Mark Trinchero, OSB No. 883221
DAVIS WRIGHT TREMAINE LLP
1300 SW 5th Ave Ste 2300
Portland OR 97201
Tel: (503) 241-2300
Fax: (503) 778-5299
Email: marktrinchero@dwt.com

Of Attorneys for McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services

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 MCLEODUSA'S PETITION FOR REVIEW, RECONSIDERATION, OR REHEARING

Pursuant to Utah Code §§ 63G-4-301, 63-46b-12 and 54-7-15, McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") submits this Petition for Review, Reconsideration, or Rehearing ("Petition") of the Report and Order issued by the Public Service Commission of Utah ("Commission") on August 16, 2010.

PROCEDURAL BACKGROUND

Qwest Corporation ("Qwest") filed its Complaint on June 8, 2009, alleging that McLeodUSA violated Utah Code §§ 54-3-1 and 54-8b-2.2(1)(b) and 47 U.S.C. §§ 251 and 252 with respect to Wholesale Service Order Charges, or WSOCs. McLeodUSA filed its Answer on July 9, 2009. Qwest filed its Motion for Summary Judgment on January 28, 2010 and McLeodUSA filed a Motion for Summary Determination on February 1, 2010. Qwest and McLeodUSA responded to the above motions on March 8, 2010 and March 9, 2010, respectively. The Division of Public Utilities ("Division") filed its response on April 15, 2010,

to which Qwest and McLeodUSA responded on May 6, 2010 and May 11, 2010, respectively.

On August 16, 2010, without a hearing, the Commission issued a Report and Order ("Order") prepared by Administrative Law Judge Ruben H. Arredondo. The Order grants Qwest's motion and denies McLeodUSA's motion. The Order declares that "the WSOC" violates federal and state law, and directs McLeodUSA to repay "all WSOCs paid by Qwest to McLeodUSA for a period of one year prior to the filing of Qwest's underlying complaint." Order, ¶¶ 2, 3. McLeodUSA respectfully disagrees with the Order, and requests that the Commission review, rehear, or reconsider the decision for the reasons set forth below.

TIMELINESS OF PETITION

Pursuant to Sections 63G-4-301 and 54-7-15 of the Utah Code, McLeodUSA has 30 days after issuance of the Commission's Order to request review or rehearing. The Order was issued on August 16, 2010. This Petition was filed on September 15, 2010. Under the method of time computation specified by Utah Admin. Code R309-115-14 the Petition is therefore timely.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment shall be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). The moving party has the burden of presenting evidence to demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id*. "Utah law does not allow a summary judgment movant to merely point out a lack of evidence in the nonmoving party's case, but instead requires a movant to affirmatively provide factual evidence establishing that there is no genuine issue of material fact." *Orvis v. Johnson*, 2008 UT 2, ¶ 16, 177 P. 3d 600 (2008).

INTRODUCTION

In 2004, McLeodUSA published a price list. Complaint, ¶ 8. The price list included a $20.00 Wholesale Service Order Charge for processing certain local service requests. Complaint, ¶ 8, Exhibit A. McLeodUSA will refer to this $20.00 charge as the "Price List

WSOC." In October 2008, Qwest and McLeodUSA settled several disputes, including a dispute over McLeodUSA's claims for compensation based on the Price List WSOC. Complaint, ¶ 8 & Ex. B, ¶ 5. As part of the settlement, Qwest agreed to pay a reduced Wholesale Service Order Charge of $13.10 in place of the disputed Price List WSOC. Complaint, Ex. B, Att. 1. McLeodUSA will refer to the reduced $13.10 charge as the "Settlement WSOC." The parties incorporated the settlement into their interconnection agreement ("ICA") by means of an amendment (the "ICA Amendment"). Complaint, ¶ 8 & Ex. B. The ICA Amendment was submitted to the Commission, and was deemed approved on May 4, 2009. Complaint, ¶ 9. Qwest makes WSOC payments in the amount of $13.10 pursuant to the ICA Amendment, not the price list. Affidavit of Robert H. Weinstein of Qwest ("Weinstein Aff."), ¶ 13 ("Under the ICA Agreement, the amount of the WSOC is $13.10 per occurrence."). Qwest does not allege that it paid the Price List WSOC, either before or after the ICA Amendment.

