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

In the Matter of	)	
	)	
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	)	

OPPOSITION OF
THE FEDERATION OF INTERNET SOLUTION
PROVIDERS OF THE AMERICAS

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EXECUTIVE SUMMARY

The Federation of Internet Solution Providers of the Americas ("FISPA") is a non-profit trade association of nearly 200 independent Internet Service Providers that use and rely on the DSL facilities of the "Baby Bells" or "RBOCs" to provide their services to the public. Forbearance from applying dominant carrier tariff regulations, rate averaging, and the requirement to resell at an avoided cost discount to Qwest's continued provisioning of DSL facilities to mass market customers and, instead, allowing Qwest to use private carriage agreements for these customers will not serve the public interest.

The Commission's duties under the Act are clear and unequivocal. Those duties, first and foremost, are to ensure that providers of telecommunications services are to do so in a non-discriminatory manner and at reasonable rates. This duty arises under both Title II and Title I of the Act. At its most basic level, Qwest's Petition seeks the freedom to act in a discriminatory and unreasonable manner. Therefore, grant of the Petition would do violence to the most fundamental duties entrusted to the Commission by Congress under either Title.

The regulatory regime under which Qwest must currently offer mass market DSL services is founded on the same principles, refined and focused on the specific problems created by the conflicting roles Qwest and the other Baby Bells have in the industry as the sole source providers of the access tools required by their competitors to reach end user customers. Today's regulatory regime effects the delicate and difficult balance of competing interests by requirements that are designed to neutralize some of the advantages the incumbent local carriers have by virtue of their bottleneck control over the local exchange networks and, in particular, DSL lines.

In place of these basic pro-competitive requirements, the heart of Qwest's Petition seeks relief from the duties to be reasonable and nondiscriminatory, in turn by ridding itself of prior notice requirements, and eradicating resale. In place of these obligations, Qwest seeks the right to substitute private carriage agreements with end user customers, while requiring its ISP competitors to adhere to the tarffing process.

FISPA's Opposition to forbearance is based on irrefutable facts, well-established legal precedents and principles and overriding public interests. FISPA's Opposition rebuts Qwest's self-serving claims that today's market environment allows lifting of safeguards intended to ensure Qwest acts reasonably and non-discriminatorily in the mass market for broadband services. Ironically, most of FISPA's rebuttal is based on Qwest's own assertions and exhibits.

For example, the "empirical" data Qwest uses to justify its claims is inadequate and does not rise to the level of proof required for forbearance. Qwest relies on the statement of one employee relating a single experience in one Qwest state in one Qwest city - Omaha, Nebraska. But all this shows is an offer by a cable company to a small neighborhood. And while Qwest claims this proves its ability to compete against cable is hampered because it is regulated and cable is not is a leap far too broad to be credible. One isolated incident is not proof of Qwest's claim that it is being harmed by its having to operate under the selected Title II requirements.

Qwest also offers a study and claims it shows that customers for broadband services are influenced by the price for such service. Such an economic truism is not proof sufficient to demonstrate that the broadband market in its 14-state region has reached the level of competitiveness that justifies forbearance under Section 10 of the Act.

It is clear that Qwest's "facts" and statistics are make weight and in no way relate to its ability to compete. Indeed, in granting the Petition, the Commission would be foisting on the public a service provider more consumed with ridding itself of regulatory requirements than providing quality and fairly priced services; this much is evident in Qwest's own data.

Qwest's arguments are not only based on dated statistics (over a year old); but the validity of Qwest's data is suspect, if not outright meaningless and contradictory to logic. Qwest argues, for example, that it needs to be relieved of its duty to average its rates. The argument is that, if relieved of this requirement, Qwest could offer lower rates to customers located in larger, low-cost markets than the rates it now offers to customers in high-cost markets. Qwest must not realize that this argument, if accepted, would have the Commission abet Qwest's intent to widen the digital divide that already exists in its 14-state territory? A divide the Commission and Congress pledged to eliminate throughout the nation as soon as possible.

While bemoaning its regulated position vis-à-vis cable modem providers, Qwest is totally silent on how the Commission, the public and its competitors can be assured that, once released from the duties to be reasonable and nondiscriminatory, it will not cross-subsidize its broadband services with its still dominant monopoly revenues derived from its lock on local exchange services, enhanced by its bundling of long distance services. Qwest's petition is not only lacking in the type of proof needed to justify the extraordinary remedy of forbearance, it is also disingenuous, a fact that should alert the Commission to Qwest's true intentions – to use "regulatory freedom" to engage in anti-competitive conduct.

Qwest makes much of the fact that tariffed services offered to ISPs are not part of its request. Qwest overstates its position by claiming it cannot use contract tariffs. This is untrue. Commission rules specifically allow price cap carriers to use contract tariffs. *See* 47 C.F.R Subpart H, Sections 69.701 *et seq*. More importantly, Qwest has the shoe on the wrong foot. Qwest's ability to offer contract tariffs to end users - residences, but more than likely small (and medium) sized businesses - can be used against independent ISPs. Qwest can use its private contracts with end users to offer its own ISP services and eliminate the ISPs as viable competitors.

Given these considerations, Qwest's Petition does not satisfy any of the Section 10(a) forbearance criteria. Therefore, a grant of Qwest's request may not be made. Qwest's Petition has failed to demonstrate that dominant carrier tariff regulations, rate averaging, and avoided cost resale are not necessary to ensure that the charges and practices for broadband services are just and reasonable and are not unjustly or unreasonably discriminatory; are not necessary for the protection of consumers; or are not necessary to protect the public interest. In addition, Qwest has not shown that forbearance will promote competitive market conditions and enhance competition among providers of telecommunications services. If any one of these criteria is missing, forbearance is not lawful.

Qwest's Petition is a textbook example of how not to justify lifting statutory protections of the public's interests. A decision to forbear from enforcing statutes or regulations is not a simple decision. It must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met; it must contain detailed evidence concerning the markets for the specific services at issue that is supported by empirical evidence. No such empirical evidence accompanies the Petition. On the contrary, the "evidence" Qwest submitted undercuts its own case and demonstrates that the decision the Commission must make is contrary to Qwest's request.

Stripped of all the pseudo arguments, self-serving rationalizations and bogus "facts," Qwest simply does not want its broadband activities encumbered with the duty to be reasonable or be restrained in the slightest from playing favorites among those it allows to make use of its DSL facilities, *i.e.*, Qwest itself.

In other contexts, the Commission has made the connection between *consumer choice* and *competitive forces*. A grant of forbearance here would deny consumer's their choice of service providers and the variety of services that only a diverse and abundant source of alternative providers can offer. In today's demonstrably uncompetitive marketplace for alternative broadband access supply, the requested forbearance will leave consumers with nothing to select from but what Qwest chooses to offer. This does violence to the central theme of the Communications Act that was embodied in the Act since its adoption 70 years ago. Section 151 of the Act provides that –

> … the purpose of regulating interstate and foreign commerce in communications [is] to make available, <u>so far as possible, to all people</u> of the United States, <u>without discrimination</u> … a rapid, efficient … wire and radio communication service with adequate facilities <u>at reasonable charges</u> … 47 U.S.C. §151 (emphasis added).

The expressed intent of Congress in enacting the 1996 Act is the same. It is the clear duty of this Commission to ensure reasonable and non-discriminatory communications services when provided by common carriers under Title II or by any provider under Title I. The Commission's duty is to adopt and enforce policies that provides to all the people, so far as possible, nondiscriminatory services with adequate facilities at reasonable rates.

The forbearance Qwest seeks will have a profound adverse impact on small and medium sized entrepreneurial businesses in an industry enmeshed in this country's telecommunications culture. The continued existence of independent ISPs, and the diversity of choices to the public rest on their ability to continue to have access to the network facilities necessary to deliver their services. While Qwest's Petition does not directly and blatantly seek to exclude independent ISPs from the market, grant of the Petition will ultimately have this effect.

