Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

EMERGENCY JOINT PETITION FOR STAY BY THE CHOICE COALITION

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SUMMARY

Pursuant to sections 1.41, 1.43, 1.44(e), 1.45(d)-(e), and 1.298(a) of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.43, 1.44(e), 1.45(d)-(e), and 1.298(a), the Coalition for High-Speed Online Internet Competition and Enterprise ("CHOICE Coalition") hereby petitions the Federal Communications Commission to stay a limited portion of the Commission's August 21, 2003, Memorandum Opinion and Order in the above-referenced dockets, FCC 03-36 (hereinafter "Order"),[1] to the extent that its application would (1) immediately increase any existing, state commission-ordered or negotiated rates for requesting telecommunications carriers to access the high-frequency portion of the loop on the Order's effective date (on or about October 3, 2003);[2] and (2) prevent requesting telecommunications carriers from purchasing access to the high-frequency portion of the loop for new customers after the first year of the Commission's announced three-year transition period.

The following members of the CHOICE Coalition join in the submission of this Petition: Complete Telecommunications; Covad Communications; DSL Internet Corporation; Biddeford Internet Corporation (d/b/a Great Works Internet); NC Telecom, Inc.; New Edge Networks; NTELOS, Inc.; Ruby Ranch Internet Cooperative Association; Skowhegan Online; and Twin Rivers Valley Telephone. Petitioners are competitive local exchange carriers (CLECs) that collectively provide broadband digital

[1] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98 and 98-147, FCC 03-36 (rel. Aug. 21, 2003) ("Order").

[2] The Commission's Order, including its rules governing the phase out of line sharing, will become effective 30 days after the Order is published in the Federal Register. Petitioners estimate that the Order will be published on or about September 3, 2003, with the Order becoming effective 30 days later, on or about October 3, 2003. As soon as the order becomes effective, Petitioners will immediately begin suffering irreparable harm, as set out in greater detail below.

subscriber line (DSL) services to hundreds of thousands of residential and small business customers in every Bell operating company region in the country using the so-called line sharing unbundled network element (UNE).[3] Unlike carriers that use unbundled network elements other than line sharing, petitioners are subject to immediate and irreversible harm, in the form of FCC-mandated price increases and imminent denial of access, upon the effective date of the Commission's decision. In order that a reviewing court may have sufficient time to receive and act on the below-described petition for judicial review before the Petitioners begin to suffer irreparable harm, Petitioners respectfully request that the Commission grant this stay request on an expedited basis no later than September 19, 2003.

Petitioners are not asking the Commission to revisit its line sharing disposition; rather, they simply seek a stay pending judicial review so that such review can be completed without the irreparable harm that will result upon the effective date of the Order. During the course of that judicial review, the Appellants will seek to show that the Commission erred in its conclusion that competitors are not impaired under section 251(d)(2)[4] of the Communications Act of 1934, as amended (Act), without access to the line sharing UNE. In addition, Petitioners believe that the Commission's reliance on the availability of line splitting to support the phase-out of line sharing is based on suppositions about the state of line splitting availability that are not fully accurate. Numerous line splitting problems must first be addressed by state commissions before the line sharing phase-out can begin, and the grant of the instant stay request will permit such

[3] *See* Attachment H (descriptions of CHOICE coalition members).

[4] 47 U.S.C. § 251(d)(2).

issues to be resolved before irreparable harm results. In compliance with Rule 18(a)(1) of the Federal Rules of Appellate Procedure, Petitioners herewith move the Commission for a stay of a limited portion of its Order, as described more fully below.

PETITIONERS' REQUEST

Petitioners have confined their stay request to the minimum relief necessary to prevent irreparable harm for the limited period of time necessary to seek judicial review of the Commission's actions related to line sharing, which will also permit state commissions to resolve outstanding line splitting implementation issues as detailed in the attached declarations.[5] Petitioners' limited stay request will allow them to (1) continue purchasing access to the high frequency portion of the loop at existing non-discriminatory, cost-based rates consistent with section 252(d)(1)(A)(i)[6] of the Act, during the pendency of judicial proceedings to review the Commission's Order, or implementation of line splitting; and (2) continue adding new customers to their networks

[5] In its Order, the Commission granted a three year old MCI petition for clarification regarding the applicability of line splitting to carriers using the so-called UNE-Platform, or UNE-P. The Commission also noted that, on a going forward basis, it "expect[s] incumbent LECs to implement, in a timely fashion, "practical and reasonable measures" to enable competitive LECs to line split." Order at para. 252 n.752. The Commission recognized that line splitting operational issues must still be addressed and fully resolved in state commission-led colloboratives, and "encourage[d] states to continue overseeing and participating in such colloboratives." *Id.* Thus, the Commission appears to have recognized that line splitting operational issues must still be addressed by the states, but unfortunately did not leave any time for those issues to be resolved before mandating an increase in line sharing prices and imminently terminating line sharing access. *See also* Department of Justice Evaluation, In the Matter of Joint Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin, WC Docket No. 03-167, at 16 n.64 (urging the Commission to ensure that line splitting is available from SBC in a nondiscriminatory manner because line splitting "will become more important if in the future incumbent local exchange providers are no longer required to share their voice customer loops with independent providers of DSL service. In such an environment, and absent line-splitting service, a given area might be served only by two broadband providers, the incumbent local exchange provider itself and any cable television system.").

serving the same area.

[6] 47 U.S.C. § 252(d)(1)(A)(i).

using the high-frequency portion of the loop until the completion of appellate review of the Commission's Order, or until line splitting is fully implemented and available for petitioners' use. If Petitioners' petition for stay is not granted by the Commission, Petitioners will immediately suffer irreparable harm in that their costs to obtain access to the high frequency portion of the loop will immediately and dramatically increase in price over a three-year period. At the same time that these new line sharing costs are imposed by Commission rule on new entrants, the incumbent LECs are not required to impose these new line sharing costs on their own DSL affiliates. As such, the incumbent LECs will be the beneficiaries of a regulatorily-imposed price advantage over their DSL competitors. Only by staying this price increase can the Commission ensure that competitive carriers can continue offering consumer line shared broadband services pending judicial review of the Commission's decision, or pending resolution of the numerous line splitting implementation issues that remain unaddressed.

In addition, there is a reasonable possibility that judicial review of the Commission's Order will take longer than one year. In such a case, Petitioners will suffer irreparable harm in not being able to add new customers to their networks using the high-frequency portion of the loop beyond the first year of the Commission's announced three-year phase-out. Given the fact that Petitioners are all new entrants into historically monopoly telecommunications markets, and given the fragile state of Petitioners' fledgling consumer broadband businesses, Petitioners will undoubtedly suffer irreparable harm if their stay request is not granted.

As set out in greater detail below, it is likely that judicial review of the Commission's line sharing decision will result in, at minimum, a remand to the

Commission for further proceedings. Should that process take more than one year, the Commission's transitional mechanism permitting ongoing access to line sharing arrangements will have expired, absent a stay of that expiration. In addition, incumbent LECs have no incentive to address and fix outstanding line splitting problems, because the Commission's line sharing phase-out is automatic and in no way linked to the actual availability of line splitting. Thus, incumbent LECs have an added incentive to avoid implementing line splitting: the Commission's line sharing phase out provides that, in the absence of line splitting functionality, competitive DSL providers could shortly have no means whatsoever of serving customers. As such, it is possible that some, if not all, of the Petitioners may be forced to exit the consumer line shared broadband business entirely if the instant stay request is not granted. If the Commission's decision on line sharing is subsequently remanded, consumers will have suffered unnecessary harm as a result of the premature exit of competitive providers.

Incumbent LECs, the suppliers of Petitioners' access to the high-frequency portion of the loop, will not be harmed by grant of Petitioners' stay request. Grant of the stay would merely continue incumbent LECs' existing processes and rates already in place for access to the high-frequency portion of the loop, pending the outcome of judicial review or resolution of line splitting operational issues. Moreover, consumers will not be harmed by grant of the stay request. In fact, consumers will greatly benefit from grant of the stay, by continuing to have multiple options for residential broadband services from multiple competing service providers. In addition, in the absence of a stay, consumers will be subjected to an immediate and scaling FCC-mandated increase in

broadband prices. In these circumstances, the balance of equities clearly favors a limited stay.

Accordingly, for the reasons set forth more fully below, Petitioners respectfully request that the Commission grant this petition by staying the effectiveness of a limited portion of the Commission's Order until the entry of a final, non-appealable decision on review of the Commission's Order, so that line splitting operational, pricing, and related issues can be resolved, to the extent that application of the Commission's Order would (1) increase any existing, state commission-ordered rates for requesting telecommunications carriers to access the high-frequency portion of the loop on the Order's effective date; and (2) prevent requesting telecommunications carriers from purchasing access to the high-frequency portion of the loop for new customers after the first year of the Commission's announced three-year transition period. Petitioners' request will not disturb the underlying conclusions reached by the Commission related to line sharing, but rather will simply allow existing, state-commission ordered or negotiated line sharing rates currently in effect to remain in place during the pendency of judicial review proceedings. Petitioners' request will also allow them to continue adding new customers to their networks using the high-frequency portion of the loop, so that their consumer broadband businesses are not left lagging far behind the incumbent phone monopolies during the pendency of judicial review proceedings and while line splitting implementation is completed.

In order that a reviewing court may have sufficient time to receive and act on the below-described petition for judicial review before the Petitioners begin to suffer irreparable harm, Petitioners respectfully request that the Commission expedite

consideration of this petition and rule no later than September 19, 2003. In addition, because of the short amount of time before which Petitioners will begin to suffer irreparable injury, Petitioners request that the Commission act on this Petition on an expedited, *ex parte* basis pursuant to its authority under section 1.45(e) of its rules. Specifically, Petitioners request that the Commission forgo requiring the filing of oppositions and replies regarding this Petition prior to rendering its decision.[7]

BACKGROUND

On August 21, 2003, following a notice-and-comment rulemaking proceeding, the Commission issued final rules which amended section 51.319[8] of the Commission's rules in its Memorandum Opinion and Order, FCC 03-36. In relevant part, the Commission's final rules: (1) conclude that competitors are not impaired without access to the unbundled high-frequency portion of the loop, i.e., the line sharing UNE or HFPL UNE;[9] (2) create a three-year transition mechanism for competitive carriers to transition their customers from the line sharing UNE to UNE standalone loops;[10] (3) require the rates for access to the high-frequency portion of the loop to increase immediately, in increments of 25%, 50% and 75% of the price of UNE standalone loops over the course of the three-year transition period;[11] and (4) prevent competitive carriers from obtaining access to the

[7] *See* 47 C.F.R. § 1.45(e).

[8] 47 C.F.R. §51.319(h).

[9] *See* Order at para. 258 (reversing the Commission's prior conclusion that competitors are impaired without access to the HFPL).

[10] *See* Order at para. 264.

[11] *See* Order at para. 265.

high-frequency portion of the loop to serve new customers after the first year of the three-year transition period.[12]

Under section 402(a) of the Communications Act, 47 U.S.C. § 402(a), appeals of the Commission's Order may be brought pursuant to chapter 158 of Title 28 of the U.S. Code.[13] Petitioner Covad Communications has already publicly indicated its intent to seek judicial review of the Commission's Order.[14] Because the Commission's Order has not been published, however, none of the Petitioners has yet had the opportunity to file a petition for review.[15] Upon publication of the Commission's Order, Covad submits that it will seek judicial review of the Commission's Order, in relevant part.

Standard of Review

In determining whether to stay the effectiveness of an FCC order pending judicial review, the Commission applies the four-factor test established in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 843 (D.C. Cir. 1977). That test examines whether: (1) petitioners are likely to succeed on the merits; (2) petitioners will suffer irreparable injury absent a stay; (3) a stay would substantially harm other interested parties; and (4) a stay would serve the public interest. The D.C. Circuit

[12] *See* Order at para. 265 and n. 787.

[13] 28 U.S.C. Ch. 158.

[14] *See Investors Conference Script*, "Triennial Review Results," Charlie Hoffman, CEO of Covad Communications Group, Inc., Feb. 21, 2003 ("We believe this is a legally unsustainable decision not based on the record before the FCC, and we plan to aggressively pursue an appeal.")

[15] *See Western Union Telegraph Co. v. FCC*, 773 F.2d 375 (D.C. Cir. 1985) ("FCC orders like that at issue here are deemed to be "entered" for purposes of § 2344 on "the date upon which the Commission gives public notice of the order," 47 U.S.C. § 405 (1982)."). *See also* 28 U.S.C. § 2344 ("On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.").

has emphasized that these factors relate on a "sliding scale," such that when "the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas" are less compelling. *See Serono Labs v. Shalala*, 158 F.3d 1313, 1317 (D.C. Cir. 1998). This is particularly true where, as here, a stay request simply seeks to preserve the *status quo* pending judicial review. Indeed, the Commission itself has indicated that a stay maintaining the *status quo* should be granted "when a serious legal question is presented, if little harm will befall others if the stay is granted and denial of the stay would inflict serious harm." *Florida Public Serv. Comm'n*, 11 FCC Rcd 14324, 14325-26 & n. 11 (1996); *see also Washington Metropolitan*, 559 F.2d at 844 ("An order maintaining the *status quo* is appropriate when a serious legal question is presented, when little harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant . . . [Such relief is available] whether or not movant has shown a mathematical probability of success.").

ARGUMENT

Petitioners satisfy all of the relevant criteria for a stay pending review. First, there is no question that Petitioners can demonstrate that a "serious legal question" exists as to the validity of the Commission's disposition of the line sharing UNE in its Order. Petitioners can easily clear the higher hurdle of "likelihood of success on the merits" for many reasons. First, as a substantive matter, the Commission's decision to eliminate the line sharing UNE was not based on the record before it and failed to comply with the strict requirements of the Administrative Procedure Act. Secondly, the decision is based on the availability of line splitting as a substitute for line sharing, and as detailed in the

attached declarations, there are numerous outstanding line splitting operational issues that must be resolved before line splitting is fully available.

Petitioners are also likely to suffer irreparable injury. At a minimum, if the Commission's decisions to (1) increase line sharing rates to standalone loop rates over three years; and (2) to prohibit competitive carriers from serving new customers with line sharing after only one year, are not stayed, some if not all of the Petitioners may be forced to cease providing their current residential line shared broadband services entirely. In addition, Petitioners will be forced to leave stranded the hundreds of millions of dollars they have invested in building the capability to provide residential broadband services. In contrast, a grant of the requested stay would not harm any third parties or the public interest, but rather would simply preserve the *status quo* pending appeal so that state commissions can ensure that line splitting is fully operational.

I. Petitioners Are Likely to Prevail on the Merits

In evaluating the likelihood of the petitioners' success on appeal, Petitioners "need not establish an absolute certainty of success."[16] Instead, "as the actual terms of the test indicate, the petitioners must show that they are "likely" to succeed on the merits."[17]

A. The Commission's Disposition of the Line Sharing UNE was Arbitrary and Capricious.

The Commission's disposition of the line sharing UNE was arbitrary and capricious, failing to satisfy the baseline administrative law requirement of "reasoned decisionmaking." First, the Commission's decision to eliminate the line sharing UNE is

[16] Population Inst. v. McPherson, 797 F.2d 1062, 1078 (D.C.Cir.1986).

[17] Iowa Utilities Bd. v. F.C.C., 109 F.3d 418, 423 (8th Cir. 1996).

entirely unsupported in the record, or in the law. Moreover, the Commission decision summarily reverses its previous conclusions in the *Line Sharing Order* and the *Line Sharing Reconsideration Order* with little explanation or justification. The Commission's cited newfound "alternatives" to use of the line sharing UNE fail to provide true alternatives, nor is there any record evidence to support the notion that they are alternatives. Moreover, the Commission's "transition plan" for line sharing appears to have been cut out of whole cloth, without any record evidence to support the particular transition mechanisms the Commission has devised.

1. The Commission's Order Arbitrarily and Summarily Flouts Its Prior Conclusions in the *Line Sharing Order* and *Line Sharing Reconsideration Order*.

The Commission's decision to eliminate the line sharing UNE on the basis of the supposed alternatives of standalone loops and line-splitting essentially ignores the conclusions the Commission reached in the *Line Sharing Order* without reasoned explanation for the change. In the *Line Sharing Order*, the Commission rejected the argument that the ability of competitors to purchase standalone loops obviates their impairment with respect to the high-frequency portion of the loop. Specifically, the Commission made detailed findings supporting its conclusion that "[i]t is not economical for competitive LECs to self-provision or purchase the entire loop as a second line just to obtain access to the high frequency portion of the loop."[18] The Commission made additional detailed findings supporting its conclusion that "if competitive LECs were to provide voice service in addition to xDSL-based service, they would be impaired in their ability to provide the data services they seek to offer."[19]

Moreover, the Commission had a subsequent opportunity to reverse these conclusions upon reconsideration of its original *Line Sharing Order*. Far from doing so, however, the Commission not only preserved the line sharing UNE on reconsideration, it further strengthened and clarified its rules to increase competitive carriers' opportunities to access the line sharing UNE.[20] In particular, the Commission clarified its loop unbundling rules to make clear that competitive carriers could engage in line-splitting

[18] *See Deployment Of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd. 20912, 20933 (1999) (*Line Sharing Order*).

[19] *See id.,* 14 FCC Rcd at 20935.

[20] *See Deployment Of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd. 2101 (2001) (*Line Sharing Reconsideration Order*).

arrangements – while reaffirming competitive carriers' rights to access the line sharing UNE.[21] But the Commission clarified its line splitting obligation as a corollary to line sharing – not as a replacement for line sharing. Thus, the Commission concluded that "the availability of line splitting will further speed the deployment of competition in the advanced services market by making it possible for competing carriers to provide voice and data service offerings on the same line."[22] Thus, the Commission reaffirmed that its line sharing rules operated in conjunction with line splitting – not that line splitting could be a replacement for line sharing. Indeed, it could not be a replacement, because only by mandating both line sharing and line splitting could the Commission ensure that consumers who elect to retain the incumbent LEC as their voice provider, as well as those consumers who elect a competitive voice provider, would be able to purchase broadband services from a competitive provider.[23] In the absence of line sharing, consumers who chose to retain the incumbent LEC as their voice provider would lose access to competitive broadband services. In its latest Order, the Commission has eliminated the line sharing UNE without offering any adequate rationale for its departure from these concrete prior conclusions.

The centerpiece of the Commission's newfound decision that competitors are not impaired in the absence of line sharing is its newfound focus on a requesting carrier's ability to "offer and recover its costs from all of the services that the loop supports,"[24] and its newfound focus "on the all potential revenues derived from using the full

[21] *See id.*, 16 FCC Rcd at 2109-2115.

[22] *See id.* at para. 23.

[23] *See id.* at para. 17.

[24] *See* Order at para. 255.

functionality of the loop."[25] Under the Commission's change of logic, because requesting carriers may recover revenues for providing both voice and data services, they are no longer impaired without access to transmission facilities solely for the purpose of providing data service. The Commission goes so far as to cite competitors' ability to derive revenues from technologies to provide digital voice and video services over DSL – nascent technologies without any significant market penetration levels, and for which there exist at best miniscule, niche markets. Of course, the Commission would have known not to seriously consider these as viable mass market services over mass market standalone loops, had it considered and weighed any evidence regarding their actual deployment.[26] Moreover, what the Commission fails to explain is why it has suddenly decided that a competitor should be forced by its rules into additional lines of business simply in order to provide "the services that it seeks to offer."[27] The Commission's logic contradicts its previous reasoning that competitors should not be forced into the provision of voice service in order to compete in the provision of broadband service.

Even more troubling, the Commission's reasoning that the ability to provide both narrowband voice and broadband data services relieves impairment with respect to line sharing contradicts its unbundling analysis for other UNEs. In its impairment analysis for the unbundling of standalone loops, the Commission expressly states that it determines competitive carriers are impaired regardless of "whether they seek to provide narrowband or broadband services, or both."[28] In other words, competitors are allowed to purchase

[25] *See* Order at para. 258.

[26] *See* Order at para. 258.

[27] 47 U.S.C. § 251(d)(2)(B).

[28] *See* Order at para. 248.

standalone loops regardless of whether they choose to provide narrowband voice services only or bundle voice service with broadband. But by regulatory fiat, the Commission determines that competitors will no longer be allowed to buy line shared loops to provide data services, because they can obtain scope economies by bundling voice and data. And how does the Commission justify its sleight of hand in choosing when it will and will not apply economies of scope to analyzing UNE impairment? The Commission simply declares that competitors face "varying levels of impairment" over different types of mass market loops.[29] Of course, between standalone loops and line shared loops, the Commission never really explains why there are "varying levels of impairment" for each – since both network elements consist of the exact same legacy copper loop facilities.

Such unreasoned inconsistencies in analysis – inconsistencies not only between the *Line Sharing Order* and the current Order, but also within different sections of the current Order as well – do not meet the standard the Commission bears to reverse its prior conclusions. The Commission bears a high burden to reverse its previous conclusions that the ability to access standalone loops with a combined voice/data offering does not relieve competitors' impairment without access to the line sharing UNE. Specifically, as the D.C. Circuit has stated, "[i]t is axiomatic that an agency choosing to alter its regulatory course 'must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored.'"[30] Moreover, the

[29] *See, e.g.*, Order at para. 211.

[30] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir.1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971); *accord Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983).

Commission bears an even higher burden with respect to reversing conclusions previously reached. Indeed, as the Supreme Court has stated:

> Revocation constitutes a reversal of the agency's former views as to the proper course.... In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation. If Congress established a presumption from which judicial review should start, that presumption ... is not against ... regulation, but against changes in current policy that are not justified by the rulemaking record.[31]

Here, the Commission cannot find record support for reversing its previous conclusion that the availability of standalone loops does not relieve competitors' impairment with respect to the line sharing UNE. But the Commission's decision ignores the clear facts that standalone loops and line-splitting do not provide adequate substitutes for unbundling of the high-frequency portion of the loop. Indeed, the overwhelming and uncontroverted weight of economic evidence on the record in this proceeding proves that standalone loops are not substitutes for line sharing.

The evidentiary record on these points compelled the Commission to reach the same conclusions it has already reached before: standalone loops and line-splitting do not relieve competitors' impairment without access to the line sharing UNE. As the Commission found previously in the *Line Sharing Order*, purchasing standalone loops to provide xDSL services requires longer provisioning intervals for field work to provision a second loop to the home, additional cost for both installation of the loop and field work to test the quality of the loop provisioned, and additional recurring cost to maintain a second loop in working order.[32] By contrast, line sharing allows broadband service provisioning

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[31] *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41, 42, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983).

[32] *See Line Sharing Order,* 14 FCC Rcd at 20931-35.

without ILEC or CLEC truck rolls, and allows customer self-installation of CPE – greatly reducing the cost of provisioning service. For consumer broadband services, the extra costs of installing a second loop simply are not cost-justified. As Petitioner Covad Communications has shown, purchasing a second loop to provide consumer broadband services could force it on average to actually lose hundreds of dollars per customer, far from being able to profitably provide service.[33] Of course, as the Commission previously recognized in the *Line Sharing Order*, this is why the ILECs do not provide consumer broadband services over second-line loops, but use line sharing instead – because line sharing enables them to provide xDSL data services over the same loop already installed and in service to provide basic phone service.[34]

The same weaknesses are inherent in the Commission's newfound conclusion that competitors may alleviate their impairment by entering the voice market, and providing combined voice and data bundles. Again, the evidence before the Commission in this docket compelled the same conclusion reached by the Commission in the *Line Sharing Order*. Entering the voice market is hardly an easy undertaking – in fact, as the *Line Sharing Order* makes clear, the Commission has repeatedly recognized the difficulties of entering the circuit-switched voice market:

> …[C]oncluding that competitive LECs should be able to provide voice service on the customer's first line would impose on requesting carriers all of the cost and operational issues associated with providing circuit-switched voice services…
>
> Investments in circuit switched networks may only be justified by carriers that have attained sufficient scale and scope economies to justify deploying large-scale circuit switched networks. For other entrants, requiring this investment diverts

[33] *See* Letter from Jason Oxman, Covad Communications, to Marlene H. Dortch, Federal Communications Commission, in WC Docket 01-338, dated Sept. 30, 2002, Attachment "Trienniel Review *Ex Parte*," at 16.

[34] *See Line Sharing Order,* 14 FCC Rcd at 20931-35.

