

**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)	

**COMMENTS OF
ALPHEUS COMMUNICATIONS, L.P.;
CAVALIER TELEPHONE, LLC;
CIMCO COMMUNICATIONS, INC.;
DSLNET COMMUNICATIONS, LLC;
FIRST COMMUNICATIONS, INC.;
GLOBALCOM, INC.;
INTEGRA TELECOM, INC.;
LIGHTYEAR, INC.;
MEGAPATH, INC.;
MPOWER COMMUNICATIONS CORP., d/b/a
TELEPACIFIC COMMUNICATIONS;
RCN TELECOM SERVICES, INC.;
TDS METROCOM, LLC.; AND
U.S. TELEPACIFIC CORP. d/b/a TELEPACIFIC COMMUNICATIONS**

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Dated: August 29, 2007

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY.....	ii
I. INTRODUCTION.....	2
II. THE PETITION SHOULD BE CLOSELY EVALUATED AS A “TEST CASE” OF POST-FORBEARANCE BOC BEHAVIOR.....	4
III. THE PETITION SHOULD BE GRANTED BECAUSE QWEST HAS FAILED TO OFFER REASONABLE WHOLESALE ALTERNATIVES FOR THE AF- FECTED FACILITIES DESPITE THE COMMISSION’S “PREDICTIVE JUDGMENT” THAT QWEST WOULD DO SO.....	10
IV. CONCLUSION	15

SUMMARY

The Commission should expeditiously reinstate Qwest's Section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA. The Commission's forbearance from enforcing those duties was specifically premised on Qwest's provision of network elements at just and reasonable rates, and on Qwest's obligation to provide wholesale access to network elements under Section 271. Qwest has failed to meet the Commission's expectations of reasonable wholesale market conduct, and the forbearance grant should be modified as McLeodUSA requests.

The significance of McLeodUSA's Petition transcends Qwest's anticompetitive actions in the wire centers affected by the Omaha Forbearance Order. Several BOC forbearance requests are now pending before the Commission. It must take decisive action against Qwest in this case to avoid the inappropriate extension of its ruling to much larger markets. The Commission should likewise refrain from basing subsequent forbearance decisions on uncertain "predictive judgments" whose success relies on BOC performance. Qwest's actions have shown both that such confidence is misplaced, and that forbearance decisions must have a more concrete foundation.

Instead of offering wholesale access to last mile bottleneck facilities in a manner consistent with the Commission's expectations, Qwest has demonstrated its monopolistic intention to curtail the wholesale availability of necessary facilities. Although the Commission predicted that "market incentives" would moderate Qwest's conduct, this has not been the case. The Commission's reliance on the reasonableness of Qwest's post-forbearance actions was overly optimistic, and it must now regulate Qwest's conduct by reinstating its unbundling obligations.

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COMMENTS ON MCLEODUSA PETITION FOR MODIFICATION

Alpheus Communications, L.P.; Cavalier Telephone, LLC; CIMCO Communications, Inc.; DSLnet Communications, LLC; First Communications, Inc.; Globalcom, Inc.; Integra Telecom, Inc.; Lightyear, Inc.; MegaPath, Inc.; Mpower Communications Corp. d/b/a TelePacific Communications; RCN Telecom Services, Inc.; TDS Metrocom, LLC; and U.S. TelePacific Corp. d/b/a TelePacific Communications (collectively, "Joint Commenters,"), by their undersigned counsel, in response to the Public Notice, DA 07-3467, released July 20, 2007, respectfully submit these comments in support of the Petition for Modification of McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") of the Commission's Omaha Forbearance Order ("Petition").¹

For the reasons explained herein, McLeodUSA's Petition should be granted promptly.

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").

