

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

QWEST CORPORATION,	)	DOCKET UT-090892
)	
Complainant,)	
	)	ORDER 05
v.)	
)	
MCLEODUSA	)	INITIAL ORDER DENYING
TELECOMMUNICATIONS	)	<u>GRANTING</u> QWEST'S MOTION
SERVICES, INC., d/b/a PAETEC	)	FOR SUMMARY
BUSINESS SERVICES,	)	DETERMINATION AND
	)	DENYING -GRANTING
Respondent.	)	MCLEODUSA'S MOTION FOR
.....	)	SUMMARY DETERMINATION

1 **SYNOPSIS.** *This is an Administrative Law Judge's Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of this order. This order ~~denies~~grants the Motion for Summary Determination filed by Qwest Corporation (Qwest) and grants~~denies~~ the Motion for Summary Determination filed by McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services (McLeodUSA). This order finds that the Qwest entered into the Wholesale Service Order Charge (WSOC) Amendment allows Qwest to bring all challenges to the WSOC that it could have brought absent the Amendment. The WSOC as contained in McLeod's price list violates state and federal law as discussed herein. ~~voluntarily in order to resolve certain business disputes and that aspects of its nonrecurring charges are comparable to McLeodUSA's WSOC. Thus, this order concludes that Qwest has not established per se that the WSOC is being imposed in violation of the Telecommunications Act of 1996 or state law.~~*

2 **NATURE OF PROCEEDING.** On June 10, 2009, Qwest Corporation (Qwest or Complainant) filed with the Washington Utilities and Transportation Commission (Commission) a formal complaint (Qwest's Complaint) against McLeodUSA

Telecommunications Services, Inc., d/b/a PAETEC Business Services (McLeodUSA). On July 2, 2009, McLeodUSA filed an answer to the complaint. Qwest's Complaint alleges that McLeodUSA's assessment of its Wholesale Service Ordering Charge (WSOC) violates RCW 80.04.110, which prohibits conduct by a competitor that is unreasonable, discriminatory, illegal, unfair or intending or tending to oppress the complainant, or to stifle competition. Further, Qwest's Complaint argues that the imposition of the WSOC through a price list is in direct violation of the Telecommunications Act of 1996 (the Act), Public Law 104-104, 110 Stat. 56 (1996), specifically 47 U.S.C. §§ 251 and 252, which requires that the WSOC be imposed only through arbitration or negotiation.

3 **APPEARANCES.** Lisa Anderl, attorney, Seattle, Washington, represents Qwest. Gregory J. Kopta, Davis Wright Tremaine LLP, Seattle, Washington, represents McLeodUSA.

4 **PROCEDURAL HISTORY.** The Commission convened a prehearing conference in this docket at Olympia, Washington, on July 29, 2009, before Administrative Law Judge Marguerite E. Friedlander. On July 30, 2009, the Commission entered Order 01 which established the procedural schedule.¹

5 On October 19, 2009, Qwest and McLeodUSA filed motions for summary determination. On November 23, 2009, both parties filed responses to the motions.

6 On March 11, 2010, the Commission issued a Notice of Bench Requests. Bench Request No. 1 sought a stipulation of facts from the parties. Bench Request No. 2 directed Qwest to indicate whether it had filed a formal complaint in any other jurisdiction against McLeodUSA regarding the same issues as the instant case in the state of Washington, and, if so, to indicate the docket numbers for those matters.

7 On March 17, 2010, Qwest filed its response to Bench Request No. 2. The parties filed their response to Bench Request No. 1 on March 22, 2010, with a supplemental response (Supplemental Response No. 1) filed on April 9, 2010.

¹ The Commission entered Order 02, a protective order, on July 30, 2009. Orders 03 and 04, which revised the procedural schedules, were entered on October 14, 2009, and March 23, 2010, respectively.

8 On May 12, 2010, the Commission issued Bench Request No. 3 which directed the parties to define certain acronyms contained within the joint stipulation of facts. The parties filed their response to Bench Request No. 3 on May 17, 2010.

9 The Commission issued Bench Request Nos. 4, 5, and 6 on July 13, 2010. Bench Request No. 4 instructed Qwest to evaluate certain customer migration situations and inform the Commission as to whether Qwest would impose a customer transfer charge for any of them. Bench Request No. 5 asked McLeodUSA to provide a copy of any interconnection agreement (ICA) indicating explicitly that McLeodUSA does not charge other competitive local exchange carriers (CLECs) the WSOC due to a bill and keep relationship. Bench Request No. 6 directed both parties to answer questions related to the use of local service requests (LSRs). Qwest and McLeodUSA filed responses to the bench requests on July 19, 2010.

10 On August 17, 2010, Qwest filed supplemental authority with the Commission. Specifically, Qwest filed an August 16, 2010, order from the Public Service Commission of Utah (Utah Commission) addressing an identical complaint brought before it by Qwest. The Utah Commission's order grants Qwest's Motion for Summary Determination based primarily on two findings: 1) the WSOC is an interconnection charge that should have been imposed through a process defined within the Act, not a price list; and 2) McLeodUSA did not sufficiently establish the cost differences in providing LSR processing to Qwest as opposed to other companies, so there is no basis for concluding that the WSOC is not discriminatory.²

MEMORANDUM

11 Qwest and McLeodUSA are telecommunications carriers that interconnect their networks and exchange traffic in Washington pursuant to an existing ICA. In order to resolve a number of business disputes between the two parties, Qwest and McLeodUSA entered into a settlement agreement on October 10, 2008, entitled

² *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, (August 16, 2010), at 12-13.

Wholesale Service Order Charge Amendment (WSOC Amendment).³ The WSOC Amendment was filed with the Commission. It was approved and became effective on May 7, 2009.⁴ It requires that Qwest pay McLeodUSA's WSOC when Qwest submits a LSR to migrate a customer from McLeodUSA to Qwest.⁵ In addition, the WSOC Amendment preserves Qwest's ability to challenge the WSOC before the Commission.⁶ Finally, it provides for implementation and retroactive application of the WSOC to August 1, 2008, regardless of its lawful effective date as a consequence of the Commission's approval.

I. GOVERNING LAW

12 In ruling on the motions, the Commission considers the rule governing summary determination. WAC 480-07-380(2) provides that:

A party may move for summary determination of one or more issues if the pleadings filed in the proceeding, together with any properly admissible evidentiary support (e.g., affidavits, fact stipulations, matters of which official notice may be taken), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In considering a motion made under this subsection, the [C]ommission will consider the standards applicable to a motion made under CR 56 of the Washington [S]uperior [C]ourt's [C]ivil [R]ules.

