Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	WC Docket 04-416
Pursuant to 47 U.S.C. §160(c) Pertaining to	)	
Qwest's xDSL Services	)	

COMMENTS OF EARTHLINK, INC.
IN OPPOSITION TO THE PETITION

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INTRODUCTION

EarthLink, Inc. opposes the "Petition of Qwest Corporation for Forbearance" filed with the Commission on November 10, 2004 ("Petition").[1] In its Petition, Qwest has requested that the Commission exercise its statutory authority under section 10 of the Communications Act to forbear from applying dominant carrier tariff regulation, rate averaging requirements, and requirements that mandate resale to competitive local exchange carriers ("CLECs") at an avoided cost discount for its xDSL services. EarthLink is one of the nation's leading Internet service providers ("ISPs"), with approximately 5.4 million total customers, of which approximately 1.3 million are broadband customers. EarthLink seeks to provide Internet access to its broadband customers using every available transmission network, including DSL, cable, satellite,

[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 (filed Nov. 10, 2004).

and wireless. Because EarthLink is one of many competitors in the high-speed Internet access marketplace that does not own the transmission networks that makes delivery of information services possible, it has a fundamental interest in this proceeding.

The consumer's ability to choose from a range of competitive ISPs depends on those ISPs' ability to obtain the necessary transmission services from facilities-based wholesale providers like Qwest, and from CLECs that, on reasonable and nondiscriminatory terms and conditions, obtain underlying transmission from Qwest and other incumbent LECs ("ILECs"). Currently, Qwest and other ILECs provide this wholesale transmission under tariff and at an avoided cost discount to CLECs. The Petition fails to demonstrate that these regulations harm Qwest's ability to deploy its current service or any new service to its consumers. Instead, the forbearance that Qwest seeks in this Petition is simply an effort to allow Qwest to curtail or eliminate competition from ISPs and CLECs by giving Qwest the right to avoid tariff requirements and to demand discriminatory rates and terms for its transmission service.

In support of its Petition, Qwest relies primarily on a vague discussion of "robust competition in the mass-market broadband services" marketplace[2] to suggest that forbearance is appropriate.[3] However, the Commission has recognized that the retail services product market is distinct from the wholesale product market.[4] As EarthLink explains in greater detail below, forbearance from the regulations under consideration in this Petition would threaten the ability of ISPs and CLECs to obtain essential wholesale

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[2] *See, e.g.,* Qwest Petition 14-15.

[3] *See id.* at 12.

[4] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 1999 WL 1016337, at ¶ 8 (1999) (hereinafter *Advanced Telecommunications Capability Second R&O).*

transmission service. This fact, combined with the reality that cable providers (with certain limited exceptions) refuse to sell transmission service to unaffiliated ISPs, means the relief requested could effectively close the wholesale transport market relied upon by ISPs. This would substantially harm the retail consumer, because the driving force behind competition in the *retail Internet access* marketplace has always been *wholesale transmission availability.* Without the regulations in question, Qwest would have every incentive and ability to foreclose competition from independent ISPs, leaving retail consumers in Qwest territory with little or no choice in high-speed Internet providers. At best, such consumers could choose between high-speed DSL service offered by Qwest and high-speed cable modem service provided by a cable company, if such a choice is even available.

Qwest has not met the burden of showing that section 10 of the Communications Act permits the forbearance that it requests. The appropriate regulatory response by the Commission is to enforce dominant carrier tariffing and tariff review, and to require that Qwest continue to sell transmission service at an avoided cost discount to CLECs. Accordingly, the Petition should be denied.

