Attachment

Qwest's DS-0 Rate History in Nebraska

	Nebraska PSC Ordered TELRIC Rates (Zone 1)[1]		Qwest Voluntary Reduced "UNE" Rates (Zone 1)[2]		Qwest Commercial Rates (OFO WCs)		Percent Commercial Rates Over (Under) TELRIC	
	MRC	NRC	MRC	NRC	MRC	NRC	MRC	NRC
ire loop	$15.14	$65.00	$12.14	$55.27	$15.71	$55.27	3.76%	(15%)
ire loop	$30.28	$65.00	$23.83	$55.27	$30.84	$55.27	1.85%	(15%)

cket No. C-2516/PI-49, 4/23/02
cket No. C-2750, 2/4/03.

ATTACHMENT C

Attach

COMPARISON OF INTERSTATE SPECIAL ACCESS PRICES - DS1s and DS3s
QWEST vs. OTHER RBOCs
(Ameritech, PacBell and SWBT Prices are Pre-AT&T/BellSouth Merger Commitment)

	QWEST	VERIZON - BELL ATLANTIC	VERIZON - NYNEX	AT&T- AMERITECH	AT&T- BELLSOUTH	AT&T- PACBELL	AT&T SWB
innel Termination	$350.00	$567.10	$578.99	$563.20	$350.00	$340.00	$45
iage (fixed+per mile)	$252.00	$328.70	$328.70	$382.70	$266.50	$205.00	$25
TAL DS1 MRC	$602.00	$895.80	$907.69	$945.90	$616.50	$545.00	$70
% Difference vs. Qwest		*49%*	*51%*	*57%*	*2%*	*-9%*	
innel Termination	$4,400.00	$6,352.50	$5,494.91	$4,896.00	$3,680.00	$4,100.00	$3,80
iage (fixed+per mile)	$1,500.00	$2,375.30	$2,375.30	$1,436.60	$2,400.00	$635.00	$1,62
TAL DS3 MRC	$5,900.00	$8,727.80	$7,870.21	$6,332.60	$6,080.00	$4,735.00	$5,42
% Difference vs. Qwest		*48%*	*33%*	*7%*	*3%*	*-20%*	

es:

) Prices reflect Price Flex Zone 2 rates, with two channel termination and 10 miles assumed. The Price Flex Zone 2 equivalent in Verizon Tariff F.C.C. No. (Bell Atlantic) and in Verizon Tariff F.C.C. 11 (NYNEX) is Price Band 5. Where applicable, prices reflect the average of all states covered.

) Except for DS3 prices in Ameritech, PacBell and SWBT, all prices are month-to-month. Because they no longer offer month-to-month pricing for DS3 ser Ameritech, PacBell and SWBT DS3 prices are for a 12-month term.

) Ameritech, PacBell and SWBT prices do not reflect the temporary reductions committed to by AT&T in the AT&T/BellSouth Merger docket, WC Docket No 74.

EXHIBIT 2

Qwest.

Spirit of Service™

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Daphne E. Butler
Senior Attorney

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Via Courier

December 18, 2007

EX PARTE

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:

On November 12, 2007,[1] and November 17, 2007,[2] McLeodUSA Telecommunications Services, Inc. ("McLeod"), filed *ex partes* responding to Qwest's reply,[3] and making new arguments in support of McLeod's petition that the Federal Communications Commission ("Commission") revoke the forbearance from unbundling in nine Omaha wire centers.[4] This letter serves to respond to the *ex partes* and McLeod's reply comments.[5]

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[1] *Ex parte* letter to Marlene H. Dortch, FCC, from Andrew W. Lipman, *et al.*, attorneys for McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223, dated Nov. 12, 2007 ("Nov. 12, 2007 *ex parte*").

[2] *Ex parte* letter to Marlene H. Dortch, FCC from William A. Haas, McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223, dated Nov. 17, 2007 ("Nov. 17, 2007 *ex parte*").

