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

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

# COMMENTS OF
# <u>WASHINGTON BUREAU FOR ISP ADVOCACY</u>

The Washington Bureau for ISP Advocacy ("WBIA"), by its attorneys, hereby submits its Comments on the November 10, 2004, Petition for Forbearance filed by Qwest Corporation ("Petition").[1]

## <u>STATEMENT OF INTEREST</u>

WBIA is a national, non-profit grassroots coalition of Internet Services Providers ("ISPs"), competitive local exchange carriers ("CLECs"), technology innovators, suppliers, aggregators and consumers who recognize the need for consumer choice, sustaining competition and retaining the first tier of independent ISP connectivity to the Internet.[2]

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[1] *Petition of Qwest Corporation For Forbearance Pursuant to 47 U.S.C. §160(c) Pertaining to Qwest's xDSL Services*, WC Docket No. 04-416 (Nov. 10, 2004).
[2] WBIA was founded by Cynthia H. de Lorenzi, Chief Executive Officer of PatriotNet, Inc. and Frank Muto, President of FSM Marketing. PatriotNet and the following independent ISPs and representatives of the independent ISP industry support WBIA and formally endorse these Comments: The North Texas Technology Council ("NTTC"), a non-profit, member-based organization that develops programs and services to add value to the north

WBIA is dedicated to ensuring open and frank dialogue that reflects all interests of our nation's Internet infrastructure, from consumer to supplier.[3] WBIA and its supporters believe that all of the facts and consequences must be considered before de-constructing an industry that has contributed to the growth of small business and entrepreneurship and the unparalleled success of our nation's growth as a recognized global technology leader.

The WBIA has no financial interest in the outcome of these proceedings. The Comments presented are based on a consensus of the best interests of the Internet industry, its members, suppliers, and the broad and diverse range of communities served by independent ISPs. WBIA is participating in the above-captioned Docket because it views Qwest's Petition for Forbearance ("Petition") as a direct and immediate threat to the survivability of independent ISPs. WBIA believes that granting the relief sought by Qwest would be the first step towards tearing down the independent ISP industry, the very industry which gave rise to the Internet, stimulated its widespread deployment, and on whose back this nation's information economy is now solidly based.

WBIA believes that telecom policies do not operate in a vacuum and impact not only the independent ISP, but consumers, technology innovators, suppliers and legislators. The failure to

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Texas technology community; PatriotNet, Inc. (Patriot Computer Group, Inc.), a woman-owned, privately-held, multi-faceted communications and technology company providing commercial Internet access, hosting services, information technology support and consulting services; ConnectNC, Inc./Internet of the Sandhills, a woman-owned Internet solutions provider; and the following small, independent information solution providers: Branded Access Solutions, Fitch Affordable Telecom and The-I.Net Solutions Group, Northeast Texas Online, Inc., Kinex Networking Solutions, Inc., Northeast Texas Online, Inc., Kinex Networking Solutions, Inc., Elirion, Inc., Evangel.Net, Inc., Leadfoot.com, Inc., MuslimAccess, Skowhegan OnLine, Inc., U.S. Digital Television Inc. (USDTV), Alpha Communications Integration Company, DelmarvaOnline, Atlantech OnLine, Eagle Telecommunications, Inc. and Your-Computer-Guy.com.

[3] WBIA is officially hosting the online headquarters for the Virtual Gigabyte March on Washington, D.C. – www.gigabytemarch.org. This grassroots movement serves to build a groundswell of business and consumer voices expressing their views and demanding that the Commission first consider the consequences to all by its systematic dismantling of the Telecommunications Act of 1996 and eradicating the first tier of our nation's Internet infrastructure.

address the needs of these key participants will derail our nation's economic recovery and affect our ranking among the world's global economic powers.

## COMMENTS

Qwest asks the Commission to forbear from applying dominant carrier tariff regulations, rate averaging, and the requirement to resell at an avoided cost discount[4] based on an entirely fallacious and misleading premise. On its face, Qwest's forbearance request is seemingly limited to its mass market xDSL services, which Qwest defines as "service of a type that is normally associated with residential and small business end users." Qwest also takes strides to put independent ISPs at ease with its forbearance request by implying that their ability to obtain the transmission facilities needed to serve their customers will not be affected in the slightest.[5] But make no mistake, granting Qwest's Petition will harm the ability of independent ISPs to compete for broadband customers and is the first step down a slippery slope that will ultimately have a devastating impact on independent ISPs, the public interest and the future of the Internet and development of information technologies.

