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March 10, 2006

VIA ECFS

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

Ex Parte
WC Docket No. 04-223

Dear Ms. Dortch:

On February 6, 2006, McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") filed a Motion for Stay of the *Omaha Order* pending McLeodUSA's appeal of that order in the United States Court of Appeals for the District of Columbia.[1] In its motion, McLeodUSA explained, *inter alia*, that it was threatened with irreparable injury if it were required to order DS0 voice grade UNE loops in Omaha on March 16, 2006 because, among other reasons, Qwest did not have electronic ordering processes in place for ordering DS0 voice special access and because Qwest intended to implement the conversion of McLeodUSA's existing UNE circuits to special access as a "design change" that could involve interruption of customer service.

Qwest's response confirms that it does not have a replacement product for DS0 UNE loops, much less a commercially reasonable electronic ordering interface for them.[2] Nor does Qwest aver that it has an electronic ordering interface for voice grade DS0 special access terminations. Thus, as stated in its Motion, McLeodUSA would be irreparably harmed because it would be unable adequately to provide service to new and existing customers or be on a competitive footing with Qwest because Qwest does not have in place a commercially reasonable ordering process for voice grade DS0 UNE loops. McLeodUSA could not provide voice service to its thousands of customers in Omaha served by the affected wire centers on a competitive and commercially

[1] *McLeodUSA v. FCC*, Case No. 05-1469, January 9, 2006.

[2] Declaration of Candace Mowers, para. 10.

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reasonable basis if it were required to process hundreds of orders per month using Qwest's inferior current voice grade special access DS0 ordering processes. This would result in irreparable harm to McLeodUSA in the form of damaged customer relations and loss of goodwill.[3] Nor is it correct, as implied in Qwest's reply that McLeodUSA currently orders voice grade DSO channel terminations.[4] As stated in its Motion, McLeodUSA orders data grade DS0 channel terminations, and these are few in number.[5]

To add insult to injury, in its opposition, Qwest's states that it will implement the conversion of McLeodUSA's existing circuits from UNEs to the currently non-existent unspecified replacement product as a "design change" even though this "can be accomplished entirely as a matter of record keeping."[6] However, if this conversion is no more than a "records change"[7] there is no apparent basis for implementing the conversion as a design change. If Qwest chooses to implement this as a design change because of its own internal bureaucratic or other reasons there could not be any possible justification for the $350,000 charge quoted by Qwest to McLeodUSA for the nonexistent "design change." Although Qwest now states that it will bill appropriate cost-based rates for this change, the costs of implementing a record change should be minimal. Nor is it clear in any event why McLeodUSA should pay for any such change since it does not request this change. As the entity that is causing any conversion costs to be incurred, Qwest should be solely responsible for implementation of costs associated with forbearance. Moreover, because Qwest does not have a commercially reasonably ordering process in place, McLeodUSA is particularly prejudiced by the proposed "design change" charge because it is unable to avoid any such conversion charges by ordering new replacement products.

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[3] *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F3d 546, 552 (4th Cir. 1994); *Baker Elec. Coop., Inc. v Chaske*, 28 F.3d 1446, 1473 (8th Cir. 1994).

[4] Qwest Opposition p. 4.

[5] Motion for Stay n. 39.

[6] Qwest Opposition p. 6.

[7] Declaration of Candace Mowers, para. 15.

The fact that Qwest avers that it will not immediately bill higher rates does not mitigate the irreparable harm McLeodUSA will suffer absent a stay. Qwest makes it clear that it will at some point retroactively bill McLeodUSA to March 16, 2006. In light of this threat of retroactive charges, McLeodUSA will need to implement price changes now. In fact, McLeodUSA has already notified its largest customer in the market of price increases absent a stay. McLeodUSA would need to implement price increases for its wholesale and retail customers to recover these significantly higher charges. Although, McLeodUSA has no intention of paying any such back-billed charges, it has no guarantee that it will ultimately succeed in its challenge. Charging higher, non-competitive rates to customers will generate significant churn of customers from McLeodUSA and loss of customer good will.

Qwest states that "nothing will happen" on March 16. Instead, McLeodUSA can continue to order UNEs from the affected wire centers until both the parties have amended their interconnection agreement to implement the *Omaha Order* and Qwest has developed a replacement product. "Thus, no carrier will be placed in a circumstance in which it is no longer able to secure DS0 loop UNEs prior to Qwest's introduction of a commercial package and related ordering interface with respect to a DS0 loop commercial product."[8] Assuming that Qwest follows through on this proposal including with respect to new and existing customers, and Qwest agrees not to back bill, and considering that it took Qwest over a year to implement replacement products for UNEs eliminated under the *Triennial Review Remand Order*, it is not likely that McLeodUSA will experience irreparable harm on March 16, 2006 or during the course of the appeal. The Commission should, however, take this opportunity to turn Qwest's assertion into a binding order eliminating the threat of retroactivity and conditioning the effectiveness of the forbearance established in the *Omaha Order* on the existence of a commercially reasonable replacement product and ordering system.

While no longer relevant, we note that Qwest's statements that it is not likely that McLeodUSA will prevail in an appeal are unconvincing. Qwest erroneously contends that McLeodUSA's arguments concerning "fully implemented" are barred by Section 405 of the Act even though McLeodUSA previously presented its views to the Commission on this issue, which the *Omaha*

[8] Declaration of Candace Mowers, para. 10.

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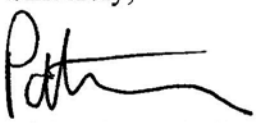
Order either ignored or rejected.[9] Therefore, McLeodUSA may raise these issues on appeal. Qwest fails to acknowledge, much less address, McLeodUSA's argument that the Commission failed to consider alternative interpretations of Section 10 forbearance standards that would have permitted the Commission to preserve access to UNEs where impairment exists. Qwest also fails to acknowledge McLeodUSA's argument that in a duopoly environment Qwest's will not have incentives to charge competitive wholesale rates.

Sincerely,



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[9] *Omaha Order*, para. 55.