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LEGAL INSIGHT. BUSINESS INSTINCT.

Andrew D. Lipman
Direct Phone: 202.373.6115
Direct Fax: 202.373.6001
andrew.lipman@bingham.com

July 23, 2007

VIA ECFS

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

Re: ***Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223**

Dear Secretary Dortch:

On behalf of McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), attached for filing in the above-referenced docket is a Petition for Modification of the Commission's December 2, 2005 Memorandum Opinion and Order, which includes the Declarations of August H. Ankum, Don Eben, and Pritesh D. Shah, and supporting exhibits.

If you have any questions about this filing, please let me know.

Very truly yours,

Andrew D. Lipman

Attachments

cc: Chairman Martin (all via email)
Commissioner Copps
Commissioner Adelstein
Commissioner Tate
Commissioner McDowell
Ian Dillner, FCC
Scott Deutchman, FCC
Scott Bergmann, FCC
Chris Moore, FCC
John Hunter, FCC
Thomas Navin, FCC
Pamela Arluk, FCC
Denise Cocoa, FCC
Janice Myles, FCC
Jeremy Miller, FCC
Tim Stelzig, FCC
Best Copy and Printing, Inc.
William H. Haas
Melissa Newman, Qwest (via email and overnight delivery)

Boston
Hartford
Hong Kong
London
Los Angeles
New York
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Walnut Creek
Washington

Bingham McCutchen LLP
2020 K Street NW
Washington, DC
20006-1806

T 202.373.6000
F 202.373.6001
bingham.com

CERTIFICATE OF SERVICE

I, Robin F. Cohn, do hereby certify that on this 23rd of July 2007, I caused to be served a true and correct copy of the foregoing by delivering copies thereof via electronic and overnight mail to the following:

Melissa Newman
Qwest Corporation
Suite 950
607 14th Street, NW
Washington, DC 20005
Email: Melissa.newman@qwest.com

Robin F. Cohn

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	WC Doc. No. 04-223
Pursuant to 47 U.S.C. § 160(c) in the	)	
Omaha Metropolitan Statistical Area	)	

PETITION FOR MODIFICATION OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

Andrew D. Lipman
Russell M. Blau
Robin F. Cohn
Bingham McCutchen LLP
2020 K Street, N.W.
Washington, DC. 20006
(202) 373-6000 (telephone)
(202) 373-6001 (facsimile)

Dated: July 23, 2007

TABLE OF CONTENTS

Page

SUMMARY i

I. BACKGROUND 1

II. QWEST HAS FAILED TO OFFER NETWORK ELEMENTS AT JUST AND REASONABLE WHOLESALE RATES TO MCLEODUSA IN THE NINE AFFECTED WIRE CENTERS 4

III. PUBLIC INTEREST CONSIDERATIONS COUNSEL IN FAVOR OF MODIFYING THE OMAHA FORBEARANCE ORDER 12

IV. CONCLUSION 19

ATTACHMENTS

DECLARATION OF AUGUST H. ANKUM

DECLARATION OF DON EBEN

DECLARATION OF PRITESH D. SHAH

SUMMARY

The Commission should modify the *Omaha Forbearance Order* by reinstating Qwest's Section 251(c)(3) unbundling obligations in the Omaha MSA. That Order was expressly contingent on a "predictive judgment" that Qwest would provide network elements at just and reasonable rates, which in fact it has not done. The Commission said it could alter its ruling if Qwest failed to offer just and reasonable post-forbearance offerings. Unfortunately, Qwest has wholly failed to meet the Commission's expectation and the Commission should now revoke the Section 251(c)(3) forbearance in the Omaha MSA. Absent relief from the Commission, McLeodUSA will be forced to exit the Omaha market due to the infeasibility of executing its business plan under the terms of Qwest's unilateral and unreasonable post-forbearance offerings.

In stark contrast to the Commission's "predictive judgment" that Qwest's post-Omaha Order offerings would be just and reasonable, and despite McLeodUSA's diligent efforts to negotiate acceptable terms, Qwest has proposed only uneconomical, onerous, and non-negotiable offerings to replace the Section 251(c)(3) network elements for the affected wire centers. Its demands include price increases in the range of 30% or more for monthly charges for DS0 stand alone loops, a minimum increase of 86% for DS1 access loops, and a 360% increase in associated non-recurring charges for installing DS1 access loops. Although the Commission predicted that Qwest would not react to forbearance by curtailing wholesale access to its DS0, DS1, or DS3-capacity facilities, that is precisely what has happened.

Furthermore, Qwest's actions cannot be reconciled either with the Commission's confidence that market incentives would motivate it to meet its obligation to provide wholesale access to network elements pursuant to Section 271, or with the public interest standard articulated in Section 10(c). Because the Commission's grant of forbearance was premised in part on Qwest's

compliance with its Section 271 obligations, Qwest's improper actions plainly show that revision of the *Omaha Forbearance Order* is necessary. Qwest's refusal to act in accordance with the Commission's expectations is likewise fundamentally incompatible with the public interest. McLeodUSA's market exit will reduce consumer choice by eliminating one of the very few facilities-based telecommunications services providers in the Omaha MSA.

