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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation	)	WC Docket No. 04-416
for Forbearance Pursuant to	)	
47 U.S.C. § 160(C) Pertaining	)	
to Qwest's xDSL Service	)	

COMMENTS OF ESCHELON TELECOM, INC.

INTRODUCTION AND SUMMARY

Qwest Corporation (Qwest) has filed a petition requesting the Federal Communication Commission to forbear from applying the following Title II requirements to Qwest's provision of digital subscriber line service (DSL): dominant carrier tariff regulation; rate averaging; and the wholesale discount for resale. Because Qwest fails to support or justify the need for forbearance, its petition should be denied.

Qwest's petition for Federal Communications Commission (FCC) forbearance from regulation is based entirely on the proposition that Qwest must be loosed from regulation to meet competition from cable modem broadband providers. Qwest's position should be rejected for several reasons. First, Qwest focuses on cable's residential DSL market share as the sole argument to portray certain ILEC regulations as competitively disadvantageous, but fails to mention that these regulations are critical to sustaining consumer choice among competitors for both DSL and voice. Second, the facts, including key differences in availability and technology between cable and DSL, belie Qwest's arguments regarding the threat of competition from cable, particularly for business services. Third, Qwest fails to demonstrate why cable modem's approximately 50% broadband market share must be due to over-regulation of Qwest, and not to Qwest's choices regarding DSL price, service quality, or infrastructure investment.

Serious examination of Qwest's arguments leads to the conclusion that Qwest is asking for FCC regulatory forbearance not to stave off crushing competition from cable modem but rather to increase its market share for broadband services by driving its DSL competitors from the field. Elimination of the regulatory requirements in Qwest's petition, particularly the wholesale discount for resold services, would seriously undermine competition within the significant share of the broadband market held by DSL providers. This fact is particularly true in light of the FCC's recent decision to transition competitive carriers away from access to unbundled mass market local circuit switching (UNE-P), forcing greater carrier dependence on resale as an option for DSL.

Qwest fails to fulfill the factors for a meritorious forbearance petition under 47 U.S.C. §160; the FCC should reject Qwest's arguments and deny Qwest's petition for forbearance.

ARGUMENT

I. BACKGROUND

A. Qwest's Petition.

Based upon its argument that cable modem is a serious competitor for the retail broadband market, Qwest petitions the FCC for forbearance from three types of regulatory requirements.

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First, Qwest asks the FCC to remove the requirements of dominant carrier tariff requirements as to Qwest's provision of DSL. Specifically, Qwest asks to be relieved of: 1) cost study price support for tariff changes required under 47 U.S.C. § 61.38; 2) tariff notice requirements found in 47 U.S.C. § 204(a)(3) and 47 C.F.R. § 61.58; 3) required delays between rate changes in 47 C.F.R. § 61.59; and 4) the requirement to obtain FCC permission to offer contract tariffs.

Second, Qwest asks the FCC to forbear from applying the requirement to rate average its provision of DSL within a study area. 47 C.F.R. § 69.3 (c) (7).

Third, Qwest asks that the FCC lift Qwest's obligation to resell its DSL to wholesale customer/competitors at an avoided cost discount, pursuant to 47 U.S.C. §§ 251(c)(4) and 252(d)(3).

Elimination of Qwest's tariff requirements and rate averaging obligation is unnecessary and problematic for competitors. As an example, Qwest has shown no reason that CLECs should be subject to wholesale price changes without limit or notice, or why CLECs would not be unfairly disadvantaged by them. As detrimental as these changes would be, the elimination of the DSL resale wholesale discount would have by far the greatest impact on competition. Eschelon's comments will therefore focus for the most part on the harm that would befall broadband competition from the elimination of Qwest's wholesale discount.

