December 15, 2003

VIA ECFS

Honorable Michael C. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, S.W., 8th Floor
Washington, D.C. 20554

Re: *Ex Parte* – CC Docket Nos. 96-262 and 01-92

Dear Chairman Powell:

McLeodUSA is a leading provider of facilities-based competitive local telecommunications services, and has been providing these services for nearly 10 years. We currently serve over 400,000 customers in our 25-state local service footprint, with over half of these customers being residential. We have invested nearly $3 billion in our network facilities, and 66% of our customers will be served using McLeodUSA's own local switching facilities by year-end 2003.

McLeodUSA, as a competitive local exchange carrier, has also, over the years, sought out various entry points into the ILEC-controlled telecommunications services markets beyond its traditional small and medium business and residential customer base. McLeodUSA has sought to provide service to business customers that are intensive users of telecommunications services. As sophisticated buyers of telecommunications services, this particular customer segment has special needs and requires superior, flexible, and innovative services. A natural market for new entrants are businesses that aggregate large numbers of calls such as colleges, hospitals, hotels, government agencies, and CMRS providers. Among the array of services offered by McLeodUSA to such customers is outbound 800 services. Because such services provide market-opening niches essential to market entrants, McLeodUSA is deeply concerned that the Commission is considering possible actions that would directly impact such markets and its ability to successfully compete in those markets.

Specifically, McLeodUSA is concerned that 30 months into the Commission's 36-month transition period for CLEC switched access charge rates, the Commission is considering action that has the potential of exposing facilities-based CLECs to a new round of revenue cutting, regulatory uncertainty, and access charge litigation. It is McLeodUSA's understanding that the Commission is considering addressing a petition for reconsideration of the

CLEC Access Charge Order, which was filed by Qwest more than two years ago. That petition requests that when CLEC access charge rates are reduced to the ILEC level, a CLEC's rate would be decreased below that level to take into account any access functions not provided by the CLEC.

Adopting such a decision on a prospective basis once CLEC rates are decreased to the ILEC rate will result in a degree of regulatory uncertainty as IXC's seek to litigate which functions are, or are not, provided by the CLEC and what is the appropriate amount to be deducted from the ILEC rate to reflect those functions. Indeed, the uncertainty created by such a result would virtually guarantee that IXCs could challenge each and every CLEC CABs billing by claiming that certain functions were not provided by the CLEC for some subset of the calls. This will inevitably lead to an endless cycle of CABs billing disputes, nonpayment and litigation.[1]

The likelihood of such litigation is not a question of surmise. One need only recall the seemingly endless litigation surrounding the issue of whether a CLEC is entitled to be paid the tandem rate element of the reciprocal compensation rate or whether the CLEC is only entitled to the end office rate. This litigation ensued for over five years despite the fact that the FCC had adopted a specific rule on how that issue was to be addressed. Given the very substantial reductions CLECs have already incurred as a result of the CLEC Access Charge Order, it seems appropriate that the Commission make clear that the CLEC is entitled to the ILEC rate whenever and however it provides switched access services to an IXC.

Moreover, the adoption of the "functional discount" approach on a retroactive basis as some have proposed is not only unlawful, but would produce enormous amounts of litigation as IXCs seek to obtain refunds from the tariffed levels charged in accordance with the CLEC Access Charge Order. The Commission was undoubtedly aware when it adopted the CLEC Access Charge Order that, in most cases, as a result of the amount of traffic involved, the decision of the IXC, or of the ILEC, most CLEC access traffic reaches the majority of smaller IXCs via an ILEC tandem. A result of the retroactive application of the CLEC Access Charge Order would be that CLECs would face challenges to their access bills from a plethora of IXCs. It seems abundantly clear from the CLEC Access Charge Order that the Commission's adoption and implementation of a "bright line" test for CLEC

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[1] Indeed, the uncertainty created just due to the recent speculation that the FCC is considering such a result has resulted in a tremendous spike in CABs billing disputes over the past four months as numerous IXCs

access charge rates was intended to avoid this exact result. Such a result would make a mockery of the entire "bright line" concept of the Order.

With respect to 8YY traffic, and based on its experience in the market for access services, McLeodUSA agrees with the Commission's conclusion that there is no basis on which to distinguish 8YY traffic from any other exchange access traffic. Nor can McLeodUSA see any basis for distinguishing among 8YY calls based on the origin of the call. Whether an 8YYcall is originated by a hotel guest, a government employee, a hospital patient, or a CMRS end user, the call is handled in the same manner by the CLEC (or, for that matter, the ILEC). As a result, McLeodUSA believes that when a CLEC provides access services to an IXC at the tariffed benchmark rate, the CLEC is entitled to be paid the FCC mandated composite benchmark rate, regardless of the manner in which the CLEC provisions the services. It is not unusual to provision exchange access services utilizing a combination of facilities, including the aggregator's PBX, the CLEC switch, and transport provided utilizing a UNE. There is no reason why the Commission should consider how the CLEC provisions its exchange access services to be relevant. The facts are that the IXC is provided access service at the lawful benchmark tariffed rate. In those circumstances, the CLEC should be able to expect and receive the tariffed rate, regardless of how it provisions that service.

The Commission should reaffirm the basic rules set forth in the CLEC Access Charge Order. When a CLEC provides access service to an IXC at the Commission-established composite benchmark rate, it should be paid for that service at that rate and its charges should not be subject to dispute by IXCs. The CLEC Access Charge Order was intended to meaningfully decrease IXC's access charges, provide a "bright line" lawful rate, and provide stability as CLEC access rates transitioned to the ILEC level. The CLEC Access Charge Order has saved IXCs millions of dollars in the last 30 months and it has provided regulatory stability.[2] CLECs reasonably relied on the CLEC Access Charge Order in charging the "conclusively presumed lawful" benchmark rate contained in that Order. That rate was explicitly identified as a transitional rate with a steep glide path to the prevailing ILEC rates. By the terms of the Order the rates were to apply until the Commission addressed intercarrier compensation in a comprehensive and unified manner. While that may remain a priority of the Commission, it has not done so. It

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refuse to pay access charges on the grounds being considered by the FCC. Thus, this result is fact not speculation.

would be unfair, inequitable, and unlawful to reopen the issue of CLEC access charge rates on a retroactive basis under these circumstances.

Finally, it is important to note that while McLeodUSA may be able to adapt its business plans should the Commission change its policy on reconsideration, any retroactive application of such a policy change that creates a potential refund obligation could seriously impact McLeodUSA's planned network investment levels. Such network investments permit McLeodUSA to make the necessary capital improvements required to bring the benefits of new network infrastructure technologies to serve its sizeable base of small and medium business and residential customers. The potential for a significant negative financial impact on facilities-based CLECs anytime the Commission contemplates a retroactive policy change that reduces ongoing revenue and creates a refund obligation on CLECs cannot be understated and certainly cannot be ignored by the Commission.

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[2] This stability is quickly disappearing as certain IXCs have begun to challenge McLeodUSA CABs billings based on the perception that the FCC was considering a change in the its policy at this late date.

We hope that you give serious consideration to the concerns expressed in our letter, and are ready to discuss these issues at your convenience. Thank you for your consideration.

Very truly yours,

Stephen C. Gray
President

cc: Marlene Dortsch,
Kathleen Abernathy, Commissioner
Kevin Martin, Commissioner
Michael Copps, Commissioner
Jonathan Adelstein, Commissioner
Bill Mayer
Jeff Carlisle
Tamera Priess
Michelle Carey
Christopher Libertelli
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