Gregory J. Kopta, WSBA No. 20519
DAVIS WRIGHT TREMAINE LLP
1201 Third Ave., Suite 2200
Seattle, WA 98101
Tel: (206) 757-8079
Fax: (206) 757-7079
Email: gregkopta@dwt.com

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

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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

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

INTRODUCTION

McLeodUSA filed its own motion for summary determination of Qwest's complaint in which McLeodUSA demonstrated that its wholesale service order charge ("WSOC") is compensatory, as well as just and reasonable, and that the charge is neither

discriminatory nor anti-competitive. That motion largely addresses and refutes the arguments in the Qwest Motion, and McLeodUSA will not repeat that discussion here. Rather, McLeodUSA will explain that Qwest incorrectly contends that the WSOC is procedurally improper, and will show that Qwest fails to prove that the WSOC is unlawful, unjust and unreasonable, discriminatory, or otherwise unauthorized by applicable law. The Commission, therefore, should deny the Qwest Motion, grant McLeodUSA's motion, and dismiss the complaint.

DISCUSSION

A. McLeodUSA Has Complied with the Act's Requirement to Negotiate Interconnection Terms and Conditions.

McLeodUSA established the WSOC in its Utah price list to recover the costs McLeodUSA incurs to process local service requests ("LSRs") submitted by other carriers to transfer a customer. Qwest disputed that charge and refused to pay it. As part of a settlement agreement resolving multiple issues, Qwest agreed to pay the WSOC at a rate negotiated by the parties but reserved the right to challenge that charge. The parties amended their interconnection agreement ("ICA") to reflect this agreement, and filed the amendment with the Commission. *See* Qwest Motion at 9. Qwest now contends that McLeodUSA improperly failed to negotiate an amendment to the parties' ICA to authorize the WSOC as required under Section 252 of the Telecommunications Act of 1996 ("Act"). Such a contention is inconsistent with the facts and defies common sense.

McLeodUSA and Qwest negotiated an amendment to the parties' ICA in which Qwest agreed to pay the WSOC subject to future Commission action. Both McLeodUSA and Qwest signed that amendment and filed it with the Commission. Qwest attached the amendment to its complaint. Qwest, therefore, has no factual or logical basis on which it

can claim that "McLeod seeks to alter the terms of the agreement by circumventing the negotiation process and the intent of the Act," Qwest Motion at 13, when the undisputed facts demonstrate that McLeodUSA and Qwest engaged in the negotiation process and executed an amendment to the ICA governing the WSOC as contemplated by the Act.

Qwest disagrees, claiming "[t]he parties executed that amendment simply to settle their dispute on an interim basis, while preserving all of Qwest's rights to challenge the charge. Thus, the WSOC must be considered, for purposes of this complaint, as if it did not exist in an amendment . . . ." *Id*. at 14. The amendment cannot be interpreted to support such a fiction. Paragraph 2a of Attachment 1 to the amendment states,

> The Parties agree that Qwest reserves its rights to challenge CLEC's Wholesale Service Order tariff provisions before the Commission or before the utility commissions of other states. The Parties further agree that Qwest's agreement to the Amendment is and shall be without prejudice to any position that Qwest may take in the event that Qwest institutes any challenge to the CLEC's Wholesale Service Order tariff provisions in the future. In the litigation of any such challenge, CLEC 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 right to collect charges for the activities identified in the Amendment.

In compliance with the amendment, McLeodUSA has not taken the position that the amendment precludes Qwest from challenging the WSOC, nor has McLeodUSA made any argument in support of its price list based on the amendment or Qwest's agreement to enter into that amendment. But Qwest cannot reasonably claim that the amendment allows Qwest to argue that the parties never executed an amendment.

