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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

QWEST CORPORATION, Complainant, v. MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., d/b/a PAETEC BUSINESS SERVICES. Respondents.	Docket No. 09-049-37 MCLEODUSA MOTION FOR SUMMARY DETERMINATION

Pursuant to Utah Admin. Code R746-100 and the procedural schedule established in the above-captioned proceeding, McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services ("McLeodUSA") provides the following motion for summary determination of the complaint filed by Qwest Corporation ("Qwest").

FACTS

McLeodUSA and Qwest each provide local exchange service to customers in Utah in competition with each other. They interconnect their networks and exchange traffic and services pursuant to a Commission-approved interconnection agreement ("ICA").

One of the hallmarks of local exchange competition is that it allows customers to move back and forth between local exchange service providers. When a customer decides to move to another local exchange carrier ("LEC"), the customer's new carrier must notify the customer's old carrier by means of a local service request ("LSR") that the customer is to be transferred from the old carrier's network onto the new carrier's network. This is true irrespective of the LECs involved. *See, e.g.*, Declaration of August H. Ankum ("Ankum Decl.") ¶¶ 17-19.

For example, if a McLeodUSA customer is transferring its service to another LEC, that LEC submits an LSR to McLeodUSA to coordinate the transfer. McLeodUSA processes the LSR and coordinates with the other LEC to facilitate a seamless migration of the customer's service and to ensure that the customer is no longer viewed from the public-switched-telephone-network's perspective as residing on McLeodUSA's network. *Id*.

Depending on the nature of the request, the activities McLeodUSA undertakes in response to an LSR include such activities as: release of triggers in the McLeodUSA switch; removal of the telephone number from the McLeodUSA switch; updating McLeodUSA's internal facility assignment to the correct status; deleting McLeodUSA's line information database ("LIDB") record for the customer; unlocking the 911 record; and sending Care records. Declaration of Patricia Lynott ("Lynott Decl.") ¶¶ 12-13.

McLeodUSA, like other carriers, incurs costs to process LSRs. McLeodUSA has made a substantial investment in the development and maintenance of the operations support systems ("OSS") that enable other carriers to place such LSRs with

McLeodUSA. *Id.* ¶¶ 8-10. McLeodUSA also incurs costs to process these LSRs. *Id.* ¶¶ 12-13; Ankum Decl. ¶¶ 21-27 & 35-51.

McLeodUSA developed its Wholesale Service Order ("WSO") charges to recover its order processing costs but only from carriers that seek to recover their LSR-processing costs from McLeodUSA. McLeodUSA maintains a bill-and-keep arrangement with other competitive LECs ("CLECs") under which neither carrier pays the other when submitting an LSR to transfer a customer. While the carriers do not exchange money, McLeodUSA and the other CLECs nevertheless are compensating each other through an "in kind" service-for-service barter arrangement. Ankum Decl. ¶¶ 57-60.

Qwest, however, does not engage in such bill-and-keep arrangements with McLeodUSA. Instead, Qwest and McLeodUSA assess each other charges to process LSRs. Qwest's charges are intermingled as components of other Qwest non-recurring charges ("NRCs"), but Qwest's charges nevertheless recover explicit compensation from McLeodUSA for its use of Qwest's OSS. *Id*. ¶¶ 52-54. McLeodUSA, in turn, assesses WSO charges on Qwest to obtain compensation for the costs to process the LSRs that Qwest submits. *Id*. ¶¶ 31-51.

McLeodUSA originally established its WSO charge in its Utah price list. Qwest objected to this charge and disputed McLeodUSA's authority to impose it on Qwest. As part of a settlement of multiple issues between the parties, they amended their ICA to establish a WSO rate of $13.10 in Utah, which reflects the proportion of Qwest's NRC the parties agreed would reflect the activities that McLeodUSA undertakes. Qwest Complaint, Ex. B, Pricing Ex.; *See* Ankum Decl. ¶¶ 38-41. The amendment also states, "Qwest will not dispute [McLeodUSA's] properly stated and documented invoices for

Wholesale Service Order charges associated with orders submitted by Qwest to transfer a [McLeodUSA] customer to Qwest." Qwest Complaint, Ex. B, Attachment 1, § 1. Qwest also reserved its rights to challenge the WSO charge before the Commission without prejudice by having entered into the ICA amendment. *Id*. § 2.

Qwest's complaint is just such a challenge. Qwest alleges that McLeodUSA's WSO charges are discriminatory, anti-competitive, and unjust or unreasonable in violation of state and federal law.

ARGUMENT

A. The WSO Charge Is Compensatory and Is Just and Reasonable.

McLeodUSA established its WSO charge to recover the costs it incurs to process LSRs submitted by other carriers to transfer a customer. Qwest, however, alleges that McLeodUSA "incurs no costs that [it] may properly impose on Qwest when a customer switches providers away from [McLeodUSA.]" Qwest Complaint ¶ 14. Qwest's contention is disingenuous and incorrect.