The Commission specified that if its "predictive judgment" proved "too optimistic," carriers could request that the Commission reconsider its ruling. Now, nearly twenty months after the Commission's decision, Qwest has yet to make any just and reasonable wholesale replacement arrangements available to McLeodUSA. The company faces the impending prospect of having to discontinue its operations in the Omaha market as the direct result of Qwest's conduct. The Commission's oversight is urgently necessary to prevent McLeodUSA's exit from the Omaha MSA. The Commission should immediately act on its promise to monitor Qwest's wholesale market behavior by reinstating Qwest's Section 251(c)(3) unbundling obligations.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	WC Doc. No. 04-223
Pursuant to 47 U.S.C. § 160(c) in the	)	
Omaha Metropolitan Statistical Area	)	

PETITION FOR MODIFICATION
OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), by its undersigned counsel, submits this petition for modification of the Commission's *Omaha Forbearance Order*.[1] McLeodUSA urges the Commission to reinstate Qwest's Section 251(c)(3) loop and transport unbundling obligations in the Omaha Metropolitan Statistical Area ("MSA"), because its "predictive judgment" that Qwest would offer wholesale access to dedicated facilities on reasonable terms and conditions once released from the legal mandate of Section 251(c) has proven incorrect. The Commission should carry out its promise to monitor Qwest's behavior in the wholesale market and should revoke the forbearance granted to Qwest from providing UNE loops and transport at TELRIC prices in nine wire centers in the Omaha MSA.

I. BACKGROUND

Qwest petitioned the Commission pursuant to Section 10 of the Act, 47 U.S.C. § 160, seeking forbearance from the application of four broad categories of regulation in its service areas in the Omaha MSA, which includes communities in Nebraska and Iowa. The Commis-

[1] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 04-223, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*").

sion's December 2, 2005, decision "granted substantial relief" for several of Qwest's requests.2 Among other relief, the Commission relieved Qwest from the obligation to provide unbundled loops and dedicated transport at cost-based rates pursuant to Section 251(c)(3) in nine wire centers within the Omaha MSA.3

However, the Commission rejected Qwest's request for forbearance of its Section 271(c)(2)(B) obligations to provide wholesale access to local loops and transport "at just and reasonable prices."[4] It specified that, "Our justification for forbearing from Qwest's section 251(c)(3) obligations for loops and transport in certain areas depends in part on the continued applicability of Qwest's wholesale obligations to provide these network elements under sections 271(c)(2)(B)(iv) and (v)."[5]

In making the Section 10(a)(3) public interest determination that was necessary to justify forbearance from the requirements of Section 251(c), the Commission made a "predictive judgment" that, "based on previous experience in the market for wireline local exchange service

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[2] *Id.*, ¶ 1.

[3] *Id.*, ¶ 2.

[4] *Id.*, ¶ 103 (referring to 47 C.F.R. § 271(c)(2)(B)(iv-vi)).

[5] *Id.*, ¶ 105. *See Id.*, ¶ 96 ("part of the reason we are able to grant Qwest forbearance from section 251(c)(3) unbundling obligations for loops and transport is because a comparable wholesale access obligation exists under section 271(c)"). Qwest's independent obligation to offer loops, transport, and other network elements was likewise addressed in the *Triennial Review Order*. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 653 (2003), corrected by Errata, 18 FCC Rcd 19020 (2003) ("*Triennial Review Order*" or "*TRO*") ("the requirements of Section 271(c)(2)(B) established an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251"). Furthermore, such facilities must be priced on a just, reasonable, and not unreasonably discriminatory basis." *Id.*, ¶ 656.

served by Qwest and in other markets, that Qwest will not react to our decision here by curtailing wholesale access to its analog, DS0, DS1 or DS3-capacity facilities."[6]

The Commission's prediction was based in part on the fact that Qwest had entered into commercial agreements with UNE-P providers.[7] Noting that Qwest had previously taken steps to enter into commercial agreements with carriers where not compelled to do so, the Commission stated, "Here, too, we predict that Qwest's market incentives will prompt it to make its network available – at competitive rates and terms – for use in conjunction with competitors' own services and facilities. We will monitor the accuracy of this prediction in the wake of our decision; in the event it proves too optimistic, we will take appropriate action."[8]

The Commission further clarified that, "To the extent our predictive judgment proves incorrect, carriers can file appropriate petitions with the Commission and the Commission has the option of reconsidering this forbearance ruling."[9] Despite the Commission's forewarning, Qwest's actions have shown that, in the absence of regulatory oversight over wholesale pricing, there simply are not adequate market incentives for an RBOC to offer reasonable wholesale rates to competitors for essential bottleneck facilities. It is now necessary for the Commission to fulfill its promise to monitor Qwest's behavior, and to exercise its option to revoke forbearance as to

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[6] *Id.*, ¶ 79.

[7] *Id.*, ¶ 82. *See Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 (2005), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) ("*Triennial Review Remand Order*" or "*TRRO*").

