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 **QWEST'S RESPONSE TO THE UTAH DIVISION OF PUBLIC UTILITIES RESPONSE TO QWEST'S AND MCLEOD'S MOTIONS FOR SUMMARY JUDGMENT**

In accordance with the Commission's March 22, 2010 Third Amended Scheduling Order and Notice of Hearing, as modified on May 3, 3010, Qwest hereby files its Response to the April 15, 2010 Response of the Utah Division of Public Utilities ("Division") to complainant Qwest's and respondent McLeod's motions for summary judgment in this proceeding.

QWEST'S RESPONSE

Preliminarily, Qwest appreciates the Division taking the time to respond to the issues that Qwest has raised in its complaint, and that both Qwest and McLeod raised in their respective motions for summary judgment. Qwest agrees in large part with the Division's response.

I. McLEOD CIRCUMVENTED THE SECTION 252 NEGOTIATION PROCESS

For example, the Division found that by filing its Wholesale Service Ordering Charge ("WSOC") under Utah Code Ann. § 54-8b-2.3 as a price listed item, instead of going through the negotiation and arbitration processes of Section 252 of the 1996 Telecommunications Act and

Utah Code Ann. § 54-8b-2.2, McLeod *circumvented* the proper procedures for resolving disputes among interconnecting carriers. (See Division Response, p. 3.) Qwest agrees with the Division on this point, consistent with Qwest's original advocacy.

The Division also found that it is not appropriate for a telecommunications carrier to file a "wholesale" charge through its *retail* price list, especially because a wholesale service is not a service offered to the public. Rather, the charges for wholesale services are subject to Commission review under interconnection agreements ("ICAs") or proper cost dockets where the Commission sets the price, terms and conditions of the wholesale service.[1] The Division correctly found that the prices, terms and conditions for interconnection of facilities or services of connecting carriers is governed by Section 252 of the Federal Act and Section 54-8b-2.2 of the Utah Code. (Division Response, p. 4.) Qwest agrees with the Division on these points.

The Division further found that at the time McLeod filed its WSOC in its Utah price list, McLeod and Qwest were negotiating their ICA, and thus McLeod should have raised the issues surrounding the WSOC. If agreement with Qwest could not be reached, the issue should have been brought to the Commission for resolution. However, by forcing the issue to be decided through a complaint proceeding, McLeod denied Qwest and the Commission the opportunity to

[1] The Division discussed Docket 00-049-105, the cost docket in which the Commission established the rates, terms and conditions for wholesale services for Qwest, and described Qwest's compliance filing for its unbundled network element ("UNE") installation and UNE disconnection charges. (Division Response, pp. 2-3.)

The DPU is correct in describing how Qwest's disconnection charge was established, and in stating that Qwest did so in compliance with the Commission's June 6, 2002 order in that cost docket. In that docket, Qwest wanted the costs for disconnecting a UNE to be included in its nonrecurring installation charge, but the Commission determined it should be a separate disconnection charge. However, when McLeod purchases a UNE from Qwest, it is *buying a service*, and pursuant to the Commission's order in that cost docket, McLeod is charged a disconnection charge when it disconnects the UNE that it purchased from Qwest. McLeod, however, does not provide Qwest with any service, and thus, when it charges the WSOC, it is undermining the Commission's decision in that cost docket by essentially offsetting most of Qwest's disconnection charge that the Commission ordered in that docket.

allow the negotiation process and a full hearing that is envisioned by both the federal and state telecommunications acts and rules to occur. The Division further noted that while only one issue is being heard in this proceeding, it is not clear what the result might have been had McLeod been willing to engage in negotiations. (Division Response, p. 4.)

Finally, although McLeod has claimed that the ICA "negotiation process" was used in the "amendment" to the ICA, that argument is completely without merit. Both Qwest and McLeod specifically agreed that Qwest reserved its right to challenge the WSOC, and if it was found improper, it would be struck. Moreover, the amendment not only occurred after the ICA was originally negotiated, and after McLeod unilaterally imposed the charge, but it was a result of the settlement in a different litigation, and thus not part of the negotiation and arbitration process dictated by the Act. Had McLeod included the WSOC in the original negotiations, or had Qwest simply agreed to it without reservation, McLeod's argument might have some merit. However, that is clearly not the case here.