A. Eschelon's Provision of DSL.

Eschelon offers DSL to small to medium business end user customers in six states in which Qwest as the incumbent LEC has an obligation to provide its DSL service as a wholesale offering. Those states are Arizona, Colorado, Minnesota, Oregon, Utah, a

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and Washington. As Qwest noted in its petition, small business customers are considered under mass-market analysis by the FCC because these customers buy products, including DSL, of a type that is normally associated with residential and small business end users.[1]

The vast majority of Eschelon's DSL service is obtained through Qwest's resale of a DSL-qualified loop. *****BEGIN TRADE SECRET

END TRADE SECRET*****[2]

Eschelon offers DSL through Qwest resale chiefly because it has been unable to successfully self-provision DSL at a competitive speed due to fundamental problems with Qwest's loop quality and record keeping, and because of the prohibitive cost to Eschelon.[3]

The resale avoided cost discount currently offered Eschelon and other CLECs by Qwest pursuant to the requirement of 47 U.S.C. 251(c)(4) varies between 12.2% and 18% in the six states in which Eschelon provisions DSL.

As Attachment A to these comments demonstrates, purchasing the DSL-capable loop from Qwest at a wholesale discount is essential for Eschelon's continued offering of a viable DSL service. Considering Qwest's wholesale charges to Eschelon, together with Eschelon's other monthly costs for providing resale ADSL to its end user customers,

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[1] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c), at 3, n 12 (November 10, 2004) (Qwest Petition), citing FCC, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DECEMBER 31, 2004, AT 4, N 11 (June, 2004).
[2] *See,* Attachment A, Declaration of Anne Garlock.
[3] *See,* detailed background on the roadblocks Qwest presented when Eschelon attempted to self-provision ADSL and facts regarding costs of self-provisioning, Attachment B, Declaration of Steven Kolar. *See, also,* Attachment A, Declaration of Anne Garlock.

Eschelon could not feasibly compete with Qwest's retail product without the continued application of the wholesale discount.[4]

II. THE FACTS BELIE QWEST'S ARGUMENTS REGARDING THE COMPETITIVE THREAT OF CABLE MODEM BROADBAND.

Qwest argues that regulatory forbearance is necessary for its DSL service because the competition from cable modem broadband service would otherwise be insurmountable. According to Qwest, the broadband market share held by cable is due to the fact that the FCC maintains what Qwest terms a "hands off" policy toward cable, while retaining some regulatory requirements for ILECs.[5] If its regulatory bonds were loosed, Qwest argues, it could compete more effectively, lower prices, and accelerate DSL infrastructure investment.

Qwest's "cause and effect" argument is deceiving for a number of reasons. First and foremost, Qwest exaggerates the competition from cable modem broadband, and the effect of that competition on Qwest's DSL sales. Qwest furthermore offers no evidence to link the existence of DSL regulatory requirements with the market share that cable does hold. Contrary to Qwest's implications, cable is surviving in the market while under its own municipal regulation. The relative market positions for DSL and cable could be, and, as discussed more fully below, probably are, due to many other factors such as technology and customer location. Also, while Qwest argues that decreased regulation would incent it to lower DSL prices and accelerate DSL deployment, it fails to acknowledge that it is currently free to attempt to increase its market share through pricing, service quality, and investment. Last, and very significantly, Qwest's argument

[4] *See*, Attachment A, Declaration of Anne Garlock.
[5] Qwest Petition at 5.

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that the wholesale discount obligation costs it market share and revenue is fundamentally unsound.

Contrary to Qwest's advocacy, DSL holds a very healthy share of the broadband market, and that share is growing. The FCC recently reported a steady growth of DSL lines at the expense of cable share. From December, 1999, through June, 2004, ADSL grew from 16.3% share of the small business and residential high speed broadband market to 35.8%. In the same time frame, cable's share of this market sank from 78.2% to 61.6%.[6] During the first half of 2004, overall subscribership in high-speed ADSL services increased by 21%, while the number of cable high-speed connections grew by 13%. During the previous six months, ADSL connections grew by 39% while cable connections grew by 20%.[7]

Qwest's provision of DSL service has been part of this increase in broadband market share. Qwest reported in its third quarter 2004 earnings statement that the company "continued its strong DSL growth, adding 102,000 lines, up 12 percent sequentially, to a total of 956,000 subscribers. Over the past four quarters, Qwest has added more than 375,000 DSL lines."[8] Qwest's "strong DSL growth" and DSL's overall ability to take market share away from cable are both facts that run counter to Qwest's argument that regulation is blocking DSL's ability to compete.

[6] FCC, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF JUNE 30, 2004, at 8, Chart 6 (December, 2004), *available at* www.fcc.gov/wcb/stats.
[7] *Id.* at 8, Table 3.
[8] QWEST, THIRD QUARTER 2004 EARNINGS REPORT at 3 (November 4, 2004), *available at* http://media.corporate-ir.net/media_files/nys/Q/reports/Q304.pdf.