Qwest also attempts to circumvent the requirements of section 10(a), by relying on section 706 in support of forbearance. Qwest argues section 706 establishes a duty under which the Commission must remove barriers to infrastructure investment in order to promote broadband competition. But the argument that forbearance from regulation would serve the goals of section 706 is nothing new. It is the same old "carrot" the Baby Bells have trotted out for many years. Just give us freedom from regulation and we will wire the world, solve the digital divide, provide free service and products to the communications disadvantaged. Empty promises and hollow bribes of benefits will not meet the three prong test of section 10(a). Those three prongs are conjunctive. Thus, even if the Commission were to consider that Qwest's section 706 promises lent some support to a public interest claim under section 10(a)(3), that is insufficient because, standing alone, it fails to satisfy the requirements of sections 10(a)(1) and 10(a)(2).

Finally, Qwest's petition is fatally flawed because it does not mention, much less address, the interests protected by the Regulatory Flexibility Act ("RFA"). The RFA requires each federal agency to conduct a regulatory flexibility analysis of the impact of its actions on small businesses and places the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete.

In 1996, Congress strengthened the RFA and provided for judicial review of agency compliance with the law. Now, agency actions or inactions are directly challengeable in court. As the many declarations submitted herewith demonstrate, the ISPs' very survival depends on access from the ILECs. The Commission cannot ignore or overturn established policy designed in large part to protect these small ISPs unless it does so on a reasoned basis that rests on an adequate record and is clearly and convincingly explained by the Commission.

A proper RFA analysis dooms Qwest's Petition. Forbearance will drive these small businesses out of the market. The effect, therefore, of a grant of the Petition cannot meet a major express goal of the RFA, *viz*., to provide regulatory relief to small entities.

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OPPOSITION OF
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The Federation of Internet Solution Providers of the Americas ("FISPA"), by its attorneys, hereby submits its Opposition to the November 10, 2004, Petition for Forbearance filed by Qwest Corporation ("Petition").[1]

STATEMENT OF INTEREST

FISPA was founded in May, 1996 to represent the interests of Internet Solution Providers. Our members are called "SOLUTION" providers because they provide a range of services including Internet Access, Web Hosting, Web Design and an ever-increasing number of other services that use the Internet to facilitate a "solution." FISPA offers its members education, a place to network, and to facilitate discussion and technological development. We work to educate the public about the importance of the Internet industry. We support quality standards and practices for Internet Solution Providers. We create a single voice representing the concerns of the Internet industry.

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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).

FISPA represents the interests of nearly 200 companies. Each offers a broad and unique range of Internet solutions, technologies, and information services to consumers across a wide swath of America.

FISPA members and other independent ISPs have long been the engine hidden beneath the hood of the car driving the Internet and broadband revolutions. Recent telecommunications and information technology policy decisions, rulemakings, and incumbent Bell Company ("RBOC") filings which tend to diminish the value and seek to further limit and even exclude the role that small, independent ISPs play in the future of the Internet, broadband services, and information technology, have awakened FISPA's members. Qwest's Petition is but the latest example of an agenda that began in 1987 with the first Triennial Review of the Modified Final Judgment ("MFJ"),[2] an agenda whose goal is anti-competitive, anti-small business, anti-consumer and, now, anti-independent broadband provider. Qwest's Petition, like other recent filings,[3] has driven FISPA's members to take action.[4]

FISPA and its members oppose Qwest's Petition and request the Commission deny it.

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[2] In 1987, a scant three years after AT&T's Divestiture of the Baby Bells, *see United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 224 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), the U.S. Department of Justice issued its first triennial review of the state of competition post-divestiture. *See* Peter W. Huber, The Geodesic Network, *1987 Report on Competition in the Telephone Industry*, United States Department of Justice, 1987. Incredibly, Huber's Report concluded that all telecommunications markets affected by the monopoly control of the Baby Bells were sufficiently competitive to warrant lifting MFJ restrictions and all the Bells to compete where they willed. This was 1987 when the average long distance call still cost around $0.25/minute and the commercial Internet was a decade away from its boom! Common sense, wisdom and trust in competitive markets over monopoly-driven agendas ultimately prevailed, ensuring that Huber's Report would not have its author's desired effect. The Baby Bells continue to press for re-monopolization of telecommunications markets to this day. FISPA implores the current Commission to exercise sound judgment and the foresight of its predecessors as it considers BellSouth's most recent push down this path of competitive destruction.

[3] *Petition of BellSouth Telecommunications Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of Computer Inquiry and Title II Common Carriage Requirements* (filed Oct. 27, 2004), Public Notice, WC Docket No. 04-405, DA 04-3507, rel. Nov. 3, 2004 ("BellSouth's Petition")

[4] FISPA recently filed an Opposition to BellSouth's Petition, hereinafter referred to as *BellSouth Opposition.*

I. QWEST'S PETITION CLEVERLY MASKS ITS TRUE INTENTIONS, BUT THE COMMISSION SHOULD NOT BE SO EASILY MISLED.

Unlike the Petitions filed by its Baby Bell counterparts,[5] that, on their face, seek broad relief from Title II and *Computer Inquiry* rules, Qwest seemingly requests only targeted and limited regulatory relief. In particular, Qwest asks the Commission to forbear from applying dominant carrier tariff regulations, rate averaging, and the requirement to resell at an avoided cost discount.[6] Qwest's request is also 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.[7] 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 technological development.

Qwest comes before the Commission seeking what it describes as expedited regulatory relief in "narrow" pricing areas.[8] However, Qwest's true intentions cannot be disguised, for they mirror the intentions of her sister RBOCs. Qwest admits as much when it declares: "Qwest

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[5] *See BellSouth Petition*; *see also Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules With Respect to Their Broadband Services*, WC Docket No. 04-440 (filed Dec. 20, 2004); *In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29 (filed Feb. 5, 2004).

[6] 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.

[7] *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).

[8] Qwest Petition at 3.

supports and joins in BellSouth's recently-filed forbearance petition."[9] Reading between the lines of its carefully crafted Petition, it becomes 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[10] 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, as well as its own affiliates, to whom it might offer preferential treatment. Qwest then will 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. Regulatory forbearance should be used as a last resort and then, only if the case for forbearance is supported by irrefutable facts and evidence. Qwest has not done so here, nor can it.

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[9] *Id.* at 2.

[10] Qwest overstates its position by claiming it cannot use contract tariffs. This is untrue. Commission rules specifically allow price cap carriers to use contract tariffs. *See* 47 C.F.R Subpart H, Sections 69.701 *et seq*.

Qwest's claim that it needs to be freed from dominant carrier tariff obligations in order to craft more tailored services on behalf of its customers is disingenuous and so blatantly fallacious that it mocks the regulatory expertise of the Commission. Qwest's ability to tailor its offerings is in no way diminished by the presence of competitors in the marketplace. Such competition, if anything, only goads a reluctant monopolist to respond to its customer's demands, something it need not do and has not done when heretofore left unchallenged by such competitive forces.

A premature grant of the requested forbearance will quickly lead to the evisceration of Title II common carrier requirements, which soon will be replaced by a private carriage regime. As the Commission is aware, private carriage arrangements can only be effected by negotiated contracts. Absent regulatory mandates such as avoided cost resale, however, Qwest has no incentive to fairly negotiate private contractual arrangements – not with end users and especially not with its competitors. If the Petition is granted, Qwest will have the upper hand and ability to force unfavorable private carriage arrangements and contracts of adhesion onto the public and ISP customers.

Qwest fashions its Petition under the guise of "mass market" regulatory relief, but FISPA has no doubt Qwest will use any relief obtained to squash competition in all markets. The Petition must be denied.

