue stream that can be used to cover the costs of stand-alone loops, VoIP provides a strong reason not to reimpose mandatory line sharing. In fact, Covad itself recently underscored this increased revenue potential when it announced to investors that it is evolving from a DSL wholesaler to "a VoIP company."[12]

---

[10] *See* Castleton Decl. ¶ 6, filed as Attachment M to Verizon Oct. 4, 2004 Comments.

[11] EarthLink Ex Parte at 2.

[12] *Covad Is Evolving From a DSL Wholesaler to "a VoIP Company,"* Communications Daily, Dec. 1, 2004, at 8 (quoting Covad CEO Charles Hoffman).

Nevertheless, Covad complains that, while it has to pay both the recurring costs of purchasing access to a stand-alone loop to provide service and the initial nonrecurring costs of having a loop provisioned, "the incumbent LECs themselves provide mass market ADSL services using line sharing configurations, *avoiding these expenses*."[13] In fact, ILECs do not avoid the costs of obtaining and using a stand-alone loop because they have to recover the full cost of the loop, as well as the cost to install a DSLAM and connect it to the customer's loop; they simply earn more revenue from the loop by offering services beyond DSL. As the Commission expressly found in paragraph 260 the *Triennial Review Order*, "[*e*]*ach carrier faces the same loop costs* and, if it wishes, each can partner with another carrier to provide service over the HFPL alone or the low frequency portion of the loop alone as it wishes."

The effect of offering voice and data together on the same loop, as incumbent LECs typically do, is not to *avoid* loop expenses but rather to *recover* those expenses by offering additional services to produce additional revenues. This is especially important if the advent of VoIP means that the costs of the low-frequency portion of the loop will no longer be covered by circuit-switched voice services, as most state commissions assumed when setting rates for the high-frequency portion of the loop ("HFPL"). As the Commission correctly found, "*not* requiring the HFPL to be separately unbundled puts competitive LECs using only the HFPL in a more fair competitive position with respect to other competitive LECs and to the incumbent LECs." *Id.* (emphasis added). Because VoIP replaces circuit-switched voice service, reimposing line-sharing at near-zero cost as VoIP gains in popularity will exacerbate the "irrational cost advantage [of data-only CLECs] over competitive LECs purchasing the whole loop and over the incumbent LECs" that the elimination of line-sharing was designed to end. *Triennial Review Order* ¶ 260. With VoIP, CLECs can offer voice service without incurring any of the costs of investing in circuit switches or the infrastructure to support them.

Ultimately, Covad's own launch of a dedicated-loop ADSL product eviscerates its claim that data services cannot be used to cover the cost of an unbundled loop. Attempting to downplay this devastating fact, Covad observes lamely that these offerings are new, so that "it can hardly be predicted that they will assuredly replace the need for line sharing."[14] But these services can readily be used in conjunction with VoIP to generate additional revenues – and the fact that dedicated-loop DSL services are in fact being offered demonstrates that competitors are not impaired without access to line sharing. Given this plain lack of impairment, the Commission may not lawfully reimpose mandatory UNE access to the high-frequency portion of the loop.

---

[13] Covad Ex Parte at 3 (emphasis added).

[14] Covad Ex Parte at 4.

Covad also tries to confuse the picture by suggesting that the Commission's decision to eliminate line sharing somehow rested on exaggerated assumptions about the revenues that CLECs could generate from *video* over DSL.[15] In reality, however, the Commission never said that video revenues would be needed in order to make data service over an unbundled loop viable. The Commission noted "that there are a number of services that can be provided over the stand-alone loop, including voice, voice over xDSL (i.e., VoDSL), data, and video services," *Triennial Review Order* ¶ 258. The presence or absence of video revenues was simply not a decisive factor in the Commission's analysis. In any event, to the extent that DSL is not suitable for the provision of video service, that fact would simply provide all carriers with an added incentive to deploy fiber.[16] And the Commission has correctly found that CLECs are just as capable of deploying fiber infrastructure as incumbents.[17]

Finally, in another recent *ex parte*, the Maine Public Utilities Commission ("Maine PUC") expresses concern about problems reported by some CLECs in transitioning their existing line-shared data service to a full stand-alone loop. This concern relates primarily to the relatively small group of line-shared DSL lines that were added after the grandfathering period ended on October 2, 2003, but before the end of new additions on October 1, 2004, by CLECs who do not have an interim line-sharing agreement with Verizon. New CLEC DSL services commenced after October 1, 2004 are provisioned from the outset over stand-alone loops that are readily available. Thus, the issue raised by the Maine PUC is an isolated and non-recurring one, mainly affecting a small number of existing line-sharing CLECs. Moreover, as the Maine PUC's own letter shows, Verizon is currently working to create an adequate transition mechanism that will address the Maine PUC's concern. Consequently, this soon-to-be resolved issue, which does not impact new CLEC DSL lines, provides no ground for reinstating mandatory line sharing.

---

[15] Covad Ex Parte at 1-3.

[16] Many companies in the U.S. and abroad do in fact provide video over DSL. *See* Reply Comments of Verizon, CC Docket No. 04-313, at 176-77 (FCC filed Oct. 19, 2004).

[17] *See Triennial Review Order*, ¶ 240 ("the barriers faced in deploying fiber loops . . . may be similar for both incumbents LECs and competitive LECs. Both incumbent and competitive LECs must purchase fiber and the associated equipment, negotiate access to the necessary rights-of-way, obtain any necessary government permits, hire skilled labor, and manage their construction projects in order to deploy fiber loops. Moreover, by some estimates, competitive LECs enjoy advantages that incumbent LECs do not have, such as lower labor costs and superior back office systems.") (footnotes omitted).

Please place this letter in the record of the above proceedings.

Sincerely,

c: Jeff Carlisle
Michelle Carey
Tom Navin
Pam Arluk
Gail Cohen
Ian Dillner
Russ Hanser
Marcus Maher
Jeremy Miller
Carol Simpson
Tim Stelzig