[3] *See* Reply of Qwest Corporation, WC Docket No. 04-223, dated Sept. 13, 2007 ("Qwest Reply").

[4] *See* Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223, dated July 23, 2007 ("McLeod Petition").

[5] *See* McLeod's Reply to Opposition, WC Docket No. 04-223, dated Sept. 13, 2007 ("McLeod Reply").

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The enterprise market, which was competitive in 2005, when the Commission granted forbearance, continues to be competitive to this day. The *Omaha Order*[6] has not stemmed Qwest's business losses in the nine wire centers. Qwest has documented that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL][7] Moreover, at least four other carriers offer private line/special access services in competition with Qwest in the Omaha market.[8] McLeod originally told the Commission that "the cable operator has declined to offer access to its facilities on a wholesale or resale basis."[9] Confronted by Qwest's evidence that Cox does offer wholesale services, McLeod changed its tune, claiming that it was agreeable to Cox's prices, but Cox did not have adequate coverage.[10] This claim is also questionable given the Commission's findings regarding Cox's network coverage in the nine Omaha wire centers.

As described more fully below, the Commission did not condition the unbundling forbearance grant on any future market behavior by Qwest, and certainly not on TELRIC, or near-TELRIC pricing. Moreover, as detailed below, recent data from TNS suggests that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] As detailed in Qwest's opposition to McLeod's petition,[11] McLeod's claims that Qwest has been unresponsive are inaccurate. Qwest has negotiated in good faith, and has tried to keep McLeod's traffic, and that of other carriers, on Qwest's network. Accordingly, McLeod's petition should be denied.

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[6] *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 Order*" or "*Forbearance Order*"), *pets. for rev. dismissed and denied on the merits, Qwest v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

[7] *See* Qwest Opposition at Teitzel Declaration ¶ 4 ("Teitzel Declaration") and its Confidential Attachment A, and Opposition of Qwest Corporation, WC Docket No. 04-223, dated Aug. 29, 2007 at 3-4 ("Qwest Opposition").

[8] *See* Teitzel Declaration ¶¶ 9-11 and Qwest's Opposition at 4-6.

[9] McLeod Petition at Declaration of Pritesh D. Shah ¶ 6 ("Shah Declaration").

[10] McLeod Reply at ii, 3.

[11] Qwest Opposition at 8-17.

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I. The Commission Did Not Condition The Unbundling Forbearance Grant On Any Future Market Behavior By Qwest, And Certainly Not "Reasonable" Pricing As Defined By McLeod.

McLeod's attack on Qwest is based upon an unsound foundation. First, McLeod argues that the Commission "made the grant of forbearance expressly contingent on Qwest's subsequent offering of reasonable terms for access to its facilities, including its continuing Section 271 obligations, from which the Commission did not grant forbearance."[12] Second, McLeod argues that "TELRIC is a very reasonable approximation of where Qwest's prices should be to be found just and reasonable."[13] As demonstrated below, neither of these assertions finds support in the Commission's orders.

a. The Commission Did Not Condition the *Omaha Order's* Forbearance from Unbundling on Any Future Market Behavior by Qwest.

McLeod argues that the Commission made the forbearance grant contingent upon Qwest's subsequent offerings to wholesale customers.[14] To the contrary, the Commission did not make forbearance from unbundling contingent upon any subsequent actions by Qwest. While forbearance from dominant carrier requirements was conditioned upon Qwest complying with requirements applicable to competitive carriers,[15] the only condition upon the forbearance from unbundling was compliance with the transition period.[16]

The Commission knows how to make a forbearance grant conditioned upon a petitioner's future market behavior. For example, in the Anchorage grant,[17] the Commission conditioned the grant upon ACS's future market behavior. In that order the Commission said "We conditionally grant ACS's petition in part,"[18] and again "We conditionally grant ACS forbearance from its

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[12] Nov. 12, 2007 *ex parte* at 2.

[13] McLeod Reply at 10.

