

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	
Qwest Corporation)	Transmittal No. 178
Tariff F.C.C. No. 1)	
)	

EARTHLINK PETITION TO SUSPEND AND INVESTIGATE

I. Introduction

EarthLink, Inc. (“EarthLink”), pursuant to Section 1.773 of the Commission’s Rules, hereby petitions the Commission to suspend and investigate the above-captioned transmittal filed by the Qwest Corporation (“Qwest”) on November 28, 2003 (“Transmittal” or “Transmittal No. 178”).

In the Transmittal, Qwest proposes to set new prices for a number of its digital subscriber line (“DSL”) services, including “DMT Qwest Choice DSL Deluxe.” Although the Transmittal would result in a decrease in the tariffed rate for this service, EarthLink urges the Commission to suspend and investigate the proposed tariff change because, based on Qwest’s own cost justification data, the new price for the “DMT Qwest Choice DSL Deluxe” service recovers an unreasonable and discriminatory amount of overhead or common costs and thus violates the proscriptions in Sections 201(b) and 202(a) of the Communications Act against unjust, unreasonable and unreasonably discriminatory pricing.¹ Under these circumstances, a reduction

¹ 47 U.S.C. §§ 201(b), 202(a).

in the recurring rate for “DMT Qwest Choice DSL Deluxe” would be appropriate and serve the public interest.

II. Transmittal No. 178 Proposes Anticompetitive Pricing That is Unreasonable and Discriminatory

According to Qwest’s cost support, Qwest’s direct recurring unit cost for the services affected by the rate change is \$11.80 per month. The rates Qwest proposes to charge for these services, however, vary widely, from \$15.00 to \$28.00 per month. The difference between the direct unit cost and the rate for each of these services—the overhead or common cost amount—varies from \$3.20 for the lower-speed “DMT Qwest Choice DSL” and “CAP Qwest DSL Select” services to \$16.20 for the higher-speed “DMT Qwest Choice DSL Deluxe” and “CAP Qwest Choice DSL Deluxe” services.²

Thus, customers of the higher-speed services pay *more than five times* the amount of common costs that customers of the lower-speed services pay, despite the fact that Qwest’s direct unit costs for services in both speed categories are the same. This difference puts at a significant disadvantage customers, including Internet service providers (“ISPs”) such as EarthLink, that would seek to use the higher-speed service as a wholesale input for their retail broadband Internet access services.³ While Qwest’s supporting documentation offers no justification for this discrimination, Qwest’s demand forecasts and marketing materials strongly

² Transmittal No. 178 at 2 (Attachment A hereto). This common cost mark-up is over and above normal profit, which is recovered as Cost of Money, an element in Qwest’s direct unit costs. *See* Transmittal No. 178 at 8 (Workpaper 1).

³ The FCC has found disparate overhead loadings without valid justification to be anticompetitive and unlawful under the Act. *In the Matter of Local Exchange Carriers’ Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, Report and Order*, 10 FCC Rcd 6375, ¶¶ 2, 60-75 (1995) (affirming Bureau’s conclusion that “[d]ue to the interconnectors’ need for the bottleneck LEC facilities, ... the LECs’ market-based justification for the levels of overhead loadings was not a reasonable basis for the differences between the overhead loadings ...”).

suggest that Qwest would be the primary beneficiary of this discrimination, to the detriment of other customers, including independent ISPs.⁴

III. Transmittal No. 178 Would Recover Unreasonably High Common Costs

As explained above, Qwest's supporting materials show that under the proposed tariff modifications, the "DMT Qwest Choice DSL Deluxe" service would recover \$16.20 per month in common costs. Although Qwest does not provide any data to identify the specific common costs recovered or to justify such recovery, earlier Qwest cost filings suggest that \$16.20 is an unreasonably high level of common costs for this service.

Four and a half years ago, when Qwest (then US West) introduced its DSL service called MegaBit Subscriber Service, it filed cost support with a proposed tariff modification.⁵ The filing proposed a \$29.95 per month price for a 256 kbps bi-directional DSL service, and it stated that Qwest's direct unit cost was \$17.32 per month.⁶ The rate therefore recovered common costs of \$12.63 per month.

Now, after years of cost reductions industry-wide, Qwest in Transmittal No. 178 proposes to offer "DMT Qwest Choice DSL Deluxe," an asynchronous service offering very similar speeds of 256-640 kbps downstream and 128-256 kbps upstream, for \$1.95 less per

⁴ According to its Description and Justification, under the proposed tariff changes, "Qwest expects to add 200,702 DMT Qwest Choice DSL customers and 72,847 DMT Qwest Choice Deluxe customers." Transmittal No. 178 at 3. The retail broadband Internet access service primarily emphasized in Qwest's website materials relies upon the DMT Qwest Choice DSL service with a downstream speed of 256 kbps (to which Qwest allocates only \$3.20 in overhead costs per month), not the higher-speed DMT Qwest Choice DSL Deluxe service (to which Qwest allocates \$16.20 in overhead costs per month). See Qwest website materials (Attachment B hereto).

