

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

-----  
In the Matter of the Complaint of Qwest )  
Corporation against McLeodUSA ) DOCKET NO. 09-049-37  
Telecommunications Services, Inc., d/b/a )  
PAETEC Business Services ) ORDER ON RECONSIDERATION  
-----

ISSUED: March 10, 2011

By The Commission:

This matter is before us on Paetec Business Services’s (“McLeodUSA”) Petition for Review, Reconsideration or Rehearing (“Petition”) of the Commission’s Report and Order issued August 16, 2010 (“August Order”). This matter commenced when Qwest filed its June 8, 2009, Complaint against McLeodUSA for imposing through McLeodUSA’s Utah price list a wholesale service order charge (“WSOC”) assertedly in violation of Utah State Code §§54-3-1, 54-8b-2-2(1)(b), 54-8b-3.3<sup>1</sup>, and the Telecommunications Act of 1996 (“Act”), 47 USC 151, *et*

---

<sup>1</sup> Utah Code Ann. § 54-3-1 provides, in pertinent part, as follows:

All charges made, demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful .

...

Utah Code Ann. § 54-8b-2.2(1)(b) provides, in pertinent part, as follows:

(b)(i) Whenever the commission grants a certificate to one or more telecommunications corporations to provide public telecommunications services in the same or overlapping service territories, all telecommunications corporations providing public telecommunications services in the affected area shall have the right to interconnect with the essential facilities and to purchase the essential services of all other certificate holders operating in the same area on a nondiscriminatory and reasonably unbundled basis.

(ii) Each telecommunications corporation shall permit access to and interconnection with its essential facilities and the purchase of its essential services on terms and conditions, including price, no less favorable than those the telecommunications corporation provides to itself and its affiliates.

Utah Code Ann. § 54-8b-3.3 provides, in pertinent part, as follows:

(2) Except with respect to a price regulated service offered in a promotional offer, or market trial, or to meet competition and notwithstanding any other provision of this chapter:

*seq.*—specifically sections 251 and 252, which sections generally require charges to be negotiated or arbitrated, and provided without discrimination. Qwest asks the Commission, among other things, to find the WSOC is unlawful and discriminatory, and to order McLeodUSA to refund any WSOC payments received from Qwest between June 9, 2008 and June 8, 2009.

McLeodUSA generally and specifically denied Qwest's allegations in its Answer filed with the Commission on July 8, 2009.

We set deadlines for the filing of cross-motions for summary judgment, responses, response by the Division of Public Utilities (Division) to the Qwest and McLeodUSA motions, and responses by Qwest and McLeodUSA to the Division. The Commission also set the matter for hearing but canceled it pending consideration of the cross-motions.

Upon review of the cross-motions, we issued the August Order: 1) granting Qwest's motion for summary judgment and denying McLeodUSA's cross-motion; 2) declaring McLeod's WSOC to be unjust, unreasonable, discriminatory and in violation of federal and state law; and 3) ordering McLeodUSA to repay all WSOCs paid by Qwest to McLeodUSA for one year prior to the filing of Qwest's complaint.

In this Order on Reconsideration, we address the assertions of error McLeodUSA presents in its Petition, re-affirm our grant of summary judgment in favor of Qwest, and modify the August Order in certain respects. The parties' pleadings and supporting affidavits are

- 
- (a) a telecommunications corporation with more than 30,000 access lines in the state that provides a public telecommunications service may not:
    - (i) as to the pricing and provisioning of the public telecommunications service, make or grant any undue or unreasonable preference or advantage to any person, corporation, or locality; or
    - (ii) in providing services that utilize the local exchange network:
      - (A) make or give any undue or unreasonable preference or advantage to any person, corporation, or locality; or
      - (B) subject any person, corporation, or locality to any undue or unreasonable prejudice or disadvantage;

summarized extensively in the August Order. That material will not be repeated here, except as needed to provide brief factual background and context for this order.

### **FACTUAL BACKGROUND**

Qwest is a “telecommunications corporation” as defined in Utah Code Ann. § 54-8b-2 and a “public utility” as defined in Utah Code Ann. § 54-2-1. Qwest is an “incumbent telephone corporation” as defined in Utah Code Ann. § 54-8b-2 and an “incumbent local exchange company” (“ILEC”), as defined in 47 U.S.C. § 251(h). Qwest provides local exchange and other telecommunications services in the State of Utah.

