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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 ANSWER TO
MCLEOD'S PETITION FOR
REVIEW, RECONSIDERATION,
OR REHEARING; IN SUPPORT OF
THE COMMISSION'S AUGUST 16,
2010 REPORT AND ORDER**

I. INTRODUCTION

1 Pursuant to Utah Code Ann. §§ 54-7-15, and Utah Administrative Rule R746-100-11 F., Qwest Corporation (“Qwest”) hereby files its answer to the Petition for Review, Reconsideration, or Rehearing (“Petition”) that was filed by McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services (“McLeod”).

2 Qwest supports the Report and Order of the Public Service Commission of Utah (“Commission”) which properly decided that McLeod’s Wholesale Service Order Charge (“WSOC”) is “unjust, unreasonable, discriminatory and in violation of federal and state law” and which required

McLeod to “repay all WSOCs paid by Qwest to McLeodUSA for a period of one year prior to the filing of Qwest’s underlying complaint.”¹

3 McLeod challenged the Report and Order by filing a Petition for Review on September 15, 2010. Responsive pleadings are due 15 days following that filing, so this answer is timely filed on September 29, 2010.

II. SUMMARY OF ARGUMENT

4 McLeod challenges the Report and Order on various grounds, none of which provides a basis for modifying the decisions contained therein.

5 The Report and Order correctly interpreted the WSOC Amendment to the parties’ interconnection agreement (“ICA”). The Report and Order finds that Qwest may bring a challenge to the WSOC in the manner and on the grounds previously agreed by the parties and approved by the Commission. In so doing, the Report and Order properly gives effect to all of the provisions of the Commission-approved WSOC Amendment. The WSOC Amendment specifically preserves Qwest’s rights to challenge the WSOC. If the Commission determines that the WSOC is unjust, unreasonable, unlawful, or otherwise unenforceable, the WSOC Amendment is deemed terminated on the effective date of the Commission’s final order.

6 The claimed distinction in McLeod’s Petition between the WSOC contained in the Price List and the WSOC contained in the ICA Amendment is irrelevant, and does not provide a basis for changing the Report and Order.

7 The Washington order cited by McLeod does not provide guidance to the Utah Commission. It is an initial order only, with no binding effect, and is

¹ Report and Order in this docket issued August 16, 2010, page 13. (“Report and Order”)

currently subject to a lengthy and detailed petition for review by Qwest. That initial order erred in several respects, but most importantly it erred by failing to properly interpret the ICA Amendment so as to allow Qwest to challenge the WSOC.

8 Finally, the Commission has authority to require the refund of unlawful charges under Utah law, and the ICA Amendment that temporarily allowed the WSOC to be assessed did not guarantee McLeod that it would be permitted to retain those charges.

III. ARGUMENT

9 McLeod presents several arguments in its Petition, but none of those arguments provides any basis upon which to modify or reverse the Report and Order. In fact, the Report and Order correctly analyzes the issues presented for decision, and clearly and concisely renders a decision on all of the issues raised. McLeod's central position is that the Division and the ALJ were "confused" by Qwest's "tactics", a position that only highlights the weakness of McLeod's Petition.

A. **The Claimed Distinction Between the "Price List WSOC" and the "ICA WSOC" is Irrelevant, and Does Not Change the Analysis or Decision in the Report and Order.**

10 McLeod first argues that Qwest has confused the issues by failing to distinguish between the Price List WSOC and the ICA Amendment WSOC. (Petition at pp. 5-7.) This argument incorrectly assumes that a relevant difference exists between the WSOC McLeod unilaterally imposed via Price List and the WSOC the parties incorporated into the ICA on an interim basis, while reserving

Qwest's right to challenge through the complaint process. There is no relevant difference.

11 The Commission was clearly aware that there was a Price List WSOC that predated the ICA WSOC. The Commission stated "the WSOC was not originally contained in the parties' Agreement, but was only put in the Agreement in the interim, while the parties disputed the charge." (Report and Order, page 4). Thus, the fact that the WSOC was contained in two separate places, and at two different rate levels, does not impact the validity of the charge, the Commission's analysis, or the conclusions the Commission reached.

12 The Commission's Report and Order gives full effect to the plain language in the parties' Commission-approved ICA, which states clearly that "[t]he Parties agree that Qwest reserves its rights to challenge CLEC's Wholesale Service Order tariff provisions before the Commission or before the utility commissions in 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 CLEC's Wholesale Service Order tariff provisions in the future." The entire relevant provision is set forth below, with emphasis added:

2. **Without Prejudice** a. 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 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. b. It is the intent of the Parties to negotiate in good faith whether terms and rates similar to those in the Amendment should be included in the successors to the Agreement. Neither Qwest nor CLEC waive any position it may take with respect to negotiations in any successor agreements.

3. **Termination.** The Amendment shall continue in force until the earliest of these events: a. The parties mutually agree to terminate it, including but not limited to the execution and approval of a successor to the Agreement; or b. The Commission issues a Final Order that the Wholesale Service Order charge provisions *in McLeodUSA's tariff* in this state are unjust, unreasonable, unlawful or otherwise unenforceable, *in which case this Amendment shall be deemed terminated in this state* with respect to charges for any Wholesale Service Orders after the effective date of the Commission's order.

