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June 3, 2010

**VIA ECFS**

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

**Re: Notice of Ex Parte Presentation: WC Docket Nos. 09-135, 04-223**

Dear Secretary Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this will provide notice that on June 2, 2010, William Haas of PAETEC Holding Corp.,<sup>1</sup> Anthony Hansel of Covad Communications Company ("Covad"), the undersigned and Fathia Touray, a summer associate with Bingham McCutchen LLP, along with Sara Cole of TDS Metrocom, LLC ("TDS") and Nancy Lubamersky of U.S. TelePacific and Mpower Communications Corp., both d/b/a TelePacific Communications (both of whom participated in the meeting via teleconference) jointly met with Jennifer Schneider, Legal Advisor, Office of Commissioner Michael Capps.

In addition, on June 2, 2010, Bill Haas of PAETEC, Anthony Hansel of Covad, the undersigned and Lihua Chen, a summer associate with Bingham McCutchen LLP, along with Sara Cole of TDS (who participated in the meetings via teleconference) jointly met with the following individuals in separate meetings: Angela Kronenberg, Legal Advisor, Office of Commissioner Mignon Clyburn; Commissioner Meredith A. Baker and her legal advisor Christi Shewman; and Zachary Katz, on detail to the Office of Chairman Julius Genachowski.

The attached presentation was distributed and formed the basis of what was discussed during these meetings. As a threshold matter, petitions seeking forbearance from offering § 251(c)(3) unbundled network elements ("UNEs") should be denied because granting such petitions under prevailing market conditions would not "enhance competition among providers of telecommunications services", as 47 U.S.C. § 160(a)(3) and (b) require.

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<sup>1</sup> On behalf of its operating subsidiaries, PAETEC Communications, Inc. US LEC, and McLeodUSA Telecommunications Services, Inc. (all doing business as "PAETEC").

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Additionally, in any market power analysis, the Commission should examine competition in discrete product markets. Retail and wholesale markets should be examined separately. In evaluating the wholesale markets, the Commission should assess whether wireline competitors that have deployed their own loop facilities and offer *wholesale substitutes* for the specific UNEs available under the Commission's rules—namely DS0 loops, dry copper loops (including conditioning), DS1 loops, DS3 loops; DS1 transport, DS3 transport and dark fiber transport. Further, although each may start with the same underlying UNE facility, residential and business retail product markets should be examined separately because business services are different from residential services and face different market conditions.

PAETEC also emphasized that the *Omaha Forbearance Order*<sup>2</sup> should be modified as it has requested in CC Docket 04-223.<sup>3</sup>

As indicated above, a copy of this notice was filed electronically, via ECFS, with the Commission in the above-referenced proceedings. Please contact us if you have any questions.

Very truly yours,

/s/ Russell M. Blau

Russell M. Blau  
Philip J. Macres

Attachment

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<sup>2</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 USC §160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (“*Qwest Omaha Forbearance Order*”), *aff'd*, *Qwest Corp. v. FCC*, 482 F3d 471 (DC Cir 2007).

<sup>3</sup> *See* Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No 04-223 (filed July 23, 2007); *see also* Letter from Andrew D. Lipman and Russell M. Blau, Counsel for PAETEC Holding Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 09-135, 04-223 (filed Dec. 11, 2009); Letter from William A. Haas, Deputy General Counsel, McLeodUSA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223 (filed Nov. 19, 2007); Letter from Andrew D. Lipman *et al.*, Counsel for McLeodUSA Telecommunications Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223 (filed Nov. 13, 2007). Courtesy URLs of these cited documents on ECFS will be emailed to Christi Shewman by one of the undersigned individuals.

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cc: Commissioner Meredith Baker (all via E-mail)  
Zachary Katz  
Angela Kronenberg  
Jennifer Schneider  
Christi Shewman

**The Commission Should Deny The Qwest Phoenix Forbearance Petition**

- **The Omaha Forbearance Standard has Failed**
  - Harms consumers and competition by subjecting them to a cable-RBOC duopoly that is contrary to the public interest
  - Based on a predictive judgment about wholesale competition that has been proven erroneous
  - Did not “promote competitive market conditions” as Section 10 requires
  - Does not identify locations where competitors “actually” have facilities available to serve customers
  - Fails to recognize distinctions between relevant product markets
- **In Evaluating UNE Forbearance Petitions, the Commission Should Employ an Analytical Framework Similar to Its Traditional Market Power Analysis**
  - The market power analysis should, at a minimum, require “two facilities-based wireline competitors to the ILEC” before granting UNE forbearance
    - The facilities-based wireline competitors must offer substitutable services to the entire range of the ILEC services provided over facilities subject to unbundling.
  - The market power analysis should focus on “actual” competition, especially in light of the high barriers to entry in the last mile
  - The market power analysis should consider “supply and demand elasticities”
  - The market power analysis should examine “competition in discrete product markets”
- **Qwest’s Phoenix Forbearance Petition Should be Denied Because Qwest Retains Dominant Market Power**
  - Unbundling is necessary to assure that Qwest's rates remain reasonable and non-discriminatory
  - Qwest has not shown sufficient competition to justify forbearance in either residential or business markets
    - Qwest’s claims of competition improperly rely on competition provided over Qwest’s facilities and are otherwise unreliable and places too much emphasis on potential competition
  - Qwest fails to demonstrate sufficient competition to justify forbearance in the wholesale market
  - UNE forbearance would harm competition because loop and transport unbundling remains necessary to protect consumers against an entrenched duopoly market structure
    - Granting the petition would be contrary to the Section 10(a)(3) and (b) public interest test