DISCUSSION

I. SECTION 10 OF THE COMMUNICATIONS ACT

The Communications Act provides the Commission with regulatory flexibility by giving it the authority under section 10 to forbear from applying, in specific circumstances, any regulation or provision in the Act that is applicable to telecommunications carriers or services.[5] In its Petition, Qwest requests that the Commission use its section 10 authority to forbear from applying dominant carrier tariff regulation, rate averaging requirements, and the requirements to resell its transmission services to CLECs at an avoided cost discount. Before the Commission may exercise its forbearance authority, the petitioner bears the burden of showing that all of the requirements in the three-part test established by Congress are met:[6]

> (a) Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act 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 determines 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;
> >
> > (3) forbearance from applying such provision or regulation is consistent with the public interest.[7]

Where petitioners provide only a cursory analysis of how the three forbearance tests are satisfied, the Commission has rejected forbearance petitions for a lack of legal

[5] 47 U.S.C. § 160.

[6] *See Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, As Amended,* Memorandum Opinion and Order, 15 FCC Rcd. 7066, at ¶ 7 (1999).

[7] 47 U.S.C. § 160.

and factual support for the relief requested.[8] The Commission held in its *Fixed Wireless Forbearance Order* that "the decision to forbear from enforcing statutes or regulations is not a simple decision, and must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met."[9] It held that it could not forbear "in the absence of a record that would permit [it] to determine that each of the tests set forth in Section 10 is satisfied...."[10] The Petition does not meet this standard.

In its Petition, Qwest argues that the existence of "robust intermodal competition" in the broadband services marketplace satisfies all three prongs of the above test.[11] This suggestion is incorrect. Because the section 10 test is stated in the conjunctive, before the Commission may lawfully forbear from applying any of the Act's provisions, it must satisfy each of the three parts of that test. Although the existence of competition may be relevant to the analysis under each part, competition in and of itself is not sufficient to satisfy the requirements under section 10. The language of section 10(b) provides that the Commission must consider "competitive market conditions" in making a public interest determination under section 10(a)(3), and further provides that a finding that forbearance would enhance competition among providers of telecommunications services "*may* be the basis of a Commission finding that forbearance is in the public interest." [12]

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[8] *See e.g., Petition of Core Communications, Inc. for Forbearance under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, 19 FCC Rcd. 20179, at ¶ 16 (2004).

[9] *In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, First Report and Order, 15 FCC Rcd. 17414, at ¶ 13 (2000) (hereinafter *Fixed Wireless Forbearance Order*) (internal citations omitted).

[10] *Id.*

[11] *See* Qwest Petition at 13, 20, 23.

[12] 47 U.S.C. § 160(b) (emphasis added).

Thus, under section 10(b), although the Commission must consider the effect on competition, a finding that forbearance will enhance competition is not dispositive even under a third prong analysis. The specific reference in section 10(b) to section 10(a)(3) demonstrates that a finding that forbearance would enhance competition—without more—is not adequate to satisfy the requirements under the first two parts of the test set forth in section 10(a)(1) and 10(a)(2). Therefore, because Qwest relies on the premise that competition by itself is sufficient to satisfy a forbearance analysis, the Petition is inadequate on its face, and for this reason alone it should be denied. In any event, as EarthLink demonstrates below, the competition that Qwest claims as the basis for its Petition simply does not exist.

II. THE COMMISSION MAY NOT FORBEAR FROM APPLYING DOMINANT CARRIER TARIFF REGULATION TO QWEST'S xDSL SERVICES.

Qwest seeks forbearance from dominant carrier tariff regulations which require Qwest: 1) to provide cost support,[13] 2) to file a tariff on 15-day's notice before implementing a price increase, [14] 3) to wait 30 days after a price change before implementing a further price change,[15] and 4) forbid Qwest from offering contract tariffs.[16] The Supreme Court has repeatedly held that the tariff filing requirement is the primary tool chosen by Congress to prevent unreasonableness and discrimination in

[13] 47 C.F.R. § 61.38.

[14] 47 U.S.C. § 204(a)(3) and 47 C.F.R. § 61.58.

[15] 47 C.F.R. § 61.59.

[16] 47 C.F.R. § 61.3(o).

charges.[17] The Court has held that "the duty to file rates...and the obligation to charge only those rates, have always been considered essential to preventing price discrimination and stabilizing rates."[18] Dominant carrier tariff requirements serve to protect both wholesale ISP and CLEC competitors, as well as retail consumers, from any potential pricing and competitive abuses by ILECs.

