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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,

Respondent.

Docket No. 09-049-37

QWEST'S MOTION FOR SUMMARY
JUDGMENT

INTRODUCTION

Pursuant to Utah Code Ann. §§ 54-7-9, 54-7-11, 54-7-20, 54-3-1, 54-8b-2.2(1)(b) and 54-8b-3.3, on June 8, 2009, Qwest Corporation (“Qwest”) filed a Complaint against McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services (“McLeod”). In accordance with the agreed-upon revised schedule and the Commission’s December 21, 2009 Order, Qwest hereby files its Motion for Summary Judgment.

Motions for summary judgment are governed by Rule 56 of the Utah Rules of Civil Procedure.¹ This matter is appropriate for summary judgment because there are no genuine

¹ Rule 56 (**Summary judgment**) provides in pertinent part:

(c) . . . The judgment sought shall be rendered if 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 a judgment as a matter of law.

issues as to any material fact, and Qwest is entitled to judgment as a matter of law that McLeod's Wholesale Service Order Charge ("WSOC") is not just and reasonable, and is discriminatory, anti-competitive and unlawful.

Attached to and in support of this motion are the Affidavit of Robert H. Weinstein and four exhibits to Mr. Weinstein's affidavit. 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 decision by the Minnesota Public Utility Commission 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.

SUMMARY OF ARGUMENT

McLeod, a Competitive Local Exchange Carrier ("CLEC"), imposes what it calls a Wholesale Service Order Charge ("WSOC") on Qwest, and *only Qwest*, when a McLeod end-user customer chooses to discontinue receiving local telephone service from McLeod and takes local telephone service from Qwest. McLeod unlawfully imposed this charge on Qwest by unilaterally filing the WSOC in McLeod's Utah price list, which can also be found at <http://www.paetec.com/surf/static-assets/tariffs/mcleod-utah-local-and-ld-price-list-no1.pdf>, without any negotiation or Commission approval. McLeod unlawfully imposed the WSOC on Qwest in violation of the federal Telecommunications Act of 1996 (Act), and the WSOC is not just and reasonable, and is discriminatory and anti-competitive, in violation of state law.

McLeod assesses the WSOC on Qwest, but not on other carriers to whom a McLeod retail end-user customer may change its service. Qwest is the *only carrier* to which the WSOC,

by its own language, can be applied. Thus, the WSOC essentially operates as a *penalty* on Qwest when a customer switches its local service provider from McLeod and is, accordingly, not just and reasonable, and is discriminatory and anti-competitive.

McLeod cannot point to any law that authorizes it to assess these charges on Qwest. McLeod initially began charging Qwest the WSOC on the basis of its Utah price list. Since McLeod does not have a tariff in Utah, but only a price list, the rates that it has charged have not been approved by the Commission. Qwest has not and does not order any services from McLeod, and certainly no services that would warrant assessment of these charges. The WSOC was unilaterally introduced and assessed against only Qwest without being negotiated as required by the federal Act. The Act requires that any charge arising from or related to a service provided under Section 251 and 252 of the Act be put through a process described in the Act, and then included within an interconnection agreement (“ICA”). McLeod did not follow this process. McLeod may not lawfully assess these charges on Qwest outside of the parties’ ICA.²

Finally, McLeod is simply wrong in claiming that Qwest and McLeod submit “comparable” orders, and that the WSOC that it assesses on Qwest is “comparable” to the rates that Qwest charges McLeod. McLeod submits orders for unbundled network elements (“UNEs”) to Qwest. Qwest does not submit orders for UNEs to McLeod. Qwest’s rates and charges differ from McLeod’s WSOC in several important respects. First, Qwest’s rates are Commission-approved, based on Total Element Long Run Incremental Cost (“TELRIC”) cost studies, and are

² Qwest anticipates that McLeod may argue in its motion for summary judgment that its interconnection agreement authorizes its charging of the WSOC because of an amendment to the agreement. However, as explained more thoroughly in this motion, the inclusion of the WSOC in the interconnection agreement has no legal significance because the parties specifically provided that this issue was in dispute, and thus the WSOC is interim, and that Qwest specifically reserves the right to challenge it before the Commission. Indeed, the amendment specifically provided that McLeod cannot make any argument in support of its tariffs based on the amendment, or on Qwest’s agreement to enter into the amendment. (See e.g., Weinstein Affidavit, ¶ 18; Ex. B, Attachment 1, § 2; see also pp. 9-10, 14-15, *infra*.)

specifically authorized by the federal Act. Thus, there is no question about the legal authority, the costs recovered, or the reasonableness of Qwest's rates charged to McLeod. McLeod's WSOC, however, has none of these characteristics. Further, Qwest's rates charged to McLeod are assessed based on *McLeod's decision to obtain a service* from Qwest (e.g., the lease of UNEs). McLeod's WSOC, however, is based on the fact that a retail end-user customer is leaving McLeod, and not on any Qwest decision to obtain products or services from McLeod.