The ICA Amendment reflects a settlement compromise. Qwest expressly agreed to pay the Settlement WSOC and not to dispute McLeodUSA's proper invoices for the same. Complaint, Ex. B, Att. 1, ¶ 2. McLeodUSA agreed to a reduced rate of $13.10 for the Settlement WSOC, and further agreed to discontinue even the reduced Settlement WSOC if the Commission issued a Final Order that the (now inoperative) Price List WSOC was unlawful. Complaint, Ex. B, Att. 1. Accordingly, Qwest retained the right to challenge "CLEC's [McLeodUSA's] Wholesale Service Order *tariff provisions*" (emphasis added) and McLeodUSA agreed that it would not use the ICA Amendment "*in support of its tariffs*" (emphasis added). Complaint, Ex. B, Att. 1, ¶ 2. The ICA Amendment does not authorize challenges to its own terms, or allow Qwest to renege on its agreement to pay the $13.10 Settlement WSOC. *See* Complaint, Ex. B.

Nonetheless, Qwest's arguments focus almost entirely on alleged flaws with the now-defunct Price List WSOC, despite the undisputed fact that the only WSOC Qwest has paid is the Settlement WSOC defined by the ICA Amendment. Qwest uses the Price List WSOC as a red herring, drawing attention away from the central issue in this case – whether the Settlement WSOC is lawful. Qwest advances numerous arguments against "the WSOC" that in fact apply

only to the *Price List* WSOC. Relying on those arguments, Qwest asks the Commission to refund payments made under the *Settlement* WSOC. This indirect assault on the Settlement WSOC violates Qwest's commitment in the ICA Amendment to pay the Settlement WSOC. Complaint, Ex. B, Att. 1, ¶ 1. Unfortunately, Qwest's red-herring tactics succeeded in confusing both the Division and ALJ in this case.

The ALJ's analysis, like the Division's briefing, fails to differentiate between (1) the $20.00 Price List WSOC in McLeod's price list, and (2) the $13.10 Settlement WSOC memorialized in the ICA Amendment. Instead, the order simply declares "the WSOC" to be unlawful. The ALJ faults McLeod for "imposing the WSOC in its *price list*," rather than in a negotiated ICA, Order, at 11, after previously describing "the WSOC" as the $13.10 charge paid under the ICA Amendment. Order, at 3, 6. Without resolving the confusion evident in its references to "the WSOC," the Order directs McLeodUSA to repay "all WSOCs paid by Qwest to McLeodUSA" during the year preceding Qwest's Complaint. Order, at 13. Qwest paid only the Settlement WSOC during that time. Complaint, ¶ 7; Weinstein Aff., ¶ 13. In effect, the Order grants Qwest's requested refund of the Settlement WSOC based on apparent flaws in the Price List WSOC. It does so without expressly recognizing the different bases of the two charges, and in direct contravention of the language of the ICA Amendment.

A parallel proceeding brought before the Washington Utilities and Transportation Commission came to the opposite result. *See* Initial Order Denying Qwest's Motion for Summary Determination and Granting McLeod's Motion for Summary Determination ("Washington Order"), *Qwest Corp. v. McLeodUSA Telecomm. Servs.*, No. UT-090892 (Aug. 30, 2010), at 28. That decision is attached as Exhibit A. The Washington ALJ rejected Qwest's attempt to avoid the Settlement WSOC by attacking the Price List WSOC. The Washington ALJ understood that Qwest's payments to McLeodUSA are based on the ICA Amendment, not on the price list. *Id.* ¶¶ 43-44. The Washington ALJ recognized that Qwest's attacks on the Price List WSOC are irrelevant to the key issue of whether the charges Qwest paid were lawful. Instead, the Washington ALJ properly focused on the Settlement WSOC and the ICA Amendment. *Id.* ¶

43 ("We reject Qwest's proposal that we ignore a voluntarily-negotiated and fully-executed ICA amendment that had been previously approved by this Commission."). The Washington ALJ concluded that, despite flaws in the Price List WSOC, the Qwest failed to show that the operative Settlement WSOC was unlawfully imposed or unreasonably discriminatory. *Id*. ¶¶ 43, 65.

