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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 RESPONSE TO McLEOD'S MOTION FOR SUMMARY DETERMINATION**

INTRODUCTION

In accordance with the agreed-upon schedule, Qwest hereby files its Response to the Motion for Summary Determination that McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services ("McLeod") filed on January 28, 2010. This Response is supported by the Affidavits of Robert H. Weinstein, Christopher Viveros and David Vogel filed herewith.

McLeod's Motion, including the declarations of Ms. Lynott and Dr. Ankum, fails to support McLeod's request for relief. The Motion itself is utterly devoid of any legal basis upon which McLeod can claim that it has a right to assess its Wholesale Service Order Charge ("WSOC") on Qwest. McLeod's factual support fails to establish any costs that McLeod incurs that are "comparable" to costs that Qwest recovers from McLeod, or that are recoverable from Qwest. Further, unlike the WSOC, any costs that Qwest recovers from McLeod are costs established in Qwest's Commission-approved TELRIC rates, and are set forth in the parties' interconnection agreement ("ICA").

The only conclusions that can be reached in this matter are that:

- Any rates the parties charge each other must be contained in an ICA;
- McLeod's WSOC is not in the ICA;
- McLeod assesses the WSOC solely for local number portability;
- Qwest does not purchase any "wholesale services" from McLeod;
- 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;
- The WSOC that McLeod seeks to recover from Qwest is not comparable to costs that Qwest recovers through its non-recurring charges for resold services or unbundled network elements ("UNEs");
- If McLeod were to win an end-user customer from Qwest and serve that customer over McLeod's own facilities, Qwest would perform the exact same functions that McLeod does when a McLeod customer changes to Qwest, and under those circumstances Qwest would not assess a non-recurring charge on McLeod;
- Under the circumstances here, McLeod's WSOC must be found to violate federal law as an improper and unlawful attempt to assess a charge outside of the parties' ICA, and without the requisite negotiation and arbitration process;
- Under the circumstances here, McLeod's WSOC must be found to be unjust, unreasonable, and discriminatory, in violation of state law.

- Under the circumstances here, McLeod's WSOC must be found to violate federal law as an improper and unlawful attempt to recover ongoing costs of providing local number portability.

SUMMARY OF ARGUMENT

The Commission should deny McLeod's motion, and should grant Qwest's motion. McLeod attempts to support its WSOC with irrelevant arguments regarding a "policy justification" for the WSOC, and with patently incorrect arguments about the costs that Qwest recovers in its non-recurring charges. Although Qwest will address these arguments as well, it is important to keep in mind that McLeod has not established any legal basis upon which it may assess charges on Qwest. A legal basis to assess these charges is the very first thing that McLeod must establish, and McLeod has completely failed to offer any basis in law upon which it may recover these costs, or unilaterally begin imposing these charges on Qwest.

In fact, McLeod cannot and does not refute the fact that the WSOC is assessed only in local number portability ("LNP") circumstances. McLeod's motion itself explains that the costs relate directly to porting a telephone number. Yet McLeod does not put forth any legal basis, argument or fact that would allow recovery of LNP costs through the WSOC. Moreover, McLeod does not acknowledge the law surrounding local number portability.

As such, any argument that there is an appropriate policy justification for McLeod's WSOC is irrelevant – whether or not there is such a justification is an issue that would have been addressed had McLeod properly put the issue before the Commission in an interconnection proceeding. Nevertheless, Qwest will briefly address McLeod's policy arguments.

Qwest will also address McLeod's allegation that Qwest charges McLeod a fee or fees in like circumstances – as was shown in Qwest's Motion, Qwest does not assess a like fee. Qwest's non-recurring charges ("NRCs") and Operational Support Systems ("OSS") charges are Commission-approved charges that allow Qwest to recover Total Element Long Run Incremental Cost ("TELRIC") costs for activities that Qwest is required by law to perform, and for which Qwest is permitted by law to recover its costs. Moreover, these costs were established after a litigated proceeding where opposing parties, including McLeod as an intervenor, were able to challenge all facets of Qwest's cost studies. These costs are different from the costs that McLeod seeks to recover, and its analysis purporting to show otherwise is based on a misinterpretation of Qwest's cost studies. Further, unlike McLeod's charge, Qwest's charges are contained in the parties' ICA, and were not unilaterally imposed without McLeod's agreement.

Finally, Qwest would not assess either an NRC or an OSS charge on McLeod under the circumstances that McLeod assesses the WSOC on Qwest – that is, where an end-user customer leaves Qwest to take services from a new carrier where the new carrier provides services entirely over its own facilities. Thus, it is clear that the non-recurring charges that Qwest imposes (non-recurring charges for work associated with provisioning UNEs or resold services) are not comparable to the WSOC, which is a charge that McLeod assesses to recover McLeod's purported internal costs, and McLeod's internal costs do not reflect services provided to Qwest.