[8] *Id.*, ¶ 83.

[9] *Id.*, ¶ 83, n.204.

Qwest's Section 251(c) obligations so that CLECs can obtain unbundled loop and transport network elements to the extent that they are "impaired" under the rules adopted in the *TRRO*.[10]

II. QWEST HAS FAILED TO OFFER NETWORK ELEMENTS AT JUST AND REASONABLE WHOLESALE RATES TO MCLEODUSA IN THE NINE AFFECTED WIRE CENTERS

Qwest's conduct belies the Commission's prediction that "market incentives" would motivate Qwest to make reasonable wholesale offerings of essential network elements available to competitors after forbearance from Section 251(c) UNE obligations. Qwest instead has failed to comply with its obligation to offer "just and reasonable prices" to competitors under Section 271. With respect to McLeodUSA, Qwest has conclusively refused to negotiate wholesale pricing for voice-grade, DS1, and DS3 loops and transport for the nine affected wire centers. Instead, as explained herein and in the accompanying Declaration of Don Eben, Qwest has offered only to replace high-capacity UNEs with special access services from its FCC Tariff No. 1, at vastly higher rates for both recurring and non-recurring charges.[11] Qwest proposes to offer stand alone DS0 loops at rates that are nearly 30% higher than the previous UNE prices for identical network facilities.[12]

Moreover, Qwest recently has attempted to require McLeodUSA to execute a burdensome and uneconomic package of unilaterally drafted, non-negotiable agreements, including a "commercial" DS0 loop offering that imposes considerable increases over TELRIC rates, as well

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[10] *TRRO*, ¶¶ 5, 22-23.

[11] *See* attached Declaration of Don Eben ("Eben Declaration"), ¶¶ 5-19, 27-28.

[12] *Id.*, ¶¶ 25-26.

as unreasonable terms and conditions that, among other things, insulate Qwest from any performance metrics and obligations for service provisioning.[13]

With regard to DS1 and DS3 loops, Qwest has merely offered the tariffed "Regional Commitment Program" ("RCP") from its special access tariffs. The RCP provides a discount off of the monthly special access rates, but only if McLeodUSA binds itself, and is able to comply with, term and volume commitments for obtaining such facilities.[14] In other words, to obtain somewhat less oppressive special access pricing in the nine wire centers affected by the *Omaha Forbearance Order*, McLeodUSA would have to forego the opportunity to obtain such facilities as UNEs at significantly more economical, cost-based rates throughout the rest of Qwest's operating territory. These conditions make Qwest's discount offer a mere charade. It is evident that, absent any relief from the Commission, McLeodUSA will be forced to replace the essential network elements formerly available as UNEs by leasing such facilities from Qwest at a combination of prohibitive special access rates and premium DS0 "commercial" rates.

McLeodUSA has made repeated good faith attempts to negotiate wholesale replacement arrangements with Qwest following release of the *Omaha Forbearance Order*. However, these efforts have met with Qwest's steadfast refusal to negotiate any wholesale pricing for high capacity facilities in the affected wire centers that deviates from its special access and RCP pricing. McLeodUSA first contacted Qwest to negotiate wholesale pricing for the affected

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[13] *Id.*, ¶¶ 24.

[14] *Id.*, ¶¶ 10-11.

Omaha wire centers in January, 2006.[15] Although the parties held a preliminary conference call on January 24, 2006, Qwest repeatedly delayed further meetings, failed to participate in scheduled conference calls, and did not respond to email communications from McLeodUSA regarding the parties' negotiations.[16] On April 7, 2006, McLeodUSA again sought Qwest's attention and noted its uncooperative attitude.[17] Qwest responded on the same day, advising McLeodUSA that it expected to be in a position to resume negotiations the following week.[18] However, McLeodUSA received no further communications from Qwest until October 26, 2006, when McLeodUSA's negotiator sent an email message seeking information about the status of the parties' negotiations.[19] Qwest again replied on the same day and indicated that it would make the appropriate inquiries in order to continue negotiations.[20] Although meetings and e-mail exchanges continued through December 6, 2006, no further meetings between the companies' respective negotiators have taken place.[21]

In a January 22, 2007, *ex parte* filed with the Commission in this docket, Qwest alleged that McLeodUSA had refused to meet with Qwest to negotiate. What Qwest's filing failed to disclose is that Qwest had previously made it clear that it was unwilling to negotiate certain

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[15] Eben Declaration, ¶ 16. McLeodUSA likewise requested that Qwest negotiate wholesale pricing based on its Section 271 obligation to offer just and reasonable prices for loops, transport and other elements.

[16] *Id.*, ¶ 16.

[17] *Id.*

[18] *Id.*

[19] *Id.*, ¶ 17.

[20] *Id.*

[21] *Id.*

terms. It is these non-negotiable terms and conditions that make such an agreement economically untenable for McLeodUSA.[22] The fact that Qwest is willing to meet but unwilling to change its position on critical economic issues illustrates that the Commission's predictive judgment that market incentives would compel Qwest to negotiate reasonable wholesale pricing and terms and conditions is simply amiss. Qwest is exercising monopoly power by refusing to change its position on key points since it knows McLeodUSA has no alternative supplier of network elements. There simply is no market force constraining Qwest from offering a "take it or leave it" proposal.