The Commission must reconsider the Order in the instant proceeding. The Order fails to separately analyze the validity of the Settlement WSOC and ICA Amendment, though the ICA Amendment is the sole basis for Qwest's WSOC payments. The Order directs McLeod to repay "all WSOCs" paid by Qwest in the preceding year, contravening the ICA Amendment that expressly provides that invalidity of the Price List WSOC does *not* entitle Qwest to a refund of Settlement WSOCs. With respect to Qwest's discrimination claim, the Order improperly shifts procedural burdens to McLeod. Fundamentally, the Order is unjust because it allows Qwest to retain the benefits of its settlement with McLeodUSA on a variety of contested issues while escaping one of the commitments Qwest made to obtain the settlement. The Commission should adopt the Washington approach to disentangle the valid Settlement WSOC that Qwest pays per the ICA Amendment from flaws in the Price List WSOC.

DISCUSSION

A. Qwest Confuses Two Distinct WSOCs.

Qwest sows confusion about the two distinct WSOCs in this proceeding by using identical terms to refer to different charges – the $20 Price List WSOC and the $13.10 Settlement WSOC. The Complaint does not clearly specify the target of Qwest's claims. Qwest alleges first that "McLeod's assessment of its Wholesale Service Order Charge" violates Utah Code §§ 54-3-1 and 54-8b-2.2(1)(b), Complaint, ¶ 21. Second, Qwest alleges that "McLeod's imposition of the Wholesale Service Order Charge through a price list . . ." violates 47 U.S.C. §§ 251 and 252. Complaint, ¶ 23. While Qwest expressly limits its federal claim to charges set forth in McLeod's price list, *id.*, Qwest does not specify whether the state claim targets the Price List WSOC or Settlement WSOC.

Despite different rates, Qwest refers to "the WSOC" as if Qwest pays the charge in McLeodUSA's price list. The Complaint refers to a current charge paid by Qwest, stating "McLeod *charges* Qwest a Wholesale Service Order Charge," Complaint, ¶ 6, and that "McLeod *imposes* the Wholesale Service Order Charge on Qwest when McLeod wins a customer from Qwest." *Id.* at 11. Qwest misidentifies the source of that charge as the price list, stating that "Qwest and McLeod came to an agreement with regard to certain charges that McLeod had been assessing on Qwest, referred to herein as the Wholesale Service Order Charge(s). The Wholesale Service Order Charges are contained in McLeod's tariff, or price list . . . ." Complaint, ¶ 8. In fact, the record is clear that the agreed upon Settlement WSOC that Qwest pays is defined in the ICA Amendment – *not* the price list. *See* Weinstein Aff., ¶ 13.

Qwest's requested relief, including the refund it seeks, similarly fails to distinguish the $20 Price List WSOC from the $13.10 Settlement WSOC that Qwest subsequently agreed to pay. *See* Complaint, ¶ 24. Qwest's misleading statements about the ICA Amendment perpetuate this confusion. For example, Qwest states that "The Amendment, in Attachment 1, paragraph 2, specifically preserves Qwest's rights to challenge the Wholesale Service Order Charge," without noting that the right is expressly limited to challenging the *tariff* provisions. Complaint, ¶ 10 & Ex. B, Att. 1, ¶ 2 ("Qwest reserves its rights to challenge CLEC's Wholesale Service Order *tariff provisions*.") (emphasis added).

B. Qwest's Objections to a Unilaterally Imposed Price List WSOC Cannot Show that the Carefully Negotiated Settlement WSOC is Invalid.

Qwest's failure to distinguish between the old Price List WSOC and the new Settlement WSOC is especially troubling because Qwest's primary legal arguments apply only to the Price List WSOC. For example, Qwest argues that McLeod "unlawfully imposed this [WSOC] charge on Qwest by unilaterally filing the WSOC in McLeod's Utah price list," Qwest's Motion for Summary Judgment ("Qwest's Motion"), at 2, and points out that the Telecommunication Act requires the ICA to set forth the rates, terms, and conditions by which carriers interconnect. *Id.* at 10. That argument cannot apply to the Settlement WSOC, which the parties agree was

