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Via Courier

August 29, 2007

FILED/ACCEPTED
AUG 2 9 2007
Federal Communications Commission
Office of the Secretary

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

Re: *In the Matter of 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 Ms. Dortch:

Qwest Corporation ("Qwest") hereby files its Opposition to the Petition for Modification of McLeodUSA Telecommunications Services, Inc., filed July 23, 2007, in the above-captioned proceeding.

Pursuant to the *Protective Order* in this proceeding (19 FCC Rcd 11377 (2004)), Qwest requests that the confidential version of its Opposition be withheld from the public record. Pursuant to paragraph 5 of the *Protective Order*, portions of the Opposition, the Declaration of David L. Teitzel and its appended Attachment A, and the Declaration of Cindy Buckmaster are designated as including confidential information. The confidential information in these documents has been rendered unavailable for viewing in the public version of this Opposition. The confidential versions of the documents are marked with the language "**CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER**" pursuant to paragraph 5 of the *Protective Order*.

Enclosed with the cover letter (non-redacted) are an original and a single copy of the confidential version of the submission, including associated attachments. Enclosed with the cover letter (redacted) are an original and four copies of the public version of the submission, including attachments. Both are being filed simultaneously today, via courier, under separate cover. The redacted, non-confidential version of the Opposition and associated Teitzel Declaration, and its appended Attachment A, and the Buckmaster Declaration are each marked "**REDACTED -- FOR PUBLIC INSPECTION**."

Should the Commission consider at anytime invoking paragraph 6 of the *Protective Order*, Qwest is prepared to provide a confidentiality justification upon request, pursuant to

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47 C.F.R. §§ 0.457, 0.459, for the confidential information enclosed with today's submission (non-redacted version).

Finally, a second copy of this letter is being provided, for which acknowledgment is requested. Please date-stamp the copy and return it to the courier. If you have any questions regarding this submission, please contact the undersigned at the contact information reflected in the letterhead. Thank you for your assistance with this matter.

Sincerely,

Daphne E. Butler/jno

Daphne E. Butler

Enclosures

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

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

OPPOSITION OF QWEST CORPORATION

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August 29, 2007

REDACTED - FOR PUBLIC INSPECTION

TABLE OF CONTENTS

REDACTED - FOR PUBLIC INSPECTION

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

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	WC Docket No. 04-223
Pursuant to 47 U.S.C. Section 160(c) in the	)	
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OPPOSITION OF QWEST CORPORATION

Qwest Corporation ("Qwest"), through counsel, hereby files its opposition to the July 23, 2007 Petition for Modification[1] of the *Omaha Forbearance Order*.[2]

I. INTRODUCTION AND SUMMARY

Qwest faces intense competition in Omaha. The enterprise market, which was competitive in 2005 when the Federal Communications Commission ("Commission") issued the *Omaha Forbearance Order*, continues to be competitive to this day. Now, just as in 2005, Cox Communications, Inc. ("Cox") offers a robust set of Cox business services available for, and successfully sold to, small, medium and large business customers. The *Omaha Forbearance Order* has **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** in the *Omaha Forebearance Order* Wire Centers ("OFO Wire Centers"). Moreover, Cox is now serving carriers with its Cox Carrier Access Service. In addition, three other carriers are selling private line/special access services in competition with Qwest.

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[1] Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223, filed July 23, 2007 ("McLeod Petition"); Public Notice, DA 07-3467 (July 30, 2000).

[2] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, Memorandum Opinion and Order*, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), *pets. for rev. dismissed and denied on the merits*, *Qwest v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

Despite the robust competition in Omaha, McLeodUSA Telecommunications Services, Inc. ("McLeod") asks the Commission to revoke the bulk of the relief that the Commission granted to Qwest. Specifically, McLeod asks the Commission to revoke the forbearance from Section 251 unbundling of loops in nine Omaha wire centers[3] and from provision of unbundled dedicated interoffice transport on routes between those wire centers. McLeod has demonstrated no facts warranting modification of the *Omaha Forbearance Order*. The Commission did not err in its predictive judgment that Qwest would continue to provide wholesale access to DS0, DS1 and DS3 facilities. Qwest has done so. Qwest developed a new commercial offering of DS0 loops, which one competitive local exchange carrier ("CLEC") already buys. In addition, as substitutes for unbundled network element ("UNE") loops and transport, Qwest offers its tariffed DS1/DS3 special access services, including a number of tariffed rate plans that provide for discounts. These offerings meet Qwest's obligation to offer wholesale access pursuant to Section 271.

McLeod has been dogged in its attempts to frustrate Qwest's pursuit of unbundling relief in Omaha. McLeod opposed Qwest's Petition for Forbearance Pursuant to 47 U.S.C. § 160(c), filed June 21, 2004 ("petition").[4] Then, once the petition was granted McLeod filed a petition for review in the D.C. Circuit,[5] and sought a stay pending that appeal.[6] Now that the D.C. Circuit

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[3] Omaha Douglas, Omaha Izard St., Omaha 90th St., Omaha Fort St., Omaha Fowler St., Omaha O St., Omaha 78th St., Omaha 135th St. and Omaha 156 St. (the "OFO Wire Centers").