## I. QWEST'S PETITION IS BASED ON A FALSE PREMISE

At the outset, WBIA wishes to clarify for the record why the entire premise behind Qwest's requested relief is misleading and wrong. Qwest would like the Commission to believe that cable modem service is "the most popular service by which consumers obtain high-speed access to the Internet" as a result of the Commission's "hands off" policy towards cable modem

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[4] The specific tariffing rules and regulations Qwest seeks relief from are found at 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. *See* Qwest Petition at 13. The rate averaging requirement is found at 47 C.F.R. §69.3(e)(7). *See* Qwest Petition at 20. Qwest's duty to offer xDSL at an avoided cost discount under Sections 251(c) and 271 of the Act. *See* Qwest Petition at 23.

[5] *See* Qwest Petition at 3, note 13 ("DSL Host service is not a subject of this petition"); *see also* Qwest Petition at 3-4 ("an end user without Qwest telephone service can buy "naked DSL"); see also Qwest Petition at 4 ("In addition, Qwest sells "bulk" DSL service to ISPs such as Earthlink and AOL pursuant to tariff).

service. And, as a result of cable modem service's popularity, forbearance is necessary for Qwest to compete. WBIA takes umbrage with Qwest's premise, which completely disregards reality. Cable modem service is not more popular "as a result" of the Commission's "hands off" policy; cable modem service is more popular because DSL suffers from an inherent handicap: only a fraction of homes are "loop qualified" for Central Office-based DSL, while 100% of homes passed by suitably-equipped cable plant can obtain cable modem service. Qwest and other ILECs, however, are catching up as more and more deploy "next generation digital loop carrier" ("NGDLC") DSL into their outside plant, thus increasing the percentage of loop-qualified homes. Qwest's description of causality is misleading and incorrect. It, along with the rest of Qwest's Petition, should be disregarded and denied by the Commission.

## II. QWEST'S REQUEST IS THE FIRST STEP DOWN A SLIPPERY SLOPE

Qwest comes before the Commission seeking what it describes as expedited regulatory relief in "narrow" pricing areas. However, Qwest's true intentions cannot be disguised, for they mirror the intentions of her sister RBOCs; Qwest even says so, "Qwest supports and joins in BellSouth's recently-filed forbearance petition." Reading between the lines, it is clear that Qwest can and will use any narrow relief granted by the Commission to realize the same broad, long term anti-competitive goals overtly sought by her sister RBOCs. Why else would Qwest request relief from contract tariff prohibitions if its only goal is to better serve "mass market" consumers?

Contract tariffing has never been used to serve this market set because contract tariffing is not necessary; indeed, individually negotiating contract tariffs with mass market consumers is likely to increase Qwest's cost of doing business. The only conceivable reason Qwest would request such relief is because, once granted, Qwest will be authorized to negotiate private carriage agreements with ALL customers – including unaffiliated ISPs and its affiliates, to whom it will undoubtedly offer more favorable terms. Qwest will then have no incentive to maintain the current wholesale DSL offerings it claims are unaffected by its Petition, or at least to maintain them at levels that would be attractive to an unaffiliated ISP.

Qwest argues that forbearance will benefit the public in that without the tariffing and avoided cost resale requirements it will be able to tailor its services, enter into private contractual agreements, and take other actions in order to meet competitive pressures imposed by cable companies. But regulatory forbearance has not been adequately justified, nor is it the only means by which Qwest can compete with cable for broadband customers. Perhaps Qwest should develop a superior technology or use the pricing flexibility and promotional incentives that are readily available under existing regulations. Just because Qwest remains a dominant carrier subject to regulatory oversight does not mean it cannot compete. Even if existing regulations do place speed bumps in Qwest's roadway, Qwest has not shown that the public interest would be served by their removal. Regulatory forbearance should be used as a last resort and, even then, only if the case for forbearance is supported by irrefutable facts and evidence. Qwest has not done so here, nor can it.

## III. ROBUST COMPETITION DOES NOT EXIST; FORBEARANCE WILL EMPOWER QWEST TO PRICE INDEPENDENT ISPs OUT OF THE MARKET.

Qwest's Petition relies on the proposition that the marketplace for retail broadband is "robust," thus making dominant carrier tariff regulations, rate averaging, and the requirement to resell at an avoided cost discount unnecessary to discipline its retail pricing. What Qwest conveniently ignores is the wholesale broadband access market and the effect retail pricing flexibility will have on independent ISPs who rely on Qwest because of its position as the super-dominant supplier of wholesale DSL in its region. Before the Commission grants any of Qwest's requested relief, it must take into consideration and develop a factual record regarding the impact on the wholesale DSL market.