negotiated as part of a business settlement and embodied in the ICA Amendment. Weinstein Aff., ¶ 17. Similarly, Qwest argues that "the WSOC" is not comparable to Qwest's charges to McLeod by stating that Qwest's rates are Commission-approved. Qwest's Motion, at 3. Again, this argument does not apply to the Settlement WSOC, because both sides agree that the ICA Amendment, which included the specific $13.10 negotiated price for Utah, was deemed approved by the Commission on May 4, 2009. Complaint, ¶ 9. Similarly, Qwest's argument that "[b]y writing the terms of the WSOC to apply to Qwest only, McLeod has dictated an unjust result." Qwest's Motion, at 20, does not apply to the Settlement WSOC, which Qwest cannot dispute was negotiated, not dictated. Qwest cannot seriously argue that the Settlement WSOC was unjust or discriminatory when it voluntarily entered into the settlement with McLeodUSA. *See* Complaint, ¶ 7; Weinstein Aff., ¶ 17. At most, Qwest has shown defects in the price list. But the price list is not the basis of the $13.10 WSOC Qwest pays. Indeed, as the Washington proceeding recognized, the ICA Amendment does not even define prices based on this list, but includes a standalone rate schedule, with different rates. Washington Order, at 13, n.72.

C. The Washington Order Reached the Opposite Conclusion by Correctly Focusing on the Operative Settlement WSOC.

1. The Washington ALJ Distinguished the Price List from the ICA Amendment.

The Washington proceeding recognized that the Settlement WSOC in the ICA Amendment, not the Price List WSOC, is the operative basis for WSOCs paid by Qwest. The ALJ forcefully rejected the same red-herring tactics that Qwest has employed here. The decision noted that "The Amendment became effective according to its own terms and pursuant to federal law." Washington Order, ¶ 71. Yet it noted that "Qwest contends that the Commission should ignore the WSOC listing in the WSOC Amendment and treat it 'as if it did not exist …'" Washington Order, ¶ 41. Qwest's contention was rejected: "We reject Qwest's proposal that we ignore a voluntarily – negotiated and fully-executed ICA amendment . . ." Washington Order, ¶ 43. Distinguishing the Minnesota proceeding (which Qwest similarly cited in that case), the decision stated: "In this proceeding, we have a lawfully executed and effective WSOC

Amendment before us that directly pertains to the charge, and we are unwilling to simply pretend it doesn't exist." Washington Order, ¶ 46.

2. The Washington ALJ Criticized the Utah Commission for Focusing on Defects in the Price List While Ignoring the Effective ICA Amendment.

The Washington ALJ reviewed this Commission's order and sharply criticized it for ignoring the ICA Amendment:

> "Unlike the Utah Commission, which appears to have treated the WSOC Amendment as if it does not exist, we place significant weight herein on the parties' mutual agreement to resolve unspecified business disputes including agreement on incorporating, by way of amendment, the WSOC into their existing ICA."

Washington Order, ¶ 44. The Washington ALJ recognized that the validity of the price list is but a red herring, ruling that the price list, even if defective, is irrelevant to the validity of the ICA Amendment:

> "As the Utah Commission determined, the WSOC, as a wholesale charge, should never have been included in McLeodUSA's price list, a document principally intended to address the rates, terms and conditions of services provided to retail customers. However, this apparent defect was overcome by inclusion of the WSOC in the mutually negotiated ICA Amendment."

Washington Order, ¶ 44. The Washington ALJ further recognized that the Price List WSOC has no further effect on charges paid by Qwest. "Once approved by the Commission, the WSOC Amendment effectively replaced the disputed provisions of McLeodUSA's price list." Washington Order, ¶ 45.

3. The Washington ALJ Rejected Qwest's Discrimination Claims.

Finally, in the Washington proceeding the ALJ recognized that Qwest's agreement to the WSOC Amendment undercuts its discrimination argument:

> "If Qwest believed, at the time it was negotiating the WSOC [ICA] Amendment, that the WSOC was discriminatory and anti-competitive, it should never have agreed to the charge, albeit on what it contends was a "temporary" basis."

Washington Order, ¶ 71 (alteration added). The Washington ALJ recognized that the Settlement WSOC was not imposed in a discriminatory manner, but was voluntarily entered into as part of a multi-issue settlement. *See id.* Accordingly, the Washington decision found that Qwest's discrimination arguments failed. *Id.* at 65.