13 These provisions mean that Qwest was permitted to challenge the WSOC Price List in Utah, and that if the Commission finds that the inclusion of the WSOC in a Price List is unlawful, or that the WSOC is unlawful for any other reason, then the other provisions of the Amendment take effect, and the Amendment is "deemed terminated" by its own terms. There is no ambiguity in these terms. This is the agreement between the parties, and is the agreement approved by the Commission. The Commission's Report and Order gives full and exact effect to these terms.

14 McLeod as much as admits that the Price List is legally indefensible, stating that "[a]t most, Qwest has shown defects in the price list." (Petition at p. 7). McLeod goes on to argue however that even if the Price List WSOC is invalid, the ICA WSOC is valid. But that is exactly opposite of the language of the Amendment – the Amendment provides that Qwest need only show that the Price List is defective, which Qwest unarguably did. At that, the inquiry is over, and the WSOC, whether in the Price List *or* in the ICA, is "deemed terminated."

15 McLeod has not demonstrated any error, or any confusion, in the Report and Order.

B. The Washington Decision is in Error and Does Not Provide Guidance to the Utah Commission

16 McLeod next argues that the ALJ's initial order in Washington decided the issues correctly by focusing on the ICA WSOC, by rejecting Qwest's challenge to the Price List, and by rejecting Qwest's discrimination claim. (Petition at pp. 7-9). Qwest disagrees, and has filed a Petition for Administrative Review of the Washington order.

17 The most significant flaw in the Washington Order is that it fails to give effect to the terms of the ICA Amendment. That Amendment specifically allows Qwest to challenge the WSOC tariff/price list, and provides that a finding that the tariff/price list is invalid then invalidates the ICA WSOC. The Washington Order does not give effect to those terms, as it essentially concludes, in spite of that language, that Qwest is not allowed to challenge the price list.

18 In this regard it is critical to note that the Utah Commission gave effect to all the language in the Amendment. The Amendment did not limit Qwest's challenge to the WSOC to issues around the validity of the Amendment – rather, it preserved to Qwest the right to challenge the WSOC on all the grounds it could have argued before the Amendment. Under the plain language of the Amendment, if the Utah Commission finds that “the Wholesale Service Order charge provisions in McLeodUSA's [price list] in [Utah] are unjust, unreasonable, unlawful or otherwise unenforceable” “[the] Amendment shall be deemed terminated in [Utah].”²

² WSOC Amendment, Attachment 1, ¶ 3.

19 Notably, the Washington Order in paragraph 44 specifically agrees with this Commission’s Report and Order, finding that the WSOC is improper and stating “[a]s the Utah Commission determined, the WSOC, as a wholesale charge, should never have been included in McLeodUSA’s price list...”³ The Washington Order then states that “this apparent defect was overcome by inclusion of the WSOC in the mutually negotiated ICA Amendment” and further states that “[u]nlike the Utah Commission, which appears to have treated the WSOC Amendment as if it does not exist, we place significant weight herein on the parties’ mutual agreement to resolve unspecified business disputes including agreement on incorporating, by way of amendment, the WSOC into their existing ICA.”

20 The Washington Order misinterprets both the Utah decision and the parties’ Amendment. The Report and Order in this case clearly does not treat the WSOC Amendment as if it did not exist, and did not selectively enforce only some provisions while ignoring others. The Report and Order instead relied on the plain language of the Amendment, finding that the Amendment was used to allow the WSOC in the “interim”:

Here, the WSOC was not originally contained in the parties’ Agreement, but was only put in the Agreement in the interim, while the parties disputed the charge.⁴

21 The Utah Commission engaged in the correct analysis – the WSOC was contained in the Amendment on an interim basis, while the parties disputed the charge. The WSOC as a price listed element is unlawful, and the WSOC in the price list is therefore invalid and unenforceable. As a consequence, the ICA

³ The Washington Order is attached to McLeod’s Petition.

⁴ Report and Order, page 4.

Amendment containing the WSOC is deemed terminated under the clear provisions of that Amendment. To hold otherwise would negate not only part of the Amendment, but also the clear intent of the parties.

C. The Report and Order is Correct.

22 McLeod next focuses its attack on a number of aspects of the Report and Order that McLeod claims are defective. McLeod's challenges are not well-founded.

23 First, McLeod reiterates its argument that the Report and Order only looked at the enforceability of the Price List WSOC, not the ICA WSOC. (Petition at pp. 9-10) McLeod also contends that the Report and Order mistakenly focused its analysis of the discrimination claim on the Price List WSOC not the ICA WSOC. (Petition at pp. 10-11). Both of these arguments are essentially addressed above and by the plain language of the Amendment.

24 The Report and Order did not err, and it did properly analyze the WSOC. McLeod argues that “[t]he Order concludes that because negotiations did not precede the price list, the price list is unenforceable. No express conclusion is reached on the Settlement WSOC.” (Petition p.10). McLeod argues that this is a critical omission. However, that is exactly what McLeod agreed to in the Amendment – it agreed to allow Qwest to challenge the Price List WSOC, and agreed that that determination would control the validity of the ICA WSOC. McLeod's complaint here is simply that it is dissatisfied with the bargain it struck, but this argument does not present a legitimate challenge to the Report and Order.

