

**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)	

REPLY COMMENTS OF EARTHLINK, INC.

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INTRODUCTION AND SUMMARY

Unlike the similar forbearance petitions filed by BellSouth and Verizon that seek broad forbearance from the application of all Title II and *Computer Inquiry* requirements,¹ on its face Qwest's Petition seemingly requests only targeted relief from certain common carrier provisions found in Title II of the Communications Act. Specifically, Qwest has asked the Commission to forbear from applying dominant carrier tariff regulations, rate averaging requirements, and the requirements to resell at an avoided cost discount.² However, contrary to Qwest's assertion that it somehow only

¹ Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of *Computer Inquiry* and Title II Common Carrier Requirements, WC Docket No. 04-405 (filed Oct. 27, 2004); In the Matter of Petition of 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 04-440 (filed Dec. 20, 2004).

² Qwest Petition at 3.

seeks relief in “narrow” pricing areas,³ its request in fact covers much of the same ground as the forbearance petitions of the other ILECS.⁴ Because Qwest declared in its Petition that it “supports and joins BellSouth’s recently-filed forbearance Petition,”⁵ it is clear that it is the company’s intention to use any “narrow relief” granted by the Commission to achieve the same anti-competitive and anti-consumer goals sought by BellSouth and Verizon.⁶ As EarthLink and others stated in the opening round of comments, if the Commission grants Qwest’s relief as requested, Qwest will be authorized to use this relief to avoid tariff requirements and to demand discriminatory rates and terms for the transmission component of its xDSL service. Indeed, just as in the BellSouth forbearance proceeding, forbearance from the regulations under consideration here would threaten the ability of independent ISPs and CLECs to obtain the essential wholesale transmission service that makes delivery of high-speed Internet access services to their consumers possible. Without these regulations, Qwest would have both the ability and incentive to foreclose competition from these independent ISPs and CLECS, leaving consumers in Qwest territory with little or no choice of high-speed Internet service providers.

³ *Id.* at 3.

⁴ In its opposition to the BellSouth forbearance petition, EarthLink gave several reasons why there is no basis for forbearance from the core common carrier provisions in the Communications Act applicable to the transmission component of ILEC high speed Internet access services. Rather than repeat those arguments at length here, EarthLink incorporates them by reference in this proceeding. *See* EarthLink Comments, Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of *Computer Inquiry* and Title II Common Carrier Requirements, WC Docket No. 04-405 (filed Dec. 20, 2004).

⁵ Qwest Petition at 2.

⁶ *See* AT&T Comments at 1-2; Federation of Internet Solution Providers of America Comments at 3-4; Time Warner Telecom Comments at 5-6; Washington Bureau for ISP Advocacy Comments at 4-5.

As pointed out in EarthLink's opening comments, and supported by the majority of commenters in this proceeding, there are three fatal flaws in Qwest's Petition which should control the Commission's disposition of this proceeding:

1. Qwest provides no tangible evidence that dominant carrier tariff, rate averaging, and avoided cost discount requirements have reduced incentives, created barriers to entry, or slowed the deployment of any its services. Citing only *the possibility* of delays and expenses, Qwest has failed to address any substantive harm that these requirements have had on its ability to offer existing or new services to consumers in a timely fashion. In fact, the empirical evidence shows that these requirements, in addition to helping create a competitive ISP marketplace, present no actual impediment to Qwest's services. Forbearance therefore is not appropriate.
2. Qwest's Petition relies solely on evidence regarding *retail competition*, while providing no discussion or analysis on the level of competition in the provision of *wholesale transmission services*. Because there is little competition in the wholesale transmission service market, and ISPs depend upon wholesale transmission services in order to offer retail competition in Internet access services, the Commission must evaluate the impacts of the wholesale transmission market on the very retail competition which Qwest cites as justification for the forbearance it seeks. The Petition provides no evidence of the state of competition in the wholesale marketplace, and it grossly understates the market power that ILECs like Qwest retain in this market. For these reasons, the Commission must deny the Petition.
3. Qwest relies on the argument that "robust intermodal competition" in the retail services marketplace satisfies all three prongs of the section 10 forbearance test.⁷ It does not. Under section 10, a petitioner must make three "conjunctive" showings that forbearance is appropriate, and in the absence of such a record, the Commission should "deny a petition for forbearance if it finds that any one of the three prongs are unsatisfied."⁸ Because Qwest has failed to make these showings, its Petition must be denied.

For all these reasons, Qwest has not met the burden of showing that forbearance from the requested requirements is appropriate. As such, the Commission should continue to enforce dominant carrier tariffing and tariff review, and to require that Qwest

⁷ Qwest Petition at 13, 20, 33.

⁸ *CTIA v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

continue to sell transmission service at an avoided cost discount to CLECs. Accordingly, the Petition must be denied.

I. THE COMMISSION MUST DENY THE PETITION BECAUSE QWEST HAS NOT PROVIDED TANGIBLE EVIDENCE OF SUBSTANTIVE HARM SUFFICIENT TO JUSTIFY FORBEARANCE FROM DOMINANT CARRIER TARIFF REGULATION, RATE AVERAGING, AND AVOIDED COST RESALE REQUIREMENTS.

