

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

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

**COMPTTEL COMMENTS IN SUPPORT OF MCLEOD PETITION FOR
MODIFICATION**

COMPTTEL, through undersigned counsel, hereby submits these comments in support of McLeodUSA Telecommunications Services, Inc.’s Petition for Modification of the Qwest Omaha Forbearance Order.¹ Although the Commission found that the record developed in the Omaha Forbearance proceeding “does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market,”² it nonetheless relieved Qwest of its obligations, pursuant to Section 251(c) of the Communications Act, to make unbundled loops and transport available to competing carriers. The relief granted to Qwest was premised, at least in part, on the Commission’s predictive judgment that “Qwest will not react to our decision here by curtailing wholesale access to its analog DS0-, DS1-, or DS3- capacity facilities” and that market incentives would prompt Qwest to make its network available to competitors at

¹ *In the Matter of Petition of Qwest Corporation For Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area, SC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 (rel. Dec. 2, 2005) (Omaha Forbearance Order).*

² *Id.* at ¶67.

competitive rates and terms.³ McLeod has conclusively shown that the Commission’s predictive judgment has not been confirmed by marketplace developments. For this reason, the Commission must modify its decision and reinstate Qwest’s Section 251(c) unbundling obligations.

I. Qwest’s Market Power in the Omaha MSA Continues Unabated

In the *Omaha Forbearance Order*, the Commission committed to “monitor the accuracy” of its prediction that market incentives would prompt Qwest to make loops and transport available to other carriers at competitive rates and terms in the wake of its decision and to take appropriate action in the event the prediction proved too optimistic.⁴ McLeod has demonstrated that the Commission’s predictive judgment was indeed overly optimistic. Qwest has declined to negotiate rates, terms and conditions for the loops and transport it continues to be obligated to provide pursuant to Section 271 of the Act, 47 U.S.C. §271, and instead has presented McLeod with take-it-or-leave-it standard agreements and uneconomic special access pricing.⁵ The non-negotiable rates Qwest has offered McLeod involve monthly recurring price increases over the UNE rates ranging from 30% for stand alone DS0 loops⁶ to 138% for DS1 loops in one wire center to 151.5% for DS1 loops in 5 wire centers and to 165% for DS1 loops in the remaining three wire centers.⁷ The increase in non-recurring charges for DS1 loops – 360% -- is

³ *Id.* at ¶¶79, 83.

⁴ *Omaha Forbearance Order* at ¶83.

⁵ McLeod Eben Declaration at ¶¶5 and 25 and Exhibits 1 and 3.

⁶ The 30% price increase over the UNE rates is Qwest’s “commercial agreement” price for stand alone DS0 loops. McLeod Eben Declaration at Exhibit 1.

⁷ McLeod Eben Declaration at ¶¶7-8 and Exhibit 1 at 3.

even more phenomenal.⁸ Competitors would have to raise their end user rates by equivalent double and triple digit percentages in order to recover the costs they must pay to Qwest for essential inputs. Clearly Qwest’s unilateral ability to increase rates for essential inputs to such levels is not reflective of a competitive marketplace and adversely impacts the viability of competitive carriers that rely on Qwest for last mile loop and other facilities.

The only alternative to the month-to-month special access rates Qwest has offered McLeod for DS1 and DS3 loops is its Regional Commitment Plan (“RCP”) rates, which are 22% lower than the month-to-month special access rates, but still 91% to 111% higher than the UNE rates for the nine wire centers.⁹ In order to qualify for those rates, however, McLeod would have to commit to a four year term and to purchase a minimum of 90% of its total Qwest-provided DS1s and DS3s at the RCP rates.¹⁰ In other words, McLeod would have to forgo its right to purchase UNE DS1s and DS3s for all but 10% of its demand *throughout Qwest’s 14 state* service territory in order to get a 22% discount off the monthly special access rates in the *nine Omaha wire centers* for which the Commission granted forbearance. In a blatant effort to deter customers from purchasing services from competitive carriers whose presence in the market might serve to constrain Qwest’s special access pricing, the RCP also contains a take-or-pay provision. For each month that an RCP customer falls below the 90% commitment level for its special access purchases, the customer must nonetheless pay Qwest the full amount that would have

⁸ McLeod Petition at 9.

⁹ McLeod Eben Declaration at ¶13.

¹⁰ McLeod Eben Declaration at ¶10.

been billed had the 90% commitment been satisfied.¹¹ Thus, the RCP would make it uneconomical for McLeod to purchase all but a fraction (10%) of its DS1 and DS3 demand throughout Qwest's 14 state service area from competitive carriers where such carriers provide service in McLeod's footprint.