In short, McLeod's WSOC operates as a *penalty* on Qwest when a McLeod retail end-user customer switches local service providers away from McLeod to Qwest. As such, these charges are not just and reasonable, and further, are discriminatory in that they do not apply to other carriers. These charges are also anti-competitive in that they operate as a disincentive for Qwest to compete for customers served by other carriers.

STATEMENT OF PERTINENT FACTS

A. Background regarding the Parties' Interconnection Relationship

"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.³ 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

³ Certain requirements apply in order for a customer to keep the same number, but are not relevant in these proceedings. (Weinstein Affidavit, ¶ 4.)

request by Qwest for any products or services from McLeod. (Affidavit of Robert Weinstein (“Weinstein Affidavit”), ¶ 4.)

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,⁴ 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) customer. (Weinstein Affidavit, ¶ 5.)

McLeod leases UNEs or other facilities from Qwest to provide service for the majority of its retail end-user customers. (Weinstein Affidavit, ¶ 6, and Exhibit (“Ex.”) D (McLeod response to Qwest data request No. 6).)⁵ 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

⁴ McLeod is obligated to port telephone numbers under federal law, 47 CFR § 52.26, and under Utah Code Ann. § 54-8.b-2.2 and Admin. Code R746-348-7A.7. Neither provision of law gives McLeod the right to recover any costs associated with porting a number from another carrier.

⁵ The parties have agreed to use the discovery from the proceeding before the Washington Utilities and Transportation Commission in this docket. (Weinstein Affidavit, ¶ 3.)

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. (Weinstein Affidavit, ¶ 6.)

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. (Weinstein Affidavit, ¶ 7.)

B. Qwest's Non-Recurring Charges to McLeod

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.⁶ 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 approved by the Commission only after it found that Qwest had a lawful right to recover certain costs from CLECs like McLeod, and that those costs were fair, just, and reasonable. (Weinstein Affidavit, ¶ 8.)

Thus, 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

⁶ See e.g., June 6, 2002 Order in Docket No. 00-049-105.

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. (Weinstein Affidavit, ¶ 9; see also Complaint, ¶ 13, McLeod Answer, ¶ 13.)

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. (Weinstein Affidavit, ¶ 10, Complaint, ¶ 12, McLeod Answer, ¶ 12.)

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. (Weinstein Affidavit, ¶ 11, Complaint, ¶ 14, McLeod Answer, ¶ 14.)

Finally, Qwest does not purchase or lease UNEs from McLeod, and does not order retail or wholesale services from McLeod. (Weinstein Affidavit, ¶ 12; see also Complaint, ¶ 15, McLeod Answer, ¶ 15.) Any costs that McLeod incurs are related to the service that McLeod

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. (Weinstein Affidavit, ¶ 12.)

C. When McLeod Assesses the WSOC

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 (see section D., below), the amount of the WSOC in Utah is \$13.10 per occurrence. This is the case whether Qwest solicited the customer, or the customer decided to make the change on his or her own initiative. (Weinstein Affidavit, ¶ 13; see also Complaint, ¶ 11, and McLeod Answer, ¶ 11.)

In defense of its actions, McLeod has stated that 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. (Weinstein Affidavit, ¶ 14, and 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. (Weinstein Affidavit, ¶ 14.)

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. (Weinstein Affidavit, ¶ 15.)

D. The Settlement Agreement and ICA Amendment

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 also be found at <http://www.paetec.com/surf/static-assets/tariffs/mcleod-utah-local-and-ld-price-list-no1.pdf>. (Weinstein Affidavit, ¶ 16, Ex. A.)

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. (Weinstein Affidavit, ¶ 17, and Ex. B; see also Complaint, ¶¶ 9, 17, McLeod Answer, ¶¶ 9, 17.)

