

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
) WC Docket No. 07-52
Broadband Industry Practices)

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

QWEST COMMUNICATIONS
INTERNATIONAL INC.

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Qwest Communications International Inc. (“Qwest”) hereby submits its comments on the *Notice of Inquiry* (the “*NOI*”) issued by the Federal Communications Commission (“Commission”) on April 16, 2007 in this proceeding.¹

I. INTRODUCTION AND SUMMARY

In describing the intended purpose of the *NOI*, the Commission states that it “seeks to enhance [its] understanding of the nature of the market for broadband and related services, whether network platform providers and others favor or disfavor particular content, how consumers are affected by these policies, and whether consumer choice of broadband providers is sufficient to ensure that all such policies ultimately benefit consumers.”² More specifically, the Commission, in the *NOI*, asks for examples of beneficial or harmful behavior, focusing particularly in the areas of packet management and pricing practices employed by providers.³ The Commission also asks whether “any regulatory intervention is necessary.”⁴ In connection

¹ *In the Matter of Broadband Industry Practices*, WC Docket No. 07-52, Notice of Inquiry, FCC 07-31 (rel. Apr. 16, 2007).

² *Id.* ¶ 1.

³ *Id.* ¶¶ 8-9.

⁴ *Id.* ¶ 1.

with this last inquiry, the Commission invites comment as to whether it should adopt a new principle of non-discrimination.⁵

As discussed more fully below, Qwest submits that it is beyond dispute that the market for broadband services is competitive. Indeed, the Commission so found in its *2005 Broadband Order*⁶ and competition has only increased since that time. As a result, Qwest, as a broadband service provider (“BSP”), has every incentive to employ and does in fact employ pro-competitive network management and pricing practices. Indeed, competition in this market does ensure that consumer choice is able to act as a natural market “regulator” to prevent policies that harm consumers. In light of this record, there clearly is no basis for any form of regulatory intervention at this time. With respect to an affirmative non-discrimination obligation, every sensible policy argument suggests a “hands-off” approach in this area. Additionally, this particular type of proscriptive regulation is beyond the limited scope of the Commission’s Title I jurisdiction.

In short, it is Qwest’s position that the market forces of a competitive market are the answer to any concerns raised by proponents of proscriptive regulation in the name of “Net neutrality.”⁷ At this time, Internet (or “Net”) regulation is a solution in search of a problem.

⁵ *Id.* ¶ 10.

⁶ See *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Internet Access Services Order*) (“2005 Broadband Order”), *pets. for review pending sub nom. Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases) (Third Cir. filed Oct. 26, 2005, oral argument held Mar. 16, 2007).

⁷ “Net neutrality” is a catch-phrase typically used to describe efforts to impose costly new regulation (through new legislation or agency regulation) on the Internet and on Internet access. As discussed below and in numerous other filings in this docket, these so-called Net neutrality proposals are hardly neutral and, indeed, would impose costly and one-sided regulation on the Internet and Internet access.

Qwest believes the Commission and Congress have been correct in refraining to-date from Internet regulation and should not change course now.

II. QWEST'S COMMENTS

A. The BSP Market Is Competitive And Proposals For Internet Regulation Are Solutions In Search Of A Problem.

1. The broadband services market is competitive.

The BSP market is indisputably competitive.

Indeed, the Commission, in its *2005 Broadband Order*, found the market for broadband Net access to be thriving.⁸ In that *Order*, the Commission stated:

... a wide variety of competitive and potentially competitive providers and offerings are emerging in this marketplace. Cable modem and DSL providers are currently the market leaders for broadband Internet access service and have established rapidly expanding platforms. There are, however, other existing and developing platforms, such as satellite and wireless, and even broadband over power line in certain locations, indicating that broadband Internet access services in the future will not be limited to cable modem and DSL service. Changes in technology are spurring innovation in the use of networks. As discussed below, there is increasing competition at the retail level for broadband Internet access service as well as growing competition at the wholesale level for network access provided by the wireline providers' intramodal and intermodal competitors. We find that an emerging market, like the one for broadband Internet access, is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as this market continues to evolve.⁹

With respect to future trends, the Commission stated that:

Increased intermodal and intramodal competition will continue to encourage these two broadband providers to deploy broadband Internet access services throughout their respective service areas. In addition, the threat of competition from other forms of broadband Internet access, whether satellite, fixed or mobile wireless, or a yet-to-be-realized alternative, will further stimulate deployment of broadband infrastructure, including more advanced infrastructure such as fiber to the home.¹⁰

⁸ *2005 Broadband Order*, 20 FCC Rcd at 14879 ¶ 47.