II. QWEST'S PETITION DOES NOT SATISFY ANY OF THE SECTION 10(a) FORBEARANCE CRITERIA - IT MUST BE DENIED.

The Commission may not grant Qwest's request for forbearance unless it is convinced that Qwest has satisfied the explicit forbearance requirements set forth in section 10(a) of the Communications Act. In particular, Qwest must demonstrate that the dominant carrier tariff regulations, rate averaging and resale of its mass-market xDSL services: (1) are not necessary to ensure that the charges and practices for its DSL services "are just and reasonable and are not unjustly or unreasonably discriminatory;" (2) are not necessary "for the protection of consumers;" and (3) are not necessary to protect the public interest,[11] and, in particular, that such non-enforcement will "promote competitive market conditions" and "enhance competition among providers of telecommunications services."[12] If "any one of the three prongs is unsatisfied" the Commission must deny Qwest's Petition.[13]

In considering Qwest's Petition, the Commission must adhere to the principle that "[t]he 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."[14] Because these criteria focus on competition and consumer protection, both the Commission and the courts have recognized that the Commission must examine detailed evidence concerning the markets for the specific services at issue. In particular, a request that seeks "the forbearance of dominant carrier regulation under Section 10" demands "a painstaking analysis of market conditions" supported by empirical evidence.[15] The Commission cannot simply "assume that, absent the regulation at issue, market conditions or any other factor will adequately ensure that charges … are just and reasonable and are not unjustly or unreasonably

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[11] 47 U.S.C. § 160(a).
[12] 47 U.S.C. §160(b).
[13] *CTIA v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003); The Commission "cannot forbear in the absence of a record that will permit [it] to determine that each of the tests set forth in Section 10 is satisfied for a specific statutory or regulatory provision;" *In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, First Report and Order, 15 FCC Rcd. 17414, ¶ 13 (2000) ("*Fixed Wireless Forbearance Order*") (internal citations omitted); *see also, In the Matter of Amendment of the Commission's Rules Concerning Maritime Communications*, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd. 19853, ¶ 55 (1998) (request for forbearance from Title II common carrier obligations "cannot be granted because it is too vague, both as to the specific provisions from which we should forbear from enforcing, and as to why forbearance would be in the public interest").
[14] *PCIA's Broadband PCS Alliance's Petition for Forbearance for Broadband Personal Communications Services* ,Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 113 (1998).
[15] *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001); *AT&T Corp. v. FCC*, 236 F.3d 729, 735-37 (D.C. Cir. 2001).

discriminatory."[16] There must be hard market data that unequivocally supports the drastic result of forbearance.[17] Section 10(a) analysis cannot be applied in the abstract, but must focus on the specific market conditions existing with respect to the regulations and service at issue.

As set forth below, Qwest's evidence does not provide the required factual and legal basis for forbearance and thus fails to meet the statutory requirements of Section 10.

A. QWEST DOES NOT SHOW THAT, ABSENT REGULATION, ITS WHOLESALE DSL RATES WILL BE "JUST AND REASONABLE" AND IT WILL NOT ENGAGE IN "UNREASONABLE AND DISCRIMINATORY" PRACTICES.

In order to satisfy the first prong of the three-part forbearance analysis, Qwest must make a *prima facie* showing that sufficient competition exists so that the tariff regulation, rate averaging requirements and resale regulations are not necessary to ensure that Qwest's rates and practices for its wholesale DSL services are just, reasonable, and not unreasonably discriminatory.[18]

Forbearance is rarely granted and should not be done so here. The Petition lacks the necessary credible evidence that provides any assurance of just and reasonable rates and does not explain how unjust and unreasonable discrimination will not occur. The Petition is also completely devoid of any explanation of how retail pricing flexibility will impact the wholesale DSL market. Determining whether incumbent LECs continue to possess market power over

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[16] Report and Order, Fifth Memorandum Opinion and Order, *1998 Biennial Regulatory Review – Review of ARMIS Reporting Requirements,* 14 FCC Rcd. 11443, ¶ 32 (1999).
[17] *See Petition of US West Communications, Inc. For Forbearance from Regulation as a Dominant Carrier in Phoenix, Arizona MSA,* Memorandum Opinion and Order, 14 FCC Rcd. 19947 ¶ 25 (1999) ("*Special Access Forbearance Order"), reversed and remanded on other grounds, AT&T v. FCC,* 236 F.3d 729 (D.C.Cir. 2001). *Fixed Wireless Forbearance Order*, (the Commission rejected forbearance because "[t]he BOC petitioners must provide more than just general conclusions about market conditions so that interested parties have a meaningful opportunity to refute, and this Commission has a meaningful opportunity to evaluate, the BOC petitioners' claims."
[18] *Special Access Forbearance Order* ¶ 32.

access is a highly fact-specific inquiry.[19] Qwest has not adequately shown that existing marketplace forces are sufficient to constrain its market power and ensure that both its retail and wholesale rates and practices are just, reasonable, and not unreasonably discriminatory. Therefore, Qwest's Petition fails to meet its burden of providing sufficient evidence to satisfy section 10(a).

1. While Qwest and Cable are Equal Partners in the Broadband Duopoly They are Completely Different Animals and Should Be Treated as Such.

Despite its cries to the contrary, Qwest has considerable market power in both the retail and wholesale markets. Indeed, what the below statistics indisputably show is that incumbent LECs, such as Qwest, are now nearing equal partners with cable in broadband market share.

In 2004, for the first time, more Internet subscribers are using broadband than dialup connections[20] as subscribership to high-speed services increased 15% during the first half of 2004.[21] Within the broadband marketplace, the incumbent LECs enjoy market power as either the monopoly or duopoly provider.[22]

In the first half of 2004, ADSL lines in service increased by 20% compared to cable's increase of 13%.[23] Industry analyst Point Topic further found that DSL gained 3.2 million new subscribers in the third quarter of 2004, to reach a total of 12.6 million DSL-enabled phone lines,

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[19] *See e.g., AT&T Corp. v. FCC*, 236 F.3d 729, 735-37 (D.C. Cir. 2001); Report and Order, Fifth Memorandum Opinion and Order, *1998Biennial Regulatory Review – Review of ARMIS Reporting Requirements,* 14 FCC Rcd. 11443 (1999); *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001).
[20] *See* "Broadband passes dial-up in U.S." Eric Auchard (citing Neilsen/Net ratings report that concludes 51% of U.S. residential users connect to the Internet via broadband links), found at www.msnbc.msn.com/id/57509681.
[21] *FCC High Speed Services for Internet Access Services: Status as of June 30, 2004* – Table 1: High Speed Lines (rel. December 22, 2004).
[22] As of June 30, 2004, ADSL and cable accounted for 92.4% of all high-speed lines in the U.S. and accounted for 97.4% of all high speed lines in the residential and small business market. *Id.* at Table 1 and Table 3: Residential and Small Business High-Speed Lines.
[23] *Id.*

raising DSL's overall broadband market share by 3.8%.[24] Through the third quarter of 2004, DSL and cable are considered "neck-and-neck" in the United States for consumers added.[25]

Additional evidence from the Pew Internet and American Life Project confirms that "DSL now has a 42% share of the home broadband market" compared with cable's 54% share.[26] Because many homes have not been loop-qualified for DSL, due to distance, line impairments, or the presence of Digital Loop Carrier systems between the subscriber and the wire center, the actual Total Available Market for DSL services has been substantially limited. Expanding deployment of DSL at remote terminals served by loop carrier systems has raised the loop qualification percentage over the past five years. Given the current growth numbers, it is likely that DSL may well now have, or may soon have, a higher market share than cable modems among homes that are actually able to get DSL service.

Jupiter Research estimates that by 2008 the U.S. should have a 50% broadband penetration, in which DSL will narrow the 2-to-1 adoption gap, reaching more than 20%, compared to cable modem's nearly 25% share. Jupiter figured DSL lines accounted for 6.7% of total U.S. Internet accessibility in 2003, with cable modem representing 14.4 percent. The divide narrows incrementally until it finally reaches just over 4.5% points in 2008.[27] Recent data released by the FCC indicate that this gap will be closed even sooner.[28]

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[24] Report found at www.point-topic.com; *see also*, http://blog.tmcnet.com/blog/tom-keating/voip/voip-blog/dsl-statistics.asp

[25] DSL Forum and Point Topic Report: *Sharing the broadband market: DSL pulls ahead*, DSL Forum, December 2004, attached as Exhibit A.

