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May 11, 2009

VIA ECFS

EX PARTE

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

Re: Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island, WC Docket No. 08-24; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area, WC Docket No. 08-49

Dear Ms. Dortch:

McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services ("McLeodUSA"), writes to correct a variety of factual errors made by Verizon in its May 8, 2009 *ex parte* letter filed in the above-referenced dockets.¹ In its letter, Verizon relies on a June 19, 2008 *ex parte* letter filed by Qwest in the *Qwest 4-MSA Forbearance* proceeding (WC Docket No. 07-97) where Qwest incredulously claimed that the market turndown initiated by McLeodUSA in the Omaha Metropolitan Statistical Area ("MSA") had nothing to do with the Commission's grant of forbearance.²

¹ Letter from Rashann Duvall, Regulatory Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-24 & 08-49 (filed May 8, 2009).

² *Id.* at 4-5 (citing Letter from R. Steven Davis, Qwest, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-97 (filed June 19, 2008)).

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McLeodUSA fully refuted Qwest's claim in the attached July 10, 2008 *ex parte* letter filed in WC Docket No. 07-97.³ McLeodUSA attaches that letter for inclusion in the record of the above-referenced dockets.

Respectfully submitted,

/s/ Andrew D. Lipman
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Attachment

cc: (all via e-mail)	P. Michelle Ellison
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Commissioner Adelstein	Marcus Maher
Commissioner McDowell	Tim Stelzig
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³ Letter from William A. Haas, VP-Regulatory and Public Policy, McLeodUSA Telecommunications Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed July 10, 2008).

ATTACHMENT

**(McLeodUSA Telecommunications Services, Inc., d/b/a
PAETEC Business Services
July 10, 2008 Ex Parte)**



July 10, 2008

VIA ECFS

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

Re: *Ex Parte* Communication, WC Docket No. 07-97

Dear Secretary Dortch:

McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services (“McLeodUSA”), wishes to correct a variety of factual errors made by Qwest Corporation (“Qwest”). Qwest has made several submissions, most recently (and at greatest length) in an *ex parte* filed on June 19, 2008, containing the amazing claim that the market turndown initiated by McLeodUSA in the Omaha Metropolitan Statistical Area (“MSA”) “[has] nothing to do with the Commission’s grant of forbearance...”¹ The claim is amazing because Qwest, a non-participant in any internal McLeodUSA discussion on the topic, has no basis to make such a claim other than its speculative spin based on its misinterpretation of a limited number of facts.

Qwest Mischaracterizes McLeodUSA’s Revised Business Strategy

Qwest’s primary theory is that a change in business strategy and the Company’s declining performance in Omaha were the real reasons for McLeodUSA’s decision to turn down service in Omaha. Indeed, Qwest goes so far as to claim that McLeodUSA’s new business plan led it to “divorce” itself from serving residential and small business customers in the Omaha MSA.² Qwest’s claim is flatly wrong.

McLeodUSA did initiate a revised business strategy in January 2006 that focused on selling services to enterprise customers, but that revised business strategy did not include “divorcing” itself from the Company’s existing base of residential and small to medium sized business customers. In fact, a recurring goal expressly identified during multiple planning meetings was to “protect the base” – that being the base of existing

¹ See Letter from R. Stephen Davis, Senior Vice President Public Policy, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 1 (filed June 19, 2008) (“*Qwest June 19th Ex Parte*”).

² *Qwest June 19th Ex Parte* at 2.

residential and small business customers served by McLeodUSA. As a key goal for the Company in 2006 and 2007, McLeodUSA undertook multiple measures designed to “protect the base” during and after the launch of its new business strategy. Therefore, it is 100% inaccurate to assert that McLeodUSA’s new business strategy involved “divorcing” itself from its residential and small business customer base. In fact, since 2006, McLeodUSA has sought to preserve its existing residential and small business customers throughout its footprint—except in Omaha, Nebraska.