Of course, forcing McLeodUSA out of the market means that current McLeodUSA customers will be forced to go back to Qwest, thereby increasing the margin Qwest will realize from directly serving these end users.[23] Thus, it is not surprising that Qwest is refusing to negotiate. It was this very concern – that an unregulated RBOC would have the ability to price squeeze competition out of the local market – that was the basis for Section 251(c) of the 1996 Act.

McLeodUSA recently renewed its request for Qwest to provide a price list for the affected elements based on Qwest's Section 271 obligations to offer them at just and reasonable

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[22] These terms and conditions are critical because an RCP will lock McLeodUSA into a region-wide commitment level for special access circuits, which, if not met, will result in monetary penalties such as the loss of RCP discounts. Eben Declaration, ¶ 11. Qwest is well aware that McLeodUSA cannot accept the current level of special access circuits in a new RCP because McLeodUSA has a significant number of existing special access circuits that it plans to convert to UNE circuits (where such circuits can be purchased as UNEs). *Id.*, ¶ 14.

[23] While it is possible that some mass market customers may choose to switch to Cox, *see Omaha Forbearance Order*, ¶ 66, business customers, and, in particular, small and medium sized customers served with T1 services, will not actually have a choice of facilities-based providers unless Cox is directly connected to each affected customer's premise with their own connection. The evidence in this docket did not indicate that Cox had actual connections to each business customer location, but only that Cox's network passed by many locations in certain wire centers.

prices.[24] McLeodUSA emphasized that the Commission rejected Qwest's request for forbearance from its Section 271 obligations in the *Omaha Forbearance Order*, observed that several state commissions have commenced proceedings to establish Section 271 pricing (for which, in some instances, TELRIC principles have been applied as an interim solution), and assured Qwest that "McLeodUSA is willing to consider any reasonable starting point for the negotiation of 271 pricing."[25] To date, Qwest has not provided a proposed Section 271 pricing list. Instead, by its silence, Qwest apparently continues to maintain that its special access/RCP offer satisfies its Section 271 obligation.

While Qwest has offered unregulated "commercial" pricing for DS0 loops, McLeodUSA's review of Qwest's recently-provided proposed agreement revealed numerous unacceptable and onerous terms. For example, Qwest has priced the commercial two-wire DS0 loop rates for Omaha nearly 30% higher than TELRIC rates, and has specifically excluded this offering from all wholesale performance standards, including Section 271 performance metrics.[26] Moreover, the commercial pricing for standalone DS0 loops confirms the anticompetitive nature of Qwest's wholesale pricing. Qwest offers CLECs a lower-cost DS0 loop if the CLEC combines that loop with Qwest local switching. The identical loop facility is nearly 30% more expensive when purchased without Qwest local switching attached.[27] Clearly, there is no cost justification

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[24] *See* Eben Declaration, ¶¶ 22, 24-25, and Exhibit 3 attached thereto.

[25] *Id.*

[26] *Id.*, ¶¶ 20, 24-25, and Exhibit 3, pages 43-70 of 70 attached thereto (Qwest's DS0 Loop Facility offering is attached to the MSA as Service Exhibit 1). According to Qwest's website, only one CLEC (TCG Omaha) has executed what appears to be Qwest's template agreement. *See* http://www.qwest.com/wholesale/clecs/commercialagreements.html.

[27] *Id.*, Eben Declaration, ¶¶ 25-26.

for the significantly higher price point. Qwest is merely able to extract a 30% monopoly premium for the standalone DS0 loop since CLECs have no alternative. There is no "market incentive" since Qwest has no competition in the wholesale market for DS0 loops. This price discrimination is wholly inconsistent with the Commission's prediction that Qwest would offer network facilities at competitive rates for use in conjunction with a "competitor's *own* services and facilities."[28] Qwest's price discrimination appears to be intentionally designed to drive facilities-based competitors out of the market.

Another egregious illustration of Qwest's refusal to negotiate wholesale pricing involves the exorbitant non-recurring charges ("NRCs") that it demands for high capacity circuits. For example, the cost-based NRC to install a UNE DS1 loop and cross connect in Nebraska is $136.15.[29] For the *Omaha Forbearance Order* wire centers, Qwest has set the NRC at $626.50.[30] That amounts to a post-forbearance NRC increase of approximately 360%.

Monthly recurring charges ("MRCs") also increase significantly in the forbearance wire centers for high capacity facilities. UNE DS1 loops in Zone 1 increase from $76.42 to a special access "price flex" rate of $182.22, a 138% increase.[31] Moreover, switching to special access from UNEs transforms most affected Omaha wire centers from low-cost Zone 1 UNE wire

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[28] *Omaha Forbearance Order*, ¶ 83.

[29] Eben Declaration, ¶ 27.