<u>ARGUMENT</u>

I. <u>THE WSOC VIOLATES FEDERAL LAW</u>

McLeod makes a blanket argument that its WSOC is just and reasonable. In support of this argument, McLeod makes a number of arguments regarding alleged "public policy" reasons that support the charge, including the broad and otherwise unsupported contention that the charge is necessary for the health of the economy as a whole. (Declaration of August Ankum ("Ankum Declaration"), ¶ 15.) McLeod also contends that its WSOC is just and reasonable because it is based on cost, those costs are "comparable" to costs that Qwest recovers from McLeod, and that imposition of the charge is therefore justified.

McLeod's arguments are both incorrect and beside the point. If McLeod wanted to assess a wholesale service order charge, the proper venue to request authority to impose it is an interconnection arbitration. Because McLeod circumvented that process, no justification that it can now offer can make the charge permissible. An ICA arbitration would have been the venue to assert policy arguments, legal arguments, and cost arguments in support of the charge, but McLeod did not follow that process. Now, even if McLeod had the law, the facts, and public policy in support of the charge, it could not succeed. But that is not the case in any event. As will be discussed, McLeod's public policy arguments are not persuasive, McLeod's legal support is non-existent, and McLeod's cost analysis is wrong.

A. <u>The WSOC Violates Federal Law by including Costs for Number Portability</u>

McLeod's case hinges on one central question – can McLeod recover the costs involved with porting an end-user's telephone number from McLeod to Qwest? Because the answer is that it is *not* entitled to recover those costs from Qwest, there is no genuine issue of material fact. Carriers are required to port telephone numbers, and the FCC made clear that the costs involved must be revenue-neutral. In other words, carriers cannot charge another carrier for an end-user's choice to move providers and keep its telephone number. Section 251(b)(2) of the Act requires *all* local exchange carriers, including 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). Further, the FCC's rule, 47 C.F.R. § 52.33, states that telecommunications carriers other than Incumbent Local Exchange Carriers ("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.[1] McLeod cannot point to any law that allows it to recover number portability costs from Qwest through its WSOC.

McLeod also cannot deny that the costs it seeks to recover through its WSOC are related to the porting of an end-user who is moving from McLeod to Qwest for its local service and is keeping its telephone number. Indeed, McLeod's Director of Network Costs and Access Billing, Tami Spocogee, testified in a federal court case involving, among other things, the WSOC, that the WSOC is "solely related to porting" a telephone number when an end-user customer chooses to leave McLeod and use Qwest as its local service provider: (See Affidavit of David A. Vogel, ¶ 4, Exhibit A (p. 375, line 8- p. 376, line 4, and p. 392, line 20- p. 393, line 13).)

Further, McLeod declarant Dr. August Ankum's whole testimony concerns McLeod recovering costs for processing an Local Service Request ("LSR") submitted to it to port a customer with its telephone number. The steps that Dr. Ankum, and for that matter, Ms. Lynott, describe that must be taken when the LNP LSR is received all are part of the telephone number porting process. Thus, the WSOC is an LSR-processing charge and is undoubtedly part of the continued costs of providing number portability. McLeod itself has established this fact.

First, McLeod's own declarants emphasize this point. For example, Dr. Ankum states the objective of the LSR is to allow the end-user customer to switch to Qwest's network:

> . . . the general objective of Qwest's LSRs is to request that McLeodUSA notify the rest of the world that the customer is henceforth being served by Qwest and to facilitate the migration of the customer in the public switched network. (Ankum Declaration, ¶ 21.)

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[1] 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 Docket No. 95-116 (May 12, 1998), ¶ 8.

Dr. Ankum further agrees:

> These LSRs are requests for McLeodUSA to perform a number of activities that will permit Qwest to migrate customers to its network and offer those customers services off the Qwest switch (as opposed to the McLeodUSA switch). Many of the subsequent activities and services rendered by McLeodUSA have to do with McLeodUSA notifying the rest of the world (other carriers, 911, etc.) on behalf of Qwest that a customer will henceforth be served by Qwest and to facilitate the migration of the customer across the public switched network. (Ankum Declaration, ¶ 17.)

McLeod's other witness, Patricia Lynott, echoes Dr. Ankum's statement:

> Based on a LEC LSR, the system initiates, and in some cases completes, various tasks that must be completed to ensure that end users can seamlessly move their local service (and other services as the case may be) to their new chosen service provider. (Declaration of Patricia Lynott ("Lynott Declaration"), ¶ 9.)

In addition to McLeod's own declarants *in this case* affirming that the LSR is part of number portability, the Minnesota Commission reached a similar conclusion. That Commission found "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."[2]

Further, McLeod's price list provides for a LNP surcharge on all customers. In Utah, the surcharge is $0.43 per month per line, with higher charges applicable to T1 and ISDN lines.[3] This surcharge presumably recovers McLeod's LNP costs, and thus recovery of those costs through the WSOC, besides being otherwise prohibited, would be double recovery of those costs.

