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other evidentiary basis, for determining that such retail competition as exists today would survive if the Qwest wholesale services upon which that retail competition depends were unregulated.⁶²

Additionally, Ad Hoc demonstrated how formidable the entry barriers confronting even large CLECs, such as Level 3, actually are. Level 3 hopes to add 750 to 1,000 buildings to its network in 2007.⁶³ But since there are 100,000 “enterprise buildings” within 500 feet of Level3’s metro fiber in the U.S., Level 3 must continue to rely on Qwest’s facilities because “it would take between *100 and 140 years* for Level 3 to ‘light’ all of those 100,000 buildings.”⁶⁴ Further, to the extent there is some actual competition, Qwest is silent as to the extent to which competitors are providing service using their own facilities without dependence on the UNEs for which Qwest seeks forbearance.

All of this should come as no surprise, however, to the Commission as PennTel, McLeodUSA, and DeltaCom recently provided the Commission with declarations establishing

⁶² Declaration of Lee L. Selwyn on Behalf of the Ad Hoc Telecommunications Users Committee, at ¶ 6 (Aug. 3, 2007) (“Selwyn Declaration”) *filed as an attachment to* Comments of Ad Hoc Telecommunications Users Committee, WC Docket No. 07-97 (filed Aug. 31, 2007) (“Ad Hoc Comments”).

⁶³ Selwyn Declaration at ¶ 31 (*citing* Level3 Communications Analyst and Investor Conference 2007, “From VoIP to Video: Making Sense of the Content (R)evolution,” at slide 36.)

⁶⁴ Selwyn Declaration at ¶ 31.

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that they are rarely able to find or construct alternatives to ILEC last mile facilities in the markets in which they operate.⁶⁵

C. *Qwest's Showing of Competition is Flawed in Numerous Additional Respects*

1. *Qwest's Reliance On White Pages Data Is Unreliable and In Violation of Section 222 of the Communications Act of 1996*

Qwest estimates the level of competition provided by CLECs in the MSAs at issue by projections made from its own white pages listings.⁶⁶ Not only is Qwest's extrapolation unreliable, its use of the customer information contained in white pages listings is in violation of Section 222 of the Communications Act.

Qwest reasons that since its internal data shows that about 75% of Qwest's residential lines⁶⁷ and 36% of Qwest's enterprise lines⁶⁸ are listed in white pages, those same percentages must therefore hold true for CLEC customers.⁶⁹ Qwest's use of this data is a clear violation of Section 222 of the Communications Act which prohibits the use of customer proprietary network

⁶⁵ See Petition of McLeodUSA Telecommunications Services, Inc. for Modification, WC Docket No. 04-223, at 56 n.156 (filed July 23, 2007) ("McLeodUSA Petition for Modification").

⁶⁶ Minneapolis Petition at 10-11; Denver Petition at 10; Phoenix Petition at 10; Seattle Petition at 10.

⁶⁷ See Minneapolis Petition at 10; Seattle Petition at 10; Phoenix Petition at 10; Denver Petition at 10.

⁶⁸ See Minneapolis Petition at 24; Seattle Petition at 23; Phoenix Petition at 24; Denver Petition at 23.

⁶⁹ See Minneapolis Petition at 23-25; Seattle Petition at 22-24; Phoenix Petition at 23-25; Denver Petition at 22-24.

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information ("CPNI") for purposes other than the provision of telecommunications service.⁷⁰

Specifically, Section 222(c)(1) states that:

[e]xcept as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.⁷¹

These white pages listings are customer proprietary network information that Qwest only possesses by virtue of its status as a telecommunications carrier. Put another way, Qwest feels entitled to use this information to advance its interests – when the information was provided by competitors with an expectation that it would be used solely for provisioning of their services – is, in and of itself, evidence that Qwest is not ready to be relieved of its obligations as a dominant carrier.⁷² The undersigned competitive carriers were hardly alone in noting this. Ad Hoc agrees, and adds that "Qwest is, in fact, the *only* carrier in each market that is in a position to possess, mine, and utilize competitor data in support of its own business purposes and regulatory strate-

⁷⁰ 47 U.S.C § 222.

