Alex M. Duarte
Corporate Counsel
QWEST
421 SW Oak Street, Room 810
Portland, OR 97204
(503) 242-5623
(503) 242-8589 (facsimile)
Alex.Duarte@qwest.com

Attorney for Qwest Corporation

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

QWEST CORPORATION, Complainant, v. MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., d/b/a PAETEC BUSINESS SERVICES, Respondent.	Docket No. 09-049-37 AFFIDAVIT OF ROBERT H. WEINSTEIN IN SUPPORT OF QWEST'S MOTION FOR SUMMARY JUDGMENT

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)
)

I, ROBERT H. WEINSTEIN, being first duly sworn, depose and state as follows:

1. My name is Robert H. Weinstein. I work for Qwest Corporation ("Qwest") in the Wholesale Markets organization as a witness for Qwest with respect to FCC orders, state commission decisions, and other legal and regulatory matters. My business address is 1801 California Street, 24th floor, Denver, Colorado, 80202. I received a Bachelors of Science degree in Business Administration from the University of Colorado in 1985. In June 1990, I earned a Juris Doctorate from the University of Denver College of Law and worked in the legal profession until 1998, when I joined U S WEST (now known as Qwest) in its software development

organization. In 2001, I left Qwest to implement and convert billing systems for several national broadband companies as a consultant. I returned to Qwest in my current capacity in July 2003.

2. In my capacity as a witness for Qwest, I have reviewed the interconnection agreement ("ICA") between Qwest and McLeod, Qwest's Complaint in this docket, McLeod's Answer, and McLeod's responses to Qwest's data requests. I am familiar with the rates that Qwest is allowed to charge under the parties' ICA, the Qwest processes used to fulfill orders for unbundled network elements ("UNEs") and for notifications between carriers. I have also submitted a declaration in support of Qwest's motion for summary determination in Qwest's complaint against McLeod before the Washington Utilities and Transportation Commission.
I attest that the facts stated herein are true and accurate to the best of my knowledge.

3. Attached to and in support of this affidavit are four exhibits. Exhibit A is an excerpt from Section 7 of McLeod's Utah price list, which contains terms and conditions related to the WSOC. Exhibit B is an amendment to the current interconnection agreement between Qwest and McLeod. Exhibit C is a copy of a Minnesota Public Utility Commission decision that invalidated McLeod's WSOC. (Exhibits A, B and C were attached to Qwest's complaint and are provided again here for the Commission's convenience.) Finally, Exhibit D consists of various McLeod responses to Qwest data requests from the parties' proceeding before the Washington Utilities and Transportation Commission, and specifically, Nos. 3, 5, 6, 7, 8, 9, 10 and 11. (The parties have agreed to use discovery from the Washington Commission proceeding in this docket.) True and correct copies of these documents are attached hereto as Exhibits A through D to this affidavit, and are incorporated by this reference.

Background regarding the Parties' Interconnection Relationship

4. "Local Number Portability" ("LNP") allows a retail end-user customer to change its local service provider to any other local service provider, including Qwest, and choose to keep the same telephone number. (Certain requirements apply in order for a customer to keep the same number, but are not relevant in these proceedings.) This is true for McLeod retail end-user customers. When a McLeod retail end-user customer changes its local service provider and becomes a customer of Qwest and chooses to have a new telephone number assigned, Qwest may advise McLeod of that change through a "loss report," or the end-user customer may notify McLeod directly. Neither method of notification constitutes a service "order" to McLeod, nor would either method constitute a request by Qwest for any products or services from McLeod.

5. If a McLeod end-user customer contacts Qwest for local service, and asks to retain the same telephone number that it currently has with McLeod, the telephone number will be "ported," and Qwest will submit a "Local Service Request" ("LSR") for LNP purposes to McLeod. The LNP LSR informs McLeod that the customer has chosen to leave McLeod and keep its telephone number, advises McLeod that McLeod will be required to "port" the customer's telephone number to Qwest, and advises McLeod that the UNE that McLeod has purchased from Qwest should be disconnected on a specific due date. Once McLeod receives the LSR, it then has notice that it should initiate its process for the porting of the telephone number, as well as initiating its process for disconnection of the end-user customer's local loop that is serving that customer. If McLeod does not process the disconnection of the local loop, Qwest could continue to charge McLeod the monthly recurring charges associated with the UNE that McLeod had purchased from Qwest to serve its (former) end-user customer.