25 Further, contrary to McLeod's argument at page 10 of its Petition, the discriminatory nature of the WSOC is immediately evident from the language

in the Price List, which is structured so that the WSOC cannot be assessed on any carrier other than Qwest.⁵ This is true even though end-user customers may leave McLeod and go to any number of other service providers, not just Qwest. Qwest also established that the charges it imposes on McLeod have to do with provisioning an unbundled loop, not with processing an order for number portability. As such, Qwest made a prima facie showing that McLeod treats Qwest differently than it treats other carriers, and that that difference is both disadvantageous to Qwest, and not otherwise authorized by law. Under those circumstances, the burden would then shift to McLeod to show that its WSOC was not discriminatory, and McLeod failed to do so. The Report and Order is correct on this point.

26 McLeod next argues, at page 11 of its Petition, that the Report and Order is ambiguous. Qwest disagrees. There is no ambiguity – the Report and Order holds that the WSOC in the price list is unlawful.⁶ That decision flows out to invalidate the WSOC in the Amendment, under the clear language of the Amendment itself. Further, Qwest is not aware that the parties have any dispute concerning the amount of the WSOCs paid for the one year prior to Qwest’s complaint.

⁵ See, McLeod’s Price List; Exhibit A to Qwest’s complaint.

⁶ See, e.g., the Report and Order at page 12: “Also, no agreement including the WSOC was ever submitted for Commission review before its imposition. Here there is no factual dispute that McLeodUSA, by filing its WSOC as a price-listed item under Utah Code § 54-8b-2.3, before seeking to add it to the interconnection agreement after negotiation or arbitration, circumvented the mandates of the Telecommunications Act. Therefore, the WSOC violates Sections 251 and 252 of the Telecommunications Act and is unlawful.”

D. The Report and Order Does Not Modify the ICA Amendment, and Properly Requires Refund of the WSOC as Unlawful.

27 McLeod's final arguments address the remedy ordered. Beginning at page 12 of its Petition, and continuing with variations on the same argument through the end of the Petition, McLeod argues that the Report and Order impermissibly modifies the ICA Amendment, (which provides that Qwest must not dispute properly invoiced charges for the WSOC) and that the Amendment itself precludes any requirement to refund the WSOCs. (Petition at pp. 12-16). The arguments all boil down to McLeod's disagreement with the requirements of the Report and Order that McLeod refund all WSOCs for the period of one year prior to the filing of the complaint.

28 The Report and Order does not impermissibly modify the ICA Amendment. The Amendment required Qwest to pay and not dispute all properly invoiced WSOCs. There is no dispute that Qwest did so. However, the terms of the Amendment specifically preserve to Qwest all rights to challenge the WSOC, and the Amendment explicitly states that it is without prejudice to any claims that Qwest may make against the WSOC. Thus, McLeod agreed to an Amendment that left it vulnerable to a claim for refunds, which is precisely what the Commission ordered. There is no modification of the ICA Amendment and no abrogation of Qwest's obligations.

29 The Commission's authority to order refunds is also set forth in Utah Code Ann. §§ 54-7-20, which allows the Commission to require reparations when a rate is found, as here, to be either unjust, unreasonable, or discriminatory. The Amendment to the ICA did not alter that authority.

30 For the reasons set forth herein, the Commission should affirm the Report and Order, invalidating McLeod's WSOC, and requiring a refund.

IV. CONCLUSION

31 After consideration of all of the arguments, Qwest respectfully submits that the Commission should deny McLeod's Petition for Review, Reconsideration, or Rehearing, and affirm the Commission's well-reasoned order of August 16, 2010, finding that McLeod's Wholesale Service Ordering Charge violates both federal and state law, is discriminatory, and is not just and reasonable. The Commission should further affirm its Report and Order requiring a refund of the WSOCs paid for the one year prior to the complaint being brought, as such a requirement is not prohibited by the ICA Amendment, and Utah law permits the Commission to order a refund of unlawful rates.

DATED this 29th day of September, 2010

Respectfully submitted,
QWEST CORPORATION

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September, 2010, I served a true and correct copy of the foregoing **QWEST'S ANSWER TO MCLEOD'S PETITION FOR REVIEW, RECONSIDERATION, OR REHEARING; IN SUPPORT OF THE COMMISSION'S AUGUST 16, 2010 REPORT AND ORDER** to the following persons via *hand-delivery, electronic mail or U.S. Mail postage prepaid to the addresses shown below:

<p>*Julie P. Orchard Commission Administrator Utah Public Service Commission Heber M. Wells Building, 4th Floor 160 East 300 South Salt Lake City, UT 84111 ORIGINAL & 5 COPIES <i>via hand-delivery</i> psccal@utah.gov</p>	<p>*Patricia E. Schmid Heber M. Wells Building 160 East 300 South PO Box 45807 Salt Lake City, UT 84145 pschmid@utah.gov</p>
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/s/ Brenda S. Studebaker