McLeod claims that its WSOC is intended to recover the costs of processing the LSR that Qwest sends to McLeod when a McLeod end-user customer chooses to use Qwest for local

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

[3] See http://www.paetec.com/static-assets/notice/ML_FCC_Interstate%20and%20International%20Rates%20and%20Services.pdf, pp. 7 and 8.

service. (McLeod Motion, p. 3.) Yet, Qwest only submits an LSR to McLeod when the end-user customer returning to Qwest wants to keep or port the current telephone number. Thus, it is only in this *number portability* situation that Qwest sends an LSR to McLeod.

The facts are not in dispute that the WSOC only applies when Qwest sends an LSR to McLeod when a customer chooses to leave McLeod and use Qwest as its local exchange carrier and wishes to keep the same number – in other words, local number portability. McLeod's own declarants agree that the LSR is part of the number portability process, and previous testimony demonstrates the charge relates to local number portability. The law clearly states that McLeod cannot use the WSOC to recover its costs of number portability. Accordingly, there are no facts in dispute with regard to the question of whether the WSOC violates federal law.

B. The WSOC violates Federal Law because the Interconnection Negotiation Process was not used

In addition, Qwest alleged in its Complaint that "McLeod's imposition of the Wholesale Service Order Processing charge through a price list or tariff violates the Telecommunications Act of 1996, 47 U.S.C. 151, et seq., specifically sections 251 and 252 which require such charges to be negotiated or arbitrated." (Complaint, ¶ 23.) Qwest established that under Sections 251 and 252, terms such as the WSOC must be contained in the parties' ICA. (Motion, pp. 10-15.)

McLeod failed to address this allegation, however. Thus, even if all of the facts in McLeod's motion are deemed true, there is still no genuine issue of material fact. The issue of law is whether the interconnection negotiation process was required to be utilized prior to assessing any charges against Qwest, and the answer is undeniably that it must be. Accordingly, the Commission should grant Qwest's motion for summary judgment and declare McLeod's WSOC and Section 7 of its price list invalid.

Because there is no dispute over this issue, the Commission does not need to consider the rest of McLeod's arguments. As noted above, granting Qwest's motion on this basis does not deny McLeod an opportunity to present these arguments. To the contrary, if McLeod truly believes that its additional arguments are valid, it can use the proper forum – the interconnection negotiation process – to assert its claims. Following this process not only would allow Qwest the opportunity to negotiate and to challenge the validity of these arguments, if necessary, it would require both parties to present evidence to prove their case in arbitration before the Commission. Thus, McLeod does not suffer harm, and the Commission's actions remain consistent with the Act, if it denies McLeod's motion and grants Qwest's motion.

Although McLeod did not address its failure to use the Interconnection Negotiation Process in violation of the requirements of the Act in its motion, Qwest anticipates that McLeod may address the issue in its response to Qwest's motion. In fact, Qwest's position is clearly stated in the Complaint. However, McLeod has long known that the Minnesota Commission ruled against it for the same reasons Qwest asserts here. The Minnesota Commission ruled that the Interconnection Negotiation Process was the proper forum for determining issues involving the WSOC and that McLeod violated the federal law by unilaterally putting it in the tariff.[4]

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[4] Said the Minnesota Commission:

> 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 ICAs. Further, in this case both McLeod and Qwest have indicated a willingness to enter into negotiations to amend their ICA.
>
> Finally, this is consistent with the Commission's recent action in the CenturyTel case [fn. omitted] 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. *Minnesota Order*, p. 5.

The Act requires the parties to have an interconnection agreement. Section 251 and Section 252 of the Act provide for negotiation or arbitration of such agreement that shall include "a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement." Further, Section 251(c)(3) of the Act requires Qwest to provide UNEs to McLeod on "rates, terms and conditions …in accordance with the terms and conditions of the agreement and the requirements of this section and section 252." Thus, the Act requires that any charge arising from or related to the UNE that Qwest provides be put through the negotiation process and/or arbitrated by the Commission and included within the ICA. The application of the WSOC is clearly based on "interconnection and each service or network element included in the agreement."

The language of Section 7 of McLeod's Utah price list states that the WSOC applies due to a charge for processing orders submitted by McLeod "to initiate service using network elements leased from the incumbent local exchange carrier ("ILEC")." In other words, the WSOC can *only* apply when McLeod has ordered a "network element" from Qwest. McLeod orders the network element service by submitting an LSR. The UNE is thus leased from Qwest at the rates, terms and conditions in accordance with the terms and conditions of the ICA.[5] Because the WSOC can only be applied where the interconnection of the two networks pursuant to Section 251 occurs, can only be applied when McLeod orders a UNE pursuant to Section 251, and can only be applied when the terms and conditions of the ICA apply pursuant to Sections

[5] McLeod and Qwest are parties to an ICA, and McLeod leases UNEs from Qwest to provide service to the majority of its end-user retail customers. See McLeod response to Qwest data request No. 6 in Washington, used by agreement of the parties for all states in which the complaint was brought; see also Qwest Complaint, ¶ 17; McLeod Answer, ¶ 17.