⁹ *Id.* at 14880-81 ¶ 50 (footnotes omitted).

¹⁰ *Id.* at 14884 ¶ 57 (footnote omitted).

It is also noteworthy that the Commission's decision to "de-list" hybrid loops, Fiber-to-the-Curb ("FTTC"), Fiber-to-the-Home ("FTTH") and any obligation to provide line sharing from Section 251 unbundling rested upon its findings that competition made unbundling unnecessary.¹¹

There is extensive and more recent data from a variety of sources confirming the Commission's prior findings that the market for broadband access, however that market is defined, is competitive. By way of example, in January of 2007, the Commission reported that, for the twelve-month period ending June 30, 2006, high-speed lines increased by 22.1 million, from 42.4 million lines to 64.6 million lines. Of the 64.6 million total high-speed lines in existence as of that date, 44.1% of those were cable modem, 34.9% were asynchronous digital subscriber line ("ADSL"), 1.5% were symmetric digital subscriber line ("SDSL") or traditional wireline, 1.1% were fiber to the end-user premises, and 18.4 % used other technologies.¹² This last category includes satellite, terrestrial mobile wireless (licensed or unlicensed), electric power line, or "all other" technology.¹³ The Commission's January 2007 report reveals that there are 1,323 providers of high-speed lines.¹⁴ Notably, the number of residential satellite and wireless high-speed lines has increased dramatically (428,367 in June 2005 compared to 1,839,368 in June 2006).¹⁵

¹¹ See *In the Matters of Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*; *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc., Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21502 ¶ 12 (2004).

¹² See High-Speed Services for Internet Access: Status as of June 30, 2006, Industry Analysis and Technology Division, Wireline Competition Bureau, January 2007 at Chart 2.

¹³ *Id.* at n.8.

¹⁴ *Id.* at Table 7.

¹⁵ *Id.* at Table 3.

2. Qwest has every incentive to employ, and does employ, pro-competitive Net architecture management and pricing practices.

Qwest should be permitted to pursue Net management initiatives that the market will allow because the competitive market will “regulate” it adequately. Qwest strives to manage its Net architecture in a manner that preserves and enhances the experience of all end users and enables innovative new end-user experiences. Along these lines, Qwest pursues legitimate network management policies which, among other things, address problems such as spam, viruses and excessive bandwidth use. To that end, Qwest employs industry standards and practices in managing its network. Qwest has also made clear its right to enter into commercial agreements to offer value-added services in connection with the Net. As has always been the case, residential and business customers are able to purchase different tiers of Internet access based on their own customer preference. Qwest believes that content and application providers should have the same ability based on their business needs. In all of these activities, Qwest strives in a competitive market to meet market demands and the needs of both customers and content/application providers.

B. The Products And Services At Issue Are Subject Only To Title I Regulation, Are Not Currently Regulated, And The Commission Should Not Impose Internet Regulation At This Time.

1. The products and services at issue are subject only to Title I regulation.

The products and services at issue in the *NOI* are competitive services subject only to Title I regulation. For example, Net access service is an information service.¹⁶ The Commission has ruled that wireline broadband transmission components used to provide Net access service

¹⁶ 2005 *Broadband Order* at 14857-58 ¶ 4.

are private carriage and are not telecommunications services.¹⁷ As to the latter, the Commission has ruled that these services are merely a telecommunications component of an information service.¹⁸ The Commission emphasized that this was true whether the transmission component is provided over a copper loop, a hybrid copper-fiber loop, FTTC, FTTH or any other type of wireline facility.¹⁹

2. In robustly competitive markets, the Commission consistently declines to regulate.

There is no simply legal basis for the Commission to reverse course now and impose onerous regulation upon the products and services at issue here, particularly when considering the high level of competition already present in the market. Again, as described more fully above, the Commission has found the market for the products and services at issue in the *NOI* subject to robust competition. In such circumstances, the Commission has, in the past, consistently declined to impose regulation.²⁰

¹⁷ *Id.*

¹⁸ *Id.* at 14856 ¶ 3, 14899 ¶ 86, 14909-12 ¶¶ 102-07.