D. The Commission's Order is Defective.

1. The Order's Analysis of Enforceability Mistakenly Focuses on McLeodUSA's Price List WSOC Without Distinctly Analyzing the Settlement WSOC.

With respect to enforceability of "the WSOC," the ALJ found that the Price List WSOC was unenforceable pursuant to Sections 251 and 252 of the Telecommunications Act, stating:

> "McLeodUSA could have obtained a resolution allowing it to put the WSOC in the interconnection agreement before imposing it in its price list. Here, there is no dispute that McLeodUSA failed to do either before imposing the WSOC in its price list . . . ."

Order, at 11. From language in the price list, the Commission concluded that "the WSOC" related to charges that should be included in an interconnection agreement. *Id.* at 10. The Commission held that because McLeodUSA placed "the WSOC" on its price list before seeking to add it to the interconnection agreement, the WSOC violated Sections 251 and 252 of the Telecommunications Act. *Id.* at 12. This analysis fails with respect to the Settlement WSOC, which became part of the ICA through the ICA Amendment. The Order overlooks the fact that the only WSOC assessed on Qwest following the ICA Amendment was the Settlement WSOC.

Generally, while the Commission's decision refers unqualifiedly to "the WSOC" or "all WSOCs paid by Qwest to McLeodUSA," the discussion focuses on the Price List WSOC and the fact that McLeodUSA established the *price list* before reaching an agreement with Qwest. The Commission's decision does not separately consider the Settlement WSOC, to which Qwest and McLeodUSA agreed in the settlement and memorialized in the ICA Amendment.

The Commission found no "factual dispute" regarding whether McLeodUSA used a proper vehicle for implementing its WSOC (*i.e.*, the Price List WSOC), but failed to address whether the WSOC was actually implemented by the price list (as Qwest's briefing implies) or

by the ICA Amendment (as the record clearly shows). *See* Order, at 12. Similarly, the Order says McLeodUSA must have either negotiated an addition to the agreement before its assessment, or proceeded by way of arbitration. *Id.* 10. The Order concludes that because negotiations did not precede the price list, the *price list* is unenforceable. No express conclusion is reached on the Settlement WSOC. If the Settlement WSOC was assessed after the ICA Amendment, as the facts show, then it meets the standard for negotiation. By failing to analyze the ICA Amendment and the enforceability of the Settlement WSOC, the Order omits critical issues that must be addressed before McLeodUSA is compelled to refund the Settlement WSOC.

2. The Order's Analysis of Discrimination Again Inappropriately Focuses on the Price List, Mistakenly Shifts Burdens to McLeodUSA, and is Analytically Flawed.

The Commission's finding that "the WSOC" is discriminatory and unjust, Order, at 13, is based on a mistaken focus on the Price List WSOC, a mistaken shifting of evidentiary burdens, and a critical absence of analysis of the costs relating to the Settlement WSOC.

First, the Order again exhibits confusion as to whether "the WSOC" challenged by Qwest is the Price List WSOC or the Settlement WSOC. An inadvertent shift from discussion of the Price List WSOC to a general discussion of the WSOC (apparently including the Settlement WSOC in the ICA Amendment) is apparent at the end of the Commission's discussion. The Commission moves from a discussion of whether "permitting McLeodUSA to include the [Price List] WSOC in its price list . . . would discriminate . . ." to whether "[a]llowing McLeodUSA to maintain its [Settlement] WSOC would violate state law." Order, at 13 (alterations added).

Second, the Order's finding of discrimination misplaced the burden of proof. As the Complainant and moving party, Qwest must show the WSOC was discriminatory. *See* Utah R. Civ. P. 56. Qwest had the burden of producing evidence that the Settlement WSOC was discriminatory, and could not merely "point out" a lack of evidence. *See Orvis*, 2008 UT 2 ¶ 16. Here, no evidence showed how the Settlement WSOC, negotiated by Qwest and approved by the Commission, was discriminatory. Yet the ALJ appeared to place the burden on McLeodUSA to show that it was not. McLeodUSA did cite genuine cost differences in providing services to a