251 and 252, the WSOC and the whole of Section 7 of the McLeod Utah price list fall under the provisions of Sections 251 and 252.

As such, McLeod is required to go through the negotiation process specified by the Act prior to any charges being applied. A carrier contending that a charge related to the interconnection of two carriers' networks is owed or is even recoverable from another carrier is the exact set of circumstances the Act anticipates. The facts and the law are clear, and McLeod's failure to obey the requirements of the Act is clear. Thus, McLeod cannot plausibly prove or even construct a genuine issue of material fact. The Commission should therefore deem the WSOC improper and thus order it stricken.[6]

C. <u>The WSOC is Not Authorized by Law</u>

As noted above, McLeod does not provide any citation to any legal authority which would allow it to impose the WSOC, or would even allow the Commission to approve such a charge if it were proposed in the context of an interconnection arbitration.

Indeed, the *only* citation to law that McLeod offers proves why the WSOC is *not* authorized. At page 7 of its motion, McLeod cites and discusses 47 C.F.R. § 51.711 in support of the notion that it is reasonable for McLeod to use Qwest's costs as proxies for its own. Of course, this is entirely beside the point if McLeod does not have any legal authority upon which

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[6] As Qwest noted in its motion (p. 3, fn. 2) and explained more thoroughly in the motion (pp. 9-10, 14-15), McLeod's inclusion of the WSOC in the interconnection agreement through an interim amendment has no legal significance. This is especially so because the parties specifically provided that this issue was in dispute, and thus the WSOC is interim, and because Qwest specifically reserves the right to challenge it before the Commission. Indeed, the amendment itself 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 Affidavit of Robert Weinstein in Support of Qwest's Motion, ¶ 18; Ex. B, Attachment 1, § 2; see also Qwest's Motion, pp. 9-10, 14-15.)

to claim that it is entitled to cost recovery. And McLeod simply does not have any such authority to point to.

To the contrary, if 47 C.F.R. § 51.711 illustrates a point relevant to this case, it is that when the FCC allowed Competitive Local Exchange Carriers ("CLECs") to recover their costs on a reciprocal basis with the costs of an ILEC, the FCC was very clear about putting that in an administrative rule. The FCC placed no such authorization for any of McLeod's claimed costs in any rule. And, contrary to the very explicit allowance of cost recovery for ILECs contained in Section 252 of the Act, McLeod cannot point to any such allowance for CLEC costs. Indeed, the costs that McLeod seeks to recover are either expressly prohibited from recovery from Qwest (the LNP costs discussed above in Section I.A. (see also Section II.B. below)), or are for costs that McLeod incurs for its own internal benefit or the benefit of its end-user customers, and are neither caused by nor recoverable from Qwest.

D. **<u>The Virginia Cavalier order does not support McLeod's position</u>**

McLeod's reliance on the Virginia Cavalier arbitration order (McLeod Motion, pp. 5-6) is misplaced. Although McLeod argues that the Cavalier (CLEC) "winback" charge is "virtually identical" to its WSOC, the facts in the Virginia do not support that contention. Nowhere in the Virginia order is there any discussion about number porting, or whether Cavalier's charge was for porting of telephone numbers, as McLeod's WSOC clearly is. Indeed, the facts indicate that Cavalier's charge recovers costs that are not associated with number porting.

The Virginia case is distinguishable from this case in several other ways. In Virginia, Verizon acknowledged that it performed similar functions as Cavalier's disconnection actions. *Virginia Order*, ¶ 203. However, Qwest's nonrecurring charges do not recover the same costs that McLeod seeks to recover in this case, and are not associated with activities that are the same as McLeod performs.

Additionally, in the Virginia case, the Verizon (ILEC) witness did not know what individual functions were included in its “Service Order Connect” and installation charges. *Virginia Order*, ¶¶ 199, 203. The witness was also unfamiliar with any cost study that supported Verizon’s contention that it would perform these functions for free (*id.*, ¶¶ 199, 203, 205), and further, did not know whether costs associated with these particular functions were covered through these charges (the Service Order Connect and installation charges) or were buried in OSS or OSS-related charges (*id.*, ¶ 203). Qwest’s evidence in this case, however, shows that Qwest’s nonrecurring charges do not include costs associated with any activity associated with disconnecting a retail end-user. Further, Qwest’s OSS charges, where they have been approved by state commissions, include only development and enhancement costs for Qwest’s OSS, which were caused by and benefit only the CLECs.

The Verizon witness also confirmed that Cavalier paid a disconnection charge when a Cavalier (CLEC) customer served by a Verizon unbundled loop left Cavalier to take service from Verizon. *Virginia Order*, ¶¶ 199, 203, 204. In contrast, Qwest applies the disconnect charge only if the CLEC disconnects the loop, not when a customer transfers service from McLeod to Qwest (or another CLEC) but is still served over the Qwest loop.