Despite the significance of the dominant carrier tariff filing requirements, Qwest has failed to address any substantive harm that these requirements have on its ability to offer existing or new services to consumers in a timely manner. All ILECs that offer wholesale DSL transport service via the FCC's dominant carrier tariff filing process make frequent changes to their tariffs with little difficulty. Qwest cites only the *possibility* of delays and expenses that are associated with tariff filing,[19] but offers no actual examples of such delays or expenses, or how they affect Qwest's ability to offer its services to its subscribers. To the contrary, the evidence suggests that the ADSL service that is subject to dominant carrier tariff requirements has had enormous success over its "non-regulated" CLEC counterparts. Recent FCC data shows that, of all ADSL lines, ILECs have a 95% market share compared to the 5% share owned by CLECs.[20] Qwest's Petition offers no evidence to rebut the presumption that dominant carrier tariff

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[17] *See MCI v. AT&T*, 512 U.S. 218, 230 (1994); *Maislin Industries Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990); *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440 (1907).

[18] *Maislin*, 497 U.S. at 126.

[19] Qwest Petition at 18-19.

[20] *See FCC High Speed Services for Internet Access: Status as of June 30, 2004*, at Table 5—High-Speed Lines by Type of Provider (rel. Dec. 22, 2004) (hereinafter *High-Speed Services Report*).

requirements present no actual impediment to its service, and as such forbearance is not appropriate.

a. The Petition Fails To Show That, Absent Dominant Carrier Tariff Regulation, Charges Will Be Just And Reasonable And Qwest Will Not Engage In Unreasonable And Unjust Discrimination.

The first prong of the section 10 forbearance test requires the petitioner to demonstrate that "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."[21] Qwest's primary argument under this prong is that "competition, where it exists, serves the Commission's statutory goal of ensuring fair and reasonable rates."[22] Qwest's argument is insufficient under the first prong of section 10.

The existing regulatory regime for DSL transport services—under which ILECs are required to file tariffs and are subject to rate regulation and discounted resale requirements—has played a large role in creating the vibrant, competitive ISP market that provides consumers with a variety of choices of high-speed Internet access service. The premise behind these statutory requirements is that the ISP market will best flourish when all ISPs have non-discriminatory access to the transmission networks that make delivery of information services to their customers possible. One of the most important regulatory mechanisms to ensure the availability of competitive transmission services is the dominant carrier tariff filing process, which requires 15 days notice of tariff changes and

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[21] 47 U.S.C. § 160(a)(1).

[22] Qwest Petition at 14.

a 30-day waiting period after a price change before implementing any further price change. In the context of ILEC DSL services, this process alerts ISPs, CLECs, and the Commission to any changes that would ultimately impact consumers of retail DSL-based Internet access service. The scrutiny of the tariff process uncovers efforts by ILECs to impose unreasonable or discriminatory terms on ISPs and CLECs. The process also allows wholesale ISP customers to adjust their business and marketing plans in light of any sudden service changes. Finally, the tariff process affords non-affiliated ISPs the opportunity to ensure that promotional offerings and similar discounts are afforded on a non-discriminatory basis, rather than used to favor the ILEC-affiliated ISPs.

Qwest's Petition fails to address or even acknowledge any of these important functions, and offers no analysis on how rates and terms to unaffiliated ISPs will remain just, reasonable and non-discriminatory. Because the Petition fails in all respects to address these considerations, it fails the first prong of the forbearance test.

b. Dominant Carrier Tariff Regulation is Necessary for the Protection of Consumers.

The second prong of the section 10 forbearance test requires the petitioner to demonstrate that "enforcement of such regulation or provision is not necessary for the protection of consumers."[23] Under this prong, Qwest argues that "consumers neither know nor care whether their provider is subject to dominant carrier tariff restrictions,"[24] and therefore that these requirements are not necessary to protect consumers. As stated above, ISPs and CLECs depend on these requirements to successfully manage their businesses. Whether retail consumers are aware of these restrictions or not has no

[23] 47 U.S.C. § 160(a)(2).