6. McLeod leases UNEs or other facilities from Qwest to provide service for the majority of its retail end-user customers. (See e.g., Exhibit ("Ex.") D, McLeod's response to Qwest data request No. 6.) McLeod purchases the UNEs at wholesale rates from Qwest, and then in turn provides retail end-user local service through the UNEs that Qwest provides. Qwest's role in this relationship is essentially as a wholesaler selling McLeod services at a non-retail rate. Qwest does not buy or lease UNEs or other facilities, wholesale or retail, from McLeod. McLeod does not provide any wholesale services to Qwest. The relationship between the parties is governed by the parties' ICA, and the ICA provides the terms, conditions, and prices for network interconnection, access to UNEs, ancillary networks services and retail service available for resale.

7. As an example of this relationship, one product that McLeod leases from Qwest is an "unbundled loop." The "loop" is essentially the wire from the Qwest central office serving the end-user customer to the demarcation point at the end-user's premises. McLeod can order a loop to serve its end-user customer pursuant to the ICA. The rate elements listed in the ICA are the rates that Qwest will charge to McLeod for the loop.

<u>Qwest's Non-Recurring Charges to McLeod</u>

8. In Utah, under the parties' ICA and pursuant to Commission cost docket orders, Qwest is permitted to charge McLeod nonrecurring charges ("NRCs") associated with installing or disconnecting an unbundled loop, or with converting a customer to resale services. These NRCs vary depending on whether Qwest processes an order manually or on a mechanized basis. These NRCs were all established in litigated cost docket proceedings, and were approved by the Commission only after the Commission found that Qwest had a lawful right to recover certain costs from CLECs like McLeod, and that those costs were fair, just, and reasonable.

9. Qwest charges McLeod the Commission-approved installation or disconnect charge for installing or disconnecting the UNE that McLeod has ordered (at McLeod's request). It is important to note that these charges are in *direct response* to the McLeod order for the wholesale service (the UNE), and are not assessed to an end-user customer for a retail service. In other words, McLeod only purchases wholesale services, and is not purchasing retail local service from Qwest. When a McLeod retail end-user customer chooses to use a different local service provider, the UNE that McLeod had ordered from Qwest to serve that customer is no longer needed by McLeod, and the disconnect charge is assessed. This is so regardless whether the departing McLeod customer then takes service from Qwest, from another provider, or if the customer simply disconnects altogether. (See also Complaint, ¶ 13, McLeod Answer, ¶ 13.)

10. In contrast, Qwest does not charge McLeod to process an order simply because a Qwest customer leaves Qwest to take service from McLeod. Rather, pursuant to its approved ICA, if McLeod chooses to serve its new customer through unbundled elements leased from Qwest and thus orders a UNE, McLeod pays Qwest the various Commission-approved charges for access to unbundled elements, including the installation NRC. (See e.g., Complaint, ¶ 12, McLeod Answer, ¶ 12.)

11. Similarly, Qwest imposes an installation or new connection charge on McLeod, in accordance with Commission-approved rates, when McLeod orders a new service from Qwest. This is true regardless whether McLeod has won the customer from Qwest, from another CLEC, or if the customer has never received service before, and thus the order is a new connection. In all cases, Qwest performs a service for McLeod – disconnection or installation of a wholesale service – and thus may charge McLeod for those services. (See also Complaint, ¶ 14, McLeod Answer, ¶ 14.)

12. Finally, Qwest does not purchase or lease UNEs from McLeod, and does not order retail or wholesale services from McLeod. (See also Complaint, ¶ 15, McLeod Answer, ¶ 15.) Any costs that McLeod incurs are related to the service that McLeod has ordered and purchased from the ICA, and there are no costs that McLeod may properly impose on Qwest when a customer switches providers away from McLeod.