McLeodUSA is also a “telecommunications corporation” as defined in Utah Code Ann. § 54-8b-2 and a “public utility” as defined in Utah Code Ann. § 54-2-1. McLeodUSA is registered with and classified by the Commission as a competitive local exchange company (“CLEC”). McLeodUSA provides switched and non-switched local exchange and long distance services in Utah.

An interconnection agreement (“ICA”) exists between McLeodUSA and Qwest which provides the terms, conditions, and prices for network interconnection, access to unbundled network elements, ancillary network services, and retail services available for resale. The WSOC was not contained in the parties’ original ICA. McLeodUSA unilaterally added the WSOC to its Utah price list, without Qwest’s consent and without seeking the Commission’s review or approval.<sup>2</sup> Qwest objected to the charge on a number of legal bases, including because

---

<sup>2</sup> As imposed by McLeodUSA, a WSOC arises when a McLeodUSA end-user chooses to discontinue service from McLeodUSA, takes service from Qwest, and chooses to keep its number. When this occurs, Qwest notifies McLeodUSA that the customer chooses to leave McLeodUSA and desires to keep (i.e., port) its number. Qwest will then submit a local service request (“LSR”) for local number portability (“LNP”) purposes, allowing the customer to

it was not a negotiated change to the ICA. Later, on or about October 2008, in connection with a settlement agreement resolving a variety of business issues, Qwest and McLeodUSA agreed to execute the “Wholesale Service Order Charge Amendment” to their ICA (“ICA Amendment”). In the ICA Amendment, Qwest agrees to pay a revised wholesale service order charge of \$13.10 (“Amendment WSOC”), \$6.90 less than McLeodUSA’s Utah price list WSOC. Notably, the ICA Amendment also includes the following terms:

2. **Without Prejudice** a. The Parties agree that Qwest reserves its rights to challenge CLEC’s [McLeodUSA’s] Wholesale Service Order tariff provisions before the [Utah] 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.<sup>3</sup>

The ICA Amendment was filed with the Commission and subsequently deemed approved on May 4, 2009. Qwest filed the Complaint giving rise to this docket on June 8, 2009.

---

switch companies and keep its number. Whenever Qwest submits an LSR for LNP purposes, McLeodUSA assesses Qwest a WSOC.

<sup>3</sup> Attachment 1 To Wholesale Service Order Charge Amendment (emphasis added).

**ANALYSIS**

Rule 56 of the Utah Rules of Civil Procedure states that summary judgment shall be granted where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Utah R.Civ.P. 56(c)*. We apply this standard as we evaluate the cross-motions, in light of the assertions of error in the Petition.

The Act at Section 251 imposes a duty on each telecommunication carrier, “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. . . .” *47 USC 251(a)(1)*. Additionally, an ILEC has the duty to negotiate in good faith the “particular terms and conditions of agreements” to fulfill the interconnection obligations, *47 USC 251(c)(1)*, as does a “requesting telecommunications carrier.” *Id.* Parties may negotiate a binding agreement, which “shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement.” *47 USC § 252(a)(1)*. If the parties reach a negotiated agreement, the agreement “shall be submitted” for approval to the state commission having jurisdiction. *47 USC §§ 252(a)(1) and (e)*.

The Act further allows “any party negotiating an agreement” at “any point in the negotiation” to ask us to participate in the negotiation and mediate any differences that may arise. *47 USC § 252(a)(2)*. Similarly, if the parties are unable to reach a negotiated agreement, the ILEC or any party to the negotiation process, may petition us to arbitrate “any open issues.” *47 USC § 252(b)(1)*. The Act provides guidelines for conducting the compulsory arbitration, *see*

*id.*, standards for use in arbitration, 47 USC § 252(c)-(d), and a deadline for either approval or rejection of an interconnection agreement by us. 47 USC § 252(e).

The price list language of McLeodUSA's WSOC (attached as Exhibit A to Qwest's Complaint, ¶ 7.1) states the WSOC 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 [ILEC]". Because the WSOC applies when McLeodUSA submits an order to "initiate service using network elements leased from" Qwest, the WSOC falls within the "itemized charges for interconnection and each service or network element" that must be included in an interconnection agreement. *See* 47 USC § 252(a)(1). Additionally, as already noted, any such agreement must be approved by the state commission having jurisdiction, in this instance this Commission. *Id.* Therefore, in order for the WSOC to have been assessed lawfully against Qwest, McLeodUSA first must have secured its inclusion in a Commission-approved interconnection agreement, either through negotiation with Qwest or prevailing in mediation or compulsory arbitration.