Finally, the Virginia Order found that Cavalier’s activities were not solely for Cavalier’s benefit. *Virginia Order*, ¶ 204. To the contrary, in this case, the functions that McLeod performs *are* solely for McLeod's benefit. They enable McLeod to stop billing the end-user, to reclaim its switch resources, and to update its systems. Qwest does not require McLeod to perform any of these functions, nor does Qwest benefit from them. McLeod is *not* responsible for initiating a loop disconnect LSR or for coordinating due dates.

E. <u>There is no Public Policy Support for the WSOC</u>

Finally, McLeod argues that recovery of the WSOC is consistent with economic principles and sound policy. (Ankum Declaration, at ¶¶ 11-16.) However, McLeod does not rely on these paragraphs in support of its motion. Further, these policy arguments, even if they were well-taken, belong in an ICA arbitration, and not in a *post hoc* justification for an unlawful charge. Finally, it is worth noting that all of McLeod's policy arguments are predicated on the incorrect assumption that McLeod is providing *services* to Qwest for which it (McLeod) should be compensated. But McLeod does not provide services to Qwest,[7] and Qwest does *not* impose costs on McLeod which would otherwise justify the WSOC.

II. <u>QWEST DOES NOT IMPOSE COSTS ON McLEOD</u>

McLeod spends a great deal of time in its motion and in Dr. Ankum's declaration (¶¶ 17-60) attempting to establish that 1) Qwest issues LSRs to McLeod (Ankum Declaration, ¶¶ 17-24); 2) Qwest causes McLeod to incur costs (*id*., ¶¶ 25-27); 3) McLeod is not required to provide evidence of its costs, and can rely on Qwest's costs as proxies (*id*., ¶¶ 28-30); and 4) McLeod's WSOC is generally commensurate with Qwest's non-recurring charges for customer transfers, OSS, and loop installation charges (*id*., ¶¶ 31-51).

Because McLeod is wrong about all of these points except the first one, McLeod cannot establish that Qwest causes McLeod to incur any costs, and cannot establish that the WSOC is just or reasonable. This is, of course, assuming that McLeod had met the precondition showing some legal entitlement to cost recovery in the first instance, which it has not.

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[7] See McLeod's Answer, at ¶ 15 (admitting ¶ 15 of the Complaint): "Qwest does not purchase or lease unbundled network elements from McLeod in Utah, and does not order retail or wholesale services from McLeod."

A. Qwest's submissions of LSRs are not "service orders"

It is true that Qwest submits LSRs to McLeod. However, these LSRs are required by the ICA when an end-user leaves McLeod to take service from Qwest and the customer wishes to retain the same telephone number. The LSRs that Qwest submits are not "service orders."

McLeod argues (Ankum Declaration, ¶¶ 17-24) that the LSRs that Qwest submits are requests to McLeod that it perform activities that will allow the end-user to migrate to the Qwest network. In Dr. Ankum's declaration (¶ 21) and Ms. Lynott's declaration (¶ 13), McLeod details the seven steps that McLeod supposedly does to "notify the rest of the world" that Qwest will now be serving this customer. In the discussion to follow, Qwest will explain why these activities are not ones for which McLeod has any right to recover its costs from Qwest, and how these activities are not "comparable" to the activities for which Qwest assesses non-recurring charges when McLeod chooses to serve its customer over Qwest facilities.

B. McLeod's "activities" are related to Number Portability

McLeod contends that the first two steps that it takes in the activities that support its WSOC are the "release of triggers in the McLeodUSA switch," and "grant concurrence in the NPAC." (Ankum Declaration, ¶ 21, and Lynott Declaration, ¶ 12.) These two activities, however, are specifically associated with number portability, and thus are costs which McLeod is not permitted to recover from other carriers. Further, if McLeod failed to perform these activities, the customer could still transfer service to Qwest, but McLeod would be out of compliance with the ICA, the Act and industry requirements. Thus, these activities, to the extent they are components of the WSOC, demonstrate why the WSOC is unlawful. Moreover, these activities are not wholesale services that McLeod provides to Qwest.

McLeod's theory is that it is doing work on Qwest's behalf and, as such, is due compensation. For example, Dr. Ankum declares that McLeod's basic contention is:

> In the telecommunications industry, as in other industries, when companies provide wholesale services for one another, compensation is due. (Ankum Declaration, ¶ 11.)

Although this statement may be true as a general proposition, McLeod does not provide wholesale services to Qwest. McLeod admits Qwest does not purchase or lease any product or service from McLeod, and further, does not order retail or wholesale services from it. (Answer, ¶ 15.) Thus, even under Dr. Ankum's own theory, McLeod would not be due compensation.