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. (Weinstein Affidavit, ¶ 18, 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. (Weinstein Affidavit, ¶ 18; 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.)

Thus, there would be no merit to any argument by McLeod about the fact that there is an amendment to the parties' ICA, or that Qwest is limited to a challenge to the price list only.

ARGUMENT

I. THE WSOC VIOLATES FEDERAL LAW BECAUSE THE INTERCONNECTION NEGOTIATION PROCESS REQUIRED BY THE TELECOMMUNICATIONS ACT WAS NOT USED

A. The Telecommunications Act's Negotiation Process

McLeod's imposition of the WSOC through a price list or tariff violates the Telecommunications Act of 1996, 47 U.S.C. 151, *et seq.* ("the Act"), specifically sections 251 and 252. Section 251(c) of the Act requires Qwest to provide unbundled network elements (UNEs) to requesting telecommunications carriers. The Act requires, and Congress intended, for the rates, terms and conditions of these UNEs to be put through the negotiation and arbitration process outlined in the Act. Further, in Utah, terms and conditions between carriers related to interconnection must be filed with the Commission for approval. See Utah Code Ann., § 54-8b.2.2(1)(d)(i).

The Act provides that when a carrier requests access to an incumbent's network, the parties will negotiate an interconnection agreement (or ICA) setting forth the rates, terms and conditions by which they can interconnect." 47 U.S.C. § 252(a)(1). The Act provides the process by which the parties will negotiate the ICA to establish the terms and conditions by which the networks can interconnect and provides that the agreement shall include "a detailed

schedule of itemized charges for interconnection and each service or network element (UNE) included in the agreement for local exchange traffic (47 U.S.C. § 251(C)(1) and § 252(a)(1)), and that if the parties fail to reach an agreement on all or some of the issues, either party can petition the state commission for an arbitration of the issues (47 U.S.C. § 252(b)). The rates, terms, and conditions of the UNE arrangement between Qwest and McLeod are contained in the ICA. Exhibit A of this Agreement contains the rates for UNEs. The Commission reviews the agreements and approves the rates. Finally, Section 251(b)(2) of the Act requires all local exchange carriers, including Qwest and McLeod, to provide local number portability (“LNP”). See also Admin. Code R746-348-7A.7.

In summary, the Act requires that (1) an ICA be negotiated between the parties, (2) the ICA shall set forth the rates, terms and conditions for interconnection, (3) the ICA shall include a detailed schedule of itemized charges for interconnection and each service or network element (UNE) included in the agreement, (4) Qwest must provide UNEs to McLeod on “rates, terms and conditions ...in accordance with the terms and conditions of the agreement,” and (5) if the parties fail to reach an agreement on all or some of the issues, the Commission may hold an arbitration of those issues. In this manner, Qwest and McLeod negotiated their original ICA, including Exhibit A that contains the rates for UNEs. Because the law requires that any charge arising from or related to interconnection or a UNE must be included in the ICA, any such charge would necessarily be required to be put through the negotiation process and/or arbitrated by the Commission, thereby ensuring that the charges are reasonable, the application is non-discriminatory, and every part of the agreement comports with the law. The Commission reviews such agreements and approves the rates. This is true for the initial ICA, amendments and changes of law. In this case, McLeod’s application of the WSOC is clearly based on

“interconnection and each service or network element included in the agreement,” and thus should have followed the interconnection negotiation process under Section 252 of the Act.

B. The WSOC applies only to UNEs, and only to Qwest

According to the language of 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). (Weinstein Affidavit, ¶ 19.)

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. (Weinstein Affidavit, ¶ 20.) It necessarily follows that the interconnection negotiation process required by the Act is mandatory and should have been followed before McLeod could assess the WSOC. Because the WSOC is only assessed in relation to products or services provided by Qwest under Section 251 of the Act, the process mandated by the Act requires that all rates, terms and conditions of the interconnection between the parties’ networks be incorporated into the ICA. The issues of the WSOC are thus required to be determined through the negotiation process (and arbitration process, if necessary), and any results incorporated into the ICA. McLeod simply cannot circumvent this process by simply filing a price list with this charge.

C. McLeod did not use the Act's Interconnection Negotiation Process

As stated, 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. (Weinstein Affidavit, ¶ 21.) As such, McLeod’s inclusion of certain rates in its price list, even if McLeod has filed it with the Commission, has no legal force or effect because it has not been approved by the Commission.