[30] *Id.* Qwest has been granted pricing flexibility in all nine Omaha wire centers affected by the forbearance. *See Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 02-01, Memorandum Opinion and Order, 17 FCC Rcd 7363 (WCB Apr. 24, 2002) (granting Qwest Phase II pricing flexibility in the Omaha MSA, among other MSAs). This has permitted Qwest to *increase* its pricing for high capacity circuits. *See* Eben Declaration, ¶ 9. It therefore appears that Qwest's response to the grant of special access pricing deregulation was a better indicator of what Qwest would do once Section 251(c) UNEs were eliminated.

[31] Eben Declaration, ¶ 6.

centers to higher cost special access zones. Only one of the affected Omaha wire centers is a Zone 1 special access wire center; five are Zone 2, with a "price flex" rate of $192.22, and two are Zone 3, with a "price flex" rate of $202.22.[32] The prospect of these cost increases has already led McLeodUSA to significantly limit its Omaha operations as described in Section III, *infra.* McLeodUSA cannot be a viable competitor in Omaha unless the wholesale pricing regime is significantly modified.[33]

Qwest's persistent refusal to negotiate wholesale rates following the *Omaha Forbearance Order* contravenes not only the Commission's predictive judgment regarding Qwest's conduct once forbearance was granted for Section 251(c)(3) loops and transport, but its Section 271 obligation to provide wholesale access to local loops, transport, and other network elements "at just and reasonable prices."[34] Because the Commission's predictive judgment was premised in part on Qwest's compliance with Section 271 pricing requirements, Qwest's flouting of this obligation provides further reason for the Commission to modify the *Omaha Forbearance Order* at this time.

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[32] Eben Declaration, ¶¶ 7-8 and Exhibit 1, at 3.

[33] To date, Qwest has continued to invoice McLeodUSA in the affected Omaha wire centers at UNE pricing. However, it is Qwest's position that it is entitled to re-rate all network elements in the affected wire centers to the March 2006 effective date of the *Omaha Forbearance Order* and backbill McLeodUSA. Accordingly, for planning and financial purposes, McLeodUSA has had to operate as if the higher costs resulting from the loss of UNEs are already in effect. McLeodUSA is particularly disadvantaged because, in contrast to the *ACS Order*, where the Commission's grant of forbearance was conditioned on ACS's continued provision of local "legacy" loops pursuant to the existing rates, terms and conditions between ACS and GCI in Fairbanks, Alaska, until such time as commercial agreements were concluded, the *Omaha Forbearance Order* contains no provision for interim pricing pending the negotiation of commercial replacement arrangements. *See Petition of ACS of Anchorage, Inc., Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, FCC 06-188, ¶ 39 (rel. Jan. 30, 2007) ("*ACS Order*").

[34] *Omaha Forbearance Order*, ¶ 103.

Qwest's tariffed special access RCP offering, which provides a 22% discount from tariffed monthly special access rates if term (48 months) and volume commitments are met, cannot represent the wholesale access that the Commission relied on in rendering its predictive judgment.[35] First, Qwest has offered RCPs for a number of years, so this offering was not made in response to the FCC's prediction that Qwest would offer reasonable wholesale pricing.[36] Nor can an RCP agreement be characterized as a commercially *negotiated* agreement since Qwest has offered RCP as part of its filed tariff on a take it or leave it basis for a number of years. Second, a CLEC does not receive the RCP discount unless all of the agreement's conditions are met, and it is subject to financial penalties for failing to satisfy them. An RCP can in no way be considered a wholesale pricing arrangement that discharges Qwest's obligations under the *Omaha Forbearance Order*, and the Commission should not permit Qwest to evade its wholesale pricing requirements in the guise of an RCP offering. Indeed, even if a CLEC qualified for the 22% RCP discount, the lowest new "discounted" price in the affected Omaha wire centers is $145.92, which is still 91% higher than the monthly UNE rate for DS1 circuits. For the five wire centers in special access Zone 2, the discounted RCP price is $153.72,[37] a 101% increase. The RCP price for the two Zone 3 wire center circuits would be $161.52,[38] a 111% increase in the MRC.

Qwest's ability to, at a minimum, double MRCs and quadruple NRCs for high capacity circuits demonstrates the absence, not the existence, of market forces, as well as Qwest's will-

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[35] Qwest FCC Tariff No. 1, Section 7.1.3(b).

[36] Eben Declaration, ¶ 12. McLeodUSA formerly had an RCP agreement with Qwest, but it currently has no such arrangement since the company continues to have a number of special access circuits to convert to UNEs.

[37] *Id*., ¶ 13.

[38] *Id*.

ingness to take advantage of its deregulated monopoly power. And of course, since Qwest has been granted pricing flexibility, there is no constraint on its ability to further increase rates above these current special access price points.

McLeodUSA has evaluated the impact of Qwest's replacement of UNE services with special access services and the "commercial" pricing arrangements offered in Qwest's DS0 loop agreement in the nine wire centers affected by the *Omaha Forbearance Order*.[39] These dramatic cost increases leave no doubt that Qwest has failed to offer reasonable wholesale replacement arrangements and plainly show that the Commission's confidence in Qwest's willingness to do so once unencumbered by regulatory constraints was misplaced. Revision of the *Omaha Forbearance Order* is therefore warranted.

