- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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

ISSUED: August 16, 2010

By The Commission:

This matter is before the Commission on Qwest Corporation (Qwest) and Paetec Business Services's (McLeodUSA) cross-Motions for Summary Judgment. This matter commenced when Qwest filed its Complaint against McLeodUSA for McLeodUSA's imposition of the Wholesale Service Order Charge (WSOC) in violation of Utah State Code §§54-3-1, 54-8b-2-2(1)(b), 54-8b-3.3[1], and in violations of the Telecommunications Act of 1996, 47 USC 151,

[1] 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.
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> . . .

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:
> (a) a telecommunications corporation with more than 30,000 access lines in the state that provides

et seq—specifically sections 251 and 252, which sections generally require charges to be negotiated or arbitrated and provided with nondiscrimination.

McLeodUSA generally and specifically denied Qwest's allegations in its Answer filed before the Commission.

The Commission set deadlines for the filing of cross-Motions, responses, response by the Division of Public Utilities (Division) to the Qwest and McLeodUSA moving papers, and responses by Qwest and McLeodUSA to the Division. There was a hearing set but the Commission struck that hearing pending its consideration of the cross-Motions.

Upon further review of the cross-Motions, the Commission declines to set a hearing in this matter, finding that the issues disposing of the cross-Motions are authoritatively decided and that a hearing would not materially assist the Commission in rendering a decision. *See Rule 7 of the Utah Rules of Civil Procedure.*

BACKGROUND

Qwest filed its Motion on or about January 28, 2010.[2] McLeodUSA filed its Motion on February 1, 2010.[3] On March 8, 2010, Qwest responded to McLeodUSA's Motion.[4]

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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;

[2] Qwest's Motion is supported by the affidavit of Robert H. Weinstein, an employee of Qwest in the wholesale markets organization. Qwest also supports its Motion with a portion of McLeodUSA's Utah price list (Exhibit A), a copy of the amendment to Qwest and McLeodUSA's interconnection agreement (Exhibit B), a copy of the Minnesota Public Utility Commission's decision that invalidated the WSOC in Minnesota (Exhibit C), and copies of McLeodUSA responses to Qwest data requests (Exhibit D).

On March 9, 2010, McLeodUSA responded to Qwest's Motion.[5] On April 15, 2010, the Division of Public Utilities (Division) filed their response to the cross-Motions. Qwest and McLeodUSA also replied to the Division's response. The parties' positions are detailed in their respective moving and responding papers, and also in their replies to the Division. For purposes of this Order, their positions are only summarized.

Qwest's Position

The 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—or port, its number. Qwest will submit a local service request (LSR) for local number portability (LNP) purposes, allowing the customer to switch companies and keep its number. When this LSR is submitted for LNP purposes, McLeodUSA assesses Qwest the $13.10 WSOC charge per occurrence. The WSOC is not imposed on any other carrier to whom a McLeodUSA end-user may switch its service—it is only imposed on Qwest.

The relationship between Qwest and McLeodUSA is governed by their interconnection agreement (Agreement), which provides the terms, conditions, and prices for network interconnection, access to UNE's, and ancillary network services and retails service available for resale. Therefore, charges made by McLeodUSA to Qwest must be contained in

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[3] McLeodUSA's Motion is supported by the declaration of Dr. August H. Ankum, who is senior vice president at QSI Consulting, Inc.---a firm specializing in economics, econometric analysis and telecommunications issues. McLeodUSA's Motion was also supported by the declaration of Patrica Lynott, vice-president of service delivery for McLeodUSA.

[4] Qwest's response was supported by the responsive affidavits of Mr. Weinstein, Christopher Viveros and David Vogel.

[5] McLeodUSA's response was supported by the reply declaration of Patrica Lynott.

the Agreement. Qwest argues McLeodUSA placed the WSOC in its Utah price list without negotiation or Commission approval. 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. Qwest argues that because McLeodUSA did not follow the arbitration or negotiation process required in sections 251 and 252 of the Telecommunications Act and as required by Utah law, in order to impose the WSOC, it may not now impose that charge outside of their Agreement.