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. (Weinstein Affidavit, ¶ 21.)

Instead, McLeod seeks to alter the terms of the agreement by circumventing the negotiation process and the intent of the Act. Because the WSOC would need to be part of the rates, terms and conditions of the interconnection service and network element arrangement contained in the ICA, the issues surrounding the WSOC should have been properly put through the negotiation process. This is consistent with how the Minnesota Commission addressed this issue when McLeod attempted to tariff the WSOC in that state. In addition to finding that the proposed tariff was unreasonably discriminatory and would impede competition, the Commission 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. (Weinstein Affidavit, ¶ 22, Ex. C.)⁷

⁷As the Minnesota Commission found:

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

The description of the WSOC also demonstrates why the ICA is the proper venue for the negotiation and implementation of 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 Weinstein Affidavit, ¶ 23, Ex. A.)

Nor does the fact that the WSOC is temporarily contained in an amendment to the ICA have any impact on the merits or the outcome of this complaint. The parties executed that Amendment simply to settle their dispute on an interim basis, while specifically preserving all of Qwest's rights to challenge the charge. (Weinstein Affidavit, ¶ 24.) Thus, the WSOC must be considered, for purposes of this complaint, as if it did not exist in an amendment, and was otherwise being imposed by McLeod simply through the publication in McLeod's price list. McLeod's failure to engage in the negotiation process and its attempts to charge Qwest for the WSOC from its price list circumvents the intent of the Act.

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 support

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.

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). (Weinstein Affidavit, ¶ 22; Ex. C.)

McLeod language in the description of the WSOC also demonstrates why the ICA is the proper venue. 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 Weinstein Affidavit, ¶ 23, Ex. A.)

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. (Weinstein Affidavit, ¶ 24; Ex. B, Attachment 1, § 2.) Thus, any argument by McLeod that its entering into this interim amendment is evidence that it complied with its Section 252 interconnection process requirements would not be well taken.

In sum, the WSOC is intractably linked to interconnection and services provided by Qwest under the Act, and thus the ICA is the proper place for any "rate" that may be charged. McLeod cannot unilaterally decide to alter the interconnection relationship by implementing additional terms and conditions. By imposing its WSOC by price list and avoiding the required process, McLeod violates the Act. The WSOC is thus unlawful and must be rejected.

II. THE WSOC VIOLATES FEDERAL LAW BY INCLUDING COSTS FOR NUMBER PORTABILITY

Section 251(b)(2) requires all local exchange carriers, including CLECs like McLeod, to provide number portability. Federal law requires the costs of number portability be borne by carriers on a competitively neutral basis. 47 U.S.C. § 251(e)(2). The Federal Communications Commission's ("FCC") number portability rule, 47 C.F.R. § 52.33(b), states that telecommunications carriers other than ILECs may recover their number portability costs in any manner consistent with state and federal law. The FCC stated that continued costs of providing number portability are part of these costs.⁸ McLeod can point to no law that allows it to recover number portability costs from Qwest through its WSOC. Furthermore, McLeod's tariff provides

⁸ Specifically, the FCC stated:

Furthermore, we conclude that the costs of establishing number portability include not just the costs associated with the creation of the regional databases and the initial physical upgrading of the public switched telephone network for the provision of number portability, but also the continuing costs necessary to provide number portability.

In the Matter of Telephone Number Portability, Third Report and Order, CC Dkt. No. 95-116 (May 12, 1998), ¶ 8.

for a LNP surcharge on all retail end-user customers. In Utah, the surcharge is \$0.43 per month per line, with higher charges applicable to T1 and ISDN lines. (Weinstein Affidavit, ¶ 25.)⁹ This surcharge presumably recovers McLeod's LNP costs, and thus recovery of those costs through the WSOC, besides being otherwise prohibited, would be a double recovery of those costs.

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. (Weinstein Affidavit, ¶ 26, and 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). (Weinstein Affidavit, ¶ 26.) Accordingly, since it is only in this local number portability situation that an LSR is sent to McLeod by Qwest, McLeod cannot recover from Qwest the costs of its responsibility to port the number. The WSOC is an LSR processing charge, which is part of the continued cost of providing number portability. (*Id.*)¹⁰

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." (Weinstein Affidavit, ¶ 27, Ex. C, p. 5.)¹¹

⁹ See McLeod's federal tariff, http://www.paetec.com/static-assets/notice/ML_FCC_Interstate%20and%20International%20Rates%20and%20Services.pdf, pp. 7- 8.