[24] Qwest Petition at 18.

relevance to the protection of these wholesale consumers and, in turn, of retail consumers as well. Without the benefits of dominant carrier tariff requirements, ILECs would have every incentive and ability to seek to eliminate independent ISPs from the competitive landscape, by offering retail products or terms that create a price squeeze on ISPs that use ILECs' underlying transmission services. Because ILECs control the access facilities and services that ISPs use as a wholesale input into their retail Internet access offering, price squeezing remains a real possibility, and as the D.C. Circuit noted, the evaluation of competition in a market demands that the Commission not "brush off" price squeeze issues.[25]

Qwest's second argument that the regulations in question are not necessary to protect consumers is that "if Qwest attempts to use freedom from dominant carrier regulation to harm consumers, Qwest's customers will simply turn to other providers."[26] This argument is meritless for four reasons. First, particularly in the largely rural Qwest territory, it is often the case that there is no alternative provider. Second, there is nothing in the record that indicates how many of Qwest's customers in fact have a choice of alternate providers, or what the price differences would be if these consumers made the choice to switch. Third, where the competitive choice is cable, that "choice" is only to accept the cable company's chosen ISP or forego services completely. Finally, emerging technologies such as satellite, BPL, and wireless at this stage carry deployment and/or pricing disadvantages that limit their availability and affordability as mass-market alternatives. In short, as Qwest tacitly admits, the relief it seeks would in fact allow it to

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[25] *Sprint Comm. v. FCC*, 274 F.3d 549, 554 (2001).

[26] Qwest Petition at 18.

harm consumers. The "protection" that it claims would remain for consumers is retail competition that exists, if at all, only to the extent that a duopoly constitutes competition. One is hard pressed to imagine that this is the sort of protection Congress had in mind when it enacted section 10(a)(2).

c. Forbearance From Dominant Carrier Tariff Regulation is Not Consistent With the Public Interest.

Section 10(a)(3) of the Act requires a petitioner to demonstrate that "forbearance from applying such provision or regulation is consistent with the public interest."[27] Section 10(b) of the Act states that in making a public interest determination, the Commission "shall consider 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 such telecommunications service."[28]

Qwest argues that forbearance is in the public interest because: 1) the 15-day notice requirement eliminates the possibility of surprising competitors, 2) the 30-day waiting period decreases price competition, and 3) the cost study requirement increases delay and expenses associated with the introduction of new services.[29] In making a public interest analysis, the Commission must decide whether the benefits of regulation, including the benefits of competition in the information services market that come from the enforcement of dominant carrier tariffs, are outweighed by specific and quantified

[27] 47 U.S.C. § 160(a)(3).

[28] 47 U.S.C. § 160(b).

[29] Qwest Petition at 18.

harm to Qwest. Qwest, however, has provided no explanation of how, after years of compliance with these regulations, compliance has now become too burdensome. Nor has Qwest provided any explanation of how compliance now interferes with the introduction of new services. The burden falls on Qwest to provide the Commission with actual instances where the company has experienced harm. Qwest has not met this burden.

In making a public interest analysis, Qwest is incorrect to assert that forbearance from the dominant carrier tariff rules would enhance competition. To the extent that the competition at issue is that for "telecommunications services," as the statute states, there is no competition from cable companies on these services, because the Commission in its Cable Modem Declaratory Ruling concluded that the transmission underlying cable modem service is entirely an information service."[30] Under an analysis that looks at competition among "telecommunications service providers," CLECs are currently the only potential competitors to Qwest. Inasmuch as the regulations from which Qwest seeks forbearance were enacted primarily for the benefit of CLECs and their customers, it is difficult to see how elimination of those regulations would increase competition from CLECs. Certainly Qwest has not explained how this would occur.