I. INTRODUCTION

McLeodUSA's Petition is based on Qwest's failure to make reasonable wholesale access to DS0, DS-1, and DS-3 loops and transport available, after being released from Section 251(c)(3) unbundling obligations by the Omaha Forbearance Order, notwithstanding the Commission's "predictive judgment" that Qwest would do so,² and on Qwest's failure to fulfill its wholesale obligations to provide Section 271 network elements under Sections 271(c)(2)(B)(iv) and (v) after forbearance was granted.³

The Petition presents the Commission with a unique opportunity to reflect on a BOC's compliance with a "predictive judgment" rendered in the context of a forbearance ruling. The "predictive judgment" in this case was an integral part of the Commission's decision to grant Section 251(c)(3) unbundling relief, and McLeodUSA's Petition should result in the Commission's close scrutiny of Qwest's post-forbearance conduct. Qwest's fundamental failure to meet the Commission's expectations as articulated in the Omaha Forbearance Order leaves no doubt that the Commission should immediately reinstate Qwest's Section 251(c)(3) loop and transport unbundling obligations in the Omaha Metropolitan Statistical Area ("MSA").

The unfortunate situation now before the Commission was specifically contemplated in the Omaha Forbearance Order, where the Commission stated that "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 accu-

² *Id.*, ¶ 79.

³ *Id.*, ¶ 105.

racy of this prediction in the wake of our decision; in the event it proves too optimistic, we will take appropriate action.”⁴

Despite the Commission’s admonition that Qwest either comply with the “predictive judgment” by making just and reasonable offerings to replace loop and transport facilities for the affected wire centers or face the possibility of corrective action by the Commission, all indications to date are that Qwest has used forbearance as a “Get Out of Jail Free” card instead of complying with the Commission’s directives. Qwest’s post-forbearance conduct is marked by an unequivocal reversion to monopolistic practices, and consists of an inflexible “take it or leave it” position that clearly ignores the Commission’s expectation that Qwest’s actions would comply with the “predictive judgment” that the forbearance ruling was based on.

Instead of making just and reasonable offers for the loop and transport facilities affected by the forbearance grant, Qwest’s offers consist largely of its tariffed special access rates for DS-1 and DS-3 loops, and DS0 loop proposals at rates that are unacceptably higher than UNE rates. Qwest’s unreasonable stance does not end with its rate proposals. It also seeks to impose a burdensome array of terms and conditions, including unacceptable term and volume commitments and exclusion of its provisioning from performance metrics that would otherwise serve to maintain some control over its conduct. The time has come for the Commission to oversee Qwest’s wholesale market activities, as it promised to do in the Omaha Forbearance Order, and end Qwest’s disregard of the Commission’s ruling by restoring Section 251(c)(3) unbundling

⁴ Omaha Forbearance Order, ¶ 83.

obligations for the affected wire centers due to Qwest's failure to comport with the Commission's "predictive judgment."

II. THE PETITION SHOULD BE CLOSELY EVALUATED AS A "TEST CASE" OF POST-FORBEARANCE BOC BEHAVIOR

The issues raised by the Petition extend beyond the imminent market exit of one competitive carrier whose economic viability is threatened by the anticompetitive conduct of a BOC in a forborne environment. McLeodUSA's position has ramifications for other CLECs operating not just within the Omaha MSA, but throughout Qwest's territory, and in the territories served by other BOCs. Additional forbearance requests by Qwest itself are now before the Commission, and multiple Verizon forbearance filings are likewise pending.⁵ If forbearance is dispensed based on a "predictive judgment" that speculatively relies on the reasonableness of a BOC's conduct and the BOC plainly fails to meet the Commission's expectations, it is clear both that revocation of the previously awarded forbearance is warranted and that future grants of forbearance should be more stringently evaluated to curtail further improper activity.

⁵ See *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).

A highly undesirable precedent will be set if Qwest is permitted to retain Section 251(c)(3) forbearance despite its track record of unreasonably high price offerings, onerous terms and conditions for replacement of the affected UNEs, and an uncooperative and inflexible negotiating stance. The Commission should not allow Qwest (and other BOCs) to believe that they can freely engage in anticompetitive conduct and predatory pricing in a post-forbearance environment. The Commission may easily avoid this result by following through on its promise to reconsider Section 251(c)(3) forbearance and reinstate Qwest's unbundling obligations due to its unacceptable wholesale market behavior.