When McLeod Assesses the WSOC

13. McLeod, however, charges Qwest the WSOC at issue when a McLeod end-user customer switches its local service provider from McLeod to Qwest. Under the ICA Amendment, the amount of the WSOC in Utah is $13.10 per occurrence. This is the case regardless whether Qwest solicited the customer, or the customer decided to make the change on his or her own initiative. (See also Complaint, ¶ 11, and McLeod Answer, ¶ 11.)

14. In defense of its actions, McLeod has stated it assesses this charge to recover costs associated with activities involved in accepting, verifying, correcting and processing “orders” that it receives from Qwest. McLeod claims that the activities are “comparable” to the activities described in Qwest’s nonrecurring cost (“NRC”) studies. (See Ex. D, McLeod response to Qwest data request No. 3.) McLeod claims that receiving an LSR is an order from Qwest, and that such order is “comparable” to the McLeod order for a UNE. However, Qwest only sends an LSR to McLeod when a customer is seeking to port its telephone number. Qwest does not order UNEs or any other service from McLeod, whether with an LSR or by any other means.

15. McLeod, however, does *not assess this charge on any other carrier* to whom a McLeod end-user customer may transfer service. The provisions of Section 7 of McLeod’s Utah Local and LD Price List 1 ensure that Qwest is the *only carrier charged* with the WSOC. Thus,

the WSOC essentially operates to penalize Qwest for winning a customer from McLeod, but the same penalty is not assessed on any other carrier.

The Settlement Agreement and ICA Amendment

16. Prior to asserting that Qwest owes the WSOC, McLeod did not attempt to engage in the interconnection negotiation process required by the Act. Instead, McLeod simply placed the WSOC into its Utah price list (the last page of the price list, in a new section, section 7, for "wholesale services") in April 2004. McLeod's Utah price list ("Local and LD Price List 1") can be found at http://www.paetec.com/surf/static-assets/tariffs/mcleod-utah-local-and-ld-price-list-no1.pdf. (See Ex. A.)

17. On or about October 10, 2008, Qwest and McLeod entered into a settlement agreement whereby they resolved a number of business disputes between them. In order to reach settlement on other disputed issues, Qwest and McLeod came to an *interim* agreement with regard to the WSOC. The parties' agreement with regard to the WSOC was memorialized in a "Wholesale Service Order Charge Amendment" ("Amendment") to the parties' ICA. The Amendment was filed with this Commission and deemed effective on May 4, 2009. (See Ex. B; see also Complaint, ¶¶ 9, 17, McLeod Answer, ¶¶ 9, 17.)

18. However, the Amendment, in Attachment 1, paragraph 2, *specifically preserves Qwest's rights to challenge* the WSOC. Thus, if the Commission determines that the WSOC is unjust, unreasonable, unlawful, or otherwise unenforceable, the Amendment is deemed terminated on the effective date of the Commission's final order. (See Ex. B, Attachment 1, § 2; see also, Complaint, ¶ 10, McLeod Answer, ¶ 10.) Indeed, the Amendment specifically provides that Qwest reserves its rights, and that its agreement to the Amendment is and shall be without prejudice to any position that Qwest may take in the event that it institutes any challenge to

McLeod's WSOC tariff (price list) provisions in the future. (Ex. B, Attachment 1, § 2.) In fact, the Amendment also provides as follows:

> In the litigation of any such challenge, *CLEC [McLeod] shall not make any argument in support of its tariffs based on the Amendment or on Qwest's agreement to enter the Amendment,* including but not limited to any argument that the Amendment evidences Qwest's acceptance of CLEC's [McLeod's] right to collect charges for the activities identified in the Amendment. (*Id*.) (Emphasis added.)

<u>The WSOC applies only to UNEs, and only to Qwest</u>

19. According to McLeod's price list, McLeod's WSOC applies only to an ILEC who provides a UNE which, as noted above, is required under Section 251 of the Act. The WSOC is charged if the ILEC assesses an installation charge upon McLeod, even if that installation charge is a Commission-approved charge. When a customer is leaving McLeod and returning to Qwest, Qwest sends an LSR to McLeod if the customer has requested local number portability. In this situation, McLeod applies the WSOC to Qwest (and only Qwest).