> financial resources and management focus away from competitive LECs' ability to offer advanced services and frustrates a requesting carrier's plan to migrate telecommunication services from circuit switched to packet switched networks.[35]

In its analysis that competitors are impaired notwithstanding the bundling of voice and data, the Commission also recognized the extensive difficulties and expenses faced by carriers that must provide competitive voice services using the unbundled network elements platform (UNE-P):

> There are additional costs associated with being a provider of voice service than the cost of the circuit switches. In particular, a competitive carrier would need to develop marketing, billing, and customer care infrastructure… deploy sales and marketing forces, and invest in creating a recognizable brand. To compete against incumbent LECs that have a long history providing voice services, competitors must overcome the substantial goodwill, experience and market power of the incumbent LECs. These factors make it a considerable challenge for competitive LECs [to provide competitive voice services].[36]

The Commission now ignores these previous conclusions, does an abrupt about-face without an adequate evidentiary record basis, and summarily concludes that competitive data providers can easily enter the competitive voice service market if they wish to provide competitive data services. Moreover, the Commission performs this about-face without citing any market or economic evidence showing why it has suddenly become so easy to be a voice provider, or what other change in circumstance has enabled the Commission to change its mind. The one change in circumstance the Commission does cite – namely, its grant of section 271 authority to Bells in more than 40 states – hardly explains why competitors are no longer impaired due to their ability to offer bundled

[35] *See Line Sharing Order,* 14 FCC Rcd at 20935 (citing Local Competition Third Report and Order, at para. 266, 306).

[36] *See Line Sharing Order,* 14 FCC Rcd at 20936.

voice and data services.[37] Indeed, the Commission routinely relied on the non-discriminatory availability of line sharing in concluding that local markets were open in these states and awarding section 271 authority to the Bells. Moreover, the Commission never explains why its section 271 impairment logic should be limited to line sharing. By the Commission's logic, now that the Bells have received 271 authority through most of the country, the ability to provide bundled narrowband and broadband services should alleviate competitive impairment for every UNE. Of course, the Commission expressly declines to follow this logic elsewhere in its Order, without any explanation for this variance.[38]

The notion that the availability of line-splitting arrangements, set forth by the Commission in its *Line Sharing Reconsideration Order*, alleviates competitor impairment with respect to line sharing is incorrect. Line sharing involves the provisioning of a competitive carrier's broadband DSL service over the same line as an incumbent phone company's voice service. Line splitting, although architecturally similar to line sharing, involves the provisioning of a broadband service and a voice service provided by a competitive carrier over the same line. Thus, in a line sharing arrangement, the consumer has chosen to retain the incumbent as her voice service provider. In a line spitting arrangement, the consumer has chosen a competitive carrier as her voice service provider. Line splitting therefore cannot, by definition, be a substitute for line sharing, because the consumer who chooses to retain the incumbent as her voice provider cannot access DSL

[37] *See* Order at para. 259.

[38] *See* Order at para. 248.

service from a competitive provider. Line splitting is only available to those consumers who choose voice service from a competitive provider.

That said, it is clear that line splitting is an important and viable method of providing broadband DSL services to consumers. At the same time, the facts belie the Commission's current conclusions regarding the substitutability of line splitting for line sharing. According to the FCC's own statistics, less than 8% of the nation's access lines consist of residential and small business customers who have chosen a competitive carrier as their voice provider.[39] Furthermore, about 90% of the nation's residential and small business customers still receive voice service from the incumbent phone company.[40] Those customers cannot use line splitting as a substitute for line sharing, because the FCC's Triennial Review Order does not permit consumers to purchase DSL from a competitive carrier if they receive voice service from the incumbent. Furthermore, the natural candidates for line-splitting arrangements are end users receiving voice services over the UNE-Platform, or UNE-P. The Commission's data indicates that competitive voice providers today serve at best 5% of the wireline voice market using UNE-P arrangements.[41] Given that current residential ADSL take rates approximate 3.5% of

[39] See "Federal Communications Commission Releases Data On Local Telephone Competition: Customer Lines Reported by New Entrants Totaled 25 Million at End of 2002 Represents 13% of Total Access Lines," News Release, rel. June 12, 2003. The FCC report indicates that 58% of competitive carrier access lines serve residential and small business customers. Thus, only 58% of the 13% of the nation's access lines served by competitive carriers are residential and small business customers.

[40] *See id.,* Table 2. In December 2002, ILECs reported serving 127,008,159 residential and small business customers, while CLECs reported serving 14,361,191 residential and small business customers.

[41] Specifically, the FCC's latest report shows that, as of December 2002, approximately 10.2 million access lines were being served by the UNE-Platform. *See Local Telephone Competition: Status as of December 31, 2002*, Industry Analysis and Technology Division of the Wireline Competition Bureau, at Table 4 (June 2003) ("UNEs with Switching"). By contrast, the report indicates a total of approximately 188 million switched access lines nationwide. *See id.* at 1. Thus, UNE-P accounts for approximately 5% of the total access lines in service.

total access lines,[42] line-splitting will allow Petitioners to serve only 5% of the access lines they can serve today, with a take rate of 3.5% – a total of 0.19% of access lines nationwide. In other words, restricting Petitioners to line-splitting relegates them to providing data services to a miniscule fraction of the potential market they can serve today using line sharing. Under no plausible reading of the facts is line-splitting any real alternative to line sharing.

Notably, the Commission first clarified the existence of the line-splitting arrangement as part of its loop unbundling rules. Specifically, the Commission articulated the line-splitting arrangement as a requirement of its *existing* loop unbundling rules in the *Line Sharing Reconsideration Order*.[43] Furthermore, the Commission's loop unbundling rules, of which line-splitting is thus part and parcel, were adopted in August 1996 in the first *Local Competition Order*.[44] By contrast, the Commission's line sharing rules were adopted in November 1999 in the *Line Sharing Order*.[45] Thus, the line-splitting requirement inherent in the loop unbundling rules predates line sharing rules by *more than three years*. The Commission's instant Order, however, fails to explain how its present conclusion, that line-splitting obviates competitor impairment without access to the line sharing UNE, can be rationally reconciled with the Commission's

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[42] The FCC's latest data indicates that there are 6.5 million high-speed ADSL lines in service nationwide. *See High-Speed Services for Internet Access:Status as of December 31, 2002*, Industry Analysis and Technology Division of the Wireline Competition Bureau, Federal Communications Commission, at Table 3 (June 2003). Out of a total of 188 million access lines nationwide, *see supra* n. 41, this represents a take rate of approximately 3.5%.

[43] *See Line Sharing Reconsideration Order*, 16 FCC Rcd at 2109-10 ("…we clarify that existing Commission rules support the availability of line splitting.").

[44] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, 15602 (1996) (*Local Competition Order*).

[45] *See supra* n. 18.

decision to enact the *Line Sharing Order* in the first place. Indeed, when the Commission clarified the existence of a line-splitting obligation in its loop unbundling rules, it did so in the context of an order reaffirming and extending its line sharing obligations – because at the time the Commission knew and accepted that bundling UNE-P voice with competitive data is not at all a substitute for line sharing:

> …[R]equesting carriers could obtain combinations of network elements and use those elements to provide circuit-switched voice service as well data services. This would relieve a competitive carrier from the need to make significant investments in switching technology that may soon become obsolete.
>
> We find, however, that despite its ability to purchase transmission facilities from the incumbent to provide voice service, a competitor is still impaired if it must provide analog voice service in order to enter the market for voice-compatible xDSL services. There are additional costs associated with being a provider of voice service than the cost of the circuit switches…[46]

Moreover, the Commission's Order does not explain what policy rationale it invokes to justify forcing consumers who wish to purchase a data service from a competitive provider to also purchase voice service from a different provider. Why shouldn't consumers have the ability to choose between incumbent monopolies and competitors for both their voice services and their data services? Indeed, the Commission's previous policy course, providing for the availability of both the line sharing UNE and line-splitting arrangements, seemed to serve the policy rationale of furthering exactly that kind of consumer choice. Given the Commission's repeated statements regarding the importance of broadband competition and the consumer benefits

[46] *See Line Sharing Order*, 14 FCC Rcd at 20936.

of a multitude of broadband providers,[47] the Commission has articulated no policy rationale for reaching the opposite conclusion for the first time here.

2. The Commission's Decision Misconstrues the Evidence Before It

The Commission had before it undisputed evidence that line sharing has appreciably contributed to broadband deployment and broadband price competition in the United States. Instead of basing its decision on that evidence, the Commission invokes the obvious numerical lead cable modem deployment has historically enjoyed over line shared ADSL deployment. The Commission then views that "evidence" through the distorted lens of its misinterpretation of the D.C. Circuit's decision in *USTA v. FCC* to reach its predetermined outcome – the elimination of line sharing. As discussed further below, the Commission's interpretation and application of *USTA* wholly misreads the opinion of the court, treating as inevitable a determination not actually required by the court's opinion.

Even leaving aside the Commission's misinterpretation of its obligations under *USTA,* however, the Commission's decision completely misconstrues the evidence before it. The Commission proceeds as though the lead cable modem enjoys obviates the need for the competition made possible by line sharing. In fact, the Commission's own deployment data show clearly that the primary factor driving the deployment of ADSL services for the last three years, by incumbent phone monopoly and competitors alike, has been the Commission's line sharing rules. When the FCC created the line sharing

[47] *See, e.g., Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, CC Docket No. 98-146, FCC 99-5, para. 53 ("Our experience in communications markets teaches that entry by many competitors is the best paradigm by which to bring broadband to all Americans. Entry by many competitors is more likely to bring low prices, high quality, constant innovation and improved price-performance ratios, a variety of different retail services, and as many ISPs and content providers as the market will support.").

rules in 1999, its own data showed 115,000 residential ADSL lines in service.[48] Today, as a direct result of the line sharing rules, the FCC reports 6.5 million ADSL lines in service – an increase of over five thousand percent.[49]

As Petitioner Covad Communications has shown on the record before the Commission, the incumbent phone monopolies willfully slow-rolled their line shared ADSL deployment in order to protect lucrative, legacy monopoly services such as ISDN, T1, and second line telephone service. Thus, years after cable modem services had entered the Internet access marketplace, incumbent phone company ADSL deployment remained pitiful, and was priced at around $69.95. No wonder, then, that residential ADSL deployment stood at only 115,000 lines. Only when the Commission opened the incumbent monopoly networks to data competitors through line sharing did prices drop, availability increase, and residential ADSL deployment begin to take off – today, to the tune of five thousand percent.[50]

Importantly, the Commission's latest high-speed deployment data confirms the error in its decision to eliminate line sharing. The Commission recently released data showing that, among advanced services lines,[51] ADSL lines increased by 52% during the last six months of 2002, compared to a 22% increase for cable modem service in the

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[48] *See Deployment of Advanced Telecommunications Capability: Second Report*, CC Docket No. 98-146, Second Report, FCC 00-290, para. 72 (2000).

[49] *See High-Speed Services for Internet Access:Status as of December 31, 2002*, Industry Analysis and Technology Division of the Wireline Competition Bureau, Federal Communications Commission, at 2 and Table 1 (June 2003).

[50] *See* Letter from Jason Oxman, Covad Communications, to Marlene Dortch, Federal Communications Commission, in WC 01-338 (dated November 20, 2002), Attachment "Declaration of Steven E. Siwek and Su Sun," at 10-13.

[51] The FCC defines advanced service lines as lines exceeding 200 kilobits per second in both directions. *See High-Speed Services for Internet Access:Status as of December 31, 2002*, at 1, n. 1.

same time period. During the preceding six-month period, however, the rate of growth of cable modem (55%) exceeded that of ADSL (35%) among advanced service lines.[52] What changed during the second half of 2002, creating this dramatic upsurge in ADSL line growth? What changed was an ADSL "price war" made possible by competition from line shared ADSL:

> Some of the growth may have been sparked by a price war begun by Covad Communications Group Inc. (COVD), a competitive DSL provider, in June 2002.[53]

Specifically, in June 2002 Petitioner Covad Communications announced the launch of its new TeleSurfer Link product, consumer ADSL service at a previously unheard of price point: $21.95 for the first four months, and $39.95 per month thereafter.[54] The price war sparked by Covad's line shared DSL service led to such an increase in ADSL deployment that, for the full year 2002, among advanced services lines ADSL deployment outstripped cable modem deployment. Specifically, ADSL advanced service lines increased by 105%, while cable modem connections increased by only 90%.[55] Industry reports now suggest that DSL deployment will continue to overtake market share from cable modem deployment – a direct consequence of three years of competition from line sharing.[56]

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[52] *See High-Speed Services for Internet Access:Status as of December 31, 2002*, at Table 2.

[53] *See Dow Jones Newswires*, Mark Wigfield, "DSL Internet Connections Gain On Cable At End Of 2002," (June 11, 2003).

[54] *See Press Release,* "Covad Reduces Price of Consumer Broadband to $39.95 per Month with $21.95 Introductory Price," Covad Communications (June 19, 2002).

[55] *See High-Speed Services for Internet Access: Status as of December 31, 2002*, at Table 2.

[56] *See* Goldman Sachs Telecom Weekly, "The Americas – US Spotlight" (Aug. 4, 2003) ("As expected, the market share reversal in 1Q2003 was indeed an inflection point in the DSL vs. cable battle, and DSL is now firmly gaining share against cable.").

Thus, even the Commission's own statistics – available to the Commission while it pondered its Triennial Review decision – show that line sharing drives broadband deployment. And the Commission's disregard of the fact that line sharing has made an enormous contribution to broadband deployment flies not only in the face of the evidence set out by commenting parties, but even in the face of the evidence the Commission has compiled itself.

3. Line Sharing Decision Process Proves the Lack of Logical Relation between Commission's Reasoning and Its Final Decision.

It is not necessary to detail the unfortunate process that led to the elimination of line sharing in this proceeding. The compromise reached in this proceeding was widely reported in the public media, and was the result of a judgment that assenting to the elimination of line sharing was necessary to reach compromise on other, unrelated issues. As such, certain public statements prove the lack of reasoned decision-making on the issue of line sharing, as they make clear the lack of relation between the evidence before the Commission and the decision it ultimately reached.[57] Although compromise on unrelated policy issues is the hallmark of legislative decision-making, it is not the province of independent administrative agencies charged with implementing the statutory directives of Congress. Indeed, the Administrative Procedure Act forbids it.[58]

Although this Commission decision-making process is not necessarily germane to the instant stay request, it does highlight the probability of success on the merits of a

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[57] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Press Statement of Commissioner Michael J. Copps (Feb. 20, 2003) (referring to "aspects of this Order that are certainly not my preferred approach, but which I have had to accept in order to reach compromise."). See *id.*, Separate Statement of Commissioner Jonathan S. Adelstein (Feb. 20, 2003).

[58] *See* 5 U.S.C. § 706(2) ("The reviewing court shall...hold unlawful and set aside agency action, findings, and conclusions found to be… arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.")

judicial challenge to the FCC's decision on line sharing. Rather than empowering the Commission to pick winners and losers among different forms of telecommunications competition, Congress has directed the Commission to implement its statute requiring the unbundling of network elements, for all forms of telecommunications service competition – voice and data.[59] Because the Commission failed to comply with the Administrative Procedures Act's requirement of engaging in reasoned decision-making based on the record, there is a substantial likelihood that parties will be successful in appealing the FCC's line sharing decision.

4. The Commission's Notice of Proposed Rulemaking Failed to Give Adequate Notice of the Rule Changes It Adopted.

The Commission's decision to eliminate line sharing also proceeded from a fundamentally defective notice and comment process. In short, the Commission's Notice of Proposed Rulemaking in this docket gives no indication that the Commission contemplated adopting the sweeping changes to its line sharing rules ultimately adopted. The closest that the Notice comes to seriously suggesting that the elimination of line sharing is at stake is an oblique question "whether, in light of changed circumstances, we should retain this unbundling requirement and if so, whether we should modify this requirement or the existing definition of this network element."[60] Nowhere, however, does the Commission suggest that it is actually considering reversing its prior jurisprudence on the issue and eliminating the line sharing network element, nor is such

[59] *See* 47 U.S.C. § 251(d)(1) ("…[T]he Commission *shall complete all actions necessary* to establish regulations to implement the *requirements* of this section."); *and* §251(c)(3) ("…[E]ach incumbent local exchange carrier has the following *duties*: …The *duty* to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis…") (emphasis added).

[60] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, FCC 01-361 (2001).

an outcome ever proposed. The Notice merely asks a series of open-ended questions about line sharing, without offering any indication to commenting parties where the Commission ultimately seeks to go. Such open-ended notice processes do not offer interested parties the notice required of the Commission, namely notice "adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process."[61] The Commission must not be allowed to use open-ended, vague notice processes as a license for policy-making carte blanche.

Specifically, the Commission never sought comment on the substitutability of line splitting for line sharing and whether line splitting availability actually eliminates the statutory impairment that the Commission had previously found in the absence of line sharing. The Commission never sought comment – and received none – on the viability of a rate increase that rapidly increased the prices competitive carriers must pay line sharing arrangements up to the full cost of a stand-alone loop, without requiring incumbent carriers to impose the same costs on their own DSL affiliates. Most importantly, the Commission never sought comment – and received none – on whether line splitting was actually available on a nationwide basis.

a. No Record Basis for Adoption of "Transition Plan"

Certainly, by no means did the Commission's Notice ever announce its intention to phase-out the line sharing UNE with immediate price increases for continued access to the high-frequency portion of the loop, and discontinued access after only one year.[62] This abrupt and severe outcome is never even contemplated in the Commission's notice,

[61] *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C.Cir.1988).

[62] *See* Order at para. 265.

let alone actually proposed for further comment. Even if the Commission's open-ended, vague questions about line sharing raise the remotest possibility of it being eliminated, certainly this meager notice fails to "afford interested parties a reasonable opportunity to participate" in the crafting of rules for a transition period that causes the least disruption to consumers, competitive broadband providers, and the public interest. Indeed, as the D.C. Circuit has previously reminded the Commission, "the conclusory manner in which the Commission dealt with these important issues only points up the importance of providing the public with adequate notice and opportunity to comment."[63] Here, however, the Commission has chosen, unlawfully, to hastily cobble together a complex series of burdensome transition mechanisms without the evidentiary record and public comment required under the Administrative Procedures Act.

Petitioner Covad Communications did attempt to provide the Commission with suggestions for a less onerous transition mechanism within the strictures of the Commission's Sunshine Period prohibitions.[64] Unfortunately, however, due to the Commission's defective notice processes, Covad only became able to present this evidence *after* the Commission had already voted to eliminate line sharing – in other words, Covad could only present this evidence when it had already become 'too little, too late.'[65] Neither Covad nor any of the other Petitioners had any opportunity to present this evidence prior to the Commission's vote, because the Commission never informed the

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[63] *MCI v. FCC*, 57 F.3d 1136, 1143 (D.C. Cir. 1995).

[64] *See* Letter from Jason Oxman, Covad Communications, to Marlene Dortch, Federal Communications Commission, in WC 01-338, dated Feb. 24, 2003, Attachment "Transitional Mechanisms to Apply if Linesharing is Removed as UNE."

[65] In any event, it is now clear from the text of the Order that the Commission refused to adopt Covad's post-adoption proposals.

public it was contemplating crafting a phase-out of the line sharing UNE. If the Commission's Notice had supplied commenting parties with more than mere open-ended questions about line sharing, and given meaningful notice to commenting parties that the Commission was actually considering phasing it out, Petitioners would have had the time and notice necessary to prepare more extensive recommendations for a less onerous phase-out of line sharing than the one cobbled together at the last minute by the Commission. Indeed, the first public "notice" to Petitioners that the Commission was seriously considering eliminating line sharing and reversing three years of jurisprudence based on the availability of stand-alone loops was the FCC's press release announcing its decision on February 20, 2003.

5. Line-Splitting Is Not Yet Operationally Available as a True Substitute for Line Sharing

In fact, a proper development of the complete factual record would have clearly established that a key premise underlying the Commission's decision to phase out line sharing is simply false. Contrary to the Commission's presumptions, line splitting is not yet sufficiently operational to constitute a true alternative to line sharing.[66]

Petitioner Covad Communications has had extensive experience with the discriminatory inadequacies in line splitting OSS systems and provisioning processes that persist in all four of the Regional Bell Operating Companies. As the attached declarations by Covad personnel show, the OSS systems and provisioning processes for line splitting are at this point still woefully inadequate. Although line split voice and data bundles have met with some initial success and their rollout will and must continue, the

[66] *See* Order at paras. 259-260 (relying on the availability of line splitting to determine that competitors are not impaired without access to the HFPL).

Commission's Order simply assumes without any evidence that line splitting is fully available on a nondiscriminatory basis to competitors, and constitutes a complete and true substitute for line sharing. As the attached declarations show clearly, the Bells have not yet achieved the nondiscriminatory systems and processes that the Commission simply assumes.

For example, although Verizon has arguably had the longest operational experience with implementing line splitting, its systems for line splitting remain discriminatorily deficient.[67] For example, Verizon's convoluted line splitting OSS forces upon competitive DLECs the need to use multiple service orders for line splitting configurations with UNE-P, resulting in an artificial 3-5 day "waiting period" for line splitting orders that its retail DSL customers do not suffer through. In some parts of its region, Verizon's OSS is designed to assign random, fictitious telephone numbers to the circuits of customers purchasing competitive voice services, numbers that competitive DLECs have no automated means of accessing and ascertaining, rendering line splitting on a commercial scale virtually impossible. Verizon recently unilaterally and arbitrarily determined that it would refuse to act on a change request to implement line splitting migrations – even though every requesting CLEC gave this change request a rating of 5 (reflecting the highest level of importance). Verizon also continues to refuse to provision line splitting with resold voice service. Perhaps even more egregiously, while Verizon perennially argues against the availability of UNE-P in regulatory proceedings (such as the Triennial Review), it refuses to use the same, commercially scalable processes for line splitting with competitive voice providers using UNE-L as opposed to UNE-P, even

[67] *See* Attachment A, "Joint Declaration of Valerie Evans and Michael Clancy."

though both forms of line splitting are functionally and technically equivalent for Verizon.

BellSouth's processes and OSS for line splitting are similarly inadequate to allow CLECs to offer commercially scalable line split bundles of voice and data services.[68] For example, BellSouth bizarrely requires 23 different ordering scenarios for line splitting, each with its own requirements. Of these 23 line splitting scenarios, only one is mechanized – while every ordering configuration for BellSouth retail voice and DSL bundle is mechanized. Furthermore, BellSouth's choice of mechanized scenario – solely UNE-P-to-Line Splitting (with a DLEC owned splitter) – allows competitors to offer mechanized voice and data bundles only to their existing customer base, and limits them to manual processes to market to BellSouth's retail customer base. In addition, BellSouth's choice to mechanize line splitting only for DLECs that own their own splitters, alongside its choice to mechanize linesharing only for DLECs that use BellSouth-owned splitters, cynically forces CLECs to incur double costs for data splitters in order to use mechanized ordering capabilities. Like Verizon, BellSouth forces CLECs to use fictitious pseudo-circuit numbers to place line splitting orders for customers purchasing competitive voice services – without mechanized processes for CLECs to obtain and use these fictitious pseudo-circuit numbers. Thus, like Verizon, BellSouth's OSS currently renders line splitting unmanageable on a commercial basis.

In the Qwest region, the Commission's phase out of line sharing in favor of a transition to line splitting puts the future of data competition into a black box.[69]

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[68] *See* Attachment B, "Joint Declaration of William H. Weber and Colette Davis."

[69] *See* Attachment C, "Joint Declaration of William H. Weber and Michael Zulevic."

Throughout the 271 process, competitors, state commissions, and Qwest relied on the Commission's previous line sharing rules, and focused their efforts on developing performance measures for Qwest's line sharing performance. As a result, at present, Qwest has no meaningful performance measures governing its line splitting performance. Until states can modify Qwest's performance plans to include its line splitting performance, there is simply no assurance that Qwest's line splitting performance will be non-discriminatory. Furthermore, Qwest's mechanization of line splitting lags far behind its mechanization of line sharing, and its mechanization of its own data orders for retail customers. Qwest refuses to implement this mechanization, citing the lack of order volumes, while its lack of implementation is precisely what hinders the development of commercial volumes. Moreover, Qwest's existing line splitting OSS forces CLECs to place duplicate orders for individual customer requests, rather than a single service order for voice/data bundles. Qwest's OSS also forces customers to disconnect their DSL while their voice service is being transitioned to a new providers – resulting in needless service outages, and deterring customers from choosing competitive voice/data bundles.