McLeod next contends that it has to "pull the telephone number from the PAETEC switch," "change McLeodUSA's internal facility assignment," "delete LIDB (outgoing caller ID) record," and "send care records." (Ankum Declaration, ¶ 21.) Qwest does not dispute that these events happen. However, these events are associated with *any* disconnect activity, and are simply triggered by the fact of the end-user customer leaving McLeod, but they are *not* triggered by Qwest's submission of an LSR. These activities are internal to McLeod's own record-keeping and administrative processes for its own benefit, and the benefit of its other customers. These activities, however, do not enable the customer to transfer to Qwest. Finally, McLeod contends that it must "unlock the 911 record." (*Id*.) Again, this may be true, but it is not a "service" that McLeod provides for Qwest, but rather, is merely associated with the porting of the end user's telephone number.

McLeod next contends (Ankum Declaration, ¶ 22) that McLeod needs to process a large number of variables to accurately carry out the specifics of Qwest's service request. McLeod then includes a large table that details various "fields" that are populated on the LSR. This is misleading, at best, especially because there is no field that has anything to do with the provision of a service to Qwest. In fact, McLeod *does not* provide service to Qwest. The fields are simply populated so that McLeod can properly port the telephone number, stop billing its end-user, and maintain its administrative records. Thus, this information does not support the WSOC.

C. Qwest is not the Cost-Causer

Finally, McLeod claims (Ankum Declaration, ¶¶ 25-27) that Qwest "imposes costs" on McLeod – McLeod states that it "would not engage in the aforementioned activities" "but for the LSRs submitted by Qwest." (Ankum Declaration, ¶ 26.) This is patently untrue, however. After all, McLeod is obligated to port telephone numbers, even if Qwest did not submit an LSR to trigger that port, and McLeod would clearly perform its own administrative activities to discontinue billing its customers even if the customer left McLeod and took service from a wireless carrier (or did not take service from any carrier at all). Thus, it is clear that the activities that McLeod discusses are caused by the simple fact of an end-user *disconnecting* service, and not by Qwest's "submission of an LSR."

As will be discussed below, the WSOC is not "comparable" to Qwest's OSS charges, or its non-recurring charges. Qwest does not seek to recover costs from McLeod when a customer leaves Qwest's network and is served over McLeod's own facilities – rather, it is McLeod's purchase of UNEs or resold services from Qwest that results in non-recurring charges to McLeod. But, as already discussed, Qwest does not purchase any wholesale services from McLeod, and any attempt to draw a parallel is simply a misrepresentation of the facts.

III. MCLEOD'S WSOC IS NOT JUST OR REASONABLE

McLeod also argues that as a CLEC, it is not required to provide cost support for its rates, and that it is appropriate for the WSOC to mirror Qwest's rates. (Ankum Declaration, ¶¶ 28-30.) As noted above, this argument misses the point in several respects.

First, McLeod has not shown that it has a legal right to recover its costs from Qwest to begin with. While it may be that McLeod may incur costs, it does so based on actions of its end-user customers, and not Qwest, and thus McLeod can recover those costs through either non-recurring charges assessed when those customers first take service from McLeod or as a part of McLeod's general overhead costs. Second, the following discussion will show that the WSOC is *not* "comparable" to the charges that Qwest assesses.

A. The WSOC is Not Comparable to Qwest's Charges

McLeod's WSOC states that it is assessed on LECs who assess charges on McLeod for "comparable orders." In order for McLeod's argument to succeed, the LSR that Qwest submits must be sent to McLeod for the same purpose as the LSR that McLeod submits to Qwest. If, however, one LSR is for ordering a service or product and the other LSR is for notifying the customer's old carrier that the customer is transferring onto a new carrier's network, McLeod's argument fails. That is what occurs in this case.

When a Qwest customer decides to move to McLeod for local service, McLeod submits an LSR to Qwest to order a UNE. The Qwest cost studies that McLeod cited in its motion are related to McLeod's order for a *UNE* from Qwest, but are not related to a notification of the disconnection of a customer.

In contrast, when a McLeod customer chooses to leave McLeod and use Qwest for local service and keep its telephone number, Qwest sends the LSR to McLeod not to order a UNE (or, in fact, any service), but for a different purpose – notification of the discontinuance of the end-user's McLeod service due to the customer's decision to move to a new carrier (Qwest).

McLeod apparently wants the Commission to ignore the obvious problem with its claim – the LSRs are not "comparable orders." McLeod submits an LSR to order a loop from Qwest, while Qwest's "LSR" is a "local service request" in name only – McLeod has already agreed that Qwest does not order any products or any services from McLeod.

Further, contrary to McLeod's allegations, Qwest would not charge McLeod either an OSS charge, a customer transfer charge or a loop non-recurring charge if McLeod simply advised Qwest that a Qwest end-user customer was disconnecting, and did not order any wholesale products or services. This would be true even if the end-user wanted to port his telephone number. Thus, the "comparable order" to Qwest's LSR to McLeod would not result in Qwest assessing any charges on McLeod.

1. <u>Operations Support Systems ("OSS") Charges</u>

McLeod claims it incurs OSS costs, and that it should be permitted to recover those costs from Qwest. McLeod points to Qwest's (Washington) commission-approved OSS charges as justification. (Ankum Declaration, ¶¶ 32-34.) McLeod's argument is wrong for several reasons.