13 Typically, the agency's determination is two-fold. First, the Commission must review the pleadings and supporting evidence to ascertain whether there is a dispute as to any question of fact material to our determination of the issues that cannot be resolved without resorting to further process, i.e., an evidentiary hearing, to develop additional evidence. Second, if the agency can make all findings of fact necessary to a decision on the basis of the pleadings and supporting evidence, it considers that evidence in the

³ Qwest's Complaint, ¶ 8.

⁴ *Id.*, ¶ 9.

⁵ *Id.*, ¶ 11.

⁶ *Id.*, Exhibit B.

light most favorable to the nonmoving party⁷ and determines whether the moving party is entitled to judgment as a matter of law.⁸ The Commission will grant motions for summary determination only where reasonable minds “could reach but one conclusion from all the evidence.”⁹

14 The nonmoving party may not rely upon speculation or argumentative assertions in meeting their burden.¹⁰ As the Court of Appeals has stated, “[e]xpert testimony must be based on the facts of the case and not on speculation or conjecture.”¹¹ CR 56(e) provides that declarations containing conclusory statements that are unsupported by facts are insufficient for purposes of summary determination.¹²

II. UNDISPUTED FACTS

15 Qwest is a telecommunications corporation as defined in RCW 80.04.010 and is an incumbent local exchange company (ILEC), as defined by 47 U.S.C. § 251(h) within the Act.¹³ Qwest provides local exchange and other telecommunications services in the state of Washington.¹⁴

16 McLeodUSA is an Iowa corporation and is registered with and classified by the Commission as a CLEC and is also a telecommunications corporation as defined in

⁷ *Activate, Inc., v. State, Dept. of Revenue*, 150 Wash.App. 807, 812, 209 P.3d 524 (2009) (citing *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wash.2d 16, 26, 109 P.3d 805 (2005)).

⁸ CR 56(c).

⁹ *Activate*, 150 Wash.App. at 812, (citing *Vallandigham*, 154 Wash.2d at 26).

¹⁰ *Marshall v. Bally's Pacwest, Inc.*, 94 Wash.App. 372, 377, 972 P.2d 475 (1999) (citing *Vacova Co. v. Farrell*, 62 Wash.App. 386, 395, 814 P.2d 255 (1991)).

¹¹ *Davies v. Holy Family Hospital*, 144 Wash.App. 483, 493, 183 P.3d 283 (2008) (citing *Seybold v. Neu*, 105 Wash.App. 666, 677, 19 P.3d 1068 (2001)).

¹² CR 56(e) and *Davies*, 144 Wash.App. at 496 (citing *Guile v. Ballard Cmty. Hosp.*, 70 Wash.App. 18, 25, 851 P.2d 689 (1993)).

¹³ Supplemental Response No. 1, ¶ 1.

¹⁴ *Id.*

RCW 80.04.010.¹⁵ McLeodUSA is authorized to provide switched and non-switched local exchange and long distance services in Washington.¹⁶

17 Qwest and McLeodUSA are parties to an ICA entitled “Local Interconnection Agreement,” which was voluntarily negotiated, as is permitted by the Act.¹⁷ The ICA was filed by Qwest and subsequently approved by the Commission on August 30, 2000, in Docket UT-993007.¹⁸

18 The ICA provides the terms, conditions, and prices for network interconnection, access to unbundled network elements (UNEs), ancillary network services, and retail service available for resale.¹⁹

19 McLeodUSA leases UNEs or other facilities from Qwest to serve the majority of end user customers in Washington.²⁰

20 When McLeodUSA leases UNEs or other facilities from Qwest to serve McLeodUSA end user customers, the transaction is performed pursuant to the ICA.²¹

21 Except for local call termination services, Qwest does not purchase any network facilities or services from McLeodUSA under the ICA on either a wholesale or retail basis when providing service to its end users.²²

22 The non-recurring charges (NRCs) that Qwest assesses for installation of unbundled loops are based on Total Element Long Run Incremental Cost (TELRIC) studies that were approved by the Commission in wholesale cost proceedings, Dockets UT-960369 and UT-003013.²³

¹⁵ Supplemental Response No. 1, ¶ 1.

¹⁶ *Id.*

¹⁷ *Id.* ¶ 3.

¹⁸ *Id.*

¹⁹ *Id.* ¶ 4.

²⁰ *Id.* ¶ 5.

²¹ *Id.* ¶ 6.

²² *Id.* ¶ 7.

²³ *Id.* ¶¶ 8, 11.

- 23 The approved rates in those proceedings permit Qwest to charge McLeodUSA specifically enumerated NRCs when McLeodUSA orders an unbundled loop for installation.²⁴
- 24 Part of Qwest's cost study includes cost support for NRCs which recover the costs Qwest incurs to process LSRs submitted by CLECs ordering unbundled loops.²⁵ Among other things, the cost study specifically included costs related to order processing and completion.²⁶
- 25 When an end user switches from Qwest to any other local service provider, Qwest assesses a Commission-approved installation NRC to the new local service provider if it orders an unbundled loop from Qwest.²⁷
- 26 When an end user switches from Qwest to another local service provider that is not using unbundled loops from Qwest to provide its service to that end user, Qwest does not assess that other local service provider an installation NRC as that provider is not ordering an unbundled loop. Qwest does charge a Customer Transfer Fee for any resold line purchased by McLeodUSA.²⁸ There are also NRCs for Qwest Local Services Platform[®] (QLSP[®]) services purchased by McLeodUSA.²⁹ Those QLSP[®] NRCs include the installation of the unbundled loop.³⁰
- 27 McLeodUSA's WSOC was filed as part of McLeodUSA's Price List, Washington UTC Price List No. 1, Original Sheet No. 126, effective April 10, 2004 (WSOC Price List).³¹ The WSOC Price List provision states:

²⁴ *Id.*, ¶ 9.

²⁵ *Id.*, ¶ 10.

²⁶ *Id.*

²⁷ *Id.*, ¶ 12.

²⁸ *Id.*, ¶ 13.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*, ¶ 14.

A Wholesale Service Order charge 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 incumbent local exchange carrier.³²

28 McLeodUSA charges the WSOC to Qwest when an end user customer switches from McLeodUSA to Qwest.³³ McLeodUSA does not assess any other local service provider the WSOC based on McLeodUSA's application of the WSOC Price List.³⁴

29 No other LEC operating in Washington charges either McLeodUSA or Qwest an NRC when a customer leaves that carrier and moves their telecommunications services, including local services, to McLeodUSA or to Qwest.³⁵

30 McLeodUSA and Qwest are parties to a multistate WSOC Amendment that was filed with the Commission for approval and approved by the Commission on May 7, 2009, in Docket UT-993007.³⁶ The Amendment reflected the resolution of "other business issues" which, in resolving such issues, allowed the parties to reach agreement on the application of the WSOC both retroactively and prospectively.³⁷

31 Under the WSOC Amendment, McLeodUSA invoices Qwest "for [WSOC] charges associated with orders submitted by Qwest to transfer a CLEC customer to Qwest, and [Qwest] will pay such invoices according to the payment terms of the Agreement."³⁸

³² *Id.*

³³ *Id.* ¶ 15.