Granting Qwest's Petition is premature because, if there even is a competitive wholesale broadband access market in Qwest's region, it is nascent, narrow, technologically inferior, and not available to most small, independent ISPs. Whatever competition does exist is insufficient to discipline Qwest from engaging in anticompetitive pricing and marketplace tactics for the foreseeable future.

### A. Wireless Options Are Limited

A few ISPs have succeeded in going wireless. To date, however, wireless ISP access impacts only a very small market share. There are many reasons for this. Licensed spectrum is very costly in most areas, if available at all. In addition, there is little evidence of licensed spectrum owners offering ISPs a wholesale access service that is the technological equivalent and therefore substitute for ILEC DSL. Instead, they are more likely to provide a retail ISP service over their own spectrum in order to compete with less-well-capitalized ISPs who cannot afford the spectrum. If there is a market for wireless broadband, it has not been proven to be sufficiently competitive to justify and support widespread wholesale access.

Unlicensed spectrum is limited both in availability and power. Because of the low power limit, range is necessarily limited. The best results are found in rural areas that are flat (to avoid being blocked by hills), dry (to avoid rain and fog attenuation) and treeless (to avoid signal absorption. Thus, wireless ISPs are most heavily concentrated in the area between the Rocky Mountains and the Mississippi River, from Texas to Kansas. A few opportunistically operate in coastal regions and in flat areas such as Florida. But most ISPs lack the combination of clear paths and subscriber density needed to make unlicensed wireless access profitable.

In urban areas, interference is also a problem. The unlicensed bands are occupied by cordless phones, microwave ovens, video extenders, home wireless local area networks, public access points, Bluetooth devices, and other sources of interference. The Commission should certainly continue to support wireless operation, and pending dockets may be of some assistance, but wireless access can never fully substitute for wireline access. It certainly cannot be used to support Qwest's forbearance request.

### B. The CLEC "Alternative" is Not Sufficiently Available and is Likely to Become Less So in the Future

Qwest implies that independent ISPs have and will continue to have alternative avenues of accessing their customers, both through Qwest's DSL Host service and other CLECs. Again, Qwest not only ignores the effect its requested retail pricing flexibility will have on ISPs that rely on Qwest for wholesale DSL, it also distorts the CLEC alternative.

CLEC access to loop plant has been hobbled. Their ability to access digital loop carrier ("DLC") enclosures is restricted in most instances and even where access is available, CLECs lack the economies of scale to make access viable. Recent Commission rulings on Fiber-to-the-Home ("FTTH") and Fiber-to-the-Curb ("FTTC") have further diminished, if not entirely cut off, CLEC access to loops. Most importantly, the lack of UNE line sharing makes CLEC DLC very questionable. And, even though Qwest still offers commercial line sharing today to large CLECs, like Covad, there is no guarantee and no proof that just and reasonable line sharing will be made available to smaller CLECs who lack bargaining power.

## III. INDEPENDENT ISPS ARE SMALL BUSINESSES - THE IMPACT OF FORBEARANCE AND THE REGULATORY FLEXIBILITY ACT

It must be stressed that it is small business that drives innovation in the American economy, not large monolithic businesses that wish to dominate the marketplace so as to be able to profit from a "one-size fits all" approach to service. The Internet was brought to the public by small, independent and entrepreneurial ISPs. The telephone companies not only did not support it; they fought it. Only after the Internet was firmly ensconced in American life did the large ILECs, including Qwest,[6] begin to see the Internet and the information society as a business opportunity. The Commission must protect independent ISPs, which are small businesses. It must protect the innovation they stimulate. Indeed, this is Congress' mandate in the Regulatory Flexibility Act ("RFA"). 5 U.S.C. § 601.

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[6] Lest we forget, Qwest is still largely US WEST.

## IV. CONCLUSION

In conclusion, the Washington Bureau for ISP Advocacy requests that the Commission deny Qwest's Petition for Forbearance in all its particulars. Any other choice would cause grievous harm to many ISPs around the country, especially small businesses, and would harm the public by taking away critical choice.

**RESPECTFULLY SUBMITTED**

**THE WASHINGTON BUREAU FOR ISP ADVOCACY**

By its Attorneys:

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