Qwest similarly misstates that McLeodUSA was “moving away” from residential and small business customers, citing an SEC filing by McLeodUSA. The quote highlighted in Qwest’s *ex parte* merely states that the new McLeodUSA strategy was to “[focus] on sales to small- and medium-sized enterprise customers...”³ Qwest uses this and other like statements to leap to the conclusion that McLeodUSA was getting rid of (*i.e.*, divorcing, moving away, leaving behind, etc.) its existing residential and small business customers as part of a national strategy, and that the market turndown in Omaha is attributable to the new business strategy rather than the Commission’s grant of forbearance in the *Omaha Forbearance Order*. This is plainly not the case.

The SEC statement speaks for itself. Announcing that the revised company “focus” would be “sales to small and medium-sized enterprise customers” does not mean, as Qwest avers, that McLeodUSA was getting rid of its existing residential and small business customer base. Although the Company did cease offering services to new residential customers, it did not terminate service to its existing residential customers where it served customers using its own local switching in combination with UNE loops.⁴

³ *Qwest June 19th Ex Parte* at 3.

⁴ In 2006, McLeodUSA did terminate service to residential and small business customers in a limited number of wire centers in which it served customers via Qwest’s QPP commercial service, *i.e.*, Colorado, Wyoming, and Nebraska. Qwest makes note of this in a more recent letter. *See* letter from Daphne E. Butler, Corporate Counsel for Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 3 (filed July 8, 2008) (“*Qwest July 8th Ex Parte*”). Paralleling McLeodUSA’s post-forbearance experience, Qwest’s unilaterally-set price for its commercial replacement for cost based UNE-P service was raised so precipitously that McLeodUSA was forced to turn down service because it is not economically viable to deploy its own switch and provision residential services using UNE loops in these other markets. That action is wholly consistent with the situation in Omaha where elimination of Section 251 unbundling obligations enabled the ILEC to squeeze a competitor via deregulation of bottleneck loop and transport facilities. Contrary to Qwest’s claims and as discussed herein, McLeodUSA’s exit from Omaha had everything to do with the forbearance from Section 251(c)(3) requirements Qwest received under the *Omaha Forbearance Order*. *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, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (“*Omaha Forbearance Order*”) *petitions for review denied in*

Indeed, part of the new business strategy was to play in the residential market space by being a competing provider of local wholesale services to other service providers versus a provider of retail services to new residential customers. McLeodUSA continues actively to market its local wholesale services to carriers serving the residential and small business segments throughout its footprint—except in Omaha, Nebraska.

McLeodUSA’s Partial Exit from Omaha was Triggered by the *Omaha Forbearance Order* Not Its Nationwide Strategy

Qwest’s claim that McLeodUSA’s revised business strategy explains the situation in Omaha cannot be squared with the facts that:

- McLeodUSA has not taken comparable action in any other market served by Qwest or another RBOC;
- The Omaha MSA is unique, and it is unique because of the grant of forbearance. Omaha is the *only* market in which McLeodUSA has made plans, filed for regulatory approval, and initiated the turn down of services to retail residential and small business customers served via UNE loops; and
- It is also the *only* market in which McLeodUSA has taken steps to terminate local wholesale services to wholesale customers providing retail services to residential and some small business customers.⁵

The facts simply do not support Qwest’s belated effort to explain away the situation in Omaha, where McLeodUSA has begun to terminate service to residential and small business customers.

Qwest’s June 19th *Ex Parte* also argues that the Omaha market was not a viable geographic fit for the new McLeodUSA business strategy.⁶ Citing the McLeodUSA May 2007 SEC filing and a statement by then-CEO Royce Holland, Qwest maintains that McLeodUSA had already turned its back on competing in Omaha. Qwest’s argument simply flips the facts upside down to reach its incorrect conclusion.

Starting in 2002, McLeodUSA began to eliminate a significant number of its field sales force employees throughout its entire footprint, relying more heavily on an inside sales effort. This action included disbanding much of the Omaha direct sales force. McLeodUSA maintained a very small direct sales force (three employees in 2002) within

part, dismissed in part, Qwest Corp. v. FCC & USA, 482 F.3d 471 (D.C. Cir. 2007) (emphasis added).

⁵ Even after the acquisition by PAETEC, a key integration goal of the combined entity has been to retain the existing McLeodUSA residential and small business customer base.

⁶ See *Qwest June 19th Ex Parte* at 4-5.