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Qwest's portrait of the competition from cable is particularly exaggerated regarding Eschelon's customer base—small to medium businesses. Technological differences between the two major modes of broadband service tend to separate the country into logical DSL or cable markets. Most U.S. small businesses today are in the DSL camp, for a number of reasons. Cable rollout is highly constrained in congested downtown areas and other areas of concentrated development, where the majority of small businesses are located. In addition, cable's historical origins in providing video services to residential customers meant that the cable networks targeted residential areas and did not extend service into business areas. The FCC has noted that most cable systems are deployed in primarily residential areas.[9] Recent industry estimates of potential small and medium business broadband customers show 30% to 50% of this market segment located a viable 50 to 100 feet from cable modem coaxial wires.[10] In contrast, wireline telephony networks have historically been ubiquitous, serving both business and residential customers.[11]

Eschelon's own experience demonstrates that cable is very seldom considered a viable telephone service option for its small and medium business customers. In 2004, fewer than 5% of the voice line losses incurred by Eschelon within its facilities-based footprint were due to cable company competition.[12]

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[9] Inquiry Concerning the Deployment of Advanced Telecommunications Capability, CC Docket 98-146, Third Report, FCC No. 02-33, 17 FCC Rcd 2844, at 2864, Par. 45 (2002).

[10] SONIA ARRISON, PACIFIC RESEARCH INSTITUTE, BEING SERVED: BROADBAND COMPETITION IN THE SMALL AND MEDIUM SIZED BUSINESS MARKET, *available at* http://www.pacificresearch.org/pub/sab/techno/SME%20paper.pdf, at 4.

[11] TRO at Par. 239 ("Incumbent LECs achieved low average costs because historically they have served 100 percent of demand in any given area.")

[12] *See*, Attachment C, Declaration of Kirstin Johnson.

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Business owners who have both DSL and cable modem broadband available still often pick DSL because businesses cannot tolerate a significant variance in bandwidth capability. In contrast to DSL, which offers a high degree of reliability through dedicated lines, cable modem involves locally shared bandwidth. The result of the network sharing is that a customer's realized performance at a particular time will depend on how many other customers in the surrounding area are using the service.[13] While residential customers may find this characteristic bothersome but tolerable, businesses may find unreliable connections fatal to their existence.

All of these reasons have led to the dominance of DSL in the small business broadband market. Cable modem in fact held just four percent of the broadband market for small and medium businesses in 2003.[14]

Cable modem is not only significantly less dominant in the broadband market than Qwest portrays, but it is also less free from regulation. In arguing that the FCC's "hands off" regulation of cable has led to cable's competitive advantage, Qwest fails to mention that cable companies are regulated by the municipalities in which they offer service. Cable companies must conform to local regulations and secure franchises from their local municipalities. Those franchises are not granted permanently but must be periodically renewed. Cable companies seeking franchise renewals must support certain specific factual requirements; the resulting municipal renewal decisions are subject to

[13] *See, e.g.*, About.Com, *"DSL Crib Sheet," available at* http://compnetworking.about.com/od/dsldigitalsubscriberline/l/aa063000a.htm;

[14] SONIA ARRISON, PACIFIC RESEARCH INSTITUTE, BEING SERVED: BROADBAND COMPETITION IN THE SMALL AND MEDIUM SIZED BUSINESS MARKET at 6.

judicial review.[15] Cable companies are required to pay municipal franchise fees as long as they serve.[16] Cable companies furthermore are required by the terms of their franchises to dedicate significant capacity to public education and government access.[17] Telephone companies offering DSL do not face such municipal regulation or fees.