SBC's systems and processes for line splitting fare no better.[70] For example, the systems and processes for adding UNE-P to a data line or adding data to a UNE-P line often require multiple orders, manual orders, or a combination of both and some threaten service interruption or unreasonably high nonrecurring charges for such migrations. Second, systems and processes that maximize the customer's ability to choose from a wide variety of service providers are simply nonexistent. Customers' choices to change voice providers, change data providers, and drop voice or data service at some time are

[70] *See* Attachment D, "Joint Declaration of Catherine Boone and Colette Davis."

not supported by the existing SBC line splitting systems and processes. For CLECs to be able to scale their line split data/voice bundled offerings, SBC's systems and processes must achieve timely migrations that are seamless to the customer and result in minimal (if any) service interruption. The deficiencies in SBC's line splitting processes are legion. For example, SBC's trouble ticket processes for line splitting require CLECs to provide information they lack access to before troubles can be resolved. SBC also refuses to take for line split loops the same measures it takes to "strap out" line shared loops to ensure the continuity of voice services while data troubles are resolved. SBC's discriminatory "versioning policy" forces DLECs who wish to place line split loops orders for their voice partners to use the same EDI version as their partners at the same time, and migrate EDI versions in tandem – a completely unworkable condition that SBC has yet to resolve. SBC also refuses to allow competitive voice and data orders to be placed simultaneously – instead, the voice order must be completed first, after which the data order can be placed. Meanwhile, SBC's ability to offer voice and data bundles at one time to its retail customers suffers no such impediments. SBC's ordering requirements force customers to order DSL for every line on which they purchase competitive voice services in order to use call hunting features – artificially inflating the costs of competitive voice/data bundles to multiline businesses. SBC also forces customers through a harrowing experience if they switch from line split services back to voice-only UNE-P, including service outages, loss of telephone numbers, and in some states potential loss of 911 access. By contrast, even though the two arrangements are functionally identical, line shared customers suffer no such indignities when switching to voice-only service from SBC. In addition, SBC's line splitting OSS creates potentially disastrous, life-threatening

consequences for certain customers of line-split services. Because SBC's OSS arbitrarily treats line splitting as the purchase of two separate services, SBC often records its central office location as a line splitting customer's physical location in E911 databases, without a mechanized process to ensure that the E911 database is correctly populated with the customer location. In California, SBC persists with this outrageous use of E911 databases to thwart competition, by shirking its responsibility to maintain customer location records in E911 databases for line splitting customers, and threatens to extend its policy to all 13 states.

In addition to SBC's inadequate OSS for line splitting, SBC imposes exorbitant non-recurring charges on line splitting orders. Without any commission's oversight or approval, SBC has cobbled together a series of rates for line splitting -- some inappropriate for line splitting at all, and none of which have been approved to apply in the line splitting context. Having unilaterally made up rates for line splitting, SBC merely announced to CLECs that these charges would apply. Needless to say, this process has hardly resulted in non-discriminatory, cost-based rates for line splitting. By requiring a morass of orders, disconnects, reconnects and policies that seek only to increase the cost of obtaining line splitting, SBC artificially inflates the costs for CLECs to compete using line splitting in many states in its region – and inflates them far above the corresponding costs SBC itself incurs to offer voice/data bundles to retail customers.

As the attached declarations show, across the country, the Bells have used every trick in the book to thwart the development of competition using line splitting. After all, competitive voice and data bundles represent a tremendous threat to the Bells's own ability to offer bundled services. As the attached declarations show, even today, when

line split bundles are beginning to appear in the competitive marketplace, serious problems persist in the Bells' systems and processes for line splitting. Yet, without any factual support or solicitation of public comment on the specific issue of line splitting, the Commission assumes line splitting constitutes a complete and true alternative to line splitting. Sadly, a true examination of the facts reveals that this is not yet the case.

C. The Commission's Elimination of the Line Sharing UNE Rests on a Fundamentally Flawed Understanding of *USTA v. FCC* and Fails to Respond Adequately to the Remand in that Decision

In its efforts to shore up an irrational decision, the Commission invokes the D.C. Circuit's decision in *USTA v. FCC,* [71] which rejected the Commission's previous unbundling analysis for the 1999 line sharing rules, and remanded them for further consideration by the Commission. Contrary to the Commission's characterization of *USTA v. FCC*, that decision in no way prevents the Commission from re-adopting the line sharing UNE. On the contrary, the language of the opinion and the court's decision to stay its mandate both make clear that the Commission was permitted under *USTA* to readopt the line sharing UNE, so long as the Commission undertook the analysis set out by the court. Indeed, by failing to analyze line sharing as required by *USTA*, the Commission failed to comply with the remand in *USTA*.

The D.C. Circuit "remand[ed] both the *Line Sharing Order* and the *Local Competition Order*[[72]] to the Commission for further consideration in accordance with the principles outlined" in its decision.[73] In its decision the court specifically affirmed

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[71] *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

[72] *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C.R. 3696 (1999) ("*Local Competition Order*"), *modified*, 15 F.C.C.R. 1760 (1999).

[73] *USTA*, 290 F.3d at 430.

the FCC's judgment that the high frequency portion of the loop properly qualified as a discrete "network element," a critical cornerstone of the Commission's *Line Sharing Order*.[74] In other words, the Court held that the upper frequencies of a loop fit the Act's legal definition of a network element, and thus could properly be unbundled by the Commission. The Court nevertheless remanded the *Line Sharing Order* on the ground that the FCC did not consider whether ordering the incumbent carriers to share the high frequency portion of the lines connecting their central offices to their customers would benefit or harm competition in general.[75] In particular, the FCC "failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite)."[76]

In so ruling, the court remained appropriately agnostic on whether, after performing the requisite analysis, the FCC could re-impose its line sharing rules on remand. That evidence was not before the court. Indeed, if the Court had concluded that line sharing was unlawful no matter what the evidence showed on remand, it would not have remanded the matter to the FCC at all.[77] In sum, agencies routinely reinstate orders

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[74] *USTA,* 290 F.3d at 429.

[75] *USTA,* 290 F.3d at 428-29.

[76] *Id.* at 428.

[77] *See Chemical Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1268 (D.C. Cir. 1994) (holding that remand for further proceedings was not warranted where there did not appear to be *any* basis to support the agency's rule). *See also WorldCom, Inc. v. FCC,* 288 F.3d429, 434 (D.C. Cir. 2002) (rule remanded where there exists a "non-trivial likelihood" that the agency could reinstate the rule on remand after proper consideration of the relevant factors).

after they have been remanded because the reviewing court has concluded that the agency had failed to consider relevant evidence based on a misunderstanding of the law.[78]

Moreover, subsequent to its decision, the Court granted a petition to stay the mandate relating to the *Line Sharing Order* filed by WorldCom, Inc., and supported by Covad, leaving the line sharing rules in place until January 2, 2003.[79] In its motion, WorldCom had argued that the FCC could well re-adopt line sharing rules consistent with the Court's decision, and it would be deeply disruptive to the status quo and to the thousands of customers benefiting from competitive services offered over line-shared loops if the line sharing rules were vacated pursuant to the Court's mandate, only to have those rules reinstated by the Commission in the Triennial Review. The Court agreed with these arguments, staying the mandate until January 2003 based on the FCC's representations that by that time it will have adopted new line sharing rules as part of its Triennial Review Process.[80] The court also granted a subsequent petition to extend the length of the stay to allow for the conclusion of the Commission's *Triennial Review* proceeding.[81] Obviously, the Court would not have granted these motions if it believed that the line-sharing rules could not be reinstated consistent with its decision; to the contrary, the prospect that those rules would be reinstated was the very predicate of the relief requested in the petition to stay the mandate and the petition to extend the stay.

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[78] *See, e.g.,* III Pierce, Jr. *Administrative Law Treatise* at § 18.1, p. 1325 (4th Ed.) ("if the judicial decision was based on the court's conclusion that the agency action was predicated on a misunderstanding of applicable law, the agency often can support the same action on remand with a set of reasons or findings that is consistent with the applicable law announced by the reviewing court").

[79] *See Order* dated September 4, 2002, 2002 WL 31039663 (D.C. Cir. 2002), citing *Triennial Review NPRM* ¶ 81 (FCC is currently reviewing rules for triennial review that is to be completed in 2002).

[80] *See id.*

[81] *See Order* dated December 23, 2002, (extending stay until February 27, 2003).

Thus, the *USTA* decision clearly leaves open the possibility that the Commission could well have reinstated the line sharing rules on remand. Yet the Commission's reliance on *USTA* becomes a crucial cornerstone of its decision that competitors are not impaired without access to line sharing. According to the Commission, *USTA* is the primary reason it must depart from its previous determinations in the *Line Sharing Order* and *Line Sharing Reconsideration Order* that competitors are impaired without access to line shared loops:

> As we noted above, the D.C. Circuit vacated these rules and directed the Commission to apply some limiting standard rationally related to the goals of the Act. The D.C. Circuit stated that the Commission must weigh the costs associated with unbundling in making its section 251(d)(2) determinations. More generally, the D.C. Circuit explained that the Commission must make an effort to balance these costs against the benefits of unbundling. It is against this backdrop that the Commission makes its decision on line sharing.[82]

The Commission's point that *USTA* controls its unbundling analysis for line sharing is fair enough. What is missing from the Commission's Order, however, is an application of the actual standard laid out by the *USTA* court.

Although the Commission makes a facial attempt to address *USTA* by invoking intermodal competition from cable modem, satellite, wireless and other sources, the Commission fails to properly undertake the analysis required by *USTA*.[83] Does the presence of intermodal competition mean that line sharing should be eliminated or preserved? How should the presence of intermodal broadband competition affect the Commission's determination of impairment with respect to line sharing? What about the fact that, as the Commission's own statistics reveal, in many areas of the country DSL

[82] *See* Order at para. 256.

[83] *See* Order at para. 262.

rather than cable modem is the dominant form of broadband service?[84] We don't know the answers to these questions, because the Commission fails to undertake this level of analysis. Beyond making more than passing reference to the existence of alternative network platforms, the Commission makes little analysis of the larger competitive context for broadband services.[85]

All the Commission does is point out the availability of one actual alternative (cable) and some potential alternatives (satellite, wireless and power line) to line shared DSL, assuaging its fears that "competition is heavily dependent upon unbundled access to the HFPL," thereby allowing it to proceed with its decision to phase out line sharing.[86] But the Commission does not conclude that the availability of some intermodal competition alone is a dispositive ground for concluding that competitors are not impaired without access to a network element. After all, such a conclusion would violate a core principle of the Commission's new impairment analysis.[87] Instead, in order to comply with the *USTA* court's mandate, the Commission must undertake some kind of weighing of the costs and benefits of unbundling, a requirement it acknowledges.[88] Yet the Commission's analysis fails to provide any adequate explanation of the costs resulting from the unbundling of the HFPL, while at the same time it ignores the extensive record

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[84] *See, e.g.,* Goldman Sachs Global Telecom Weekly, "The Americas – US Spotlight" (Aug. 18, 2003) ("…there are several states, including the largest (California) where DSL actually holds the market-share advantage") (citing data from the FCC report "Trends in Telephone Service" (Aug. 2003)).

[85] *See* Order at para. 262.

[86] *See* Order at para. 262.

[87] "We do not find the presence of intermodal alternatives dispositive in our impairment analysis…". *See* Order at para. 97.

[88] *See* Order at para. 256 ("[T]he D.C. Circuit explained that the Commission must make an effort to balance these costs against the benefits of unbundling").

before it of the benefits that have resulted from the unbundling of the HFPL. In other words, the Commission's invocation of *USTA* constitutes little more than lip service.

When it comes to a discussion of the social costs of unbundling line sharing, the Commission's explanations ring particularly hollow. The Commission states that phasing out line sharing somehow creates "better competitive incentives than the alternatives." What better competitive incentives? The facts are that line sharing has created exactly the right incentives for both competitors and incumbents alike – resulting in an explosion of broadband deployment since 1999, and leading DSL deployment to now overtake cable modem deployment.[89]

In addition, the Commission misconstrues the application of its longstanding UNE pricing rules to line sharing – they neither result in over-recovery of ILEC costs as the Commission states, nor do they require a price of roughly zero.[90] The Commission's line sharing pricing rules merely required incumbents to comply with a principle of non-discrimination. Specifically, its pricing rules required competitors to pay for the HFPL the same loop cost the incumbent allocated to its own line shared xDSL services.[91] How a rule requiring pricing non-discrimination for the HFPL results in an "irrational cost advantage over competitive LECs purchasing the whole loop and over the incumbent LECs" is anybody's guess.[92] Comparing the cost advantages of competitors' whole loops and line shared loops is comparing apples and oranges – the two are different network elements, used for different services. And to the extent a competitive LEC uses whole

[89] *See supra* at 23-26.

[90] *See* Order at para. 260.

[91] *See Line Sharing Order*, 14 FCC Rcd at 20975, para. 138.

[92] *See Order* at para. 260.

loops to provide services that could be provided over line shared loops, any cost disadvantage suffered by that competitor would easily be cured by making line shared loops available to it. As for incumbent LECs, the Commission's statement is positively Orwellian; under pricing rules requiring non-discrimination, any "advantages" enjoyed by a line shared competitor would be exactly the same as those enjoyed by the incumbent. Moreover, the Commission never claims that state commissions have somehow thwarted the non-discrimination requirements of its rules and priced line shared loops below the level of the incumbents' allocation of loop cost to ADSL. Instead, paradoxically, the Commission concedes that most states have been faithfully following its line sharing pricing rules.[93] So how, exactly, a rule requiring non-discrimination has put incumbents at an irrational cost disadvantage remains a complete mystery.

The other putative social cost claimed by the Commission is the fact that the availability of line sharing somehow "skews" competitors towards providing broadband-only services, rather than voice and data bundles.[94] What exactly is skewed about competitors providing data-only services to satisfy consumer demand for data-only services? Again, the Commission's reasoning is something of an economic mystery. What *is* "skewed" is a regulatory decision to foreclose service providers from having the ability to offer broadband products for which there is clearly consumer demand. As discussed above, the Commission's aspersions that line sharing creates some kind of pricing distortion or regulatory arbitrage ring completely hollow. Given that the Commission does not successfully make the case of pricing or regulatory arbitrage

[93] *See Order* at para. 260.

[94] *See Order* at para. 261.

against line sharing, the only economic distortion readily apparent from the Commission's reasoning is not the success of line sharing in satisfying consumer demand for broadband services over the last three years, but rather the Commission's decision to foreclose such services in the face of that consumer demand. And again, in a flourish of Orwellian rhetoric, the Commission declares that its action to restrict the availability of competitive broadband offerings "is meant to encourage competition and innovation in all telecommunications markets," without explaining how exactly that will result.[95]

D. Conclusion.

Based on the foregoing, Petitioners believe that there is more than ample reason to conclude that Petitioners are likely to succeed on the merits of their claim that the Commission's decision to eliminate the line sharing UNE was unlawful.

II. Petitioners Will Suffer Irreparable Harm If the Commission Does Not Grant Their Request for a Stay Pending Judicial Review.

"In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief."[96] Petitioners will certainly suffer irreparable harm if their stay request is not granted. Under the terms of the Commission's *Triennial Review* order, Petitioners will suffer immediate, dramatic price increases for continued access to the high frequency portion of the loop. Specifically, upon the effective date of the Commission's order, Petitioners will face a new requirement that they pay a new, recurring monthly fee of 25% of the standalone UNE loop rate for access to the high-frequency portion of the loop. In a nascent business already facing thin margins, this result would place

[95] *See* Order at para. 260.

[96] *Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 425 (8th Cir. 1996).

tremendous pressure on Petitioners' continued ability to viably provide consumer broadband services. Certainly, Petitioners would be hard pressed to offer the low-priced, entry-level consumer products that have been the hallmark of competitive broadband offerings.[97] Indeed, many, if not all, Petitioners could be forced to exit the consumer line shared broadband business entirely, and limit their product offerings to expensive, niche business services, either with much higher profit margins or that do not use the line sharing UNE at all. The threat of such unrecoverable economic loss clearly qualifies as irreparable harm.[98]

Meanwhile, Petitioners' primary competitors, the incumbent phone monopolies on whom Petitioners depend for network element access, will be unfettered in their ability to continue growing their share of the consumer broadband market. Indeed, the FCC has given them a severe competitive advantage, because the incumbent LECs are immune from the price increases that the Commission has arbitrarily imposed on competitive carriers. Indeed, the Bell companies' DSL affiliates – which use exactly the same line shared facilities as do competitive carriers – will have an immediate 25% price advantage over their competitors. Under current market conditions, the margins available to competitive broadband service providers like the Petitioners have become much lower,[99] while simultaneously the Commission's decision artificially inflates their costs

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[97] *See supra* n. 54.

[98] *See, e.g., Baker Elec. Coop., Inc. v. Chaske,* 28 F.3d 1466, 1473 (8th Cir.1994); *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1227 (8th Cir.1987).

[99] For example, under Verizon's current retail DSL pricing, Verizon's entry-level DSL product can be purchased for $29.95. *See Verizon Press Release*, "Verizon Supercharges DSL with New Wi-Fi Access, Higher Speed, Lower Prices and 'Verizon Online DSL with MSN 8' Service," May 13, 2003. Meanwhile, under Verizon's current wholesale tariffed pricing, the least expensive product available carries a monthly charge of $28.95 if the purchaser commits to a five year term. (This can be lowered to $26.95 – but only if the purchaser commits to purchasing 50,000 lines per year over those five years.) Thus Verizon itself

to provide line shared broadband services over a three year period. Under the Commission's decision, Petitioners end up paying for "costs" that their suppliers (the incumbent phone companies) will never incur, and that their competitors (also, the incumbent phone companies) will never face for their own broadband service offerings. Under these conditions, to remain in the consumer line shared broadband space amounts to a Sisyphean task.

Similarly, the Commission's decision to preclude Petitioners from adding new customers to their networks using the high-frequency portion of the loop after one year would cause Petitioners to suffer irreparable harm. Industry reports suggest that broadband adoption is at a nascent, critical stage, after which a typical S-curve adoption rate is to be expected.[100] In light of the sharp uptick in broadband adoption predicted to be around the corner, the Commission's order amounts to a decision to leave Petitioners out at a critical stage of the impending broadband boom. As discussed below, the Commission's own data shows that its adoption of line sharing rules in 1999 has already resulted in a dramatic boom in broadband deployment. That data also shows, however, that an even greater boom in ADSL deployment by competitive DSL providers is around the corner.[101] Deployment data for Petitioner Covad Communications, the largest provider of competitive ADSL services in the nation, also reflects a sharp, impending

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purports to have margins of only $1 to $3 on its retail DSL products. Needless to say, Petitioners have extremely low margins in competition with such pricing.

[100] *See, e.g., Federal-State Joint Conference on Advanced Services,* Report, "Broadband Service in the United States: An Analysis of Availability and Demand," at pp. 24-32 (Oct. 2002) (discussing current broadband penetration levels as being at the early stage of an S-curve adoption pattern, and projecting broadband penetration between 36.1 and 49 million households by 2005) (available at: http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513307632).

[101] *See* Attachment E, Chart entitled "Non-ILEC ADSL Lines, 2001-Present" (data taken from FCC High Speed Subscribership Reports, available at http://www.fcc.gov/wcb/iatd/comp.html).

boom in ADSL deployment to come.[102] Indeed, the Commission's own Joint Conference on Advanced Services has recognized that current broadband penetration levels are at the early stage of an S-curve adoption pattern, with dramatically higher take rates to follow.[103] As these data show, Petitioners will surely suffer irreparable harm in the loss of a huge future customer base if the Commission's prohibition on the addition of new line sharing customers after one year is allowed to stand.

Furthermore, if the Commission's order phasing out line sharing is allowed to stand, then Petitioners' primary competitors (the incumbent phone monopolies) will be free to exploit the exploding future broadband market, while, after judicial review proceedings have been concluded, Petitioners become free at some point in the future to capture a small fraction of the remaining market. In the meantime, consumers will view the additional costs imposed on broadband services provided by Petitioner competitive carriers as less attractive than services offered by incumbent carriers, who face no such regulatorily-imposed costs. The Petitioners' potential loss of consumer goodwill qualifies as irreparable harm.[104] This assumes that Petitioners are economically able to sustain their residential line sharing business while subject to these discriminatory price increases. Thus, the line sharing pricing transition in the Commission's order will act to further limit the customers that Petitioners are able to win during the phase-out period.

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[102] *See* Attachment E, Chart entitled "Covad Consumer Lines, 2001-Present" (data taken from Covad press releases, available at http://www.covad.com/companyinfo/pressroom/index.shtml).

[103] *See supra* n. 100.

[104] See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 552 (4th Cir.1994) (holding that the possibility of permanent loss of customers to a competitor or the loss of goodwill satisfies the irreparable injury prong).

Moreover, unless the Petitioners' limited stay request is granted, their line shared DSL offerings (both wholesale and retail) will immediately become less marketable than the incumbent LECs' similar offerings, due to the Commission's restricting Petitioners from adding new line shared customers to their networks after one year. In particular, wholesale and large retail customers are likely to begin shifting their line shared business immediately to the incumbent LECs, from whom they can continue adding customers beyond one year. In addition, new wholesale and large retail customers are likely to prefer providing their initial business for line shared services to the incumbent LECs over the Petitioners. After all, why would a large customer invest in negotiating access arrangements and creating business-to-business relationships (including OSS interfaces and personnel) with the Petitioners, when that customer will no longer be able to place new orders with the Petitioners after one year in any case?

Indeed, the Commission's Order also makes it very difficult for Petitioners to continue making inroads into the wholesale market for high-speed consumer broadband services. Particularly with the combination of immediate price increases, continuing price increases over three years, and an inability to add new customers after one year, Petitioners' wholesale consumer broadband offerings could immediately become extremely unattractive to Internet Service Providers (ISPs) compared to the incumbent phone monopolies wholesale consumer broadband offerings. After all, why would an ISP put its end users on the Petitioners' networks now, when their prices are likely to be immediately higher, continue to increase over three years, and when the ISP would no longer be able to add new customers to the Petitioners' networks after one year? Why would an ISP invest in creating business-to-business processes and operations support

systems to order large volumes of wholesale consumer services from the Petitioners, when those consumer offerings threaten to disappear anyway? Thus, the Commission's Order not only curbs Petitioners' future business prospects in the consumer broadband space, but forces Petitioners to face the immediate business impact of rendering their wholesale service offerings to ISPs much less competitive compared to the incumbent phone monopolies' similar offerings – again, at a critical stage in the nascent broadband boom.

Furthermore, as set forth in detail above and in the attached declarations, the Commission's decision to preserve access to line splitting does not yet act to alleviate the competitive harm that Petitioners are sure to suffer under the Commission's Order. Line splitting is not yet fully operationally available across the nation. Thus, when the Commission's Order becomes effective, Petitioners will not yet even have sufficient access to line splitting to help mitigate the injurious effects of the Commission's immediate prices increases and prohibition on new line shared customers after one year. Until line splitting systems and process reach parity with existing line sharing systems and processes, Petitioners will require continued access to line sharing at the rates and terms contained in their existing interconnection agreements. And until line splitting is available on a truly nondiscriminatory basis, Petitioners will surely suffer irreparable harm when the Commission's Order becomes effective.

These detrimental effects, both individually and in the aggregate, surely constitute "irreparable harm" for the purposes of a stay request. While Petitioners recognize that temporary economic losses for which "adequate compensatory or other corrective relief

will be available at a later date do not qualify as irreparable harm,"[105] this is decidedly not such a case. There is no way that Petitioners could – were they ultimately to prevail on the merits – obtain "adequate compensatory or other corrective relief" for having been relegated to the sidelines nationally from providing consumer line shared broadband services while the incumbent phone monopolies solidified their dominance in the provision of such services. Accordingly, this is a clear situation in which the "threat of unrecoverable economic loss 'does qualify as irreparable harm.'"[106]

Indeed, the U.S. District Court for the Northern District of Illinois recently reached the same conclusion when it enjoined the application of an Illinois state statute that would have had the effect of substantially raising rates competitive telecommunications service providers pay incumbent telephone monopolies for access to unbundled network elements, such as a the line sharing UNE. The Court stated:

> Plaintiffs argue that they will be irreparably harmed in a manner for which they have no adequate remedy at law if the ICC implements new rates as directed by the Illinois legislation. We agree… [T]he competing LECs will still suffer an injury for which no remedy exists if the rates are permitted to increase and are later invalidated upon a full disposition of this case on the merits.[107]

In the absence of a stay in this matter, Petitioners will suffer irreparable harm that is virtually identical to that of the plaintiffs before the District Court. Like the Illinois legislation, the Commission's Order requires "substantially higher rates" for access to the line sharing UNE, higher rates that "will immediately effect [sic] all lines leased by" the

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[105] *Virginia Petroleum Jobbers*, 259 F.2d at 925.

[106] *See, e.g., Access Charge Reform (Request for Stay)*, 12 FCC Rcd 101175, 10188 (1997) (quoting *Iowa Utilities Board v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996)).

[107] *See Voices for Choices, et al., v. Illinois Bell Telephone Co., et al.,* Docket No. 03-C-3290, Slip Op., at 15-16 (N.D. Ill. June 9, 2003).

Petitioners.[108] Like the plaintiffs, Petitioners will have to "choose between forgoing the expansion [of their consumer broadband customer base]… or proceeding with the expansion and paying higher rates. Either way, they will suffer irreparable harm."[109] In the instant matter, Petitioners face exactly the same scenario – they can either pay higher line sharing rates, or forego the expansion of their consumer line shared customer base. Only the immediate issuance of a stay can prevent that irreparable harm from ensuing while judicial review of the Commission's decision is underway.