³⁴ *Id.*

³⁵ *Id.* ¶ 16.

³⁶ *Id.* ¶ 17.

³⁷ *Qwest's Memorandum*, ¶ 19.

³⁸ Supplemental Response No. 1, ¶ 18 and Amendment, ¶ 1.

32 The WSOC Amendment specifically preserves Qwest's rights to challenge the WSOC.³⁹ 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.⁴⁰

33 The WSOC Amendment provides that the WSOC in Washington is \$21.24.⁴¹

34 When a customer decides to leave McLeodUSA and take services from Qwest while keeping its telephone numbers, Qwest submits an LSR via a McLeodUSA web-based Operations Support Systems (OSS).⁴² Depending on the customer's service configuration with McLeodUSA as reflected in the Customer Service Record McLeodUSA's form permits a carrier to submit an LSR that requests that McLeodUSA disconnect additional lines that are not being ported to that carrier.⁴³ The McLeodUSA OSS takes the information completed by the LEC and streams that information into various internal systems.⁴⁴ Based on the LSR, the system initiates, and in some instances, completes various tasks that must be performed to ensure that end users can seamlessly move their local service to their new local service provider.⁴⁵ Undertaking such steps to ensure a seamless transition is in the best interests of the end user.⁴⁶

35 In addition to the OSS, McLeodUSA personnel are involved in various aspects of completing the steps required to process an LSR for number portability, service disconnection, line disconnection, or all of the above.⁴⁷ Among other tasks, these employees perform the following:

³⁹ *Id.* ¶ 19.

⁴⁰ *Id.*

⁴¹ *Id.* ¶ 20.

⁴² *Id.* ¶ 21.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* ¶ 22.

- Release of Trigger in the McLeodUSA switch
- Grant concurrence in the Number Portability Administration Center
- Pull the telephone number from the McLeodUSA switch once the line has ported out
- Change McLeodUSA's internal facility assignment to the correct status
- Delete McLeodUSA's Line Information Data Base (LIDB) record
- Unlock the 911 record
- Send Care records
- Terminate McLeodUSA's billing to the end user⁴⁸

36 A LEC may request expedited processing of an LSR by McLeodUSA.⁴⁹ Expediting the processing of an LSR can cause McLeodUSA to roll a truck to a switch site or engage in special manual processes to complete the processing of an LSR in a severely compressed amount of time.⁵⁰

37 When a McLeodUSA end user changes its local service from McLeodUSA to Qwest and chooses to have a new number assigned, Qwest may send McLeodUSA a loss report or the end user may notify McLeodUSA directly.⁵¹

38 Qwest submits an LSR to McLeodUSA when a local telephone customer requests that his or her telephone number be ported over to Qwest as its new local service provider.⁵²

III. ISSUES

A. Qwest's Claim of Failure to Negotiate Under the Telecommunications Act

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* ¶ 24.

⁵² *Id.* ¶ 25.

39 Qwest maintains that McLeodUSA's imposition of the WSOC violates the Act⁵³ since McLeodUSA should have used the interconnection negotiation process if it wished to assess the WSOC.⁵⁴ Qwest argues that the Commission need not go further in addressing any of McLeodUSA's arguments since, if McLeodUSA feels it is justified in implementing this charge, it can voice these arguments during the negotiation process.⁵⁵ Qwest asserts that the price list memorializing the WSOC applies the charge when McLeodUSA receives a request "to initiate service using network elements leased from the [ILEC]."⁵⁶ These network elements are, according to Qwest, leased under the terms and conditions found in the ICA, and thus the WSOC should have been handled in the ICA.⁵⁷

40 Qwest asserts that McLeodUSA's WSOC only applies to ILEC's providing McLeodUSA with UNEs.⁵⁸ Even then, Qwest states that it is only after the ILEC providing the UNEs to McLeodUSA submits an LSR to alert McLeodUSA to the request for number portability that McLeodUSA will assess the WSOC.⁵⁹ Qwest maintains that both UNEs and number portability are specifically addressed under the provisions of the Act.⁶⁰ As a result, Qwest contends that the parties are required to resolve the issues surrounding the assessment of the WSOC through the interconnection negotiation process envisioned by the Act.⁶¹ Instead, Qwest states that McLeodUSA filed a price list imposing its WSOC for every LSR submitted.⁶²

⁵³ See Qwest's Answer, ¶ 10-11.

⁵⁴ *Id.* ¶ 12.

⁵⁵ *Id.* ¶ 13.

⁵⁶ *Id.* ¶ 15, citing Section 7 of McLeodUSA's Price List.

⁵⁷ *Id.*

⁵⁸ Qwest's Motion, ¶ 26.

⁵⁹ *Id.* and Exhibit A to Qwest's Motion, at 126.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* ¶¶ 16, 27.

41 Qwest admits that the parties executed an amendment to the ICA containing the WSOC and has filed the amendment with its complaint.⁶³ However, Qwest argues that the WSOC Amendment was intended to operate solely on a temporary basis while still preserving Qwest’s right to object to the WSOC.⁶⁴ For this reason, Qwest contends that the Commission should ignore the WSOC listing in the WSOC Amendment and treat it “as if it did not exist ...”⁶⁵ In addition, Qwest points out that another jurisdiction, the state of Minnesota, found that McLeodUSA’s tariff containing the WSOC violated the Act which requires that terms and conditions be negotiated or arbitrated and then implemented through the ICA.⁶⁶

42 McLeodUSA counters that it did negotiate the WSOC with Qwest before implementing it.⁶⁷ McLeodUSA asserts that the WSOC was one item in a settlement agreement resolving multiple issues and that Qwest agreed to pay the charge but reserved its right to challenge the WSOC’s validity.⁶⁸ McLeodUSA argues that the parties’ negotiations resulted in the WSOC Amendment to the ICA, that the WSOC Amendment was filed with the Commission, and that it became effective in 2009.⁶⁹

43 | **Decision.** We ~~reject Qwest’s proposal that we ignore a~~will enforce the voluntarily-negotiated and fully-executed ICA amendment that had been previously approved by this Commission. Section 252(e) of the Act specifically requires that, “[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission.”⁷⁰ The parties clearly negotiated and entered into

⁶³ *Id.* ¶ 27 and Attachment 1 to Exhibit B of Qwest’s Complaint.

