service can buy "naked DSL," a service that Qwest innovated, which is also sold pursuant to tariff.[14]

In addition, Qwest sells "bulk" DSL service to ISPs such as EarthLink and AOL pursuant to tariff. End users then purchase the ISP's branded bundle of DSL transmission and Internet access from the ISP. Moreover, pursuant to Sections 251(c) and 271, Qwest resells its retail DSL service to CLECs at an avoided cost discount in accordance with the pricing provisions of Section 252.[15]

The Commission has decided that DSL is an interstate access service.[16] Thus, when Qwest provides mass-market xDSL service it is subject to the full weight of Title II and common carrier regulation. These requirements include, but certainly are not limited to, dominant carrier tariff regulation and rate averaging. In addition, as mentioned above, Qwest is subject to the

[14] "Naked DSL" allows an end user without a plain old telephone service ("POTS") telephone line to purchase DSL. In the recent introduction of naked DSL, tariff regulation and resale requirements added 60 to 75 days delay to Qwest's roll out of the new service.

[15] Pursuant to Sections 251(c) and 271, Qwest also provides raw copper loops to CLECs as unbundled network elements ("UNEs"), and provides DSL over the UNE-P. Qwest also provides line-sharing pursuant to commercial contract, such as Qwest's contract with Covad and its recently announced commercial agreement with Z-Tel Communications wherein Qwest has committed to provide Z-Tel with access to its Platform Plus Service as a replacement to the UNE-P within Qwest's 14-state service area. In this petition Qwest is not seeking forbearance from the collocation and unbundling requirements of Sections 251(c) and 271. Nor is Qwest filing this petition to request a change in the manner in which it offers line-sharing or its Platform Plus Service.

[16] *See, e.g., In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998), *aff'd*, 17 FCC Rcd 27409 ("*GTE DSL Order*"). *See also In the Matter of 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, 18 FCC Rcd 16978, 17070-71 n.465 (2003), *vacated and remanded in part, aff'd in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied, sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. United States Telecom Ass'n, 2004*, U.S. Lexis 6710 (Oct. 12, 2004). The tariff is filed in Qwest's *Access Service Tariff* (F.C.C. No. 1, Section 8), *Advanced Communications Networks*.

requirements of 47 U.S.C. Sections 251(c) and 271, which include resale at an avoided cost discount.

Dominant carrier tariff regulation mandates 15-day advanced notice for rate increases, 7-day advanced notice for rate decreases, limits the frequency of rate changes, and imposes cost study requirements, among other things.[17] Since DSL is regulated as an access service,[18] Qwest must charge averaged rates within each of its study areas.[19] In practice that requires Qwest to charge the same rate in both the high-cost and low-cost areas within the same state without regard to whether Qwest confronts intermodal and intramodal competitors.

In this petition Qwest seeks forbearance from dominant carrier tariff and rate-averaging requirements with respect to its sale of mass-market xDSL service to **end users**. Additionally, Qwest seeks forbearance from resale of mass-market xDSL at an avoided cost discount pursuant to Sections 251(c) and 271. Qwest does not seek relief from the resale requirement of Section 251(b) in this petition.

B. The Commission Is Striving To Maintain A "Hands Off" Policy Towards Cable Modem Service

The Commission's regulatory treatment of DSL stands in stark contrast to its policies towards cable modem service. "[S]ince the enactment of the Telecommunications Act in 1996, the Commission has taken a 'hands off' policy toward cable modem service, and the service has thrived during that period. Cable modem service is today the most popular service by which

[17] 47 U.S.C. § 204(a)(3); 47 C.F.R. §§ 61.58, 61.38.

[18] *GTE DSL Order*, 13 FCC Rcd at 22480 ¶ 25.

[19] 47 C.F.R. § 69.3(e)(7). "A study area is a geographical region generally composed of a telephone company's exchanges within a single state." *In the Matter of Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 ¶ 4 (1990).

consumers obtain high-speed access to the Internet."[20] In the *Cable Modem Decision*,[21] the Commission decided that cable modem service should be classified as an interstate information service under Title I of the Communications Act of 1934. This classification means that cable modem service is presumptively unregulated.[22] Thus, the *Cable Modem Decision* maintains the hands-off policy that has allowed cable modem service to thrive.

Although the Ninth Circuit vacated the portion of the *Cable Modem Decision* that classified cable modem service as an information service, the Commission recently filed a petition for a writ of certiorari seeking to protect its hands off policy. The Commission explains that its analysis in *the Cable Modem Decision* was guided by several overarching principles. These include "the statutory goal of encouraging the deployment" of advanced telecommunications capability to all Americans[23] and "the related goal of fostering investment and innovation in broadband services by creating a minimal regulatory environment."[24]

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[20] *Brand X* petition at 25 (citation omitted).

[21] *In the Matter of Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Decision*"), *aff'd in part, vacated in part and remanded, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *pets. for cert. pending* (U.S. Sup. Ct. Aug. 27, 2004).

[22] *See In the Matter of Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501, 11515-16 ¶ 32 (1988) ("The Act imposes no regulatory obligations on information service providers as such."); *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, 7460-61 ¶ 6. (2004) ("telecommunications service and information services are separate and distinct categories, with Title II regulation applying to telecommunications services but not to information services.").