McLeodUSA's request strongly implicates the Commission's goal of promoting independent facilities-based competition,⁶ and the Commission should closely examine the public interest issues raised by the Petition. These considerations counsel the Commission to employ a cautious approach and any doubt should be resolved in favor of granting McLeodUSA's request. Qwest's anticompetitive conduct and the severe harm to McLeodUSA, with implications for other competitive entrants, calls for the Commission's serious consideration.

In the Omaha Forbearance Order, the Commission noted that Qwest was the sole provider of wholesale access to last mile bottleneck facilities in the Omaha MSA.⁷ As McLeodUSA

⁶ See e.g., *In re Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-195, FCC 96-325, 11 FCC Rcd 15,499 (1996) ("Local Competition Order"), ¶ 683 (cautioning against pricing approach that could discourage facilities-based competition). See also *Id.*, ¶¶ 12 (noting the three paths of market entry contemplated by the 1996 Act, which includes facilities-based competition), and 172 (ILEC interconnection and unbundling obligations "pave the way for the introduction of facilities-based competition with incumbent LECs").

⁷ Omaha Forbearance Order, ¶ 67. Similar findings were made both in the recent ACS Forbearance Order, and in the ACS UNE Order. See *Petition of ACS Anchorage, Inc., for Forbearance Pursuant to 47 U.S.C. §160(c) in the Anchorage, Alaska Incumbent Local Exchange Carrier Study Area*, Memorandum

shows, most CLECs have no choice but to rely on Qwest's last mile facilities for access to the majority of customers.⁸ It is not economically feasible for competitive entrants to construct their own last mile facilities, and Cox has shown no interest in providing competitive access to its own facilities (which, in any event, are not technically suitable for most enterprise services). Qwest's posture as the only last mile provider leaves it with no "market incentives" to act reasonably and its behavior shows that it has no intention of providing such access on reasonable terms. The grant of forbearance has simply allowed Qwest to resume its monopolistic practices without the taming effects of regulatory oversight that were present when Section 251(c)(3) unbundling obligations were intact.

Perhaps the starkest illustration of Qwest's conduct is shown in the confiscatory non-recurring charges ("NRCs") that it demands for high capacity circuits. As McLeodUSA relates, the TELRIC-based DS-1 non-recurring charge (including cross connect) in Nebraska is \$136.15.⁹ For the forborne wire centers, Qwest has attempted to extract an NRC of \$626.50, which is an increase of approximately 360%. However, Qwest should not be permitted to assess *any* non-recurring charge for the conversion of UNE facilities to special access facilities, since existing arrangements are being modified solely because of the forbearance grant. Such charges inexplicably shift the costs of forbearance away from the BOC obtaining relief, and transfer them

Opinion and Order, WC Docket No. 06-109 (rel. Aug. 20, 2007) ("ACS Forbearance Order") at ¶ 50 ("The Commission found in the ACS UNE Order that nothing on the record in that proceeding reflected any significant alternative sources of wholesale inputs for carriers in the Anchorage study area, and no evidence in the instant proceeding persuades us to conclude otherwise here").

⁸ Petition at 9, 16.

⁹ Petition, Eben Decl., ¶ 27.

to the carriers who already absorb the financial brunt of forbearance in the form of lost UNE access. Any costs associated with the transition from UNEs to other forms of provisioning more appropriately fall on Qwest, as the replacement arrangements would plainly not be necessary in the absence of forbearance. Even for newly-installed circuits, these NRCs appear grossly excessive and cannot plausibly be based on cost.

Section 251(c) was enacted based on concerns that unregulated BOCs could create price squeezes.¹⁰ Qwest's conduct, including its inflexible special access pricing proposals, demonstrates that those concerns were well-founded. McLeodUSA's involuntary market exit will bring the problem full circle by forcing its customers to return to Qwest, given the paucity of facilities-based competitors in the Omaha MSA, which will in turn increase Qwest's profit margins and cement its market control. This will occur to the detriment of consumers and competitors alike, as the reduction of competitive alternatives results in constriction of the market.