In this case the interconnection of the parties' facilities and equipment is governed by the ICA which reflects the parties' negotiated terms and conditions, including detailed schedules of the charges for various services and network elements. The ICA was reviewed by us and has been deemed approved. Its compliance with Sections 251 and 252 of the Act is unchallenged. It is also undisputed McLeodUSA added the WSOC to its Utah price list without complying with Sections 251 and 252 of the Act. McLeodUSA did not secure an amendment of the ICA, or seek mediation or arbitration before the Commission. Moreover, there is no

evidence McLeodUSA was in any way prevented from doing so. Indeed, it offers no explanation for its failure to follow the requirements of Sections 251 and 252 prior to adding the WSOC to the price list. Under these circumstances the Commission concludes the WSOC provision in McLeodUSA's Utah price list violates Sections 251 and 252 of the Act and is unlawful. There is no issue of material fact pertaining to this conclusion. McLeodUSA does not challenge this conclusion in its Petition.

The WSOC also violates state public utility law. Under Utah Code § 54-3-1, all charges demanded by any public utility for any service rendered "shall be just and reasonable. Every unjust and unreasonable charge made...is hereby prohibited and declared unlawful." We conclude McLeodUSA's failure to follow the requirements of the Act, in particular its failure to present the WSOC to this Commission for approval as the Act requires, renders the WSOC unjust and unreasonable. It is therefore prohibited and unlawful under Utah law.

Because this order will constitute "a Final Order that the Wholesale Service Order charge provisions in McLeodUSA's tariff in this state are ...unlawful," the "Termination" paragraph of the ICA Amendment quoted above is triggered. Accordingly, we deem the ICA Amendment terminated in Utah "with respect to charges for any Wholesale Service Orders after the effective date of the Commission's order." See ¶ 3. *Termination, Attachment 1 To Wholesale Service Order Charge Amendment*. There is no issue of material fact concerning the plain meaning of the "Termination" paragraph and its applicability. This Order on Reconsideration satisfies the operative language requiring a final order invalidating McLeodUSA's WSOC tariff

(i.e., price list) in this state.<sup>4</sup> Consequently, we conclude as a matter of law Qwest's obligations under the ICA Amendment are terminated, as of the date of this order.

In its Petition, McLeodUSA asserts the August Order ignores the ICA Amendment and the negotiated Amendment WSOC that is one of its terms. McLeodUSA claims the Commission erred in failing to distinguish between the WSOC (the \$20.00 charge McLeodUSA unilaterally placed on its Utah price list) and the Amendment WSOC (the \$13.10 charge Qwest subsequently agreed to pay provisionally in the ICA Amendment). McLeodUSA claims the central issue in this case is whether the Amendment WSOC is lawful. *See Petition, p. 3.* McLeodUSA further claims the validity of the WSOC it unilaterally placed on the Utah price list is a "red herring." *Id.* McLeodUSA reasons invalidating the price list WSOC for McLeodUSA's failure to impose this charge through a negotiated ICA amendment should have no effect on the validity of the Amendment WSOC which is, in fact, the fruit of a negotiated amendment to the parties' ICA.

McLeodUSA's assertions of error are incorrect and its arguments miss the point. Given the language of the "Termination" paragraph to which McLeod USA agreed, and which we approved, the fact that the Amendment WSOC was "negotiated" cannot sustain its validity beyond the termination of the ICA Amendment. Contrary to McLeodUSA's claims, the August

---

<sup>4</sup> McLeodUSA maintains a price list in Utah. Even though McLeodUSA does not have a tariff in Utah, ICA Amendment paragraphs, "2. Without Prejudice" and "3. Termination," refer to the wholesale service order "tariff" rather than "price list." This difference in terminology, however, is of no significance because the terms "tariff" and "price list" are used interchangeably in the ICA Amendment. This fact is established in the ICA Amendment's second Recital, which recognizes that McLeodUSA "maintains a tariff or price list on file in the State of Utah." The price list referred to is the source of the WSOC in controversy. There is no other "tariff" to which the ICA Amendment could arguably apply. Indeed, in its Petition, McLeodUSA itself uses the terms "tariff" WSOC and "price list" WSOC interchangeably with reference to the ICA Amendment: "Under the ICA Agreement [i.e., the ICA Amendment], Qwest retained only the narrow right to challenge the WSOC *tariff* provisions, i.e., the \$20 charge listed in Section 7 of the price list," *Petition, p.14 (emphasis in original)*. Thus it is clear, in the context of the ICA Amendment, "tariff" WSOC and "price list" WSOC refer to the same thing.