Qwest does not offer any evidence that it is currently unable to lower its DSL price, offer a higher level of service quality, or develop or deploy new technologies to capture more broadband market share. Qwest apparently prefers calling up the specter of cable competition in an attempt to increase its market share at CLECs' expense to making the hard choices on price and investment that could enable it to compete more successfully with cable. Qwest has also demonstrably failed to make the necessary investment to reach further customers within its territory. Qwest itself reports that its DSL footprint covers only 63 percent of its operating territory.[18] Qwest has thus failed to make the infrastructure investment necessary for broadband competition in over one-third of its established territory. This fact further demonstrates that Qwest's real focus in its forbearance petition is not on eliminating regulatory barriers to competition from cable but rather on building an economic edge over its CLEC competitors in areas where Qwest has chosen to compete for broadband market share. Without evidence showing an inability to compete with cable through superior pricing, service, innovation, or

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[15] *See, e.g.*, John M. Myers and Daniel P. Schuering, "*Cable Television Franchise Renewals: A Primer,*" Illinois Municipal Review (January 1991), *available at* http://www.lib.niu.edu, Illinois Periodicals Online Project.

[16] *See, e.g.*, MIKE BULL, HOUSE RESEARCH SHORT SUBJECTS, CABLE REGULATION (October 2002), *available at* http://www.house.leg.state.mn.us/hrd/issinfo/sscabreg.pdf.

[17] *See, e.g.* "*Government Cable Channels FAQ,*" http://www.ci.minneapolis.mn.us/cable/govt-channel-faq.asp#TopOfPage.

[18] QWEST, THIRD QUARTER 2004 EARNINGS REPORT at 4.

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investment, Qwest's attempt to link the FCC's DSL regulation with cable's broadband market share fails to hold.

Last but no less significantly, even if all of Qwest's allegations regarding the threat of competition from cable were true, Qwest's argument that it must escape the wholesale discount in order to allow it to recover revenue from DSL is fundamentally faulty. The fact is that Qwest, like all ILECs, recovers by law *all* of its costs that it does not avoid when it resells service to wholesale customer/competitors. Section 252 (d)(3) of 47 U.S.C. requires state commissions to set wholesale rates that provide incumbents the retail rates they charge, which include a profit margin, less the portion of those rates attributable to any marketing, billing, collection, and other costs avoided when they sell the service at wholesale. Incumbents thus continue to recover their costs plus a reasonable rate of return through wholesale rates when they provision services to wholesale customers.

The FCC has noted that the ILECs' costs of mass market loop infrastructure deployment, such as securing rights-of-way, digging trenches or placing poles, and running wire, are largely fixed. The FCC further explained that "[b]y fixed we mean that these costs are largely insensitive to the number of customers being served. Much of the cost applies whether a carrier serves a single residential customer or ten thousand residential customers..."[19] If the ILECs' fixed costs of mass market loop deployment can be spread among a greater number of customers, then, it follows that economies of scale will come into play.

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[19] FCC Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC No. 01-338, 96-98, 98-147, Released August 21, 2003 (TRO), at Par. 237.

Since the incumbent recovers through the wholesale rate its unavoided costs of provisioning the mass market loop, including profit, and the costs of loop deployment are fixed and may be reduced by being spread over more partakers, the ILEC is clearly benefited by selling mass market loops to wholesale customers. The ILEC's wholesale customers procuring the loops at an avoided cost rate take on the marketing, billing, collection, and other costs to sell the loops to their own end user customers, and in the process provide incremental revenue to the ILEC with each loop ordered and resold. The effect of the application of the wholesale rate allowing wholesale customers/competitors to obtain loops at a viable rate and to market and resell them to their own customers—is the very opposite of the harm Qwest portrays in its petition.

These factors should be kept in mind as the FCC considers Qwest's plea for regulatory forbearance to offset what it characterizes as intolerable competition from cable modem broadband. For the small business market such as that served by Eschelon in particular, the broadband competition is much more likely between competitive DSL providers than between cable and DSL. The regulatory factors that Congress set in the 1996 Act to ensure an open wholesale telecommunications network, including the wholesale discount, remain essential to fair competition for the small business DSL market.

III. QWEST FAILS TO FULFILL THE STATUTORY FACTORS FOR FORBEARANCE FROM DSL REGULATORY REQUIREMENTS.

47 U.S.C § 160 provides the factors the FCC must weigh when presented with a petition for forbearance from regulation. The FCC must forbear from applying the particular telecommunications regulation if the FCC determines that:

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(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.

Section 160(b) states further that, in deciding whether forbearance will be consistent with the public interest, the FCC must determine the extent to which such forbearance will promote competition among providers of telecommunications services.

Qwest fails to fulfill any of the three statutory factors for a grant of forbearance.