⁷¹ 47 U.S.C. § 222(c)(1).

⁷² Declaration of Helen E. Golding, Economics and Technology, Inc., at ¶ 13 filed as an attachment to Opposition.

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gies – providing additional evidence of its unique and dominant position in each of these markets.”⁷³

Even if the Commission were to accept Qwest’s use of its white pages data, Qwest fails to provide any explanation of how it determined this percentage or why it should be correct for all CLECs. Qwest’s reliance on its own internal white pages data is severely misplaced because it assumes that CLEC customers in each of the subject MSAs choose to be listed in the white pages at the same rate as Qwest’s nationwide customer base. As Cox aptly noted, Qwest’s use of white page listings “provides the Commission with no information that corresponds to the Commission’s Section 251 forbearance test, and the data it does provide is speculative and disingenuously presented.”⁷⁴

2. *Qwest Double Counts Categories of Competitors*

As the undersigned competitive carriers explained in their Opposition, CLECs are frequently fiber providers, fiber collocators, systems integrators, and even wireless providers. Qwest’s description of CLECs does not enumerate an additional type of competitor, but merely for all practical purposes duplicates information provided in its descriptions of other alleged types of competitors.

⁷³ Selwyn Declaration at ¶ 25.

⁷⁴ Cox Comments at 19.

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Cox also points out that “although Qwest presents enterprise competition from Cox in a different section from that provided by competitive LECs, it provides the number of business lines served by all competitive LECs (including Cox) in the wireline competitive LEC section, effectively double-counting Cox and creating the impression that competitive LECs have gained a much greater portion of the enterprise market than they have.”⁷⁵ Qwest also double counts Comcast Digital Voice service and VoIP.⁷⁶

3. *VoIP Data Submitted By Qwest Has Previously Been Rejected By the Commission and Should Be Rejected Now*

The Commission should reject Qwest’s attempt to use VoIP providers in its enterprise and mass market competitive showings, just as the Commission did in the *Omaha* and *Anchorage Orders*.⁷⁷ Aside from falling woefully short of even the current degree of granularity required by the Commission, Qwest’s submission that VoIP providers are providing competition to Qwest’s telecommunications services is not substantiated with any valid data. For example, as observed by the Arizona Corporation Commission, “VoIP should not be considered a serious local exchange service alternative for wireline service” because “VoIP services continue to

⁷⁵ *Id.* at 18 (citing Phoenix Petition at 24).

⁷⁶ Comments of the Colorado Office of Consumer Counsel, WC Docket No. 07-97, at 30 (filed Aug. 31, 2007).

⁷⁷ *Omaha Order*, ¶ 72; *see also Anchorage Order*, ¶ 29 (concluding that “we do not include competition from wireless and interconnected VoIP services in [the] market analysis”).

undergo the difficult transition from embryonic to introductory to mainstream.”⁷⁸ COMPTEL also points out that the statewide broadband statistics Qwest relies upon to show VoIP penetration rates have been rejected by the Commission as “completely unsuitable for purposes of analyzing competition and market share.”⁷⁹ The VON Coalition adds, in fact, that “[m]any over-the-top VoIP customers (directly or indirectly) use the ILECs’ facilities.”⁸⁰

IV. QWEST HAS NOT SHOWN THAT FORBEARANCE WOULD SERVE THE PUBLIC INTEREST

Initial comments make clear that there are no public interest benefits to be gained from forbearance. The MPUC Staff correctly observes that Qwest provides no evidence to support the claim that unbundling has stifled investment.⁸¹ To the contrary, CLECs have invested \$500 million just in Minnesota.⁸² Qwest's claims that TELRIC discourages investment are bogus because "TRIC rates embody the industry's best estimates of rates which would prevail in a competitive market. Rates sustained above TELRIC indicate that at least some competitive market conditions are not present allowing the rate setter to exert non-competitive market power

⁷⁸ ACC Comments at 10.