20. In addition, the WSOC only applies in connection with UNEs provided by Qwest under Section 251 of the Act, and an LSR is only sent when number portability, also provided under the Act, is involved.

<u>McLeod did not use the Act's Interconnection Negotiation Process</u>

21. As stated above, prior to asserting that Qwest owes the WSOC, McLeod did not attempt to engage in the interconnection negotiation process. Instead, McLeod simply placed the WSOC into its price list (the last page of the price list, in a new section, section 7, for "wholesale services") in April 2004. Moreover, McLeod has had opportunity to negotiate an amendment to the current ICA with Qwest, but did not do so. In fact, the current agreement is effective on a month-to-month basis because of its expiration several years ago. McLeod could have asked to negotiate a new agreement and have the WSOC as one of the issues, but did not.

22. In a proceeding between Qwest and McLeod before the Minnesota Public Utility Commission, the Minnesota Commission rejected McLeod's attempt to tariff the WSOC in that state. The Commission found that the proposed tariff was unreasonably discriminatory and would impede competition. The Minnesota Commission also found that the proposed tariff would violate federal law, which requires that terms such as the WSOC be negotiated or arbitrated as part of an ICA. Specifically, the Commission stated:

> The Commission agrees with the DOC that the proper recourse in this situation is for the parties to negotiate an amendment to their ICA regarding this matter. First, the subject of disconnection is part of the parties' ICA and federal policy favors the use of the negotiation process set forth in the Act to resolve issues that are the subject of ICA's. Further, in this case both McLeod and Qwest have indicated a willingness to enter into negotiations to amend their ICA. Finally, this is consistent with the Commission's recent action in the *CenturyTel* case and the Commission's recognition that interconnection negotiations are the primary vehicle for resolving interconnection issues. For these reasons, the Commission will reject the proposed tariff. (See Ex. C.)[1]

23. The description of the WSOC also demonstrates why the ICA is the proper venue for negotiating and implementing the charge. McLeod's price list sets the charge for the WSOC to be "equal to the Service Order Charge (or a comparable charge assessed upon receipt of an order) *contained in the ICA. . .*" (See Ex. A.) (Emphasis added.)

24. Finally, McLeod may attempt to argue that its entering into the Amendment evidences that it complied with the Act's requirement to negotiate interconnection terms and conditions. However, any such argument would not be well taken in light of the circumstances of that Amendment, which was clearly intended to be merely an interim settlement pending Qwest's challenge, such as the one here. The fact remains that McLeod specifically agreed that in litigation of any Qwest challenge to the WSOC (i.e., this case), McLeod cannot argue in

[1] See *In the Matter of McLeodUSA's Tariff Filing Introducing Wholesale Order Processing Charges that Apply When McLeodUSA's Customers Shift to Other Telecommunications Carriers*, Docket No. P-5323/M-04-395, Order Rejecting Proposed Wholesale Service Charge (July 22, 2004), Ex. C.

support of its price list or its WSOC based on the Amendment, or on Qwest's agreement to enter into the Amendment. Nor can McLeod argue that "the Amendment evidences Qwest's acceptance of McLeod's right to collect" the WSOC. (See Ex. B, Attachment 1, § 2.)

McLeod's Local Number Portability surcharge

25. McLeod's tariff provides for a Local Number Portability ("LNP") surcharge on all of its end-user customers. In Utah, the surcharge is $0.43 per month per line, with higher charges applicable to T1 and ISDN lines. (See McLeod's federal tariff, http://www.paetec.com/static-assets/notice/ML_FCC_Interstate%20and%20International%20Rates%20and%20Services.pdf, pp. 7- 8.)

26. McLeod, however, claims the WSOC is intended to recover the costs of processing the LSRs that Qwest sends to McLeod when a McLeod end-user customer chooses to use Qwest for local service. (See Ex. D, McLeod's response to Qwest data request No. 5.) Yet Qwest only submits an LSR to McLeod when the end-user customer returning to Qwest wants to keep the current telephone number (in other words, the end-user customer wants to port its number). The WSOC is simply an LSR provisioning charge, which is part of the continued cost of providing number portability.