A. Continued Title II Regulation of Qwest's Provision of DSL Service Is Necessary to Ensure That Qwest's Charges and Practices Are Not Unjust or Unreasonably Discriminatory.

Continued application of Qwest's obligation to provide competitors an avoided cost discount is essential to Eschelon's obtaining just and reasonable rates for resale DSL. Absent the wholesale discount obligation, Qwest's 100 years of accumulated legacy infrastructure—paid for long since by its ratepayers—plus the economies of scope and scale Qwest is able to apply to DSL investment, would result in unjust and unreasonable rates for CLECs purchasing resold DSL.

The FCC recognizes that ILECs' legacy infrastructure and economies of scope and scale provide ILECs tremendous competitive advantage over CLECs. Addressing

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UNEs in the Triennial Review Order, the FCC noted the following in its discussion of loop impairment:

> Par. 237. The costs of local loops serving the mass market are largely fixed and sunk. *** If a new entrant overbuilds to serve a mass market customer and loses that customer to another carrier, the new entrant cannot economically redeploy that loop to another location. Its investment might be lost unless it could find a purchaser for its redundant loops. This is true regardless of whether the new entrant was providing narrowband or broadband service, or both.
>
> ***
>
> As new entrants, competitive LECs do not enjoy a large guaranteed subscriber base that would provide a predictable source of funding to offset their local loop deployment costs. For these reasons, we find that the costs of self-provisioning mass market loop facilities are demonstrably greater than those faced universally by new entrants in other industries.
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> Par. 238. Incumbent LECs also enjoy first-mover advantages that work with the steep costs noted above to compound the entry barriers associated with local loop deployment. When the incumbent LECs installed most of their loop plant, they had exclusive franchises, and, as such, the record shows that they secured rights-of-way at preferential terms and at minimal costs. By contrast, our record shows that new entrants have no such advantage. Even if a competitive LEC obtains speedy resolution of rights-of-way issues, it may still experience delays involved with constructing new loop plant. Incumbent LECs, of course, experience no such delays when providing narrowband or broadband services over their legacy copper loops. Because these loops are already deployed, they are available immediately for providing narrowband services (i.e. voice, fax, dial-up Internet access) and available after performing any necessary line conditioning for providing broadband service. Furthermore, competitive LECs are also faced with the problem of overcoming the incumbent LECs' established brand name recognition for providing reliable service in order to convince (potentially reluctant) mass market customers to change carriers.
>
> Par. 239. According to several commenters, due to the high fixed costs described above, the incumbents LECs designed their networks to minimize the extent to which they must modify their loop plant when adding new customers or services. Accordingly, when incumbent LECs construct loops, they typically add several spare wire pairs to the customer's location because the cost of these spare wires is small in comparison to the cost of adding these pairs at a later date. This design lowers the incumbent LECs' cost of adding customers. Incumbent LECs achieved low average costs because historically they have served 100 percent of demand in any given area. Their investments were recovered, in most cases, through regulated rates and an authorized rate of

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> return. For a new entrant to match or even come close to the incumbent LECs' economies of scale, at a minimum, it would have to capture quickly a significant percentage of the market.

TRO at Pars. 237-239. (Internal cites omitted.)

Based upon its TRO analysis, the FCC determined that it would not lift ILECs' obligation to unbundle mass market loops as UNEs to ensure open wholesale networks; this finding was upheld by the D.C. Circuit. Qwest offers no evidence or reasoning to show that the wholesale discount, the means the 1996 Act provided to foster resale as an equally legitimate method of opening incumbents' networks to wholesale competition, is no longer valid or necessary. Neither can Qwest point to anything in statute or rule to indicate that the wholesale discount was meant to be temporary or that, as Qwest avers, the wholesale discount has outlived its usefulness for DSL.[20] As a matter of fact, as of June 30, 2004, the ILEC share of the DSL market ranged from 95% of facilities-based ADSL high-speed lines to 63% of high-speed lines delivered over other traditional wireline facilities.[21] And, as previously discussed, for most business customers, as well as many residential broadband customers, DSL is the only viable broadband alternative. Clearly, the resale discount, like the unbundling of network elements, remains as important today for broadband choice, price, and innovation as it did in 1996. As Qwest itself states, "precluding entry by [firms that could provide broadband services as efficiently as, or more efficiently than, Qwest] harms consumers."[22]

The importance of a fair and reasonable resale rate to DSL competition was recently underscored by the FCC's decision to do away with unbundled access to mass

[20] Qwest Petition at 24.
[21] FCC, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF JUNE 30, 2004, at 3.
[22] Qwest Petition at 22.