III. PUBLIC INTEREST CONSIDERATIONS COUNSEL IN FAVOR OF MODIFYING THE *OMAHA FORBEARANCE ORDER*

Section 10(c) of the 1996 Act states that the FCC shall forbear from applying the Act or its rules if granting forbearance meets each of three criteria, one of which is that granting forbearance is "consistent with the public interest." The Act goes on to define the public interest test as follows:

> the Commission shall consider whether forbearance from enforcing the provision or regulation will *promote* competitive market conditions, including the extent to which such forbearance will *enhance* competition *among providers of telecommunications services*. If the Commission determines that such Communications Act of 1934 forbearance will *promote* competition *among providers of telecommunications services*, that determination may be the

[39] *See* attached Declaration of Pritesh D. Shah ("Shah Declaration"), ¶ 7.

> basis for a Commission finding that forbearance is in the public interest.[40]

In the *Omaha Forbearance Order*, the Commission did not discuss how granting forbearance would "promote" or "enhance" competition among "providers of telecommunications services." Instead, it concluded that granting forbearance would foster "regulatory parity" between intermodal competitors, and concluded that that goal satisfied the public interest test.[41] The Commission also stated that the costs of Section 251(c)(3) unbundling were outweighed by the benefits of regulatory parity.[42]

It is important to note that Section 10(c) does not mention the promotion of "regulatory parity" as being in the public interest. Considering that Congress itself mandated different regulatory regimes for cable companies and ILECs in the 1996 Act, one must presume that if fostering regulatory parity among these companies was a legitimate goal of forbearance that would meet the public interest test, Congress would have mentioned it. Instead, Congress declared that promotion or enhancement of competition among providers of telecommunications

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[40] 47 U.S.C. § 160(b) (emphasis added).

[41] *Omaha Forbearance Order*, ¶ 78.

[42] *Omaha Forbearance Order*, ¶ 76. Given the Commission's conclusion that Qwest continues to have Section 271 unbundling obligations, and because Qwest itself is willing to offer network elements under commercial agreements, the basis for finding that the costs of Section 251(c)(3) unbundling "outweigh the benefits" is unclear. First, Qwest has a continuing obligation to provision UNEs for wire centers that are not subject to forbearance or where CLECs continue to be impaired under the *TRRO*. Qwest order processing centers for UNEs are highly centralized, and the cost of developing the UNE ordering systems has already been incurred. Thus, eliminating the Section 251(c)(3) unbundling obligation for the nine affected wire centers will have a very minor, if not insignificant, effect on the incremental costs Qwest incurs to provision UNEs. *See* attached Declaration of August H. Ankum at ¶ 4.

Second, the *Omaha Forbearance Order* requires Qwest to provide Section 271 network elements in these nine wire centers. Indeed, Qwest is willing to provide network elements on a commercial basis. Because the provisioning processes for UNEs and special access facilities are nearly indistinguishable, Qwest's costs will not be materially reduced under a forbearance regime. *Id.* at ¶ 5.

services was the public interest that forbearance should foster.[43] Granting forbearance that enables the RBOC to price other facilities-based CLECs out of the market does not "promote" or "enhance" competition. At best, forbearance creates a duopoly facilities-based supply situation for mass market end user customers, and arguably hands back the RBOC a monopoly in the enterprise market.

In this instance, the grant of forbearance is causing the elimination of competition from one of the few facilities-based providers of telecommunications services in the Omaha MSA. McLeodUSA is currently in the midst of planning its exit from Omaha wire centers because it cannot compete in the market due to Qwest's unwillingness to offer just and reasonable wholesale pricing, a direct result of the grant of forbearance to Qwest from Section 251(c) obligations.[44] Furthermore, because the telecommunications industry is one of scale, McLeodUSA will not just exit the nine wire centers in which forbearance was granted. The nine affected wire centers represent the vast majority of revenue opportunity of McLeodUSA's current and prospective customer base.[45] Accordingly, McLeodUSA is being forced to exit all Omaha wire centers[46] because there is simply not enough revenue potential in the unaffected Omaha wire centers to justify the ongoing operating costs of the local switching center and related expenses.[47]

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[43] 47 U.S.C. § 160(b).

[44] *See* Shah Declaration, ¶¶ 7-8.

[45] *See* Shah Declaration, ¶ 8. Attached as Exhibit 1 to the Shah Declaration are maps showing the before and after impact of the forbearance grant. While the unaffected geographical area looks comparable in size, the reality is that the vast majority of business customers are located in the nine affected wire centers.

[46] *See* Shah Declaration, ¶¶ 8, 10. McLeodUSA will continue to offer local services out of its two Council Bluffs collocations by providing dial tone from its local switch in Des Moines, Iowa, in conjunction with its intercity fiber network. There are networking and interconnection issues that render it

In the *Omaha Forbearance Order*, the Commission predicted that the market would constrain Qwest from abusing its wholesale access pricing once relieved of its cost-based UNE obligations in Omaha.[48] However, the Commission's prediction was unfounded,[49] the circumstances the Commission described in the *Omaha Forbearance Order* that would lead it to revisit its ruling have taken place, and pricing abuse has materialized. It would be contrary to the public interest to allow the Section 251(c) forbearance ruling to stand under these circumstances, and the Commission should revoke this aspect of the *Omaha Forbearance Order*.