[4] *See* Comments of McLeodUSA Telecommunications Services, Inc., filed Aug. 24, 2004, WC Docket No. 04-223; Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission from Andrew D. Lipman, *et al.*, Attorneys for McLeod, dated Sept. 12, 2005; Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission from William A. Haas, dated Sept. 14, 2005 ("McLeod Sept. 14, 2005 *ex parte*").

[5] McLeod Petition for Review, filed Dec. 28, 2005, D.C. Cir. 05-1469, consolidated in *Qwest v. FCC*, D.C. Cir. 05-1450.

[6] McLeod's Motion for Stay, filed Feb. 3, 2006, WC Docket No. 04-223.

has denied McLeod's petition for review, McLeod is back, asking the Commission to modify the *Omaha Forbearance Order*. The Commission should deny McLeod's latest salvo in its campaign to maintain access to UNEs throughout the Omaha Metropolitan Statistical Area ("MSA").

II. FACTS

A. Qwest Faces Intense Competition In Omaha

McLeod argues that no market forces constrain Qwest,[7] and that current McLeod customers will be forced to buy from Qwest, should McLeod exit the market.[8] Nothing could be further from the truth. As already documented in the record in this proceeding, the Omaha market is fiercely competitive. The enterprise market, which was competitive in 2005, continues to be competitive to this day. The *Omaha Forbearance Order* has not stemmed Qwest's business losses in the OFO Wire Centers. In fact, as shown in Confidential Attachment A to the David L. Teitzel Declaration, Qwest's **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** after the Commission released the *Omaha Forbearance Order* in December 2005.[9] It is also noteworthy that Qwest's rate of retail business line losses in the "post forbearance" period in the OFO Wire Centers **[BEGIN CONFIDENTIAL]** [redacted] **[**

END CONFIDENTIAL].[10]

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[7] McLeod Petition at 7.

[8] *Id.*

[9] Teitzel Declaration ("Teitzel Decl."), attached hereto ¶ 4 and its Confidential Attachment A.

[10] *Id.* ¶ 4.

Now, just as in 2005, Cox offers a robust set of Cox business services available for small, medium and large business customers. In 2005, when the Commission granted forbearance, Cox's capabilities in serving the business market were before the Commission. Cox's filings demonstrated its substantial coverage of the enterprise market, including its DS0 loops to business users.[11] In 2005, Cox boasted of serving a large number of significant Omaha businesses,[12] with a network spanning 4,100 network miles, and over 1,000 miles of fiber in Omaha.[13] Moreover, the Commission found Cox willing and able to provide service to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** percent of end user locations accessible from its OFO Wire Center facilities within a commercially reasonable time.[14] Since Cox Business Services is increasing its revenue at a rate of 20% per year,[15] Cox's roster of Omaha business customers can only have grown in the last year and a half.

Not only is Cox serving the business market, it is serving other carriers as well. Cox's current website also shows the availability in Omaha of its Carrier Access Service, which Cox provides to other carriers and describes as follows:

> Cox Carrier Access service is the ideal solution for secure and reliable connections to your voice and data customers. Built on our own fiber-based

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[11] *Qwest v. FCC*, 482 F.3d at 479; *Omaha Forbearance Order*, 20 FCC Rcd at 19450-51 ¶ 69.

[12] As of May 2005 Cox served numerous significant Omaha businesses, including Creighton University, Bellevue University, Affinitas, CS!, CommScope, Echostar, Farm Credit Services, First National Technology Solutions, infoUSA, iStructure, Kellogg's, Kutak Rock, Methodist Health System, Metropolitan Utilities District, National Indemnity, Omaha Public Power District, Oriental Trading, Royal Navy, Travelex, Union Pacific, U.S. Marines, United States Strategic Command and others. *See* Tab 16 of Qwest's July 25, 2005 *ex parte* in its Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, from Cronan O'Connell, Qwest, filed July 25, 2005, WC Docket No. 04-223 ("Qwest July 25 *ex parte*").

[13] Teitzel Decl. ¶ 8 & Tab 16 of Qwest July 25 *ex parte.*

[14] *Omaha Forbearance Order*, 20 FCC Rcd at 19450-51 ¶ 69.

[15] *Cable companies intensify enterprise service ambitions; Comcast, Cablevision, Cox, Time Warner and others see multibillion-dollar opportunity,* Network World, October 25, 2006.

> SONET self-healing network, Cox Carrier Access service gives you high-capacity communications that set the standard for high-speed and high-quality digital transmissions at a cost-effective price.[16]

The Cox Carrier Access options include DS1 loops, DS3 loops and OCn services ranging from OC-3 to OC-192.[17] Further, Cox states that its DS1 and DS3 services "can be fanned out to multiple destinations" on a channelized basis[18] to provide DS0 connections as alternatives to DS0 services offered by Qwest.