As EarthLink stated in its comments, 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.⁹ 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 its customers possible. Some of the most important regulatory mechanisms to ensure the availability of competitive transmission services are those for which Qwest now seeks forbearance.

The dominant carrier tariff and avoided cost discount requirements that Qwest requests the Commission to forbear from applying to its xDSL services serve several necessary functions: they alert ISPs, CLECs, and the Commission to any changes that would ultimately impact consumers of retail DSL-based Internet access service; they allow wholesale ISP customers to adjust their business and marketing plans in light of

⁹ See EarthLink Comments at 8; see also AT&T Comments at 2-3; Federation of Internet Solution Providers of America Comments at 2 (“[I]ndependent ISPs have long been the engine hidden beneath the hood of the car driving the Internet and broadband revolutions.”); Washington Bureau for ISP Advocacy Comments at 2 (“[T]he independent ISP industry [is] the very industry that gave rise to the Internet, stimulated its widespread deployment, and on whose back this nation’s information economy is now solidly based.”).

any sudden service changes; and, perhaps most importantly, they are critical safeguards against unreasonable wholesale pricing and serve to expose efforts by ILECs to impose unreasonable or discriminatory terms on ISPs and CLECs. Despite the obvious need for these requirements, Qwest asks the Commission to forbear from applying them to its xDSL service without providing any evidence of the substantive harm that the requirements allegedly have on Qwest's ability to offer existing or new services to consumers in a timely manner. The burden is on Qwest to do so. Instead, Qwest cites only the *possibility* of delays and expenses that are associated with tariff filing,¹⁰ but offers no actual examples of such delays or expenses, or how they affect Qwest's ability to offer its services to its subscribers. In fact, the evidence suggests that the ADSL service that is subject to these 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 a 5% share for CLECs.¹¹

Similarly, the rate averaging requirements from which Qwest seeks forbearance ensure that the rates charged by telecommunications carriers in rural and high cost areas will not be higher than the rates charged by the same provider to its subscribers in urban areas. Qwest's argument, however, that averaged rates create disincentives for Qwest to deploy its services in rural areas,¹² is simply not supported by any evidence in the

¹⁰ Qwest Petition at 18-19.

¹¹ 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*).

¹² Qwest Petition at 21-22.

Petition.¹³ In fact, as EarthLink demonstrated in its comments, there is evidence to the contrary that suggests Qwest has made large financial commitments to deploy its broadband services to the rural areas within its territory.¹⁴ Simply put, even before the Commission addresses whether Qwest has met its burden under section 10 of the Act, without evidence that Qwest actually needs the relief it is requesting, the Commission must deny the Petition.

II. THE COMMISSION MUST DENY THE PETITION BECAUSE IT FAILS TO PROVIDE ANY ANALYSIS ON THE LEVEL OF COMPETITION IN THE PROVISION OF WHOLESALE TRANSMISSION SERVICES.

The majority of comments in this proceeding also recognized that the Petition—likely by design—mischaracterizes the relevant marketplace. Qwest’s Petition relies solely on evidence regarding *retail competition*, while providing virtually no discussion or analysis on the level of competition in the provision of *wholesale transmission services*.¹⁵ It is wholesale competition that is necessary to ensure that competitive services continue to reach end users. Perhaps the central issue for independent ISPs and CLECs in this proceeding—as well as the other ILEC forbearance proceedings—is whether there are alternative safeguards within the *wholesale* product market sufficient to

¹³ See Covad comments at 8 (“[D]eregulation...has not resulted in any increased or innovative investments by the incumbents—rather, it has simply set the stage for their remonopolization...”).

¹⁴ See EarthLink Comments at 17-18 (citing sources showing that Qwest spent \$100 million in 2003 to extend its xDSL service to rural areas).

¹⁵ See AT&T Comments at 9 (“Qwest does not even attempt to demonstrate the existence of meaningful competition for *wholesale* last-mile broadband transmission facilities and services...”); COMPTTEL/ASCENT Comments at 7 (“Qwest’s failure to properly identify the relevant product and geographic markets, much less prove that it lacks market power therein, is fatal to its Petition.”); ITAA Comments at 3 (“Qwest, however, has completely ignored the *wholesale* broadband market.”); Time Warner Telecom Comments at 3 (“Qwest never defines either the product or geographic markets for ‘mass market’ broadband services with any precision.”); Washington Bureau for ISP Advocacy Comments at 5 (“What Qwest conveniently ignores is the wholesale broadband access market...”).

protect against unreasonable or discriminatory rates and practices by ILECs—and in particular large ILECs like Qwest—in the absence of the requirements that mandate that ILECS make available the transmission underlying their broadband Internet access service. The Petition offers no discussion whatsoever on this central question. It provides no evidence of the state of competition in the wholesale marketplace, and it grossly understates the market power that ILECs like Qwest retain in this market.¹⁶

Moreover, the Petition fails to discuss how forbearance would adversely impact competition in the retail services market because the wholesale marketplace for underlying transmission services is not competitive. The reality is that ILECs serve 95% of xDSL customers, so in the vast majority of cases independent ISPs must depend on ILEC facilities to reach its end users. Forbearance from all Title II provisions would eliminate what little competition in the wholesale marketplace there is today.¹⁷ As a result, the retail marketplace would be reduced to only two players—cable providers and ILECs. By eliminating wholesale competition, forbearance from the regulations in question would produce, at best, a duopoly market for broadband Internet access services. Such a result harms not only independent ISPs, but ultimately the retail consumer who will be denied a competitive choice in this market.