Qwest also contends that McLeodUSA's arguments comparing the local service request (LSR) it submits to Qwest for an UNE to the LSR that Qwest submits for local number portability (LNP) are incorrect. Qwest argues that the WSOC "attempts to equate Qwest's approved installation charge for a loop with McLeodUSA's loss of an end-user customer to allow McLeodUSA to recover costs from Qwest to which it is not legally entitled." *Qwest Motion, p.20.* Qwest, however, claims such an attempt, is incorrect because the LSR submitted by McLeodUSA to Qwest are for the purchase of wholesale services to provide services to its customer. When Qwest submits an LSR, it is simply to notify McLeodUSA that the customer's number is to be ported, not to purchase any wholesale service from McLeodUSA. Additionally, Qwest notes that the rates it charges McLeodUSA for its purchase of UNEs are Commission-approved, based on TELRIC[6] cost studies, and specifically permitted by the Telecommunications Act. Therefore the comparison fails and the WSOC cannot stand.

Qwest argues that the WSOC violates federal law by including costs for number portability. Qwest argues that section 251 of the Telecommunications Act requires local

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[6] Total Element Long Run Incremental Cost

exchange carriers like McLeodUSA to provide number portability on a competitively neutral basis. The Federal Communication Commission (FCC) stated that the continued costs of providing number portability are part of the costs telecommunications carriers other than ILEC's impose to recover their number portability costs. Qwest also noted that McLeod's tariff provides for an LNP surcharge on all retail end-user customers. In Utah the surcharge is $.43 per month per line, which presumably recovers McLeodUSA's LNP costs. The WSOC would be a double-recovery of those costs.

Qwest further argues that the WSOC is violative of Utah Code § 54-3-1 in that the WSOC is not just and reasonable, and violative of Utah Code § 54-8b-2.2(1)(b) and Utah Code § 54-8b-3.3, both of which require telecommunications services be offered on a non-discriminatory basis. It makes specific arguments in support of those contentions as well.

McLeodUSA's Position

McLeodUSA claims it has complied with the negotiation provisions of the Telecommunications Act by negotiating with Qwest. McLeodUSA states it placed the WSOC in the Utah price list to recover the costs it incurs when LSRs are submitted to it. It stated that Qwest refused to pay the charge. As part of a settlement agreement resolving a variety of issues, McLeodUSA claims Qwest agreed to pay the WSOC and a mutually agreed rate on an interim basis but reserved the right to challenge the WSOC. The parties then amended their Agreement to reflect the change related to the interim payment of the WSOC. Because of these negotiations, McLeodUSA argues Qwest has no basis upon which to claim McLeodUSA failed to negotiate according to the provisions of the Telecommunications Act.

McLeodUSA contends its WSOC does not violate federal law because it does not attempt to recover LNP costs. In support of this, McLeodUSA contends the parties negotiated the $13.10 rate (McLeodUSA's price list has a rate of $20) based on Commission-approved nonrecurring costs (NRCs) attributed to Qwest's order processing activities, which Qwest has calculated to be $13.73. McLeodUSA notes that Qwest's own costs are higher than the $13.10 charged by McLeodUSA. It finally contends that it "is no more charging Qwest for LNP activities through its WSOC than Qwest is charging McLeodUSA for LNP through its NRCs."

McLeodUSA claims it maintains an operations support system (OSS) that enables carriers to place these LSR's and McLeodUSA to process them. McLeodUSA asserts it incurs costs in developing and maintaining its OSS, and the OSS is not exclusively dedicated to facilitating LNP. Therefore, the WSOC serves to compensate it for costs incurred in using its OSS to process the move from McLeodUSA to another service provider like Qwest. It claims that Qwest also maintains an OSS that is capable of electronically receiving and processing LSRs. McLeodUSA argues that Qwest has always maintained it incurs costs to develop and maintain its OSS, and cannot reasonably argue that others do not incur costs as well.

McLeodUSA also contends Qwest, as the "cost-causer" should pay for the costs it causes McLeodUSA to incur each time it submits an LSR. McLeodUSA argues that Qwest has claimed other carriers submitting LSRs to Qwest should compensate Qwest for those costs, and therefore, McLeodUSA should be entitled to assess its costs to Qwest in similar fashion.

McLeodUSA also argues its WSOC is just and reasonable. It states that the WSOC is "based on costs that the Commission has approved for the same or similar functions

that Qwest provides when it processes LSRs . . . ." Ultimately, the WSOC recovers the costs McLeodUSA incurs to process LSRs Qwest submits to McLeodUSA. Although McLeodUSA's WSOC does not include "costs associated with provisioning or disconnecting service", it "is established at a level equal to the Commission-approved costs for" similar activities Qwest takes to process LSRs and is not unjust or unreasonable.