III. Issuance of a Stay Will Not Cause Harm to Other Parties.

Although implementation of the Commission's transition mechanism to phase-out the line sharing UNE would cause imminent, severe, and irreparable harm to Petitioners, granting the limited stay requested pending a final, non-appealable decision on appeal would not cause any significant harm to other parties. Certainly a stay will not cause harm to CLECs, who may benefit from the opportunity to provide consumer broadband services made possible via the line sharing UNE. Nor would a stay harm Internet Service Providers or consumers. As discussed in greater detail below, a stay can only benefit Internet Service Providers and consumers, by affording them a greater number of consumer broadband options and greater competition amongst available providers of consumer broadband services. Clearly, having access to additional providers of consumer broadband services increases competition, and helps to keep service prices lower for ISPs and consumers alike.

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[108] *See id.,* at 15.

[109] *See id.*

A stay will also not significantly harm ILECs. A stay will simply require the ILECs to continue to provide access to the high-frequency portion of the loop at non-discriminatory, cost-based rates, as implemented in existing, state-commission ordered line sharing rates, during the pendency of the appeal. A stay will merely continue existing processes already in place, under which competitors already purchase line shared loops to provide service to more than 314,000 consumers.[110] And while the payments for these line shared loops may constitute a large portion of the expenses of small companies like the Petitioners, they barely constitute a drop in the ocean of revenues of the massive ILECs. For example, the four regional Bell companies reported a cumulative $35.75 billion revenues in the first quarter of 2003 alone.[111] By contrast, Covad Communications, the nation's largest CLEC DSL provider with approximately 417,000 total lines and 233,000 consumer broadband lines, reported first quarter revenues of $90.9 million.[112] Furthermore, Covad's operating expenses for network and product costs – also including costs for obtaining the line sharing UNE – were approximately $69 million. Thus, Covad's network and product costs were less than 0.2% of the Bell companies' reported revenues in the same quarter. Indeed, the Commission's latest figures show that incumbent phone company ADSL lines constitute more than 95% of all

[110] *See High-Speed Services for Internet Access:Status as of December 31, 2002*, at Table 5 (reporting 314,862 non-ILEC ADSL lines).

[111] *See SBC Investor Briefing*, "SBC Communications Reports First-Quarter Earnings Per Diluted Share of $1.50; $0.74 Before Cumulative Effects of Accounting Changes," at 1 (April 24, 2003) ($10.3 billion revenues); *BellSouth Investor News*, "BellSouth Reports First Quarter Earnings," at 1 (April 23, 2003) ($5.52 billion consolidated revenues); *Verizon Investor Quarterly*, "Verizon Communications Reports Solid Quarterly Results Bolstered by Demand for Wireless, LD, DSL and Bundles," at 2 (April 22, 2003) ($16.3 billion revenues); *Qwest News Release*, "Qwest Communications Reports First Quarter Earnings, Operational Highlights, And Additional Results Of Financial Restatement And Audit Review," at 2 (May 29, 2003) ($3.63 billion revenues).

[112] *See* Covad Communications Group, Inc., Form 8-K, "Covad Communications Group Announces First Quarter 2003 Results," at 1 (May 15, 2003).

ADSL lines in service, with CLEC DSL comprising the remainder.[113] Even one of the Bell companies has argued that CLEC DSL lines merely constitute a miniscule 0.3% of the broadband mass market.[114] Accordingly, it is difficult to see how grant of the Petitioners' stay request would have any significant financial impact on the ILECs.

In addition, in the unlikely event that the Commission's rules are ultimately upheld, Petitioner' payments at existing, state-commission ordered rates could be trued-up to the corresponding line sharing rates set out under the Commission's transition mechanism.[115] Accordingly, continuing to make the high-frequency portion of the loop available to Petitioners during the pendency of appeals will have absolutely no long-term effect on the ILECs' businesses.

Finally, issuance of the requested stay will not harm the Commission itself. As a number of courts have recognized, where an order that remains subject to reversal would dramatically alter the *status quo*, administrative efficiency goals are often best served by staying the order pending appeal.[116] Here, Petitioners are not asking the Commission to disturb its underlying decision regarding the line sharing UNE. Rather, this petition asks the Commission to stay the effectiveness of only a limited portion of that decision in order to permit Petitioners to continue providing service while judicial review of the underlying decision proceeds. Such a limited request protects consumers, broadband

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[113] *See High-Speed Services for Internet Access:Status as of December 31, 2002*, at 3 and Table 5.

[114] *See* Letter from Susanne Geyer to Marlene H. Dortch, Federal Communications Commission, in WC Docket No. 01-338, dated May 19, 2003 at pp. 1-2 (arguing that line sharing represents only 0.3% of the broadband mass market).

[115] But such a remedy does not work in reverse – nothing can "true up" the Petitioner's inability to sign up any residential lineshared customers while the appellate review of the FCC's decision is pending.

[116] *See, e.g., Ruiz v. Estelle*, 650 F.2d 555, 573 (5th Cir. 1981).

providers, and the Commission's interest in avoiding massive disruption in the broadband sector.

IV. Issuance of a Stay Is in the Public Interest.

A stay pending judicial review would benefit the public because it would enable Petitioners to continue to provide consumers with a greater number of broadband service options than would be available absent a stay. Petitioners serve hundreds of thousands of broadband customers in rural and urban areas of almost every state in the country. As such, without the availability of the line sharing UNE, consumers will be left with at best two choices of broadband providers (cable modem and phone company DSL), and in many areas will have only one provider. Absent a stay, as set forth above, many if not all of the Petitioners may be forced to discontinue the provisioning of consumer line shared broadband services.

Clearly, the ability of any new entrant to provide consumer broadband services will be severely curtailed by the new rules, which artificially inflate competitors' costs to provide consumer broadband services above their competitors' (the incumbent phone monopolies) own costs, and which preclude them from obtaining new customers after one year. Under such conditions, it is nearly impossible for competitive broadband providers to make investments in the provision of consumer line shared broadband services, and to compete to provide wholesale consumer line shared broadband services to Internet Service Providers. The radical reduction of consumer broadband choice that will inevitably result from the Commission's Order is clearly contrary to the public interest and to the specific goals of the 1996 Act.

Indeed, as discussed above, the Commission's own deployment data show clearly that the primary factor driving the deployment of ADSL services for the last three years, by incumbent phone monopoly and competitors alike, has been the Commission's line sharing rules. When the FCC created the line sharing rules in 1999, its own data showed 115,000 residential ADSL lines in service.[117] Today, as a direct result of the line sharing rules, the FCC reports 6.5 million ADSL lines in service – an increase of over five thousand percent.[118] Moreover, the prices for consumer broadband offerings have dropped precipitously as a result of the competitive pressures of line sharing. Prior to the Commission's *Line Sharing Order*, the Bell companies were charging as much as $69.95 for line shared ADSL service.[119] Today, as a result of the competition made possible by line sharing, competitors and incumbent phone companies alike market entry-level line shared services in the $30 to $40 price range.[120]

In considering whether grant of the requested stay would be in the public interest, the Commission should also pay heed to the tremendous benefit that competitive broadband services using line shared loops have made across the nation – including rural areas of the nation. The Wireline Competition Bureau recently presented data to the Commission indicating the increases in rural broadband deployment that have taken place

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[117] *See Deployment of Advanced Telecommunications Capability: Second Report*, CC Docket No. 98-146, Second Report, FCC 00-290, para. 72 (2000).

[118] *See High-Speed Services for Internet Access:Status as of December 31, 2002*, Industry Analysis and Technology Division of the Wireline Competition Bureau, Federal Communications Commission, at 2 and Table 1 (June 2003).

[119] *See supra* n. 50.

[120] *See supra* n. 53-54, 99.

during the last three years.[121] Of course, the last three years is precisely the time during which competitive broadband services using line sharing were first made available to consumers. The Commission's own data shows the sharp increase in rural ADSL deployment that took place in the last three years, and the even greater rural ADSL boom to come. In the six states presented by the Bureau (South Dakota, North Carolina, Kentucky, Wisconsin, Virginia and California), the Commission's data shows that ADSL deployment accelerated dramatically between the end of 1999 and the end of 2002 – a clear result of the Commission's line sharing rules. More importantly, that data shows that ADSL deployment will accelerate even further under current trends – in other words, if line sharing continues to remain available.[122] Deployment data for Petitioner Covad Communications shows that Covad's rural ADSL deployment accelerated sharply after the Commission's line sharing rules were issued. Specifically, in areas populated by less than 500 people per square mile,[123] Covad's ADSL deployment increased over a thousand fold since the end of 2000 through today, to more than 10,000 rural ADSL lines. More importantly, that data shows that Covad's rural ADSL deployment will

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[121] *See* FCC News Release, "Federal Communications Commission Looks at Data on Growth of Broadband Subscribership in Rural Areas," dated August 6, 2003.

[122] *See* Attachment F.

[123] In applying this standard to select rural areas, Petitioners attempted to conform with the Census Bureau's classification of rural areas as all areas excluding "urbanized areas" and "urban clusters," defined "to encompass densely settled territory, which consists of:

- core census block groups or blocks that have a population density of at least 1,000 people per square mile and
- surrounding census blocks that have an overall density of at least 500 people per square mile."

See U.S. Census Bureau, "Census 2000 Urban and Rural Classification," available at http://www.census.gov/geo/www/ua/ua_2k.html. Indeed, Petitioners' exclusion of all areas with a population density of 500 people per square mile or greater arguably undercounts rural areas, thereby understating Covad's overall rural ADSL line count.

continue to accelerate sharply under current trends – in other words, if the Commission's current line sharing rules are maintained.[124]

In fact, a number of the Petitioners focus their line shared broadband service offerings primarily or exclusively in rural areas – areas that would remain unserved were it not for the Petitioners' access to line shared loops. For example, Complete Telecommunications provides line shared services in rural areas of the mountain regions of Colorado, much of which has remained unserved by Qwest.[125] GWI has taken the lead in using line sharing to serve underserved rural communities in Maine, including several communities which Verizon does not serve with ADSL services.[126] NC Telecom uses line sharing to serve rural communities in northwester Colorado which Qwest does not serve with broadband services.[127] New Edge Networks provides broadband services, including line shared DSL services, in small and midsize cities across the country.[128] NTELOS provides line shared ADSL services to more than 2,500 customers in rural areas of Virginia and West Virginia; in many of its CLEC rural markets, NTELOS is the only DSL provider.[129] The Ruby Ranch Internet Cooperative Association provides line shared DSL services to homes in the Ruby Ranch neighborhood of Summit County, Colorado, homes for which there is no alternative DSL or cable modem provider.[130]

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[124] *See* Attachment G.

[125] *See* Attachment H at pp. 1-3.

[126] *See* Attachment H at pp. 4-5.

[127] *See* Attachment H at pp. 5-6.

[128] *See* Attachment H at p. 7.

[129] *See* Attachment H at p. 8.

[130] *See* Attachment H at p. 9.

Skowhegan Online began providing line shared DSL services in highly rural Somerset County, Maine, three years before Verizon entered in response.[131] Twin Rivers Valley Telephone provides line shared DSL services in central and northwest Iowa communities where Qwest has indicated it does not plan to offer any type of DSL services.[132]

As discussed above, the Commission's latest deployment data show that the price competition made possible by line sharing is working, and that ADSL deployment accelerated at a rapid rate in the second half of last year as a result.[133] Furthermore, the Commission's deployment data show that line sharing has worked to vastly improve the condition of rural broadband deployment, and stands to tremendously improve the pace and level of rural broadband deployment even further. Unless the Commission grants the Petitioners' limited stay request, as soon as the Commission's Order become effective this progress in increasing broadband deployment and lowering consumers' prices will come to an abrupt halt. Accordingly, granting Petitioners' limited stay request would clearly be in the public interest.

[131] *See* Attachment H at p. 10.

[132] *See* Attachment H at p. 11.

[133] *See supra* at pp. 19-20.

CONCLUSION

The Commission should stay the effect of a limited portion of its Order pending judicial review until the entry of a final, non-appealable decision on review of the Order, which will also allow sufficient time for line splitting-related operational issues to be resolved, to the extent that application of the Commission's Order would (1) increase any existing, state commission-ordered or negotiated rates for requesting telecommunications carriers to access the high-frequency portion of the loop on the Order's effective date; and (2) prevent requesting telecommunications carriers from purchasing access to the high-frequency portion of the loop for new customers after the first year of the Commission's announced three-year transition period. If the Commission does not act on this Petition by September 19, 2003, Appellants will deem the Commission to have denied this Petition, and intend to seek a stay of the Order from the U.S. Court of Appeals in order to provide the court with an opportunity to act before the rules would otherwise take effect.

Respectfully submitted,

THE CHOICE COALITION

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VIA ELECTRONIC FILING (signatures on file)

Dated: August 27, 2003

ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

JOINT DECLARATION OF VALERIE EVANS AND MICHAEL CLANCY

Valerie Evans and Michael Clancy state, respectively, that the following is true and correct to the best of our knowledge and belief:

1. My name is Valerie Evans, Vice President – Government and External Affairs for Covad. I act as a liaison between Covad's business personnel and Verizon. I am also responsible for participating in various federal and state regulatory proceedings, representing Covad.

2. Before joining Covad, I was employed by Verizon Communications for 13 years. After joining that company in 1985, I held various management positions including Assistant Manager of Central Office Operations and Manager of Installation, Maintenance and Dispatch Operations. In those positions, I oversaw the installation and maintenance of services to retail customers. Specifically, I supervised several groups that were responsible for the physical end-to-end

installation of facilities and the correction of any defects or problems on the line. In 1994, I became Director of ISDN Implementation. In that position, I established work practices to ensure delivery of ISDN services to customers and to address ISDN facilities issues -- issues very similar to those encountered in the DSL arena.

3. My name is Michael Clancy, Director of Government and External Affairs for Covad. Prior to my current position, I performed customer support and operations functions for Covad's New York Tri-State region. In particular, I was responsible for building out Covad's network in New York and all other operations activities.

4. Prior to coming to Covad, I was employed by Verizon's predecessor companies, in various Network Services, Special Services, and Engineering assignments, with increasing levels of responsibility, for over 27 years. My last assignment in Verizon New York was Director of Interoffice Facility Provisioning and Process Management for the Bell Atlantic 14-state footprint.

5. Verizon's processes and OSS for Line Splitting are inadequate to allow CLECs to scale their businesses by offering customers a package of both voice and data services. Before Line Sharing can be transitioned out, the processes and OSS for Line Splitting must provide competitors with a meaningful opportunity to compete.

6. First, Verizon's initial order and migration processes for Line Splitting do not offer competitors a meaningful opportunity to compete. As an initial matter, before a data CLEC can submit a new Line Splitting order with Verizon, the corresponding voice order must already be completed by Verizon. Unlike

Verizon's Retail arm, competitors cannot bundle voice and data easily via Line Splitting because two (2) orders must be submitted, rather than simply one (1) order as Verizon does. The CLEC data order cannot be submitted until the voice order is complete and the billing record (CSR) is updated in Verizon's systems, which can take from three to five days. In addition, Verizon does not allow a data CLEC to query for a telephone number against a pending voice order and, therefore, a data CLEC cannot pre-qualify a loop to determine if it is DSL compatible unless and until the voice order has been completed. Verizon's Retail arm, on the other hand, takes one order to manage the entire process.

7. With respect to migration orders, under a Line Splitting arrangement, if an end user changes voice providers or moves locations, Verizon will disconnect and reconnect an end-user's data service in order to effectuate the customer's change/move, while the customer's voice service will be transitioned seamlessly. The customer can be without data for several days during this process. Verizon's Retail arm, on the other hand, does not encounter similar problems if one of its customers moves locations.

8. Verizon recently unilaterally and arbitrarily determined that it would refuse to act on change request # CR-2805, requesting that Verizon implement LSR-based commercial processes for line splitting migrations (see attachment). Verizon allowed this change request to linger for more than 3 months, only to summarily decide that it would then deny the request. Verizon supported its decision with the glib statement that there was insufficient volume to support developing these processes – despite the fact that every CLEC supporting this request gave it a

rating of 5, reflecting the highest level of importance. Verizon's unilateral refusal to implement and schedule this change reflects nothing more than Verizon's continuing policy of discrimination against competitive voice and data providers. Indeed, Verizon's explanation of its decision to deny this request is nothing short of Orwellian. There is insufficient "volume" for line splitting migrations precisely because Verizon fails to implement a commercially scalable process for linesplitting migrations, forcing competitors to resort to a manual, project-based process.

9. Second, CLECs cannot implement Line Splitting in the Verizon West territories on a commercial scale. In the Verizon West region, when an end user chooses a UNE-P provider as its voice provider, Verizon randomly assigns the circuit a Fictitious Telephone Number ("Fictitious TN") in its OSS for purposes of cross referencing the end user circuit, rather than using the customer's actual telephone number if one exists. The Fictitious TN is used by Verizon's OSS to manage the customer's account. In order to submit and process a Line Splitting Order, a CLEC must use the appropriate Fictitious TN when using Verizon's OSS. A serious problem arises when a CLEC cannot determine the value of the ten digit Fictitious TN randomly assigned by Verizon to the end user's account. Often, this Fictitious TN is unknown and can be difficult for CLECs to determine. Verizon's Fictitious TN is not provided to data CLECs, is typically not known by the customer, and often not found in the Customer Service Record ("CSR") or not found in a searchable field, meaning that the search process cannot be automated and must be performed by the CLEC manually. CLECs must follow a time

consuming process to determine the Fictitious TN prior to submitting a Line Splitting Order. This problem makes Line Splitting unmanageable on a commercial basis in many Verizon territories.

10. Finally, Covad continues to have problems implementing various forms of Line Splitting in the Verizon region. Verizon is discriminating against resellers and UNE-L providers and preferentially treating UNE-P providers and its own Retail Voice service. First, Verizon does not make voice service available for resale when another carrier is utilizing the high frequency portion of the loop ("HFPL") to provide DSL services. Covad requests that Verizon offer a form of Line Splitting, (referred to as Line Partitioning in this Declaration), in which end users receive voice services from a reseller of Verizon local service, while Covad offers xDSL over the high frequency portion of the loop. This is a form of Line Splitting; however, rather than using a UNE-P voice service as the voice service provider, a CLEC other than Covad would be reselling Verizon's voice line. Operationally, this is the same as Line Splitting as two wholesale customers of Verizon share the loop. CLECs have the legal right to resell Verizon's voice service and Verizon's refusal to provide basic voice services in these instances is patently unreasonable and discriminatory, which is in violation of the Act and the FCC rules.

11. In a recent arbitration between Covad and Verizon New York, the New York Commission ruled that: "We see no current legal impediment to line partitioning, and we are inclined in principle to direct that it be offered as a mechanism to enhance the choices available to customers. But any such decision on a broad

policy matter may have effects on market players beyond those represented in this bilateral proceeding, and we will therefore issue a notice inviting comment before deciding whether to go forward."

12. Verizon also discriminates against UNE-L providers. The Line Splitting processes and OSS for Line Splitting with a UNE-L provider are different than with a UNE-P provider. Verizon's processes for UNE-L providers are not scaleable. In order to accomplish Line Splitting, a UNE-P provider and a collocated telecommunications carrier must interconnect with each other within the same Verizon premises via a jumper connection between a Connecting Facility Assignment ("CFA") and the Office Equipment that is the Unbundled Switch port. Verizon requires the disassembly of UNE-P into its component elements, the Switch Port and the UNE Loop to provide Line Splitting. In the case involving UNE-L and data providers, Verizon does not follow the same process for CLEC-to-CLEC cross connects. Verizon requires CLECs to interconnect with each other using Verizon's Dedicated Transit Service ("DTS") out of its respective FCC Special Access tariffs. DTS does not use the processes and OSS that Verizon has built to manage UNE orders and Line Splitting orders in UNE-P scenarios. With DTS, Verizon requires CLECs to submit an ASR, rather than an LSR. The ASR process forces CLECs, such as Covad, to build new systems to manage what is the same provisioning process used with UNE-P providers. The only difference is Verizon is forcing CLECs to use ASRs instead of LSRs. In addition, the ASR process pushes the demand for these services to a center within Verizon that is not designed to handle the provisioning of UNE

loops. Rather, Verizon's ASR process typically manages high capacity services, such as DS1 and DS3 services. The agents in these centers are neither trained nor familiar with the challenges providers typically encounter while provisioning shared loop services.

13. Verizon's discriminatory actions not only impair a CLEC's ability to place orders for Main Distribution Frame ("MDF") cross connections, as they do now, but by forcing this demand into centers that handle high capacity services, Verizon will increase the costs for itself and CLECs, will reduce Verizon's production capability for CLEC high capacity services, and will not be able to manage commercial volumes of orders to Line Split on UNE-L orders by interconnecting Voice providers with Data providers. This is contrary to the FCC's goals to promote facilities-based interconnection.

14. Verizon's decision to use different processes and OSS for UNE-P and UNE-L providers is meant only to impede the availability of Line Splitting. Verizon can easily modify its OSS to support the interconnection of two CFAs. Verizon currently inventories CFAs in order to provision voice services ordered by the facilities-based voice CLECs on UNE loops. Additionally, Verizon inventories the data providers Splitter assignments as CFA in its OSS. In fact, Verizon performs this function today in order to self-provision Line Sharing where Verizon's dial tone equipment is connected to a competitive data CLEC's CFA. Verizon simply refuses to perform the same functions for a facilities-based voice CLEC that it does for its own retail voice service today.

15. Verizon is discriminating against resellers and UNE-L providers and unreasonably tying Line Splitting to the availability of UNE-P. Should a state eliminate UNE-P as a UNE, resellers and facilities-based voice carriers alike will be inhibited by Verizon's operational practices from offering competitive bundles of voice and data services to consumers.

16. Verizon's policy is designed to defeat competition and should not be permitted to stand. Verizon's intended result of offering its own retail Line Sharing without a competitive Line Splitting alternative should be rejected.

17. This concludes our joint declaration.

Rank	CR#/ Type	Description of CR	CLEC Ratings	Status/Comments
6	2805 Type 5	**Title:** Linesplitting Data Migrations - East **Description:** The purpose of this initiative is to expand the interim migration capability to include the migration of data on linesplit loops. This would include a migration scenario for LineSplitting to LineSplitting where the data carrier changes. **Reason:** System enhancement **Process:** Order, Pre-Order; **Jurisdiction:** North, South **System:** EDI, LSI, CORBA **Primary Area:** UNE; **LSOG Version**: LSOG 5 and above. **Initiator:** Michael Clancy, COVAD, 1-15-03	Overall = 5.0 Allegiance = P AT&T = 5 Broadview = P Cavalier = P Choice One= P Covad = 5 Cox = P CTSI= P Met Tel = 5 TalkAmerica= P VarTec = P Worldcom= 5 Z-Tel = 5 Adelphia= 5 McGraw= 5 Conestoga= 5	**STATUS: DENY** 5/6/03 There is not enough volume to justify resources to develop an LSR based process. Requests to migrate data providers in a line split arrangement will be handled on a project basis. 2/11/03 Rated by CLECs LOE=High 2/4/03 New to list.

ATTACHMENT B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

JOINT DECLARATION OF WILLIAM H. WEBER AND COLETTE DAVIS

William H. Weber and Colette Davis state, respectively, that the following is true and correct to the best of our knowledge and belief:

18. My name is William H. Weber, Vice President – Government and External Affairs for Covad Communications Company (Covad). I act as a liaison between Covad's business personnel and both BellSouth Telecommunications, Inc. (BellSouth) and BellSouth Communications International, Inc. (BellSouth), and I lead Covad's regulatory and legislative initiatives in both the BellSouth and the BellSouth regions.

19. Before joining Covad, I was an attorney in private practice. Prior to that, I was a law professor at the University of Georgia School of Law and an attorney for the United States Marine Corps. I also spent six years as an armor officer in the Marine Corps.

20. My name is Colette Davis, Director of Government and External Affairs for Covad in the BellSouth region. In that capacity, I am involved in the day to day operations of Covad's relationship with BellSouth, its sole supplier of unbundled network elements. I function as the liaison between BellSouth's and Covad's operations groups in the resolution of operational issues arising from Covad's use of BellSouth OSS systems, as well as pre-ordering, ordering and provisioning systems. I participate in ensuring that Covad's operational issues are appropriately escalated and addressed by the various BellSouth work groups that affect Covad's ability to be successful in this region, including the CRSG, the CWINS group, the LCSC and Covad's account team.