[14] Nov. 12, 2007 *ex parte* at 2.

[15] *Omaha Order*, 20 FCC Rcd at 19429 ¶ 25, 19432 ¶ 33, 19434 ¶ 39, 19435 ¶ 41, 19435-36 ¶ 43.

[16] *Id.* at 19453 ¶ 74.

[17] *In the Matter of 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*, Memorandum Opinion and Order, 22 FCC Rcd 1958 ("*Anchorage Order*"), *appeals dismissed sub nom., Covad v. FCC*, Case No. 07-70898 (9th Cir. June 14, 2007).

[18] *Id.* at 1971 ¶ 20.

obligation to provide unbundled access to copper subloops as provided for in section 51.319(b)(1) of the Commission's rules,"[19] and again "we . . . expressly condition the relief we grant ACS on the requirement that ACS provide continued access to loops at just and reasonable rates, terms, and conditions in the manner set forth below after ACS is no longer required to provide UNEs in the relevant wire centers."[20] The Commission even included a section titled "Condition of Forbearance."[21] Thus, in the *Anchorage Order* the Commission made clear that the grant was a conditional one. The Commission used no such language in granting forbearance from unbundling in the *Omaha Order*.

In the *Anchorage Order* the Commission explained that the obligation it imposed on ACS to continue to provide access to loop facilities mirrors the Section 271 obligation that the Act imposes on BOCs that have obtained Section 271 approval to provide access to such facilities.[22] Thus, the Commission did not condition the Omaha grant, because Qwest already had a duty to provide access to loop facilities under Section 271, just as the Commission did not condition its grant on compliance with Qwest's ongoing obligations to provide interconnection, resale, and other Section 251(c) services, to which the Commission pointed in listing the remaining regulatory protections that it believed would maintain robust competition in the Omaha MSA.[23]

b. The Commission Has Not Established TELRIC as The Standard for Just and Reasonable Pricing of Section 271 Elements.

McLeod argues that "TELRIC is a very reasonable approximation of where Qwest's prices should be to be found just and reasonable."[24] McLeod also contends that because the *Omaha Order* "predicted 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,' a comparison of Qwest's proposed prices to UNE rates shows whether the proposed prices are set at competitive levels."[25] McLeod further maintains that "Qwest's proposed prices are presumptively unreasonable because they depart so significantly from the forward-looking cost-based prices that a competitive market would produce. Qwest's failure to

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[19] *Id.* at 1972-73 ¶ 24.

[20] *Id.* at 1974 ¶ 26.

[21] *Id.* at 1983.

[22] *Id.* at 1987 ¶ 42.

[23] *Omaha Order*, 20 FCC Rcd at 19452 ¶ 71, 19456-60 ¶¶ 84-89.

[24] McLeod Reply at 10.

[25] *Id.* at 9.

claim its prices comply with any forward-looking cost approach is little more than a direct assertion that it should be permitted to charge prices that by definition are unreasonable."[26]

As McLeod points out, the Commission has expressed support for the economic theory that switched access and special access prices should move towards forward looking costs.[27] The Commission has not, however, ordered that TELRIC, or any other forward-looking cost is the measure of whether switched access, special access, or Section 271 network element prices are just and reasonable. While McLeod might like to use TELRIC as an approximation of where Qwest's prices should be, the Commission has not ordered that TELRIC, or any forward-looking cost, be used as a gauge for pricing of Section 271 elements. In fact, the Commission's orders, and federal court decisions, point away from using TELRIC as a pricing gauge.