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[30] *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities,* Declaratory Ruling, CS Docket No. 02-52, Aug. 6, 2002, at ¶ 39. In this regard, the support of certain ILECs—including SBC, BellSouth, and Verizon—for the FCC's position before the U.S. Supreme Court in *Brand X Internet Services v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003), *cert. granted* (Dec. 3, 2004) (Nos. 04-277 & 04-281), is most puzzling. If the existence of cable-based transmission services is ever to support ILEC forbearance petitions, those cable-based services will have to be classified as "telecommunications services" under the Act.

Similarly, one of the provisions from which Qwest seeks forbearance is the prohibition on offering contract tariffs.[31] As Qwest itself notes, this requested relief is similar to relief available under the Commission's Phase II pricing flexibility regulations.[32] To obtain Phase II pricing relief, an ILEC must show that its competitors in a given marketplace have established significant market presence sufficient to preclude the ILEC from exploiting any individual market power. Specifically, the ILEC must show that its competitors have obtained a certain level of collocation in the ILEC's wire centers in a given study area.[33] Thus, the relief from the regulations prohibiting contract tariffs is already provided for by the FCC's collocation test. The fact that Qwest is unable to obtain such relief is significant for two reasons. First, Qwest relies on the presumption that cable has established significant market presence in the provision of mass-market broadband services to support its argument that relief is necessary.[34] However, the only competition measured in the collocation test is *wholesale competition*, i.e., the ability of other carriers to provide services to their customers. As noted above, cable companies do not provide wholesale services to ISPs or CLECs. Thus, whatever competition they may provide in the "mass-market broadband services" marketplace, they provide none in the wholesale marketplace. As a result, because the Commission has already determined (albeit incorrectly) that the transmission underlying cable modem service is an information service, the Commission has no choice but to maintain that cable providers do not represent competition in the wholesale marketplace. Second,

[31] Qwest Petition at 14.

[32] *Id.* at 14, n. 63.

[33] 47 C.F.R. § 69.709(c).

[34] Qwest Petition at 14, n. 63.

because the collocation test measures wholesale competition, Qwest's inability to satisfy the requirements for Phase II pricing flexibility further supports the fact that there is not sufficient CLEC competition in the wholesale marketplace to merit forbearance.

Finally, neither Qwest nor the Commission can ignore the central role that independent ISPs have played in bringing choice and competition to consumers in the high-speed Internet access services market. ISPs are vital to the Commission's articulated goal of bringing affordable high-speed access to consumers. Forbearance from the tariffing process has the potential of allowing ILECs like Qwest to disadvantage independent ISPs or even to eliminate ISP competitors from the marketplace without any benefits to the public. For all of these reasons, Qwest's request for relief fails under the third prong of the forbearance analysis.

III. THE COMMISSION MAY NOT FORBEAR FROM APPLYING ITS RATE AVERAGING REQUIREMENT TO QWEST'S xDSL SERVICES.

Rate averaging requires that Qwest's tariffs "shall not contain charges…that are disaggregated or deaveraged within a study area."[35] The primary policy behind rate averaging is to ensure that rates for rural areas "will not reflect the disproportionate burdens" associated with serving these so-called "high cost areas."[36] Further, if prices are falling due to competition in high-traffic areas, then customers in rural areas should also benefit from lower prices.[37] The Commission has a long and well-established rule

[35] 47 C.F.R. § 69.3(e)(7).

[36] *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, As Amended,* Report and Order, 11 FCC Rcd. 9564, at ¶ 3, 6 (1996).

[37] *Id.* at ¶ 6.

that "the rates charged by all providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas."[38] In its Petition, Qwest asks the Commission to stray from this rule and requests the freedom to charge different prices to consumers in urban areas, such as Denver, than to consumers in rural areas, such as the Colorado Rockies.[39] As EarthLink demonstrates below, the request for such relief is not appropriate under section 10 of the Act.

a. The Petition Fails To Show That, Absent Rate Averaging Requirements, Charges Will Be Just And Reasonable And Qwest Will Not Engage In Unreasonable And Unjust Discrimination.