McLeodUSA argues the WSOC is not unduly or unreasonably discriminatory because it applies to only carriers that submit LSRs to it and charge McLeodUSA for processing what McLeodUSA claims are comparable orders. It does not charge the WSOC to those carriers that engage in a bill-and-keep arrangement where neither carrier charges the other. McLeodUSA claims that because Qwest has declined to engage in bill-and-keep, it is assessed the WSOC. Therefore, the imposition of the WSOC is a result of Qwest's decision not to engage in bill-and-keep.

McLeodUSA also contends the WSOC is consistent with Applicable law. McLeodUSA performs LSR functions for Qwest, and uses the WSOC to recover those costs, like Qwest uses charges to McLeodUSA to recover its costs. McLeodUSA claims it is entitled to charge just and reasonable rates for the services it provides. McLeodUSA claims that—contrary to Qwest's claims otherwise, it has provided sufficient cost information, i.e. "Qwest's costs as proxies" to establish its WSOC. Because the costs used by Qwest to recover its LSR processing costs are Commission-approved, and because McLeodUSA's WSOC are based on those costs, and because Qwest agreed to set the WSOC at its current rate during the parties negotiations

relating to the Agreement amendment, using Qwest's costs as a proxy are reasonable. McLeodUSA claims it has provided sufficient evidence to support the WSOC and its amount.

Division's Response

The Division submitted a response addressing some of the issues raised by the parties. The Division argued that McLeodUSA did not follow the proper procedures in instituting its WSOC. The Division stated that the price list was meant to detail services available to the public, e.g. services available to a residential or business customer, not for listing wholesale services not available to the public. The Division argued that the WSOC was a charge "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 Division contended that McLeodUSA circumvented the proper procedures for resolving such disputes by listing the WSOC in the price list, rather than proceeding through the negotiation and arbitration process of Section 252 of the Telecommunications Act and following the process set forth in Utah Code § 54-8b-2.2. The Division argued that at the time McLeodUSA and Qwest were negotiating, McLeodUSA should have raised the issue of the WSOC, and if they could not come to an agreement, McLeodUSA could have petitioned the Commission for assistance in mediating the differences, *see 47 USC § 252(a)*, or made a request for arbitration to the Commission, *see 47 USC § 252(b)*.

The Division asserts the costs for LNP should not be recovered through charges to carriers. It stated that if the Commission concludes, "based on the various affidavits, that the

WSOC is, in essence, recovering LNP charges from Qwest" then the Commission should grant Qwest's motion.

The Division also argued that any charge, like the WSOC, should be cost-based and non-discriminatory. The Division points to Utah Code §54-8b-2.2(1)(f) for support that it is not a discriminatory practice to vary prices to reflect genuine cost differences. However, the WSOC must find support in evidence presented before the Commission, and the Commission must find the WSOC to be non-discriminatory.

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).*

Under Section 251 of the Telecommunications Act, each telecommunication carrier has the duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carrier. . . ." *47 USC 251(a)(1).* Additionally, an incumbent local exchange carrier (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).* The Telecommunications Act further allows "any party negotiating an agreement" at "any point in the negotiation" to ask

the Commission to participate in the negotiation and mediate any differences that may arise. *47 USC § 252(a)(2)*. If the parties reach a negotiated agreement, then the agreement "shall be submitted", *47 USC § 252(a)(1)*, to the Commission for approval. *47 USC § 252(e)*.

If the parties are unable to reach a negotiated agreement, however, then the ILEC or any party to the negotiation process, may petition the Commission to arbitrate "any open issues" within the timeframe specific in the Telecommunications Act. *47 USC § 252(b)(1)*.

The Telecommunications Act provides guidelines for conducting the compulsory arbitration, *see id*, standards for use in arbitration, *47 USC § 252(c)-(d)*, and also a deadline for either approval or rejection of an interconnection agreement by the Commission. *47 USC § 252(e)*.