The Commission's orders show that TELRIC is not the measure of whether Section 271 elements are priced at a just and reasonable rate. These orders demonstrate that despite the rhetoric cited by McLeod from the *Local Competition Order* or the *Special Access NPRM*, the Commission realizes that just and reasonable rates are higher than forward-looking costs, and has not suggested that there should be any relationship between just and reasonable Section 271 rates and TELRIC. For example, the Commission directly contradicts McLeod's theory in the *UNE Remand Order*. There the Commission drew a stark contrast between forward-looking rates and market rates. The Commission stated "it would be counterproductive to mandate that the incumbent offers the element at forward-looking prices. Rather, the market price should prevail . . . ."[28] Similarly, the Commission has confirmed that a key difference between the unbundling obligations of Section 251 and the checklist obligations of Section 271 is the price that competitive local exchange carriers ("CLEC") must pay for the network elements: Under Section 271, network elements are to be provided at a "just and reasonable rate," rather than at the low, cost-based TELRIC rate required by Section 251.[29] The First Circuit agrees that Section

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[26] *Id.* at 11. McLeod ignores that Qwest has shown that its prices for DS0 loops are less than 4 percent above TELRIC as originally ordered by the Nebraska Public Service Commission ("Nebraska PSC"). Qwest Opposition at 21-23. McLeod later argues that Qwest's comparison to the Nebraska PSC's order is a concession that TELRIC applies. McLeod Reply at 14-15. To be clear, Qwest does not concede that TELRIC has any place in determining just and reasonable rates under Section 271.

[27] McLeod Reply at 8-9.

[28] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3906 ¶ 473 (1999) (subsequent history omitted).

[29] *See 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

271 elements need not be priced at TELRIC rates, stating that the "FCC orders provide carriers the authority to charge the potentially higher just and reasonable rates, in order to limit subsidization and to encourage investment by the competitors."[30] Thus, not only is there no legal support for McLeod's position that TELRIC rates are the standard by which 271 elements should be judged just and reasonable, the Commission and the courts also realize that requiring TELRIC for 271 elements would be "counterproductive" and allowing higher just and reasonable rates will "limit subsidization" and "encourage investment." In sum, there is no legal or policy support for McLeod's contention that Qwest's prices should be judged in relation to TELRIC.

II. Qwest Has Offered Reasonable Terms And Conditions, Complying With Its Section 271 Obligations, And Realizing The Commission's Predictive Judgment.

McLeod incorrectly asserts that "Qwest provides no alternative basis by which to judge its proposed prices."[31] Qwest has repeatedly pointed to the formula set out in the *Triennial Review Order*: "Whether a particular checklist element's rate satisfies the *just and reasonable pricing standard of section 201 and 202* is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6). We note, however, that for a given purchasing carrier, a BOC might satisfy this standard by demonstrating that *the rate for a section 271 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. 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.*"[32]

a. DS0 Loops

With respect to DS0 pricing Qwest has continued to offer its Qwest Platform Plus/Qwest Local Service Platform ("QPP/QLSP") agreements, keeping the loop in such arrangements at the pre-forbearance rate of $12.14. McLeod argues that the QPP/QLSP agreements fall "far short of

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Proposed Rulemaking, 18 FCC Rcd 16978, 17389 ¶¶ 663-64 and n.2008 (2003) ("*TRO*"), *corrected by Triennial Review Order Errata*, 18 FCC Rcd at 19020, *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004). *Southwestern Bell Tel., L.P. v. Mo. PSC*, 2006 U.S. Dist. LEXIS 65536 (D. Mo. 2006).

[30] *Verizon New Eng., Inc. v. Me. PUC*, 2007 U.S. App. LEXIS 21349 (1st Cir. 2007).

[31] McLeod Reply at 11.