Qwest's primary argument as to why rate averaging is not necessary to ensure that rates and practices are just, reasonable, and nondiscriminatory is that retail consumers still have protections against unjust and discriminatory rates because, even without the rate averaging requirements, Qwest would still be subject to the remaining tariff rules and complaint processes.[40] The section 208 complaint process entails substantial expenses and resource burdens, and as a result, such an alternative is not practical for the average consumer. The rate averaging requirements provide market-wide protection on reasonable and non-discriminatory rates that would not require any cost-prohibitive individual consumer complaints. For this reason, it is clear that the rate averaging safeguards currently in place provide consumers with more cost-efficient protection than

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[38] *Id.* at ¶ 9.

[39] Qwest Petition at 21.

[40] *Id.* at 20-21.

the alternatives provided by Qwest, and therefore Qwest's argument does not satisfy the requirements under section 10(a)(1) of the Act.

b. Rate Averaging Requirements Are Necessary for the Protection of Consumers.

Qwest contends that rate averaging is not necessary for the protection of consumers because, were Qwest to use this relief to harm consumers, its customers would flock to its competitors.[41] This argument fails for the simple reason that many of the consumers that stand to benefit from the Commission's rate averaging requirements, particularly consumers in rural areas, have few if any choices of high-speed Internet access providers where they are located. According to the Commission's most recent data, 13.8% of zip codes have only one high-speed provider, and another 16.8% of zip codes have a choice of only two providers.[42] Qwest's argument that consumers could choose another provider if they are harmed ignores the fact that more than 30% of zip codes in this country lack any competitive alternatives in the high-speed Internet access service marketplace. Moreover, as noted in Section II(c), the "alternative," if there is one, is most likely the cable company, which likely only offers its own ISP. Again, this is a strange kind of "consumer protection." Nevertheless, the Petition neither acknowledges nor seeks to argue that this alternative is adequate to meet the second prong of the forbearance test.

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[41] *Id.* at 21.

[42] *See High Speed Services Report* at Table 12 – Percentage of Zip Codes with High-Speed Lines in Service.

c. Forbearance From Rate Averaging Requirements Are Not Consistent With the Public Interest.

Qwest claims that forbearance from rate averaging is consistent with the public interest for two reasons: 1) it will enhance competition by allowing Qwest to move its xDSL rates closer to actual costs, and 2) averaged rates create disincentives for Qwest to deploy its services in rural areas.[43] As to whether deaveraging is in the public interest because it will allow Qwest to move its rates closer to actual costs, this assertion is unsupported. As Qwest itself asserts in its Petition, it is an incumbent LEC that serves *both* urban and rural areas.[44] The costs to Qwest of providing service to rural areas, however high, is subsidized both by universal service and the revenue Qwest receives from subscribers in urban areas. Qwest provides no analysis of how these costs in fact balance out.

In response to Qwest's argument that the rate averaging requirements reduce incentives for entry in rural areas, Qwest never goes so far as to claim that rate averaging has actually slowed deployment in these rural areas. In fact, as recently as last year, Qwest's Chairman told state regulators that Qwest would be spending $100 million in 2003 to extend broadband service to rural areas.[45] In Arizona, one of the 14 states where Qwest's xDSL service is offered, the company reportedly spent as much as $75 million to

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[43] Qwest Petition at 21-22.

[44] *Id.* at 21.

[45] *Notebart Thanks States For Giving Qwest Chance to Help Itself*, State Telephone Reg. Rep. (Aug. 1, 2003).

extend its DSL reach to 11 different rural areas within the state.[46] In a news article, Qwest claimed that the take rate in these areas was "exceptionally high" and cited an 18% increase in high-speed customers in Arizona from the previous year.[47] Therefore, even if rate averaging does somehow impede Qwest's deployment to rural areas, and the facts seem to suggest otherwise, the burden is on Qwest to prove that this is the case. It has not done so in its Petition.