[23] *Brand X* petition at 11 (internal quotations omitted).

[24] *Id.* (internal quotations omitted).

The Commission deems maintaining regulatory freedom for cable modem service an issue of "exceptional national importance,"[25] and explains that regulating broadband Internet access service as a telecommunications service "is inconsistent with, and would directly threaten,"[26] the federal policy of promoting broadband deployment. The Commission further argues that cable modem service should remain free from Title II and common carrier regulatory burdens because the effect of such regulation "could lead operators to raise their prices and postpone or forego plans to deploy new broadband infrastructure, particularly in rural or other underserved areas."[27]

Just as increased regulation may lead cable operators to increase price or forego deployment, decreased regulation could incent Qwest to lower xDSL prices or accelerate xDSL deployment plans. Qwest is concerned, however, that there has been no discernible movement on the pending proceedings that could grant some regulatory relief to xDSL services. For example, the Commission is considering whether ILECs should be subject to dominant carrier regulation in their provision of DSL.[28] The Commission is also considering whether access to the Internet over DSL should be regulated under Title II or Title I.[29] Both of the proceedings have been pending for over two years and appear to have stalled.

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[25] *Id.* at 24.

[26] *Id.* at 15.

[27] *Id.* at 26.

[28] *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22754 (2001).

[29] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002).

Consequently, the Commission is deploying its resources to maintain regulatory freedom for the service that dominates the market, while Qwest, a relatively small competitor, must file this petition to seek just a modicum of regulatory relief. This petition is not, however, a substitute for relief in the stalled proceedings. Forbearance does not speak to the issue of whether ILECs providing xDSL service should be regulated as dominant carriers. (They should not.) Nor does forbearance address whether xDSL-based broadband access should be subject to regulation as a telecommunications service in the first place.[30] (It should not.) Nonetheless, in hopes of getting some long overdue relief, Qwest is allocating resources to this proceeding, which will undoubtedly be "time-consuming and hotly contested and [will] assuredly lead to new rounds of litigation."[31]

C. Cable Modem Enjoys Greater Market Share And Less Regulation Than DSL

1. Market Share

DSL service trails cable modem service in market share in the nation as a whole. As of December 2003, cable accounted for almost 60% of all high-speed lines.[32] ADSL accounted for 33.7%.[33] Nationally, RBOCs provided 30.9% of all high-speed lines.[34] As of December 2003 cable modem accounted for an astounding 75.3% of all advanced service lines (lines over 200

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[30] *Cf. Brand X* petition at 28.

[31] *Cf. id.*

[32] FCC, *High-Speed Services for Internet Access: Status as of December 31, 2003*, at Chart 2 (June 2004) ("*High-Speed Services for Internet Access*").

[33] *Id.*

[34] *Id.* at Chart 9.

kbps in both directions, a subset of high-speed lines).[35] ADSL accounted for a mere 14.9% of such lines.[36]

DSL's share of high-speed broadband connections in Qwest's 14 states mirrors that of the nation. As of December 31, 2003, the Commission's data confirms that cable modem had over 56% of high-speed lines in Qwest's 14 states.[37] All ADSL, not limited to Qwest ADSL, accounted for only 31% of all high-speed lines in Qwest's 14 states.[38] Nonetheless, Qwest in its 14-state region had a lower share of high-speed connections than RBOCs as a whole across the nation. As of December 31, 2003, Qwest had [Redacted] market share of high-speed broadband connections in its 14 states,[39] compared to the RBOCs' national share of 30.9%.

In Qwest's individual states, cable modem benefits from a high of 75% share of high-speed lines in Nebraska,[40] to a low of 39% in South Dakota.[41] In contrast, DSL service, not limited to Qwest's DSL, ranges from a high of 49% of high-speed lines in Montana to a low of 15% of such lines in Nebraska.[42] *See* attached Table 1. Looking specifically at Qwest, its share of high-speed lines ranges from a high of [Redacted] in Utah to a low of [Redacted] in Nebraska.[43] *See* attached Table 2.

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[35] *Id.* at Chart 4.

[36] *Id.*

[37] We know that cable modem service had more than 1.88 million subscribers in just 10 Qwest states. The Commission did not disclose the number of high-speed cable modem connections in Idaho, Montana, Utah and Wyoming. *Id.* at Table 7. There were 3,324,759 high-speed subscribers in Qwest's 14 states. *Id.*

[38] *Id.*

[39] *Compare id. with* attached Rex Morse Declaration ¶ 5.

[40] *High-Speed Services for Internet Access* at Table 7.

[41] *Id.*

[42] *Id.*

[43] *Compare id. with* attached Rex Morse Declaration ¶ 5.