Cox is not the only carrier offering services to other carriers in Omaha.[19] Cox and AT&T have provided bids to Qwest Communications Corporation ("QCC"),[20] for DS1 and DS3 services in the Omaha MSA. Cox and AT&T have also provided QCC quotes for OCn services, as has Verizon/MCI.[21] Additionally, the Northwest Iowa Power Cooperative ("NIPCO") reports that it has installed fiber optic telecommunications facilities in Nebraska, Iowa and South Dakota. Its subsidiary NIPCO Development Corporation offers telecommunications services in Omaha, as well as in cities in Iowa and South Dakota. The services on offer include DS0, T1, DS3 and Synchronous Optical Network services.[22] There is no reason to believe that these carriers will not offer service to McLeod, and to McLeod's wholesale and retail customers.

In sum, contrary to McLeod's claims, Qwest faces intense competition in Omaha. Cox serves a growing number of Omaha businesses over its own facilities. Moreover, there are at

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[16] http:///www.coxbusiness.com

[17] http://www.coxbusiness.com/pdfs/cox_carrier.pdf

[18] *Id.*

[19] Teitzel Decl. ¶ 9.

[20] *Id.* ¶ 10.

[21] *Id.*

[22] *Id.* ¶ 10 and n.11.

least four carriers offering private line/special access services in competition with Qwest's interstate special access services in the Omaha market.[23]

B. The Commission Has Heard, And Rejected, McLeod's Complaints About The Consequences Of Forbearance

McLeod alleges that the *Omaha Forbearance Order* has led to the following consequences:

- In place of UNE DS0 loops Qwest is offering McLeod a commercial agreement with rates for DS0 loops higher than the previous rates.[24] McLeod further complains that under the commercial agreement the services would not be subject to wholesale performance standards,[25] by which McLeod is presumably referring to Qwest's Change Management Process ("CMP"), Performance Indications ("PID") and Performance Assurance Plan ("PAP").
- In place of UNE DS1 and DS3 loops and transport, Qwest is offering tariffed special access, which costs more than the previous UNE rates.

McLeod complains that the lack of UNEs and Qwest's "unacceptable" offerings will force McLeod to leave the Omaha market, and prevent other CLECs, such as Integra Telecom, Inc. ("Integra"), from entering that market, resulting in McLeod's enterprise and wholesale customers having little choice but to turn to Qwest for services.[26]

The underlying facts, such as the fact that Qwest is no longer offering UNE rates, are not a surprise. Nor are Qwest's plans to charge commercial rates for DS0 loops and to charge

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[23] *Id.*

[24] McLeod Petition at 8-9.

[25] *See* Eben Declaration ("Eben Decl.") (attached to the McLeod Petition) at n.22, McLeod Petition at 8.

[26] McLeod Petition at 17-19.

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tariffed rates for special access in lieu of providing UNE loops and transit. The price differential between UNEs and Qwest's tariffed special access services were well detailed in the record before the Commission.[27] McLeod complains even now of Qwest's 2004 Special Access price increase in Omaha.[28] That price increase was also before the Commission when it granted forbearance.[29] There has been no price increase since. McLeod's threat to leave the Omaha market if UNEs were not available in every Omaha wire center was part of the record before the Commission.[30] McLeod explained in detail that it had a UNE-based business plan in Omaha, and that it believed that its investment there would be stranded if Qwest's petition were granted. McLeod was quite explicit that forbearance from the requirement that Qwest offer UNE loops and transport would result in McLeod's enterprise and wholesale customers losing McLeod as their chosen carrier. McLeod further stated its belief that its customers would have no choice but to return to Qwest.[31] Similarly, Integra's threat that it would not enter the Omaha market if UNEs were not available throughout the Omaha MSA was also in the record before the Commission.[32] Given the robust facilities-based competition faced by Qwest, the Commission granted Qwest's forbearance request, and did not rely upon UNE-based competition in reaching

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[27] *See, e.g.*, Integra *ex parte* dated Sept. 14, 2005, WC Docket No. 04-223 at 3 ("Integra Sept. 14 *ex parte*").

[28] *See* McLeod Petition at n.30 & Eben Decl. ¶ 9.

[29] *See, e.g.* Opposition of AT&T Corp., filed Aug. 24, 2004, WC Docket No. 04-223 at 35-36; Opposition of Time Warner Telecom, filed Aug. 24, 2004, WC Docket No. 04-223 at 3, 15.

[30] *See* McLeod Sept. 14, 2005 *ex parte* at 1.

[31] *Id.* at 2.