21. Prior to joining Covad in July 2000, I worked at Project Management Services, Inc. ("PMSI") as an Assistant Vice President of Professional Services Division. In that role, I directed strategic network infrastructure projects for our clients. During my tenure at PMSI, I provided project management services to the BellSouth ADSL network process improvement project. Earlier in my career, I worked for BellSouth for 15 years in the Consumer Operations department. In that capacity, I held responsibilities including business office line management, staff support for force management, customer service and carrier services as well as managing consumer projects. Because of my project management and Operation Support Systems (OSS) background, my work at Covad focuses on managing our OSS needs and ensuring that BellSouth develops the functionalities necessary to enable Covad to successfully compete in this region. Because of my

work with other ILECs while at Covad, I gather the best practices from around the country and implement them in the BellSouth region, when appropriate.

22. BellSouth's processes and OSS for Line Splitting are inadequate to allow CLECs to scale their businesses by offering customers a package of both voice and data services. Before Line Sharing can be phased out without causing serious injury to the vigorous competitive market that has begun to develop in consumer DSL services, the processes and OSS for Line Splitting must provide CLECs with a meaningful opportunity to compete. This Declaration focuses on several key areas where BellSouth's Line Splitting procedures create a barrier to the development of competition: Line Splitting ordering, testing, provisioning specifications, record keeping and performance measures. BellSouth's failures in these areas must be corrected before any changes are made to the Line Sharing rules. Any other outcome will mean that the significant strides that were made during the 271 process in fostering competition in the BellSouth region will be lost, and all the work that state commissions throughout the BellSouth footprint put into ensuring that Line Sharing processes were fair and appropriate will have been for naught.

23. **Ordering.** First, BellSouth's OSS for Line Splitting does not offer CLECs a meaningful opportunity to compete. BellSouth has defined twenty-three different scenarios for placing a Line Splitting order, each one of which has its own ordering requirements. **Of these twenty-three scenarios, only one ordering scenario is mechanized.** For BellSouth, on the other hand, there is not a single consumer order adding data to an existing voice customer or, for that matter,

implementing a combined voice/data order for the first time, that is not mechanized.

24. The only ordering scenario that BellSouth has mechanized is the UNE-P-to-Line Splitting (with a DLEC owned splitter) migration. BellSouth's failure to mechanize other types of Line Splitting orders is—as will be shown in detail below—a carefully calculated way to ensure that competition for bundled voice and data services is never allowed to develop. The lack of mechanized ordering for the vast majority of Line Splitting ordering scenarios has three primary impacts: (1) it dramatically increases the non-recurring cost of establishing service for a new customer, (2) it channels competition into the narrow lanes where mechanized ordering is available and thereby limits competition in other areas, and (3) it provides for a poor customer experience at the outset of the customer relationship. Each of these issues will be addressed in turn.

25. *Competition is limited by the cost of placing manual orders.* The cost of placing a manual order is, in most states, more than double the rate to provision Line Splitting. This added cost is so significant that it will prevent competitors from processing orders under any of the twenty-two non-mechanized scenarios. The added cost of manual ordering—both in the actual cost that must be paid to the ILEC for placing the order and the added time and personnel costs incurred by the CLEC placing the order—is a cost that is never incurred by BellSouth when it provides a voice/data bundle.

26. *Competition is limited by BellSouth's choice to mechanize only certain Line Splitting ordering scenarios.* BellSouth's decision to mechanize only the UNE-

P-to-Line Splitting scenario (with a DLEC owned splitter) is calculated quite specifically to prevent BellSouth's existing voice customers from enjoying the benefits of bundles offered by its competitors. Because the single mechanized ordering scenario applies only to voice customers who have already chosen competitive providers, CLECs seeking to provide voice/data bundles to compete with BellSouth's own bundled offerings will be forced by the economic realities of BellSouth's OSS to avoid attempting to sell competitive bundles to BellSouth's customers and will, instead, be forced to focus only on their existing customers. While marketing Line Splitting only to existing UNE-P customers may be a significant opportunity to UNE-P providers, BellSouth should not be allowed to make this the **only** economically viable marketing strategy by choosing to mechanize only those ordering scenarios that do not threaten BellSouth's own voice base.

27. BellSouth's lack of mechanization not only shields its own customers from competition, but also Balkanizes UNE-P customers: the ordering scenario to move from UNE-P to Line Splitting where the voice provider changes is one of the many manual-only orders. This means that not only are CLECs disincented from competing for BellSouth's customers, they are also disincented from competing with each other. By thus limiting the potential customer base for every CLEC seeking to provide combined voice and data bundles, BellSouth's failure to provide mechanized ordering for all of the Line Splitting ordering scenarios erects a barrier to the development of competition in bundled services.

28. BellSouth's decision to mechanize only the UNE-P-to-Line Splitting scenario (with a DLEC owned splitter) also harms CLECs such as Covad who already provide Line Sharing services to BellSouth customers because BellSouth has refused to mechanize ordering for Line Sharing with a DLEC owned splitter. This places CLECs like Covad in at a terrible disadvantage: these CLECs cannot place mechanized orders for Line Splitting unless they install their own splitters, but—once they have incurred this huge expense in an effort to compete with BellSouth's own bundled offerings—they can no longer place mechanized orders for Line Sharing unless they rely on BellSouth-owned splitters. This, in effect, forces data CLECs to pay for multiple splitters, the ones needed to place mechanized orders for Line Splitting and the ones needed to continue placing mechanized orders for Line Sharing. It would be difficult to imagine a more cynically calculated way to prevent competition from developing.

29. **Provisioning Specifications.** BellSouth has not developed testing specifications for Line Splitting. The impact of this failure is significant: when a Line Split loop develops trouble, there is no standard of performance that can be used by a technician to determine if the loop is working to technical specifications. Incredibly, BellSouth has never even attempted to define the provisioning specifications for Line Sharing or Line Splitting. Covad had no choice but to implement Line Sharing without these standards, but the risk was offset by the fact that BellSouth owned the voice side of the loop and therefore had a significant incentive to maintain the loop. Line Splitting, however, does not involve BellSouth as the voice owner, and the risk that BellSouth's performance

will be poor in all areas of loop provisioning and maintenance is acute. BellSouth must provide the provisioning specifications in order to ensure that Line Splitting service can be properly installed and maintained. BellSouth's failure to develop testing standards for Line Splitting is discriminatory and a barrier to deployment.

30. **Record Keeping.** When an end user chooses a UNE-P provider for his/her voice service in the BellSouth region, BellSouth randomly assigns the circuit a pseudo-circuit number for purposes of identifying the end user account (rather than using the customer's actual telephone number). The pseudo-circuit number is used by BellSouth's OSS to manage the customer's account. In order to submit and process a Line Splitting Order, a CLEC must use the appropriate pseudo-circuit number. This pseudo-circuit number is difficult to determine without access to the Customer Service Records, and customers typically have no idea what the number is. Further, the search process to locate the number cannot be automated, so a costly and time-consuming manual search for the pseudo-circuit number must be done by a CLEC before each Line Splitting order is submitted. This problem makes Line Splitting unmanageable on a commercial basis throughout the BellSouth footprint.

31. **Performance Measurements.** Throughout BellSouth's 271 application process, a focus for data CLEC's was on Line Sharing related performance measures. Although BellSouth has made great strides in its performance for competitors on Line Sharing orders, there is still much work to be done. Covad is hopeful that with its penalty payments on the rise, the remaining areas of poor Line Sharing performance will be fixed. Now, however, BellSouth is being given a new tool

that it can use to punish competitors: the phase-out of a product that is well-understood and carefully measured by state performance plans and the phase-in of a product with no performance requirements. If past practice is any guide, BellSouth's performance in provisioning and maintaining Line Splitting orders will be poor and will not improve until state commissions can modify state performance plans to take into account the changed competitive landscape. Any changes to Line Sharing rules should be delayed until such time as this problem can be remedied.

32. Line Sharing is—finally—working. The state commissions are not prepared to address the numerous problems that remain before Line Splitting can be considered a viable alternative to Line Sharing. Until such time as ILEC performance—either because state commissions force the issue or because they fix the many Line Splitting OSS issues voluntarily—matches their Line Sharing performance in a demonstrable and monitored way, no changes should be made in the current Line Sharing policy. Any other outcome would risk destroying a market that is just beginning to see the full benefits of competition.

33. This concludes our joint declaration.

ATTACHMENT C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

JOINT DECLARATION OF WILLIAM H. WEBER AND MICHAEL ZULEVIC

William H. Weber and Michael Zulevic state, respectively, that the following is true and correct to the best of our knowledge and belief:

34. My name is William H. Weber, Vice President – Government and External Affairs for Covad Communications Company (Covad). I act as a liaison between Covad's business personnel and both BellSouth Telecommunications, Inc. (BellSouth) and Qwest Communications International, Inc. (Qwest), and I lead Covad's regulatory and legislative initiatives in both the BellSouth and the Qwest regions.

35. Before joining Covad, I was an attorney in private practice. Prior to that, I was a law professor at the University of Georgia School of Law and an attorney for the United States Marine Corps. I also spent six years as an armor officer in the Marine Corps.

36. My name is Michael Zulevic, Director of Government and External Affairs for Covad. Prior to my current position, I performed network deployment and operational support functions for Covad's Qwest and SBC/Ameritech regions. I was also responsible for the national build-out of the Covad Line Sharing network.

37. Prior to coming to Covad, I was employed US West (Qwest), in various Network Services, Special Services, and Engineering assignments, with increasing levels of responsibility, for over 30 years. My last assignment with US West was providing technical guidance and support for the capital recovery program.

38. Qwest's processes and OSS for Line Splitting are inadequate to allow CLECs to scale their businesses by offering customers a package of both voice and data services. Before Line Sharing can be phased-out without causing serious injury to the vigorous competitive market that has begun to develop in consumer DSL services, the processes and OSS for Line Splitting must provide CLECs with a meaningful opportunity to compete. This Declaration focuses on two key areas where there remain barriers to the development of Line Splitting competition: (1) Line Splitting Performance Measures and (2) Line Splitting OSS. The problems in these areas must be corrected before any changes are made to the Line Sharing rules. Any other outcome will mean that the significant strides that were made during the 271 process in fostering competition in the Qwest region will be lost, and all the work that state commissions throughout the Qwest footprint put into ensuring that Line Sharing processes were fair and appropriate will have been for naught.

39. **Performance Measurements.** Throughout Qwest's 271 application process, a focus for data CLEC's was on Line Sharing related performance measures. Although Qwest has made great strides in its performance for competitors on Line Sharing orders, there is still much work to be done. Covad is hopeful that with its penalty payments on the rise, the remaining areas of poor Line Sharing performance will be fixed. Now, however, Qwest is being given a new tool that it can use to punish competitors: the phase-out of a product that is well-understood and carefully measured by state performance plans and the phase-in of a product with no performance requirements. If past practice is any guide, Qwest's performance in provisioning and maintaining Line Splitting orders will be poor and will not improve until state commissions can modify state performance plans to take into account the changed competitive landscape. Any changes to Line Sharing rules should be delayed until such time as this problem can be remedied.

40. **Line Splitting OSS.** Qwest's mechanization of Line Splitting orders lags far behind its mechanization of both Line Sharing and its own data orders for its own customers, and it refuses to remedy the situation. Qwest has taken the position that significant changes to its OSS mechanization for Line Splitting can only be made once volumes for the service reach some unspecified order level. This, of course, places Qwest's competitors in a Catch-22: CLECs cannot compete until mechanization makes it economically feasible to do so, but Qwest will not mechanize until significant competition already exists.

41. But a failure to mechanize is not the only problem. Even within Qwest's primitive manual ordering system for Line Splitting, things can get worse. Unlike

any system that Qwest uses to provide services to its own customers, CLECs are forced to place **two orders to complete a single customer request** that involves Line Splitting. For true competition to grow, voice/data bundles must be allowed to migrate from one service provider to another using a single service order and with minimal service interruption to the end user. This migration has been largely achieved for the migration of voice services from one provider to another. Such is not the case for voice and data shared services. This problem is particularly noteworthy, since Qwest admits that both Line Sharing and Line Splitting use exactly the same equipment and wiring configuration.

42. Qwest's discriminatory OSS practices also cause customer outages during migrations that would never occur for Qwest's own customers. For example, when a customer migrates from Qwest Retail Voice/DSL to Line Splitting, Qwest—as mentioned above— requires that two orders be submitted, one for the migration of voice service and a second to add DSL once the UNE-P service is established. Astonishingly, in order to accomplish this simple migration, it is Qwest's process to disconnect the DSL service at the time the voice service is migrated. This, of course, results in the end user being without DSL service for days or possibly weeks, representing a serious impediment to competition and a serious blow to the CLEC that is hoping to make a good first impression on a new customer.

43. Line Sharing is—finally—working. The state commissions are not prepared to address the numerous problems that remain before Line Splitting can be considered a viable alternative to Line Sharing. Until such time as ILEC

performance—either because state commissions force the issue or because they fix the many Line Splitting OSS issues voluntarily—matches their Line Sharing performance in a demonstrable and monitored way, no changes should be made in the current Line Sharing policy. Any other outcome would risk destroying a market that is just beginning to see the full benefits of competition.

44. This concludes our joint declaration.

ATTACHMENT D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

JOINT DECLARATION OF CATHERINE BOONE AND COLETTE DAVIS

1. I am Catherine Boone, Vice President of External Affairs for Covad Communications Company ("Covad") for the SBC Communications, Inc. ("SBC") region. In this capacity, I am responsible for managing the business, regulatory and legal relationship between Covad and its largest incumbent telephone company vendor, SBC. I am responsible for ensuring resolution of business issues between the two companies, including driving resolution on operational, OSS, and billing problems and negotiating with Ameritech, Southwestern Bell Telephone Company ("SWBT"), Pacific Bell ("PacBell"), and Southern New England Telephone ("SNET") for the purpose of ensuring Covad can pursue meaningful business opportunities in these markets.

2. Covad is currently providing high speed internet access service using DSL technology in ten of the 13 SBC states. Covad purchases unbundled network elements from SBC to provide residential and business DSL services in those states.

3. The team that I manage interfaces with internal Covad groups dedicated to provisioning Covad service, including services using stand alone loops, line sharing, and line splitting. Currently, Covad's marketing, sales, engineering and operational groups focus extensively on developing and scaling our ability to provide DSL services in a bundle with voice partners using line splitting.

4. I hold a Bachelor of Arts degree from Dickinson College in Carlisle, Pennsylvania with a double major in Public Policy and Spanish. I also hold a Juris Doctor degree with Distinction from Emory University School of Law in Atlanta, Georgia. Before joining Covad, I practiced with the Atlanta firm of Smith, Gambrell & Russell, LLP. I joined Covad in 1999 with responsibility for resolving business issues in the BellSouth region. In July 2002, I moved to my current assignment with responsibility for the SBC region.

5. I am Colette Davis, Director of External Affairs for Covad for the BellSouth and SBC regions. In that capacity, I am involved in the day to day operations of Covad's relationship with BellSouth and SBC. In both those regions, the ILEC is Covad's sole supplier of unbundled network elements. I function as the liaison between SBC's and Covad's operations groups in the resolution of operational issues arising from Covad's use of SBC's OSS systems, as well as pre-ordering, ordering and provisioning systems. I participate in ensuring that Covad's operational issues are appropriately

escalated and addressed by the various SBC work groups that affect Covad's ability to be successful in this region.

6. Prior to joining Covad in July 2000, I worked at Project Management Services, Inc. ("PMSI") as an Assistant Vice President of Professional Services Division. In that role, I directed strategic network infrastructure projects for our clients. During my tenure at PMSI, I provided project management services to the BellSouth ADSL network process improvement project. Earlier in my career, I worked 15 years for BellSouth in the Consumer Operations department. In that capacity, I held responsibilities including business office line management, staff support for force management, customer service and carrier services as well as managing consumer projects.

7. Because of my project management and Operation Support Systems (OSS) background, my work at Covad focuses on managing our OSS needs and ensuring that the ILECs develops the functionalities, products and processes necessary to enable Covad to successfully compete in the marketplace. Because of my work with other ILECs while at Covad, I gather the best practices from around the country and work to implement them in the SBC region, when appropriate.

8. The strategic importance of line splitting to Covad's business objectives requires that I spend a considerable amount of my time working with SBC to resolve some ongoing and significant problems with line splitting processes that hamper Covad's ability to implement its line splitting offerings.

I. PURPOSE AND SUMMARY OF DECLARATION

9. The purpose of this declaration is to outline the significant, ongoing operational and business obstacles Covad faces as it attempts to partner with UNE-P

voice providers to offer a competitive package of bundles services in the SBC region. Current SBC processes, rates and OSS for line splitting are inadequate to allow Covad and other CLECs to scale their businesses by offering customers a package of both voice and data services. To insure that residential competition continue in the DSL market, and before line sharing can be transitioned out, state commissions must ensure that the processes, rates and OSS for line splitting provide competitors with a meaningful opportunity to compete.

10. Line splitting is a simple arrangement that provides two services on a single customer loop, similar to when SBC adds data services to an existing voice customer. Until the processes and systems that enable line splitting are as seamless and customer friendly as when SBC adds data services to an existing customer's account, Covad's ability to compete in offering packages of voice and data service will be severely restricted. Significant obstacles stand in the way of scalable line splitting at this time.

11. First, SBC has a morass of system and process limitations that make line splitting migrations difficult, expensive and, in some cases, service interrupting. For example, the systems and processes for adding UNE -P to a data line or adding data to a UNE-P line often require multiple orders, manual orders, or a combination of both and some threaten service interruption or unreasonably high nonrecurring charges for such migrations. Second, systems and processes that maximize the customer's ability to choose from a wide variety of service providers are simply nonexistent. Customers may wish to change voice providers, change data providers, and drop voice or data service at some time. These consumer choices are not supported by the existing SBC line splitting systems and processes. To scale this business, SBC's systems and processes must

achieve timely migrations that are seamless to the customer and result in minimal (if any) service interruption. Further, these migrations must occur without any negative effects on 911 databases, telephone number retention and other customer impacting aspects of service.

12. Our declaration establishes the existence of serious impediments to successful line splitting in the SBC region: (1) Inadequate Trouble Ticket Processes for Line Splitting; (2) Discriminatory Versioning Policy for Submission of Line Splitting Orders; (3) Customer Impacting Limitations on Timing of Line Splitting Orders; (4) Customer Impacting Limitations on Line Splitting with Hunting Feature; (5) Untenable Process for Migrating Customers From Line Splitting Back to UNE P; (6) SBC Policy that Threatens Accuracy of E911 Databases; (7) Indefensible E911 Database Update Requirements in California; and (8) SBC's NRCs for Line Splitting Create an Enormous Barrier to Entry. Each of these issues creates a significant impediment to providing high quality customer service for those customers who choose a competitive voice and data bundle. Together, these maladies constitute a critical limitation on Covad's ability to serve residential customers with competitive DSL.

II. SIGNIFICANT PROBLEMS STYMY CLEC EFFORT TO BUNDLE VOICE AND DATA IN THE SBC REGION

13. We will discuss briefly below the significant issues that must be resolved by the states before line splitting can, in actuality, serve as a replacement for line sharing. As amply discussed below, line splitting processes and procedures are light years behind those currently in place for line sharing. These deficiencies severely undermine the FCC's stated rationale for the elimination of line sharing based on the "availability" of line splitting as a replacement service.

(1) Inadequate Trouble Ticket Processes for Line Splitting

14. Covad considers it critical to maintain the highest possible customer service and to provide our customers with a reliable service. When we partner with voice providers in a line splitting arrangement, they share the concern for the ultimate customer experience. Unfortunately, SBC's processes for addresses trouble tickets in a line splitting scenario are problematic. When we open a trouble ticket in a line splitting scenario, we need the trouble addressed in a timely fashion, particularly to preserve continuity of voice service. SBC's processes make that impossible. First, SBC requires that the CLEC determine whether the problem is with the switch or the xDSL line (since SBC refuses to treat line splitting as a UNE P service with those elements combined). Obviously, we will provide that information when we can ascertain it, but there are numerous problems inside the central office that Covad has no visibility into.

15. Second, if the problem is determined to be in the CLEC collocation cage, where the splitter resides, or in the SBC wiring to connect the loop to the splitter, SBC takes no further action with the voice service. Other ILECs, including Verizon, "strap out" the voice loop at the MDF to insure that it remains functioning while the splitter problem is being resolved. This insures continuity of the voice service. SBC refuses to take these steps.

16. In contrast, in a line sharing scenario, SBC will also insure that its voice service remains continuous even if a similar problem is found in the CLEC cage or in the wiring to connect the loop to the CLEC cage. SBC takes prompt steps to "strap out" the voice loop at the MDF to insure that voice service experiences minimal interruption,

while work to restore the data service is underway. Thus, SBC clearly treats line splitting differently than line sharing.

17. Moreover, SBC recognizes the importance of maintaining voice service because SBC will "strap out" the voice circuit when **provisioning** a line sharing or a line splitting line. If the technician installing either of those circuits identifies problems with the voice service, the order is immediately put in jeopardy and steps are taken to restore voice service. To provide our customers with a satisfactory experience, we need the same treatment in a maintenance scenario. SBC could easily accomplish this by using the same methods and procedures for line splitting trouble tickets that it does when provisioning line splitting or repairing line sharing.

(2) **Discriminatory Versioning Policy for Submission of Line Splitting Orders**.

18. SBC does not permit DLECs to place line splitting orders on behalf of their voice partners unless they are on the same version of EDI as the partner in the line splitting scenario. This severely limits the number of carriers that Covad can successfully partner with because if we are not on the same version at the same time, SBC will not accept the orders. This is completely unworkable. The reason CLECs have the choice of three EDI versions at any one time is to insure that they are able to move to new software versions in a manner that makes sense to their business plans. If AT&T is on version 5.1, but Covad is on version 5.0, line splitting would not be possible. Likewise, even if AT&T and Covad were on the same version at some time, SBC's policy would require extensive coordination between line splitting partners to insure that we both move to new versions of EDI simultaneously – a goal which would be almost impossible to attain. If

either company developed a glitch and could not migrate on time, customer orders would be left in limbo and service interruption could result.

19. After spending months saying the problem could not be resolved, SBC has now agreed to a solution that allows Covad and its partners to submit line splitting order while on different EDI versions, by utilizing a previously unused field on the LSR. This essentially establishes an LSR based agency arrangement. SBC now says that it is committed to a March 2004 OSS release for this solution. But SBC limits that commitment with caveats that foreshadow potential delays in the release. If this release deadline slips (as software release dates often do) line splitting could come to an abrupt half all over the SBC region as Covad and its partners move to different versions of EDI at different times. It is imperative that SBC meet this deadline. Until it does so, line splitting cannot be a true replacement for competitive residential DSL services previous offered by Covad via line sharing.

(3) **Customer Impacting Limitations on Timing of Line Splitting Orders**

20. SBC's policy today creates an enormous barrier to carriers like Covad and its voice partners who want to offer consumers a package of voice and data services. Obviously, when we solicit a customer, the customer expects that its voice and data services will be successfully working within a very short time. However, SBC currently will not allow the placement of a UNE P order at the same time as a line splitting order. Under this absurd policy, CLECs must first establish a UNE P voice account and then migrate to a line splitting arrangement. This delays the installation of the full package of services for the customer and obviously results in an inferior customer experience.

Moreover, if the line splitting order is placed before the UNE P order completes, it will be rejected. This further delays the installation of the full bundle of services.

21. Of course, SBC has designed processes that enable it to install a bundle of services in a much more streamlined fashion and the contrasts between what SBC does for itself and what SBC is willing to do for CLECs is dramatic. A new SBC customer is solicited to add DSL service to its voice service on the first contact with SBC. SBC promises both services will be installed in a few short days, with no delay while the voice service order winds its way through the SBC systems. SBC takes the order for both services at one time and processes them at the same time. SBC currently tells CLECs that a UNE P order will take about 1-3 days to install. Likewise, a line splitting order will take 5 days minimum to install. Thus, while the customer who chooses SBC services has his orders processed together and moving simultaneously through the systems, a customer who chooses the competitive package receives inferior service. Before Covad and its partners can scale the bundled services business, this obstacle must be removed.

(4) **Customer Impacting Limitations on Line Splitting with the Hunting Feature**.

22. Small business customers often want DSL, and they also frequently want the hunting feature. This feature allows the incoming call to "hunt" for an open line (a call to line one hunts to line two -- if the first line is busy -- then on to line three and so on.) Under SBC's existing line splitting process, a customer cannot have hunting on a line split line unless every line in the hunt group has DSL. In other words, if lines one and two do not have DSL, but line three has DSL, calls to the first two lines cannot ring

on line three even if the first two lines are busy. SBC will not allow a line with DSL on it to be included in the hunt group.