2. Regulation

DSL's lower market shares may be explained by the fact that DSL is more heavily regulated than cable modem service. In addition to the regulations from which Qwest seeks relief in this petition, there are numerous other examples of asymmetric regulation:

- Qwest is mandated to unbundle network elements.[44] Cable modem providers face no similar requirements.
- Qwest must give its competitors advance notice before it deploys DSL in a new geographic area.[45] As one would expect of a market with vigorous competition, Qwest's mass-market broadband competitors use that information to target with special offers those neighborhoods that Qwest has announced are about to get DSL. For example, just this spring, before Qwest began providing DSL in an Omaha neighborhood, Cox began a special promotion offering half-price cable modem service for six months.[46] Upon roll out, Qwest had low penetration of its xDSL services as a result.[47]
- Qwest is not only mandated to sell its DSL service to ISPs, such as EarthLink and AOL, but is required to do so pursuant to tariff and is not allowed to negotiate individual case basis contracts with such providers even though they are large sophisticated businesses.[48] Most cable modem providers, on the other hand, are able to decide whether to sell to a competing ISP,[49] and such agreements are not regulated. This allows cable modem providers to structure their deals to meet the individualized requirements of each large ISP.
- DSL and cable modem service are even taxed differently. Eighteen states tax DSL but do not tax cable modem. Conversely all states that tax cable modem also tax DSL.
- In another form of taxation, Qwest is required to make a contribution to the Universal Service Fund that is a percentage of its interstate

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[44] 47 U.S.C. § 251(c)(3).

[45] 47 C.F.R. § 51.325-51.335.

[46] *See* attached Rick MacInnes Declaration and its associated flyer distributed by Cox.

[47] *Id.*

[48] *See generally Cable Modem Decision*, 17 FCC Rcd at 4824-26 ¶¶ 42-47.

[49] This is not universally true. For example, AOL Time Warner offers multiple brands of cable modem service to subscribers on all of its major systems pursuant to the Federal Trade Commission AOL Time Warner Merger Order. *See Cable Modem Decision*, 17 FCC Rcd at 4828-31 ¶¶ 2-55. The Commission has, however, classified this service as a private carrier service, rather than a telecommunications service. *Id.* at 4830-31 ¶ 55.

> telecommunications revenue, including DSL revenues.[50] Since they are not subject to telecommunications regulation, cable modem providers are not required to make a similar contribution. This asymmetric regulation imposes a significant cost on DSL providers and provides a substantial competitive advantage to cable modem providers. For the third quarter of 2004, the Commission decided that telecommunications carriers must contribute 8.9% of interstate revenue to the Universal Service Fund.[51]

Thus, Qwest's DSL offerings are burdened with the full weight of Title II and common carrier regulation, as well as being subject to different tax and USF contribution levies from their cable modem competition. In comparison, cable modem providers and Qwest's other mass-market broadband rivals enjoy relative freedom. This asymmetry is contrary to the public interest and thwarts Congress's goal of promoting the deployment of high-speed telecommunications capabilities "without regard to any transmission media or technology."[52]

D. The Commission Is Free To Decrease Regulation Where It Finds That Less Regulation Will Serve Its Statutory Goals

Qwest seeks forbearance from regulations put in place under Title II of the Communications Act of 1934, and adopted to regulate monopoly telephone companies in a "one-wire world." There is a marked contrast between the one-wire world and the market for mass-market broadband services. The Commission recognizes this difference. In 1999, the Commission in its first report to Congress on deployment of advanced services said the "record does not indicate that the consumer market is inherently a natural monopoly. . . . By the standards of traditional residential telecommunications, there are, or likely will soon be, a large

[50] 47 U.S.C. § 254(d).

[51] *See* Public Notice, *Proposed Third Quarter 2004 Universal Service Contribution Factor,* 19 FCC Rcd 10194 (2004).

[52] *Cf. Brand X* petition at 27; Section 706(c)(1), 110 Stat. 153.

number of actual participants and potential entrants in this market. Anti-competitive coordination among competitors is difficult in such markets."[53]

Just this year, the Commission accepted that the United States has a competitive broadband market.[54] The Commission also acknowledged that "having multiple advanced networks will also promote competition in price, features, and quality-of-service among broadband-access providers. This price-and-service competition, in turn, will have a symbiotic, positive effect on the overall adoption of broadband: as consumers discover new uses for broadband access at affordable prices, subscribership will grow; and as subscribership grows, competition will constrain prices and incent further deployment of new and next generation networks and ever-more innovative services."[55] Most importantly, the Commission recognized that "minimal regulation of advanced telecommunications networks and services is needed to ensure that this happens."[56] Fortunately, the Commission is free to decrease regulation where it finds that less regulation will serve its statutory goals.[57] Notably, the Commission has exercised that freedom in its decision, subject to notice and comment, it is appropriate to forbear from applying all Title II regulation to cable modem service, should the courts decide that cable modem service is a telecommunications service.[58]

Section 10(a) of the 1996 Act requires that the Commission "forbear from applying any

[53] *In the Matter of Inquiry Concerning the 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, 14 FCC Rcd 2398, 2423-24 ¶ 48 (1999) ("*First 706 Report*") (footnotes omitted).

[54] *Availability of Advanced Telecommunications Capability in the United States,* Fourth Report to Congress, at 43 (Sept. 9, 2004), 2004 FCC LEXIS 5157 ("*Fourth 706 Report*").

[55] *Id.* at 9.

[56] *Id.*

[57] *See, e.g., WorldCom v. FCC*, 238 F.3d 449, 463 (D.C. Cir. 2001).