First, the language of the amendment does not support Qwest's position. The applicable sentence provides, "The Parties further agree that Qwest's agreement to the

Amendment is and shall be without prejudice to any position that Qwest may take in the event that Qwest institutes any challenge to the CLEC's ***Wholesale Service Order tariff provisions*** in the future." (Emphasis added.) This sentence permits Qwest to challenge the contents of the WSOC provisions in the price list but does not authorize Qwest to claim that McLeodUSA is impermissibly billing Qwest the WSOC out of McLeodUSA's price list. To the contrary, paragraph 1 in Attachment 1 expressly states that Qwest will pay invoices for that charge "according to the payment terms of the Agreement." The rate of $13.10 that Qwest pays, moreover, is contained in the ICA, while the price list includes a rate of $20.00. The amendment, not McLeodUSA's price list, governs Qwest's payment of the WSOC.

Nor is Qwest's position sustainable as a practical matter. The parties executed a settlement agreement in which Qwest agreed to pay the WSOC pending any challenge Qwest might bring to the Commission in the future. There would have been no need for the parties to amend their ICA if Qwest had only agreed to pay McLeodUSA the WSOC pursuant to the price list. The parties, however, negotiated, executed, and filed the amendment to require Qwest to pay that charge as an obligation under their ICA unless and until such time, if any, as the Commission concludes the WSOC is unlawful. Qwest cannot now pretend the amendment does not exist and argue that the WSOC should be part of the ICA when Qwest participated in making the WSOC part of the ICA.

Qwest, therefore, can bring its other challenges to the WSOC, but Qwest cannot take the position that McLeodUSA has circumvented the interconnection agreement requirements in federal law when McLeodUSA and Qwest have amended their ICA in compliance with those requirements.

B. The WSOC Does Not Violate Federal Law.

The WSOC recovers costs McLeodUSA incurs to process LSRs that Qwest submits. Qwest, however, contends that the WSOC recovers local number portability ("LNP") costs in violation of federal law. Qwest is incorrect.

Qwest's argument ignores how the parties established the rate for the WSOC in the parties' ICA. McLeodUSA's price list has a rate of $20.00, *see* Weinstein Aff., Ex. A, but the ICA rate is $13.10, *id*., Ex. B, Pricing Exhibit. The distinction is the result of negotiations between the parties, pursuant to which they agreed on a rate level (with Qwest reserving the right to challenge the charge itself) that represents the Commission-approved nonrecurring costs ("NRCs") attributed to Qwest's order processing activities. *See* Ankum Decl. ¶¶ 35-50. Qwest has calculated its costs to be $13.73 for activities related to reviewing an LSR and entering the information into Qwest's operational support systems ("OSS") – which exceeds the $13.10 WSOC that McLeodUSA charges Qwest for performing comparable activities. *Id*. ¶¶ 40-41.[1] McLeodUSA thus is no more charging Qwest for LNP activities through its WSOC than Qwest is charging McLeodUSA for LNP through its NRCs.

McLeodUSA, moreover, has provided evidence of the type of activities it undertakes in response to the LSRs that Qwest submits. *See* Initial Declaration of Patricia Lynott. Like Qwest, McLeodUSA has invested in OSS required to receive and process LSRs and undertakes activities to process and fulfill those orders. That investment and those activities are not for LNP. Some (though not all) of those activities

[1] The $13.73 cost estimate is for Washington, but on information and belief, the costs that this Commission has authorized Qwest to recover in Utah for these same activities equals or exceeds $13.10.

may facilitate LNP, but their primary purpose is to enable the McLeodUSA customer to move to Qwest service without delay or disruption. *See* Reply Declaration of Patricia Lynott (attached). Recovery of the costs of those activities is fully consistent with federal law.

Qwest also claims that McLeodUSA is double recovering its costs through the monthly LNP surcharge it assesses its end users. Again, however, the WSOC compensates McLeodUSA for the costs incurred to receive and process LSRs, not for LNP. The LNP surcharge recovers the costs the FCC has authorized all carriers to recover for LNP. Just as Qwest imposes both an LNP surcharge on end users and LSR NRCs on competitors, McLeodUSA has two different charges for two distinct sets of customers that recover different costs. There is no double recovery or unlawful shifting of LNP costs as Qwest contends.