¹⁹ *Id.* at 14860-61 ¶ 9 and n.15.

²⁰ *See, generally, 2005 Broadband Order; See, also, In the Matter of Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service; Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation; Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613, 19693 ¶ 187 (2001) (“We decline to impose regulatory mandates that might hinder the competitive market for interexchange services and the deregulatory objectives of the 1996 Act.”)*

3. Section 157 of the Act creates a presumption against regulation of these products and services.

Section 157 of the Act requires the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing, in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating measures that remove barriers to infrastructure investment.”²¹ In other words, Section 157 creates a presumption against regulation, under either Title I or Title II, of the products and services at issue in the *NOI*. Indeed, the requirement in Section 157 that the Commission remove barriers to infrastructure investment creates a presumption in favor of BSPs’ rights to employ Net management initiatives as these efforts are critical to the ability of BSPs to fund further build-out of the Net infrastructure. In other words, even assuming the Commission had authority to act in a given manner, Section 157 (and relevant statutory history)²² makes it clear that the proponents of Internet regulation must prove their case. In other words, they must affirmatively demonstrate that the current system has actually brought about discriminatory conduct, and that this discriminatory conduct (if any) was detrimental to the public interest. The normal deference given to the Commission’s “predictive judgment” is not operable here.²³ In the absence of facts demonstrating a very real need to regulate, regulation with respect to this quickly evolving technology cannot be supported as a matter of law.

²¹ 47 U.S.C. § 157 note.

²² See 47 U.S.C. § 230(b)(2).

²³ See, e.g., *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Red 11501, 11546 ¶ 95 (1998) (“The Internet and other enhanced services have been able to grow rapidly in part because the Commission concluded that enhanced service providers were not common carriers within the meaning of the Act. This policy of distinguishing competitive technologies from regulated services not yet subject to full competition remains viable . . . We believe that Congress, by distinguishing ‘telecommunications service’ from

4. The Commission should not impose Internet regulation at this time.

The Commission should not impose Internet regulation at this time, whether through an unbundling obligation, a non-discrimination obligation or otherwise. As described above, end users are protected by the existence of competition. Indeed, advocacy for proscriptive Internet regulation here is led in reality by content and application providers who, as described more fully below, seek to impose the entire cost of Net infrastructure on end users. However, arguments in favor of proscriptive regulation reminiscent of that imposed upon former Bell Operating Companies (“BOCs”) in connection with their efforts to provide long distance services or information services ring hollow. In prior debates leading to this legacy BOC regulation, questions were raised about whether BOCs had monopoly power in bottle-neck facilities and whether they should be prevented from using that power to gain control of the markets for long distances services and information services, what restrictions should be placed upon BOCs in the event they were to provide services in such markets, whether BOCs should be permitted to discriminate in favor of themselves in providing those other services, etc. In those prior debates, Congress and the Commission answered by imposing onerous regulatory obligations in connection with BOC provision of both long distance services and information services. The Commission, among other things, required BOCs to unbundle the underlying transmission services and prohibited them from discriminating in favor of their own long distance and information services, respectively, and against other non-affiliated providers of these services.

However, the context for this current debate about broadband service is fundamentally different -- both as to policy and relevant law. Unlike the local exchange service markets at issue

‘information service,’ and by stating a policy goal of preventing the Internet from being fettered by state or federal regulation, endorsed this general approach.”).

in those prior debates,²⁴ BSP service markets and the markets for other data services potentially at issue here are, as discussed more fully above, competitive. As a result, unlike the services at issue in those prior debates, the services at issue here are, as a matter of law, subject only to Title I jurisdiction and, in large part because of this competitive state, are now minimally regulated by the Commission.²⁵ The products and services at issue should not now be regulated under the Act.²⁶

5. A non-discrimination obligation is beyond the limited scope of the Commission's Title I jurisdiction.

Nor can the Commission legally impose a non-discrimination obligation on BSPs in this area. For all the reasons described above and below, a non-discrimination obligation is not needed and would only penalize end users by making them the sole source of revenue for capital funding to build out new network capabilities. When it comes to non-discrimination obligations, there is not any variety of a non-discrimination obligation that would not chill good behavior.