[58] *See Cable Modem Decision*, 17 FCC Rcd at 4847-48 ¶ 95.

regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets" if the Commission finds that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[59]

Section 10(b) provides that in making the public interest determination the Commission must

> [c]onsider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.[60]

II. BECAUSE THERE IS ROBUST INTERMODAL COMPETITION IN MASS-MARKET BROADBAND SERVICES, THE COMMISSION SHOULD FORBEAR FROM DOMINANT CARRIER TARIFF REGULATION

Qwest seeks forbearance from dominant carrier tariff regulation. The tariff requirements from which Qwest seeks relief are found in 47 U.S.C. Section 204, 47 C.F.R. Part 65, 47 C.F.R. §§ 61.38-61.49, and 61.58 to 61.59. Notably, Qwest seeks forbearance from:

1. the requirement that it provide cost support as required in 47 C.F.R. § 61.38;
2. the tariff notice requirements set forth in 47 U.S.C. § 204(a)(3) and 47 C.F.R. § 61.58;[61]

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[59] 47 U.S.C. § 160(a)(1)-(3).

[60] 47 U.S.C. § 160(b).

[61] Specifically, Qwest seeks to make "deemed lawful" tariff filings on one-day's notice.

3. the required delays between rate changes as set forth in 47 C.F.R. § 61.59; and

4. the provisions that forbid it from offering contract tariffs, (and that thereby bar volume and term discounts tailored to the needs of specific customers).[62]

This relief will benefit consumers. The goal is to enhance "the efficiency of the market . . . by allowing prices to be tailored more easily and accurately to reflect costs and, therefore," to promote competition.[63]

A. Dominant Carrier Tariff Restrictions Are Not Necessary To Ensure That Rates And Practices Are Just, Reasonable, And Not Unreasonably Discriminatory

The first statutory condition for forbearance directs that the Commission determine whether the continued application of dominant carrier tariff regulations is necessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory. Competition, where it exists, serves the Commission's statutory goal of ensuring fair and reasonable prices.[64]

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[62] 47 C.F.R. § 61.3(o).

[63] *WorldCom v. FCC*, 238 F.3d at 455; *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14252-53 ¶ 59 (1999) ("*Pricing Flexibility Order*"). The *Pricing Flexibility Order* provides a precedent for allowing regulatory relief prior to a non-dominance finding. That *Order* reflects an effort to allow LECs more pricing freedom as they face more competition. *WorldCom v. FCC*, 238 F.3d at 455; *Pricing Flexibility Order*, 14 FCC Rcd at 14257 ¶ 67. The tariff relief that Qwest seeks here is similar to that available with Phase II pricing flexibility. 47 C.F.R. § 69.727(b). Phase II relief is available once "competitors have established a significant market presence in the provision of the services at issue." *WorldCom v. FCC*, 238 F.3d at 456; *Pricing Flexibility Order*, 14 FCC Rcd at 14258 ¶ 69, 14301 ¶ 153. It is clear that Qwest's competitors, particularly cable modem operators, have established a significant market presence in the provision of mass-market broadband services. The triggers for tariff relief are based upon collocation, which the Commission has acknowledged underestimates competition when competitors do not rely upon the ILECs' facilities. *Pricing Flexibility Order*, 14 FCC Rcd at 14274-76 ¶ 5.

[64] *WorldCom v. FCC*, 238 F.3d at 452.

Thus, because mass-market broadband services are characterized by "robust intermodal competition from cable providers,"[65] tariff regulation is not necessary for ensuring fair and reasonable rates.

Specifically, the Commission has concluded that "the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed."[66] Qwest's intermodal competitors, in particular, have made significant sunk investment in mass-market broadband services. According to the National Cable & Telecommunications Association, cable providers spent roughly $1,200 per customer to upgrade cable infrastructure and launch new broadband services.[67]

Cable modem providers are not the only facilities-based competitors within Qwest's territory. The Commission has recognized the "explosive growth of hotspots," where a user with a computer or personal digital assistant equipped with a wireless local area network card can connect to the Internet through wireless access points.[68] Moreover, as the Commission has noted, municipalities such as Seattle, Washington, which is within Qwest's footprint,[69] now provide their own wireless access. The Commission has further noted that several carriers provide wireless broadband services in small communities, many of which are in Qwest's footprint. These include Info-Link.net in Minnesota, Evertek in Iowa, and BeamSpeed in Arizona.[70]

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[65] *USTA II*, 359 F.3d 582.

[66] *WorldCom v. FCC*, 238 F.3d at 458; *Pricing Flexibility Order*, 14 FCC Rcd at 14262 ¶ 78.

[67] http://www.ncta.com/Docs/PageContent.cfm?pageID=37 (visited September 9, 2004).

[68] *Fourth 706 Report* at 18.

[69] *See id.* at 19.

[70] *See id.* at 22.

Besides the cable modem and wireless competitors, two satellite providers, Hughes Network Systems and Starband, currently offer high-speed service to "individuals primarily in small office/home office environments and small businesses."[71] In addition, the Commission has noted that Boeing Corporation and WildBlue Communications will soon launch high-speed Internet access services.[72] Moreover, the Commission recently adopted "rules to encourage the development of" broadband over power line systems ("BPL") with the goal of increasing the availability of broadband and enhancing competition by providing another broadband alternative.[73]

Because cable modem, wireless and satellite providers are available, and BPL is emerging, if Qwest attempted to charge unjust or unreasonably discriminatory rates, customers would turn to the other providers. Econometric data on demand elasticity, consumer surveys, and Qwest's internal data regarding the interplay between DSL and cable modem service all support this conclusion.