¹⁰ Qwest assumes that McLeod will claim, as it did in Washington, that the WSOC also recovers McLeod's Operational Support Systems ("OSS") costs. However, recovery of McLeod's OSS costs is not authorized either, even if McLeod was able to prove its OSS costs, which it has not. Qwest will respond to any such argument in more detail in its reply brief.

¹¹ *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), p. 5.

The facts are not in dispute that Qwest sends an LSR to McLeod when an end-user customer chooses to leave McLeod and use Qwest as its local exchange carrier, and wishes to keep the same telephone number. The law clearly states that McLeod cannot use the WSOC to recover the costs of number portability. Accordingly, there are no facts in dispute with regard to the question of whether the WSOC violates federal law.

III. THE WSOC IS NOT JUST AND REASONABLE

McLeod’s assessment of its WSOC violates Utah Code Ann. § 54-3-1, which requires that all charges made, demanded or received by any public utility, including CLECs like McLeod, shall be just and reasonable.¹² McLeod assumes that its orders for UNEs are “comparable” to the LSR that Qwest submits when a customer leaves McLeod, and therefore, McLeod assesses the charge on Qwest when a McLeod customer chooses Qwest for local service. However, McLeod’s assumption is wrong.

A. McLeod’s WSOC charges Qwest for an LSR for Number Portability

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.” (Weinstein Affidavit, ¶ 28, Ex. A, § 7.1.) (Emphasis added.) 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

¹² Utah Code Ann. § 54-3-1 provides, in pertinent part, as follows:

All charges made, demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, shall be just and reasonable. Every *unjust or unreasonable* charge made, demanded or received for such product or commodity or service is hereby *prohibited* and declared *unlawful*. . . . (Emphasis added.)

Qwest to McLeod via the McLeod website to facilitate a customer moving from McLeod to Qwest. (Weinstein Affidavit, ¶ 28, Ex. D (McLeod response to Qwest data request No. 5).)

B. An LSR for a UNE is not “Comparable” to an LSR for Number Portability

McLeod’s position that an LSR that it submits to Qwest for a UNE is “comparable” to an LSR that Qwest submits for LNP is simply 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 submitted by McLeod 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 end-user 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.” Yet Qwest does not purchase a UNE, or any other service from McLeod. (Weinstein Affidavit, ¶ 29.)

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.¹³ If the notice was not provided, or if disconnection of the UNE did not occur, the port might not occur correctly, and McLeod would

¹³ For example, the Number Portability Administration Center (NPAC) receives notice from both Qwest and McLeod prior to porting. (Weinstein Affidavit, ¶ 30.)

then be paying a monthly recurring charge for a service it would no longer use or need. (Weinstein Affidavit, ¶¶ 30.) In general, McLeod seeks to equate the porting of a telephone number with its ordering of a loop. This comparison fails.

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. (Weinstein Affidavit, ¶ 31.)

In addition, the disconnection of the UNE takes place any time that 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.¹⁴ Thus, McLeod is trying to charge Qwest when Qwest provides McLeod with notice that a disconnection will take place. This means that McLeod wants to charge Qwest for its

¹⁴ As Qwest has mentioned, McLeod's federal tariff applies a \$0.43 per month LNP surcharge per line to its retail end-user customers in Utah. (See e.g., p. 16, *supra*, and Weinstein Affidavit, ¶ 25.)

disconnection process, even though the process would be the same as when McLeod disconnects without porting a number. (Weinstein Affidavit, ¶ 32.)

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.¹⁵ 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. (Weinstein Affidavit, ¶ 33.) It is unreasonable for McLeod to charge Qwest simply because McLeod ordered a product from Qwest.

Finally, the “order” that McLeod wants to compare 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 cannot be mistaken for an order for a wholesale product or service. This LSR tells McLeod about the page number port so McLeod can ensure that the transfer is completed in a timely fashion. The LSR does not order a UNE, and does not ask McLeod to provide retail local service. (Weinstein Affidavit, ¶ 34.)

In short, the language of the WSOC attempts to equate Qwest’s approved installation charge for a loop with McLeod’s loss of an end-user customer to allow McLeod to recover costs from Qwest to which it is not legally entitled. That is inappropriate, and thus the WSOC is not just and reasonable.

¹⁵ 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. (Weinstein Affidavit, ¶ 33.)