II. LNP COSTS SHOULD NOT BE RECOVERED THROUGH McLEOD'S WSOC

Further still, the Division agreed that if the Commission finds, based on the evidence (the various affidavits), that McLeod's WSOC is, in essence, a charge by McLeod to recover Local Number Portability ("LNP") charges from Qwest, the Commission should find in favor of Qwest. (Division Response, p. 5.) It is, of course, very clear from the evidence submitted in the affidavits that the WSOC is in fact an LNP charge. And as the Division found, no other CLEC besides McLeod charges a nonrecurring charge to another carrier (Qwest) when a customer leaves McLeod and transfers its service to that other carrier (Qwest). (Division Response, p. 6.)

III. THE WSOC HAS NO COST SUPPORT AND IS DISCRIMINATORY

Finally, the Division notes that if the Commission were to allow McLeod to charge a WSOC the charge must be cost-based and nondiscriminatory and McLeod would need to show genuine cost differences in order to justify such a charge. (Division Response, p. 5.) The evidence, however, is exceedingly clear that McLeod has shown no cost support at all, much less that the WSOC is not discriminatory.[2] Moreover, since Qwest is the *only carrier* that McLeod charges the WSOC, it is clear the WSOC is not nondiscriminatory (and thus is discriminatory).

McLeod wants the Commission to believe that its WSOC is "fair" because it allegedly charges the same charge that Qwest charges. This argument is, of course, not only misleading, but completely false. Qwest's charges (and for that matter, its costs) are based on extensive cost studies, are for installation/disconnection of the loop, and have been approved by the Commission. McLeod's WSOC, however, meets none of these criteria.

IV. THE WSOC IS UNLAWFUL UNDER BOTH FEDERAL AND STATE LAW

In short, the Division's filing supports Qwest's positions here. First, as a legal matter, McLeod has not established any legal basis upon which to impose an "ordering" or other non-recurring charge on Qwest when a customer leaves McLeod. It is also clear that any rates the parties charge each other must be contained in an ICA, and that the WSOC is not "in" the ICA

[2] As Qwest has shown, *McLeod is not providing any service to Qwest.* Thus, any costs it incurs are costs triggered by a customer's decision to disconnect McLeod service and take service from Qwest. If McLeod wishes to recover any valid costs for disconnecting its customer, it has the option to seek recovery from its own customers.

If the Commission were to allow McLeod to continue to charge Qwest the costs for McLeod disconnecting its own customers, the Commission would also need to allow other providers, including Qwest, to do the same. For example, if a customer were to leave Qwest, and thus disconnect its service and sign up for service with Comcast on its network, for instance, Qwest should also be able to charge Comcast for the costs that Qwest incurs for disconnecting the customer. Obviously, however, if the Commission were even inclined to allow such charges to occur, it would need to address these issues in a cost docket.

for purposes of this analysis, and that McLeod assesses the WSOC solely for LNP. Meanwhile, the evidence is clear that Qwest does not purchase any "wholesale services" from McLeod. Overall, it is also uncontroverted that McLeod should have, but failed to, use the negotiation process specified in the Act.

The evidence shows that McLeod's WSOC is not comparable to costs that Qwest recovers through its non-recurring charges for resold services or UNEs. Also, the costs that McLeod claims it is recovering are for LNP. Even McLeod's declarants agree that LNP is what is occurring when the WSOC is applied.

Finally, if the situation were reversed and McLeod was winning back a Qwest end-user customer and was going to serve that customer over McLeod's own facilities (rather than buying a service from Qwest), Qwest would have to perform the exact same functions as McLeod claims when a McLeod customer changes to Qwest. The critical difference and key point is, under those circumstances, that Qwest would not assess a non-recurring charge on McLeod.

Accordingly, under the circumstances here, McLeod's WSOC violates federal and state law as an improper and unlawful attempt to assess a charge outside of the parties' ICA, and without the requisite negotiation and arbitration process. As such, McLeod's WSOC is unjust, unreasonable, and discriminatory, in violation of federal and state law, and it is an improper and unlawful attempt to recover ongoing costs of providing LNP.

CONCLUSION

After consideration of all of the arguments and evidence here, Qwest respectfully submits that the Commission should grant Qwest's Motion for Summary Judgment, and deny McLeod's Motion for Summary Determination, and thus find that McLeod's Wholesale Service Ordering Charge violates both federal and state law, is discriminatory, and is not just and reasonable.

DATED this 6th day of May, 2010

Respectfully submitted,

QWEST CORPORATION

By_____

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

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