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

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reasonableness."[33] McLeod complains that even though there have been over 100 companies that signed QPP/QLSP agreements, with multiple such companies in each of Nebraska and Iowa, statewide declines in UNE-P/QPP/QLSP lines in the Omaha MSA from June 30, 2004 to June 30, 2006 show that the QPP agreements are not reasonable.[34]

First, it is clear that Qwest's continued QPP/QLSP offering in the nine wire centers meets the Commission's standard for just and reasonable 271 rates because Qwest has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element (here, multiple Section 271 elements, *i.e.*, loop and local switching) at the Qwest-offered rate. Moreover, the QPP/QLSP rate is just and reasonable even under McLeod's incorrect claim that TELRIC sets the bar because the rate for the loop component of QPP/QLSP is exactly the same as the rate that McLeod argues is based on TELRIC.[35] McLeod's assertion that the number of UNE-P/QPP/QLSP lines have declined in Nebraska and Iowa has no bearing on whether Qwest's $12.14 rate is just and reasonable for the Section 271 loop in the nine Omaha forbearance wire centers. Even if the number of UNE-P/QPP/QLSP lines had declined in the nine wire centers, which McLeod does not argue, the rate would still be just and reasonable, because the Commission's test correctly does not hinge on line counts, since line counts are dependent on multiple factors, and a Section 271 rate need not guarantee ever-increasing line counts.

McLeod's argument that it faces a price squeeze under QPP when serving residential customers is specious. First, none of the listed wire centers identified in McLeod's example is one of the nine Omaha Forbearance wire centers. Thus, the argument is irrelevant to the issue in McLeod's petition. Nonetheless, McLeod's analysis contains numerous inaccuracies and incorrectly calculates the QPP Cost for each example. First, McLeod represents the rates as residential rates, when in fact, the Port rate they include is the business rate. In addition, McLeod incorrectly uses Zone 3 loop rates, for the two Zone 2 wire centers. Therefore, the QPP/QLSP rates are significantly overstated.

Most significantly, however, McLeod's analysis is very deceptive and poorly conceived. While the "QPP cost" in the OFO wire centers would have a $12.14 Zone 1 loop rate, McLeod has chosen to provide examples that exclusively use the much higher Zone 3 loop rates that exist in more rural wire centers. The "price squeeze" that McLeod alleges has nothing to do with forbearance. In fact, it is the high loop rate in rural Zone 3 areas that causes the alleged price squeeze in these Zone 3 areas, and this alleged "price squeeze" would exist whether the CLEC purchased a UNE loop or QPP. The loop rates in Zone 3 areas are often higher than the

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[33] Nov. 12, 2007 *ex parte* at 7.

[34] *Id.* at 7-8.

[35] McLeod argues that the rate that the Nebraska PSC originally ordered was not "true" TELRIC. McLeod Reply at 14-15.

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residential retail rates in these areas, and thus the basic residential retail rate will be lower than McLeod's cost *even with TELRIC-based UNE rates firmly in place*. Thus, unless McLeod draws revenues from other services, such as features and long distance, these customers may not be profitable to serve regardless of whether UNEs are or are not available. McLeod's decision to exit the rural markets is apparently based on this fact, and has nothing to do with forbearance.

While McLeod's analysis is irrelevant to its petition, the analysis is corrected below:

OLWNIATC (Oelwein, IA) –

McLeod Calculation	
Zone 3 Loop	$26.39
Port Rate	$6.73
Total	$33.12
Correct Calculation	
Zone 2 Loop	$15.14
Port Rate	$6.63
Res Credit	($3.78)
Total	$17.99

STPLNENW (St Paul, NE) –

McLeod Calculation	
Zone 3 Loop	$62.50
Port Rate	$9.43
Total	$71.93
Correct Calculation	
Zone 2 Loop	$28.11
Port Rate	$9.43
Res Credit	($5.16)
Total	$32.38

BLFSCOMA (Black Forest, CO) –

McLeod Calculation	
Zone 3 Loop	$32.74
Port Rate	$8.11
Total	$40.85
Correct Calculation	
Zone 3 Loop	$32.74

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Port Rate	$8.11
Res Credit	($3.36)
Total	$37.49