23. This creates a huge impediment to serving small businesses with line splitting arrangements. Obviously, DSL services benefit small businesses because they allow a single line to support both voice and data services. Covad has an entire suite of Small Office/Home Office ("SoHo") services that utilize only the high frequency portion of a loop and could be used in a line splitting arrangement. These customers do not want or need to bear the expense of multiple DSL lines. But currently SBC processes force them to choose between the added expense of unneeded DSL lines and the loss of a valuable feature: hunting. This problem hampers our ability to use line splitting for small business and home offices.

(5) Untenable Process for Migrating Customers from Line Splitting back to UNE P.

24. The ultimate goal of competition is to give customers choices of providers, innovative services and competitive prices. SBC's current process for migrating line splitting customers back to UNE P (for instance, when a customer chooses to drop its DSL service) ensures a truly horrific customer service experience for our customers. First, the migration requires a disconnect of the xDSL loop, a disconnect of the switch port and a new order for UNE-P. Throughout the various SBC states, these various orders may be electronic, manual or a combination of both. But most significantly, SBC indicates that a customer making this migration may lose its voice service for as much as 5 days. That customer may also risk losing its telephone number. And in some states, E911 database information is threatened by such a move.

25. The key drivers of this delay, resulting in this horrendous customer experience, are SBC's insistence that it must provision a "new" loop for the UNE P. SBC categorically refuses to reuse the loop facility successfully supporting the line splitting arrangement. SBC takes the position that it cannot reuse the existing xDSL capable loop that was used in the line splitting arrangement because it is not certain the loop will meet its voice loop requirements. This argument is patently ridiculous. In a line splitting scenario, the voice CLEC using UNE P provides the **EXACT** same quality of voice service as it will using UNE P outside the line splitting scenario. If the loop works successfully to support voice service in a line splitting arrangement, it will work for UNE P.

26. Furthermore, SBC's policy has the added negative effect of increasing the cost of the migration (by charging us for a new loop connection fee that is clearly not needed) and may also require customers to stay home to wait for a dispatch to install a "new" line. Further, our customers run the risk of losing voice service for an extended period of time and perhaps losing their phone numbers after this migration. This situation becomes even more serious if SBC reports that there are no "new" facilities available to serve that customer. The delay could result for weeks before SBC finally frees up the "old" and perfectly suitable loop for use in the restored UNE P service. Covad simply cannot compete effectively when our customers risk this type of experience.

27. The explanation for this failed process is, once again, SBC's fundamentally flawed policy position that treats line splitting as an unbundled switch port and an unbundled loop, rather than as UNE P with data. As a result of this policy

contrivance, SBC requires the CLEC to submit separate LSRs to perform the migration – one to disconnect the loop and another to disconnect the port and replace it with a UNE-P arrangement (in some states 3 or more orders are required). As a result, if SBC has not yet received the LSR to disconnect the loop when it receives the LSR to install a new UNE-P line, it appears to SBC that the existing loop is already in use and thus is unavailable to use as the UNE-P line. Even though the CLEC does not want a new UNE-P line at all and simply wants to drop DSL on the existing line. For this reason, every other ILEC in the country has created a process in which the CLEC submits only one LSR to drop DSL.

28. The devastating customer impacts described above are nonexistent when the identical work steps are taken to return a line sharing customer back to solely SBC voice service: the customer never risks losing dial tone or losing his telephone number and the customer never faces a delay of up to five days. SBC reuses the existing DSL loop for its voice service. Further, the only charges Covad faces when a line sharing DSL customer decides to discontinue its DSL service is the disconnect of the HFPL – a minimal charge. Thus, it is clear that the process for addressing a customer decision to discontinue DSL service is far easier, cheaper and extraordinarily more satisfactory when that customer has SBC voice service. Once the customer has chosen a competitive voice and data bundle, SBC insures that the experience is painful for the customer and the CLECs involved.

(6) SBC Policy that Threatens Accuracy of E911 Databases

29. Over the past several months, SBC has made numerous changes to its policies governing a CLECs obligation with respect to E911 databases in a line splitting

scenario. There is much confusion around what SBC does and does not require, but what is clear is that E911 database accuracy is in doubt after a customer chooses to buy a competitive voice and data bundle using a line splitting arrangement. Although SBC may have excuses for this, the bottom line is that SBC is attempting to impose enormous and unnecessary burdens on CLECs engaged in line splitting. Even more significant, SBC's policies threaten the accuracy of E911 databases.

30. Covad and AT&T discovered this E911 database problem during a line splitting trial order in Michigan. When a line splitting customer made a 911 call, the E911 database did not retrieve accurate street address information for the customer. It was later determined that the database had the address of the SBC central office service the customer. Fortunately, the incident that precipitated the 911 call was not life-threatening.

31. This problem results directly from SBC's policy that line splitting is comprised of two separate services, an unbundled local switch port with transport and an xDSL capable loop, rather than an integrated UNE P product. SBC's methods and procedures assume that a standalone switch port product is being used to provide a foreign exchange (FX) service. SBC's methods and procedures assume that no one would seek emergency service from an FX number, since FX numbers do not correspond to a telephone set. SBC's systems, however, require its E911 database to contain a street address for every working telephone number, and therefore SBC simply assigns the central office address for these FX numbers as a default rule. SBC admitted that the LSC methods and procedures ('M&P') instructed LSC service representatives to populate the

central office location as the service address on service orders created for the provisioning of ULS-ST ports.

32. These methods and procedures are completely unworkable for line splitting arrangements and effectively deny nondiscriminatory access to E911 services. SBC now indicates that it has corrected its methods and procedures so that representatives are aware that address fields for unbundled switch port orders associated with line splitting should not be populated with the SBC central office address. This "solution" subjects critical 911 information to a judgment call and potential human error. Because this solution is not mechanized, representatives that do not thoroughly review M&Ps or that are unable to differentiate the two types of unbundled switch port orders may mistakenly continue to populate the address field with the SBC central office address. That leaves line splitting customers at jeopardy of inaccurate E911 listings and it severely limits our ability to offer line splitting to customers throughout the region.

(7) Indefensible E911 Database Update Requirements in California

33. As discussed above, SBC has made numerous statements about its E911 policies in the last few months, and then made further statements to "clarify" earlier comments – all of which serve only to leave grave doubt about SBC's policies and the devastating effect they have on the future of line splitting in the region. In California, SBC has been most clear and, unfortunately, that clarity reveals an onerous and unworkable burden on CLECs offering bundled services to customers.

34. Moreover, SBC has now required CLECs in California to perform all E911 updates for *all* UNE-P customers, not just customers served by line splitting

arrangements. Additionally, SBC has recently announced that it is formulating a new 13-State policy on E911 database updates, which threatens the success of line splitting across the entire region.

35. With respect to California, SBC has stated that when a CLEC converts from either UNE-P or line sharing to line splitting, the 911 record for the UNE-P service will be temporarily retained in the E911/911 database. California Accessible Letter at 1. The Accessible Letter further states that "[a] CLEC that provides a telecommunications service via a UNE Stand Alone Port purchase[d] from SBC-2STATE is treated as [a] facilities-based carrier for 911 purposes. Therefore, any such CLEC is responsible for updating the 911 Database for municipality ordered address changes." *Id.* In other words, the California Accessible Letter establishes precisely the discriminatory and unlawful E911 policy that SBC briefly imposed in the Ameritech states and hastily withdrew once it was raised in the pending 271 proceedings. Indeed, the California Accessible Letter goes even further than the former Ameritech policy by requiring CLECs to input the address information directly into the 911 database, which, unlike the LSR policy, will require CLECs to perform their own updates or contract with 911 vendors to complete this work.

36. SBC stands alone as the only ILEC attempt to foist this significant burden on UNE P providers and on all CLECs using line splitting. But it is untenable to use the vital E911 databases to severely restrict competition using line splitting arrangements. SBC has made repeated references to its position that CLECs using unbundled switching are "facilities-based" carriers for purposes of E911; SBC contends that, as a result, SBC

has the legal right to foist its E911 update responsibilities on any CLEC that uses unbundled switching.

(8) SBC's NRCs for Line Splitting Create an Enormous Barrier to Entry

37. For line splitting to act as a replacement service for line sharing, the elements that compromise line splitting must be priced to allow CLECs to compete in the RESIDENTIAL marketplace. Clearly, the success of residential services is driven largely by the competitiveness of the price of those services, together with the overall value and quality of services provided. By requiring a morass of orders, disconnects, reconnects and policies that seek only to increase the cost of obtaining line splitting, SBC effectively makes it impossible for CLECs to compete use line splitting in many states in its region.

38. It is important to note that no commission in the region has approved the rates that SBC charges for line splitting. Instead, SBC has cobbled together a series of rates some inappropriate for line splitting and none of which have been approved to apply in the line splitting context. After stirring this brew, SBC merely announced to CLECs that these charges would apply for line splitting. Thus, there are no commission approved rates and none of the rates discussed below are TELRIC compliant.

39. From a business perspective, these rates create an enormous barrier to entry and almost certainly guarantee that no CLEC could profitably offer line splitting in certain states. The FCC has long recognized that cost-based pricing for NRCs is critical to making competitive local telephone entry economically feasible. Regardless of the recurring rates charged by SBC, SBC can and will thwart competition if it is allowed to

increase potential competitors' costs significantly through inflated non-recurring charges. That is because carriers must pay NRCs up-front. If those NRCs are sufficiently overstated, then potential new entrants will not be able to afford to enter the market. Moreover, higher NRCs increase the level of market risk faced by potential competitors because competitors lose the benefit received for having paid NRCs when they lose customers. This is important here because a customer that has decided to change carriers once (sign up for competitors' services and requiring the competitor to incur the NRCs) is likely to change service providers again (creating the possibility that the competitor will be unable to recover the NRCs from the customer of the term of the customer's agreement).

a. UNE-P To Line Splitting NRCs

40. Where a CLEC currently provides the voice service to a customer, and the customer chooses to add DSL service to that line, SBC needs to do nothing more than run cross-connects between the facilities providing voice service and those facilities providing the data service. One set of cables cross connects the loop to the CLEC collocation appearance at the Main Distribution Frame ("MDF"), which connects the loop to a splitter, and then a second set of cables cross connects the voice portion of the loop to the switch port presentation. This is all the "work" that must be performed by SBC to allow an end user served by UNE-P to add DSL (*i.e.,* to split into high and low frequency) to the loop currently being used to provide the end user voice service by a CLEC.

41. SBC's NRCs, however, are based upon a complete "disconnection" of the UNE-P elements being used to provide service to the end user, and, thus, SBC plans to charge CLECs multiple NRCs to disconnect and then reconnect the loop/port elements when a carrier attempts to order a line splitting configuration. In other words, in order to add DSL to a UNE-P loop, SBC claims that it must disconnect the switch port, disconnect the loop, install a "new" switch port, and install a "new" xDSL loop. Indeed, SBC claims that it is entitled to three service order charges in connection with these activities: one for disconnecting the UNE-P, one for ordering the xDSL capable loop, and one for ordering the switch port. Of course, **such disconnection and reconnection do not actually occur**, as the existing and working loop and port are simply cross-connected to and from the data carrier's collocation cage. But the NRCs are charged despite the fact the no disconnection work is actually performed.

42. As noted previously, one of the fundamental problems with SBC's line splitting NRCs is that they are based on SBC's contrived assumption that it is entitled to configure line splitting by first completely disconnecting the current voice CLEC's UNE-P line and then reconnecting the voice line using standalone UNE elements. As shown below, SBC's proposed rates for this scenario in Indiana and Wisconsin, for example, are based on NRCs for disconnecting the existing UNE-P line, placing new service orders, and installing a standalone loop and a standalone port. In each case separate loop and port connection charges are levied even though the end user is currently receiving voice service from those already combined elements.

SBC's NRCs For UNE-P to Line Splitting

State	NRC Element	NRC Rate	Total NRC
Indiana	Disconnect UNE-P Loop Service Order Loop Qualification Loop Connection Charge Port Service Order Port Installation Charge	\$0.37 \$14.57 \$0.10 \$29.33 \$14.14 \$44.01	\$102.52
Wisconsin	UNE-P Service Order Disconnect Charge xDSL Loop Service Order Stand-alone Loop Connection Charge Port Service Order Port Installation Charge Cross-Connect	\$0.04 \$0.07 \$30.64 \$0.06 \$11.21 \$26.82	\$68.84

43. Of course, there is no need for SBC to tear apart a CLEC's UNE-P line and reinstall the standalone components in order to add data to an existing UNE-P line. On the contrary, the only necessary activity is to install cross-connects that enable the loop to be routed through the data CLEC's splitter. SBC's imposition of unnecessary NRCs is based on its policy decision to treat line splitting as a new combination of standalone elements rather than UNE-P, and is yet another example of SBC's strategy to use its interpretation of line splitt**ing.**

b. Line Sharing To Line Splitting NRCs

44. When a customer moves from line sharing to line splitting, it may move its voice service from SBC to a CLEC and retain its current data provider or move both its voice and data services. If the customer is moving only its voice service and is retaining its current data provider, this amounts to nothing more than the migration of the voice service to the CLEC with no change in the physical configuration of the facilities used.

Indeed, the Commission has already found that no physical work is required on a line sharing to line splitting conversion when the customer is not changing its data service provider.[134] If the data carrier is changing, installation of two cross connects to and from the new data carrier's collocation cage would be necessary.

45. As was the case with the UNE-P to line splitting rates, SBC's line sharing to line splitting NRCs are based on the false premise that SBC must conduct a host of unnecessary activities, including completely disconnecting the data service, and then provisioning a new standalone loop and a standalone port (rather than a UNE-P arrangement). In Wisconsin and Indiana, the same charge applies whether or not the customer changes its data carrier. In Illinois, SBC acknowledges that the charges appropriately vary depending on whether the data carrier changes. Obviously the Wisconsin and Indiana rates are not based upon the actual work activities to perform these activities and are certainly not TELRIC-compliant. In Illinois, however, SBC again proposes service order charges that should not apply (under either variation) and a loop connection service order charge of $20.21 if the data carrier changes. The table below summarizes SBC's line splitting NRCs in Illinois, Indiana and Wisconsin for this scenario.

[134] *See Line Sharing Reconsideration Order*, ¶ 22 ("because no central office wiring changes are necessary in a conversion from line sharing to line splitting, we expect incumbent LECs to work with competing carriers to develop streamlined ordering processes for migrations between line sharing and line splitting that avoid voice and data service disruption and make use of the existing xDSL-capable loop.").

SBC's NRCs For Line Sharing to Line Splitting

State	NRC Element	NRC Rate	Total NRC
Illinois	No Change in DLEC Loop Service Order Port Service Order	 $2.58 $2.35	$4.93
	Change in DLEC Loop Service Order Loop Connection Service Order Port Service Order	 $2.58 $20.21 $2.35	$25.14
Indiana	Service Order to Disconnect HFPL Loop Service Order Port Service Order Port Installation Charge	$14.57 $14.57 $14.14 $44.01	$87.29
Wisconsin	Service Order to Disconnect HFPL Loop Service Order Loop Connection Charge Port Service Order Port Installation Charge	$0.04 $0.07 $30.64 $0.06 $11.21	$42.02

46. SBC's line sharing to line splitting NRC's also include completely fabricated and inappropriate charges. In Indiana, for example, the "Disconnect HFPL" component in SBC's line splitting charge is entirely arbitrary – it is not based on a cost study related in any way to HFPL, and it has never been approved by the Indiana state commission in that context. Rather, SBC inappropriately used the "Loop Service Order" NRC as a proxy for the "Disconnect HFPL" charge even though the Loop Service Order activities are not designed to recover the costs for line splitting activities. Another problem with including the HFPL Disconnect charge in SBC's Indiana line splitting NRC for this scenario is that it recovers its disconnect costs more than once. In Indiana, nonrecurring charges generally include disconnection costs. Thus, the existing customer pays up front for the costs SBC Indiana will eventually incur to disconnect the service. When converting from line sharing to line splitting, however, SBC again charges for

disconnecting the HFPL and then levies various loop and port standalone nonrecurring charges that inappropriately include even more disconnect costs.

47. In Wisconsin SBC's line sharing to line splitting NRCs include a standalone loop connection charge of $30.64, whereas the SBC Illinois and SBC Indiana line splitting charge do not. It simply makes no sense that SBC would have to install a standalone loop in Wisconsin, but not in Illinois or Indiana to perform the exact same line splitting conversion.

48. These inconsistencies in charges among the states, the inflated rates for simple migrations, and SBC's insistence on charged for work NOT ACTUALLY performed presents a significant challenge to CLECs attempting to use line splitting to serve the residential market. Until these rates are reviewed by commissions looking specifically at what work is necessary for line splitting, CLECs entry into competition to offer bundled services will be hampered.

III HOW TO EFFECTIVELY ADDRESS THESE CRITICAL ISSUES

49. Most state commissions in the SBC region are already addressing line splitting issues in pending dockets. We simply need to confirm that the issues do, in fact, get address in a timely manner. Until that work is accomplished, line splitting will not truly be available to replace line sharing. Most state commissions have several avenues through which they could investigate and resolve this significant problems and set rates that reflect the true work effort required to provision line splitting. For example, the Texas Commission is currently addressing these proceedings in connection with a Complaint by AT&T against SBC for line splitting issues. *See Complaint of AT&T*

Communications of Texas against Southwestern Bell Telephone Company; PUC Docket No. 27634. That could easily be turned into a generic docket. Missouri is squarely addressing these issues in a *In the Matter of the Determination of Prices, Terms and Conditions for Line Splitting and Line Sharing*; Case No. TO-2001-440. Likewise, California has recently opened a proceeding to address CLEC migration issues and has sought comments from the parties on the proper scope of this docket. Covad has filed comments asking the California Commission to address line splitting operational issues, and is hopeful the CPUC will do so. *See Petition of Verizon California Inc. for a Commission Order Instituting Rulemaking to Adopt, Amend or Appeal a Regulation Pursuant to Public Utilities Code Section 1708.5 in Order to Establish Rules Governing the Transfer of Customers from Carriers Exiting the Local Telecommunications Marketplace*; Order Instituting Rulemaking to Establish Rules Governing the Transfer of Customers from Competitive Local Carriers Exiting the Local Telecommunications Market; Docket: R.03-06-020/P.02-05-014. Obviously, the timing of resolution of these issues is critical. Illinois, Kansas, Indiana, and Wisconsin are all examining whether competitors are impaired without access to line splitting over SBC's Project Pronto architecture. *See* ILLINOIS BELL TELEPHONE COMPANY Filing to modify Broadband UNE tariffs, ICC Docket 03-0107, *In The Matter of the General Investigation to Determine Conditions, Terms and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning, and Line Sharing*, KCC Docket No. 01-GIMT-032-GIT, *In The Matter of the Commission Investigation and Generic Proceeding on Ameritech Indiana's Rates for Interconnection, Service, Unbundled Elements, and Transport Under The Telecommunications Act of 1996 and Related Indiana Statutes*;

IURC Docket No. 40611-S1, *Investigation into Ameritech Wisconsin's Unbundled Network Elements*; WPSC Docket No. 6720-TI-161. The Ohio and Connecticut utility commissions expressly envisioned the need to address line splitting terms and conditions in light of future developments, including the Triennial Review, and have dockets pending open in which to do so. See *In the Matter of the Review of Ameritech Ohio's Economic Costs for Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Traffic*, PUCO Case No. 96-922-TP-UNC; *In the Matter of the Review of Ameritech Ohio's TELRIC Costs for Unbundled Network Elements*, PUCO Case No. 02-1280-TP-UNC; and, *In the Matter of the Further Investigation Into SBC Ameritech Ohio's Entry Into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996*, PUCO Case No. 00-942-TP-COI; Decision, DPUC Docket No. 00-05-06, Application of the Southern New England Telephone Company for a Tariff to Introduce Unbundled Network Elements, June 13, 2001 at 21. Each of these dockets or other post triennial review docket could be used expeditiously to address line splitting operational issues.

IV. CONCLUSION

49. As set forth above, line splitting processes in the SBC region are not sufficient to replace services currently available through line sharing arrangements. Until these issues are remedied, line sharing must continue to be available to insure competition remains in the residential DSL market.

Date: July 31, 2003 **Number:** CLECCN03-024

Effective Date: 06/20/2003 **Category:** All

Subject: (BUSINESS PROCESSES) Line Splitting Process Clarification

Related Letters: **Attachment:** NA

States Impacted: California and Nevada

Issuing SBC ILECS: SBC California and SBC Nevada (collectively referred to for purposes of this Accessible Letter as "SBC 2-State")

Response Deadline: NA Contact: **911 Account Manager**

Conference Call/Meeting: NA

SBC-2STATE has received questions regarding the intent of Accessible Letter **CLECALL03-077** issued on June 20, 2003, which was intended solely to address a potential situation in which a CLEC initially engages in line-splitting by reusing facilities previously used as part of a UNE-P or line-shared arrangement, but subsequently physically rearranges the UNE loop and switch port within the CLEC's collocation arrangement (or that of its partnering CLEC).

Accessible Letter **CLECALL03-077** indicated that in such a conversion scenario (i.e., UNE-P to line splitting or line sharing to line splitting), the 911 record from the previous UNE-P service will be retained on the initial order. For clarification, the 911 record for the UNE-P service will be temporarily retained in the 911/E911 database, just as it would if the Telephone Number was porting from one carrier to another via Local Number Portability (LNP). SBC-2STATE uses standard LNP practices to convert the former SBC-2STATE provided UNE-P NENA ID to the CLEC provided NENA ID for the UNE Stand Alone Port, which requires a 911/E911 database record update. This 911 transaction is required when obtaining UNE Stand Alone Port products and must be submitted by the CLEC via a Local Service Request or a CLEC initiated update via the 911 MS Gateway

Additionally, **CLEC03-077** stated that "[o]nce the initial provisioning of the UNEs in the conversion scenario for a line splitting arrangement has been completed, the CLEC is responsible for ensuring the ongoing accuracy of the end user service address information in order to maintain the integrity of the 911/E911 database." This was merely intended to ensure that CLECs recognized the need to provide updated end-user service address information based upon a change in the customer's physical service address in connection with a physical rearrangement or disconnection of the UNEs used in the original line-

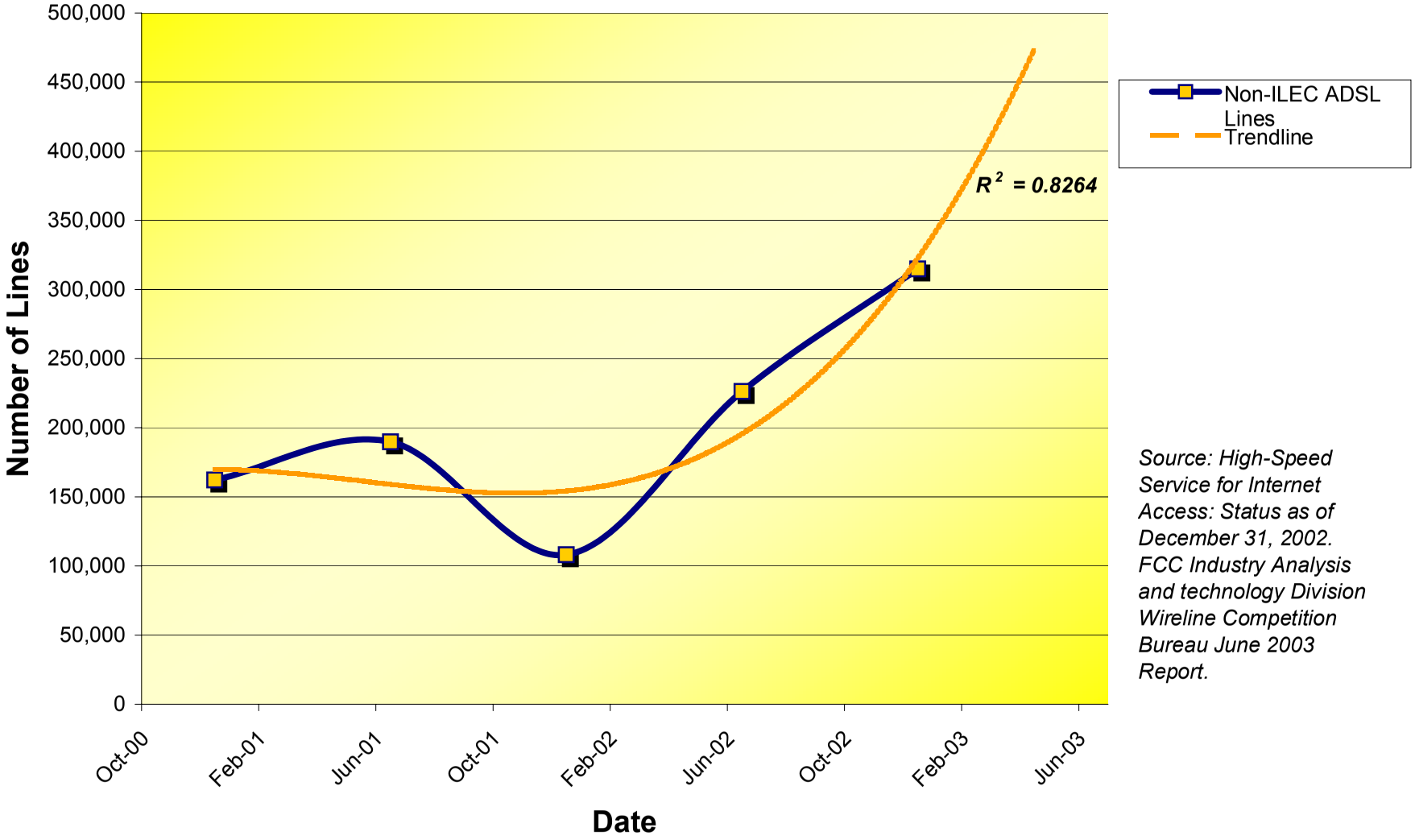
splitting arrangement (i.e., to move the end-user's physical service address by connecting the switch-port to a new or different stand alone loop).