In the ACS Forbearance Order released last week, the Commission declined ACS's request for forbearance from dominant carrier regulation for interstate special access services.¹¹ Its decision rested in part on a finding that, even if conditions proposed by ACS were sufficient to ensure that its special access rates would be just and reasonable (which is plainly not the case here), ACS would "still have the incentive and ability to increase its rivals' costs by manipulat-

¹⁰ See Local Competition Order, ¶ 11 (Congress mandated that the most significant economic impediments to efficient entry into monopolized local markets must be removed, and entrants must be able to share the economic benefits of that efficiency in the form of cost-based prices).

¹¹ ACS Forbearance Order, ¶¶ 85-86.

ing the terms and conditions under which it offered and provisioned such services.”¹² Apart from the unreasonable pricing proposals discussed herein, similar concerns about anticompetitive terms and conditions should guide the Commission’s decision in this case, where Qwest offers only unilateral boilerplate terms that reflect its “take it or leave it” position, including the imposition of term and volume commitments before discounts from special access rates are available, and the removal of performance metrics from its provisioning. The Commission described manipulative non-rate tactics as “non-price discrimination” in the ACS Forbearance Order,¹³ and it should be equally vary of Qwest’s “non-price” proposals here.

McLeodUSA’s difficult position is paralleled by the experience of other CLECs who have raised their concerns about continued viability as facilities-based competitors, both in the wake of the Omaha Forbearance Order and in response to Verizon’s pending forbearance petitions. Several CLECs have highlighted their respective situations in comments filed in the Verizon forbearance docket. Integra explained that the company was forced to halt its plans to enter the Omaha market after Qwest refused to offer essential facilities at reasonable cost, instead basing its offerings on special access rates, following the grant of forbearance. Integra’s actions were directly affected by Qwest’s failure to meet the Commission’s predictive judgment in the instant docket.¹⁴

¹² *Id.* at ¶ 87. *See Id.* at ¶ 86 (“We are not persuaded...that the conditions proposed by ACS are sufficient to ensure that ACS’s rates and practices would be just, reasonable and not unjustly or unreasonably discriminatory as required to satisfy Section 10(a)(1)”).

¹³ *Id.* at ¶ 88.

¹⁴ Comments of Integra Telecom, Inc., WC Docket No. 06-172, at 5 (filed March 5, 2007) (“The Commission’s ‘predictive judgment’ that the ILEC will have an incentive to offer wholesale facilities at

Other Joint Commenters similarly emphasized the extent of CLEC reliance on cost-based DS0, DS-1, and DS-3 loop and transport facilities, noted the paucity of wholesale alternatives to Verizon's facilities, and stated that many competitive carriers would not be able to continue operations if forced to rely exclusively on special access facilities in lieu of UNEs.¹⁵ These filings plainly show the anticompetitive results of Qwest's conduct in deterring potential competitors from executing their market entry plans in a forbore environment, and demonstrate that the special access facilities as offered by Qwest are not an economically viable alternative to Section 251(c)(3) UNEs.

Finally, Qwest's failure to meet the Commission's "predictive judgment" shows that the Commission should not rely on such judgments in deciding pending or future forbearance requests. Given the *anticompetitive* nature of Qwest's conduct in the aftermath of the Omaha Forbearance Order, there is no sound basis for further "predictive judgments" that optimistically but speculatively and imprecisely rely on the expectation of BOC compliance with the Commis-

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"). Integra further stated its belief 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." *Id.*, Slater Decl., ¶ 8. It also noted the difficulty of Omaha market entry at special access rates, informing the Commission that the investments it originally intended to make in the Omaha market would be better applied to other markets. *Id.*, Slater Decl., ¶ 9.