IV. THE COMMISSION MAY NOT FORBEAR FROM REQUIRING QWEST TO ENGAGE IN AVOIDED COST RESALE OF DSL TO CLECs.

Section 251(c) of the Act requires Qwest, and all ILECs, to resell its retail transmission services at an avoided cost discount.[48] In its Petition, Qwest suggests that it is not attempting to avoid all resale, but instead requests the "freedom to negotiate commercial agreements with its carrier customers."[49] As a threshold matter, Qwest's FCC Tariff No. 1 contains a broad range of volume and term discounts for wholesale DSL, indicating that Qwest has already implemented the flexibility it seeks here. Moreover, the language of that tariff claims that:

> The telecommunications services offered under the *QWEST DSL* Volume Plan are provided at wholesale to carriers and non-carriers. The telecommunications services offered under the *QWEST DSL* Volume Plan are not services that the Company provides at retail, and accordingly, are

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[46] Max Jarman, *High-Speed Net Services Connect With Consumers,* Arizona Republic (Oct. 20, 2003) at D1.

[47] *Id.*

[48] 47 U.S.C. § 251(c).

[49] Qwest Petition at 23.

not subject to the rate provisions of Sections 251 (c) (4) and 252 (d) (3) of the Communications Act, 47 U.S.C. §§ 251 (c) (4), 252 (d) (3).[50]

Even if Qwest were correct that these are not the same services that it offers at retail, which it is not, the wholesale price requirement is nevertheless a critical safeguard against unreasonable wholesale pricing, and forbearance from 251(c) would have a serious negative effect on resale. For this reason, and the reasons below, forbearance from section 251(c) is not appropriate.

a. The Requirements of Sections 251(c) and 271 Have Not Been Fully Implemented.

As an initial matter, section 10(d) provides that the Commission may not forbear from applying the requirements of section 251(c) or 271 until it determines that those requirements have been fully implemented.[51] Qwest contends that each relevant state commission where it offers its xDSL service has determined that Qwest has fully implemented the requirements of sections 251 and 271 with respect to all of its services.[52] The Commission should not consider section 10(d) satisfied until it can conclude that, within every relevant geographic market area, a robust wholesale market exists that enables competing providers to obtain access to the telecommunications services and facilities they require to offer end-users Internet access without the need for continued enforcement of sections 251(c) or 271. Qwest has failed to demonstrate that such a market exists in each of the 14 states with respect to Qwest's xDSL service. Until such a

[50] Qwest Corp., Tariff F.C.C. No. 1, at 8.4.4, *available at* http://tariffs.qwest.com:8000/.

[51] 47 U.S.C. §160(d).

[52] Qwest Petition at 27.

showing is made, Qwest has not satisfied the requirements of section 10(d). However, even if Qwest were to make such a showing, Qwest has not met the statutory criteria in order for the Commission to forbear from applying section 251(c), and Qwest's forbearance request should therefore be denied.

b. The Petition Fails To Show That, Absent Enforcement of Section 251(c), Charges Will Be Just And Reasonable And Qwest Will Not Engage In Unreasonable And Unjust Discrimination.

Qwest's primary argument under the first prong is that "[c]ompetition 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."[53] This argument fails first because the only real-world example of a facilities-based provider not forced to offer its wholesale customers reasonable rates and terms is cable, and the fact remains that cable companies by and large continue to refuse to sell their transmission services to unaffiliated ISPs. With the exception of Time Warner Cable, which is required to sell access to ISPs under conditions of the AOL Time Warner merger, no other cable company has chosen to expand its offerings to unaffiliated ISPs on any commercially meaningful scale. Companies in this position, rightly or wrongly, have decided to exclude competitors in an effort to maximize their own profits and retail market share. Consequently, the source of wholesale competition upon which Qwest almost entirely relies—cable—as a matter of indisputable fact offers no such competition at all.

Qwest gives no indication in its Petition that its cost-benefit analysis between maximizing wholesale sales and reducing competition in the information services market

[53] *Id.* at 25.

will lead to a choice of the former over the latter. In fact, because Qwest supports the much-broader Petition of BellSouth for forbearance from applying all Title II common carriage requirements requiring ILECs to make available the transmission component of its wireline broadband Internet access service on reasonable and non-discriminatory terms,[54] the evidence seems to suggest that Qwest in fact intends to follow the path chosen so far by cable providers.