[32] *See* Integra Sept. 14 *ex parte* at 4.

that conclusion.[33] The Commission found the combination of tariffed incumbent local exchange carrier ("ILEC") facilities and facilities-based competition adequate to ensure competition.[34]

C. Qwest Has Complied With The Letter And Spirit Of The *Omaha Forbearance Order's* Requirement That It Continue To Offer Network Elements Pursuant To Section 271

Qwest has complied with the letter and spirit of the *Omaha Forbearance Order* in its negotiations with McLeod, as it has in its negotiations with other CLECs. Of the 58 CLECs with which Qwest has interconnection agreements in Nebraska, 47 have executed amendments to bring their interconnection agreements in compliance with the *Omaha Forbearance Order*. CLECs are no longer able to purchase DS0, DS1 or DS3 loops or dedicated transport out of their interconnection agreements at UNE rates. Qwest is offering a commercial agreement on DS0 loops to replace UNE loops, as Qwest has no tariffed substitute available. One CLEC, AT&T/TCG, has executed the Commercial DS0 loop facility agreement to purchase DS0s in the OFO Wire Centers.[35] As to DS1 and DS3 UNEs, CLECs can turn to tariffed Special Access services to replace DS1 and DS3 UNEs in the OFO Wire Centers.[36]

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[33] *See Omaha Forbearance Order*, 20 FCC Rcd at 19449-50 ¶ 68.

[34] *Qwest v. FCC*, 482 F.3d at 480; *Omaha Forbearance Order*, 20 FCC Rcd at 19447-49 ¶¶ 65-67 and n.177.

[35] Christensen Decl. ¶ 3.

[36] As the Commission found in the *TRRO*, the alternatives to DS1 and DS3 UNE transport and loops include special access offered by the ILEC. *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, 20 FCC Rcd 2533, 2612 ¶ 142, 2639 ¶ 195 (2004) ("*TRRO*"). The other substitutes are self-provided facilities and facilities offered by other carriers. *Id.*

1. Negotiations for DS0 Loops and Amendments to the Interconnection Agreement

McLeod purchases about **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** DS0 loops in the nine OFO wire centers.[37] Background on pricing is helpful in understanding the negotiations and pricing with respect to DS0 loops. With respect to two-wire loop in Zone 1 the Nebraska Public Service Commission ("Nebraska PSC") determined the total element long run incremental cost ("TELRIC") monthly recurring charge ("MRC") to be $15.14 and the non-recurring charge ("NRC") to be $65.00.[38] With respect to four-wire loop in Zone 1 the TELRIC MRC was determined to be $30.28 and the NRC $65.00.[39] In 2003, in connection with Section 271 proceedings, Qwest voluntarily agreed to UNE rates below the TELRIC-compliant rates previously established by the Nebraska PSC. With respect to two-wire loop in Zone 1 Qwest agreed to a MRC of $12.14 and a NRC of $55.27.[40] With respect to four-wire loop in Zone 1 Qwest agreed to a MRC of $23.83 and a NRC of $55.27.[41] Thus, McLeod has been paying $12.14 a month for two-wire loop and $23.83 a month for four-wire loop, both of which are below the TELRIC-compliant rates previously established by the Nebraska PSC.

On April 27, 2006, Qwest provided notice to McLeod requesting execution of Qwest's proposed OFO Amendment and, because McLeod was purchasing DS0 UNE loops, the Qwest

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[37] Buckmaster Decl. ¶ 3.

[38] *See Before the Nebraska Public Service Commission, In the Matter of the Commission, on its own motion, to investigate cost studies to establish Qwest Corporation's rates for interconnection, unbundled network elements, transport and termination, and resale*, Application No. C-2516/PI-49, Findings and Conclusions, April 23, 2002.

[39] *Id.*

[40] *See Before the Nebraska Public Service Commission, In the Matter of Qwest Corporation, Denver, Colorado, seeking approval of PO-20 for inclusion in the Qwest Performance Assurance Plan (QPAP)*, Application No. C-2750, February 4, 2003.

[41] *Id.*

Commercial DS0 Loop Facility Agreement. The OFO Amendment would make UNE loops unavailable in the nine OFO Wire Centers and also would make UNE dedicated interoffice transit between those same wire centers unavailable. The proposed rates for commercial DS0 loops were MRCs of $15.71 for two-wire loop and $30.84 for four-wire loop, *i.e.*, virtually identical to the TELRIC rates prior to Qwest's voluntary rate reduction in the context of its Section 271 application in 2003.[42] Qwest proposed to keep the NRCs at the below-TELRIC level it agreed to in 2003. The Nebraska rate history and Qwest's proposal are shown in the table below and at Attachment B to the Teitzel Declaration:

	Nebraska PSC Ordered TELRIC Rates (Zone 1)		Qwest Voluntary Reduced "UNE" Rates (Zone 1) (*i.e.*, McLeod's current rate)		Qwest Offer of Commercial Rates		Percent Commercial Rates Over (Under) TELRIC	
	MRC	NRC	MRC	NRC	MRC	NRC	MRC	NRC
2 wire loop	$15.14	$65.00	$12.14	$55.27	$15.71	$55.27	3.76%	(15%)
4 wire loop	$30.28	$65.00	$23.83	$55.27	$30.84	$55.27	1.85%	(15%)

Not much occurred after Qwest made its offer. In the course of the negotiations for amendments to McLeod's interconnection agreements reflecting the *Triennial Review Order* and the *Triennial Review Remand Order* ("*TRO/TRRO*"),[43] shortly after Qwest sent the *Omaha Forbearance Order* notice to McLeod in April 2006, Qwest brought up the subject of the *Omaha*

[42] Christensen Decl. at Exhibit A.