⁷⁹ COMPTEL Opposition at 43 (*citing Verizon/MCI Merger Order*, 20 FCC Rcd 18433, at ¶ 49 n.135 (2005)); *see also, e.g.*, VON Coalition Comments at 3.

⁸⁰ VON Coalition Comments at 3; *see also* WAG Comments at 10 (“VoIP, however, is still a fledgling services and...requires a broadband connection, which, in the case of a business, is most likely provided by an ILEC.”).

⁸¹ MPUC Staff Paper at 19.

⁸² *Id.*

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...⁸³ Nor can the costs of unbundling exceed benefits in the absence of competitive market conditions.⁸⁴

On other hand, harms that would be caused by forbearance are real. Qwest would increase prices for wholesale services which would cause CLECs at a minimum to raise prices to consumers or more likely exit the market entirely.⁸⁵ Qwest would be able to increase rates “at will” for services sold through commercial agreements.⁸⁶ As noted by COMPTTEL,⁸⁷ the Commission has previously determined that forbearance will not serve the public interest or promote competitive market conditions where, as here, it is likely to lead to an increase in prices for wholesale inputs that competitors need to provide service:

Specifically, we find that forbearance would be likely to raise prices for interconnection and UNEs (particularly those that may constitute bottleneck facilities), inputs competitors must purchase from incumbent LECs in order to provide competitive local exchange service. Because we find that the result of forbearance would be higher costs for competitive LECs which could impair their ability to enter and compete in local markets, we cannot find that forbearance would promote competitive market conditions.⁸⁸

⁸³ *Id.* at 20.

⁸⁴ Covad Comments at 61.

⁸⁵ *See, e.g.*, COMPTTEL Opposition at 21. *See also*, McLeodUSA Petition for Modification at 14-15; Declaration of Pritesh D. Shah, Director of Business Planning and Analysis, McLeodUSA, WC Docket No. 04-223, at ¶ 4 (July 23, 2007) *filed as an attachment to* McLeodUSA Petition for Modification.

⁸⁶ WAG Comments at 6.

⁸⁷ COMPTTEL Opposition at 35.

⁸⁸ *In the Matter of the 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, CC Docket 98-137, Report and Order in CC

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Forbearance would diminish competition,⁸⁹ including in the Seattle MSA⁹⁰. Forbearance raises the very real possibility that Qwest could emerge as the only provider for a large portion of the telecommunications services available to Minnesotans.⁹¹

Accordingly, there is no basis for the Commission to conclude that forbearance would serve the public interest.

V. QWEST HAS NOT OFFERED REASONABLE COMMERCIAL AGREEMENTS

The WUTC reports that it reviewed "commercial agreements" entered into by Qwest with 12 small CLECs for access to network elements that replace UNE offerings in areas where they are unavailable under the *TRRO*.⁹² The WUTC found that these commercial agreements each contained a provision that excludes application of performance guarantees. The WUTC found that this provision "means that poor wholesale performance by Qwest for services provided under its commercial agreements is no longer subject to the QPAP, which is the only remaining incentive in place to ensure reasonable and adequate wholesale service quality."⁹³ The WUTC

Docket No. 98-137, Memorandum Opinion and Order in ASD 98-91, FCC 99-397 at ¶ 63 (rel. Dec. 30, 1999).

⁸⁹ Covad Comments at 60.

⁹⁰ WAG Comments at 3.

⁹¹ MPUC Staff Paper at 22.

⁹² WUTC Comments 14.

⁹³ *Id.* at 15.