IV. THE WSOC IS DISCRIMINATORY UNDER UTAH LAW

Further still, McLeod's assessment of its WSOC also violates Utah Code Ann. § 54-8b-2.2(1)(b) and Utah Code Ann. § 54-8b-3.3, which require that telecommunications services be offered on a nondiscriminatory basis.¹⁶ The McLeod price list, however, is specifically crafted to target one company. McLeod has worded the price list so that Qwest is the only LEC that is charged. The language applies only to an ILEC, and only to a carrier providing UNEs. Qwest is the *only carrier* who has this relationship with McLeod. (Weinstein Affidavit, ¶ 35.) This is discriminatory in violation of Utah Code Ann. §§ 54-8b-2.2(1)(b) and 54-8b-3.3.

McLeod admits that it only serves end-user customers in Utah through the use of Qwest products or services. (Weinstein Affidavit, ¶ 36, 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

¹⁶ Utah Code Ann. § 54-8b-2.2(1)(b) provides, in pertinent part, as follows:

(b)(i) Whenever the commission grants a certificate to one or more telecommunications corporations to provide public telecommunications services in the same or overlapping service territories, all telecommunications corporations providing public telecommunications services in the affected area shall have the right to interconnect with the essential facilities and to purchase the essential services of all other certificate holders operating in the same area on a *nondiscriminatory* and reasonably unbundled basis.

(ii) Each telecommunications corporation shall permit access to and interconnection with its essential facilities and the purchase of its essential services on terms and conditions, including price, *no less favorable* than those the telecommunications corporation provides to itself and its affiliates. (Emphasis added.)

Utah Code Ann. § 54-8b-3.3 provides, in pertinent part, as follows:

(2) Except with respect to a price regulated service offered in a promotional offer, or market trial, or to meet competition and notwithstanding any other provision of this chapter:

(a) a telecommunications corporation with more than 30,000 access lines in the state that provides a public telecommunications service may *not*:

(i) as to the pricing and provisioning of the public telecommunications service, make or grant any undue or unreasonable preference or advantage to any person, corporation, or locality; or

(ii) in providing services that utilize the local exchange network:

(A) make or give any undue or unreasonable preference or advantage to any person, corporation, or locality; or

(B) subject any person, corporation, or locality to any *undue or unreasonable prejudice or disadvantage*. (Emphasis added.)

customer. Thus, Qwest is at a competitive disadvantage to any other CLEC who may solicit a McLeod customer. (Weinstein Affidavit, ¶ 36.)

Finally, Qwest does not charge McLeod anything for processing an LSR to change service providers when a Qwest retail customer switches its service to McLeod. (Weinstein Affidavit, ¶ 37.)¹⁷ Accordingly, Qwest stands in precisely the same position as other telecommunications carriers when it obtains a former McLeod customer. Imposing a charge of \$13 or more on Qwest in such a situation is discriminatory and creates an uneven playing field when competing for Utah customers.

V. McLEOD'S WSOC IS NOT AUTHORIZED BY LAW

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. (Weinstein Affidavit, ¶ 38.)

Nothing in the Act, however, provides for McLeod to assess the WSOC, or to recover the costs that it seeks. McLeod simply has no legal authority upon which to claim that it is entitled to cost recovery. Even if such recovery were permissible under the Act, it would obviously be subject to interconnection negotiation process. (Weinstein Affidavit, ¶ 39.)

Finally, McLeod has submitted no cost information to justify the WSOC or its rate. It is also unreasonable 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

¹⁷ 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. (Weinstein Affidavit, ¶ 37.)

properly brought 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. (Weinstein Affidavit, ¶ 40.) The charges are simply not authorized by law.

CONCLUSION

McLeod's WSOC is not just and reasonable, and is discriminatory and anti-competitive. McLeod has no right under federal or state law to impose this charge on Qwest, and can point to no provisions of the Telecommunications Act or other legal authority that authorizes it to assess these charges on one of its competitors. The WSOC violates Section 252 of the federal Telecom Act and Utah Code Ann. §§ 54-3-1, 54-8b-2.2(1)(b) and 54-8b-3.3. Given the legal issues here, there is no genuine issue of material fact that would preclude summary judgment in favor of Qwest. The Commission should therefore reject McLeod's WSOC and declare it unenforceable.

DATED this 28th day of January, 2010

Respectfully submitted,

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