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impossible to provide dial tone from the Des Moines switch to the Omaha collocations. Shah Declaration, ¶ 7.

[47] It is important to note that McLeodUSA's exit from the Omaha market will potentially cause more than its own retail customers to lose their carrier of choice in the Omaha market. McLeodUSA provides wholesale local services (a combination of McLeodUSA local switching and transport with a UNE loop) to another significant CLEC in the Omaha market. McLeodUSA also provides broadband access to a significant "over the top" VoIP provider in this market. These other service providers will face higher costs in the Omaha MSA once McLeodUSA exits this market. Accordingly, these service providers will also have to make a decision about whether to exit the market or attempt to pass through significantly higher costs to their end users. *See* Shah Declaration, ¶ 4.

[48] *Omaha Forbearance Order*, ¶ 79. In the *TRRO*, in the context of finding that a rule barring access to UNEs based on the availability of tariffed alternatives creates a risk of abuse by ILECs, the Commission noted the potential for price squeezes due to the control maintained by ILECs over special access pricing. *TRRO*, ¶ 59.

[49] The Commission's prediction was based on the notion that Qwest had "voluntarily" negotiated commercial UNE-P arrangements. In fact, none of Qwest's commercial agreements were truly "negotiated" *after* Qwest had been freed from regulatory wholesale pricing oversight. *See* Letter from William Haas, McLeodUSA, to Marlene Dortch, Secretary, WC Doc. 04-223, at 3 (filed Sep. 14, 2005); see also Letter from Patrick Donovan, Swidler Berlin LLP, to Marlene Dortch, Secretary, WC Doc. 04-223, at 11 (filed Feb. 3, 2006) (attaching Motion for Stay). While it is true that Qwest negotiated a commercial UNE-P replacement agreement with MCI, that deal was negotiated and announced before the FCC announced the elimination of UNE-P in its interim order on July 21, 2004. All of the remaining commercial agreements between Qwest and CLECs for commercial UNE-P replacement services mirrored the Qwest-MCI agreement. Qwest refused to negotiate substantive changes (such as different price points) to its template MCI agreement. Thus, attributing these commercial agreements to Qwest's reaction to market forces is not an accurate reflection of circumstances that existed when the underlying terms of Qwest's commercial agreements were negotiated.

The Commission's prediction that Qwest would comply with its independent obligation to provide wholesale access to loops and transport "at just and reasonable prices" under Section 271(c)(2)(B), which was explicitly made part of the justification for granting forbearance from Section 251(c)(3), has likewise failed to materialize.[50] Qwest has not responded to McLeodUSA's numerous inquiries regarding the negotiation of Section 271 pricing other than to cryptically assert that McLeodUSA's request for Section 271 pricing "is really a complaint that Qwest will not agree to TELRIC pricing."[51] To the contrary, Qwest's proposed UNE replacement arrangements indicate that Qwest does not intend willingly to offer "just and reasonable prices" and related terms, such as performance metrics, that are associated with Section 271 offerings.[52]

Similarly, although the Commission's findings were based in part on the fact that Qwest voluntarily entered into some commercial agreements with UNE-P providers,[53] the Commission's prediction that Qwest would act reasonably with regard to wholesale loops and transport was incorrect. As McLeodUSA noted in its Motion for Stay of the *Omaha Forbearance Order*, commercial agreements do not necessarily produce competitive rates. Instead, Qwest's pricing decisions in the absence of Section 251(c) requirements demonstrate that it will take advantage of the fact that it is the only wholesale provider of last mile loop facilities in Omaha and reflect its attempt to consolidate its current position in lieu of maintaining reasonable access to last mile

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[50] *See Omaha Order*, ¶¶ 96, 105.

[51] *See* Letter from Daphne E. Butler, Qwest, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 04-223 & 05-281, at 3-4 (filed Jan. 22, 2007).

[52] Eben Declaration, ¶ 24.

[53] *See Omaha Forbearance Order*, ¶ 82.

network facilities as the Commission intended. This blatantly defies the public interest and provides the Commission with further reason to revoke the Section 251(c) forbearance granted to Qwest.[54]

Furthermore, "me too" forbearance petitions filed by Verizon and by Qwest itself are now pending before the Commission.[55] Because the Commission's *Omaha Forbearance Order* ruling was based in part on a "predictive judgment" that has proven incorrect, it should revisit the decision at this juncture in order to avoid inappropriate extension of the ruling to pending and future forbearance proceedings involving Qwest and other ILECs.