⁶⁴ *Id.* ¶ 27.

⁶⁵ *Id.*

⁶⁶ *Id.* ¶ 29. Qwest quotes the Minnesota Public Utilities Commission as finding that “interconnection negotiations are the primary vehicle for resolving interconnection issues.” *Id.* n. 21, quoting *In the Matter of McLeodUSA’s Tariff Filing Introducing Wholesale Order Processing Charges that Apply When McLeodUSA’s Customers Shift to Other Telecommunications Carriers*, Docket No. P-5323/M-04-395, Order Rejecting Proposed Wholesale Service Charge, July 22, 2004.

⁶⁷ McLeodUSA’s Response, ¶ 3.

⁶⁸ *Id.*

⁶⁹ *Id.* ¶ 4.

⁷⁰ 47 U.S.C. § 252(e)(1).

an agreement to revise their existing ICA and filed it with us for approval. The terms of that Amendment clearly allow Qwest to challenge the WSOC terms in the price list, and, if such a challenge is sustained, the Amendment is deemed terminated. ~~They did so to resolve certain unspecified business issues indicating a clear *quid pro quo* exchange of consideration of which, in part, is the WSOC Amendment. There is nothing in the record that suggests that either party, particularly Qwest, did not comprehend the scope or intent of each term and condition of the WSOC Amendment, including establishment and contractual application of the WSOC as of August 1, 2008.~~

44 | ~~As~~ The Utah Commission determined, and we agree, that the WSOC, as a wholesale charge, should never have been included in McLeodUSA's price list, a document principally intended to address the rates, terms and conditions of services provided to retail customers. ~~However, this apparent defect was overcome by inclusion of the WSOC in the mutually negotiated ICA Amendment. Unlike 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.⁷¹~~

45 | ~~While Qwest points to~~ The WSOC Amendment language where ~~it~~ Qwest reserved its rights to contest the applicability of the charge in ~~some sort of a~~ prospective dispute is clear, and as previously approved by the Commission, it is binding on the Commission and the parties. ~~, we find it absurd that the company would enter into the agreement willfully only to contest certain aspects of its provisions in a subsequent proceeding. It is clear that Qwest agreed to the imposition of the WSOC in exchange for some unspecified concession it received from McLeodUSA. Once approved by the Commission, the WSOC Amendment effectively replaced the disputed provisions~~

⁷¹ ~~Qwest fails to explain why it took the company more than five years to contest a charge it asserts is both discriminatory and anti-competitive, and to which it voluntarily incorporated into the parties' existing ICA. We note that the parties' ICA was approved in 2000, and that McLeodUSA's price list containing the WSOC became effective sometime in 2004, more than five years prior to Qwest's filing of the complaint at issue in this proceeding. While we could reach the same conclusion as Utah regarding the merits of including the WSOC in McLeodUSA's price list, we are not inclined to do so in light of the subsequent steps that both parties undertook pursuant to the Act.~~

~~of McLeodUSA's price list.⁷² Thus, Qwest's own actions in voluntarily compromising and seeking Commission approval of the WSOC Amendment effectively undercuts the company's contention that the disputed charge is both unlawful and discriminatory or that it was somehow established incorrectly. If the WSOC was objectionable to the company during the course of negotiating the WSOC Amendment, it should have pursued the matter in arbitration at that time rather than taking specific action to enable the agreement to become effective only to misuse the parties' and Commission's valuable resources in a subsequent proceeding seeking to overturn the effect of Qwest's own contractual concession.~~

46 We also find the Minnesota decision to be analogous inapposite from to the instant case. In that proceeding, the parties had not executed an ICA amendment containing the WSOC prior to the initial filing, but the analysis is the same – the WSOC price list violates state and federal law, and under the terms of the Amendment the Amendment is deemed terminated. ~~In this proceeding, we have a lawfully executed and effective WSOC Amendment before us that directly pertains to the charge, and we are unwilling to simply pretend it doesn't exist.~~

B. Qwest's Claim of Discriminatory and Anti-Competitive Terms

47 When a customer leaves McLeodUSA to become a Qwest customer and wants to retain its original telephone number,⁷³ Qwest maintains that it will send McLeodUSA a LSR.⁷⁴ Qwest explains that the LSR advises McLeodUSA of several occurrences: 1) that McLeodUSA's end user is leaving, 2) that McLeodUSA must port the customer's number, and 3) that the UNE McLeodUSA purchases from Qwest should

⁷² Even as the WSOC Amendment references McLeodUSA's price list, it also provides that the terms of the parties' agreement are only contained within Attachment 1 and the Pricing Exhibit to the WSOC Amendment. The WSOC Amendment, its Attachment 1, and Pricing Exhibit do not recite all of the terms contained within the price list, nor do they make the price list a part of the terms and conditions of the WSOC Amendment.

⁷³ This practice is known as number porting, and, as Qwest contends, the previous service provider is required to port telephone numbers under both federal and state law. See 47 C.F.R. Part 52.26 and WAC 480-120-146. Qwest's Motion, n. 8. Qwest maintains that neither of these provisions allows McLeodUSA to assess a number porting charge. *Id.*

⁷⁴ Qwest's Motion, ¶ 15.

be disconnected on a specific date.⁷⁵ Qwest states that, if McLeodUSA did not disconnect the local loop it was using for the customer, Qwest could continue to unnecessarily charge McLeodUSA for the UNE.⁷⁶

48 Qwest argues that the WSOC is anti-competitive and discriminatory pursuant to state law and the Act.⁷⁷ According to Qwest, McLeodUSA only assesses this charge on Qwest and not on any of the other carriers to which McLeodUSA end user customers may migrate.⁷⁸ Qwest asserts that the WSOC rate has not been approved by the Commission.⁷⁹ Instead, Qwest contends that the WSOC is found in McLeodUSA's price list which is available only on McLeodUSA's website.⁸⁰ The Company notes that McLeodUSA's price list characterizes the WSOC as applying to carriers that "... assess a nonrecurring charge on McLeod[USA] for comparable orders submitted by McLeod[USA] to initiate service using [UNEs] leased from the incumbent local exchange carrier."⁸¹

49 Qwest contends that the LSR McLeodUSA submits to the company in order to request wholesale UNE services is not comparable to Qwest's LSR to transfer a customer.⁸² Qwest states that it does not purchase UNEs from McLeodUSA and would only send an LSR to notify a carrier that a number needed to be ported.⁸³ If the LSR were not sent, Qwest posits that "the port might not occur correctly and McLeod[USA] would be paying a monthly recurring charge for a service it did not

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* ¶ 4.