²⁴ Even in those prior debates, the negative effects of regulation on investment and dynamic innovation were evident. *See, e.g., Verizon Communications Inc., et al. v. Federal Communications Commission, et al.*, 535 U.S. 467, 548-54 (2002) (Breyer, J., dissenting); *United States Telecom Association v. FCC*, 359 F.3d 554, 572 (D.C. Cir. 2004) (subsequent case history and citation omitted) (“We note that there are at least two ways in which the Commission could have accommodated our ruling in *USTA I* that its impairment rule take into account not only the benefits but also the costs of unbundling (such as discouragement of investment in innovation in order that its standard be ‘rationally related to the goals of the Act.’”))

²⁵ The Commission relied on these important distinctions in its *2005 Broadband Order*. For example, it found that, “[u]nlike narrowband services provided over traditional circuit-switched networks, broadband Internet access services have never been restricted to a single network platform provided by the incumbent LECs. This is in stark contrast to the information services market at the time the *Computer Inquiry* obligations were adopted, when only a single platform capable of delivering such services was contemplated and only a single facilities-based provider of that platform was available to deliver them to any particular end user. As a consequence, many consumers have a competitive choice for broadband Internet access services today.” *2005 Broadband Order*, 20 FCC Rcd at 14879 ¶ 47 (footnotes omitted).

²⁶ Depending upon the type of regulatory proscription posed, due process, First Amendment, and takings issues could also be implicated in this area.

However, in addition to being a bad idea, a non-discrimination obligation is outside the scope of the Commission's ancillary Title I jurisdiction.

At bottom, a non-discrimination obligation of any kind is the hallmark of Title II regulation and is only appropriate in markets where Title II regulation applies. A non-discrimination obligation can not be imposed here without backtracking on the past rulings made in the *2005 Broadband Order* and others.

The ruling of the United States Supreme Court in *FCC v. Midwest Video* is on point here.²⁷ In that case, the Court upheld a decision by the United States Court of Appeals for the Eighth Circuit that set aside certain of the Commission's cable access, channel capacity, and facilities rules.²⁸ The rules at issue in that case "prescrib[ed] a series of interrelated obligations ensuring public access to cable systems of a designated size and regulat[ed] the manner in which access is to be afforded and the charges that may be levied for providing it."²⁹ The issue in that case was whether these rules were "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."³⁰ The Commission had argued that its rules would promote "the achievement of long-standing communications regulatory objectives by increasing outlets for local self-expression and augmenting the public's choice of programs."³¹ The Court rejected this argument, finding:

With its access rules, however, the Commission has transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium. Effectively, the Commission has relegated cable systems, *pro tanto*, to common-carrier status. A common-carrier

²⁷ *FCC v. Midwest Video*, 440 U.S. 689 (1979).

²⁸ *Id.*

²⁹ *Id.* at 692.

³⁰ *Id.* at 697, citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

³¹ *Id.* at 694-95.

service in the communications context is one that “makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing”³²

Similarly, imposition of a non-discrimination obligation on the services at issue in this *NOI* would effectively relegate them to common carrier status and would violate the Act.

6. A “hands-off” approach in this area is also good policy.

In addition to being the legally correct regulatory treatment, there are countless good policy reasons as to why the Commission’s approach to the issues raised in the *NOI* should be “hands-off.” To begin with, Dumb Pipe advocates³³ wrongly assume that a static broadband network architecture will be adequate. However, a new wave of Net-based products being demanded by end users requires higher bandwidth than the current network infrastructure can allow. Without either “Quality of Service” innovation of some kind or a much higher bandwidth capacity, congestion will grow on the Net architecture. Thus, BSP Net management and investment free from onerous Internet regulation is the only way to accomplish the innovation and investment necessary to build the network needed for the future. If, as Dumb Pipe advocates would have it, content and application providers do not share the burden, the entire cost of network investment will be imposed on end users. On the other hand, a regulatory “hands-off”

³² *Id.* at 700-701, citing *Report and Order, Industrial Radiolocation Service*, 5 F.C.C. 2d 197, 202 (1966) (footnotes omitted).