A CLEC that provides a telecommunications service via a UNE Stand Alone Port purchases from SBC-2STATE is treated as facilities-based carrier for 911 purposes. Therefore, any such CLEC is responsible for updating the 911 Database for municipality ordered address changes. SBC-2STATE has provided additional documentation regarding E911 requirements for line splitting arrangements on CLEC ON-LINE (https://clec.sbc.com/clec). The E911 requirements can be located in the CLEC Handbook under Products & Services, E911.

SBC-2STATEreserves the right to make any modifications to or to cancel the information set forth in this Accessible Letter. Any modifications to or cancellation of the information will be reflected in a subsequent accessible letter. SBC-2STATE shall incur no liability to any CLEC if the information set forth herein is modified or canceled by SBC-2STATE.

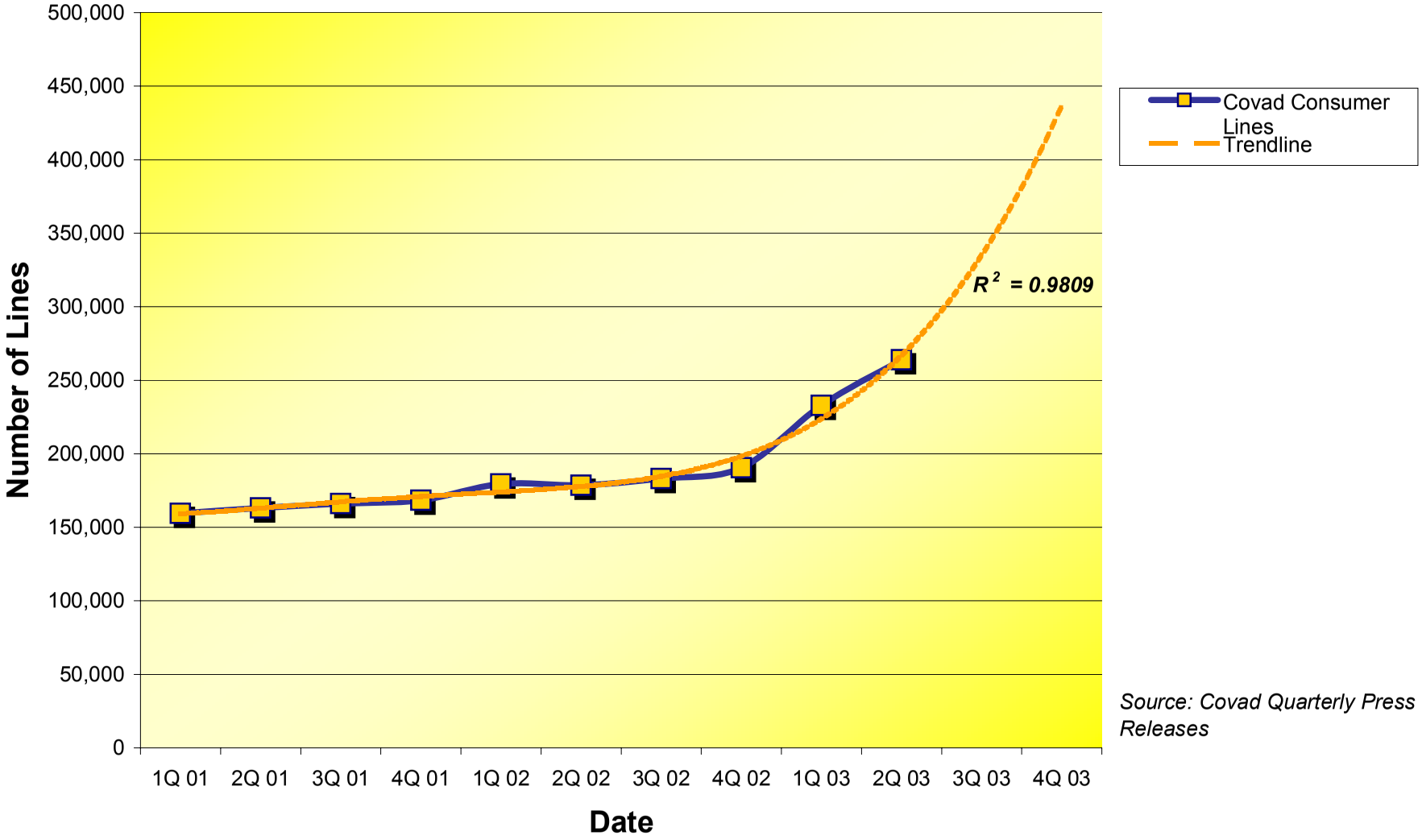
ATTACHMENT E

NON-ILEC ADSL LINES



Source: High-Speed Service for Internet Access: Status as of December 31, 2002. FCC Industry Analysis and technology Division Wireline Competition Bureau June 2003 Report.

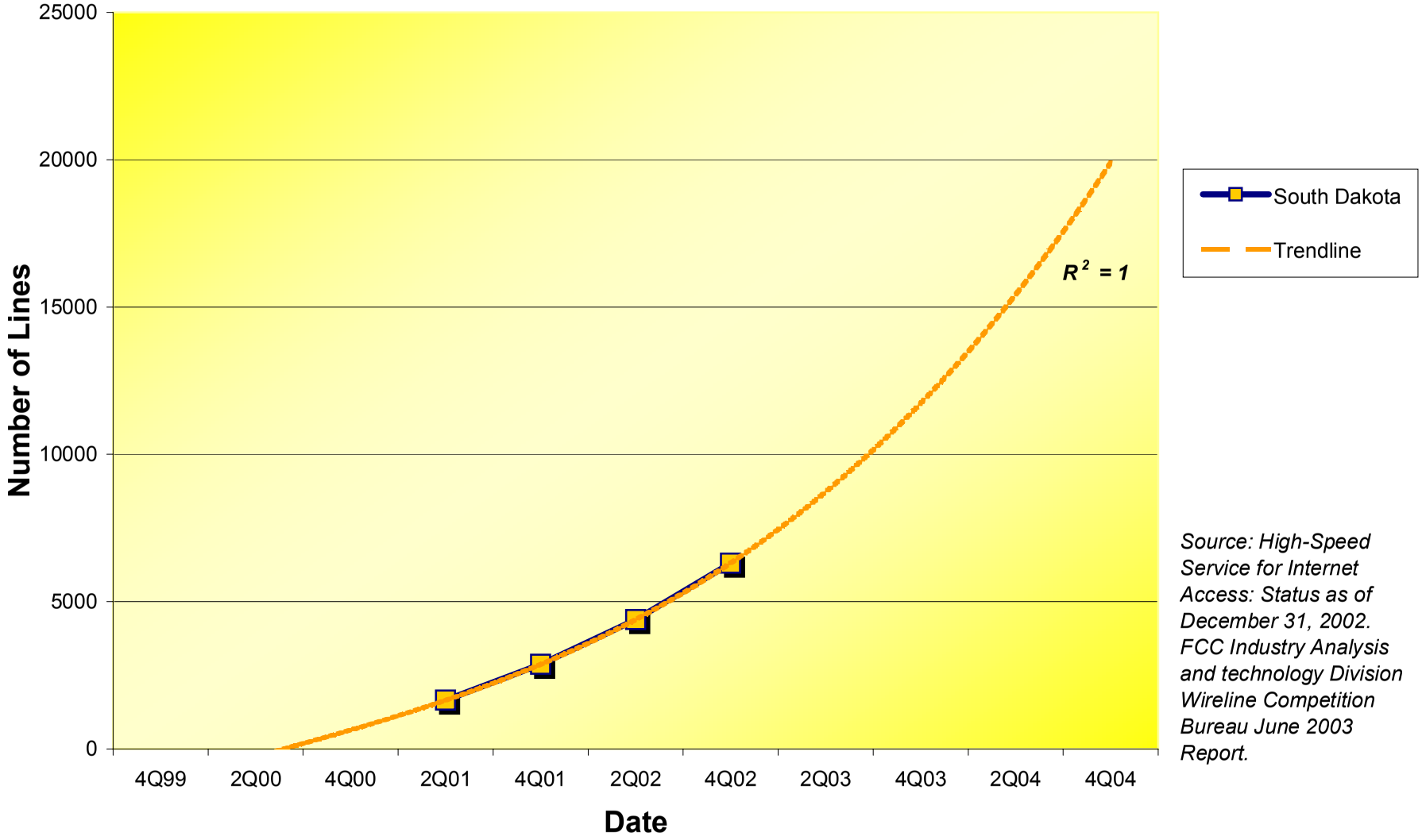
COVAD CONSUMER LINES



Source: Covad Quarterly Press Releases

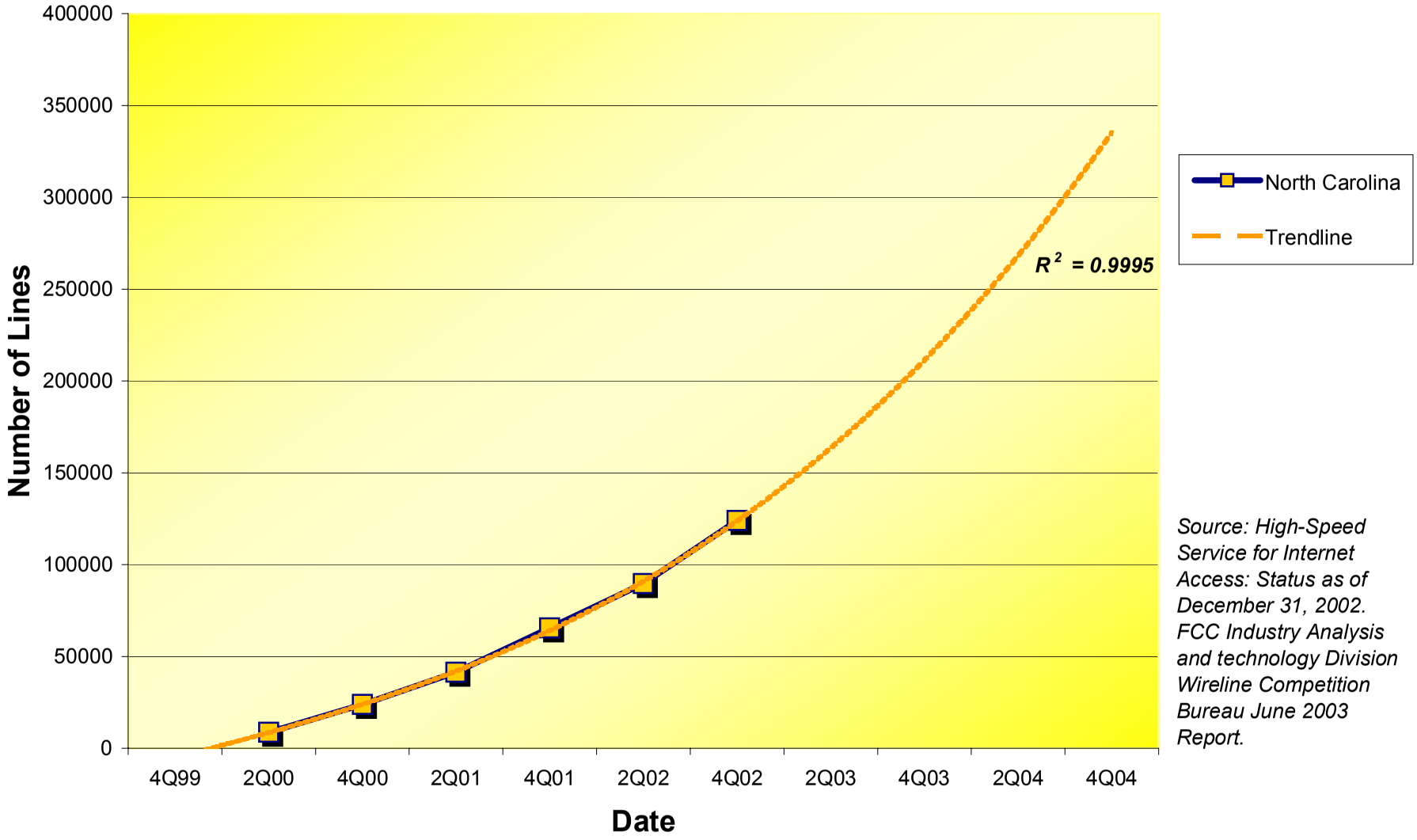
ATTACHMENT F

SOUTH DAKOTA ADSL LINES



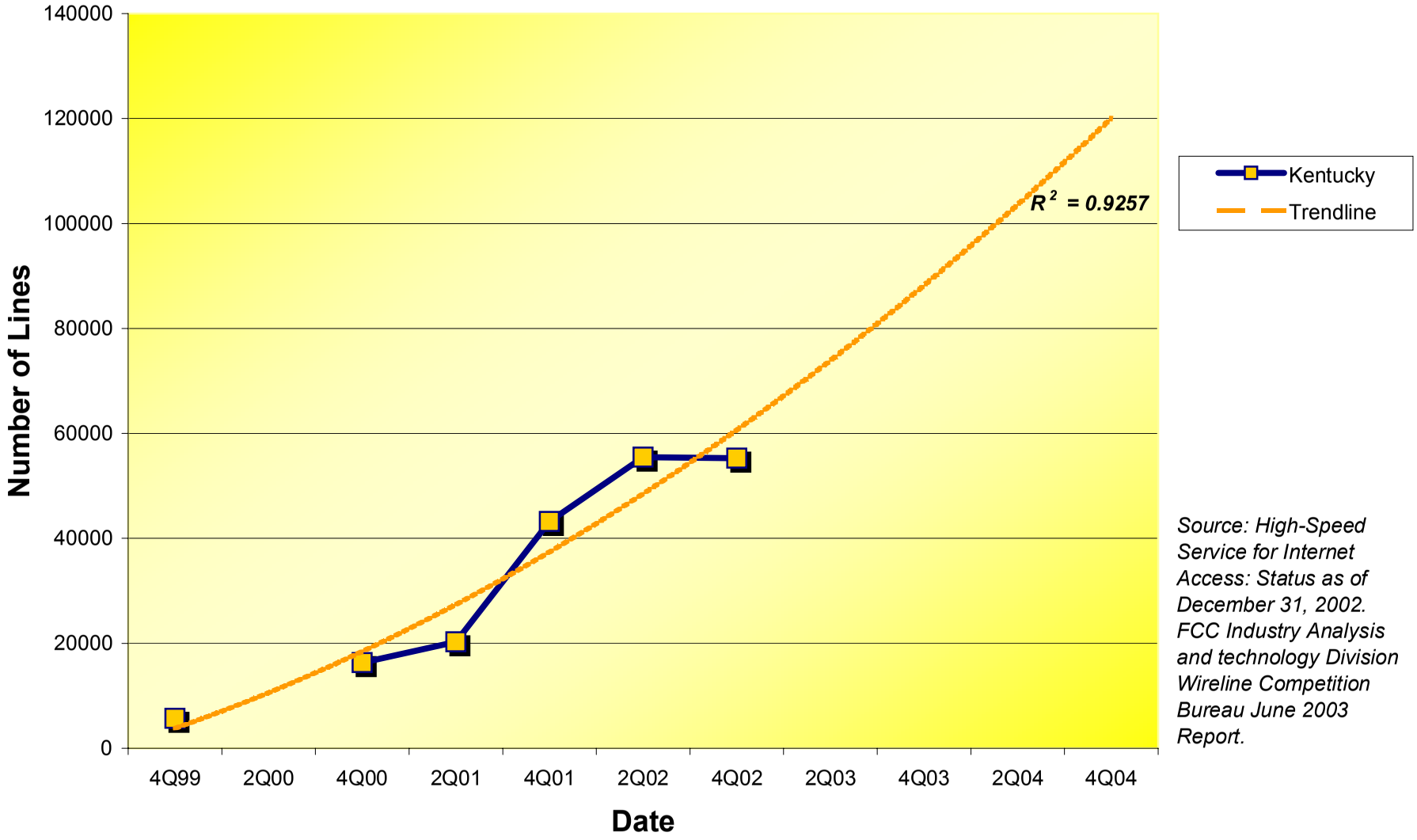
Source: High-Speed Service for Internet Access: Status as of December 31, 2002. FCC Industry Analysis and technology Division Wireline Competition Bureau June 2003 Report.

NORTH CAROLINA ADSL LINES



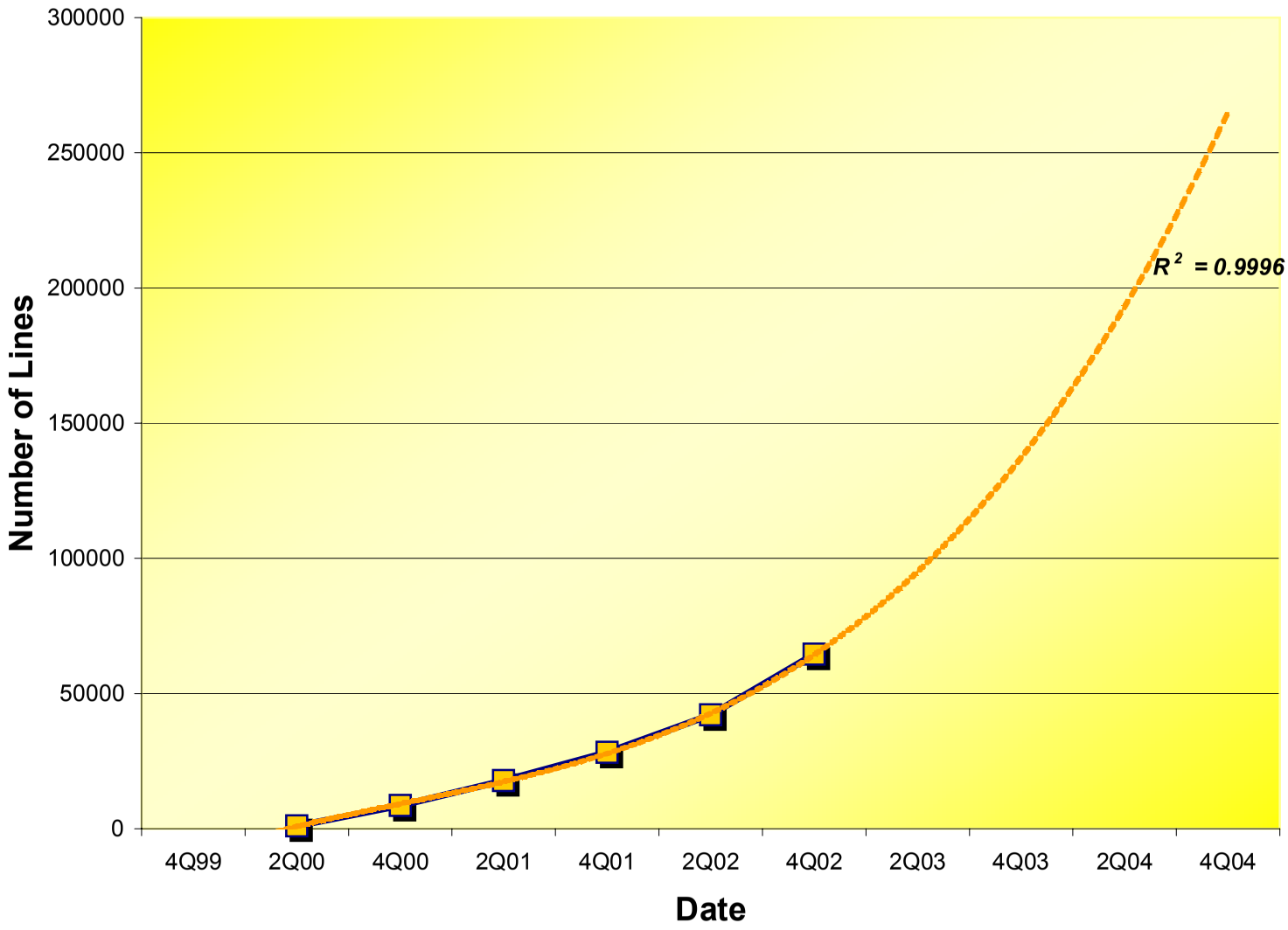
Source: High-Speed Service for Internet Access: Status as of December 31, 2002. FCC Industry Analysis and technology Division Wireline Competition Bureau June 2003 Report.

KENTUCKY ADSL LINES



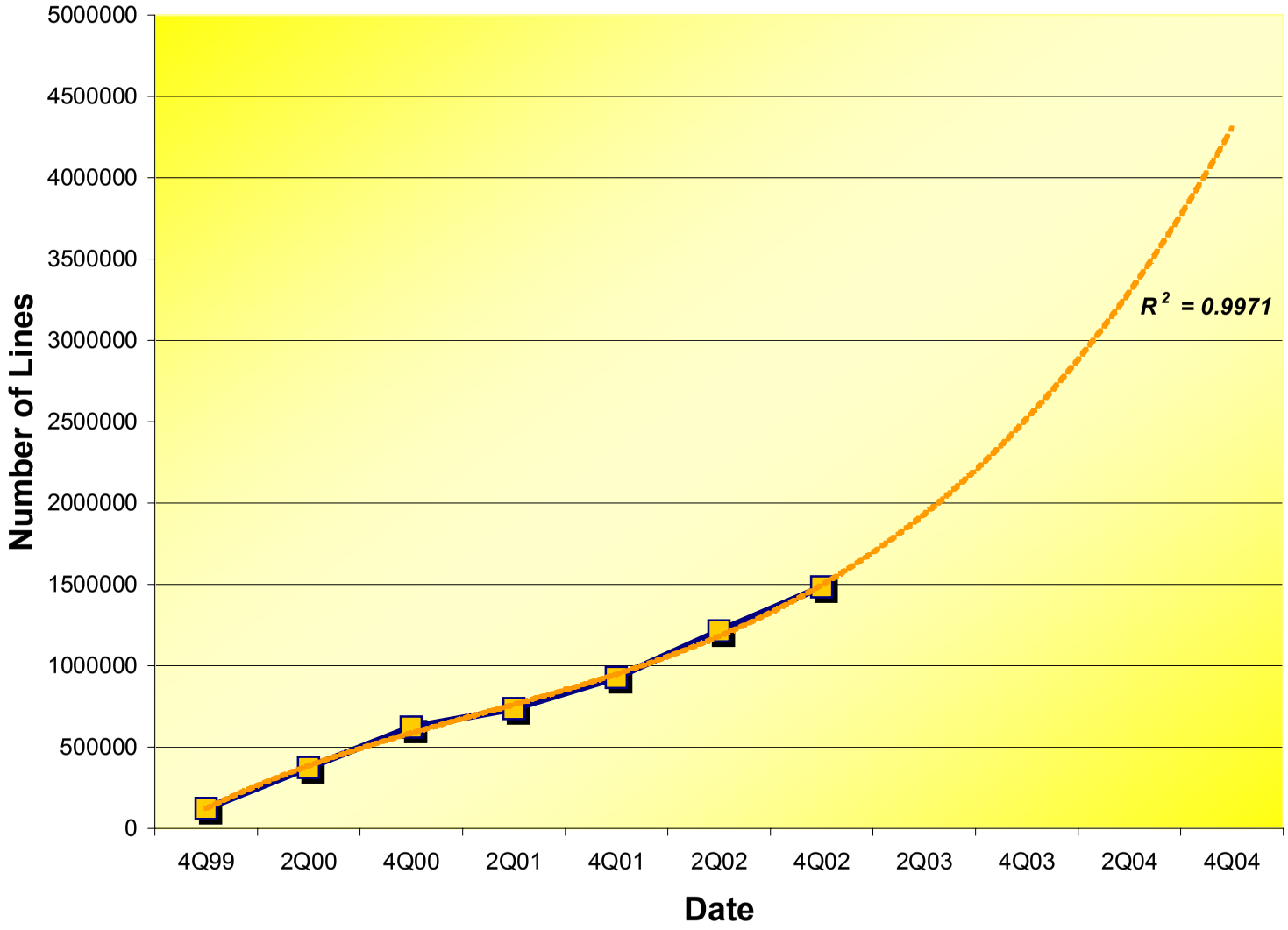
Source: High-Speed Service for Internet Access: Status as of December 31, 2002. FCC Industry Analysis and technology Division Wireline Competition Bureau June 2003 Report.