1. Econometric Data

Demand elasticity data show that customers do switch services based upon price. For example, a 2002 study, analyzing fourth quarter 2000 and first quarter 2001 nationwide data of customers who had access to both cable modem and DSL services found significant cross-price

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[71] *See id.* at 23.

[72] *Id.*

[73] *FCC Adopts Rules for Broadband Over Power Lines to Increase Competition and Promote Broadband Service to All Americans*, 2004 FCC LEXIS 5796 (Oct. 14, 2004); Report and Order, ET Docket Nos. 04-37, 03-104, FCC 04-245, rel. Oct. 28, 2004.

elasticity. For every one-percent increase in the price of DSL, the demand for cable modem service rises by 0.591 percent.[74]

2. – Consumer Surveys

Consumer surveys echo the econometric findings. A Strategis Group survey established that eight percent of broadband users would be willing to switch between cable modem and DSL for a discount of $5 on their monthly bill, another 24 percent for a discount of $10, and an additional 28 percent for a discount of $15.[75] Another consumer survey found that price competition is a major factor for consumers in deciding whether to change to a different ISP.[76]

3. Internal Qwest Data

Internal Qwest data reflect the same trends. In a survey of Qwest customers who canceled their DSL service, about [Redacted] of those canceling DSL service cited cost or the fact that they received a better competitive offer.[77] Qwest found that most people who replace Qwest DSL service replace it with cable modem service.[78]

In sum, dominant carrier tariff requirements are not necessary to ensure that charges are just and reasonable and not unjustly discriminatory. If Qwest attempted to impose unjust or unreasonable rates or terms Qwest's customers would turn to other providers. Accordingly, the Commission should find that the first requirement is met.

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[74] *See The Empirical Case Against Asymmetric Regulation of Broadband Internet Access*, by Robert W. Crandall, Gregory Sidak and Hal J. Singer, Berkeley Technology Law Journal, Vol. 17:01, at 972-73 (2002).

[75] *See* Attachment 1, *ILEC Non-Dominance in the Provision of Retail Broadband Services, Strategic Policy Research*, John Haring & Harry M. Shooshan, dated March 1, 2002 at 5.

[76] *TR's Online Census 4th Quarter 2003* at 2.

[77] *See* attached Brad Hughes Declaration and its associated Qwest Residential DSL Churn Study conducted by Travis Research Associates, Inc.

[78] *Id.* [Redacted] of the customers who switched would have stayed with Qwest if Qwest had been able to match their new providers' offers. *Id.*

B. Dominant Carrier Tariff Restrictions Are Not Necessary To Protect Consumers

The second statutory condition for forbearance requires that the Commission determine whether enforcement of dominant carrier tariff regulation is necessary for the protection of consumers. Analysis shows that the second statutory condition is met.

First, more consumers have chosen cable modem service, thereby demonstrating that consumers neither know nor care whether their provider is subject to dominant carrier tariff restrictions. As shown above, if Qwest attempts to use freedom from dominant carrier tariff regulation to harm consumers, Qwest's customers will simply turn to other providers. Finally, consumers will still have the protections found in the remaining tariff regulations and the complaint processes. As such, the Commission should find that the second condition is satisfied.

C. Forbearance From Dominant Carrier Tariff Restrictions Is Consistent With The Public Interest

The third statutory condition for forbearance requires that the Commission determine whether forbearance from dominant carrier tariff requirements is consistent with the public interest. In making this public interest determination, the Commission considers whether forbearance "would enhance competition." As demonstrated below, forbearance from dominant carrier tariff restrictions is consistent with the public interest.

Forbearance from the dominant carrier tariff rules would enhance competition. For example, 47 C.F.R. § 61.58 provides that Qwest must file a tariff on 15-day's notice before implementing a price increase. The 15-day notice period eliminates the possibility of surprising competitors, and thereby harms competition. Further, Qwest must wait 30 days after a price change before implementing a further price change. 47 C.F.R. § 61.59. This also decreases price competition. Moreover, the cost study requirement increases delay and expense associated with Qwest's introduction of new service offerings, or changes in technology. Similarly, forbidding Qwest from utilizing contract tariffs discourages Qwest from tailoring its service offerings to a customer's needs.

Considering these constraints, it is not surprising that the Commission has previously recognized that imposing tariff requirements on one provider may encourage *all* providers to maintain rates at an artificially high level.[79] Accordingly, forbearance may encourage *all* providers to engage in more vigorous competition, thereby benefiting consumers. "[D]elaying regulatory relief imposes costs on carriers and the public, the latter of which is deprived of the benefits of more vigorous competition."[80] For these reasons, the Commission should find that forbearance would be in the public interest.

Since all three forbearance conditions are met, the Commission must forbear from applying dominant carrier tariff regulation to Qwest's mass-market broadband services.[81]

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[79] *See Pricing Flexibility Order*, 14 FCC Rcd at 14272-73 ¶ 92 ("the existing rules clearly limit price cap LECs' ability to respond to competition. Price cap LECs are subject to both our Part 61 rules regarding rate levels and the mandatory rate structure rules set forth in Part 69 of our rules. Our rules precluding LECs from offering contract tariffs and limiting volume and term discount offerings may create a pricing umbrella for competitors.").