¹⁵ Reply Comments of Opponents ACN Communications Services, Inc., Alpheus Communications, L.P., ATX Communications, Inc., Broadwing Communications, LLC, Cavalier Telephone Corporation, CloseCall America, Inc., DSLnet Communications, LLC, Eureka Telecom, Inc., d/b/a InfoHighway Communications, ITC^DeltaCom Communications, Inc., McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp., Norlight Telecommunications, Inc., Penn Telecom, Inc., RCN Telecom Services, Inc., RNK, Inc., segTEL, Inc., Talk America Holdings, Inc., TDS Metrocom, LLC, and U.S. Telepacific Corp. d/b/a Telepacific Communications, WC Docket No. 06-172, at 9-11 (filed April 18, 2007).

sion's expectation of reasonable conduct. Given the devastating consequences of forbearance on the competitive landscape and the fact that just and reasonable access to loop and transport facilities lies at the very heart of CLEC business operations, the Commission must have greater certainty about future BOC conduct before granting such extreme relief. In fact, the Commission is required to modify a ruling in the event that its predictive judgment proves incorrect, as is the case here.¹⁶ It should therefore revisit its determination in order to prevent further extension of its erroneous predictive judgment.

III. THE PETITION SHOULD BE GRANTED BECAUSE QWEST HAS FAILED TO OFFER REASONABLE WHOLESALE ALTERNATIVES FOR THE AFFECTED FACILITIES DESPITE THE COMMISSION'S "PREDICTIVE JUDGMENT" THAT QWEST WOULD DO SO

As detailed in Section II, *infra*, Qwest's conduct demonstrates that there is ample justification for the Commission to scrutinize Qwest's actions as a "test case" of post-forbearance BOC behavior. In addition, the Commission expected in rendering its "predictive judgment" that "based on previous experience in the market for wireline local exchange service served by Qwest and in other markets, ... Qwest will not react to our decision here by curtailing wholesale access to its analog, DS0, DS1 or DS3-capacity facilities."¹⁷ The Commission's reliance on Qwest's willingness to make reasonable wholesale offerings was, regrettably, misplaced, despite Qwest's

¹⁶ See *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (internal citations omitted) (Reversing predictive judgment related to Commission broadcasting station licensing integration policy and finding that FCC's necessarily wide latitude to make policy based on predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time to ascertain whether they work - that is, whether they produce the benefits the Commission originally predicted they would). See also *American Family Association v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir. 2004) (citing *Bechtel*).

¹⁷ *Id.*, ¶ 79.

subsequent representation that “the FCC’s prediction that Qwest will make its network available on competitive terms is less a predictive judgment than a certainty.”¹⁸ Qwest’s statement was no more than a hollow promise, and the Commission must now intervene to reinstate Section 251(c)(3) unbundling obligations consistent with its promise to oversee Qwest’s wholesale market behavior should the “predictive judgment” fail to come to fruition.

Qwest has likewise failed to comply with its duty to offer just and reasonable prices under Section 271, even though the Commission rejected Qwest’s request for forbearance of its Section 271(c)(2)(B) obligations, and its prediction that Qwest would act reasonably specifically rested in part on Qwest’s continued wholesale obligations under Sections 271(c)(2)(B)(iv) and (v).¹⁹ This failure provides further reason for the Commission to reinstate Qwest’s unbundling obligations as requested in the Petition.

As McLeodUSA explains, its attempts to obtain reasonable wholesale replacement arrangements with Qwest have been thwarted by a variety of inappropriate responses, including Qwest’s uncooperative attitude;²⁰ Qwest’s unresponsiveness to McLeodUSA’s request for Section 271 pricing;²¹ Qwest’s insistence on special access pricing and other unreasonable

¹⁸ Qwest Opposition to Motion for Stay, Docket 04-223 (Feb. 10, 2006).

¹⁹ Omaha Forbearance Order, ¶ 103 (referring to 47 C.F.R. § 271(c)(2)(B)(iv-vi)). *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)”).

²⁰ Petition, Eben Decl., ¶¶ 16-17.