First, Qwest does not assess OSS charges in Utah, so McLeod's comparisons fails immediately. However, even if Qwest was authorized to assess OSS cost recovery charges in Utah, the situation would be distinguishable in several respects. Notably, Qwest is *required* by the Act to develop and make available its OSS so that CLECs can place orders for UNEs and resold services. The OSS charges Qwest assesses are explicitly permitted by the FCC, and are Commission-approved after lengthy contested proceedings, and are contained in the parties' ICA. McLeod, however, is under no legal obligation to create OSS, and thus has no legal right to recover its expenses for the development of those OSS.

The FCC specifically authorized an ILEC's recovery of the reasonable costs of its OSS.[8] There is no such authorization applicable to McLeod. So while Qwest is legally entitled to recover the costs of development and ongoing operations of its OSS, McLeod is not entitled to recover any such costs of its own. McLeod's claim that it is entitled to recover costs simply because Qwest does is without merit.

In short, if such charges were permissible for McLeod to assess, they too would have some legal authority upon which to assess them, and such charges would be contained in an arbitrated or negotiated ICA. Regardless, it is worth noting that McLeod does not provide any such legal authority (because none exists).

2. Customer Transfer Charges

McLeod next argues that it "engages in a host of activities to transfer a customer to Qwest," and that it expects compensation for those activities. (Ankum Declaration, ¶¶ 35-43.) McLeod then purports to examine Qwest's customer transfer charge cost support. McLeod incorrectly interprets the cost support that Qwest provides, but McLeod's analysis does not support its position.

McLeod accurately notes that Qwest's customer transfer charges apply when a Qwest customer transfers to a CLEC under a *resale* arrangement. However, McLeod mistakenly contends that this is a parallel situation to when a customer leaves McLeod to transfer to Qwest. It is not a parallel situation. Qwest's customer transfer charge applies when a customer moves to a CLEC and Qwest provides resold retail services to the CLEC so the CLEC can serve that

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[8] See 47 C.F.R. § 51.319(g), requiring unbundled access to OSS, and § 51.503, for general pricing standards. These rules do not apply to authorize CLEC cost recovery of OSS expenditures.

customer. This charge is not applied if the CLEC provides service over its own facilities, and therefore reflects costs associated not with the disconnection of a customer (as McLeod's claimed costs do), but with costs associated with Qwest fulfilling its legal mandate to allow other carriers to purchase retail services at a wholesale discount and resell those services to end-users. This is not at all comparable to the WSOC.

McLeod further alleges that "Qwest assesses the customer transfer charge when the customer moves to a CLEC *and again* when the customer moves to Qwest." (Ankum Declaration, ¶ 42 (emphasis in original).) This is absolutely untrue – Qwest assesses the charge only when the CLEC orders resold service. Finally, unlike McLeod's WSOC, Qwest's charges are Commission-approved and contained in the parties' ICA.

3. <u>Loop Non-Recurring Charges</u>

McLeod further argues that it engages in activities comparable to those for which Qwest assesses UNE loop non-recurring charges. McLeod states that "to transfer a customer to Qwest, McLeodUSA needs to release the customer's telephone number from the McLeodUSA switch in which it resides, in part so that the rest of the world knows that Qwest is now the serving carrier, 911 calls can be routed correctly, etc. These activities are comparable to Qwest's for which Qwest expects to be compensated." (Ankum Declaration, ¶ 44.) McLeod points to documentation from Qwest's non-recurring cost study in support of this contention.

McLeod either misunderstands or misinterprets Qwest's cost study. McLeod cites a definition of the "FACS" system contained in Qwest's cost study in support of the contention that Qwest recovers switch-related costs in its loop installation and disconnection charges. (Ankum Declaration, ¶¶ 47-49.) Qwest's documentation book states that "[f]or switched customer service requests SOAC sends the telephone number, office equipment and features to

MARCH for translation to the physical switch." (*Id*., ¶¶ 48-49.) However, the cited definition does not apply to UNE loop requests, which are not included in the definition of "switched customer service requests." Anything more than a cursory review of the cost studies and documentation cited would have shown McLeod's witness that his testimony is in error.

Contrary to Dr. Ankum's contention, releasing a telephone number from the switch does not have anything to do with routing 911 calls. Even if McLeod failed to perform this activity, 911 calls would still complete correctly as long as Qwest properly programmed its own switch.

B. McLeod's Other Arguments Fail

Finally, McLeod claims that Qwest "commingles" costs for LSRs with costs for other activities. (Ankum Declaration, ¶¶ 52-54.) This is not so, as Qwest does not "commingle" costs of LSRs with other activities. Rather, Qwest processes orders for resold services and UNEs, and charges Commission-approved rates to do so. In contrast, McLeod does not provide Qwest with either resold services or UNEs. Any attempt to draw a parallel between the two and McLeod's WSOC is off the mark. McLeod tries to distract from this point by saying that "the superficial asymmetry" between Qwest's non-recurring charges and the WSOC should not justify the contention that the charges are different. (McLeod Motion, at p. 6.) However, the asymmetry is not superficial – it is fundamental, and illustrates that the charges are in no way the same.