Qwest has consistently contended – and the Commission has agreed – that Qwest incurs costs to receive and process an LSR and that Qwest has incurred costs to develop and maintain an OSS that is capable of electronically receiving and processing those LSRs. Qwest cannot legitimately claim that McLeodUSA (or any other LEC) has not likewise incurred costs to develop and maintain its own OSS and to process LSRs received from other LECs. McLeodUSA, moreover, has provided substantial evidence that it has incurred costs to develop and maintain an OSS capable of fulfilling the LSRs that other carriers submit to McLeodUSA and that it incurs costs on an ongoing basis to process the LSRs that it receives from Qwest and other carriers. Ankum Decl. ¶¶ 17-27 & 35-51; Lynott Decl. ¶¶ 8-14.

Consistent with the notion that the cost causer should pay, Qwest has also consistently claimed – and the Commission has agreed – that the carriers that submit the LSRs cause those costs and should compensate Qwest. If that is the case for LSRs that other carriers submit to Qwest, it is equally true for LSRs that Qwest submits to McLeodUSA. Qwest causes McLeodUSA to incur costs every time Qwest submits an LSR to McLeodUSA, and as the cost-causer, Qwest should be required to compensate McLeodUSA for those costs. Ankum Decl. ¶¶ 25-27 & 35-51.

Qwest alleges that, unlike McLeodUSA, it does not obtain unbundled loops from McLeodUSA, and accordingly McLeodUSA cannot incur the costs that Qwest incurs when McLeodUSA orders or disconnects a Qwest UNE loop. This argument is a red herring. Qwest conveniently ignores the fact that its own NRCs are designed to recover costs for activities that are comparable or identical to activities McLeodUSA performs for transferring customers to Qwest. *Id*. ¶¶ 35-51. McLeodUSA, like Qwest, has developed and needs to maintain its OSS and incurs costs it would not incur but for the LSRs from Qwest and other LECs. Lynott Decl. ¶¶ 8-10. Therefore, McLeodUSA, like Qwest, is entitled to cost recovery for its order processing from the cost causers – other LECs.

The Chief of the FCC's Wireline Competition Bureau reached just that conclusion in an arbitration proceeding between Cavalier Telephone and Verizon Virginia and adopted Cavalier's proposal for a "winback" charge that is virtually identical to McLeodUSA's WSO charge. *In re Petition of Cavalier Telephone LLC Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration*, WC Docket No.

02-359, DA 03-3947, Memorandum Opinion and Order ¶¶ 198-205 (Dec. 12, 2003) ("*Cavalier Arbitration Order*") (relevant excerpts of which are attached to this Motion). The Bureau Chief expressly found "that Cavalier's work in connection with a Verizon winback is similar in purpose and scope to the work that Verizon is responsible for performing when Cavalier submits a local service request to Verizon to move a customer from Verizon to Cavalier." *Id*. ¶ 204.

Qwest's allegations to the contrary rely on the fact that Qwest's costs for transferring customers are often commingled in Qwest's NRCs with costs for other activities, such as those associated with the provisioning of unbundled network elements ("UNEs"). This is true, for example, for Qwest's Customer Transfer Charge ("CTC") and its NRCs related to UNE loops. Qwest's cost documentation for those NRCs, however, reveals costs associated with LSR processing. Ankum Decl. ¶¶ 35-54. The superficial asymmetry between Qwest's commingled NRCs and McLeodUSA's explicitly stand-alone WSO charges does not in any way justify Qwest's contention that McLeodUSA is somehow assessing charges that Qwest is not. Both McLeodUSA's WSO charges and Qwest's NRCs recover comparable order processing costs. The fact that Qwest's NRCs also recoup costs that Qwest incurs for other, unrelated activities is irrelevant. Indeed, Qwest's allegations are particularly disingenuous given that Qwest and McLeodUSA, as part of their previous settlement of this issue, established a rate for McLeodUSA's WSO charges based on the relevant portion of the Qwest NRCs that represent order processing cost elements. *See* Qwest Complaint, Ex. B, Pricing Ex.; Ankum Decl. ¶¶ 39-45.

Nor can Qwest justify its allegation that McLeodUSA's WSO charges are not just and reasonable. The Commission approved Qwest's NRCs as being cost-based, and McLeodUSA's WSO charges reflect only those components of Qwest's NRCs for comparable activities under like circumstances. *Id.* ¶¶ 39-54. It is eminently reasonable for McLeodUSA to use Qwest's costs and rates as *proxies* for determining its WSO charges when those charges recover costs for comparable activities in like circumstances. *Id.* ¶ 55.[1] McLeodUSA is a CLEC, and this approach to CLEC pricing, under which a CLEC opts to base its rates on the ILEC's costs or rates, is consistent with provisions of the Telecommunications Act of 1996 ("Act") and FCC practices. *See, e.g.*, 47 C.F.R. § 51.711 (requiring symmetrical reciprocal compensation at the ILEC's cost-based rate); Ankum Decl. ¶ 30. Indeed, the Chief of the FCC's Wireline Competition Bureau adopted Cavalier's "winback" charge that was set at the same rate Verizon charged Cavalier for performing corresponding and comparable functions. *Cavalier Arbitration Order* ¶ 198.