⁷⁸ *Id.* ¶ 5. Qwest has also alleged that McLeodUSA, on occasion, charges Qwest when one of McLeodUSA's customers migrates to a LEC other than Qwest. *Id.* However, Qwest has provided no evidence to substantiate this assertion, and even if it had, this would be a factual determination that could not be made on summary determination.

⁷⁹ *Id.* ¶ 6.

⁸⁰ *Id.* ¶18 and n. 12.

⁸¹ Qwest's Motion, ¶ 33, quoting McLeodUSA's Price List, Section 7.1.

⁸² *Id.* ¶ 34.

⁸³ *Id.*

use.”⁸⁴ In addition, Qwest points out that it is required to provide McLeodUSA with an LSR when an end user switches service providers.⁸⁵

50 According to Qwest, the WSOC is not comparable to the NRC Qwest assesses against McLeodUSA.⁸⁶ Qwest maintains that the rates it charges McLeodUSA are Commission-approved and based on TELRIC studies.⁸⁷ Qwest contends that there is no question as to its legal authority to charge its rates since they are authorized by the Act and the result of McLeodUSA’s decision to take services from Qwest in the form of leasing UNEs.⁸⁸ The company asserts that this relationship is governed by the ICA, which allows Qwest to charge McLeodUSA the NRC for such activities as installing or disconnecting unbundled loops.⁸⁹ Qwest asserts that McLeodUSA does not incur costs to provide a service or a product to Qwest or to connect or disconnect a Qwest customer.⁹⁰

51 Qwest argues that McLeodUSA is charging Qwest to port customer telephone numbers, and the law does not permit such recovery for number porting.⁹¹ Qwest asserts that, because it is the only LEC assessed the WSOC, the WSOC acts as a deterrent to Qwest from competing with McLeodUSA for customers.⁹² Qwest notes that it does not charge McLeodUSA at all for processing an LSR when a Qwest customer migrates to McLeodUSA.⁹³ Finally, Qwest argues that it is authorized by the Commission to assess its NRC to connect or disconnect a UNE, while nothing in the Act nor any Commission dockets authorize McLeodUSA to assess a WSOC.⁹⁴

⁸⁴ *Id.*

⁸⁵ *Id.* ¶ 40.

⁸⁶ *Id.* ¶ 7.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* ¶¶ 9-11.

⁹⁰ *Id.*, ¶ 35.

⁹¹ *Id.* ¶ 36.

⁹² *Id.* ¶ 37.

⁹³ *Id.* ¶ 44.

⁹⁴ *Id.* ¶¶ 45-46.

52 McLeodUSA contends that it does incur costs to process LSRs,⁹⁵ and that it has imposed the WSOC to recover those costs.⁹⁶ For example, McLeodUSA asserts that it uses its WSOC for reimbursement of the “costs it incurs to develop and maintain [an OSS⁹⁷] capable of processing LSRs submitted by Qwest and other carriers and to process those LSRs.”⁹⁸ McLeodUSA claims that it bases the WSOC on Qwest’s Commission-approved costs, so the WSOC is inherently just and reasonable.⁹⁹ McLeodUSA points out that Qwest’s NRCs contain compensation for recovery of Qwest’s OSS.¹⁰⁰

53 McLeodUSA’s witness, Dr. August Ankum, states that the WSOC is “on par with a combination of Qwest’s OSS charges and comparable portions of Qwest’s customer transfer (CTC) and Qwest’s UNE loop NRC charges.”¹⁰¹ According to Dr. Ankum, “Qwest’s OSS charges are a conservative proxy for McLeodUSA’s costs and set a minimal level for McLeodUSA’s [WSOC].”¹⁰² Dr. Ankum also declares that “to deny McLeodUSA compensation to recoup the costs involved in providing specific services would undermine the company’s ability to render services and compete viably with other companies, such as Qwest.”¹⁰³

54 McLeodUSA contends that Qwest’s own NRCs are intended to recover costs for acts comparable to what McLeodUSA performs when it receives a request to migrate a customer.¹⁰⁴ According to McLeodUSA, Qwest’s documentation verifies that the company’s NRCs are associated with LSR processing.¹⁰⁵ In fact, Dr. Ankum indicates that Qwest assesses charges when it transfers a customer to a CLEC that are

⁹⁵ McLeodUSA’s Motion, ¶ 6.

⁹⁶ *Id.* ¶11.

⁹⁷ Bench Request No. 3.

⁹⁸ McLeodUSA’s Motion, ¶ 17.

⁹⁹ *Id.*

¹⁰⁰ *Id.* ¶ 8.

¹⁰¹ Ankum Declaration, ¶ 31.

¹⁰² *Id.* ¶ 35.

¹⁰³ *Id.* ¶ 15.

¹⁰⁴ McLeodUSA’s Motion, ¶ 14. *See also* Ankum Declaration, ¶ 42.

¹⁰⁵ *Id.* ¶ 15.

almost completely “associated with updating databases in its OSS and switches.”¹⁰⁶ Dr. Ankum asserts that the activities Qwest is charging for “are very much the same activities that McLeodUSA performs and costs McLeodUSA incurs for transferring a customer to Qwest.”¹⁰⁷

55 Further, McLeodUSA maintains that it only assesses the WSOC on carriers that likewise assess a charge against McLeodUSA for processing LSRs.¹⁰⁸ McLeodUSA states that it employs a bill-and-keep methodology with other CLECs so that they mutually agree that neither will request reimbursement for the costs incurred to process an LSR.¹⁰⁹ McLeodUSA asserts that Qwest has not agreed to participate in a bill-and-keep arrangement and so each party may appropriately assess LSR charges.¹¹⁰ McLeodUSA notes that it does not have ICAs with other CLECs so that it cannot provide the Commission with an example of an explicit agreement that contains this bill-and-keep language.¹¹¹

56 McLeodUSA argues that the principle of the cost causer should apply to compensation for LSRs.¹¹² As a result, the carrier that has caused the cost to be incurred, in this case by submitting the LSR, should be required to reimburse the other carrier for expenses related to processing the LSR.¹¹³ In addition, McLeodUSA claims that the Commission has approved of the pricing approach that allows CLECs to establish their rates based on rates approved for ILECs.¹¹⁴

57 The company asserts that “only undue or unreasonable discrimination is unlawful.”¹¹⁵ McLeodUSA alleges that only a dominant carrier treating a customer differently than

¹⁰⁶ Ankum Declaration, ¶ 54.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* ¶ 18.

¹⁰⁹ *Id.* ¶ 7.

¹¹⁰ *Id.*

¹¹¹ McLeodUSA’s Response to Bench Request No.5.

¹¹² McLeodUSA’s Motion, ¶ 13.