Qwest has imposed similarly onerous, non-negotiable conditions as the price for obtaining the "commercial agreement" rate for stand alone DS0 loops. Although Qwest remains obligated to make stand alone DS0 loops available to competitors pursuant to Section 271 of the Act in the nine wire centers where the Commission granted forbearance relief,¹² Qwest has demanded that McLeod waive its rights under the Qwest Performance Assurance Plan and other wholesale quality service standards in order to secure a rate that is 30% over the UNE DS0 loop rate.¹³ In granting Qwest 271 relief in Nebraska, the Commission specifically found that the Performance Assurance Plan adopted by the Nebraska Commission provided assurance that the market would remain open after Qwest received Section 271 authority and constituted probative evidence that Qwest would continue to meet its obligation to provide nondiscriminatory service to competing carriers.¹⁴ Qwest's attempt to nullify the mechanism put in place to monitor its compliance with its Section 271 nondiscrimination obligations as a condition of

¹¹ Qwest FCC Tariff No. 1, Section 7.1.3 at 7-104.

¹² *Omaha Forbearance Order* at ¶80.

¹³ McLeod Eben Declaration at ¶24 and Exhibit 3, Appendix 4 at Section 4.6.

¹⁴ *In the Matter of Application of Qwest Communications International 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, FCC 02-332 (rel. Dec. 23, 2002) at ¶¶440, 443.

entering into a “commercial agreement” for stand alone DS0 loops speaks volumes about its intent to comply with those obligations. As the only DS0 loop supplier in town, Qwest has the ability to demand that its customers waive their legal rights to nondiscriminatory treatment as measured by the wholesale services quality standards to which Qwest is subject. Qwest’s behavior, however, is not indicative of a competitive marketplace.

The only apparent alternative to the “commercial agreement” rate for stand alone DS0 loops is the special access rate. The monthly recurring special access rate is 234% higher than the UNE rate and the special access DS0 loop non-recurring charges are more than *11 times higher* than the UNE non-recurring charges.¹⁵ Qwest’s average rate of return on its special access circuits in 2006 was 132%.¹⁶ Under no set of circumstances can a triple digit rate of return be assumed to reflect competitive market conditions.

II. Qwest Has Implemented Substantial and Sustained Special Access Price Increases After Being Granted Pricing Flexibility

In the *Omaha Forbearance Order*, the Commission found that “competition is the most effective means of ensuring that . . .charges, practices, classifications, and regulations. . .are just and reasonable and not unreasonably discriminatory” and on that basis granted Qwest forbearance.¹⁷ McLeod has shown that once Qwest was granted Phase II pricing flexibility in the Omaha MSA, it *increased* its special access monthly

¹⁵ McLeod Eben Declaration at Exhibit 1 at 1.

¹⁶ See *In the Matter of Special Access Rates For Price Cap Local Exchange Carriers*, CC Docket No. 05-25, Comments of the AdHoc Telecommunications Users Committee filed August 8, 2007 at Appendix 1, page A-1.

¹⁷ *Omaha Forbearance Order* at ¶63.

DS1 channel termination rates 45.83% over the price cap rate for month-to-month customers, 42.61% over the price cap rate for one year term customers and 31.58% over the price cap rate for 2 year term customers. McLeod's showing is consistent with the recent findings of the Government Accountability Office that pricing flexibility rates are higher than price cap rates in the Phase II MSAs,¹⁸ where the Commission predicted that competition would be sufficient to discipline special access rates.¹⁹ The Commission has acknowledged that it granted ILECs subject to price cap regulation "increased flexibility to set special access rates as part of a market based approach to drive interstate access charges towards the costs of providing those services."²⁰ Contrary to the Commission's prediction that pricing flexibility would drive special access rates towards the costs of providing the service, Qwest has been able to implement substantial rate *increases* for special access DS1 services after being deregulated on the assumption that competition would constrain rates.

In the *Omaha Forbearance Order*, the Commission also rejected arguments that relieving Qwest of its obligation to offer UNE loops and transport would strand competitive carriers' network investments because of Qwest's continuing obligation to

¹⁸ Government Accountability Office, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80 (Nov. 2006) at 27-28.

¹⁹ *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, 20 FCC Rcd 1994 (rel. Jan. 31, 2005) at ¶18.

²⁰ *In the Matter of Unbundled Access To Network Elements*, WC Docket No. 04-313, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) at ¶61 (*TRRO*). See also, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, 20 FCC Rcd 1994 (rel. Jan. 31, 2005) at ¶70 (in adopting pricing flexibility, Commission created a deregulatory regime to enable price cap LECs to respond flexibly to market forces by enabling them to *lower* rates in specific MSAs in response to competitive pressures).

make loops and transport available at just and reasonable rates and terms pursuant to Section 271 of the Act and the availability of special access services.²¹ Because Qwest has refused to negotiate rates for loops and transport provided pursuant to Section 271,²² high capacity services are only available in the nine Omaha wire centers as tariffed special access services.²³

The Commission's determination in the *Omaha Forbearance Order* is directly contrary to the views it expressed in the Triennial Review Remand Order. There the Commission found that where UNEs are unavailable, incumbent LECs would have the incentive to price their tariffed special access services at levels that will foreclose facilities-based competition:

In the absence of UNEs, incumbent LECs would, in some metropolitan statistical areas (MSAs), have the ability to set the price of their direct competitors' critical wholesale inputs (e.g., tariffed end-user channel termination and dedicated transport offerings). . . . An incumbent in that situation would have substantial incentive to raise prices to levels close to or equal to the associated retail rate, creating a "price squeeze" and foreclosing competition based on use of the tariffed wholesale input.