[43] *In the Matter of 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*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*TRO*"), corrected by Triennial Review Order Errata, 18 FCC Rcd 19020, *vacated and remanded in part, aff'd in part, U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied, National Ass'n of Regulatory Util. Comm'rs v. U.S. Telecom Ass'n.*, 125 S. Ct. 313 (2004), *on remand*, 20 FCC Rcd 2533 (2004) ("*TRRO*"), *aff'd sub nom., Covad Commc'ns. Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

Forbearance Order.[44] McLeod then expressed a desire to complete the issues of the *TRO/TRRO* before working on the *Omaha Forbearance Order* issues. Anticipating a relatively quick resolution of the *TRO/TRRO* issues, Qwest agreed to this proposal.[45] Negotiations on the *TRO/TRRO* continued until August 2006, when Qwest, McLeod and multiple other CLECs became involved in certain *TRO/TRRO*-related disputes, and associated settlement negotiations (the "Wire Center Settlement").[46]

Over the next year McLeod neither provided a redlined document or otherwise stated what changes it sought with regard to either the OFO Amendment or the Qwest Commercial DS0 Loop Facility agreement, both of which Qwest had provided in April 2006.[47] On May 17, 2007, after the D.C. Circuit of Appeals upheld the *Omaha Forbearance Order*, Qwest sent McLeod a notice stating that since the D.C. Circuit Court had rejected CLEC challenges to the *Omaha Forbearance Order* McLeod must execute the amendment to its Nebraska interconnection agreement.[48]

It soon appeared that the parties were approaching an agreement in response to Qwest's May notice. On June 13, 2007, McLeod requested that Qwest offer the same $25 non-recurring transition charge for OFO circuit transitions that had been negotiated with CLECs as part of the *TRO/TRRO* Wire Center Settlement. McLeod represented, "If the NRC issue can be clarified, McLeodUSA will promptly execute the OFO amendment. Please contact Julia Redman-Carter at your earliest convenience to advise of Qwest's position." Seven days later, on June 20, 2007,

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[44] Christensen Decl. ¶ 5.

[45] *Id.* ¶ 7.

[46] *Id.* ¶ 6.

[47] *Id.* ¶ 5.

[48] *Id.* ¶ 9.

Qwest replied indicating its willingness to charge the transition rate that was agreed to by the parties to the Wire Center Settlement agreement, and asking that McLeod execute the OFO amendment as well as the Wire Center Settlement agreement. McLeod did not voice its current complaints about the rates or the fact that DS0 loops would no longer be subject to wholesale performance metrics. Nor did McLeod complain that DS0 rates of $15.71 MRC for two-wire loop, a $30.84 MRC for wire-wire loop, and a $55.27 NRC for each, were too high, while at the same time requesting the lower $25 non-recurring transition charge.

The hoped for agreement did not materialize. Not only did McLeod not sign the OFO amendment as it had represented it would, but a month later, on July 23, McLeod filed its current request that the Commission modify the *Omaha Forbearance Order* expressing new complaints about the MRC and that DS0 loops would no longer be subject to wholesale performance standards. The next day, July 24, McLeod reopened negotiations on all of the services at issue, including the DS0 loops. McLeod's proposal as to DS0 loops is unclear because it appears to offer either $13.96 or $18.07 for DS0 loops.[49] The offer is unclear because McLeod proposes 15% above UNE rates, but applied that also to Qwest's commercial agreement DS0 loop rate of $15.71. McLeod did not propose any modifications to the language of either the OFO amendment or the DS0 Loop Facility Agreement.[50]

Thus, the parties appear further apart on DS0 loops now, than they were in June. McLeod has not complied with its commitment to execute the OFO amendment in light of Qwest's agreement to reduce its non-recurring charge for transitioning services from UNEs to commercial agreement DS0 loops.

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[49] *See* Christensen Decl. at Exhibit E.

[50] Christensen Decl. ¶ 12.