³³ Dumb Pipe advocacy holds that positioning all intelligence capability in the Net should be located at the ends of the network, preventing BSPs from affecting in any way the applications, etc. that flow over the Net architecture. This is a derivative of the “layers” or “end-to-end” theories of the Net. However, Dumb Pipe advocates completely ignore the valuable innovation that has been accomplished by BSPs. In addition to prohibiting BSPs from recovering infrastructure costs from any source but consumers, Dumb Pipe advocates would impose a legal bar on the ability of BSPs to employ innovative practices on the Net. According to Dumb Pipe advocates, virtually any BSP Net management would violate this end-to-end rule and should be prohibited.

approach will only help to increase broadband penetration and innovation, and consumers will be advantaged.

Nor, again, do old telecom regulatory frameworks have a place in this debate. As demonstrated more fully above, BSPs are not monopolists, but exist in a competitive market.

Additionally, a Dumb Pipe standard would “disincent” and discount BSP innovation, a historic strength. The list of innovations developed by Bell Laboratories and other innovations developed by wireline and non-wireline BSPs is extensive. A Dumb Pipe standard does not account for the potential that only BSPs can meet to create a better end-user experience. BSPs have as much right as other players to innovate and be rewarded for their investment in this market and have a legally protected right to do so on their networks.

There are also numerous strong policy arguments as to why government intervention in the market is unnecessary and unwise. Again, as discussed above, competition will address any concern that underlies a call for proscriptive legislative or regulatory intervention in this context. Indeed, competition will even drive the creation of a Dumb Pipe model if that is what is best for the market -- *i.e.*, what consumers desire. If consumers do not value innovative practices that a BSP employs, they will vote with their feet and move to another provider. Moreover, quickly-evolving technology is far less amenable to regulation through legislation or government agencies. Inherent in the case for the Dumb Pipe model is the obviously false assumption that Dumb Pipe advocates know with certainty what this market will or should look like or that they know with certainty that the trade-offs of proscriptive Internet regulation are worth it. Additionally, in terms of new government intervention, even the prospect of regulation stifles investment incentives. Also, as past experience with the 1996 Act makes clear, regulation inevitably creates arbitrage problems and gaming of the system.

Finally, advocacy by content and application providers for Internet regulation is obviously self-serving. Content and application providers unabashedly ask that BSPs pay the entire freight for the increasing bandwidth demands of their services and applications. Indeed, content and application providers like Google, who support Dumb Pipe advocacy, would oppose any prioritization by BSPs while employing prioritization themselves (e.g., Google search result preferences).

At bottom, past experience with the Net clearly demonstrates that less is more when it comes to the impact of regulation on development.

7. Qwest Supports the Commission's Nonbinding Internet Policy Statement.

Qwest has voiced its voluntary support for the four principles contained in the Commission's 2005 Internet Policy Statement [hereafter the "*Statement*"]³⁴ The *Statement* represents good policy, though the four principles do not constitute binding rules, as the Commission, itself, expressly acknowledged in the *Statement*.³⁵ Moreover, as discussed more fully above, the products and services at issue here are all Title I services and are not currently regulated in any significant way by the Commission. And, as is also discussed more fully above, that is the correct regulatory status in light of the competitive nature of the services at issue. The

³⁴ *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Policy Statement*, 20 FCC Rcd 14986 (2005).

³⁵ *Statement* at 14988 n.15. The Commission, in the *NOI*, seeks comment with respect to a potential non-discrimination obligation as a "fifth principle" in its *Statement*. This proposal, for the reasons discussed above, lacks any legal basis if it is imposed as binding regulation. Qwest also opposes such a principle even as an informal policy statement.

Commission could impose certain limited types of obligations on this architecture in the future under its ancillary Title I jurisdiction, but that would be limited to those things “reasonably ancillary to the effective performance of the Commission’s responsibilities.” Moreover, the Commission must adopt rules or regulations under that authority through the standard procedures of notice and comment -- something which has not yet been done. For all the reasons discussed above, however, Qwest believes that, because of the existence of competition and market forces that will prevent problems in the first place, the promulgation of formal rules and regulations is not called for in this area and would only chill good behavior and prevent end-user benefits.

III. CONCLUSION

For the reasons stated above, Qwest requests that the Commission take the action described herein.

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 07-52; 2) served via e-mail on Ms. Janice M. Myles, Competition Policy Division, Wireline Competition Bureau at janice.myles@fcc.gov; and 3) served via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpweb.com.

/s/Richard Grozier

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