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market local circuit switching (UNE-P) at the end of a 12-month transition period.[23] The FCC's elimination of UNE-P removes an avenue that CLECs have pursued with some success in a number of product markets, including DSL. Without the option of UNE-P provisioning, CLECs will be more dependent than ever on the few remaining competitive options, including resale. If the FCC now forbears from requiring Qwest to apply the wholesale discount to resale DSL, the resale alternative, for the reasons demonstrated above, will no longer be viable for competitive DSL offerings. Many small business customers will be deprived of the benefits of healthy competition among DSL providers; many who lack a cable alternative will be forced to accept whatever price and terms are offered by Qwest.

Qwest argues that the level of broadband competition from cable, wireless and satellite providers will prevent Qwest's charging unjust or unreasonable DSL rates because end users so charged would turn to other providers.[24] As has been shown, a large percentage of small and medium sized customers lack the option of turning to cable for their DSL business needs. Furthermore, this argument focuses on a potential effect of a rate increase on Qwest's *retail* end user customers and ignores the effect of the loss of the wholesale discount for Qwest's *wholesale* customers, who cannot easily switch to a competitive provider of resold DSL. Even if the CLEC is able to obtain resold DSL from a data competitive local exchange carrier (DLEC), the DLEC is almost certainly obtaining the underlying product from the wholesale monopolist, Qwest, and must mark

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[23] FCC NEWS RELEASE: ACTION BY THE COMMISSION, BY ORDER ON REMAND, FCC 04-290, at 2. (December 15, 2004).

[24] Qwest Petition at 16.

up the product to a higher price in order to resell to the CLEC. As the FCC has asserted, "[t]he record indicates that no third parties are effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market."[25]

Qwest states that it must be freed from dominant carrier requirements because its retail customers will otherwise choose competitive broadband providers based on price.[26] Qwest's argument underscores the need for the continued application of the wholesale discount for Qwest's captive wholesale DSL resale customers. Eschelon will without doubt suffer serious customer loss if it must raise its DSL rates by 14 to 18% as a result of an increase in wholesale rates of 12.2% to 18%.

Qwest complains that its cable modem competitors target their rates to areas in which they face DSL competition. Drawing on this fact, Qwest argues that its rate averaging requirements may be lifted without adverse effect because retail customers who currently choose cable must find the cable provider's rates just and reasonable.[27] Qwest once again ignores the effect that wholesale deaveraged rates would have on Qwest's *wholesale* customer/competitors. If rates were deaveraged, one can logically surmise that Qwest would target specific rates for areas in which it has experienced DSL competition. With lower DSL retail rates in those areas, Qwest would provide its CLEC customers/competitors, in effect, a "lower" discount because the percentage wholesale discount would be applied to the lower retail rate. The CLECs, who have their own fixed

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[25] TRO at Par. 233.
[26] Qwest Petition at 16.
[27] Qwest Petition at 20.

costs for provisioning to their end user customers, would experience a price squeeze that could drive them out of the market. Qwest, who would presumably raise prices in other areas to make up for the geographically reduced retail rates, could buffer itself against an adverse effect from the lower retail rate in the competitive area.

For all of these reasons, elimination of the wholesale discount and other regulatory requirements for Qwest's resale of DSL would raise significant barriers to competition for Qwest's DSL customer/competitors.

B. Continued Enforcement of the Regulations in Question Is Necessary for the Protection of Consumers.

Continued enforcement of FCC regulations currently in place will bring the most competitive choice in broadband capability to consumers. Access to Qwest's resale DSL service at a fair rate will provide Qwest's CLEC customers an opportunity to compete for potential DSL customers. Those end user customers will best be served by multiple DSL providers who are stimulated through competition to offer quality service, competitive pricing, and innovative technologies. The FCC recognizes the benefits to consumers from competition. As the FCC states at its "Broadband" on-line home page, the FCC will continue to "[d]utifully enforce market-opening requirements" and will "[e]ncourage and facilitate an environment that stimulates investment and innovation in broadband technology and service."[28]

Qwest argues that the existence of competition from cable modem will perforce keep Qwest's DSL rates reasonable because end users would otherwise respond by

[28] "*FCC Broadband homepage,*" *available at* http://www.fcc.gov/broadband/.

moving to a competitive offering. If Qwest can eliminate its CLEC competitors, however, Qwest can completely eliminate consumer competitive choice in an important segment of its markets. Even in those areas where end users have the ability to choose cable modem, the elimination of viable CLEC competition is clearly a blow to consumer choice.

