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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. Respondents.	Docket No. 09-049-37 MCLEODUSA REPLY TO DPU RESPONSE TO MOTIONS 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 reply to the Response by the Division of Public Utilities ("Division" or "DPU") to the motions for summary determination of the complaint filed by Qwest Corporation ("Qwest").

DISCUSSION

A. McLeodUSA's Interconnection Agreement with Qwest, not McLeodUSA's Price List, Is the Source of the Wholesale Service Order Charge at Issue in this Case.

McLeodUSA explained in its previous filings in this docket that while it originally established its Wholesale Service Order Charge ("WSOC") in its Utah price list, McLeodUSA and Qwest negotiated, executed, and filed with the Commission an amendment to their interconnection agreement ("ICA") incorporating that charge into the ICA. *E.g.*, McLeodUSA Opposition at 2-4. The Division, however, appears to ignore that amendment and contends "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." DPU Response at 4. The Division's position is troubling in several respects.

The most problematic aspect of the DPU Response is that although it recognizes the existence of the amendment, *see id*. at 2-3, the Division does not undertake any analysis of that amendment, much less explain why the amendment does not address the Division's concerns. The Division claims that "forcing the issue to be decided by a Complaint denies the opportunities of the negotiation process envisioned by both the state and federal acts." *Id*. at 4. Yet negotiating a contractual arrangement is exactly what the parties did. Qwest disputed McLeodUSA's WSOC, the parties negotiated the issue, and they reflected the results of those negotiations in an ICA amendment. The parties ultimately could not resolve the issue of whether McLeodUSA is entitled under applicable law to charge the WSOC, but Qwest raised that issue with the Commission

only *after* the parties had engaged in extensive negotiations. Neither party was denied the opportunities of the negotiation process envisioned under Utah and federal law.

The Division also suggests that McLeodUSA should have proposed its WSOC when the parties first negotiated their ICA, but such a suggestion ignores the reality of the marketplace. No one can predict and fully address all issues that could arise between competing companies two or more years into the future. Not surprisingly, interconnected carriers frequently amend their ICA to adapt to new or different circumstances, and if they cannot reach agreement on an amendment, they seek Commission intervention. Nothing in state or federal law prohibits a party from raising an interconnection-related issue outside the context of negotiations for a new ICA, and adoption of such a restriction would be unduly burdensome to both the parties and potentially to the Commission.

The Division nevertheless seems to believe that litigating a single issue is counter-productive because disputes are more likely to be resolved if multiple issues are being discussed. *See id*. ("In this proceeding only one issue is being heard, while in negotiations it is not clear what the result might have been.") Again such a belief is contrary to reality since carriers frequently litigate only one issue, including in arbitrations filed after lengthy negotiations. Here, for example, the parties resolved several disputes in a single settlement agreement but nevertheless could not agreed on whether the WSOC is a lawful charge that Qwest should be required to pay. The parties simply are unable to reach agreement on that issue through negotiations, whether considered alone or as one of multiple disputes. It is immaterial that Qwest filed a complaint rather than a petition for arbitration because the result is the same – the parties seek Commission resolution of an issue they cannot resolve themselves.

McLeodUSA, therefore, has fulfilled the negotiation requirements of federal and state law, and the Commission should determine the lawfulness of the WSOC on the merits, not on unfounded procedural concerns.

B. The WSOC Does Not Recover LNP Costs but Is Cost-Based and Non-Discriminatory.

McLeodUSA demonstrated in its 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") – which do not include local number portability ("LNP") costs – and thus is just and reasonable. McLeodUSA Motion at 4-7; Ankum Decl. ¶¶ 17-27 & 35-54; Initial Lynott Decl. ¶¶ 8-12. The Division correctly observes that both parties agree that they should not recover LNP costs from each other and "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." DPU Response at 4. The Division does *not* find that the WSOC is recovering LNP costs – nor does the record evidence support such a finding. Because the WSOC does not recover LNP costs but rather compensates McLeodUSA for the same type of order processing that Qwest includes in its non-recurring charges ("NRCs"), the Commission should find for McLeodUSA.

The Division also takes the position that "[i]f a charge such as the WSOC is to be put in place it should be cost based and non-discriminatory." *Id*. at 5. The record evidence demonstrates that the WSOC is both cost-based and non-discriminatory. McLeodUSA's declarants testified that the WSOC recovers the costs for activities associated with processing the LSR Qwest submits to McLeodUSA when coordinating a

customer disconnect, which are the same order processing costs identified in Qwest's own studies and which Qwest itself recovers through its NRCs. Ankum Decl. ¶¶ 35-50; Lynott Initial Decl. ¶¶ 8-12; Lynott Reply Decl. ¶¶ 4-5. As Dr. Ankum explained, Qwest's costs for undertaking comparable order processing activities are likely lower than McLeodUSA's costs, and thus setting the WSOC at the same rate the Qwest charges for those activities is eminently just and reasonable. Ankum Decl. ¶¶ 40-41.

McLeodUSA has also established that the WSOC is not discriminatory. The charge applies to all carriers that submit LSRs to McLeodUSA and that also 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. The Division does not contend otherwise.

The WSOC does not recover LNP costs but is cost-based and non-discriminatory, as the Division recommends. The Commission, therefore, should find that the WSOC is lawful and that McLeodUSA is entitled to collect that charge.

CONCLUSION

For the reasons explained above and in McLeodUSA's prior briefing and declarations in this docket, the Commission should grant summary judgment in favor of McLeodUSA and dismiss Qwest's complaint.

Dated this 6th day of May 2010.

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By:_____
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