carrier that, like Qwest, does not engage in bill-and-keep, *see, e.g.*, Declaration of August H. Ankum, Ph.D., at 6-10. Yet the ALJ held that the cost differences "have not been established sufficiently before the Commission, and the Commission does not have a basis to conclude that they are not discriminatory." Order, at 12-13. The finding of discrimination appears to be based on the price list, not evidence concerning the Settlement WSOC. *See id.* at 13 ("Additionally, permitting McLeodUSA to include the WSOC on its *price list* . . . would discriminate . . . ."). The Washington Commission recognized that the burden is on Qwest to show discrimination. There, the ALJ held that "Qwest has failed to demonstrate that the WSOC violates the Act or state law," Washington Order, ¶ 73, and stated that "[w]e find that Qwest has failed to demonstrate that McLeodUSA's WSOC is unreasonably discriminatory or anti-competitive." Washington Order, ¶ 65.

Finally, it is obvious that cost differences must be analyzed separately for the $20 Price List WSOC and the reduced, $13.10, Settlement WSOC. Absent such an analysis, the Order does not suggest a basis on which the ALJ could find the Settlement WSOC to be discriminatory. The Washington proceeding found that the Settlement WSOC was comparable to charges Qwest assesses for similar services. "We find Qwest's position, that the company incurs costs to process an LSR, yet other carriers such as McLeodUSA do not, unreasonable given that the same functionality and similar activities are involved by both carriers to process an LSR in their respective OSS systems." Washington Order, ¶ 69.

3. The Order is Ambiguous.

Failure to distinguish between the Price List WSOC and Settlement WSOC create additional serious problems in interpreting the decision and remedy. The scope of the Commission's order declaring "the WSOC" to be in violation of law is unclear, because the order does not distinguish between the $20 Price List WSOC and the $13.10 Settlement WSOC subsequently negotiated in the ICA Amendment. The declaration that "the WSOC" violates federal law leaves the status of the Settlement WSOC unclear, because Qwest's federal cause of action was expressly based on the price list, and the Commission's basis for rejecting "the

WSOC" appears to be that the price list was imposed before negotiations with Qwest. This would not apply to the Settlement WSOC, which was the result of such negotiations. The directive that McLeodUSA "repay all WSOCs paid by Qwest for one year prior to the filing of Qwest's underlying complaint" is also problematic, particularly since Qwest has never paid the $20.00 Price List WSOC.

4. The Commission Cannot Lawfully Order Modification of the Negotiated and Approved ICA.

Assuming that the Commission's order requires McLeodUSA to repay the Settlement WSOC charges that were established in the settlement and paid pursuant to the ICA Agreement, the Commission is modifying the negotiated terms of the ICA Amendment that, by its terms, can only be modified with the consent of both parties: "The provisions of this Amendment, including the provisions of this sentence, may not be amended, modified or supplemented, and waivers or consents to departures from the provisions of this Amendment may not be given without the written consent thereto by both Parties' authorized representatives." Complaint, Ex. B, at 2.

In any case, it is not clear that the Commission can undo the amendment after having approved it. The ICA Amendment was submitted to the Commission for approval on March 23, 2009. Both sides agree that the amendment was deemed approved as of May 4, 2009. Although Utah Code Ann. § 54-4 grants the Commission broad authority over public utilities and rate-making authority, *Beaver v. Qwest, Inc.*, 31 P.3d 1147, 2001 UT 81 (2001), that authority is not unlimited. Furthermore, the Commission's authority with respect to the interconnection agreement derives exclusively from federal law, which provides that the Commission can arbitrate rates, terms, and conditions when parties cannot reach agreement, or approve negotiated interconnection agreements. 47 U.S.C. § 252(b), (e). It also retains jurisdiction to enforce the interconnection agreement, or to resolve disputes under it, to construe its terms, to investigate and modify unjust rates, or to force compliance with Utah law or the Telecommunications Act. *Id.*; Utah Code, §§ 54-4-1, 54-4-2, 54-4-4. But none of the Commission's powers allow it to rewrite the terms of an approved lawful agreement. Yet by effectively eliminating Qwest's

obligations to pay the Settlement WSOC as set forth in the ICA Amendment, that is exactly what the Commission has done.

