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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

<p>QWEST CORPORATION,</p> <p style="text-align: center;">Complainant,</p> <p style="text-align: center;">v.</p> <p>MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., d/b/a PAETEC BUSINESS SERVICES,</p> <p style="text-align: center;">Respondent.</p>	<p>Response by the Division of Public Utilities</p> <p>Docket No. 09-049-37</p>
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The following is a response by the Division of Public Utilities (Division or DPU) to the Motions for Summary Determination of the issues in this Complaint filed by both Qwest and MCLEODUSA.

INTRODUCTION

On June 8, 2009 Qwest filed a Complaint against MCLEODUSA alleging, for a variety of reasons, that the Wholesale Service Order Charge (WSOC) contained in MCLEODUSA's Utah price list dated April 12, 2004 is unlawful. Both parties have filed Motions for Summary Disposition of this matter. Both parties filed a number of Affidavits of supporting witnesses. The Division has reviewed the various Motions and Affidavits and files this limited response.

As was stated on April 12, 2004 MCLEODUSA filed in its Utah Price List Section 7.0 that relates to wholesale services. The only wholesale service included in that price list is Section 7.1 Wholesale Service Order Processing.¹ All other portions of the price list provide the prices, terms and conditions of the public telecommunications services that MCLEODUSA offers to the public in Utah. The price list filing that added this section to MCLEODUSA's Utah Price List went into effect five days after the filing. (Utah Code Ann 54-8b-2.3(5)). It appears that at the time the filing was made by MCLEODUSA, an Interconnection Agreement existed between the two parties. No attempt was made to negotiate a new Interconnection Agreement or submit to the Commission the dispute for resolution. On May 4, 2009 the parties submitted an Amendment to their Interconnection Agreement that memorialized a settlement of the dispute between the parties concerning this charge. That agreement is attached as Exhibit B to the Qwest complaint. Qwest agreed to pay, on an interim basis, a disconnect charge of \$13.10, when a customer left MCLEODUSA and went to Qwest, subject to the terms of the agreement that essentially left open for future determination the legality and reasonableness of the charge.

In Docket 00-049-105 the Commission established the rates, terms and conditions for wholesale services for Qwest. One of the main issues in that Docket related to the price Qwest could charge for non-recurring costs it may incur to install and disconnect an Unbundled Network Element (UNE) that a competitive local exchange carrier (CLEC) chooses to buy from Qwest. Qwest proposed that the cost to install a UNE also include the cost to disconnect the UNE. The Commission disagreed and ordered Qwest to file a compliance filing that would separate the cost to install a UNE from the costs to disconnect a UNE.² In its compliance filing, rates for installation and disconnection of UNEs were submitted to the Commission. Qwest

¹ See Exhibit A to Qwest Complaint.

² Order 00-049-105 June 6, 2002.

charges \$18.56 to disconnect a UNE and an installation charge to connect a UNE of \$29.10.³

These charges were adopted after the completion of a cost docket. The \$13.10 in the MCLEODUSA-Qwest Amended Interconnection Agreement seems to represent what MCLEODUSA claims to be its costs for processing an order when a customer leaves MCLEODUSA and returns to Qwest. It supposedly represents that portion of Qwest's disconnect charges that are comparable to the processing of an order by MCLEODUSA when a MCLEODUSA customer leaves and goes to Qwest. Both parties seem to agree that they cannot charge each other for local number portability under FCC rules but disagree if the charge by MCLEODUSA constitutes a charge for local number portability (LNP). It does seem that Qwest does not charge for LNP.

The Division has determined to file a limited response to some of the issues in this Docket.

THE PROCESS FOLLOWED BY MCLEODUSA TO FILE WHOLESALe PRICES, TERMS AND CONDITIONS IN A PRICE LIST RATHER THEN NEGOTIATION AND ARBRITATION OF AN INTERCONNECTIN AGREEMENT CIRCUMVENTS BOTH FEDERAL AND STATE LAW.