Omaha. However, this direct sales force was, in fact, completely withdrawn from Omaha as of February 2006, shortly after Royce Holland started as CEO, *because* of the grant of forbearance associated with the *Omaha Forbearance Order*.⁷

Mr. Holland's statement in May 2007 minimizing the importance of Omaha in comparison to other market opportunities is thoroughly consistent with the explanation that McLeodUSA has provided to the Nebraska PSC and this Commission. At the time Mr. Holland made his statement, (a) the *Omaha Forbearance Order* was in effect; and (b) there was no replacement commercial agreement in place between Qwest and McLeodUSA that enabled McLeodUSA to effectively compete in Omaha.⁸ So Mr. Holland's statement to investors minimizing the import of not being able to effectively to compete in Omaha is not, as misrepresented by Qwest, an indication in May 2007, that McLeodUSA did not want to compete in Omaha. Instead, Mr. Holland's statement is thoroughly consistent with the notion that forbearance was preventing McLeodUSA from being able to effectively compete in Omaha.

A CEO's statement to investors that there are better opportunities available than the Omaha market for deploying a direct sales force when faced with the existence of UNE forbearance is stating the obvious – a CLEC will choose to compete where it can obtain wholesale access to end users on reasonable terms and conditions, not where the RBOC has been granted forbearance from its Section 251(c)(3) obligations. That stark reality is exactly the reason why the four affected state utility commissions are vigorously opposing Qwest's forbearance petition in this matter. Based on the Omaha experience, these commissions understand the negative impact that forbearance would have in maintaining robust competition in each of their respective states.

Qwest also tries to blame McLeodUSA's exit from the Omaha market on the presence of multiple strong competitors there.⁹ In reality, this factor never entered into McLeodUSA's internal deliberations. Indeed, the third competitor (after Qwest and Cox) identified by Qwest as having substantial market share in Omaha has taken an insignificant number of lines from McLeodUSA since 2004; this company has had no impact whatsoever on McLeodUSA operations in Omaha. Virtually all lines lost by McLeodUSA in Omaha due to competition have been ported either to Qwest or to Cox (with Cox taking a considerably larger share of those lines among mass-market customers than among enterprise users).¹⁰ But McLeodUSA faces substantial competition from

⁷ McLeodUSA serves the Omaha market out of its Des Moines, Iowa sales office.

⁸ Both facts remain true today.

⁹ Letter from Daphne E. Butler, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 3-5 (filed May 15, 2008).

¹⁰ In a further distortion, Qwest has misinterpreted McLeodUSA's recent statements about line exports. *See Qwest July 8th Ex Parte* at 1-2. In a recent summary of oral *ex parte* presentations, McLeodUSA noted the figure of 23% for enterprise line exports to Cox in the Omaha market in 2007. Letter from Russell M. Blau, Bingham McCutchen

incumbent LECs and other CLECs in many markets, and as already noted this factor has not led it to discontinue service to existing customers in any of those markets.

Along similar lines, Qwest asserts that McLeodUSA had experienced significant line losses in Nebraska since 2002, and that since forbearance only affected 9 of 24 wire centers in Omaha, the *Omaha Forbearance Order* was not the driving force leading to the Company's decision to change its business strategy in 2006.¹¹ But, as Qwest itself admits, the line losses McLeodUSA suffered in Omaha were commensurate with line losses McLeodUSA experienced elsewhere. Forbearance, not line loss, explains why Omaha is the *only* market in which McLeodUSA has discontinued serving existing customers. Qwest is asking the Commission to turn a blind eye to the fact that McLeodUSA went back to competing vigorously in other markets under its revised business strategy while concurrently striving to "protect its base."

The grant of forbearance not only discouraged McLeodUSA from robustly re-engaging in the Omaha market with its revised business strategy, but is also causing McLeodUSA to turn down service to a significant portion of its existing customer base.¹² Again, McLeodUSA has taken no comparable action in any market but Omaha, despite having implemented the same revised business strategy throughout its footprint. While Qwest notes that forbearance only affected 9 of the 24 wire centers, those 9 wire centers account for approximately 73% of McLeodUSA's business market opportunity in the Omaha MSA.¹³ By taking the most sought-after, viable wire centers out of play through

LLP, Counsel for PATEC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, attachment at 3 (filed June 25, 2008). Qwest apparently believes this means that McLeodUSA lost 23% of its existing enterprise lines to Cox in one year. Actually, however, the statement means that, out of all the enterprise lines McLeodUSA lost to competitors in Omaha in 2007, 23% of them were ported to Cox.