27. The Minnesota Commission reached a similar conclusion, finding "that portions of the new charge would be used to defray costs of McLeod meeting its obligation to provide local number portability, in violation of the Act's exclusive jurisdiction over local number portability." (See Ex. C, p. 5.)

McLeod's WSOC charges Qwest for an LSR for Number Portability

28. McLeod's Utah price list applies by its terms to companies that ". . . assess a nonrecurring charge on McLeod[] for *comparable* orders submitted by McLeod [] to initiate

service using unbundled network elements leased from the incumbent local exchange carrier." (See Ex. A, § 7.1.) (Emphasis added.) In order to make its language work, McLeod states that "comparable orders" includes LSRs that are submitted by McLeod to Qwest to facilitate an end-user switching service from Qwest to McLeod, and that a "comparable" LSR is submitted by Qwest to McLeod via the McLeod website to facilitate a customer moving from McLeod to Qwest. (See Ex. D, McLeod response to Qwest data request No. 5.)

An LSR for a UNE is not "Comparable" to an LSR for Number Portability

29. McLeod's position that an LSR it submits to Qwest for a UNE is "comparable" to an LSR that Qwest submits for Local Number Portability (LNP) order is wrong. The purpose of the LSR that McLeod submits to Qwest is not to facilitate a retail end-user moving its service from Qwest to McLeod. Rather, the purpose of the LSR that McLeod submits to Qwest is to order a wholesale service by purchasing the UNE in order to provide local service to its new end-user customer. That is what McLeod is doing by submitting the LSR – ordering the wholesale service from Qwest. This is so regardless whether the customer is a new end-user, an existing Qwest retail customer, or the customer of another CLEC. However, when a McLeod retail customer chooses to switch local service to Qwest, Qwest does not submit an LSR to McLeod to order a UNE. If Qwest submitted an order for a UNE from McLeod, there would be obvious "comparable orders." Qwest does not purchase a UNE, or any other service from McLeod.

30. Qwest's LSR, in the case of number porting, is simply used to notify the old service provider (McLeod) that a telephone number is to be ported, what the desired due date is, and that McLeod should begin its porting process. The LNP LSR also advises McLeod that the UNE is to be disconnected, and that notice needs to be sent to the proper organizations that keep databases of telephone numbers and carriers for various uses. (For example, the Number

Portability Administration Center (NPAC) receives notice from both Qwest and McLeod prior to porting.) If the notice was not provided, or if disconnection of the UNE did not occur, the port might not occur correctly, and McLeod would then be paying a monthly recurring charge for a service it would no longer use or need.

31. Qwest's installation charge to McLeod is not based on whether an end-user customer is leaving or going to McLeod, or whether the end-user customer is going from a CLEC or a wireless carrier, or it is a first-time connection. Rather, McLeod orders the service, and thus the charge is for installing a UNE, and is a direct result of McLeod ordering the UNE. By contrast, Qwest purchases no unbundled loops or similar local services in the state of Utah from McLeod. Further, when Qwest connects a loop for McLeod, it incurs costs, and appropriately assesses a Commission-approved installation charge as contained in the ICA. Likewise, when Qwest disconnects a loop provided to McLeod, it incurs costs, and assesses a Commission-approved disconnect charge as contained in the ICA. At no point, however, is McLeod expending resources to provide any products or services to Qwest, or to connect or disconnect a Qwest local service customer – the function of connecting and disconnecting Qwest customers is performed by Qwest.

32. In addition, the disconnection of the UNE takes place any time an end-user customer leaves McLeod, whether a number is ported or not. Since McLeod is obligated by federal law to port the number and is not authorized to recover the porting costs from Qwest or any other carrier, McLeod cannot apply the WSOC to a number portability request in the LSR.[2] Thus, McLeod is trying to charge Qwest when Qwest provides McLeod with notice that a

[2] As I mentioned, McLeod's federal tariff applies a $0.43 per month LNP surcharge per line to its retail end-user customers in Utah. See paragraph 25.

disconnection will take place. This means that McLeod wants to charge Qwest for its disconnection process, even though the process would be the same as when McLeod disconnects without porting a number.