Order gives full effect to the ICA Amendment, including the provision that terminates the ICA Amendment upon a final order determining the price list WSOC to be unlawful. McLeodUSA's efforts to focus the Commission's analysis solely on the Amendment WSOC, on the other hand, entirely overlook the "Without Prejudice" and "Termination" paragraphs in the ICA Amendment itself, quoted above. It is not by mistake or confusion the August Order examines the legality of the WSOC in the Utah price list. That legal question is at the heart of Qwest's Complaint. Under the explicit terms of the "Termination" paragraph of the ICA Amendment, the legality of the price list (i.e., tariff) WSOC controls whether the ICA Amendment remains in force.<sup>5</sup> Because the Commission has found that WSOC to be unlawful, the ICA Amendment is terminated. Hence, as noted above, Qwest has no further obligation to pay the Amendment WSOC.

The Commission also finds, however, that Qwest has not established its entitlement to any refund of past payments of the Amendment WSOC. Indeed, it seems clearly to have been the intent of the parties that the Amendment WSOC would serve as a temporary resolution of the WSOC controversy, while Qwest challenged the WSOC in the Utah price list. It is not surprising, therefore, the ICA Amendment states unambiguously that a final Commission order triggering its termination pertains to charges for any wholesale service orders after the effective date of such order. For these reasons, the Commission herein clarifies that portion of the August Order requiring refunds of prior WSOCs. The refund ordered in this matter is limited to the amount of any Qwest payments of McLeodUSA's WSOC, i.e., the Utah

---

<sup>5</sup> McLeodUSA's own pleading further underscores the fact that the validity of the WSOC has been the central issue all along. Its cross-motion for summary determination refers simply to the "WSOC" and makes no distinction in terminology between the price list WSOC and the Amendment WSOC.

price list WSOC the Commission has declared unlawful. The refund order applies to such payments, if any, made during the year preceding the filing of Qwest's Complaint on June 8, 2009, the refund period requested in Qwest's Complaint. The refund order does not apply to prior payments of the Amendment WSOC, i.e. payments of the \$13.10 WSOC made between the date of our approval of the ICA Amendment and the issuance of this Order.

In their various pleadings, Qwest and McLeodUSA present numerous factual assertions (as well as arguments) addressing whether the WSOC is just, reasonable, and nondiscriminatory. For example, some of these assertions address the nature and costs of the various activities McLeodUSA must perform when one of its customers transfers to Qwest and desires to retain the existing telephone number. Other assertions address whether McLeodUSA already recovers the costs of such activities through certain customer charges. Because the Commission concludes the process by which McLeodUSA imposed the WSOC was unlawful, this Order on Reconsideration granting summary judgment does not reach the issues of whether the WSOC, or a similar charge lawfully implemented, could be just, reasonable and nondiscriminatory. Findings and conclusions in our August Order inconsistent with this determination are hereby vacated.

In the ICA Amendment, the parties express their intent to negotiate in good faith whether terms and rates similar to those in the ICA Amendment should be included in successor interconnection agreements. *See paragraph 2, Attachment 1 To Wholesale Service Order Charge Amendment.* Should the parties pursue this intention, the Commission would expect to assess whether such terms and rates are just, reasonable and applied without undue discrimination. This assessment would take place in the course of the Commission's review of

any proposed new interconnection agreement terms or the Act's dispute resolution processes, referred to above.

**ORDER**

For the foregoing reasons, the Commission:

1. grants Qwest's Motion and denies McLeodUSA's Motion;
2. declares the WSOC to be unjust and unreasonable, and in violation of federal and state law;
3. orders McLeodUSA to refund to Qwest any WSOCs Qwest paid pursuant to McLeodUSA's Utah price list between June 9, 2008 and June 8, 2009.

DATED at Salt Lake City, Utah, this 10<sup>th</sup> day of March, 2011.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard  
Commission Secretary  
G#71444