C. The WSOC Is Just and Reasonable.

McLeodUSA demonstrated in its own motion, including the Declaration of Dr. August Ankum, that the WSOC is based on the costs that the Commission has approved for the same or similar functions that Qwest provides when it processes local service requests ("LSRs") and thus is just and reasonable. McLeodUSA Motion at 4-7; Ankum Decl. ¶¶ 17-27 & 35-54. Qwest contends that the LSRs McLeodUSA submits to Qwest to order or disconnect unbundled loops are different from the LSRs that Qwest submits to McLeodUSA when transferring a customer and thus are not "comparable orders" for which McLeodUSA can charge Qwest. Qwest misses the point.

The orders are "comparable" for purposes of determining whether any charge applies as long as they require the carrier to undertake the same or comparable activities.

The WSOC recovers the costs that McLeodUSA incurs to process the LSRs that Qwest submits to McLeodUSA. As demonstrated by Dr. Ankum, Qwest's non-recurring charges ("NRCs") recover costs for comparable activities, as well as other costs associated with provisioning or disconnecting service. McLeodUSA's WSOC does not include these other costs but is established at a level equal to the Commission-approved costs for the same or comparable activities that Qwest undertakes to process the LSRs that McLeodUSA and other carriers submit to Qwest. *See* Ankum Decl. § IV (b) and (c). Qwest cannot reasonably claim that the WSOC is unjust and unreasonable when it recovers the same costs that the Commission has authorized Qwest to recover.

Qwest also contends that the WSOC is unjust because McLeodUSA cannot charge Qwest for porting telephone numbers and Qwest only submits LSRs to McLeodUSA to disconnect a customer when that customer chooses to port its telephone number. Again Qwest misses the point.

As McLeodUSA explained in its motion and the Initial Declaration of Patricia Lynott, McLeodUSA follows standard industry practice in requiring all carriers to submit an LSR when requiring McLeodUSA to undertake an activity on their behalf – in this case, a coordinated disconnect of a customer. McLeodUSA Motion at 3; Lynott Decl. ¶¶ 8-12. The WSOC applies because McLeodUSA is required to process that LSR and undertake activities to ensure that a customer being served using McLeodUSA's own switching is able to transition its service seamlessly to another provider, regardless of whether the customer is also porting its telephone number to Qwest. Lynott Reply Decl. ¶¶ 4-5.

McLeodUSA, like Qwest, incurs – and is entitled to compensation for – costs to process LSRs, regardless of the content of the LSR. Even if Qwest seeks to coordinate the customer transfer with McLeodUSA only when porting the customer's telephone number, that choice does not somehow convert the WSOC into an LNP charge or alter the nature of the costs McLeodUSA incurs. McLeodUSA's WSOC seeks to recover only costs for activities associated with processing the LSR Qwest submits when coordinating a customer disconnect, which are the same order processing costs identified in Qwest's own studies and which Qwest itself recovers through charges on other carriers. There is nothing remotely unjust or unreasonable in McLeodUSA seeking to recover its costs for providing these activities when Qwest – or any other carrier – recovers the same costs from McLeodUSA.

D. The WSOC Is Not Discriminatory.

McLeodUSA established in its motion that the WSOC is not discriminatory because it applies to all carriers that submit LSRs to McLeodUSA and charge McLeodUSA for processing comparable orders, rather than engage in a bill-and-keep arrangement in which neither carrier charges the other. Qwest is the only such carrier, but that is a result of Qwest's decision not to opt for a bill-and-keep arrangement, not unlawful discrimination. McLeodUSA Motion at 8-10. Qwest nevertheless asserts, "The McLeod price list, however, is specifically crafted to target one company. The language applies only to an ILEC, and only to a carrier providing UNEs." Qwest Motion at 21. These statements are flatly incorrect.