As noted above, because of loop de-averaging, the purchase of QPP/QLSP (or UNE loops) is normally not an economic alternative for CLECs to serve flat rate residential lines in higher priced loop zones unless the customer purchases a number of additional features and does significant amounts of toll calling.[36] In those zones, the CLEC has the alternative to purchase resold services from Qwest at the resale discount. However, if the CLEC determines that, as a policy, it would only purchase QPP (and not resold services) and it desires to serve customers in all three zones, in order to be profitable, it may need to view the market as a whole by averaging its revenues and costs over all three zones—just as Qwest must do in most cases. This is not a new development with QPP/QLSP. Prior to the *TRRO*, in the Section 272 orders, the Commission recognized that because UNE rates are cost based, while an incumbent local exchange carrier's ("ILEC") residential rates are averaged, with below cost rates in many high cost areas, a CLEC must choose either to compete via resale in the high cost areas or choose to cost average.[37]

In addition, to the QPP/QLSP offering, Qwest has also made a new commercial offering of DS0 loops. One carrier has signed an agreement for commercial DS0 loops in Omaha. Qwest continues to negotiate terms and conditions, including rates, with another carrier. If McLeod were interested in actually coming to agreement, rather than expending its resources trying to make political "hay," Qwest would negotiate with McLeod too.

McLeod makes four arguments against the commercial agreements for DS0 loops. First, McLeod argues that the commercial agreement rate is not just and reasonable because it is not TELRIC, or within 15 percent of TELRIC.[38] Second, McLeod argues that the commercial agreement DS0 loop rates are not just and reasonable under the Commission's standard because the Commission in the *TRO* used plurals, suggesting that multiple other carriers should have

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[36] All features are free to the CLEC purchasing QPP/QLSP and the CLEC also collects switched access.

[37] *See, e.g., In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Order on Remand, 19 FCC Rcd 2839, 2845 (FCC 2004) (rejecting CLECs' claim of price squeeze in part on the basis that CLECs failed to "consider whether using a mix of the UNE-Platform and resale to provide service would affect their price squeeze arguments.")

[38] McLeod Reply at iii-iv, 10-11, 18.

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signed on to take the same rate.[39] Third, McLeod argues that the agreement Qwest has reached "shows nothing" because it is with an affiliate of another BOC, and according to McLeod, BOCs are unlikely to challenge each other's rates.[40] Finally, McLeod claims that the commercial agreement is not reasonable because it does not include PID/PAP and requires that the CLEC serve its own end-user customers.[41]

As to the argument that the commercial agreement rate is not just and reasonable because it is not TELRIC, Qwest has shown (without admitting that forward looking cost or TELRIC is the appropriate standard) that its rate is within four percent of the TELRIC rate originally ordered by the Nebraska PSC. McLeod quibbles that the Nebraska PSC's rate was not "true" TELRIC. While Qwest does not concede that the Nebraska PSC ordered rate was not "true" TELRIC, it is actually irrelevant whether the Nebraska PSC ordered "true" TELRIC. The point is that Qwest is offering a rate that is within four percent of some measure of forward-looking cost, regardless of whether that measure exactly complies with the Commission's TELRIC rules.

Turning to the argument that the commercial agreement rate is not just and reasonable because Qwest has only reached one agreement, Qwest continues to negotiate with other parties. In Omaha, which McLeod and the Commission have conceded is a small market for UNEs,[42] Qwest has to start somewhere. Qwest hopes to soon add a second carrier to make it plural. Taken to its logical conclusion, McLeod's argument would mean that in a market with only two wholesale buyers, getting 50% agreement would mean the rates are not just and reasonable, while in a market with six wholesale buyers, getting 33% agreement would mean rates are just and reasonable. That result is nonsensical. Reaching agreement with one purchaser in a relatively small market is significant. The fact that the purchasing carrier is a CLEC that happens to be affiliated with another BOC does not take away the significance of the agreement. Contrary to McLeod's argument, BOCs have been known to disagree with each other. For example, just recently Qwest challenged a Commission *Order* impacting access charges, while Verizon and AT&T supported the *Order*.[43] Finally, as discussed in Qwest's opposition, PID and

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[39] *Id.* at 13-14.

[40] *Id.*

[41] *Id.* at 16-18.