[26] Pew Internet Project Data Memo, at 2 (April 2004): *see* http://pewinternet.org/reports.asp?Report=120&Section=ReportLevel1&Field=Level1ID&ID=505

[27] DSL Leads Globally – US Gap Narrowing - *The global broadband connection of choice is expected to catch up to the cable modem in the U.S.*, Robyn Greenspan, CyberAtlas (November 23, 2003), found at http://isp-planet.com/research/2003/dsl_031126.html

[28] *See generally, FCC High Speed Services for Internet Access Services: Status as of June 30, 2004.*

In fact, in some markets, incumbent LEC ADSL already lead cable in the broadband market share.[29] Many of these markets, including California, Montana, North Dakota and South Dakota, are within Qwest's territory.[30]

Perhaps most significant is the fact that of the total number of ADSL lines, **incumbent LECs (including Qwest) have a 95% market share**[31] and overwhelmingly control last-mile transmission facilities used to provide DSL service.[32] And, even with all the "robust" competition Qwest suggests exists, approximately 14% of all American consumers are presently *capable* of being served by just one last mile broadband provider.[33]

Thus, as the above statistics unequivocally show, while cable companies may (for the time being) have slightly more market power than ILECs, it does not mean Qwest, or any ILEC, is in any way "lacking" market power. Nor do the statistics justify either scaling back or abandoning the current regulatory framework.

Thus, today, there are two primary methods competing to provide broadband Internet access, DSL offered by the incumbent LECs and cable modem service, offered by the cable television industry. It is agreed that the cable and telephone industries are very different, with a different history, different capital structure, different network architectures, and, for better or for worse, subject to different laws. This paradigm does not, however, justify the requested

[29] *FCC High Speed Services for Internet Access Services: Status as of June 30, 2004*, Table 7 – High Speed Lines by Technology as of June 30, 2003.

[30] *Id.* (Note, confidentiality concerns precluded the FCC from providing data on cable's subscribership in several states within Qwest's territory, thus, there very well may be additional markets where Qwest's ADSL market share is greater than cable).

[31] *Id.* at Table 5: High-Speed Lines by Type of Provider as of June 30, 2004.

[32] ILECs provision approximately 92% of all loops and receive approximately 88% of all revenues of local service providers in the US. *FCC Statistics of Communications Common Carriers*, Table 5.1 – Total USF Loops for all Local Exchange Companies; Table 5.13 – Gross Revenues Reported by Type of Carrier (rel. March 2, 2004).

[33] *FCC High Speed Services for Internet Access Services: Status as of June 30, 2004*, Table 12 – Percentage of Zip Codes with High-Speed Lines in Service (this number does not include the almost 6% of Americans that are not served by any broadband provider).

forbearance. Telephone companies should not be turned into cable companies. Qwest certainly likes to cite the alleged similarities of the two networks, but they are fundamentally different – from the way they were developed to the way they operate.

Cable companies did not build their networks based on the guaranteed profits of a regulated monopoly that has existed and been filling the coffers of the ILECs for nearly a century and a half. Cable companies' profits have not benefited from rate-of-return regulation. Cable companies have never been totally free from competitive alternatives such as over the air broadcasting and multichannel satellite services. For the first decades of the cable industry's existence its market penetration never exceeded 40-50% versus the typical 96% penetration of the phone industry. Given the success of cable today, it is fair to question whether cable should be immune from open access requirements. The questions surrounding the proper role of cable for the future is not a reasoned basis to allow ILECs to foreclose the markets, in which they are dominant, to competitive and diverse providers.

Cable modem networks were developed by companies whose primary business was entertainment. They saw the Internet taking away eyeballs from television and saw themselves as able to provide a competitive Internet service. Assuming that the Commission's position in the pending *Brand X*[34] case prevails at the U.S. Supreme Court, cable modem services can be easily described as self-provisioned ISPs. That is 180 degrees different from the model that the telecommunications industry has long used in which they provisioned the bandwidth for <u>*any*</u> type of user. Cable systems were developed as closed systems. The telephone network was developed differently. The difference between open and closed networks and the need to retain and extend such openness is evident in the development of the Internet. It is the telephone

[34] *Brand X Internet Services v. FCC,* 345 F.3d 1120 (9th Cir. 2003), *cert. granted,* __ U.S. __, 2004 WL 2153536 (Dec. 3, 2004).

network, not the cable network that permitted the innovation and growth of the commercial Internet in the first place. The Internet is not done growing, technology has not reached its end point, and innovative entrepreneurs stand at the ready to continue the development so long as the tools they need are not taken away from them. Taking any action that deprives or limits access to Qwest's network or even limits the number of ISPs that are able to buy and use naked transmission facilities will eventually lead to the creation of a closed telephone network. Granting Qwest's requested forbearance is the first step down this slippery slope.

If the Commission does grant ILECs their wish to become cable companies, this nation will be left with the primary communications access networks closed – closed to entrepreneurs and closed to innovation. Inevitably, the incredible technological developments witnessed over the past 30 years resulting from open networks will slow to a crawl and eventually dry up.

2. A Duopoly with Cable Does Not Provide Sufficient Price Discipline in the Wholesale DSL Market.

A duopoly partnership, such as that of the ILECs and cable companies, does not provide sufficient price discipline like one that results from a robustly competitive market. "In a duopoly, … supracompetitive pricing at monopolistic levels is a danger."[35] Undoubtedly, without the tariffing safeguards, heightened anti-competitive marketplace pricing is a certainty. This is particularly true here because Qwest utterly (and intentionally) ignores the real world impact its requested retail pricing flexibility will have on its wholesale DSL customers.

Qwest, which admittedly is the second largest competitor for retail broadband services, just so happens to be the primary (and in most instances, the only) wholesale supplier of competitive broadband access throughout its massive territory.[36] Its mass-market DSL service provides its subscribers with a broad choice of ISPs, something not provided by either its

[35] *FTC v. H.J. Heintz*, 246 F.3d 708, 724 (D.C. Cir. 2001).
[36] *FCC High Speed Services for Internet Access Services: Status as of June 30, 2004.*

wholesale service (which is purchased on the end user's behalf by the ISP, who is then the subscriber of record) or by competitive cable modem services (which have a very limited choice of ISP, if any choice at all). Qwest contends its Petition does not involve its wholesale DSL services, presumably to give the impression that such services and those who rely upon them would remain "unaffected" by grant of the Petition, but it is impossible to separate the two. Wholesale and retail DSL are inextricably linked because Qwest is not only the dominant retail provider, it has even more dominance in the wholesale DSL market. With retail pricing flexibility in hand, Qwest will have legal authority to undercut competitors who rely on its wholesale DSL. Sure, Qwest will have greater flexibility to compete head-to-head with cable for retail customers, but that same flexibility can and will also be used to snuff out whatever intramodal competition currently exists.

Intramodal competition and the continuance of competitive choices for consumers demand the denial of Qwest's Petition.