McLeodUSA's WSO charges, therefore, compensate McLeodUSA for the costs it incurs to process LSRs submitted by Qwest and other carriers. Those charges, moreover, are based on the Commission-approved costs that Qwest incurs to undertake the same or comparable activities. The Commission, like the FCC Wireline Competition Bureau Chief in the *Cavalier Arbitration Order*, should conclude that these charges are inherently just and reasonable.

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[1] Indeed as Dr. Ankum observes, McLeodUSA does not enjoy the same economies of scale and scope as Qwest, and thus McLeodUSA's WSO rates likely are conservative in relying on Qwest's costs and may under recover McLeodUSA's costs.

B. The WSO Charge Is Not Discriminatory or Anti-Competitive.

McLeodUSA applies its WSO charges only on carriers that impose charges on McLeodUSA for the LSRs that McLeodUSA submits to those carriers. Because Qwest is the only such carrier, Qwest alleges that the WSO charge is discriminatory and anti-competitive. Qwest is incorrect on both counts.

First, only undue or unreasonable discrimination is unlawful. *E.g.*, 47 U.S.C. § 202; Utah Code Ann. § 54-8b-3.3. The essence of unlawful discrimination is a dominant carrier treating one customer differently than other similarly situated customers. *See, e.g.*, *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003). McLeodUSA not only is not a dominant carrier, but it is not engaging in any such treatment. McLeodUSA does not assess its WSO charges on carriers that do not impose a comparable charge on McLeodUSA, but that does not mean that McLeodUSA and the carriers are waiving cost recovery. Rather, the carriers compensate each other for their LSR processing costs through bill-and-keep or "in-kind" compensation arrangements under which the carriers "pay" one another by reciprocally offering each other LSR-order-processing services. Ankum Decl. ¶¶ 57-58. These arrangements are similar to the bill-and-keep arrangements that provide carriers reciprocal compensation for costs incurred in the transport and termination of local traffic. Congress expressly contemplated and approved such in kind reciprocal compensation arrangements in the Act, and the FCC adopted them as an appropriate form of compensation. 47 U.S.C. § 252(d)(2)(B)(i); 47 C.F.R. § 51.713.

Qwest has never expressed any interest in an LSR processing bill-and-keep arrangement with McLeodUSA. As a result, Qwest assesses McLeodUSA various NRCs when a customer leaves Qwest for McLeodUSA, and McLeodUSA assesses Qwest its WSO charge when a customer leaves McLeodUSA for Qwest. This explicit compensation arrangement is different from the arrangement that McLeodUSA has with other LECs, but that difference is not unreasonably discriminatory – just like bill-and-keep arrangements for transport and local traffic between some carriers do not discriminate against carriers that have explicit compensation arrangements.

In-kind compensation is compensation, even though it is a different form of compensation than the exchange of money. McLeodUSA seeks compensation from all other LECs for processing the LSRs those carriers submit to McLeodUSA. The fact that McLeodUSA obtains compensation from one carrier in a different form than the compensation it receives from other carriers does not render that form of compensation unreasonably discriminatory. Indeed, McLeodUSA is more than willing to extend its mutual in-kind reciprocal compensation agreement it has with other carriers to Qwest. Qwest, not McLeodUSA, insists on explicit compensation, rather than bill-and-keep. Qwest simply cannot plausibly claim that McLeodUSA's WSO charge is unreasonably discriminatory under such circumstances.

The WSO charge is not anti-competitive for the same reasons. Carriers negotiate different compensation mechanisms for the services they provide, and the variation in mechanisms between carriers reflects the results of arms-length negotiations, not an attempt to selectively discourage competition from certain carriers. If Qwest believes that McLeodUSA's $13.10 charge is a significant "disincentive for Qwest to compete for customers who might be served by [McLeodUSA]," Qwest Complaint ¶ 16, Qwest can easily remedy that disincentive by agreeing to a bill-and-keep compensation arrangement and no longer charging McLeodUSA when it submits a comparable LSR to Qwest. Qwest obviously harbors no such belief – or values the revenues generated by its NRC too highly – to take such action. That is Qwest's choice, but Qwest cannot complain about making that choice if Qwest refuses to accept the same bill-and-keep compensation arrangement that McLeodUSA has with all other LECs.

REQUEST FOR RELIEF

WHEREFORE, McLeodUSA respectfully requests that the Commission grant the following relief:

A. Issue an order dismissing Qwest's complaint with prejudice; and

B. Such other or further relief as the Commission finds fair, just, reasonable, and sufficient.

Dated this 28th day of January 2010.

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By:______________________________
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