²¹ *Id.*, ¶¶ 22-23.

rates;²² Qwest's attempted imposition of onerous terms and conditions to accentuate the anti-competitive effects of the unreasonable rates;²³ Qwest's position that McLeodUSA execute a variety of agreements as a "package deal";²⁴ and Qwest's inflexible insistence on using unilateral "boilerplate" agreements drafted by Qwest.²⁵

Despite 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 has made only excessive rate proposals. With respect to DS1, and DS3 loops and transport, Qwest has offered its tariffed special access rates, which consist of significantly higher recurring and non-recurring charges than the UNE rates for identical facilities.²⁶ Although Qwest has offered modest discounts from special access rates pursuant to its tariffed "Regional Commitment Program" ("RCP"), availability of the RCP expressly hinges on a carrier's compliance with term and volume commitments for obtaining such facilities.²⁷ Qwest's "commercial" DS0 loop rate proposal is likewise unreasonable, inexplicably demanding rates that are nearly 30% higher than the UNE prices for the same

²² Petition at 5.

²³ *Id.* at 4-5.

²⁴ Petition, Eben Decl., ¶ 23.

²⁵ *Id.*, ¶ 18, 24, 28.

²⁶ Petition at 4.

²⁷ *Id.* at 11. As McLeodUSA notes, because Qwest has offered RCP arrangements for several years, the RCP plainly was not offered in response to the Commission's prediction that Qwest would offer reasonable pricing in a forborne environment. *Id.*

loops.²⁸ It is obvious that Qwest's rate proposals fail to meet the Commission's expectation of just and reasonable pricing, and that Qwest's offerings fall far short of the reasonable conduct expected by the Commission.

The non-price terms and conditions associated with Qwest's post-forbearance offerings are equally offensive, consisting of an anticompetitive array of onerous terms and conditions. As noted, the availability of Qwest's RCP is conditioned on a carrier's adherence to term and volume commitments without which no discount from tariffed special access rates is available,²⁹ and violations of the terms of the RCP can result in monetary penalties.³⁰ Significantly, the RCP requires a CLEC seeking reduction of special access rates in the Omaha MSA to commit to purchasing a minimum level of DS-1 and DS-3 facilities pursuant to the RCP throughout Qwest's fourteen-state footprint, even though the CLEC would generally otherwise be able to obtain identical facilities as UNEs elsewhere in Qwest's territory.³¹ Such terms and conditions are unwarranted because they bear no relation to cost, and simply reflect Qwest's unjust exercise of its overwhelming market power.

The anticompetitive and unreasonable nature of Qwest's post-forbearance offerings is similarly highlighted by the purported absence of performance standards and metrics from

²⁸ *Id.* at 8.

²⁹ *Id.* at 5.

³⁰ *Id.* at 7, n. 22.

³¹ *Id.* at 5.

Qwest's proposed Commercial DS0 Loop Agreement.³² Because performance metrics are ordinarily associated with Section 271 offerings,³³ Qwest's omission of such terms illustrates its unwillingness to comply with the Commission's prediction. Instead, Qwest has taken advantage of its position as the only supplier of essential last mile facilities and has employed anticompetitive policies that appear designed to force existing competitors out of the market. No market force is currently preventing Qwest from offering only "take it or leave it" proposals. The Commission must therefore step in to remedy the situation, and should reinstate Qwest's unbundling obligations to prevent further erosion of the Omaha MSA market in the aftermath of its erroneous "predictive judgment."

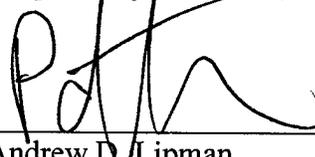
³² See Petition, Eben Decl., ¶ 24, n. 22 (citing provisions of Qwest's Commercial DS0 Loop Agreement that exclude performance metrics).

³³ *Id.*, ¶ 24.

IV. CONCLUSION

For the foregoing reasons, McLeodUSA's Petition for Modification of the Omaha Forbearance Order should be granted expeditiously.

Respectfully submitted,



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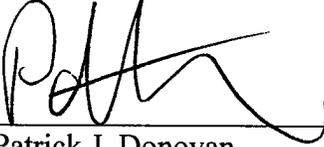
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Dated: August 29, 2007

CERTIFICATE OF SERVICE

I, Patrick J. Donovan, hereby certify that on this 29th day of August, 2007, I caused a true and correct copy of the foregoing to be served via electronic mail to the following:

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