¹¹³ *Id.*

¹¹⁴ *Id.* ¶ 16.

¹¹⁵ *Id.* ¶ 19, citing 47 U.S.C. § 202 and RCW 80.36.180.

other similarly situated customers qualifies as unlawful discrimination.¹¹⁶

McLeodUSA observes that it is not a dominant carrier, and it is not treating Qwest any differently than similarly situated carriers.¹¹⁷ McLeodUSA argues that it does not impose the WSOC on carriers that do not impose a similar charge on McLeodUSA.¹¹⁸ According to McLeodUSA, Qwest has never indicated an interest in the bill-and-keep arrangement it has with other carriers.¹¹⁹ McLeodUSA contends that in-kind compensation, like bill-and-keep, is compensation.¹²⁰ McLeodUSA contends that it would gladly replace the \$21.24 WSOC in favor of a bill-and-keep relationship with Qwest.¹²¹

58 Qwest counters that it is not the cost causer for the activities on which McLeodUSA bases its WSOC.¹²² The company claims that McLeodUSA would be performing these activities any time a customer leaves its service, not solely because Qwest has submitted an LSR.¹²³ Qwest contends that the activities McLeodUSA is charging Qwest under the WSOC are inapposite to the NRC the company charges McLeodUSA because Qwest does not purchase wholesale services from McLeodUSA.¹²⁴

59 Qwest maintains that McLeodUSA has not cited to any law that allows it to recover number portability costs from the company in its WSOC.¹²⁵ Qwest argues that McLeodUSA already collects a line number portability (LNP) charge from its

¹¹⁶ *Id.* citing *Orloff v. F.C.C.*, 352 F.3d 415 (D.C. Cir. 2003).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* ¶ 20.

¹²⁰ *Id.*

¹²¹ *Id.* ¶ 22.

¹²² Qwest's Answer, ¶ 37.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Qwest's Answer, ¶ 20.

customers in the amount of \$0.43 per line per month.¹²⁶ According to Qwest, recovery of these costs through the WSOC would amount to double recovery.¹²⁷

60 Qwest explains that, when one of its customers migrates to McLeodUSA, McLeodUSA will submit an LSR to the company to order a UNE.¹²⁸ Qwest states that the cost studies McLeodUSA bases its WSOC on are actually Qwest's cost studies for providing a UNE, not for disconnecting an existing end user.¹²⁹ Qwest contrasts this situation with one where a McLeodUSA customer migrates to Qwest and wants to keep its telephone number.¹³⁰ Qwest indicates that it will send an LSR, under the terms and conditions of the ICA, to McLeodUSA based on the customer's decision to take service from a different provider.¹³¹ Qwest points out that it would not charge McLeodUSA "an OSS charge, a customer transfer charge, or a loop non-recurring charge if [McLeodUSA] simply advised Qwest that a Qwest end user was disconnecting, and did not order any wholesale products or services."¹³²

61 Qwest notes that its OSS charges were approved by the Commission and are permitted by the FCC.¹³³ Furthermore, unlike McLeodUSA, Qwest asserts that it is required to make its OSS available so that CLECs can place UNE orders.¹³⁴ With regard to its customer transfer charge, Qwest argues that this is not comparable to McLeodUSA's WSOC.¹³⁵

¹²⁶ *Id.* Qwest cites to McLeodUSA's web site located at: http://www.paetec.com/static-assets/notice/ML_FCC_Interstate%20and%20International%20Rates%20and%20Services.pdf. Qwest notes that McLeodUSA charges a slightly higher fee on T1 and ISDN lines.

¹²⁷ *Id.* Qwest also argues that McLeodUSA's public policy arguments in favor of the WSOC are misplaced. *Id.*, ¶ 27.

¹²⁸ *Id.* ¶ 40.

¹²⁹ *Id.* ¶ 41.

¹³⁰ *Id.* ¶ 42.

¹³¹ *Id.*

¹³² *Id.* ¶ 44.

¹³³ *Id.* ¶ 46.

¹³⁴ *Id.*

¹³⁵ *Id.* ¶ 51.

62 Qwest alleges that the WSOC is discriminatory and imposes a penalty only upon it and not other carriers for winning customers away from McLeodUSA.¹³⁶ Qwest notes that McLeodUSA has explained its relationship with other carriers as a bill-and-keep arrangement.¹³⁷ The company insists that, while other carriers may have agreed to absorb each other's wholesale costs as the cost of doing business, Qwest does not take wholesale service from McLeodUSA.¹³⁸ The WSOC, according to Qwest, could never be applied to CLECs since the charge only occurs when a carrier "charges McLeod[USA] for orders to initiate service from an ILEC through UNEs, in other words, Qwest."¹³⁹ Further, Qwest maintains that the "[b]ill and keep arrangements for processing LSRs submitted by CLECs are not in any way analogous to McLeod[USA] sending Qwest an LSR ordering a UNE and Qwest sending an LSR for porting a number."¹⁴⁰

63 McLeodUSA counters that its WSOC is indeed comparable to Qwest's NRCs because both recover costs on comparable activities.¹⁴¹ McLeodUSA maintains that the WSOC "is established at a level equal to the Commission-approved costs for the same or comparable activities that Qwest undertakes to process the LSRs that [carriers] submit to Qwest."¹⁴² In addressing Qwest's argument that the WSOC improperly charges for number porting, McLeodUSA maintains that Qwest has failed to cite to any Commission or FCC orders to support its contention.¹⁴³ Further, McLeodUSA reiterates that it is attempting to recover those costs it incurs in the processing of LSRs, just as Qwest does when it performs the same or similar activities.¹⁴⁴

64 McLeodUSA indicates that the WSOC is not assessed when either a "customer simply disconnects service from McLeodUSA or when Qwest notifies McLeodUSA

¹³⁶ *Id.* ¶ 57.

¹³⁷ *Id.* ¶ 59.

¹³⁸ *Id.*

¹³⁹ *Id.* ¶ 61.

¹⁴⁰ *Id.* ¶ 60.

¹⁴¹ McLeodUSA's Response, ¶ 10.

¹⁴² *Id.* citing Ankum Declaration, § IV (b) and (c).

¹⁴³ *Id.* ¶ 11.

¹⁴⁴ *Id.*

that a customer [whom] McLeodUSA services by reselling Qwest services has chosen another carrier.”¹⁴⁵ Instead, McLeodUSA contends that the WSOC will only be assessed in situations where it has to process an LSR “to ensure that a customer being served using McLeodUSA’s own switching is able to transition its service seamlessly to another provider.”¹⁴⁶

65 | **Decision.** We find that Qwest has ~~failed to demonstrate~~d that McLeodUSA’s WSOC is unreasonably discriminatory ~~or~~and anti-competitive.