¹¹ See *Qwest June 19th Ex Parte* at 5-6.

¹² It is also in the record of this docket and WC Docket No. 04-223 that two other carriers, Eschelon and Integra, were both planning to enter the Omaha market (before their merger) and opted not to do so after forbearance was granted.

¹³ See Letter from William A. Haas, Deputy General Counsel, McLeodUSA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, at Presentation Attachment p.2 (filed Nov. 17, 2007); Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223, Declaration of Pritesh D. Shah, Exhibit 1 (filed July 23, 2007) ("Petition"). Similarly, in its more recent letter, Qwest asserts that McLeodUSA would not have exited the residential market in the entire State of Nebraska due to FCC action affecting 9 wire centers. *Qwest July 8th Ex Parte* at 3. However, McLeodUSA only operates in the Omaha area of Nebraska, as Qwest is well aware, and UNE forbearance in the 9 wire centers made it economically unviable to serve residential and small business customers in the remaining areas of the MSA.

forbearance, Qwest has succeeded in forcing a facilities-based competitor to significantly curtail services throughout the entire Omaha MSA.¹⁴

The Commission's Predictive Judgment Under the *Omaha Forbearance Order* that Qwest Would Have An Incentive to Offer Commercially Reasonable Wholesale Alternatives Absent § 251(c)(3) Obligations Failed to Materialize

Qwest's claim that the Commission's predictive judgment used to justify the grant of forbearance in the enterprise market in Omaha has been realized is easily rebutted.¹⁵ One of the predictive judgments made by the Commission was that market forces would compel Qwest to offer commercial replacements that would enable CLECs to remain viable competitors in the market. No such offer has been forthcoming to McLeodUSA. As discussed in relation to the Petition for Modification of McLeodUSA Telecommunications Services, Inc. filed in WC Docket No. 04-223, Qwest has failed to present anything but "take it or leave it" offers to McLeodUSA. A separate *ex parte* filed on June 30, 2008, in this docket explains the deficiency with Qwest's DS0 replacement offering.¹⁶

Furthermore, Qwest's May 15, 2008 and July 8, 2008 *ex partes* claiming its special access offering satisfies the Commission's predictive judgment with respect to high capacity UNE facilities is plainly wrong.¹⁷ Qwest admits that its proposed DS1 and DS3 commercial offerings are nothing more than its tariffed special access rates, claiming that "there is no requirement that Qwest offer new DS1/DS3 products priced differently than its currently tariffed services."¹⁸ In other words, Qwest freely admits it

¹⁴ Qwest correctly notes that McLeodUSA has not completely exited the Nebraska portion of the Omaha MSA. PAETEC has announced that McLeodUSA will continue service to medium and large enterprise customers served using T1 and above facilities for the foreseeable future, subject to recurring evaluations. That being said, the turn down of residential and small business customers that is underway represents more than 90% of the lines McLeodUSA had in service as of December 31, 2007. Thus, contrary to the goal of the 1996 Act, forbearance in Omaha will narrowly limit competition to only the largest enterprise customers.

¹⁵ See *Qwest June 19th Ex Parte* at 10.

¹⁶ Letter from Andrew D. Lipman *et al.*, Counsel for Affinity Telecom, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed June 30, 2008).

¹⁷ Letter from Daphne E. Butler, Corporate Counsel for Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 4 (filed May 15, 2008); *Qwest July 8th Ex Parte* at 4.

¹⁸ Reply of Qwest Corporation, WC Docket No. 04-223, at 6 (filed Sep 13, 2007); see also *Qwest July 8th Ex Parte* at 4 ("its Special Access pricing is in full compliance with the 'just and reasonable' pricing requirements of Section 271"). While Qwest also claims Special Access term and volume discounts, such as Regional Commitment Plans ("RCPs") are available to McLeodUSA, *id* at 4, the unreasonable nature of Qwest's

has been unwilling to offer McLeodUSA any pricing other than its tariffed special access rates as its commercial or 271 network element pricing for DS1 and DS3 loops and transport, consistent with what McLeodUSA stated in its Petition. Thus, despite Qwest's claims that it negotiated DS1/DS3 rates in good faith, the bottom line is that Qwest was never willing to change its position that McLeodUSA had to purchase special access services after forbearance was granted.