2. Negotiations for DS1 and DS3 Loops and Transport

a. Background

In addition, Qwest and McLeod have negotiated special access pricing for the conversion of McLeod's higher capacity UNEs to Special Access. McLeod purchases **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** UNE DS1 circuits and **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** UNE DS3 circuits in the OFO Wire Centers.[51]

By the time the Commission released the *Omaha Forbearance Order* stating that Qwest need no longer provide UNE loops and transport in the OFO Wire Centers, Qwest had experience with the situation of implementing relief from Section 251 unbundling obligations while still providing network elements pursuant to Section 271. In the *TRO/TRRO* the Commission essentially decided that under Section 271, the alternative to DS1 and DS3 UNEs could be tariffed special access services. Under the *TRO*, upheld by the D.C. Circuit in *USTA II*, when unbundling under Section 251 is unnecessary, TELRIC pricing is not mandated, nor is TELRIC pricing necessary.[52] Section 271 imposes unbundling obligations, but with less rigid accompanying conditions.[53] In considering whether an ILEC meets its Section 271 obligation the Commission will assess whether terms and conditions are just, reasonable and not unreasonably discriminatory under Sections 201 and 202.[54]

When Qwest received unbundling relief in the *Omaha Forbearance Order*, Qwest considered running a promotion in the affected wire centers to ease CLECs' transition to special access, but declined to do so, because a similar promotion related to Qwest's implementation of

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[51] Buckmaster Decl. ¶ 3.

[52] *See*, *TRO*, 18 FCC Rcd at 17386 ¶ 656.

[53] *Id.* at 17387 ¶ 658.

[54] *Id.* at 17386 ¶ 656.

the *TRRO* had generated few sales.[55] Qwest concluded that there was no market-based reason to offer a promotion in a more limited number of central offices, when the larger *TRRO*-related promotion did not generate much response.[56]

Even though Qwest did not run a promotion, customers such as McLeod are not limited to paying month-to-month special access prices in the OFO Wire Centers. Customers can pursue discounts on special access by buying out of a tariffed term discount plan (*e.g.*, 36-month term),[57] pursuant to a tariffed Regional Commitment Program ("RCP"),[58] and, where Qwest has pricing flexibility, through contract tariffs. An RCP allows a customer to receive significant price reductions for committing to a minimum quantity of DS1 and/or DS3 circuits (90% of current levels) for a 48-month term. The price reductions are taken from the month-to-month rates.[59] When offered, pricing flexibility contract tariffs are generally added on top of an RCP or term plan in order to provide deeper discounts. In most or all cases these discounts are applied to RCP or term plans that are discounted to begin with.[60]

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[55] Cogan Declaration ("Cogan Decl."), attached hereto at ¶ 6. The *TRRO*-related promotion was designed to provide CLECs some price relief for high capacity facilities in non-impaired wire centers under the *TRRO*. The promotion included two of the nine OFO Wire Centers. *Id.* ¶ 7. McLeod did not take advantage of that offer, (*id.*), which is not surprising since the offer in the two wire centers was for DS3 transport on one route and **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.

[56] *Id.* ¶ 6.

[57] Generally, term discount plans work well for retail and wholesale customers. Term discount plans require a customer to contract on a per circuit basis. *Id.* ¶ 3.

[58] RCP is available for DS1 and DS3 services, providing both term discounts and circuit portability features. "Circuit portability" means that the customers need not contract on a per circuit basis. The customers can add and delete circuits anywhere in Qwest's 14-state region, but they must maintain their commitment level. Wholesale customers value the portability feature. *Id.* ¶ 4.

[59] *Id.* ¶ 4.

[60] *Id.* ¶ 5.

b. The Qwest McLeod negotiation for an RCP

Qwest and McLeod had been negotiating a new RCP beginning in late 2005, as McLeod's RCP was about to expire.[61] This negotiation, which began just before the Commission released the *Omaha Forbearance Order*, was hampered by the fact that McLeod had developed a UNE-based business plan, not just in Omaha, but throughout Qwest's region.[62] McLeod was beginning a multi-month project to convert thousands of special access circuits to UNEs, and therefore did not renew its RCP.[63]

After the Commission released the *Omaha Forbearance Order*, McLeod injected the issue of Omaha pricing into its negotiation of another RCP, asking for Omaha-specific pricing concessions on special access such that Qwest would continue to provide UNE, or near-UNE, rates for special access circuits in the OFO wire centers.[64] Qwest did not agree to an Omaha-specific negotiation for UNE or near-UNE rates not already reflected in Qwest's tariffs, but instead offered an RCP with the possibility of additional pricing flexibility discounts in Omaha.[65] McLeod declined that offer.[66]

If McLeod entered into an RCP it could garner savings over month-to-month rates. The month-to-month rate for a DS1 channel termination in Omaha is $165.[67] The rate for the same

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[61] Logan Declaration ("Logan Decl."), attached hereto at ¶ 3.

[62] *Id.*

[63] *Id.*

[64] *Id.* ¶ 4.

[65] *Id.* ¶ 5.