66 | As the parties acknowledge, we do not typically regulate the rates of CLECs pursuant to RCW 80.36.100(5), .320, and .330. However, RCW 80.04.110 does provide that:

...when two or more public service corporations, (meaning to exclude municipal and other public corporations) are engaged in competition in any locality or localities in the state, either may make complaint against the other or others that the rates, charges, rules, regulations or practices of such other or others with or in respect to which the complainant is in competition, are unreasonable, unremunerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly, and upon such complaint or upon complaint of the commission upon its own motion, the commission shall have the power, after notice and hearing as in other cases, to, by its order, subject to appeal as in other cases, correct the abuse complained of...

67 | Having examined RCW 80.04.110, we ~~reject~~agree with Qwest’s contention that the WSOC is discriminatory in its application. McLeodUSA’s argument that it has offered Qwest the option of paying the WSOC as a form of reciprocal compensation or electing “bill and keep,” another form of intercarrier compensation is misplaced. Qwest does not bill McLeod anything if a customer moves from Qwest to McLeod and McLeod does not order a loop from Qwest. Neither should McLeodUSA bill Qwest the WSOC when a customer leaves McLeod and Qwest does not order any retail or wholesale services from McLeodUSA. The Commission adopted bill and

¹⁴⁵ *Id.* ¶ 12.

¹⁴⁶ *Id.* citing Lynott Reply Declaration, ¶ 4.

~~keep as a reasonable approach in other proceedings for the exchange of local traffic¹⁴⁷ and, indeed, the evidence shows that all carriers interconnected with McLeodUSA, other than Qwest, use bill and keep. Further, bill and keep is a form of intercarrier compensation that is approved for the mutual exchange of traffic under Section 252 (A) and (B). Mutual exchange of traffic is not at issue in this case. McLeodUSA has offered no basis upon which to conclude that bill and keep is authorized or required for any other services, and has offered no legal basis upon which to conclude that McLeod is entitled to compensation from Qwest for any of the activities it performs when a customer leaves McLeodUSA. The fact that Qwest and McLeodUSA do not use bill and keep as a form of intercarrier compensation does not make the WSOC discriminatory, per se.~~

68 | ~~While we find it curious that~~ McLeodUSA could not provide the Commission with a copy of an executed agreement between it and another CLEC demonstrating that the bill-and-keep arrangement exists for activities relating to its OSS system. ~~Furthermore, Qwest's declaration establishes that has not questioned~~ McLeodUSA's ~~has billed Qwest the WSOC when an end-user switches from~~ McLeodUSA to another CLEC. This is supported by McLeod's response to Qwest's data request 10, submitted as part of the stipulated facts. This undercuts McLeod's affirmation that ~~such a~~ bill-and-keep relationships exists with other carriers. Indeed, ~~McLeod appears to bill Qwest when an end-user switches from McLeod to another CLEC, suggesting that there is no "bill and keep" agreement. Qwest contends that~~ McLeodUSA's processing of a CLEC's LSR is vastly different from its processing of an LSR sent by Qwest. ~~The company, however, fails to provide evidentiary support for this conclusion. We are simply unconvinced that~~ When Qwest processes an LSRs from a CLEC for an unbundled loop, Qwest is providing a legally-mandated wholesale service. Qwest has the right to recover those costs under the Act, ~~differently than~~ McLeodUSA does not. McLeodUSA has presented witness testimony which demonstrates that the types of activities identified by Qwest in the review and processing of the LSR, including entering data into its OSS, are comparable to the types of activities McLeodUSA must perform when Qwest submits an LSR. ~~However, this does not support the WSOC – indeed, Qwest performs these~~

¹⁴⁷ The Commission adopted "bill and keep" as a measure in Docket UT-941464 (4th Supplemental Order) and again in UT-063038 (Orders 5 and 10).

types of activities when it processes orders from its end-users as well. The type of activity is not determinative – the question is whether the activity itself, and the service with which it is associated, support cost recovery. In this case, it is undisputed that Qwest does not purchase wholesale services from McLeod in connection with a customer moving from McLeod to Qwest, so there is no justification for the WSOC.

69 | The record shows that McLeodUSA’s WSOC charge recovers costs for LNP that the CLEC incurs in processing LSRs through its OSS, including release of the trigger in the McLeodUSA switch, changing McLeodUSA’s internal facility assignment to the correct status, deleting McLeodUSA’s LIDB record, and unlocking 911 records. ~~In terms of fairness, it is significant to observe that~~ Qwest imposes a ~~similar~~, cost-based NRC on CLECs ~~for in connection with cost recovery for allowing access to~~ its OSS, ~~albeit~~ The difference is that Qwest does not impose the charge for simply transferring a customer from Qwest to another carrier, and that Qwest is legally obligated to provide OSS as a UNE. McLeod does not offer UNEs, and does not allow access to its OSS, so the situations are not comparable. We find Qwest’s position, that the company incurs costs to process an LSR, yet other carriers such as McLeodUSA do not, unreasonable given that the same functionality and similar activities are involved by both carriers to process an LSR in their respective OSS systems.

70 | Qwest’s argument regarding the composition of the WSOC is also ~~misplaced a concern.~~ –If Qwest is concerned that McLeodUSA is over-recovering through the WSOC by collecting LNP charges for number porting from both its customers and Qwest. The evidence shows that McLeod is recovering LNP costs from its end-users, and through the WSOC, and the WSOC is unlawful as violation of the federal requirements that LNP cost recovery be competitively neutral. that is a factual determination which would need to be addressed outside the context of summary determination.

~~71 Finally, we reiterate our discussion from section A above, that Qwest entered into the WSOC Amendment voluntarily and jointly submitted it to the Commission for approval. The Amendment became effective according to its own terms and pursuant to federal law. If Qwest believed, at the time it was negotiating the WSOC Amendment, that the WSOC was discriminatory and anti-competitive, it should never have agreed to the charge, albeit on what it contends was a “temporary” basis. Qwest,~~

~~like McLeodUSA, had the opportunity to resolve this issue via arbitration and chose not to.~~

~~72 We find that the inclusion of a provision allowing Qwest to challenge the charge before the Commission after Qwest voluntarily agreed to the charge in exchange for the resolution of other unidentified “business issues” operates to circumvent the legitimacy of the negotiation process. At the time that the WSOC dispute arose, Qwest had other procedural options before it to resolve the matter including an arbitration petition.¹⁴⁸ However, as compensation for resolving certain unrelated business issues, it chose not to pursue arbitration. We find it patently unfair to allow the company to seek to overturn the effect of its commitment in the Settlement and WSOC Amendment, by contesting the WSOC on some sort of post-concession basis.~~

~~7371~~ Accordingly, we find that Qwest has ~~failed to demonstrate~~d that the WSOC violates the Act ~~and/or~~ state law.