Of course, the fact that Qwest's special access offerings were in existence at the time of the *Omaha Forbearance Order*¹⁹ renders Qwest's argument nonsensical. It is unfathomable that the Commission would rely on a "predictive judgment" that Qwest would offer reasonable prices on a commercial basis if the Commission meant only that it expected Qwest would continue to offer its existing special access services. The only logical conclusion is that the Commission was predicting that market forces would compel Qwest to offer commercial pricing for loops and transport at rates that were materially less than Qwest's existing tariffed special access pricing.

Further, the *Omaha Forbearance Order* itself precludes Qwest's reliance on tariffed special access services to satisfy its separate Section 271 obligation. In that Order, the Commission carefully distinguished Section 271 loop and transport offerings from Qwest's special access offerings:

To begin with, we note that withdrawal of these loop and transport offerings [DS0, DS1, DS3-capacity facilities] would be impermissible under section 271, which requires Qwest to make loop and transport facilities (among others) to competitors at just and reasonable rates and terms. ***In***

DS1/DS3 special access offering is compounded by the anticompetitive terms and conditions embodied in its RCPs, which Qwest addresses by stating that "the RCP *only* requires McLeod to maintain 90 percent of its special access volume with Qwest." Reply of Qwest Corporation, WC Docket No. 04-223, at 8 (emphasis added). As McLeodUSA seeks UNE replacement arrangements in the nine wire centers affected by the *Omaha Forbearance Order* but not throughout Qwest's 14-state footprint, this statement plainly illustrates how unreasonable Qwest's proposal is. Because the discounted pricing that Qwest offers is based on a region-wide commitment, not just on purchases in the nine Omaha wire centers, Qwest implicitly seeks to exploit McLeodUSA with region-wide commitment that would prompt McLeodUSA to reduce its UNE usage while simultaneously increasing its special access usage, even in areas where UNEs would generally otherwise be available, if McLeodUSA went below the commitment. This shows that the evaporation of Qwest's UNE obligations has resulted in the loss of any incentive to negotiate reasonable DS1/DS3 replacement arrangements while Qwest holds McLeodUSA hostage, safe in the knowledge that McLeodUSA has no choice but to rely on Qwest for access to last-mile bottleneck facilities.

¹⁹ *Omaha Forbearance Order*, ¶ 80.

addition, Qwest offers *similar special access services* pursuant to tariffing or contract filing requirements and cannot cease offering such *services* to customers without authority under Section 214.²⁰

The Commission's ruling distinguishing Qwest's obligation to offer Section 271 loops and transport offerings from "similar" special access offerings wholly undermines Qwest's recurring efforts to equate special access offerings with section 271 network elements. And the Commission's predictive judgment was that market forces would compel Qwest to offer commercial pricing for loops and transport at rates that were materially less than the existing tariffed special access pricing (that existed in December 2005) to address the concern that Qwest would use forbearance to price squeeze facilities-based competitors out of the Omaha market.

In summary, the Commission should not reward Qwest by granting forbearance in any additional market. Qwest has failed to fulfill the Commission's directive that Qwest negotiate reasonable commercial arrangements with carriers dependent on Qwest for loop and transport facilities rather than force them into special access arrangements. Based on a demonstrable track record of non-negotiation, the Commission cannot rationally predict Qwest would behave differently if granted forbearance in additional markets.

Respectfully submitted,

/s/ William A. Haas

William A. Haas
Vice President – Regulatory and Public Policy

cc: Chairman Martin (all via e-mail)
Commissioner Adelstein
Commissioner Copps
Commissioner McDowell
Commissioner Tate
Dana Shaffer
Amy Bender
Scott Deutchman
Scott Bergmann
John Hunter
Greg Orlando
Chris Moore
Julie Veach

²⁰ *Omaha Forbearance Order*, ¶ 80 (emphasis added).

Marlene H. Dortch

July 10, 2008

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Janice Myles

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