3. The Broadband Market is Not Robustly Competitive.

FCC precedent rejects forbearance *except* where there is clear and substantiated evidence of a robust competitive market.[37] As proof of a robust competitive market, Qwest cites the existence of access via cable modem, wireless and satellite providers and the emergence of BPL. According to Qwest, if it attempted to charge unjust or unreasonably discriminatory rates,

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[37] *In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Sixth Memorandum Opinion and Order, 14 FCC Rcd 10840 (1999) (incumbent LECs failed to meet first prong of Section 10 forbearance standard where incumbents did not demonstrate that they face "substantial competition"); *see also*, *In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Third Memorandum Opinion and Order, 14 FCC Rcd. 10816, ¶ 12 (1999) (first prong of Section 10 forbearance test not met where "independent LECs have sufficient ability through their control of bottleneck facilities to harm the in-region long distance services market by engaging in cost misallocation, access discrimination, and price squeeze); *In the Matter of 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers; United States Telephone Association's Petition for Forbearance from Depreciation Regulation of Price Cap Local Exchange Carriers*, Report and Order in CC Docket No. 98-137 Memorandum Opinion and Order in ADS 98-91, 15 FCC Rcd. 242, ¶ 54 (1999) (under first prong of forbearance test, incumbent LECs failed to "demonstrate that the local exchange market is sufficiently competitive" to warrant forbearance).

customers would turn to these other providers. Qwest is wrong. In order to reach its self-serving conclusion, Qwest must ignore customers of wholesale DSL services. FISPA members belong to this community of customers and they will attest that, even in the face of unjust and discriminatory wholesale DSL rates, they have no choice but to continue purchasing broadband access from ILECs, such as Qwest.[38]

From technological limitations to insufficiently competitive market forces, the "other" broadband delivery platforms Qwest identifies to support its case for forbearance remain out of reach to most consumers. They are not broadly available to the public and even less so to independent ISPs and other wholesale customers. In reality, there are only two broadband delivery options available to the public: ILEC DSL and cable, and only one that is available at wholesale: ILEC DSL.[39] Qwest is wrong when it claims that the telephone network is no longer the primary means for customers to obtain broadband access. As is shown below, Qwest's assertions simply are not true.

- ***Wireless and Satellite Options are Limited and Generally Unacceptable.***

One of many flaws in Qwest's argument is that it fails to recognize that satellite and wireless services are neither reliable nor affordable for most customers and, thus, are *not* viable

[38] Independent ISPs across the country will attest, the broadband market is not competitive. *See BellSouth Opposition* at pp. 31-36, citing to ISP declarations: BluegrassNet Declaration at ¶¶ 24-30; LexiSoft Declaration at ¶ 5 ("The existing marketplace lack competitively priced, technologically-equivalent and commercially-available alternatives to BellSouth and/or other ILEC wholesale transmission services which are essential for our company to provide broadband ISP services to our existing and prospective customers"; CSSLA Declaration at ¶ 5 (accord); SiteStar Declaration at ¶ 5 (accord); WebKorner Declaration at ¶ 5 (accord); Kinex Declaration at ¶ 5 (accord); Bayou Declaration at ¶ 5 (accord); GoldCoast Declaration at ¶ 5 (accord); ECSIS Declaration at ¶ 5 (accord); COL Declaration at ¶ 5 (accord); Supernova Declaration at ¶ 5 (accord); Computer Office Solutions Declaration at ¶ 5 (accord); Mecklenburg Communications Declaration at ¶ 5(accord); WCK Declaration at ¶ 5 (accord); C-N-S Declaration at ¶ 5 (accord); Acceleration Declaration at ¶5 (accord).

[39] FISPA points out that, while not directly relevant to the relief Qwest seeks, for independent ISPs, Cable is not an available alternative and therefore offers no competition in the market for broadband services. *See BellSouth Opposition* at pp. 28-31 citing LexiSoft Declaration at ¶ 7; CSSLA Declaration at ¶7; SiteStar Declaration at ¶7; WebKorner Declaration at ¶ 7; BluegrassNet Declaration at ¶ 28; Kinex Declaration at ¶ 7; Bayou Declaration at ¶7; GoldCoast Declaration at ¶ 7; ECSIS Declaration at ¶ 7; COL Declaration at ¶ 7; Supernova Declaration at ¶ 7.

options. Recent data confirms this conclusion, finding that all other providers, including fixed-satellite and wireless, captured just over 3% of the market.[40]

For many reasons, satellite and wireless, *cannot* be considered a contributing factor in the competitive equation.[41] Licensed spectrum is very costly in most areas, if available at all. 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

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[40] *FCC High Speed Services for Internet Access Services: Status as of June 30, 2004* – Table 1; Pew Internet Project Data Memo.

[41] Likewise, these services are not options for small business and independent ISPs. *See e.g., BellSouth Opposition* at pp. 39-41 citing ISP Declarations: WebKorner Declaration at ¶8 ("Our company investigated the possibility of providing service via Satellite. After investigation, we determined that Satellite service is not technologically comparable to landline broadband due to latency and inadequate upload/download speeds."); BluegrassNet Declaration at ¶¶ 24-27 ("While wireless and satellite technology are sometimes available, they are not reliable enough for BluegrassNet to be considered ready for business class services. This is especially true in more urban areas … there are tremendous difficulties in the open spectrums in the more populated areas at this particular time …. Not only has BluegrassNet attempted to run wireless, but our competitors … have attempted the same thing, and up until this point, all but one have resigned themselves to the fact that there is too much interference and not enough reliability to make it viable for business purposes."); Bayou Declaration at ¶ 8 ("… Our experiences selling our ISP services through Satellite over the past one and a half years have been poor. First, the upfront equipment costs the Satellite company requires customers to pay are unattractive and, second, the technology utilized is not the equivalent of our existing ILEC wholesale supplier. In other words, the upload/download speeds simply were not comparable and is not satisfactory to our existing or prospective customers."); GoldCoast Declaration at ¶ 8 ("Our company investigated Broadband over … Satellite. Our research concluded that … Satellite service is not technologically comparable to landline broadband due to latency and inadequate upload/download speeds. Our core target audience is businesses. There is virtually no way to serve businesses with satellite, especially in downtown areas, where there is not line of sight.); COL Declaration at ¶ 8 ("Our company also explored providing broadband ISP services through a Satellite company offering ISP service in our market. Our exploration concluded abruptly when we determined that the technology used by the Satellite company was not technologically comparable to landline service. In other words, the upload/download speeds simply were not comparable and would not be satisfactory to our existing or prospective customers."); Mecklenburg Communications Declaration at ¶ 7 ("Our company explored providing broadband ISP services through a Satellite company offering ISP service … in our market. Through such exploration our company concluded that providing service via … Satellite would be cost-prohibitive, particularly in the rural areas served by our company."); SiteStar Declaration at ¶ 8 ("Our company also explored providing broadband ISP services through iSat, a Satellite company offering ISP service in our market. Our company began offering iSat services but due to problems encountered with installation and reliability, most customers who signed up for the service have cancelled. Currently, our company serves less than 10 customers via iSat. In the final equation, the technology utilized by iSat was not the equivalent of our existing ILEC wholesale supplier"); LexiSoft Declaration at ¶ 7 ("Our company explored providing broadband ISP services through … Satellite … we have received no cooperation from the Satellite provider."); WCK Declaration at ¶ 7 ("Our company explored providing broadband ISP services through the Satellite company offering ISP service in our market. This exploration did not progress very far because of two reasons: First, the wholesale pricing offered by the Satellite company was unattractive and, second, the technology utilized was not the equivalent of our existing ILEC wholesale supplier. In other words, the upload/download speeds simply were not comparable and would not be satisfactory to our existing or prospective customers.").

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 providers 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, but wireless access can never fully substitute for wireline access and it certainly does not now.

- ***Broadband Over Power Is Not A Viable Option.***

That Qwest would suggest the emergence of broadband over power is a contributing factor for a robust, competitive marketplace is a joke. Broadband over power is non-existent in most markets.[42] Nor is it common carriage, so it is unlikely to be available at wholesale to the bulk of ISPs who now depend on ILEC DSL.