[42] Nov. 12, 2007 *ex parte* at 4 n.10; *In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, Memorandum Opinion and Order, FCC 07-212 (Dec. 5, 2007), at ¶ 38 n.122.

[43] *In the Matter of Regulation of Prepaid Calling Card Services*, Declaratory Ruling Report and Order, 21 FCC Rcd 7290 (2006), *vacated in part*, *Qwest v. FCC*, No. 06-1274, D.C. Cir. slip op. Dec. 4, 2007.

PAP are not necessary in a Section 271 agreement. The dispute resolution provisions protect the CLEC's interest in getting nondiscriminatory service. Moreover, Qwest does not understand the argument about the Commercial DS0 product restricting CLECs' ability to resell. The Commercial DS0 product does not introduce any additional obligations above those found in the 251 product it is replacing.

In sum, Qwest has met its obligations with respect to DS0 loops through the DS0 loops included in QPP/QLSP arrangements and through its commercial agreement on DS0 loops. The Commercial DS0 loop product was especially created for Omaha after forbearance because there is no recognized private line equivalent to an analog unbundled loop. The rates for the Commercial DS0 loop product are lower than those for similar products such as interstate two wire standard voice private line channel termination ($21.47 monthly recurring cost), or interstate two wire basic voice (monthly recurring rate of $28.75), or Private Line voice grade intrastate service ($28.00 monthly recurring cost and $250.00 nonrecurring cost). Thus, Qwest has, as predicted by the Commission, significantly reduced DS0 rates.

b. DS1/DS3 loops

The Regional Commitment Plan ("RCP") is available to obtain discounts for DS1 and DS3 special access loops. Qwest's RCP does not place limitations on purchases of UNEs or of services from other providers.[44] Nor does Qwest have growth commitments.[45] In fact, an RCP purchaser's commitment allows it to decrease its purchases by 10 percent over the term of the RCP. Region-wide commitments have the benefit of allowing Qwest to attempt to maintain a stable utilization rate for its expensive network facilities, while providing lower prices to purchasing carriers.[46] Moreover, contrary to McLeod's claim in its opposition,[47] McLeod also can qualify for term discount plans by signing up for a term of years for any special access loops it buys, and need not purchase special access on a region-wide basis.

III. The Status Of Competition In The Omaha MSA Should Inform The Commission's Response To McLeod's Petition.

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[44] Qwest Opposition at 21.

[45] *Id.*

[46] *See generally Bellsouth Telcoms., Inc. v. FCC*, 469 F.3d 1052, 1056 (D.C. Cir. 2006) ("Indeed, to defend its reading against a more frontal challenge than the one presented here, the Commission would have had to explain why the benefits of reading section 272 as broadly as it has done justify the inefficiencies that may result from frustrating Bell Operating Companies' attempts to maintain stable utilization rates on their networks or to lower their prices.")

[47] McLeod Reply at 20.

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McLeod argues that the status of competition in the Omaha MSA is irrelevant to its petition. Yet, McLeod itself argues that no market forces constrain Qwest,[48] and that current McLeod customers would be forced to buy from Qwest, should McLeod exit the market.[49] Of course, Qwest must rebut this inaccurate description of the market. Moreover the status of competition is very relevant to whether the Commission should re-impose unbundling. The Commission cannot ignore extensive alternative facilities when ordering unbundling.[50]

McLeod now admits that Cox has offered it last mile connections, but argues that Cox did not offer connections to all of the business locations that McLeod wanted. This is doubtful since the Commission has already found that Cox could reach at least 75 percent of the customer locations in the nine wire centers within a commercially reasonable period of time.[51] Thus, Cox likely covers more buildings than it did when the Commission issued the *Omaha Order*, and will likely reach yet additional buildings in the coming months. Further, as McLeod now admits, Cox has provided it an offer for last mile connections at an unobjectionable price.[52]