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states that if forbearance is granted Qwest's commercial agreements will contain similar provisions which would "further erode the regulatory capacity to ensure adequate wholesale performance."⁹⁴

Qwest's commercial agreements are unreasonable because they exclude performance metrics and remedies. When the Commission granted Qwest's Section 271 authority in Nebraska and other states, it specifically held that the "performance assurance plans (PAP) that will be in place in the nine states provide assurance that the local market will remain open after Qwest receives Section 271 authorization."⁹⁵ Qwest's refusal to offer performance guarantees is probative evidence that Qwest has no intention to meet its Section 271 obligations going forward.

In addition to lack of performance guarantees, Qwest has not offered reasonable wholesale replacement products because it proposes to substantially increase prices that are causing CLECs to exit forborne markets. For example, Qwest has priced the commercial two-wire DS0 loop rates nearly 30% higher than TELRIC rates.⁹⁶

⁹⁴ *Id.*

⁹⁵ *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, Memorandum Opinion and Order, 17 FCC Rcd 26303, ¶ 440 (2002).

⁹⁶ *See* Declaration of Don Eben, Director Network Planning, McLeodUSA, WC Docket No. 04-223, at ¶¶ 20, 24-25 and Exhibit 3, at 43-70 of 70 (Qwest's DS0 Loop Facility offering is attached to the MSA as Service Exhibit 1) (July 23, 2007) ("Eben Declaration") *filed as an*

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Accordingly, there is no basis on the present record for the Commission to conclude that Qwest would offer reasonable terms and conditions of wholesale access in the absence of UNE obligations.

VI. THE COMMISSION SHOULD RESOLVE AND GRANT MCLEOD'S PETITION TO MODIFY THE OMAHA ORDER BEFORE CONSIDERING THE QWEST PETITIONS

Comments overwhelmingly support McLeodUSA's Petition for Modification filed in the *Omaha Forbearance Proceeding* requesting that the Commission reinstate Qwest's Section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA.⁹⁷ There, McLeodUSA established that the Commission erred in its "predictive judgment" in Omaha and that since the Commission's grant of forbearance to Qwest in the Omaha MSA, Qwest has significantly increased prices in the affected wire centers to the point where McLeodUSA may have to abandon the market under the terms of Qwest's unilateral and unreasonable post-forbearance offerings.⁹⁸ As COMPTTEL rightfully notes in this proceeding, the Commission need only look to Qwest's post-forbearance behavior in Omaha as "a far better and more reliable prognostication than the Commission's 'predictive judgment' of what competitors will have to look forward

attachment to McLeodUSA Petition for Modification. 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>.

⁹⁷ See, e.g., Cox Comments at 25; COMPTTEL Opposition at 19; Covad Comments at 48; VON Coalition Comments at 5-6.

⁹⁸ McLeodUSA Petition for Modification at 14-15.

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to in Denver, Minneapolis, Phoenix and Seattle in the event the Commission grants Qwest's forbearance petitions."⁹⁹ Covad similarly cautions the Commission not to "presume that Qwest would behave any differently in the Denver, Minneapolis/St. Paul, Phoenix or Seattle MSAs than it has in Omaha should it be successful in gaining Section 251(c)(3) forbearance in those four markets."¹⁰⁰

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. The Commission should thoroughly review and resolve the McLeodUSA Petition for Modification before further grants of forbearance.¹⁰¹ More specifically, the Commission should grant McLeodUSA's Petition for Modification and then deny Qwest's request for forbearance.

⁹⁹ COMPTTEL Opposition at 19.

¹⁰⁰ Covad Comments at 48.

¹⁰¹ ACC Comments at 21.

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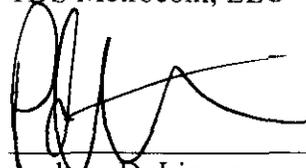
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VII. CONCLUSION

The Commission should deny the above-captioned Petitions.

Respectfully submitted,

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McLeodUSA Telecommunications
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