- ***Price is But One Factor That Contributes to a Customer's Decision in Choosing a Broadband Service Provider.***

Qwest argues that the regulations are unnecessary because customers choose broadband service based on cost and, therefore, if it charges unreasonable and discriminatory rates,

[42] *See BellSouth Opposition* at pp. 43-44 citing ISP Declarations, Kinex Declaration at ¶ 9 ("Our company has researched the availability of Broadband over Power Lines ("BPL"). However, the local utility company rolling out BPL is only in testing stages and is not interested in providing wholesale services at this time."); GoldCoast Declaration at ¶ 8 ("Our company investigated Broadband over Power Lines …. Our research concluded that BPL is not available in our market…."); Mecklenburg Communications Declaration at ¶ 7 ("Our company explored providing broadband ISP services through … a utility company offering Broadband over Power Lines in our market. Through such exploration our company concluded that providing service via …the utility company would be cost-prohibitive, particularly in the rural areas served by our company."); Acceleration Declaration at ¶ 8 ("Our company has also investigated Broadband over Power Line technology. Currently, BPL is experimental and not deployed or commercially available in our service area.").

consumers will "turn to other providers." Qwest improperly relies on dated and biased surveys and distorted internal data to support its broad and fallacious conclusion.

Conveniently, Qwest's self-serving presentation of its "internal" data paints only a small portion of the customer choice picture. The reality is, as Qwest's own data shows, that cost is but one factor that contributes to a customer's decision to disconnect its broadband service.

Undoubtedly, as with most services, cost is a consideration, but to conclude generally -- as Qwest does in its Petition -- that cost of service is everything, is simply wrong. If, in fact,

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only cost mattered, as Qwest suggests, the independent ISP would be nonexistent. Almost universally, independent ISPs charge more for DSL service than its RBOC/Wholesaler-Supplier. This is because the wholesale DSL price costs as much as RBOC retail offerings, especially when the RBOC's promotional offerings of free modems and installation are taken into consideration.[48]

Furthermore, the "empirical" data Qwest uses to justify its claims does not rise to the level of proof required for forbearance. Qwest relies on the statement of one employee relating a single experience in one Qwest state in one Qwest city - Omaha, Nebraska. But all this shows is an offer by a cable company to a small neighborhood. And while Qwest claims this proves its ability to compete against cable is hampered because it is regulated and cable is not is a leap far too broad to be credible. Qwest operates in 14 states. One isolated incident is not proof of its claim that it is being harmed by its having to operate under the targeted Title II requirements. Indeed, the statement itself and the attachment make no allusions to whether or in what manner Qwest may have responded to the offer being made or why it could not have made an effective response. As to this latter point, Verizon, subject to the same Title II restrictions as Qwest, currently runs an effective television ad campaign in the Washington, D.C. area touting its far lower price for DSL broadband service than the largest cable operator in the country, Comcast.

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[48] *See BellSouth Opposition* at pp. 33-36, citing ISP Declarations:

It is clear that Qwest's "facts" and statistics are make weight and in no way relate to its ability to compete by being required to do so in a reasonable and non-discriminatory manner. Indeed, the Commission would be foisting on the public a provider of service obviously more focused on ridding itself of its regulatory requirements than providing quality and fairly priced service. While bemoaning its regulated position vis-à-vis cable modem providers, it is totally silent on how the Commission, the public and its competitors can be assured that, once released from the duties to be reasonable and nondiscriminatory, it will not cross-subsidize its broadband services with its still dominant monopoly revenues derived from its lock on local exchange services.

Qwest's arguments are not only based on dated statistics (over one year old), but the validity of these statistics (such as are contained in the) are suspect, if not outright meaningless and contradictory to logic. Qwest argues, for example, that it needs to be relieved of its duty to rate average. Its argument is that if relieved of this requirement it could offer lower rates to its customers located in larger low-cost markets than the rates it now offers to its customers in its high-cost markets. Were the Commission to accept this outrageous argument and eliminate the rate averaging requirement it would be lending its hand to the widening of the digital divide that exists in Qwest's 14-state territory. A result that is far contrary to the Commission's and Congress' pledge to eliminate the digital divide as soon as possible.

Qwest's Petition is not only lacking in the type of proof needed to justify the extraordinary remedy of forbearance, it is also disingenuous, a fact that should alert the Commission to Qwest's true intentions – that is, to use "regulatory freedom" to engage in anti-competitive conduct. In short, Qwest's distorted presentation of its data to support its Petition must be disregarded and the Petition must be denied.

4. Continued Regulation is Needed to Ensure Qwest's Market Power is not Used to Undermine Competition.

Section 251(a) of the 1996 Act imposes a general duty upon all telecommunications carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(b)(4). In order to render interconnection and unbundled access economically feasible, the Act requires ILECs to resell their telecommunications services to CLECs at wholesale prices.[49] As an RBOC, Qwest has similar duties under Section 271. Qwest seeks relief of this requirement for its mass market xDSL services.

The implementation of the regulations from which Qwest seeks relief were necessary, in part, to provide some form of equity to competitors entering a market dominated by providers whose network was built by the public. These requirements were based further on the fact that the ILECs are both competitor and supplier and, therefore, are required to prevent anti-competitive practices such as cross-subsidization, price squeezes, predatory pricing and practices.

Granting Qwest's request for forbearance from these requirements is premature because Qwest still controls essential bottleneck facilities and, as discussed, access to alternative platforms for ISPs seeking wholesale broadband presently is unavailable. Relieving Qwest of its regulatory duty to deal and provide DSL at an avoided cost discount would throw small companies, like those of FISPA members, to the antitrust wolves. As will be shown, antitrust

[49] *Id.* § 251(c)(6). (4) Resale - The duty - (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

laws and the courts entrusted to enforce them are inadequate to protect consumers from anti-competitive practices, particularly small businesses who are consumers of wholesale DSL.

Antitrust law confers a duty to deal in the form of the essential facilities doctrine.[50] The essential facilities doctrine imparts liability on a monopolist who denies competitor access to a resource essential for competition in a relevant antitrust market. Congress enacted the antitrust laws to promote economic efficiency via the protection of the competitive process. Courts and commentators have recognized that distortion occurs in the competitive process when a monopolist refuses access to an essential facility. The instances in which a monopolist has a duty to provide access to an essential facility is "one of the most 'unsettled and vexatious' issues in antitrust law."[51] Antitrust law rarely mandates access to a monopolist's facility for several reasons: (1) liberal access encourages firms to abstain from significant investment initiatives in an attempt to free ride on the investment of their competitors; (2) access inhibits firms from undertaking risky and costly investment in the absence of countervailing first-mover advantages; and (3) mandated access does not have pro-competitive effects unless the terms and conditions of access are reasonable. Absent reasonable access requirements, a monopolist can either permit access on terms that are so onerous that, as a practical matter, access is unavailable[52] or charge monopoly rents for access, in which case price competition becomes impossible.[53]

Blind reliance on antitrust laws to discipline Qwest and other ILECs is insufficient and an unabridged abrogation of the Commission's statutory duties. First, without regulations

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[50] *See* A.D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA: A STUDY OF COMPETITION ENFORCED BY LAW 67 (2d ed. 1970) ("The Sherman Act requires that where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility.").

[51] Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1519 (10th Cir.), *aff'd*, 472 U.S. 585 (1985) (quoting Byars v. Bluff City News Co., 609 F.2d 843, 846 (6th Cir. 1980)).

[52] Robert Pitofsky, Address at the Glasser LegalWorks Seminar on Competitive Policy in Communications Industries, Washington, D.C., *Competition Policy in Communications Industries: New Antitrust Approaches* (Mar. 10, 1997).

[53] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 736.2b, at 667 (Supp. 1996).

mandating access and avoided cost resale, those most likely to be harmed by Qwest's anti-competitive conduct and pricing are those who can least afford access to the courts – small businesses and individual consumers. Second, invocation of the essential facilities doctrine necessarily implicates the prices upon which access is or is not granted. Invariably, any aggrieved entity will challenge the ILEC's access price on the grounds that the price: (1) is so excessive as to constitute a denial of access; (2) impedes price competition; or (3) precludes a reasonable rate of return.[54] Courts are often ill-equipped to assume adequately the role of a price regulatory agency by entertaining such claims.[55] Courts willing to undertake a price control function still must grapple with the unyielding antitrust principal that a legal monopolist may charge monopoly rents for an essential facility.[56] Additionally, the essential facilities doctrine heavily relies on legal precedent derived from various courts resulting in a lack of coherence and consistency.[57]

The Commission's very existence and the statutes, rules and regulations the Commission is charged with enforcing by Congress, including Sections 251(c) and 271 of the Act, rectifies and avoids many of the problems that elude antitrust enforcement. While FISPA agrees that antitrust laws may one day be enough to discipline Qwest and her ILEC counterparts, that day is

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[54] *See id.*, at 692.

