BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

I. INTRODUCTION

1 Pursuant to WAC 480-07-825(2), Qwest Corporation ("Qwest") files this Petition for Administrative Review of Order 05, the Initial Order in this matter. The Initial Order denied Qwest's motion for summary determination and granted the motion filed by McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services ("McLeod").

2 The requirements about what must be included in any Petition for Administrative Review, and other requirements for a Petition, are stated in WAC 480-07-825(3).[1] In

[1] "Petitions for administrative review must clearly identify the nature of each challenge to the initial order, the evidence, law, rule or other authority that the petitioner relies upon to support the challenge, and state the remedy that the petitioner seeks. Petitions for review of initial orders must be specific. The petitioner must separately state and number every contention. A petition that challenges a finding of fact must cite

accordance with those requirements, Qwest states that it challenges various findings of fact and conclusions of law in the Initial Order, as detailed below. In addition, Qwest provides a copy of the Initial Order in redline format, showing the changes that Qwest seeks. Qwest seeks an order from the Washington Utilities and Transportation Commission ("Commission") reversing the Initial Order, and granting Qwest's motion for summary determination. In the alternative, Qwest seeks an order from the Commission reversing the Initial Order and remanding the matter for a hearing.

II. SUMMARY OF ARGUMENT

3 The Initial Order is in error in several determinations of fact and law. The most basic flaw in the Initial Order is that it misinterprets the WSOC Amendment, and refuses to allow Qwest to challenge the WSOC in the manner and on the grounds previously agreed by the parties and approved by the Commission. In so doing, the Initial Order unlawfully voids certain provisions of the Commission-approved agreement. The "Undisputed Facts" section of the Initial Order correctly recites, at ¶ 32, that:

> The WSOC Amendment specifically preserves Qwest's rights to challenge the WSOC. If the Commission determines that the WSOC is unjust, unreasonable, unlawful, or otherwise unenforceable, the WSOC Amendment is deemed terminated on the effective date of the Commission's final order.

4 The Initial Order fails to give effect to the provisions of the parties' Commission-approved interconnection agreement ("ICA") that allows Qwest to challenge the

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the pertinent page or part of the record or must otherwise state the evidence it relies on to support its petition, and should include a recommended finding of fact. A petition that challenges a conclusion of law must cite the appropriate statute, rule, or case involved and should include a recommended conclusion of law. A petition that challenges the summary or discussion portion of an initial order must include a statement showing the legal or factual justification for the challenge, and a statement of how the asserted defect affects the findings of fact, the conclusions of law, and the ultimate decision."

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Wholesale Service Order Charge ("WSOC") on all grounds that Qwest could have challenged it on before the WSOC was included in the ICA via an amendment.

5 The Initial Order fails to properly evaluate the evidence regarding how McLeod applies the WSOC. Proper evaluation of that evidence establishes that the WSOC is discriminatory in both design and application, and that it therefore violates RCW 80.04.110.

6 The Initial Order determines that Qwest waived its right to challenge the WSOC because Qwest waited too long to challenge the WSOC. McLeod did not raise this argument, and the Initial Order makes this determination without any evidentiary support. Had Qwest been permitted to provide evidence on this issue, Qwest's evidence would show that it acted diligently and without undue delay in researching the WSOC and disputing that charge with McLeod.

7 The Initial Order also erred by granting summary determination at the same time as it held that there were unresolved issues of fact regarding recovery of local number portability ("LNP") costs, and thus failed to make a determination on all of the issues presented. Specifically, the Initial Order fails to determine that McLeod is improperly recovering costs for LNP from Qwest. That issue was squarely presented in Qwest's motion for summary determination, and bears on the lawfulness of the WSOC. If the Initial Order finds that such a determination cannot be made without an evidentiary hearing (as it apparently did), then the order erred by granting summary determination. Instead, the matter should have been set for hearing.

III. ARGUMENT

8 Qwest and McLeod 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 McLeod entered into a

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settlement agreement on October 10, 2008, entitled *Wholesale Service Order Charge Amendment* (WSOC Amendment).[2] The WSOC Amendment was filed with the Commission. It was approved and became effective on May 7, 2009.[3] The WSOC Amendment requires that Qwest pay McLeod's WSOC when Qwest submits a LSR to migrate a customer from McLeod to Qwest.[4] In addition, the WSOC Amendment preserves Qwest's ability to challenge the WSOC before the Commission, without waiver of any rights.[5]

9 It is within the context of this Amendment that Qwest filed its complaint challenging the WSOC, and its motion for summary determination asking the Commission to find that the WSOC is unlawful on various grounds. McLeod filed a cross motion, and both parties answered.