5. The Order Unfairly Allows Qwest to Abandon Its Own Commitments.

Qwest must be held to its word. Qwest cannot be allowed to abrogate the WSOC amendment that it negotiated with McLeodUSA. Rather, Qwest must be held to the terms of the Amendment, deemed approved by the Commission, in which it gained not only resolution of certain business disputes, but also gained a favorable WSOC rate of $13.10 under the ICA Agreement, $6.90 less than the $20.00 set forth in the WSOC tariff. While Qwest's red-herring tactics may have blurred the distinction between the Settlement WSOC and Price List WSOC, now that the distinct bases of the separate WSOCs are clear, the Commission has an opportunity to re-evaluate the Order.

Moreover, as the Washington Commission recognized, allowing Qwest to escape its settlement commitments would be unfair: "We find it patently unfair to allow the company [Qwest] to overturn the effect of its commitment in the Settlement and WSOC Amendment, by contesting the WSOC on some sort of post-concession basis." Washington Order, ¶ 72. Indeed, allowing Qwest to avoid this agreed upon charge would allow Qwest – having gained the benefits of the agreement in settling past disputes – to avoid the burdens it undertook as part of the agreement. Qwest seeks to retain its benefits of the bargained-for agreement while eliminating a key benefit for McLeodUSA.

E. Analysis of the Amended Interconnection Agreement Mandates a Different Result in this Matter.

1. Qwest Committed to Pay the Settlement WSOC in the ICA Amendment.

The terms of the ICA demonstrate Qwest's unambiguous commitment to pay the Settlement WSOC. Qwest expressly gave up any right to challenge the Settlement WSOC. The amendment states: "Qwest agrees that pursuant to the terms of the Agreement, Qwest will not dispute CLEC's [McLeodUSA's] properly stated and documented invoices for Wholesale Order charges associated with orders submitted by Qwest to transfer a CLEC customer to Qwest, and

will pay such invoices according to the payment terms of the Agreement." Qwest Complaint, Ex. B., ICA Amendment, Attachment 1, ¶ 1 (emphases added). Construing this language, the Washington decision found it undisputed that "Under the WSOC [ICA] Amendment, McLeodUSA invoices Qwest "for [WSOC] charges associated with orders submitted by Qwest to transfer a CLEC customer to Qwest and [Qwest] will pay such invoices according to the payment terms of the Agreement." Washington Order, ¶ 31 (first alteration added). The fact that Qwest agreed, unequivocally, to pay the charges in the ICA Amendment is further shown by the provision confirming that Qwest did not waive any positions with respect to similar terms in rates in future agreements. Qwest Complaint, Ex. B., ICA Amendment, Attachment 1, ¶ 1.

2. Qwest Did Not Reserve Any Right to Challenge the ICA Amendment or the Settlement WSOC.

Qwest did not retain, does not have, and has never had the right to challenge the ICA Amendment provisions, which set forth the $13.10 Settlement WSOC that it agreed to, and which McLeodUSA subsequently assessed and which Qwest paid. Qwest's briefing treats its limited right under the ICA Amendment to challenge the Price List WSOC, as a broad right to undermine the terms of the ICA Amendment itself. Qwest incorrectly states that in the ICA Amendment "the parties agreed to delay the resolution of the issue and that Qwest has the right to challenge the charge imposed by the Amendment, and in some states contained in McLeod's tariffs or price lists as well." Complaint, ¶ 17. The ICA Amendment, which speaks for itself, contains no provisions enabling a challenge to its own provisions – such an agreement would be absurd. In Qwest's view, despite being entitled "Agreement," the ICA Amendment is no agreement at all – or at least does not bind Qwest. The Commission should reject this implausible and self-serving mischaracterization of the ICA Amendment.

Under the ICA Agreement, Qwest retained only the narrow right to challenge the WSOC *tariff* provisions, i.e., the $20 charge listed in Section 7 of the price list. Qwest Complaint, Ex. B., ICA Amendment, Attachment 1, ¶ 2 ("Qwest reserves its right to challenge the CLEC's Wholesale Service Order *tariff provisions*.") (emphasis added). Similarly, McLeodUSA may not

use the ICA Amendment to support its *tariff*. *Id*. Of course, nothing prevents McLeodUSA from using the ICA Amendment to show what was agreed to in the ICA Amendment itself.