[55] According to one commentator:

> [T]he essential facility doctrine should not be invoked unless there is a pre-existing regulatory agency capable of adequately supervising relief, and there are a number of reasons for completely eliminating the doctrine as an antitrust cause of action. Essential facility issues often are best addressed on an industry-wide basis, through legislation or administrative regulation.

Gregory Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS U. L.J. 433, 479-80 (1987).

[56] *See* David J. Gerber, *Rethinking The Monopolist's Duty To Deal: A Legal And Economic Critique Of The Doctrine Of 'Essential Facilities*,' 74 VA. L. REV. 1069, 1087 (1988) (noting that a monopolist can generally "charge a fee that extracts monopoly rents from the users' market"). This situation does not arise when a monopolist is precluded from extracting such fees in the case of a regulated industry. *See id*.

[57] *See generally* Pitofsky, *supra* note 4.

not here. That day will not arrive until competition in *both* the retail and wholesale broadband markets is truly "robust," not just rhetorically robust.

B. FORBEARANCE WOULD HARM CONSUMERS

In order to satisfy the second prong of section 10, Qwest must demonstrate that the regulations at issue are not necessary "for the protection of consumers."[58] Qwest has not shown, nor can it show, that existing marketplace forces would be adequate to constrain its market power and ensure consumers are protected. Granting Qwest's Petition will give Qwest license to charge wholesale rates that raise its rivals' costs. This, in turn, harms consumers, unless those consumers are Qwest's. But once all those consumers are Qwest's, what is left to stop Qwest from raising its retail rates in the duopoly world Qwest envisions? It is well-established that a lack of robust price competition may lead to rates that are excessive and harm consumers.[59] Thus, regulation is necessary for the protection of consumers.

Indeed, as shown in Section IV.C., *infra*, the relief Qwest seeks is the first step down a slippery slope that will eventually harm all consumers.

C. FORBEARANCE IS NOT IN THE PUBLIC INTEREST.

Unlike her sister RBOCs, who have no shame with forbearance requests that overtly seek to exclude independent ISPs from their networks, Qwest's request, at least superficially, appears "ISP-friendly." The Commission must not be fooled by Qwest's smoke screen. Qwest's goals are the same as her sisters'. Qwest's requested forbearance is just the first step down a slippery slope, one which will eventually lead to the extermination of independent ISPs – other than those hand-picked by Qwest.

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[58] 47 U.S.C. § 160(a)(2).

[59] *Special Access Forbearance Order* ¶ 34 ("Absent a sufficient showing of competition, it is clear that regulation of the BOC petitioners' special access and high capacity dedicated transport services is necessary to protect consumers").

Stripped of all the pseudo arguments and self-serving statistics presented by Qwest, the only way to interpret a request to lift the targeted regulatory obligations in regard to broadband its mass market DSL services is that Qwest wants the right to discriminate against its wholesale competitors in favor of itself. More, not less, competition in the market for wireline broadband services, and all communications markets, is and always should be the Commission's paramount goal. Only by ensuring that the conditions needed to stimulate such competition remain in place can the Commission be assured it has satisfied its obligation to the public. The Commission must learn from its long track record of prematurely de-regulating dominant companies and refrain from doing so here.

The forbearance Qwest seeks will have a profound impact on consumers and small businesses, both retail and wholesale, in the short term. The continued diversity of choices to the public rests on their ability to continue to have reasonable access to the network facilities necessary to deliver their services. But the consequences are far graver and far more devastating when one takes a longer view of all of the RBOCs' forbearance requests. What is at stake is the very future of the Internet, technological development, consumer choice and freedom, and with it, America's ability to remain the global leader in information technologies.

Qwest's forbearance request, and others like it, represents a clear and present danger that the future availability of xDSL service will only come from the long entrenched local exchange monopolists. If this danger is realized, the public's current right and capability to choose ISPs, based on their differentiated service offerings and the unique needs of individualized consumers, will be sacrificed.

Entities that have not been born, bred and matured as a monopoly, of necessity, have had to innovate and create service distinctions that appeal to various niche markets – first, in order to establish a market and, then, to sustain their presence in that market. The independent ISP's business plan seeks not to be the choice for every potential user, but to be an attractive choice to users that may most benefit from its unique services. Forbearance will quickly convert a market of diverse choices into an anachronistic throwback to the days of homogenized, non-differentiated, totalitarian–like services, such as those available in countries that do not value and support free enterprise and free speech, that do not tear down entry barriers, but erect them, that do not allow choice but require purchase of services from a state-controlled entity. Although for different reasons and in different ways, the same smothering atmosphere will be created – not with control directly in government hands, but in the hands of private interests created over decades of sanctioned monopoly and perpetuated by government decision. What will be sacrificed is differentiation and choice created and offered by independent ISPs.

- **Service Differentiation - Content Filtering**

One area of service differentiation involves content filtering. Today, this usually consists of two very different types of service. One, often thought of as "family-friendly" filtering, intentionally blocks access to services believed to be unsuitable to some classes of viewer. Courts have ruled that this cannot be mandated of an ISP, but there are ISPs and FISPA members, especially focused in certain geographic regions, that choose to offer this because of their constituencies.

Another type of filtering is anti-spam defense. Here, there are several approaches at work. It is not always easy for a machine to tell spam from valid email. Some ISPs leave all filtering to the end user. Others block mail that fails some kind of protocol or other test. For example, there is currently a debate in the protocol community around Sender Policy Framework ("SPF") and competing methods of distinguishing forged email. Some ISPs choose block lists from among the many blacklist services now available. These services are not 100% reliable, so ISPs have to choose which ones they find most useful, and implement blocking policies. Some ISPs use rule-based filters such as SpamAssassin. Some use Bayesian filtering of the content. Some use human-mediated spam block services, such as Brightmail, which have rapidly-updated active spam filters that block specific spam messages before they are widespread. And for each of these anti-spam techniques, the ISP chooses whether to block the mail entirely, move it to a special mailbox that the user can choose to query to search for the occasional false positive, or merely label the message as questionable so that the user can filter it. An ISP monopoly unconstrained by regulatory safeguards can destroy these variations and the public will be the loser.

A particular example of the risks of choosing a blocking strategy is the case of Verizon Online which, in December, 2004, implemented a new anti-spam policy which used extremely broad criteria for determining what might be spam. This reportedly included most mail servers outside of the United States, including those of many major overseas corporations and ISPs. Such mail was blocked, rather than simply labeled, preventing users of Verizon Online's mail service from receiving large volumes of legitimate mail. Users reported that Verizon's suggested fix was for them to get Hotmail accounts, and to tell all of their correspondents to use that in lieu of their established verizon.net addresses. This type of problem would drive many customers away from an ISP that faced serious competition; instead, Verizon seeks to exclude competition from its DSL lines. While Qwest's petition would not absolutely exclude competing ISPs, it would certainly reduce the choice and increase the cost of alternatives.

- **Service Differentiation - Symmetry vs. Asymmetry of Bandwidth**

Consumer DSL services are almost always provisioned using *Asymmetric* DSL technology. This usually works well because consumer demand tends to be much greater in the download than upload direction. Business subscriber requirements tend to be far more symmetrical. Existing DSL tariffs generally permit the ISP to choose between different speed packages, allowing for a variety of upstream and downstream bandwidth offerings.