Qwest's only argument with respect to the wholesale transmission services marketplace is that “[c]ompetition from multiple sources and technologies in the retail

¹⁶ See ITAA Comments at 5-6 (ILECs retain substantial market power in the wholesale marketplace and therefore have the ability to subject rival ISPs to a “price squeeze.”).

¹⁷ See AT&T Comments at 9 (“In the vast majority of cases, non-affiliated providers of broadband services and applications...simply do not have any way of providing their competitive services without access to ILEC last-mile facilities, because they rarely have access to competitive alternatives outside the incumbents’ networks.”).

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.”¹⁸ This argument fails because cable is the only real-world example of what will happen absent the Title II requirements which Qwest is asking the Commission to forbear from applying. The fact is that cable companies almost uniformly refuse to sell their transmission services to unaffiliated ISPs. With the exception of Time Warner Cable, which is required to sell access to a limited number of ISPs under conditions of the AOL Time Warner merger, no other cable company makes transmission services available to unaffiliated ISPs on any commercially meaningful scale.¹⁹ The Commission’s continued refusal to apply common carrier regulation to cable modem services has permitted cable companies to exclude competitors in an effort to maximize their own profits and retail market share.²⁰

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. Further, because Qwest supports the much-broader petitions of BellSouth and Verizon 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,²¹ the evidence before the

¹⁸ Qwest Petition at 25.

¹⁹ See Covad Comments at 6 (Actual marketplace evidence confirms that cable does not compete with ILECs in the broadband marketplace).

²⁰ EarthLink and others have consistently opposed the Commission’s refusal to apply common carrier requirements to cable. See *Brand X Internet Services v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003), cert. granted (Dec. 3, 2004) (Nos. 04-277 & 04-281).

²¹ *Id.* at 2-3.

Commission strongly suggests that, if forbearance were granted, Qwest in fact intends to follow the discriminatory path chosen so far by cable providers.

III. THE COMMISSION MUST DENY THE PETITION BECAUSE IT DOES NOT MEET THE REQUIREMENTS FOR FORBEARANCE UNDER SECTION 10 OF THE COMMUNICATIONS ACT.

In its Petition, Qwest argues that the existence of “robust intermodal competition” in the broadband services marketplace satisfies all three prongs of the section 10 forbearance test.²² It does not. Because the section 10 test is stated in the conjunctive, before the Commission may lawfully forbear from applying any of the Act’s provisions, the petitioner must satisfy each of the three parts of that test. First, the petitioner must show that the enforcement of the identified requirements for the specific services at issue “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.”²³ Second, it must show that the enforcement of the identified requirements “is not necessary to protect consumers.”²⁴ Third, it must show that the non-enforcement of the identified requirements “is consistent with the public interest,” including consideration of whether such forbearance will promote “competitive market conditions.”²⁵ The Petition does not satisfy any of these statutory criteria.

²² See Qwest Petition at 13, 20, 23.

²³ 47 U.S.C. § 160(a)(1).

²⁴ 47 U.S.C. § 160(a)(2).

²⁵ 47 U.S.C. § 160(a)(3) and (b).

Although the existence of competition may be relevant to the analysis under each part, the mere presence of 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.”²⁶ 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.

Particularly in this case, where granting forbearance would significantly reduce or eliminate any competition in the provision of wholesale transmission services, and thereby reduce retail competition in the provision of broadband Internet access services, it is clear that the public interest would not be served. Moreover, as discussed above, continued application of the Title II requirements for which forbearance is sought clearly is necessary to ensure that Qwest does not engage in discriminatory practices towards

²⁶ 47 U.S.C. § 160(b) (emphasis added).

independent ISPs, to protect consumer access to independent ISP services, and to promote competition in the ISP marketplace. As a result, Qwest's Petition fails each of the three statutory tests and should be denied.

CONCLUSION

Qwest has not met its burden of satisfying the statutory requirements for forbearance under section 10 of the Act. The prevention of unreasonable and discriminatory practices, protection of consumers' interests, and the public interest all demand that the transmission component of wireline broadband services provided by Qwest and other ILECs remain available on reasonable and non-discriminatory terms under Title II of the Communications Act. EarthLink respectfully urges the Commission to maintain the current regulatory framework for the ILEC provision of wholesale DSL services to unaffiliated ISPs and CLECs. For the foregoing reasons, Qwest's Petition should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Magovern", with a long horizontal flourish extending to the right.

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