3. The ICA Amendment is Binding, Not Merely an "Interim" Agreement that Qwest Can Use the Commission to Discard.

The language of the ICA Amendment rebuts Qwest's argument that the ICA Amendment is merely "interim." The Commission must first look to the four corners of the document to interpret the contract. *See Bakowski v. Mtn. States Steel, Inc*., 2002 UT 62, ¶ 16 (stating that court first must look to the four corners of the document to determine the parties' intentions). If the four corners are unambiguous, as here, extrinsic evidence is irrelevant. *Id.*

4. Even if the Price List WSOC is Invalid, Repayment of Settlement WSOCs is an Inappropriate Remedy that Violates the ICA Amendment.

Under the ICA Amendment, a decision invalidating the tariff does not entitle Qwest to a refund of the $13.10 charges paid under the Settlement WSOC. McLeod does not dispute that Qwest's right to challenge the "tariff" allows it to challenge analogous price list (and the Price List WSOC). But under the ICA Amendment, the effect of such a challenge is prospective only. Namely, a Final Order declaring the Price List WSOC invalid would, under the ICA Amendment's terms, terminate Qwest's obligation to pay WSOCs incurred after the effective date of the order. By seeking repayment, Qwest attempts to retroactively escape the terms of its settlement with McLeodUSA, and to avoid the WSOCs incurred before any Final Order has issued. This Qwest cannot do. With respect to Qwest's duty to pay Settlement WSOCs incurred before a Final Order, the price list is irrelevant. There is no genuine dispute that the $13.10 charges paid (and not seeks to have repaid) were based on the ICA Amendment, not the price list. Qwest promised to pay those (reduced) charges to settle several disputes. A finding that the original price list was invalid would not entitle Qwest to walk away from the burdens of that settlement while retaining the benefits.

The ICA Amendment commits Qwest to paying the $13.10 Settlement WSOC from the date the Commission approved the ICA Amendment to the effective date of a Final Order that

invalidates the (superseded) Price List WSOC. Qwest's agreement to pay the WSOC charges in the ICA Amendment took effect on May 4, 2009, the date that the Commission is deemed to have approved the ICA Amendment. Complaint, ¶ 9 ("The Amendment was filed with this Commission and deemed approved on May 4, 2009"). The obligation was to terminate when this Commission issued a Final Order that the Wholesale Service Order charge provisions in McLeodUSA's tariff in this state "are unjust, unreasonably, unlawful or otherwise unenforceable." Complaint, Ex. B, ¶ 3. The Amendment states that "this Amendment shall be deemed terminated in this state with respect to charges for any Wholesale Service Orders after the effective date of the Commission's order." The four corners of the amended agreement make clear that a decision by the Commission invalidating the Price List WSOC would not retroactively absolve Qwest of responsibility to pay the WSOC Amendment charge of $13.10. In any case, no Final Order has issued, so Qwest's obligations to pay the Settlement WSOC per the ICA Amendment remain in effect.

Therefore, whatever the Commission's ultimate view of the Price List WSOC, it is plain that the Order erred by directing McLeodUSA to repay "all WSOCs" paid by Qwest to McLeodUSA from the past year. Any WSOCs paid from May 4, 2009 through the present are McLeodUSA's to keep under the ICA Amendment, as are only additional WSOCs paid before a Final Order is issued.

CONCLUSION

For the reasons stated herein, the Commission should review and reconsider the Order issued on August 16 in this matter. Once the red herring of the price list and Price List WSOC is distinguished from the Settlement WSOC implemented by the amended ICA, Qwest simply fails to make the case that the Settlement WSOC is unlawful. Even if the Commission should hold that the Price List WSOC did not comply with the Telecommunications Act, it should reconsider

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the remedy imposed in the Order, and should not allow Qwest to escape the burdens of a settlement from which it has reaped benefits.

DATED this 15th day of September, 2010.

DAVIS WRIGHT TREMAINE LLP

By _____

Mark Trinchero, OSB No. 883221
DAVIS WRIGHT TREMAINE LLP
1300 SW 5th Ave Ste 2300
Portland OR 97201
Tel: (503) 241-2300
Fax: (503) 778-5299
Email: marktrinchero@dwt.com

Of Attorneys for McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Service