

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

In the Matter of:)	
)	
Qwest Corporation)	Transmittal No. 186
Tariff F.C.C. No. 1)	
)	

EARTHLINK PETITION TO REJECT, OR TO SUSPEND AND INVESTIGATE

EarthLink, Inc. (“EarthLink”), pursuant to Section 1.773 of the Commission’s Rules, hereby petitions the Commission to suspend, investigate and reject relevant portions, as described below, of the above-captioned transmittal filed by the Qwest Corporation (“Qwest”) on February 13, 2004 (“Transmittal” or “Transmittal No. 186”).

In the Transmittal, Qwest proposes to introduce a new DSL service called Stand Alone Qwest DSL and to reduce the \$99 nonrecurring charge (“NRC”) for Qwest DSL services to \$.01 from February 28 to May 28, 2004. Transmittal, § 8.4.1.A, and § 8.1.8.A3. In both cases, however, the proposed tariff stipulates that the Stand Alone DSL service and the promotional NRC discount are “not available to Qwest DSL Volume Plan customers.” *Id.* As a leading Internet service provider (“ISP”) that uses volume-based DSL as an input for its high-speed Internet access service, EarthLink is directly excluded from the benefits of the Transmittal. EarthLink believes that the two tariff restrictions against Qwest DSL Volume Plan customers constitute illegal and unreasonable discrimination in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).

With respect to the tariff proscription for Stand Alone Qwest DSL, the tariff language flatly prohibits a class of users from purchasing the service: “The Stand Alone *Qwest DSL* Service is . . . not available to *Qwest DSL* Volume Plan customers.” Transmittal, § 8.4.1.A (emphasis in original). Such a tariff proscription is illegal under Section 202(a) of the Act¹ and relevant FCC precedent.² Further, as a matter of policy, the invidious nature of the discrimination is equally plain: as a result of this tariff proscription, ISPs like EarthLink that purchase volume-based DSL are effectively prohibited from offering DSL-based Internet access services to end users that have chosen a competitive voice provider. Rather, the tariff language means that such end users must obtain Qwest DSL-based high-speed Internet access services by going first to Qwest and cannot go directly to EarthLink, as can subscribers to Qwest’s voice service. This tariff language also impacts negatively on local voice competition and the purposes of the 1996 Telecommunications Act, since consumers may be reluctant to switch voice providers if it means loss of their preferred ISP (including email address changes, etc.).

¹ 47 U.S.C. § 202(a) (“It shall be unlawful for any common carrier . . . to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.”).

² *In the Matter of MCI Telecommunications Corp. v. AT&T*, Decision, 94 F.C.C. 2d 332, 333-334 (1983) (affirming ALJ decision that carrier’s customer premises and resale tariff restrictions violated Sections 201(b) and 202(a) of the Act); *In the Matter of American Trucking Ass’n v. AT&T*, Memorandum Opinion and Order, 41 F.C.C. 2d 2, 4-5 (1973) (issue of possible Section 202(a) violation is set for investigation where carrier offered service to one set of customers, but denied same service to another set of customers); *In the Matter of ITT World Communications*, Memorandum Opinion and Order, 3 F.C.C. 2d 767, (1966) (FCC rejects section 214 application where carrier proposes to offer service to one customer but deny the service to other customers. “Such substantial difference in treatment results in discrimination which, under section 202 of the act, is unlawful unless justified.”); *In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, Report and Order, 83 F.C.C.2d 167, ¶ 1 (1980) (“tariff restrictions of any kind on the resale and sharing of domestic public switched network services are unjust, unreasonable, and unreasonably discriminatory, and hence unlawful under Sections 201(b) and 202(a) of the Communications Act.”).

Transmittal 186 also prevents *Qwest DSL* Volume Plan subscribers from enjoying the promotional NRC of \$.01,³ leaving many *Qwest DSL* Volume Plan subscribers paying a much higher NRC for the same Qwest DSL service.⁴ The exclusionary nature of the three-month promotional rate discount is an illegal rate discrimination in violation of Section 202(a) of the Communications Act⁵ and relevant precedent.⁶

The tariff provisions warrant rejection, as there is no legitimate basis for the restrictions against volume-based DSL customers, i.e., ISPs. Qwest's decision to restrict ISPs from purchasing the Stand-Alone DSL will not harm Qwest's network, nor is this restriction necessitated by competitive forces. Imposing a discriminatory NRC against volume plan subscribers, i.e., ISPs, has no legitimate place, either; to the contrary, lower NRCs would allow ISPs to increase demand for Qwest's underlying DSL service.

³ Transmittal, § 8.1.8.A3.

⁴ Under the tariff, the exact NRCs owed by Qwest volume plan subscribers is somewhat complicated: Basic Discount Option subscribers pay the \$99 NRC only if the end user does not stay on-network for 12 months; Volume Commitment Option I subscribers do not pay an NRC; Volume Commitment Option II subscribers pay a \$99 NRC; Volume Commitment Option III subscribers pay a \$35 "activation fee"; Volume Commitment Option IV customers pay the NRCs associated with their original plan commitment. Qwest Corp., Tariff F.C.C. No. 1, §§ 8.4.4.A.2., 8.4.5.C.

⁵ 47 U.S.C. § 202(a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service . . .").

⁶ *In the Matter of Metrocall, Inc. v. WorldCom, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 10826, ¶ 13 (Enf. Bur. 2000) (explaining that the legal elements of the Section 202(a) test are: "(1) the services at issue are 'like,' and (2) there is disparate pricing or treatment between the 'like' services. If the complainant succeeds in establishing the first two prongs, thereby making a *prima facie* showing of discrimination, the defendant has the burden of persuasion to establish that (3) the disparity is not unjust or unreasonable."). In this case, the services are "like" since the same services – Qwest Choice DSL and Qwest Choice DSL Deluxe – are offered to volume and non-volume customers. *See also*, American Trucking Associations, Inc. v. FCC, 377 F.2d 121, 130 (D.C. Cir. 1966) ("The prohibition against different charges to different customers for like services under like circumstances is flat and unqualified. The pertinent section of the statute bristles with 'any'.").

If the Commission, in lieu of rejection, believes that Qwest should be afforded further opportunity to explain its proposed tariff (which it chose not to do in the Transmittal Description and Justification), then the Commission should suspend the tariff for five months and investigate. A full five-month suspension is warranted here because the rate and service discrimination would impose irreparable harm on EarthLink in the competitive marketplace for high-speed Internet access service and because Section 204(a)(3) of the Act, 47 U.S.C. § 204(a)(3), would prevent EarthLink from obtaining compensation for the damage caused from this illegal “streamlined” tariff filing.

Accordingly, EarthLink urges the Commission to reject or to suspend and investigate the proposed discriminatory tariff provisions in Transmittal No. 186, because they violate Section 202(a) of the Communications Act.

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

Mark J. O’Connor
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: February 20, 2004

CERTIFICATE OF SERVICE

I, Sybil Anne Strimbu, state that copies of the foregoing “EarthLink Petition to Reject, or to Suspend and Investigate” were filed electronically and delivered by hand, this day, February 20, 2004, to the following:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Room TW-A325
Washington, DC 20554

William Maher
Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Tamara L. Preiss
Chief
Pricing and Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Qualex International
Federal Communications Commission
445 12th Street SW
Room CY-B402
Washington, DC 20554

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

/s/

Sybil Anne Strimbu