Section 7.1 of McLeodUSA's Utah price list provides, "A Wholesale Service Order charge applies to all providers of telecommunications services that assess a non-

recurring charge on McLeodUSA for the processing of comparable orders submitted by McLeodUSA to initiate service using network elements leased from the incumbent local exchange carrier ('ILEC')." Weinstein Aff., Exhibit A. By its plain terms, the WSOC applies to ***all*** telecommunications carriers, not just Qwest or ILECs or carriers who provide UNEs. The language does not mention Qwest and only references ILECs to describe what constitutes a "comparable order" for purposes of determining when the charge applies. Qwest is the only carrier required to pay a WSOC because Qwest is the only carrier that charges McLeodUSA for comparable orders. As McLeodUSA explained in its motion, Qwest could avoid the WSOC by processing comparable LSRs on a bill-and-keep basis like other carriers, but Qwest has chosen not to do so. McLeodUSA Motion at 8-9. The WSOC, therefore, is not discriminatory.[2]

D. The WSOC Is Consistent with Applicable Law.

McLeodUSA explained in its motion that its WSOC recovers the costs for performing the same LSR processing functions for Qwest that Qwest performs for McLeodUSA and that McLeodUSA is no less entitled to recover these costs than Qwest. McLeodUSA Motion at 4-5. Qwest incorrectly claims, "Nothing in the Act, however, provides for McLeod to assess the WSOC, or to recover the costs it seeks." Qwest Motion at 22. McLeodUSA, like Qwest, is entitled to recover the costs it incurs as a result of order activity generated by other carriers. McLeodUSA, like Qwest, is a telecommunications carrier under state and federal law, and as such, is authorized to

[2] Qwest further alleges that because only Qwest must pay the WSOC, "Qwest is at a competitive disadvantage to any other CLEC who may solicit a McLeod customer." Qwest Motion at 21-22. Qwest, however, has not produced any evidence to demonstrate that the WSOC has any effect whatsoever on Qwest's ability, efforts, or incentive to market its services to McLeodUSA subscribers. Qwest thus has not met its burden of proof with respect to this allegation, and the Commission should afford it no weight.

charge just and reasonable rates for the services and functionalities it provides in response to customer demand. *See*, e.g., 47 U.S.C. § 201; Utah Code Ann. § 54-3-1. Once Qwest submits an LSR to McLeodUSA, Qwest is obligated to compensate McLeodUSA to fulfill that order, no less than McLeodUSA must compensate Qwest for the LSRs that McLeodUSA submits to Qwest.

Qwest also claims that McLeodUSA "has submitted no cost information to justify the WSOC or its rate," and that "[i]t is unreasonable for McLeod to use Qwest's costs as proxies for its own." Qwest Motion at 22. Dr. Ankum explained that it is eminently reasonable for McLeodUSA to establish its WSOC to recover the same costs that Qwest recovers for the same LSR processing costs at the same levels that the Commission has approved for Qwest. Ankum Decl. ¶¶ 31-50. Qwest obviously agreed when it negotiated the rate level of the WSOC in the ICA amendment to be equal to Qwest's costs for comparable activities. Indeed, setting the WSOC at this rate level when McLeodUSA cannot realize the same economies of scope and scale that Qwest enjoys, likely results in a rate that is "possibly set too low to recoup all of [McLeodUSA's] costs, thus favoring Qwest." *Id.* ¶ 55. McLeodUSA has provided more than ample evidence to support the WSOC and the rate level for that charge.

CONCLUSION

Qwest has had every opportunity in this proceeding to demonstrate that McLeodUSA is not entitled to charge the WSOC or to any cost recovery for processing the LSRs that Qwest submits. Qwest has failed to do so. The Commission, therefore, should refuse to treat McLeodUSA any differently than it has treated Qwest with respect to recovering its LSR processing and OSS development costs. For the foregoing reasons,

and the reasons described in McLeodUSA's motion and supporting declarations, the Commission should deny the Qwest Motion, grant the McLeodUSA Motion, and dismiss Qwest's complaint.

Dated this 8th day of March 2010.

DAVIS WRIGHT TREMAINE LLP
Counsel for McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services.

By:_____
Gregory J. Kopta