Qwest is still losing business and residential lines in the 9 Omaha forbearance wire centers. Contrary to McLeod's allegations,[53] Qwest does not dominate the small and medium business segment in Omaha. TNS's most recent data **[BEGIN CONFIDENTIAL]** [redacted] [54] **[END CONFIDENTIAL]** "At the end of the third quarter, Cox reported exceptional success with the commercial services delivered by its Cox Business division. Year-over-year revenue growth was greater than 21%. Cox Business Internet subscriptions increased by 14.5%, and overall voice lines grew by greater than 25%. Cox was able to make an early entry into commercial services thanks to its development of telecom services; the company noted

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[48] McLeod Petition at 7.

[49] *Id.*

[50] *USTA v. FCC*, 359 F.3d 554, 575 (D.C. Cir. 2004) ("*USTA II*") (the Commission cannot "simply ignore facilities deployment along similar routes when assessing impairment.").

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

[52] McLeod Reply at 3 & n. 7.

[53] Nov. 17, 2007 *ex parte* at 1.

[54] **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

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commercial services as a key piece in its competitive strategy, serving under-served small- to medium-sized business customers ignored by the large telephone companies."[55]

[BEGIN CONFIDENTIAL]

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[55] http://studio-5.financialcontent.com/crain?Account=rcnews&GUID=3812310&Page=MediaViewer&Ticker=S (visited Dec. 13, 2007).

[56] Moreover, Qwest understands that McLeod's investment in Omaha will not be stranded if McLeod discontinues services to Omaha. Qwest understands that McLeod serves Council Bluffs, Iowa from its Omaha switch. McLeod has not stated that it plans to discontinue service to Council Bluffs. Moreover, McLeod has publicly stated that it plans to use its Omaha fiber to integrate PAETEC's network. (Source: public comments of Mr. Royce Holland, CEO of McLeod, at an annual NARUC convention, Nov. 10, 2007).

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IV. Even If The Commission's Predictive Judgment Had Not Been Realized The Commission Could Not Re-Impose Unbundling Without Developing A Record To Support Such A Decision.

As explained above, the Commission did not condition its order upon any behavior from Qwest. The Commission took comfort from the predictive judgment, but did not make it a condition of the *Order*. While the Commission must, as in any case, monitor to determine the accuracy of its predictive judgment, this duty does not mean that the Commission must overturn its *Forbearance Order*.[57] Thus, in the *Bechtel* case, radio licenses had been granted for 28 years, based upon a predictive judgment. When that predictive judgment proved incorrect, the Commission had to reconsider the application of the applicant challenging the predictive judgment under an appropriate standard, rather than just granting the license. Moreover, the Commission did not go back and revoke 28 years worth of licenses.

McLeod argues that its petition does not call upon the Commission to address "the full scope of its power to revise forbearance orders, because in this case the Commission made the grant of forbearance expressly contingent on Qwest's subsequent offering of reasonable terms for access to its facilities, including its continuing Section 271 obligations, from which the Commission did not grant forbearance."[58] As shown above, the Commission did not make forbearance from unbundling contingent upon any future behavior by Qwest. Thus, McLeod's petition does indeed raise the issue of the Commission's scope of its power to revise forbearance orders.

As Qwest and Verizon have argued previously in this docket, the Commission may not revise the order and re-impose unbundling without developing a record supporting any such action. The record presently before the Commission does not support such action.

Respectfully submitted,

/s/ Daphne E. Butler

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[57] *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir.), *cert. denied*, 506 U.S. 816 (Oct. 5, 1992) ("The Commission's necessarily wide latitude to make policy based upon 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 actually produce the benefits the Commission originally predicted they would.") (citations omitted).

[58] Nov. 12, 2007 *ex parte* at 2.

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of June 2008, I caused two copies of the foregoing Brief for Intervenors Qwest Communications International Inc. and Qwest Corporation in Support of Petitioners (Public Version) to be served upon the following parties by first-class mail, postage prepaid.

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