The language of McLeodUSA's price list governing the WSOC (*attached as Exhibit A to Qwest's Complaint*, ¶ *7.1*) states that 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 relates to "itemized charges for interconnection and each service or network element" that would be included in an interconnection agreement, *see 47 USC § 252(a)(1)*, that is subject to Sections 251 and 252. Therefore, in order for the WSOC to have been assessed against Qwest, McLeodUSA must have either negotiated its addition to the agreement before its assessment, or the parties must have proceeded through compulsory arbitration if there were "any open issues"

concerning the WSOC. McLeodUSA could have obtained a resolution allowing it to put the WSOC in the interconnection agreement before imposing it in its price list. Here, there is no dispute that McLeodUSA failed to do either before imposing the WSOC in its price list, that it violates federal and state law, and may not be enforced by McLeodUSA.

McLeodUSA's supporting affidavits raised many issues regarding the policy justifications for McLeodUSA's imposition of the WSOC and the reasons for using Qwest costs as proxies for its own costs. For example, Dr. Ankum contended that McLeodUSA's WSOC was "consistent with economic principles and sound public policy." *Ankum Declaration*, p.4. In essence, he contended that because McLeodUSA was providing a service for Qwest, e.g. fulfilling a LSR to McLeodUSA, it was due compensation for performing that service. He contended that McLeodUSA incurs costs for processing the LSRs and that Qwest, as the cost-causer, should pay for those costs. Dr. Ankum also contended that it, as a CLEC, was not generally required to provide cost support for the WSOC, but could use Qwest costs as a proxies. *See Ankum Declaration*, ¶28-30. For these reasons, McLeodUSA argued its WSOC was just and reasonable and not discriminatory.

Despite the underlying policy and economic reasons for imposing the WSOC, McLeodUSA must still abide by the governing provisions of the Telecommunications Act and Utah telecommunications law. There may be several policy justifications for McLeodUSA's imposition of the WSOC. It may be entitled to the WSOC, and it may be determined that, ultimately, Qwest's own costs are an appropriate proxy for McLeodUSA's own charges. Whatever policy or economic justifications it may have, however, the law is clear that

McLeodUSA must have, *before* imposing the WSOC, negotiated its imposition in an interconnection agreement.[7] If it and Qwest were unable to reach agreement as to the imposition of the WSOC, it could have requested the Commission mediate the issue, or asked for compulsory arbitration *before* it imposed the WSOC. 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.

Because the Commission finds that there is no factual dispute that McLeodUSA failed to use the proper vehicle for implementing its WSOC, and because Qwest is entitled to judgment as a matter of law, the Commission does not address the parties' remaining arguments raised in their cross-Motions.

The Commission further finds that the WSOC violates state law as being unjust, unreasonable, and discriminatory. McLeodUSA claims its assessment of the WSOC solely against Qwest is not a result of discrimination, but a result of genuine cost difference in providing Qwest (a company that does not choose to engage in a bill-and-keep) the LSR processing as opposed to other companies (who do engage in bill-and-keep) the same service. Whatever those differences may be, however, they must be based on genuine cost differences that must be established before the Commission. They have not been established sufficiently

[7] McLeodUSA may still raise such issues and may still seek whatever cost recovery it feels it deserves, but must use the proper vehicle for doing so, i.e. negotiation (including possible mediation) or arbitration under the provisions of Section 251 and 252 of the Telecommunications Act.

before the Commission, and the Commission does not have a basis to conclude that they are not discriminatory. Additionally, permitting McLeodUSA to include the WSOC in its price list, thereby circumventing the negotiation and arbitration process, would discriminate against every other telecommunications corporation that was/is required to abide by state and federal law in approving an interconnection agreement. Allowing McLeodUSA to maintain its WSOC would violate state law.

ORDER

For the foregoing reasons, the Commission

1. grants Qwest's Motion and denies McLeodUSA's Motion;
2. declares the WSOC to be unjust, unreasonable, discriminatory and in violation of federal and state law;
3. orders that McLeodUSA repay all WSOCs paid by Qwest to McLeodUSA for a period of one year prior to the filing of Qwest's underlying complaint;
4. Pursuant to Sections 63G-4-301 and 54-7-15 of the Utah Code, an aggrieved party may request agency review or rehearing of this Order by filing a written request with the Commission within 30 days after the issuance of this Order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission does not grant a request for review or rehearing within 20 days after the filing of the request, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30

days after final agency action. Any petition for review must comply with the requirements of Sections 63G-4-401 and 63G-4-403 of the Utah Code and Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 16th day of August, 2010.

/s/ Ruben H. Arredondo
Administrative Law Judge

Approved and confirmed this 16th day of August, 2010, as the Report and Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#67720