[66] *Id.*

[67] Cogan Decl. ¶ 8.

facility with a three-year term agreement is $130.[68] The RCP rate is even lower still, at $128.70.[69] This compares to a UNE rate of $74.88. McLeod's most recent offer was $86.11. Similarly, the month-to-month rate for a DS3 channel termination in Omaha is $2,200.[70] The rate for the same facility with a three-year term agreement is $1,700.[71] The RCP rate is $1,716.[72] This compares to a UNE rate of $791.17 and McLeod's most recent offer of $909.85. A potential price flexibility contract overlay could reduce the RCP or term discount rate even more depending upon McLeod's remaining volume of private line circuits. McLeod declined that offer.[73]

While the parties are further apart on DS1/DS3 than on DS0, Qwest has not been unresponsive and uncooperative as portrayed by McLeod in its Petition. McLeod states that Qwest did not respond to McLeod's email communications, did not pay attention to McLeod, and was uncommunicative from April 2006 to October 2006.[74] During that period, the Qwest sales executives tapped with responsibility for serving McLeod with respect to special access services met in person at least two times with their counterparts at McLeod.[75] McLeod and the Qwest sales team frequently corresponded via email during that period.[76] If McLeod had any offers to make with regard to special access pricing the Qwest sales team remained available. In

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[68] *Id.*

[69] *Id.*

[70] *Id.* ¶ 9.

[71] *Id.*

[72] *Id.*

[73] *Id.* ¶ 5; Logan Decl. ¶ 5.

[74] McLeod Petition at 5-7.

[75] Logal Decl. ¶ 7.

[76] *Id.*

addition, the Qwest team that negotiated the *TRO/TRRO*, OFO amendment and the commercial Loop Facility Agreement met with McLeod at least 28 times in February through August 2006.[77] Had McLeod felt that it was getting "stonewalled" with respect to negotiating Special Access pricing, McLeod certainly could have asked the negotiators to check status with the sales team.[78] McLeod did not do so.[79]

III. ARGUMENT

Contrary to McLeod's contentions, the Commission did not err in its predictive judgment that Qwest would continue to provide access to wholesale services pursuant to Section 271. There is no reason to disturb the Commission's decision that Qwest need not offer UNEs in the OFO Wire Centers. The Commission explicitly did not consider UNE-based competition, such as that provided by McLeod, in deciding to forbear from enforcing unbundling requirements.[80] The Commission recognized that UNE-based competition is not necessary to meet the standards of Section 160(a). That is, UNE-based competition is not necessary to ensure that charges and practices are just and reasonable and not unjustly or unreasonably discriminatory, for the protection of consumers, and that forbearance from the requirement that Qwest provide UNEs is consistent with the public interest.[81] This decision was consistent with the Commission's statutory responsibility to protect competition, not competitors, for the benefit of consumers.[82]

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[77] Christensen Decl. ¶ 6.

[78] *Id.* ¶ 8.

[79] *Id.*

[80] *Omaha Forbearance Order*, 20 FCC Rcd at 19446-47 ¶ 63.

[81] *See* 47 U.S.C. § 160(a) (1)-(3).

[82] *In re Application of Alascom, Inc. AT&T Corporation and Pacific Telecom, Inc. For Transfer of Control of Alascom, Inc. from Pacific Telecom, Inc. to AT&T Corporation*, Order and Authorization, 11 FCC Rcd 732, 758 ¶ 56 (1995); *In the Matter of Applications of Motorola, Inc.*

A. Comparison To TELRIC Is Irrelevant To The Question Of Whether Qwest's Rates, Terms And Conditions Are Just And Reasonable And Not Unreasonably Discriminatory Under Section 271

McLeod compares the rates that Qwest is offering in the OFO Wire Centers to UNE rates, but that is not a relevant comparison. First, TELRIC rates are an inappropriate yardstick against which to measure Qwest's rates for Section 271 network elements. As Qwest recently explained in the Special Access proceeding, the Supreme Court upheld TELRIC because, and only because, it believed that Section 252(d)(1) prescribed a rate-making methodology wholly distinct from those which govern in other contexts.[83] That methodology was intended to apply to ILEC offerings only in the very limited circumstances where a competitor would otherwise be unable to obtain access to such facilities, and where the Commission expressly determined that such pricing was therefore warranted. As such, TELRIC UNE rates cannot usefully be compared with rates charged outside the scope of the unique Section 251/252 regime.

The Supreme Court has stated that Section 252(d)(1) -- the provision that the TELRIC methodology purports to implement -- contemplates a form of "ratemaking different from any historical practice," including price caps.[84] Unlike other forms of price regulation meant "to balance interests between sellers and buyers," the point of TELRIC was, in the Court's view, "to reorganize markets."[85] Comparison to TELRIC rates in the instant context would be particularly worrisome given the likelihood that a return toward TELRIC pricing would undermine the promising facilities-based deployment described above.

For Consent to Assign 800 MHz Licenses to Nextel Communications, Inc., Order, 10 FCC Rcd 7783, 7787 ¶ 20 (1995).

[83] *See* Reply Comments of Qwest Communications International Inc., filed Aug. 15, 2007, WC Docket No. 05-25 and RM-10593 at 9-11.

[84] *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 487 (2002).