By filing the wholesale charge under Utah Code Ann 54-8b-2.3, a price listed item, rather than going through the negotiation and arbitration process of Section 252 of the 1996 Telecommunications Act and following the process of Utah Code Ann. 54-8b-2.2 MCLEODUSA circumvented the proper procedures for resolving disputes among interconnecting carriers.

Under Utah Code Ann. 54-8b-2.3 a telecommunication corporation may price its public telecommunication services pursuant to a price list or competitive contract. A public telecommunications service is one offered to the public generally, such as services to a

³ Qwest compliance filing Docket 00-049-105

residential or business customer. It is not a wholesale service such as the one in dispute in this case. A wholesale service that is not offered to the public is subject to Commission review under interconnection agreements or proper cost dockets where the Commission sets the price, terms and conditions of the wholesale service. The prices, terms and conditions for interconnection of facilities or services of connecting carriers is governed by Section 54-8b-2.2 and Section 252 of the Federal Act. It appears to the Division that at the time the two parties were negotiating their interconnection agreement, MCLEODUSA should have raised the issues surrounding this charge and, if it could not have been agreed to, submit the issue to the Commission for decision. By failing to do that and forcing the issue to be decided by a Complaint denies the opportunities of the negotiation process envisioned by both the state and federal acts. In this proceeding only one issue is being heard, while in negotiations it is not clear what the result might have been.

COSTS FOR LOCAL NUMBER PORTABILITY SHOULD NOT BE RECOVERED EITHER THROUGH QWEST DISCONNECT CHARGE OR MCLEODUSA'S WHOLESALE SERVICE ORDERING CHARGE.

Both parties seem to agree that they should not recover local number portability (LNP) costs through charges to carriers. MCLEODUSA currently charges an LNP surcharge to its customers and claims that they are not recovering any LNP costs through the rate they propose to charge Qwest. (MCLEODUSA Response in Opposition to Qwest's Motion for Summary Disposition p. 6). MCLEODUSA claim that the surcharge to its customers recovers the costs the FCC has authorized all carriers to recover for LNP. Qwest contends that the WSOC unlawfully attempts to recover MCLEODUSA costs to port the number to Qwest. The Division concludes that if the Commission finds, based on the various affidavits, that the WSOC is, in essence, recovering LNP charges from Qwest, then the Commission should find for Qwest.

IF A WSOC FEE IS TO BE ASSESTED BY A CLEC IT SHOULD BE COST BASED AND NON-DISCRIMINATORY.

The Division is not aware of any other CLEC that charges a non-recurring charge to another carrier when a customer leaves one carrier and goes to another carrier. The Division is not aware of any other Carrier that charges MCLEODUSA, other than Qwest, a fee when they lose a customer. Qwest of course claims that their charge is not for the loss of the customer but for the recovery of its Commission approved costs to disconnect a UNE. Qwest would not charge anything to a carrier, if that carrier was not purchasing a UNE from Qwest. In other words, if MCLEODUSA signed up a Qwest customer, but purchased no UNEs from Qwest and used its own facilities, there would be no installation charge and no disconnect charge if Qwest at some future date won back that customer. Qwest would not recover its operational support costs associated with that customer. If a charge such as the WSOC is to be put in place it should be cost based and non-discriminatory. Utah Code Ann. 54-8b-2.2(1)(f) states it is not a discriminatory practice to vary prices to reflect genuine cost differences. Thus, Utah law envisions the possibility that CLECs may also be required to show genuine cost differences in order to justify a charge. However, if a charge such as the WSOC exists it must be non discriminatory.

CONCLUSION

1. Charges such as the WSOC are properly integrated into an interconnection agreement where negotiations can take place, cost data reviewed, and the issues can be arbitrated if necessary, rather than placing the charge in a price list;
2. Charges for LNP should not be recovered from carriers through a charge such as the WSOC or Qwest's UNE disconnect charge;

3. Charges such as the WSOC should be cost based and non discriminatory.

Respectfully submitted this _____ day of April, 2010.

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of Public Utilities

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Response by the Division of Public Utilities to the Motions for Summary Determination of the issues in this Complaint filed by both Qwest and MCLEODUSA was sent by electronic mail and mailed by U.S. Mail, postage prepaid, to the following on April ____, 2010.

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