FINDINGS OF FACT

~~7472~~ Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

~~7573~~ (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including telecommunications companies.

~~7674~~ (2) Qwest is a telecommunications corporation as defined in RCW 80.04.010 and is an incumbent local exchange company, as defined by 47 U.S.C. § 251(h)

¹⁴⁸ ~~We note that either party to the existing agreement may seek to modify or replace the existing ICA pursuant to the notice, negotiation, and arbitration provisions of Section 252 of the Act. Should Qwest seek to modify or eliminate application of the WSOC as part of a prospective arbitration proceeding, the Commission would certainly be required to consider the~~

within the Telecommunications Act of 1996, Public Law 104-104, 110 Stat. 56 (1996). Qwest provides local exchange and other telecommunications services in the state of Washington.

- ~~775~~ | (3) McLeodUSA is an Iowa corporation and is registered with and classified by the Commission as a competitive local exchange company and is also a telecommunications corporation as defined in RCW 80.04.010. McLeodUSA is authorized to provide switched and non-switched local exchange and long distance services in Washington.
- ~~7876~~ | (4) Qwest and McLeodUSA are parties to an interconnection agreement (ICA), which was voluntarily negotiated, as is permitted by the Act.¹⁴⁹ The ICA was filed by Qwest with the Commission, which granted approval of the ICA in Docket UT-993007, on August 30, 2000.
- ~~7977~~ | (5) The ICA provides the terms, conditions, and prices for access to Unbundled Network Elements, which McLeodUSA leases from Qwest to serve the majority of its end user customers in Washington.
- ~~8078~~ | (6) Qwest assesses non-recurring charges (NRCs) for the installation of unbundled loops which are based on Total Element Long Run Incremental Cost studies that were approved by the Commission in Dockets UT-960369 and UT-003013.
- ~~8179~~ | (7) Part of Qwest's cost study included cost support for NRCs in order to recover costs Qwest incurs to process local service requests (LSRs) that are initiated by the CLEC for purposes of ordering and having Qwest provision an unbundled loop, including various costs related to order processing and completion.
- ~~80~~ | (8) McLeodUSA and Qwest executed a WSOC Amendment to their ICA that was approved by the Commission on May 7, 2009, in Docket UT-993007. Under the WSOC Amendment, Qwest and McLeodUSA agreed that McLeodUSA

~~preponderance of evidence presented by both parties concerning the WSOC including the manner in which the charge is applied and its appropriate cost basis, if any.~~

¹⁴⁹ *Id.* ¶ 3.

would assess a wholesale service order charge (WSOC) associated with LSRs submitted by Qwest to transfer a customer from McLeodUSA to Qwest. The WSOC Amendment specifically preserves Qwest's rights to challenge the WSOC.¹⁵⁰ 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.¹⁵¹

~~8281 Qwest, in a quid pro quo arrangement, achieved resolution on other disputed issues.~~

~~83(9) McLeodUSA's WSOC recovers the costs incurred to process the LSR which Qwest submits via a McLeodUSA web-based Operations Support Systems (OSS). McLeodUSA's OSS takes the information resulting from the LSR and streams that information into various internal systems. The OSS initiates, and in some instances, completes various tasks that must be performed to ensure that end users can seamlessly move their local service to their new service provider.~~

~~8482 (10) In addition to the OSS, McLeodUSA personnel are involved in various aspects of completing the steps required to process an LSR for number portability, including: releasing of the trigger in the McLeodUSA switch, granting concurrence in the Number Portability Administration Center, pulling the telephone number from the McLeodUSA switch once the line has ported out, changing McLeodUSA's internal facility assignment to the correct status, deleting McLeodUSA's Line Information DataBase record, unlocking the 911 record, sending care records, and terminating McLeodUSA's billing to the end user. These costs are not properly recoverable from Qwest.~~

~~85(11) The administrative tasks McLeodUSA undertakes in order to process an LSR are very similar to the actions Qwest must employ when processing an unbundled network element LSR.~~

83

~~8684 (12) McLeodUSA has a bill and keep arrangement for recovering LSR costs from other CLECs and does not charge them the WSOC to other CLECs.~~

¹⁵⁰ *Id.* ¶ 19.

¹⁵¹ *Id.*

CONCLUSIONS OF LAW

~~8785~~ | Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:

~~8886~~ | (1) Summary judgment is properly entered if there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *WAC 480-07-380(2)*. *CR 56(c)*.

~~8987~~ | (2) In resolving a motion for summary judgment, a court must consider all the facts submitted by the parties and make all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Activate, Inc., v. State, Dept. of Revenue, 150 Wash.App. 807, 812, 209 P.3d 524, 527 (2009)* (citing *Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wash.2d 16, 26, 109 P.3d 805 (2005)*).

~~9088~~ | (3) The Telecommunications Act of 1996 (the Act) provides the process by which telecommunications carriers are to negotiate interconnection agreements and amendments. *47 U.S.C. § 251, et. seq.*

~~9189~~ | (4) The WSOC Amendment executed by the parties and approved by the Commission on May 7, 2009, and which authorized McLeodUSA to collect the WSOC from Qwest, does not violate the Act. The Amendment preserved Qwest's right to challenge the WSOC price list. The WSOC price list does violate the Act, as charges of this nature are not properly imposed via tariff or price list. As such, the Amendment is deemed terminated by agreement of the parties.

~~9290~~ | (5) 47 C.F.R. § 52.33(b) allows competitive local exchange carriers to recover their number porting costs consistent with federal and state laws.

~~9391~~ | (6) McLeodUSA's WSOC_ recovers LNP costs in violation of state and federal law. ~~expenses the carrier incurs when processing Qwest's LSRs, and is based~~

~~upon the established expenses Qwest incurs when processing other carriers' LSRs.~~

~~9492~~ (7) ~~Qwest has failed to establish that~~ McLeodUSA's WSOC violates state ~~or~~and federal law.

ORDER

THE COMMISSION ORDERS:

~~9593~~ (1) Qwest Corporation's Motion for Summary Determination is ~~denied~~ granted.

~~9694~~ (2) McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services' Motion for Summary Determination is ~~denied~~ granted.

Dated at Olympia, Washington, and effective August 30, 2010.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARGUERITE E. FRIEDLANDER
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3) provides that an initial order will become final without further Commission action if no party seeks administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and nine (9) copies of any Petition or Answer must be filed by mail delivery to:

DOCKET UT-090982
ORDER 05

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