For a competitive wholesale product market to exist, the enforcement of section 251(c) is necessary. Because cable companies refuse to sell access to transmission service to ISPs and CLECs, cable is eliminated as a potential competitor to ILECs in the wholesale market. Thus, Qwest's assertion that such competition exists and that consumers would be protected by it is simply not true. Forbearance from section 251(c), the provision that Congress explicitly included to require ILECs to permit service by competitive LECs, would also presumptively eliminate CLECs in those marketplaces where wholesale facilities-based competition (from CLECs) arguably exists. The facts show that the forbearance requested by Qwest would essentially leave no competition in the wholesale transport marketplace for ISPs. Accordingly, the regulations are necessary to maintain reasonable and nondiscriminatory rates.

[54] *Id.* at 2-3.

c. Section 251(c) is Necessary for the Protection of Consumers.

Section 10(a)(2) requires the Commission to examine whether the regulation at issue is "not necessary for the protection of consumers."[55] This examination must be more than just an exercise in theoretical economic forecasts, but instead must address how such forbearance will affect consumers *today.* Qwest contends that enforcement of section 251(c) is not necessary because consumers today have many competitive choices in the marketplace. Again, such an assertion is simply wrong. The fact is that there are only two significant carriers in the broadband transmission marketplace—cable and DSL. As of June 2004, FCC data showed that ADSL and cable accounted for 92.4% of all high-speed lines in the U.S., and 97.4% of all high-speed lines in the residential and small business market.[56] Therefore, despite Qwest's attempt to suggest that competition exists from technologies other than wireline and cable, such as wireless, satellite, and broadband over powerline ("BPL"),[57] the simple truth is that wireless, satellite, and BPL technologies combined still comprise less than 3% of the overall high-speed connections provided to consumers.[58] It is also significant that ILECs control the majority of both fiber and wireless networks used to provide high-speed connections. Simply put, competition is not at this stage coming from multiple sources and technologies, and therefore does not serve to protect consumers in the manner that Qwest suggests.

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[55] 47 U.S.C. § 160(a)(2).

[56] *See High Speed Services Report* at Table 1 – High Speed Lines and Table 3 – Residential and Small Business High Speed Lines.

[57] Qwest Petition at 15-16.

[58] *High-Speed Services Report* at Chart 2—High-Speed Lines by Type of Provider.

d. Forbearance From Section 251(c) is Not Consistent With the Public Interest.

In support of its public interest analysis, Qwest contends that forbearance from section 251(c) will enhance competition by allowing negotiation between competitors to set resale prices. As discussed above, forbearance from 251(c) would have the practical effect of eliminating the resale requirement entirely, because it would allow ILECs to charge ISPs unreasonable prices for their service by eliminating the competition check that arises from CLEC access to discounted wholesale rates. Just as EarthLink argued above in Section II(c), under a section 10(b) analysis, the forbearance requested here would in fact harm "competitive market conditions" and thwart "competition among providers of telecommunications services,"[59] because it would limit consumer choice and wholesale competition. The Commission itself has noted the public's interest in the promotion of advanced services across the DSL platform:

> The Commission's determination [that advanced services sold at retail by incumbent LECs to residential and business end-users are subject to the section 251(c)(4) discounted resale obligation] should encourage incumbents to offer advanced services to Internet Service Providers at the lowest possible price. In turn, the Internet Service Providers, as unregulated information service providers, will be able to package the DSL service with their Internet service to offer affordable, high-speed access to the Internet to residential and business consumers. As a result, consumers will ultimately benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services.[60]

Thus, Qwest's analysis under the third prong of the forbearance test is not sufficient.

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[59] 47 U.S.C. § 160(b).

[60] *Advanced Telecommunications Capability Second R&O* at ¶ 3.

CONCLUSION

EarthLink respectfully urges the Commission to maintain the current regulatory framework for the ILEC provision of DSL services to unaffiliated ISPs and CLECs. For the foregoing reasons, Qwest's Petition should be denied.

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