Reduction of competition for the distribution of data by DSL will inevitably lead to reduction of competition for voice as well. The FCC has acknowledged that bundling of data and voice is the wave of the telecommunications future. At its broadband web site, the FCC describes the inevitable rise of "bundling," the packaging of voice and data: "Broadband technologies, which encompass all evolving high-speed digital technologies that provide consumers integrated access to voice, high-speed data, video-on-demand, and interactive delivery services, are a fundamental component of the communications revolution."[29]

In its Third Quarter 2004 Earnings Report, Qwest notes the importance of bundling to its business plan. The Company states that it has seen significant improvement in market penetration of bundled service, described as voice linked with wireless, DSL, or long distance service. Qwest further states that such penetration increased in the last year from 21 percent of its customers to 43 percent, and notes the attendant increase in revenue per access line.[30]

CLECs such as Eschelon must bundle their own products in order to hold their own against the incumbent's bundled telecommunications packages. Eschelon in fact

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[29] *Id.*
[30] QWEST THIRD QUARTER 2004 EARNINGS REPORT at 5.

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******TRADE SECRET BEGINS

TRADE SECRET ENDS******[31] If Qwest is able to block Eschelon from competing successfully in the DSL market, therefore, Qwest simultaneously delivers a blow to Eschelon's voice market share. If the FCC lifts the wholesale discount and other regulatory requirements for Qwest's provision of resale DSL, the result will be a reduction in consumer competitive choice not just for data services but for voice services as well. Consumers will as a result have less choice, less market pressure for lower price, and less access to innovative technology for both DSL and voice services.

B. Forbearance from Applying These Regulations is Inconsistent with The Public Interest.

In the 1996 Act, Congress made a finding that the universal provision of advanced services was in the public interest. Congress specifically decreed that DSL and other broadband services should be deployed "on a reasonable and timely basis …to all Americans."[32] Congress simultaneously put into place the regulatory requirements necessary to expand all telecommunications competition by opening Qwest's wholesale network to would-be competitors. Now Qwest has attempted to turn the public interest on its head by urging the elimination of the regulatory framework allowing viable telecommunications broadband competition. Qwest has done so by exploiting the mere existence of cable broadband competition, without demonstrating any factual connection between cable market share and the wholesale discount or other ILEC regulatory requirements, and without showing that cable places Qwest in competitive jeopardy. As

[31] *See,* Attachment A, Declaration of Anne Garlock.

[32] Pub. L. 104-104, title VII, § 706, February 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

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articulated in these comments, removing the wholesale discount and other regulatory requirements for Qwest will result in the reduction of consumer competitive choice for the fastest growing broadband technology—DSL. Because of the growing consumer interest in bundled telecommunications service offerings, reduction in consumer choice for data services will likely lead to a reduction in voice service options as well. The FCC should deny Qwest's petition for forbearance because it is inconsistent with the public interest as specifically defined by Congress.

CONCLUSION

Qwest has offered rhetoric, not facts, to support its petition for forbearance from regulatory requirements for the provision of DSL. Qwest must do much more than simply cite to the presence of cable competition in the broadband market to justify abandonment of the Act's dominant carrier requirements and market-opening strategy to support resale. Qwest's petition fails to meet any of the statutory factors to merit regulatory forbearance. The FCC should reject Qwest's petition in its entirety.

ESCHELON TELECOM, INC.

January 5, 2005. By: Ginny Zeller

Ginny A. Zeller
Senior Attorney
Eschelon Telecom, Inc.
730 Second Avenue South, Suite 900
Minneapolis, MN 55402-2456
(612) 436-1838 (direct)
(612-436-1988 (fax)
gazeller@eschelon.com