WISCONSIN ADSL LINES



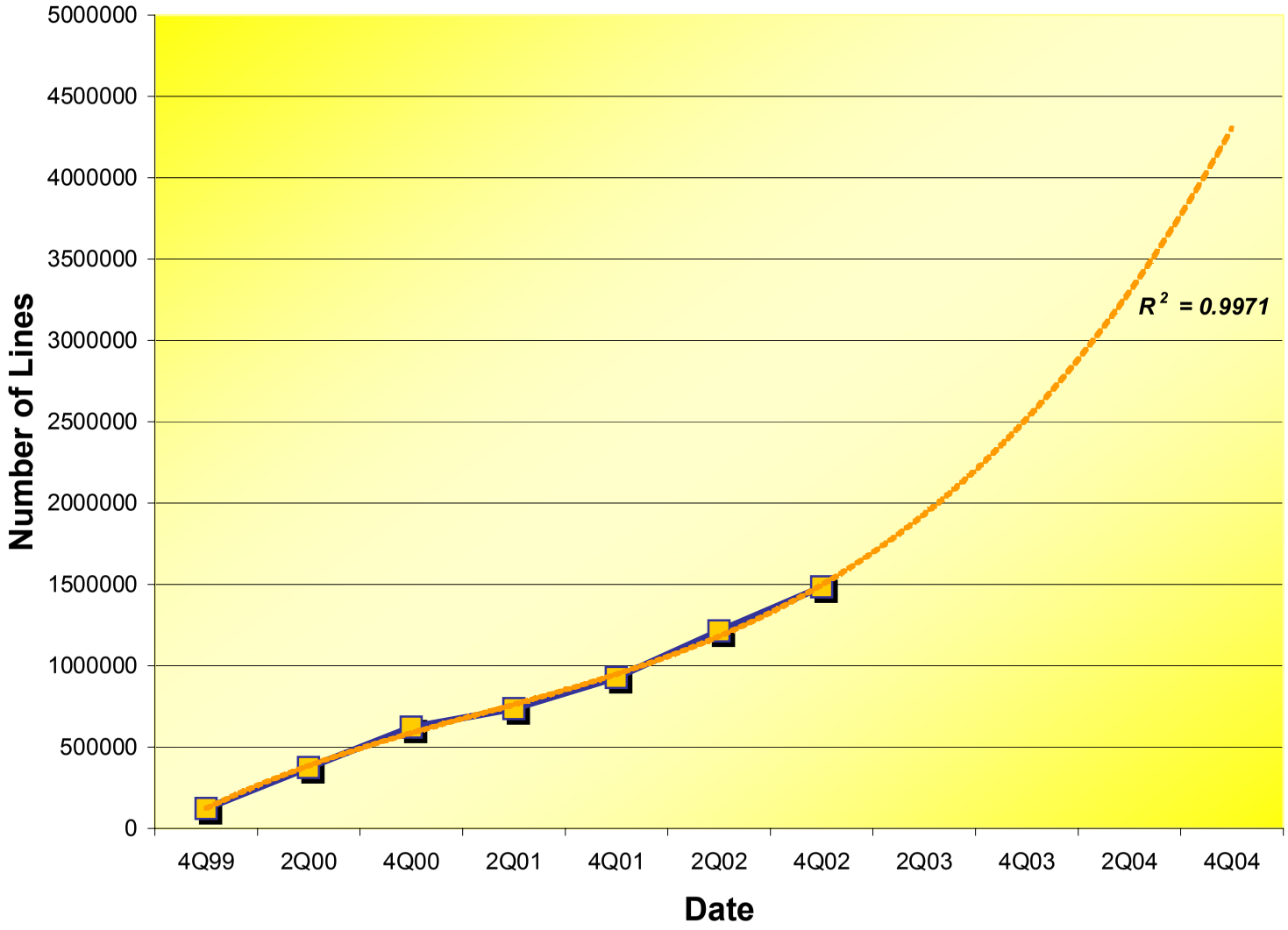
Source: High-Speed Service for Internet Access: Status as of December 31, 2002. FCC Industry Analysis and technology Division Wireline Competition Bureau June 2003 Report.

VIRGINIA ADSL LINES



Source: High-Speed Service for Internet Access: Status as of December 31, 2002. FCC Industry Analysis and technology Division Wireline Competition Bureau June 2003 Report.

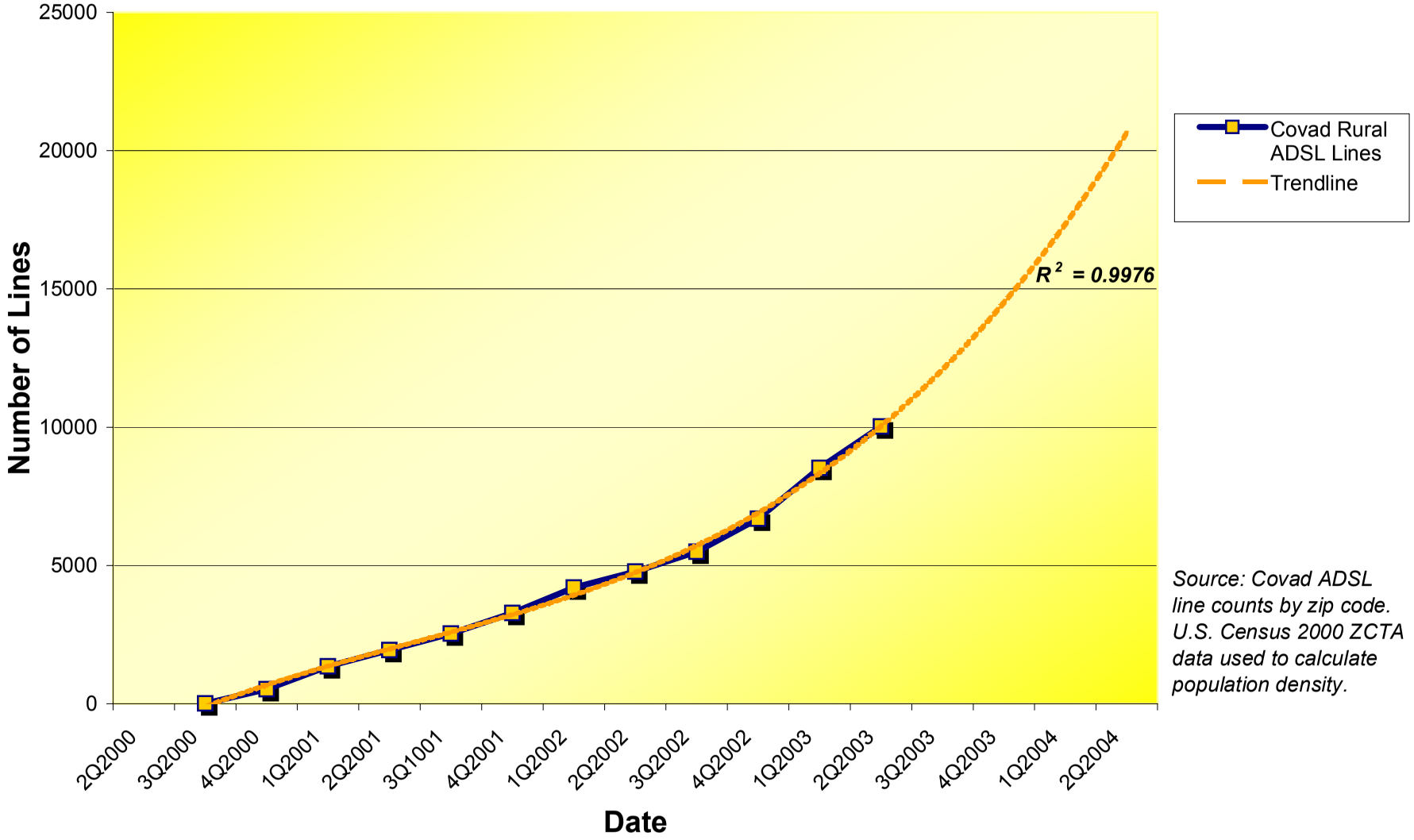
CALIFORNIA ADSL LINES



Source: High-Speed Service for Internet Access: Status as of December 31, 2002. FCC Industry Analysis and technology Division Wireline Competition Bureau June 2003 Report.

ATTACHMENT G

COVAD RURAL ADSL LINES NATIONWIDE



Source: Covad ADSL line counts by zip code. U.S. Census 2000 ZCTA data used to calculate population density.

ATTACHMENT H

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

MEMBERS OF THE CHOICE COALITION

The following members of the Coalition for High-Speed Online Internet Competition and Enterprise ("CHOICE") join in the submission of this Petition: Complete Telecommunications; Covad Communications; DSL Internet Corporation; Biddeford Internet Corporation (d/b/a Great Works Internet); NC Telecom, Inc.; New Edge Networks; NTELOS, Inc.; Ruby Ranch Internet Cooperative Association; Skowhegan Online; and Twin Rivers Valley Telephone. All of the Petitioners are facilities-based CLECs who purchase line shared loops to provide DSL services.

A. Complete Telecommunications

Complete Telecommunications ("Complete"), headquartered in Vail, Colorado, is a CLEC certificated by the Colorado PUC. Complete was formed in 2000 to provide advanced telecommunications and data services in Eagle and Summit Counties, Colorado. These counties include the towns and districts of Silverthone, Dillon,

Keystone, Frisco, Breckenridge, Avon, Beaver Creek and Bachelors Gulch. Complete's focus is entirely localized to these rural areas of the mountain regions of Colorado, where affordable advanced local telecommunications services are for the most part not being offered by Qwest Communications, the regional ILEC. Over the last few years Complete has grown to provide DSL service to nearly one thousand (1000) local homes, small businesses and hotel guest rooms through our facilities based co-locations. The regional ILEC, Qwest, has not yet deployed DSL hardware to service many of these areas. Furthermore, in some of the rural areas served by Complete, Qwest only announced plans to follow into market after Complete had already deployed its DSL services.

Complete's business decision to invest in facilities-based collocation with the ILEC was based in part on its belief that the Telecommunications Act of 1996 would guarantee CLECs access, for a reasonable fee, to a path of copper wire between Complete's collocated hardware and its potential customers. The February 2003 announcement by the FCC that the line-sharing aspect of this access might no longer be a requirement of the ILEC, tied to indications at a recent CLEC forum that the ILEC, Qwest Communications, plans to no longer offer a line-share product if not required to by the FCC, comes as a tremendous blow to Complete and many of its customers. We truly believe that the elimination of the ILEC's requirement to offer line-sharing as product will only result in the elimination of our ability to provide service to our underserved rural communities.

In statements released by the FCC Commissioners regarding their pending decision and intent to eliminate line-sharing as an ILEC requirement, at least one of the commissioners indicated that this should not be a problem for the CLEC as we would still

have the option of provisioning an unbundled loop to the same customer. In our case, this argument fails to take into consideration the limited number of copper pairs that exist in rural areas. In many cases the only available pairs to Complete's potential customers homes and businesses are already "in-use" for voice service required by the customer. Hundreds of Complete's potential customers run small businesses out of their homes and have "consumed" all of the available copper with home and business voice lines. Additional copper pairs from collocation facilities to the customer are simply not available as copper facilities are near or at exhaust. Because of this, Complete believes that an argument that CLECs can simply order a separate pair of copper wires to provide data or voice services to our customers is flawed. Further, Complete is concerned that many of its more rural customers to whom it provides high speed DSL service today may be left "in the dark" if line-sharing is eliminated.

B. Covad Communications

Covad is a leading national provider of broadband connectivity using digital subscriber line ("DSL") technology. Covad's nationwide facilities-based broadband network reaches nearly 45% of the nation's homes and businesses, offering residential and business users a wide variety of innovative and competitively priced broadband services. Covad offers consumers and small and medium-sized businesses a competitively priced alternative to the Bells' high-priced T-1 services. Covad also provides residential consumers one of the nation's lowest priced DSL offerings, Telesurfer Link, which provides broadband connectivity at or below the price of dial-up services. Covad competes directly with the retail broadband offerings of the Bell Operating Companies ("BOCs") and other incumbent local exchange carriers ("ILECs"),

providing vital innovation and price pressure on the BOCs that has sparked widespread DSL deployment in the five years since Covad launched the first commercial DSL offering in the nation.

Covad is collocated in nearly two thousand central offices throughout the country. As a facilities-based provider, Covad relies on the ILECs to provide unbundled transmission facilities (loops and interoffice transport) and the operations support systems ("OSS") necessary to facilitate ordering and provisioning of such facilities. In short, Covad relies *only* on the core bottleneck elements of the ILEC networks – the transmission grid.

C. DSL Internet Corporation

DSL Internet Corporation ("DSLi") is an Integrated Communications Provider based in Miami, Florida and is a CLEC offering local and long distance voice services together with broadband data connectivity over its own South Florida network. DSLi offers a wide range of integrated communications services tailored to the customer needs, including its own applications based upon Session Initiation Protocol (SIP) Telephone. DSLi services include: advanced phone features, Virtual Office Exchange (Vox3), a virtual PBX replacement, managed security and web hosting services. DSLi efficiently offers Voice and Data services, to both residential and commercial users, by combining the power of being its own CLEC with the connectivity of high speed Internet access. DSLi's strategy provides its customers with high-quality, reliable and efficient communication solutions.

DSLi.com is also a Digital Subscriber Line Applications Provider ("DSLAP") company combining the protection of secure application sets with the connectivity of

high speed Internet access. DSLi.com provides customized workflow application sets to both residential and commercial users via high speed Internet access.

D. Biddeford Internet Corporation

Biddeford Internet Corporation (d/b/a Great Works Internet) ("GWI") offers DSL services from collocations located in 34 Verizon Central Offices in Maine and New Hampshire, and has been using line shared loops to serve most of Maine. Via this network GWI provides service to over 43 communities. In the region GWI has taken the lead in providing DSL based broadband to under-served rural communities and GWI serves communities which Verizon does not serve. In the areas where Verizon does provide service, GWI charges significantly less than Verizon charges. Before GWI started offering service, price served as a significant barrier to broadband service for the average rural consumer. Founded in 1994, GWI has grown to more than $10 million per year in annual revenue and has over 100 Maine based employees.

E. NC Telecom, Inc.

NC Telecom, Inc., a subsidiary of UBTA Communications in Roosevelt Utah, ("NC Telecom"), was formed in 1999 when UBTA and White River Electric Cooperative recognized that local economies in rural communities in the northwest corner of Colorado were being stifled by a lack of high speed, advanced communications facilities; and US West, the incumbent carrier, had no plans to upgrade their systems in the foreseeable future. NC Telecom constructed a high capacity fiber optic network between the rural communities, and to government entities**,** to provide advanced broadband telecommunications services. NC Telecom offers broadband services in the towns of Meeker, Craig, Hayden, Steamboat Springs, Rifle and Grand Junction, Colorado. In

addition to these towns, the fiber backbone passes through the communities of Blue Mountain, Dinosaur, Hamilton, Milner and Rio Blanco. The base economy within NC Telecom's footprint consists of ranching, agriculture, petroleum, small retail business, tourism and recreation. NC Telecom's target market area represents more than 17,500 households and about 35,000 access lines.

Voice service is currently provided in all of the above mentioned towns by the incumbent carrier, Qwest Communications. However, these areas do not represent an attractive business case for the incumbent telecommunications provider to upgrade services due to the remote nature of the area and sparse population (three people per square mile and 17 to 60 miles between towns), and the lack of a fiber backbone to inter-exchange carriers. Therefore, northwest Colorado telecommunications users did not have access to advanced, or many times even adequate, telecommunications services. The market demand for both basic and advanced high capacity telecommunications services, along with the poor service perception of Qwest and the condition of its infrastructure created a business opportunity for an advanced services telecommunications provider such as NC Telecom. Thus, for example, NC Telecom is the only company offering high bandwidth services in Meeker.

NC Telecom's DSL services are delivered on leased copper loops from Qwest. Line Sharing is the only cost effective solution to bring DSL to residential homes. NC Telecom originally offered DSL and internet services to the region on new DS0 lines for business and residence, but later discovered that along with high costs, facilities were often not available. Held orders for DS1 and DS0 circuits exist due to lack of incumbent

bandwidth capacity and older technology and equipment. In many cases using the one and only existing DS0 line is the only option available.

In addition, it would be cost prohibited for most people in these rural communities to compensate NC Telecom for both the standalone loop (at $34.13) and the DSL services. With line splitting at a cost of $34.13 just for the local loop, if line sharing is not available, it will not be possible for NC Telecom to continue providing broadband to these residents and businesses. In addition, in rural parts of the country in particular, the lack of full line splitting implementation could be disastrous for broadband consumers. For example, under current practices in certain zone three rural areas in the Qwest region, rural broadband providers like Petitioner NC Telecom would be subjected to line splitting rates that are upwards of twenty times higher than the rates for line sharing. For example, Qwest charges NC Telecom per minute of use whenever NC Telecom's router is attached to a line split line, leading to monthly end user charges of over $100 for line splitting. Such rural pricing practices for line splitting make it economically unviable for small competitive carriers like NC Telecom – often the only DSL provider avilable to rural consumers – to offer broadband services.

F. New Edge Networks

New Edge Networks ("New Edge"), headquartered in Vancouver, Washington, is a national business broadband services provider that operates one of the largest multi-service data communications networks in the United States. In addition to providing frame relay, wide area networks, and other advanced data services, New Edge has one of the largest DSL coverage footprints for small and midsize cities across the country. New

Edge also provides a wide variety of business-class DSL and T-1 solutions through Internet Service Providers and their own retail channel under the TransEdge brand.

New Edge operates Approximately 60 carrier-class Cisco routers serving locations in over 30 major metropolitan markets. It offers DSL services in 600 Central Offices serving 350 small and mid-sized cities nationwide and dedicated internet access services, including T-1, DS-3, OC-3, OC-12, OC-48, and Ethernet in over 30 metropolitan markets nationwide. New Edge built one of the largest carrier-class ATM backbone communications networks with 18 regional hubs located in major cities and almost 600 nodes collocated in small and midsize towns. During 2000, New Edge installed and activated at a rate equivalent to 1.5 DSL switches (DSLAMs) per day. New Edge has launched high-speed dedicated Internet access in 27 major cities, in 19 states and the District of Columbia. As of December 2002 New Edge had 360 employees, 175 LATAs. New Edge offers DSL service in over 360 cities across the United States.

G. NTELOS, Inc.

NTELOS Inc. ("NTELOS"), headquartered Waynesboro, Virginia, is an integrated facilities-based CLEC that provides a broad range of products and services to businesses and residential customers in Virginia, West Virginia, Kentucky, and Tennessee, including many rural markets. NTELOS has over 45,000 CLEC lines, 50,000 ILEC lines, 275,000 wireless customers, and owns more than 35,000 miles of fiber in its network in Virginia and West Virginia. NTELOS' consolidated operating revenues for 2002 were $262.7 million and it has over 1300 employees located in Southern Virginia and rural West Virginia.

In 2001 NTELOS added residential digital subscriber lines service ("DSL") to its product line, made possible through the availability of line sharing, and now provides DSL in both ILEC and CLEC markets. Prior to this, DSL was only available to businesses. Today, NTELOS has approximately 5,500 DSL customers (1400 ILEC and 4100 CLEC,) all located in rural areas of Virginia and West Virginia. Of those customers, about 2580 receive service via shared lines. NTELOS was the first CLEC to provision DSL in Virginia using line sharing; in many of its CLEC markets NTELOS is the only DSL provider. NTELOS has been providing DSL for four (4) years in markets where Verizon is just beginning to offer it.

Line Sharing is important to NTELOS because it allows them to serve the residential market. 70% of its DSL customers are residential and virtually 100% of its new CLEC residential DSL customers are provisioned using Line Sharing. Line sharing has greatly improved the attractiveness of DSL service and as a result DSL continues to grow at a rapid pace, especially growth in the residential segment. If DSL Line Sharing is unavailable NTELOS will be unable to offer residential DSL and some business DSL at a competitive price, eliminating carrier choice for consumers. NTELOS' ability to provide telecom services would be greatly impaired without access to line shared loops.

H. Ruby Ranch Internet Cooperative Association

The Ruby Ranch Internet Cooperative Association ("the Coop") is a member-owned and operated provider of high-speed Internet connectivity to homes in the Ruby Ranch neighborhood in Summit County, Colorado. The Coop offers DSL service to all homes in the rural Ruby Ranch neighborhood, which currently has forty-one homes, but with full build-out could have as many as sixty homes. Eighteen of the homes now

receive the Coop's DSL service. The Coop was founded in 2001 because no carrier offered DSL or cable modem Internet access in the neighborhood, and because the voice telephone service to the neighborhood is of such poor quality that it was/is not possible to get modem connections faster than about 26K bits per second.

The Coop launched service in May of 2002. Within six weeks, Qwest had tripled the price it charges the Coop for the "unbundled distribution subloops" which the Coop had been renting, from $8.73 to $24.13 per month per line. This forced the Coop to switch over to line shared subloops which cost $3.50 per month. This conversion process required the Coop to purchase and install "splitters" at each end of each line and also required the Coop to purchase and install ADSL line cards and modems instead of its existing SDSL line cards and modems. The Coop was also forced to pay Qwest an enormous amount of money for non-recurring charges for the conversion process. The conversion process from unbundled distribution subloops to line shared subloops was technically straightforward, but Qwest seemingly did everything in its power to make the conversion process expensive, tedious, and time-consuming. Now most of the Coop's subscribers have been converted to line shared subloops.

With the Commission’s decision to phase out line sharing, it appears the Coop's enormous expenditure of time and money to convert all of its dedicated loops to line shared loops will go to waste. It appears the Coop will now be forced to convert all of the line shared loops back to dedicated loops. This will impose large nonrecurring costs upon the Coop and will increase recurring costs by a factor of six.

I. Skowhegan OnLine

Skowhegan OnLine ("Skowhegan") was founded in 1994 as a local Internet Service Provider to serve the highly rural Somerset County of Maine. For the first two years, Skowhegan was the only available ISP in the area. In 2000, SOI was approved by the Maine Public Utilities Commission as a Competitive Local Exchange Carrier. Skowhegan now provides both traditional T1 and ADSL, IDSL, SDSL, and HDSL services to all sizes of customers ranging from residential to large business. Its service area currently covers the Skowhegan, Maine exchange (207-474/207-858) with planned expansion to a second exchange during the forth quarter of 2003. Skowhegan has an estimated 15,000 telephone service consumers within its current footprint.

Skowhegan began offering DSL services in the County exchange 3 years before Verizon. Now, Skowhegan offers higher speeds than Verizon's maximum speed, 75% greater reach than Verizon, starting plans up to 30% less expensive than Verizon, and business grade DSL types (IDSL/SDSL) at consumer grade prices.

J. Twin Rivers Valley Telephone

Twin Rivers Valley Internet Services Inc., d/b/a Twin Rivers Valley Telephone, ("TRV Internet") was founded in 1995 by Mark Steil and Kirk Hundertmark to serve Central and Northwest Iowa. Together, TRV Internet and Twin Rivers Valley Telephone is known as TRV Communications. Among TRV Internet's broadband service offerings is high speed DSL service to individual and commercial customers, providing access to the "information superhighway." TRV Internet's comprehensive services include a full range of access connectivity, World Wide Web design and hosting, around the clock Help Desk, and training accessories.

In TRV Communications' last conferences with Qwest Communications it was indicated that Qwest does not plan to offer any type of DSL services in the small Iowa communities of Algona, Iowa, Kossuth County, Garner, Iowa, Hancock County, and Humboldt, Iowa, Humboldt County. Therefore, TRV Communications has secured financing and has invested about one million dollars in telecommunications network equipment to deliver a reliable, secure high speed DSL to these areas. Many of TRV Communications' customers are small businesses and manufacturing plants that rely on its DSL service. These customers have established VPNs and VOIP networks between their business and branch offices and it would be devastating to their businesses if their DSL service connection with TRV Communications were to be terminated.

If we are unable to use line sharing to deliver DSL services, these communities will not be able to receive any type of DSL services. In addition, TRV Communications may be forced out of business. In response to the FCC's decision to phase out line sharing, TRV Communications has looked into Qwest Communications' UNE-P service, but TRV Communication's cost to rent the UNE-P line is $27.30 per month. Without line sharing there is no way that TRV Communications can be competitive and stay in business.