Finally, McLeodUSA is not alone in its evaluation that the impact of the *Omaha Forbearance Order* forecloses a facilities-based competitor from competing in the Omaha MSA under the pricing terms that Qwest has offered to date. In comments recently filed in the pending Verizon forbearance docket, Integra Telecom, Inc. ("Integra") explained that it entirely aban-

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[54] UNE-P and related commercial arrangements (consisting both of commercially priced elements and UNE loops) are further distinguishable because they derived in part from Qwest's obligation to provide cost-based elements. Therefore, less opportunity existed for Qwest to exploit the pricing of such agreements, and the Commission's impression that their existence indicated that Qwest's post-forbearance actions would be reasonable was incorrect.

[55] *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the New York Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Philadelphia Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Pittsburgh Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Providence Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Virginia Beach Metropolitan Statistical Area*, WC Doc. No. 06-172 (filed Sept. 6, 2006); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area; Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area; Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area; Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle, Washington Metropolitan Statistical Area*, WC Docket No. 07-97 (filed Apr. 27, 2007).

doned its plans to enter the Omaha market as a result of the *Omaha Forbearance Order*. Integra stated that its decision was motivated by the failure of the Commission's predictive judgment to materialize.[56] Integra found that it was "substantially less attractive economically to enter the Omaha market without access to unbundled network elements at TELRIC rates in the entire Omaha market" and decided that the investments it was prepared to make to provide service in Omaha would be better utilized in other markets.[57] It emphasized the infeasibility of Omaha market entry via deployment at special access rates, noting that it would be extremely difficult for a CLEC to provide service to small and medium business customers in competition with the ILEC if loops and transport were priced at special access rates.[58] Integra's experience starkly illustrates the negative effects of Qwest's ability to revert to monopolistic practices and keep would-be competitors out of the market once unfettered by Section 251(c) obligations, thereby tightening Qwest's stronghold over the market to the exclusion of competitors.

Integra evidently is not alone in its reluctance to enter the Omaha market. McLeodUSA has been unable to entice any buyer for its Omaha assets despite numerous efforts. The last interested party declined to purchase the assets despite being offered them for pennies on the dollar. The lack of reasonable wholesale pricing for last mile loop facilities was the primary issue

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[56] Comments of Integra Telecom, Inc., WC Docket No. 06-172, at 4 (filed March 5, 2007) ("The Commission's 'predictive judgment' that the ILEC will have an incentive to offer wholesale facilities at reasonable rates to its competitors has proven to be flawed in Omaha. The prediction "that Qwest will not react to our decision here by curtailing wholesale access to its analog, DS0, DS1, or DS2-capacity facilities turned out to be wrong").

[57] *Id.* at 4.

[58] *Id.* at 5.

that caused all prospective parties to back away from purchasing the assets.[59] Absent an 11th hour reprieve from the Commission, that means that the vast majority of McLeodUSA's $25,000,000 investment in its own network facilities (Class 5 switch, collocations, intracity fiber ring, etc.) to offer a facilities-based competitive choice to a broad range of customers in the Omaha MSA in fulfillment of the 1996 Act will have been rendered worthless by the grant of forbearance, despite the Congressional mandate that forbearance should be granted to "*promote* competitive market conditions, including the extent to which such forbearance will *enhance* competition."[60]

In light of Qwest's pricing abuses, the Commission should reconsider its ruling and find that continuing to relieve Qwest from its Section 251(c) obligation to provide UNE loops and transport at TELRIC rates in nine wire centers in the Omaha MSA will result in the foreclosure of competitive entry, higher prices, and other negative consequences, all of which are manifestly contrary to the public interest.

IV. CONCLUSION

Unfortunately, the Commission's predictive judgment regarding Qwest's actions has been proven wrong. Contrary to the expectation stated in the *Omaha Forbearance Order* and in patent disregard of its Section 271 obligation to offer loops and transport at "just and reasonable" rates, Qwest has failed to make such facilities available on competitive rates and conditions. Instead, Qwest has offered to replace the Section 251(c) UNEs previously provided at TELRIC rates only on non-negotiable, uneconomic, and unacceptable rates and terms. These include tariffed special access services at monopolistic prices; a "commercial agreement" for DS0 loops

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59 *See* Shah Declaration, ¶ 9.

60 47 U.S.C. § 160(b) (emphasis added).

that reflects unreasonable rates and unacceptable conditions, such as Qwest's exclusion from any performance metrics; and, with regard to DS1 and DS3 loops, execution of a footprint-wide RCP contract that provides modest discounts from tariffed special access rates, but only if McLeodUSA agrees to (and is able to comply with) stringent term and volume commitments for replacing Section 251(c) UNEs with special access facilities throughout Qwest's 14-state region.

The Commission should therefore reconsider its determination, revoke the forbearance granted to Qwest from providing UNE loops and transport at TELRIC prices in nine wire centers in the Omaha MSA, and restore Qwest's obligation to unbundle loop and transport network elements to the extent that CLECs are "impaired" under the rules adopted in the *TRRO*.

Respectfully submitted,

Andrew D. Lipman
Russell M. Blau
Robin F. Cohn
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006
(202) 373-6000 (telephone)
(202) 373-6001 (facsimile)

Counsel to McLeodUSA Telecommunications Services, Inc.

Dated: July 23, 2007