10 The Initial Order, entered on August 30, 2010, granted McLeod's motion for summary determination, chiefly on the basis that Qwest had bargained away its right to challenge the WSOC. This is clear error, as will be discussed below. The Initial Order also erred in several other respects, discussed below.

A. The Initial Order Fails to Give Effect to the WSOC Amendment Allowing Qwest to Challenge the WSOC.[6]

11 The Initial Order fails to give effect to the provisions of the parties' Commission-approved interconnection agreement ("ICA") that allows Qwest to challenge the Wholesale Service Order Charge ("WSOC") on all grounds that Qwest could have challenged it on before the WSOC was included in the ICA via an amendment. Further,

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[2] Order 05, ¶ 11.
[3] *See,* Docket No. UT-993007, *Order Approving Interconnection Agreement Amendment*, May 7, 2009.
[4] Amendment, Attachment 1, paragraph 1.
[5] Id.
[6] Order 05, ¶ 1. "This order finds that Qwest entered into the Wholesale Service Order Charge (WSOC) Amendment voluntarily in order to resolve certain business disputes and that aspects of its nonrecurring charges are comparable to McLeodUSA's WSOC."

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the Amendment contains a provision terminating the Amendment if the Commission finds McLeod's WSOC tariff [price list in Washington] to be unlawful or unenforceable.[7] By failing to give effect to those terms the Initial Order misinterprets the Amendment. In addition, by failing to consider the lawfulness of the price list, apart from whether the inclusion of the WSOC in an ICA amendment was appropriate, the Initial Order misinterprets the Amendment.

12 With regard to this issue, Qwest challenges the Initial Order's discussion at paragraphs 43 – 46 and 71 – 72, finding of fact (8) at paragraph 82, and conclusions of law (4), (5), and (7) at paragraphs 91, 92 and 94.

13 The WSOC Amendment, as approved by the Commission, states clearly that "[t]he Parties agree that Qwest reserves its rights to challenge CLEC's Wholesale Service Order tariff provisions before the Commission or before the utility commissions in other states. The Parties further agree that Qwest's agreement to the Amendment is and shall be *without prejudice* to any position that Qwest may take in the event that Qwest institutes any challenge to CLEC's Wholesale Service Order tariff provisions in the future." The entire relevant provision is set forth below, with emphasis added:

> 2. **Without Prejudice** a. The Parties agree that Qwest reserves its rights to challenge CLEC's Wholesale Service Order tariff provisions before the Commission or before the utility commissions of other states. The Parties further agree that Qwest's agreement to the Amendment is and shall be ***without prejudice to any position that Qwest may take*** in the event that Qwest institutes any challenge to CLEC's Wholesale Service Order tariff provisions in the future. In the litigation of any such challenge, ***CLEC shall not make any argument in support of its tariffs based on the Amendment or on Qwest's agreement to enter the Amendment, including but not limited to any argument that the Amendment evidences Qwest's acceptance of CLEC's right to collect charges for the activities identified in the Amendment.*** b. It is the intent of the Parties to negotiate in good faith whether terms and rates similar to those in the Amendment should be included in the successors to the

[7] The reference in the Amendment to a "tariff" includes a price list. See, Qwest's complaint at ¶ 8 and McLeod's answer, admitting ¶ 8 of the complaint.

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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.

14 These provisions mean that Qwest is permitted to challenge the WSOC price list in Washington, and that if the Commission finds that the inclusion of the WSOC in a price list is unlawful, or that the WSOC is unlawful for any other reason, then the other provisions of the Amendment take effect, and the Amendment is "deemed terminated" by its own terms. There is no ambiguity in these terms. This is the agreement between the parties, and it is the agreement that the Commission approved. As such, it has the force and effect of law,[8] and cannot be altered, modified, or disregarded by the Commission in a proceeding such as this.

15 The Initial Order errs at paragraph 43 by stating that Qwest's position is that the Commission "ignore a voluntarily- negotiated and fully-executed ICA amendment that had been previously approved by this Commission." This is not Qwest's position. Qwest is asking the Commission to enforce the ICA amendment *in full* and to consider this complaint on the merits. It is the Initial Order that is applying a portion of the ICA Amendment while ignoring these specific negotiated and voluntary provisions.

16 The Initial Order goes on to state that the parties negotiated the amendment "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

[8] *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003).

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or intent of each term and condition of the WSOC Amendment, including establishment and contractual application of the WSOC as of August 1, 2008." It is true that the parties negotiated the Amendment in order to allow a larger set of disputes to be resolved. The suggestion in the quote above that only Qwest received a benefit for executing the Amendment, or that Qwest's benefit was somehow disproportionate to McLeod's, is without basis in the record.