ADSL technology is capable of being less asymmetric. Some ISPs use ILEC ADSL services with the upstream and downstream bandwidth both set to 640 kbps. This is near the maximum upstream and minimum downstream rate, but it provides a business-class symmetric service using inexpensive ADSL equipment. The cost of this to the underlying ILEC is essentially the same as for a more asymmetric service; the choice is made at the ISP layer, not the telecommunications service layer.[60] This choice would be lost under Qwest's requested forbearance.

- **Service Differentiation - Vertical Services**

Retail ISPs provide a number of "vertical" services in addition to raw Internet access. These are also differentiators. America Online, for instance, sells a "bring your own" service that provides no access, merely permission to use its vertical services. But most subscribers pick an ISP that provides a bundle of access and vertical services. The most familiar vertical service is probably email. This has many differentiators other than the aforementioned spam filtering. Email, in turn, has two functions: relaying (used for sending) and servers. The relaying function

[60] The maximum downstream rate for ADSL is 8 meg, the maximum upstream for ADSL is 1 meg. Some ISPs use a combination of asymmetric upstream and downstream to offer a more symmetric offering, suitable for business. For example, an ILEC's 768Kbps x 512Kbps ADSL offering can be used to create a 512x512Kbps symmetric service offering.

of most ISPs is straightforward, allowing users of their networks to send email anywhere via their server. There are, however, subtle differences. The Internet's mail protocol, SMTP, uses port 25. As an anti-spam measure, some ISPs block port 25 sent from the user to anyone but the ISP server. This prevents virus-hijacked machines from becoming bulk senders. But it also prevents users from sending mail directly, as some choose to do. A few ISPs permit port 25 SMTP sending but cap the volume, which allows typical users' email to flow, but blocks the torrent caused by a virus.

Verizon Online, however, instituted a policy by which its users are required to put Verizon's domain name in the header of their message, instead of the name of their chosen email address (which, of course, could be a private domain or a different service). This *mandatory advertising* policy is incompatible with many users' preferred mode of operation, but is nonetheless imposed on Verizon's DSL subscribers.

Email receiving options are also varied. Retail ISPs provide an email server that stores incoming emails until fetched. These do not all behave the same. They have different storage capacity quotas, blocking emails once the quota is full. Most support POP3, a simple protocol that allows retrieval of email by a client. A few ISPs support IMAP4, a more elaborate protocol that allows manipulation of the email on the server, and allows email to remain on the server while being filed by a mailbox or selectively retrieved. Some ISP POP3 servers support an option that allows email to be selectively retrieved by multiple clients (say, a user's desktop and laptop computers) while retaining knowledge that it has or has not been already retrieved once. Some encrypt passwords in transit; some do not. Many, but not all, offer web-based access as well. Many offer more than one mailbox per account, especially suitable for families; some only offer one.

Independent ISPs also offer additional services such as personal web pages. Web services vary in terms of storage capacity, usage quota, page creation support and available features (Common Gateway Interface or Active Server Page support, PHP programming, etc.). Some broadband ISPs also offer dial-up support for travel, with or without a quota of "free" hours. Some provide help with virus removal; others bundle it in software. Some support only Microsoft Windows users; some provide support for Apple Macintosh and Linux users.

What becomes of this clearly beneficial diversity if the Commission grants Qwest's Petition? Homogeneity in information services and technology benefits no one but the dominant provider of both content and transmission. The Commission must not grant Qwest the opportunity to squelch the diversity in options driven by independent ISPs – but that is exactly what Qwest is asking the Commission for authority to do.

- **Service Differentiation - Servers and Tunnels**

Independent ISPs often prohibit residential retail customers from having "servers" on their lines. This is widely done to prevent subscriber web servers from overloading the upstream direction; cable modem networks are especially limited in the upstream direction. But just how this is interpreted does vary from ISP to ISP. Some have policies against using secure tunneling protocols, such as IPsec. Some allow private email servers, some do not. Again, this is the type of issue that is best handled in a vibrant, competitive market with many players. These issues do not impact the underlying telecommunications layer, only the higher layers serviced by independent ISPs.

The "layered" approach to regulatory policies, as supported by FISPA and favored by the vast majority of non-ILEC commenters in the WC Docket No. 02-33 rulemaking proceeding is fully compatible with this approach. Forbearance is not.

The preceding Sections demonstrate that the current regulatory system has worked, continues to work, and has resulted in immeasurable benefits and abundant choice to the American consumer. Qwest's Petition creates a clear and present danger to these achievements and threatens continued diversity, tailoring of services, and customer choice made possible by independent ISPs. The Petition must be denied.

III. SECTION 10(d) PROHIBITS FORBEARANCE FROM SECTION 251(c) AND 271 REQUIREMENTS.

Section 10(d) places an explicit "[l]imitation on the remainder of section 10," providing 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."[61] Qwest's failure to satisfy the requirements of section 10(d) mandate the denial of the Petition.[62] Qwest presents distorted and unconvincing evidence to support the conclusion that a robust wholesale market exists that enables competing providers to obtain access to the telecommunications services and facilities they require to enter the market without the need for continued enforcement of section 251(c) or 271. Indeed, Qwest cannot satisfy the requirements of section 10(d) because it continues to exercise market power over the facilities that connect consumers to the Internet. Thus, the request for forbearance must be denied.

IV. THE CURRENT REGULATORY FRAMEWORK GOVERNING ILEC BROADBAND SERVICES SHOULD REMAIN UNCHANGED.

While imperfect in its enforcement, the existing regulatory system has a long history of success. FISPA posits that what is not broken need not be fixed. Indeed, the Commission should take note of the history of achievement and consumer choice given life through the

[61] 47 U.S.C. §160(d).

[62] Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, 18 FCC Rcd. 23525, ¶¶5, 9 (2003).

current regulatory framework and consider extending and enforcing these requirements on all broadband platforms and other facilities that remain essential to deliver information content to the American consumer, regardless of geographic location or income level.[63]

A public utility is regulated because its services are so important and ubiquitously required that economies of scale either warrant the grant of monopoly status or create the necessity for it. To control such power, government regulation is required to balance the competing interests of public need and right versus corporate goals and private rights. Whether the monopoly is a *natural* monopoly or one that warrants government recognition as a monopoly, the economic effect is the same - the cost of becoming another provider is significantly greater than the incumbent's cost, making competitive entry uneconomical or competitive survival problematic, post market entry.

While removal of some of the targeted regulations may slightly reduce Qwest's cost of doing business, the action Qwest's Petition asks the Commission to take creates a slippery slope that will ultimately lead to the undermining of over three decades of pro-competition policy.

V. CONCLUSION

Qwest's assertions fail to provide relevant factual support for the relief it requests. The Petition improperly highlights and distorts statistics in an effort to support its broad statements that the broadband market is optimally competitive. More importantly, Qwest conveniently ignores the relevant market – the wholesale DSL market – throughout its Petition. The forbearance Qwest seeks will have a profound impact on consumers and the public as a whole. The continued diversity of choices to consumers, development of information technology, and the future of a vibrant Internet rests on the denial of Qwest's Petition. The Commission should

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[63] *See* BellSouth Opposition at pp. 6-17.

not entertain Qwest's Petition any more than it should entertain those filed by her sister RBOCs. The Petition must be denied.

Respectfully submitted,

THE FEDERATION OF INTERNET SOLUTION PROVIDERS OF THE AMERICAS

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EXHIBIT A

CERTIFICATE OF SERVICE

I, Suzanne Rafalko, a legal secretary in the offices of The Helein Law Group, LLLP, do hereby state and affirm that copies of the foregoing "Opposition of the Federation of Internet Solution Providers of the Americas," have been served this 6th day of January, 2005, in the manner indicated, upon the following:

Marlene H. Dortch, Secretary Federal Communications Commission 445 12th Street, S.W. Room TW-A325 Washington, D.C. 20554 (Via Hand Delivery)	Original + 4 copies (Redacted) 1 copy (Non-Redacted)
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/s/

Suzanne Rafalko