⁵ US West Transmittal No. 985 (April 26, 1999) ("MegaBit filing") (Attachment C hereto).

⁶ Megabit filing at Section 5, page 1 (\$17.32 direct monthly cost figure applied to faster services as well).

month than the old \$29.95 Megabit service. The direct unit cost to Qwest of this new service is \$5.52 less than the direct unit cost of the old Megabit service.

However, for reasons not explained by Qwest, the cost reductions that have benefited other aspects of this service are not reflected in common costs. Rather, Qwest's common cost allocation for the new service has increased by \$3.57 per month over the common costs for the old Megabit service. Qwest's Transmittal showing a sharp increase in common costs while direct unit costs have dropped is unsupported, would result in recovery of inappropriately high common costs, and would lead to unjust, unreasonable, and discriminatory pricing in violation of Sections 201 and 202 of the Communications Act.⁷

IV. The Commission Should Suspend and Investigate This Proposed Tariff Modification

"The Communications Act and the Commission's Rules require that all charges in connection with communication services be just and reasonable and all tariff filings of dominant carriers be accompanied by an explanation and data supporting rate changes."⁸ Where the transmittal "raise[s] substantial questions of lawfulness," the Commission should suspend the proposed rate change and set such rates for investigation.⁹

⁷ The charge that Qwest's current and proposed DSL rates are unreasonably high is further supported by a recent report from Bear Stearns, in which the average large-carrier annual cost of providing end-to-end DSL-based Internet access service (including both the DSL transport and the Internet access functionalities), including common costs, is estimated to be \$166.00 in 2003, or \$13.83 per month. Bear Stearns, "U.S. Wireline Services, The DSL Report II, DSL as an Instrument of Competition," (September 2003) at 13 (Attachment D hereto). By contrast, as explained above, Transmittal No. 178 suggests that DMT Qwest Choice DSL Deluxe costs Qwest \$28.00 (\$11.80 of which is direct unit cost, including normal profit).

⁸ *In the Matter of Verizon Telephone Companies, Tariff F.C.C. Nos. 1, 11, 14, and 16, Transmittal No. 243, Order*, 17 FCC Rcd 19128, ¶ 3 (2002)

⁹ *See, Id.*, ¶ 4. *See, In the Matter of Iowa Telecommunications Service, Inc., Tariff FCC No. 1, Transmittal No. 31, Order*, 18 FCC Rcd 6495, ¶ 4 (2003) (finding that challengers had raised "substantial questions regarding the lawfulness of Iowa Telecom's proposed tariff revisions that require further investigation").

As described above, Qwest's own data show not only that its proposed tariff change would result in unreasonably discriminatory pricing in violation of Section 202(a) of the Act, but also in rates that recover unreasonably high common costs and are thus unjust and unreasonable in violation of Section 201(b) of the Act. The fact that the tariff modification would result in reduced rates does not negate the "substantial questions of lawfulness" raised herein; rather, if such questions exist for the proposed rates, they most certainly also exist for the higher rates currently in effect.

Accordingly, EarthLink urges the Commission to suspend the rate change proposed in Transmittal No. 178 and undertake an investigation to determine Qwest's true costs of providing DMT Qwest Choice DSL Deluxe, including a detailed review of the common cost allocations involved.

Respectfully submitted,

/s/

Dave Baker
Vice President
Law and Public Policy
EarthLink, Inc.
1375 Peachtree Street, Level A
Atlanta, GA 30309
Telephone: 404-815-0770
(ext. 22648)
Facsimile: 404-287-4905

Donna N. Lampert
Mark J. O'Connor
Linda L. Kent
Kenneth R. Boley
LAMPERT & O'CONNOR, P.C.
1750 K Street, N.W., Suite 600
Washington, DC 20006
Telephone: 202-887-6230
Facsimile: 202-887-6231

Counsel for EarthLink, Inc.

Dated: December 5, 2003

CERTIFICATE OF SERVICE

I, Helena A. Rogozinski, hereby certify that on this fifth day of December 2003, the foregoing document was filed via ETFS and copies were served via hand delivery upon the following:

/s/

Helena A. Rogozinski

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street
Washington, D.C. 20554

Qualex International
Portals II
Room CY-B402
445 12th Street, S.W.
Washington, D.C. 20554

William Maher
Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street
Washington, D.C. 20554

Tamara L. Preiss
Chief
Pricing Policy Division
Federal Communications Commission
445 12th Street
Washington, D.C. 20554

John Kure
Qwest
607 14th Street, NW
Suite 950
Washington, DC 20005