IV. MCLEOD'S WSOC IS DISCRIMINATORY

Finally, McLeod fails to address the fact that the WSOC *only applies to Qwest,* even though an end-user can move its local service to a wireless carrier, a CLEC or a cable company, and yet McLeod does not assess the charge in these situations. But because Qwest does not charge McLeod for processing an LSR that requests only number portability, as is the case with

Qwest's LSRs to McLeod, the WSOC imposes a penalty and higher cost on Qwest. The only way that Qwest could avoid the WSOC would be to not solicit or accept McLeod customers.

McLeod claims it has "bill and keep agreements" with other CLECs for processing LSRs (Ankum Declaration, ¶¶ 57-58), and because Qwest does not have that arrangement, McLeod must recover the processing costs by assessing the WSOC. McLeod, however, "is willing to extend the "in kind" arrangements with other CLECs – under which carriers mutually absorb certain wholesale costs as a cost of doing business – to Qwest *provided that it is mutual*." (Ankum Declaration, ¶ 59 (emphasis in original).)

Dr. Ankum's own words demonstrate the misleading nature of this argument – he describes "in kind" arrangements with other CLECs as being where carriers "mutually absorb certain **wholesale costs** as a cost of doing business." (Ankum Declaration, ¶ 59 (emphasis added).) However, McLeod does not provide "wholesale services" to Qwest. Thus, the "bill and keep" discussion is simply a false analogy that would require the Commission to ignore the obvious difference between Qwest and CLECs – McLeod's bill and keep arrangements with CLECs for processing of LSRs have nothing to do with McLeod ordering UNEs from Qwest.

As discussed above, there is a significant difference between an LSR that Qwest submits for number portability and an LSR that McLeod submits for a UNE. McLeod glosses over the distinction and claims that a "bill and keep" arrangement with Qwest would be equivalent to one with a CLEC. Yet the relationship between McLeod and a CLEC is obviously not the same as that between Qwest and McLeod. Significantly, McLeod and other CLECs do not purchase section 251 UNEs from each other. Thus, bill and keep arrangements for processing LSRs that other CLECs submit to each other are not in any way analogous to McLeod sending Qwest an LSR to order a UNE and to Qwest sending an LSR to McLeod to port a telephone number.

Finally, McLeod's bill and keep analogy is also damaged by the fact the WSOC could never apply to a CLEC. McLeod claims it recovers LSR processing costs through the WSOC. However, the WSOC only applies to a carrier who charges McLeod for orders to initiate service from an *ILEC* through *UNEs* (in other words, Qwest, and only Qwest). Thus, if a CLEC chose to charge for processing McLeod's number portability LSRs, McLeod could not rely on the WSOC to recover its costs of processing the CLEC's LSRs. That CLEC would have a definite competitive advantage in attracting customers. The bill and keep argument is a distraction solely to attempt to cover the discriminatory nature of the WSOC's narrowly-tailored language.

CONCLUSION

After consideration of all of the arguments and declarations in this matter, Qwest respectfully requests that the Commission make the following conclusions, and invalidate McLeod's WSOC:

a. Any rates that the parties charge each other must be contained in an ICA;

b. McLeod's WSOC is not in the ICA;

c. McLeod assesses the WSOC solely for local number portability;

d. Qwest does not purchase any "wholesale services" from McLeod;

e. 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;

f. The WSOC that McLeod seeks to recover from Qwest is not "comparable" to costs that Qwest recovers through its non-recurring charges for resold services or unbundled network elements ("UNEs");

g. If McLeod were to win an end-user customer from Qwest and serve that customer over McLeod's own facilities, Qwest would perform the exact same functions that

McLeod does when a McLeod end-user customer changes to Qwest, and under those circumstances Qwest would not assess a non-recurring charge on McLeod;

h. Under the circumstances described above, McLeod's WSOC must be found to violate federal law as an improper and unlawful attempt to assess a charge outside of the parties' ICA, and without the requisite negotiation and arbitration process.

i. Under the circumstances described above, McLeod's WSOC must be found to be unjust, unreasonable, and discriminatory, in violation of state law.

j. Under the circumstances described above, McLeod's WSOC must be found to violate federal law as an improper and unlawful attempt to recover ongoing costs of providing local number portability.

For all of these reasons, Qwest submits that the Commission should grant Qwest's Motion for Summary Judgment, and deny McLeod's Motion for Summary Determination, and find that McLeod's Wholesale Service Ordering Charge violates federal and state law, is discriminatory, and is not just and reasonable.

DATED this 8th day of March, 2010

Respectfully submitted,

QWEST CORPORATION

By:______________________________

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