[80] *Id.*

[81] Moreover, the Commission has already concluded, subject to notice and comment, that it should forbear from applying Title II and common carrier regulation to the market-leading mass-market broadband service, cable modem. The Commission declared:

> We also believe that forbearance would be in the public interest because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing. For these same reasons we tentatively conclude that enforcement of Title II provisions and common carrier regulation is not necessary for the protection of consumers or to ensure that rates are just and reasonable and not unjustly or unreasonably discriminatory. As such, we believe that forbearance from the requirements of Title II and common carrier regulation is appropriate in this circumstance."

Cable Modem Decision, 17 FCC Rcd at 4847-48 ¶ 95. The Commission should apply this broad finding to the narrow relief that Qwest seeks in this petition.

III. BECAUSE THERE IS ROBUST INTERMODAL COMPETITION IN MASS-MARKET BROADBAND SERVICES, THE COMMISSION SHOULD FORBEAR FROM THE RATE AVERAGING REQUIREMENT OF 47 C.F.R. § 69.3(e)(7)

Rate averaging requires that Qwest's DSL tariff "shall not contain charges ... that are disaggregated or deaveraged within a study area."[82] Charging averaged rates means that Qwest is mandated to charge the same rates in high-cost and low-cost areas. Qwest would like the freedom to charge different prices in different vicinities within the same study area.

A. Rate Averaging Is Not Necessary To Ensure That Rates And Practices Are Just, Reasonable, And Not Unreasonably Discriminatory

Rate averaging is not necessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory. Cable modem's market share demonstrates that consumers can find just and reasonable rates from providers who are not required to average their rates. Many of Qwest's cable modem competitors target their rates to areas in which they face DSL competition. For example, Comcast's "DSL Switch" campaign targeted discounts to markets where it competes with DSL.[83] Further, Qwest's competitors, regardless of whether they have a uniform national price structure, are able to offer consumers better rates to retain or "win back" customers who are thinking of switching providers.[84]

Moreover, as shown by the widespread availability of intermodal competition, and the econometric data, consumer surveys and internal Qwest data cited above, if Qwest were to attempt to use relief from rate averaging to charge unjust or unreasonable rates its customers would flock to its competitors. Besides, consumers will still have protections against unjust or

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[82] 47 C.F.R. § 69.3(e)(7).

[83] *TR's Online Census Third Quarter 2003* at 1, 3 (Comcast's "DSL Switch" campaign); *and see* attached Rick MacInnes Declaration and its associated flyer distributed by Cox.

[84] *See, e.g.*, attached Brad Hughes Declaration and its associated Qwest Residential DSL Churn Study conducted by Travis Research Associates, Inc.

unreasonable rates as Qwest will still be subject to the tariff and complaint rules. For these reasons, the Commission should find that the first forbearance condition is met.

B. Rate Averaging Is Not Necessary To Protect Consumers

Rate averaging is not necessary to protect consumers. The Commission has previously found that deaveraging would not permit a LEC, such as Qwest, to charge unreasonable, monopolistic rates even where the LEC does not face competition.[85] It follows that there is even less risk of unreasonable, monopolistic rates in the broadband market, where there is widespread and vigorous competition. Thus, if Qwest used forbearance from rate averaging to attempt to harm consumers, Qwest's customers would flock to its competitors. Besides, consumers will still have protections found in the tariff and complaint rules. As such, the Commission should find that the second condition is satisfied.

C. Forbearance From Rate Averaging Is Consistent With The Public Interest

Forbearance from rate averaging is consistent with the public interest. Allowing Qwest to set rates that reflect its costs of service, rather than setting uniform rates throughout a study area, would enhance competition, and promote deployment of broadband.

Because of rate averaging Qwest must offer the same xDSL rate in low-cost, densely-populated, urban areas, such as Denver, as in high-cost, sparsely-populated, rural areas, in the Colorado Rockies. Forbearance would enhance competition by allowing Qwest to move its xDSL rates closer to actual costs.[86] For example, deaveraged pricing would allow Qwest to confront Comcast with vigorous price competition in Denver because Qwest would no longer be

[85] *See In the Matter of Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Federal-State Joint Board on Universal Service,* Report and Order and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 4122 4135-36 ¶ 28 (2004) ("*MAG Order*").

[86] *Id.* at 4135 ¶ 26.

required to charge Denver xDSL customers the same prices that it charges rural xDSL customers. Shackling Qwest's ability to price based on its costs in Denver gives Comcast room to also price above ***its*** costs. Hindering Qwest's ability to engage in vigorous price competition results in ***all*** Denver broadband customers, even those who do not choose Qwest xDSL, paying higher prices than they would pay if Qwest were unshackled.

In the same way, requiring Qwest to price below its cost in high-cost areas also distorts the market. Prices that are below cost reduce the incentives for entry by firms that could provide broadband services as efficiently as, or more efficiently than, Qwest.[87] Precluding entry by such firms harms consumers. Moreover, requiring Qwest to price below cost in high-cost areas creates disincentives for Qwest to expand xDSL deployment into high-cost areas.