33. Similarly, the same steps are taken whether the customer is going to Qwest, another CLEC, or a wireless carrier. By writing the terms of the WSOC to apply to Qwest only, McLeod has dictated an unjust result. According to the price list, the WSOC is only applied to carriers who assess "a non-recurring charge on McLeod for the processing of comparable orders submitted by McLeodUSA to initiate service using network elements leased from the incumbent local exchange carrier." Thus, according to the language, the WOSC applies when (1) McLeod orders a UNE from Qwest; (2) Qwest assesses the Commission-approved rate for installation of the UNE; and (3) the orders are comparable. Because the WSOC does not apply to other carriers in the state, this charge works as a disincentive for Qwest to compete for customers who might be served by McLeod.

34. Finally, the "order" that McLeod wants to compare to its UNE order is derived from the price list language that "[o]ne LSR must be submitted for each retail end-user customer switching from McLeodUSA to the Requesting Carrier." Thus, McLeod requires submission of an LSR, and then seeks to charge Qwest for that submission. The LSR from Qwest, however, cannot be mistaken for an order for a wholesale product or service. This LSR tells McLeod about the telephone number port so that McLeod can ensure the transfer is completed in a timely fashion. The LSR does not order a UNE, or ask McLeod to provide retail local service.

<u>The WSOC discriminates against Qwest, and applies only to only Qwest</u>

35. The WSOC is specifically crafted to target one company. McLeod has worded its price list so that Qwest is the only LEC that is charged the WSOC. The language applies only to

an ILEC, and only to a carrier providing UNEs. Thus, Qwest is the *only carrier* who has this relationship with McLeod.

36. McLeod admits that it only serves end-user customers in Utah through the use of Qwest products or services. (See Ex. D, McLeod response to Qwest data request No. 7.) Thus, any time that a McLeod retail customer decides to change its local service provider, Qwest will have to pay a penalty each time, whether or not Qwest has solicited the customer. Thus, Qwest is at a competitive disadvantage to any other CLEC who may solicit a McLeod customer.

37. Qwest does not charge McLeod anything for processing an LSR to change service providers when a Qwest retail customer switches its service to McLeod. As previously noted, Qwest would charge McLeod for a UNE if McLeod serves the customer by ordering a UNE from Qwest. Qwest does not charge McLeod because the end-user is leaving Qwest, or any type of charge similar to the WSOC.

Qwest's NRC is Commission-approved

38. Finally, the Commission allows Qwest to assess a non-recurring charge (NRC) for installation and disconnection of a UNE to recover the costs of these actions. These NRCs were established by the Commission in cost dockets.

McLeod's WSOC is not Commission-approved

39. McLeod's WSOC is not Commission-approved, or FCC-approved. I am not aware that anything in the Act or Utah law provides for McLeod to assess the WSOC, and McLeod has not cited to anything in the Act or state law that I am aware of that authorizes such recovery. Moreover, I believe that even if such recovery were permissible under the Act or state law, it would obviously be subject to interconnection negotiation process.

40. Finally, McLeod has submitted no cost information to justify the WSOC or its rate. I do not believe it is reasonable for McLeod to use Qwest's costs as proxies for its own, especially given that the purposes of the LSRs submitted are completely different, and that McLeod has not submitted any cost information to justify the rate. The WSOC is not for installing or disconnecting a UNE. Neither the WSOC nor its rate has been approved by the Commission. Had the issue been brought properly under the interconnection negotiation process, both Qwest and McLeod could have presented their respective positions. However, by avoiding the interconnection process, McLeod has not had to provide support for its rates or any justification for the charge itself.

Further affiant sayeth not.

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ROBERT H. WEINSTEIN

SUBSCRIBED AND SWORN to before me the ___day of January, 2010.

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NOTARY PUBLIC

My Commission Expires:

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