[85] *Id.*

On several occasions, the Commission and the courts have also recognized that TELRIC rates deter investment in new facilities. In its *Notice* seeking comment on proposed modifications to the methodology, for example, the Commission noted that "[t]o the extent that the application of our TELRIC pricing rules distorts our intended pricing signals by understating forward-looking costs, it can thwart one of the central purposes of the Act: the promotion of facilities-based competition."[86] In the *TRRO* the Commission applied this reasoning in determining pricing is not mandated by statute nor is TELRIC pricing necessary to protect the public interest once unbundling under Section 251 is unnecessary.[87] The D.C. Circuit has agreed, repeatedly citing the negative effect that TELRIC pricing has on infrastructure investment.[88]

Thus, when Qwest provides Section 271 elements, that are no longer required under Section 251, it is not necessary, and would be counterproductive to consider the rate mandated under Sections 251/252.[89] Section 271 imposes unbundling obligations, but with less rigid accompanying conditions. The Commission assesses whether Section 271 rates, terms and conditions are just, reasonable and not unreasonably discriminatory under Sections 201 and 202, not Sections 251 and 252.

While McLeod notes that some state commissions have commenced proceedings to establish Section 271 pricing,[90] McLeod ignores that some of these actions have been reversed by

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[86] *In the Matter of Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, 18 FCC Rcd 18945, 18947 ¶ 3 (2003) ("*TELRIC NPRM*"). *See also*, *id.* at 18948-49 ¶ 6 (expressing concern that TELRIC rates "might not … achieve fully the Commission's goal of sending appropriate economic signals.").

[87] *See TRO*, 18 FCC Rcd at 17386 ¶ 658.

[88] *See, e.g.*, *USTA II*, 359 F.3d at 579.

[89] *See TRO*, 18 FCC Rcd at 17386 ¶ 656.

[90] McLeod Petition at 8.

reviewing courts finding that states have no role to play in Section 271 pricing and that it would be inappropriate to use TELRIC pricing for such elements.[91] Because TELRIC rates are designed only to serve in the specific and unique ends of Sections 251 and 252, they are not relevant to assessing whether Qwest's Section 271 rates are just, reasonable and not unreasonably discriminatory.

McLeod has proposed current UNE rates plus fifteen percent, as a permanent rate for the Section 271 elements.[92] Qwest does not believe that this adequately protects its interests. In the *TRRO*, the Commission adopted a twelve-month transitional rate of the higher of "(1) 115 percent of the rate the requesting carrier paid for the loop element on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of" the *TRRO* for that loop element.[93] The Commission reasoned that the moderate price increase would help ensure an orderly transition by mitigating any rate shock that could be suffered by CLECs, while at the same time the fact that the price increases were of limited duration, provided "significant protection to the interests of ILECs in those situations where unbundling is not required."[94] The Commission's reasoning in the *TRRO* supports Qwest, not McLeod. The Commission proposed a 15-percent increase as a limited transitional mechanism, while CLECs found other service arrangements. By contrast to the situation in the *TRRO*, McLeod is proposing 115 percent of current rates as the permanent Section 271 rate.

The Commission has said that for a given purchasing carrier a Bell Operating Company ("BOC") may satisfy the Section 271 standard by demonstrating that the rate for a Section 271

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[91] *See e.g., Qwest Corp. v. Ariz. Corp. Comm'n*, 2007 U.S. Dist. LEXIS 52261 (D. Ariz. 2007).

[92] Christensen Decl. at Exhibit E.

[93] *See TRRO*, 20 FCC Rcd at 2640 ¶ 198.

[94] *See id.*

network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist.[95] Alternatively, a BOC might demonstrate that the rate at which it offers a Section 271 network element is reasonable by showing that it has entered into arms-length agreements with other similarly situated purchasing carriers to provide the element at that rate.[96]

B. Qwest's DS0 Offer Is Just And Reasonable And Not Unreasonably Discriminatory

Qwest's DS0 offer meets the second prong of the Section 271 rate test. That is, McLeod's assertion that the commercial agreement for DS0 loops is "unacceptable and onerous,"[97] is immaterial because Qwest has entered into an arms-length agreement with AT&T/TCG, another similarly-situated purchasing carrier, to provide the element at that rate.

McLeod raises three complaints about Qwest's DS0 offer, which it never raised with Qwest in any discussion. It raised them for the first time in its Petition to revoke Qwest's unbundling relief. First, McLeod complains that Qwest's proposed DS0 commercial agreement rates are 30% higher than TELRIC.[98] Next, McLeod complains that Qwest is keeping the rate for QPP/QLSP,[99] Qwest's UNE-P replacement, constant in the OFO Wire Centers.[100] Therefore the imputed rate for the associated DS0 loop is lower than the stand-alone DS0 rate under the commercial agreement. Third, McLeod complains that under Qwest's commercial agreement,

[95] *See TRO*, 18 FCC Rcd at 17389 ¶ 664.

[96] *Id.*

[97] McLeod Petition at 8.

[98] *Id.*

[99] *Id.* Qwest Platform Plus ("QPP") was Qwest's original replacement for UNE-P. Qwest Local Service Platform ("QLSP") recently replaced QPP.

[100] McLeod Petition at 15 n.49.