The Commission has previously found that rather than ensuring that charges are just and reasonable, geographically-averaged rates may create a pricing umbrella for competitors.[88] It follows that deaveraging rates could improve rates not only for those end users choosing Qwest's xDSL services, but for *all* mass-market broadband consumers.[89] Moreover, deaveraged rates may encourage deployment -- by Qwest and other providers -- in rural and high-cost areas. The Commission's public interest analysis should be informed by Section 706 of the 1996 Act, which

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[87] *Id.*

[88] *In the Matter of Expanded Interconnection with Local Telephone Company Facilities, Amendment of the Part 69 Allocation of General Support Facilitiy Costs,* Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7454 ¶ 178 (1992); *In the Matter of Expanded Interconnection with Local Telephone Company Facilities, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board,* Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374, 7426 ¶ 98 (1993).

[89] *Pricing Flexibility Order*, 14 FCC Rcd at 14257 ¶ 67; *MAG Order*, 19 FCC Rcd at 4135-36 ¶ 28.

directs the Commission to promote the timely and comprehensive deployment of broadband facilities.[90] Thus, the Commission should find that the third condition is met.

In sum, because all three forbearance conditions are met, the Commission must forbear from applying the rate averaging requirement to Qwest's DSL services.[91]

IV. BECAUSE QWEST FACES ROBUST INTERMODAL COMPETITION, THE COMMISSION SHOULD FORBEAR FROM REQUIRING QWEST TO ENGAGE IN AVOIDED COST RESALE OF DSL TO CLECS

While all LECs are required to resell their services pursuant to 47 U.S.C. § 251(b), Section 251(c) requires Qwest, as an ILEC, to resell its retail services at an avoided cost discount. Similarly, Section 271 applies this requirement to Qwest as an RBOC. In sharp contrast to Qwest's regulatory obligations, none of Qwest's mass-market broadband competitors are subject to the avoided cost resale requirement of Sections 251(c) and 271. Qwest wants the freedom to negotiate commercial agreements with its carrier customers. Depending upon the course of such negotiations the price terms in the resulting agreements may, or may not, reflect an avoided cost discount.

The fact that CLEC DSL, cable modem, satellite, CLEC wireless and wireless providers are not legally required to resell their retail services at an avoided cost discount, does not justify the continued imposition of the resale requirement on Qwest. The express purpose of this

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[90] *See In the Matters of Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c),* FCC 04-254, Memorandum Opinion and Order, CC Docket No. 01-338, WC Docket Nos. 03-235, 03-260 and 04-48, rel Oct. 27, 2004 ¶ 34 ("*Section 271 Forbearance Order*").

[91] Moreover, as mentioned above, the Commission has already decided, subject to notice and comment, to forbear from imposing Title II and common carrier regulations, which include rate averaging, on cable modem services. *Cable Modem Decision*, 17 FCC Rcd at 4847-48 ¶ 95. This further demonstrates that the Commission should forbear from requiring Qwest to charge averaged rates for DSL.

requirement is to provide for the early development of competition.[92] Congress believed it "imperative that meaningful resale opportunities are available for competition in the local exchange" in those "markets where a facilities-based competitor is not likely to emerge in the near term."[93]

There are plenty of facilities-based competitors in mass-market broadband services, and other potential competitors are expected to emerge in the near term. Thus, the resale provision has outlived its usefulness as it pertains to resale of xDSL. Resale of Qwest's xDSL services is clearly unnecessary for a "transition to a more competitive market place."

Consistent with Qwest's far-from-dominant market share and the presence of intermodal competitors, including the market-leading cable modem providers, the Commission should forbear from requiring Qwest to engage in resale of DSL pursuant to Sections 251(c) and 271(c)(2)(B)(xiv), and the associated pricing requirements of Section 252. As shown below, Qwest's forbearance request meets the statutory conditions established in Section 10 of the 1996 Act, including Section 10(d)'s condition that these regulations have been fully implemented by Qwest.

A. Resale Of DSL At An Avoided Cost Discount Is Not Necessary To Ensure That Rates And Practices Are Just, Reasonable, And Not Unreasonably Discriminatory

Again, the first condition for forbearance is a Commission determination whether continued resale of DSL at an avoided cost discount is necessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory. As with the Section 271 unbundling decision, it is appropriate to consider the BOCs' relative position in the emerging

[92] *U.S. Code Congressional and Administrative News, 104th Congress, Second Session* (1996), *P.L. 104-104, House Report (Commerce Committee) No. 104-204,* July 24, 1995 [To accompany H.R. 1555] at 37.