* * *

[A] rule that foreclosed access to all UNEs wherever competitors had access to tariffed alternatives would diminish the facilities-based competition that is the most effective discipline to anticompetitive price squeezes. Such a rule would allow an unacceptable level of incumbent LEC abuse because incumbent carriers could strategically manipulate the price of their direct competitors' wholesale inputs to prevent competition in the downstream market. Moreover, we believe that the uncertainty and risk associated with even the possibility of such abuse would chill competitive entry, because competitive carriers might well be averse

²¹ *Omaha Forbearance Order* at ¶¶79-80.

²² McLeod Petition at 10.

²³ *Id.* at 4.

to initiating service when they know that the incumbent could – on one day’s notice, without Commission approval, and with limited market-based discipline – render competition untenable by raising tariffed prices.²⁴

The Commission’s *TRRO* analysis accurately predicted what has happened in Omaha since the Commission relieved Qwest of the obligation to provide UNE loops and transport. Qwest’s refusal to negotiate rates for Section 271 elements in the nine affected wire centers together with its ability to manipulate the price of its facilities-based competitors’ wholesale inputs has foreclosed competition in the downstream market and virtually guarantees that there will be only two competitors left standing in the Omaha MSA – Qwest and the cable operator Cox Communications.

Qwest’s supracompetitive special access rates have made it untenable for McLeod to remain in the Omaha market. McLeod has made clear its intention to exit the Omaha market if the Commission does not reinstate Qwest’s Section 251(c)(3) unbundling obligations.²⁵ It has already removed most of its employees from Omaha, limited its operations primarily to existing customers and ceased all sales of residential and nearly all business services.²⁶ Significantly, McLeod has not even been able to attract a buyer for its Omaha network, in which it has invested over \$25 million, because of the unavailability of reasonable wholesale pricing for last mile loop facilities.²⁷

²⁴ *TRRO* at ¶¶59, 63. The Commission also found that the presence of facilities based competitors relying upon UNEs may play a critical role in constraining special access pricing. *Id.* at ¶62.

²⁵ McLeod Shah Declaration at ¶10.

²⁶ McLeod Shah Declaration at ¶8.

²⁷ McLeod Shah Declaration at ¶¶3, 9.

The Commission's conclusion that its grant of forbearance in Omaha would not "strand competitive carriers' investments by denying those competitors the opportunity to use their own existing facilities in conjunction with Qwest facilities that cannot economically be duplicated"²⁸ has clearly proven erroneous. Relieving Qwest of its obligation to comply with Section 251(c)(3) has in fact stranded McLeod's \$25 million network investment in Omaha because Qwest has priced its facilities that cannot economically be duplicated to drive facilities-based competitors out of the market.

Qwest's pricing practices have also chilled competitive facilities-based entry. Integra Telecom, Inc. abandoned its plans to enter the Omaha market after the Commission's *Omaha Forbearance Order*. Integra concluded that Qwest's special access rates for loops and transport made it economically infeasible to provide service to small and medium sized businesses.²⁹

With this evidence that enforcement of Section 251(c)(3) is indeed necessary (1) to ensure that Qwest's charges and practices are just and reasonable and not unjustly discriminatory (2) to protect consumers by ensuring that they have access to reasonably priced service from the carrier of their choice and (3) to promote and enhance competition, the Commission must modify its *Omaha Forbearance Order* and reinstate Qwest's unbundling obligations. Because marketplace developments have not corroborated the Commission's predictive judgment that market incentives would prompt Qwest to make its network available at competitive rates and terms for use in conjunction with competitors' own services and facilities,³⁰ it is appropriate for the Commission to

²⁸ *Omaha Forbearance Order* at ¶79.

²⁹ See Comments of Integra Telecom, Inc. filed in WC Docket No. 06-172.

reconsider its determination that granting Qwest forbearance from Section 251(c)(3) is consistent with the mandates of Section 10 of the Act, 47 U.S.C. §160. Indeed, the Commission is obligated to rectify the situation when its predictive judgments prove erroneous. Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 445 (D.C. Cir. 1991) (“should the Commission's predictions . . . prove erroneous, the Commission will need to reconsider its [decision] in accordance with its continuing obligation to practice reasoned decisionmaking” [sic]) (emphasis in original); Cellnet Communications, Inc. v. FCC, 149 F.3d 429, 442 (6th Cir. 1998) (deferring to the Commission's predictions about the level of competition, but stating that, if the predictions do not materialize, the Commission “will of course need to reconsider its [decision] in accordance with its continuing obligation to practice reasoned decision-making”).

CONCLUSION

For the foregoing reasons, COMPTTEL respectfully submits that the Commission should grant McLeod’s Petition For Modification of the Omaha Forbearance Order and restore conditions that will enable facilities-based competitors other than Cox Communications to survive in the Omaha MSA.

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Respectfully submitted,

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³⁰ *Omaha Forbearance Order* at ¶83.