[93] *Id.*

broadband market.[94] As in that case, the BOCs' relative position would not lead to unreasonable or discriminatory practices in the absence of a Section 251 or 271 obligation to resell. The Commission has already found, and the D.C. Circuit has agreed, that "robust intermodal competition from cable providers -- the existence of which is supported by very strong record evidence, including cable's maintenance of a broadband market share on the order of 60% -- means that even if all CLECs were driven from the broadband market, mass-market consumers will still have the benefits of competition between cable providers and ILECs."[95]

Here, Qwest is not seeking to eliminate line sharing (as offered in our commercial agreements), or provision of raw copper loops. Nor is Qwest seeking to end all resale. Qwest simply argues that it should not be required to resell pursuant to the avoided cost provisions of Section 252. Competition from multiple sources and technologies in the retail broadband market, most notably from cable modem broadband providers, will continue to pressure Qwest to utilize wholesale customers to grow its share of broadband markets.[96] Thus Qwest will offer such customers reasonable rates and terms in order to retain their business.[97] Should the Commission grant this petition all CLECs will not be "driven from the broadband market." With its [Redacted] market share, Qwest clearly does not have the market power or the monopoly on mass-market broadband facilities that is assumed in Section 251(c) and in Section 271. Consequently, it is not necessary for Qwest to meet the Section 251(c) and Section 271 resale requirements in order to maintain or ensure "just, reasonable and not unreasonably

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[94] *Section 271 Forbearance Order* ¶ 21.

[95] *USTA II*, 359 F.3d at 582 (citations omitted).

[96] *See Section 271 Forbearance Order* ¶ 26.

[97] *See id.*

discriminatory" rates and practices. Accordingly, the Commission should find that the first condition for forbearance is met.

B. Resale Of DSL At An Avoided Cost Discount Is Not Necessary To Protect Consumers

The second condition for forbearance is that the Commission must determine whether resale of DSL at an avoided cost discount is necessary to protect consumers. Qwest was never the incumbent provider of mass-market broadband services. Cable modem providers are the logical parties, if any, to enjoy that distinction. Since Qwest is just one of the facilities-based competitors providing mass-market broadband service, and has limited competitive advantages with regard to broadband, given its market position with respect to others in the emerging broadband market,[98] the legal and policy rationales for resale at an avoided cost discount as a transition to a more competitive marketplace no longer exist, if they ever did.

Accordingly, it is clear that consumers have choices from non-Qwest providers who are not reselling services made available at an avoided cost discount. Thus, there is no reasonable basis for thinking resale at an avoided cost discount is necessary to protect consumers. The Commission should find that the second forbearance condition is met.

C. Forbearance From Resale Of DSL At An Avoided Cost Discount Is Consistent With The Public Interest

The third condition for forbearance is a Commission finding that forbearance from resale of DSL at an avoided cost discount is consistent with the public interest. Forbearance will enhance competition by allowing negotiation between competitors, rather than regulation, to set resale rates. Forbearance will further enhance competition by ending the economic distortions caused by the asymmetric imposition of invasive regulations. Just as an example, 47 C.F.R.

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[98] *See id.* ¶ 30.

§ 51.613(a)(2) requires that if Qwest has a promotion in effect for more than 90 days, Qwest must make the promotion available to resellers at an avoided cost discount. Accordingly, forbearance may remove impediments to Qwest's engaging in promotions. Thus, the Commission should find that the third condition for forbearance is met.

D. Sections 251(c) And 271 Have Been Fully Implemented

Section 10(d) provides that the Commission may not grant forbearance from Section 251(c) or Section 271 unless the Commission has determined that the requirements of those sections have been "fully implemented" by the ILEC.[99] The Commission has determined "that the checklist portion of section 271(c) is 'fully implemented' once section 271 authority is obtained in a particular state.[100] Each relevant state commission and this Commission have previously determined that Qwest has fully implemented the requirements of Sections 251 and 271 with respect to all of its services, not just DSL.[101] Accordingly, the checklist requirements of Section 271(c) are fully implemented throughout Qwest's 14 states. Moreover, as shown above, continuing to impose resale at an avoided cost discount would be incompatible with Qwest's status as the challenger in mass-market broadband services. Accordingly, since all four forbearance conditions are met, the Commission must forbear from requiring resale of DSL at an avoided cost discount.

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[99] *See* 47 U.S.C. § 160(d).

[100] *Section 271 Forbearance Order* ¶ 15.

[101] *See, e.g., In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, Memorandum Opinion and Order, 17 FCC Rcd 26303, 26510 ¶ 373 (2002); *In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, Memorandum Opinion and Order, 18 FCC Rcd 7325, 7389-90 ¶ 111 (2003); *In the Matter of Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Arizona*, Memorandum Opinion and Order, 18 FCC Rcd 25504, 25525-26 ¶ 40 (2003).

V. CONCLUSION

Congress adopted Section 10 because it recognized that regulation can be unnecessary and even harmful in a competitive market. Under Section 10, the Commission is required to eliminate regulations that are no longer necessary to ensure that rates and practices are just, reasonable and not unreasonably discriminatory. As the Commission and the courts have acknowledged, mass-market broadband services are already robustly competitive. Therefore competition, without dominant carrier tariff regulation, rate averaging, or resale at an avoided cost discount is sufficient to constrain prices, incent deployment and stimulate quality of service improvements. It is not in the public interest to continue heavy-handed regulation of a competitor in a competitive market. Regulating a competitor that lacks market power "can retard the development of effective competition in the entire market."[102] For these reasons, the Commission should grant Qwest's petition and exercise its authority to forbear from applying dominant carrier tariff regulation, rate averaging, or resale at an avoided cost discount to Qwest's mass-market xDSL services.

Respectfully submitted,

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[102] Reply Comments of the DOJ CC Docket No. 90-132, filed Sept. 29, 1990 at 26 n.42.