17 Further, Qwest is not arguing that it did not understand the scope or intent of each term and conditions in the Amendment. Qwest did. The terms and conditions allow the challenge that Qwest has brought, on the issues that Qwest has raised. The Initial Order fails to give effect or in fact, even consider the terms that allow Qwest to challenge McLeod's price list, fails to give effect or even consider the "without prejudice" provisions, and fails to give effect or even consider the provisions that prohibit McLeod from claiming that the WSOC is valid because it is now contained in the ICA.

18 The Initial Order, at paragraph 44, actually rules against McLeod noting that '[a]s the Utah Commission determined, 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." This ruling is correct, and under the plain language and terms of the Amendment, the Initial Order should have gone on to conclude, as voluntarily and knowingly agreed to by both Qwest and McLeod in the Amendment, that "the Wholesale Service Order charge provisions in McLeodUSA's [price list] in [Washington] are unjust, unreasonable, unlawful or otherwise unenforceable, in which case [the] Amendment shall be deemed terminated in [Washington]."

19 Unfortunately, the Initial Order notes instead, and without any support, that "this apparent defect was overcome by inclusion of the WSOC in the mutually negotiated ICA

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Amendment." The Initial Order further states that "[u]nlike the Utah Commission, which appears to have treated the WSOC Amendment as if it does not exist, we place significant weight herein on the parties' mutual agreement to resolve unspecified business disputes including agreement on incorporating, by way of amendment, the WSOC into their existing ICA."

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

> Here, the WSOC was not originally contained in the parties' Agreement, but was only put in the Agreement in the interim, while the parties disputed the charge.[9]

21 The Utah Commission engaged in the correct analysis – the WSOC was contained in the Amendment on an interim basis, while the parties disputed the charge. In Washington, the Initial Order somehow seeks to punish Qwest for agreeing to this interim resolution[10], and misinterprets the Amendment to deny Qwest the benefit of its agreement under that Amendment.

22 The misinterpretation of the amendment has been discussed above, and that same misinterpretation is present again in paragraph 44 – the Amendment did not "cure" the defect in the price list, and did not operate to bar Qwest from bringing a challenge to the

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[9] *In the Matter of the Compaint of Qwest Corporation against McLeodUSA Telecommunications Services, Inc.*, d/b/a PAETEC Business Services, Docket No. 09-049-37; Report and Order dated August 16, 2010, page 4.

[10] The punitive nature of the decision is apparent by the language used in the Initial Order, which harshly criticizes Qwest in various provisions, calling Qwest's argument "absurd", and accusing Qwest of seeking to "misuse the parties' and the Commission's valuable resources" in bringing this proceeding (¶ 45). The Initial Order goes on the characterize Qwest's position as asking the Commission to "pretend" the Amendment doesn't exist (¶ 46), and stating that Qwest's request that the WSOC be overturned is "patently unfair" (¶ 72), even though the plain language of the Commission-approved Amendment allows just such a request.

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WSOC – if it did, the language from the Amendment quoted above would have no meaning. It is basic contract law that a contract must be interpreted, where possible, to give effect to all the terms in the agreement, and an interpretation that renders some of the terms meaningless is disfavored over an interpretation that gives effect to all of the provisions. Courts approach contract interpretation with a view to giving effect to every word and every provision of a contract, if possible. An interpretation of a contract which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective.[11]

23 The Initial Order's interpretation renders the "Without Prejudice" and "Termination" provisions of the Amendment void and unenforceable. This is apparent in the next paragraph of the Initial Order, which refuses to give effect to the Amendment.

24 Paragraph 45 of the Initial Order clearly acknowledges the language of the Amendment, but simply refuses to implement it, stating that "[w]hile Qwest points to the WSOC Amendment language where it reserved its rights to contest the applicability of the charge in some sort of prospective dispute, *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." With all due respect – this determination of absurdity is not within the authority of the Initial Order to make. The Commission has already approved the Amendment, including the language allowing Qwest to contest the WSOC in this subsequent proceeding. Further, contrary to the discussion in ¶ 45, it is not the terms of

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[11] *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). *See also, Allstate Ins. Co. v. Huston,* 123 Wn. App. 530, 542 (2004); *Ball v. Stokely Foods,* 37 Wn.2d 79, 83, 221 P.2d 832 (1950) HN4 ("...in the interpretation of contracts ["..."] every word and phrase must be presumed to have been employed with a purpose and must be given a meaning and effect whenever reasonably possible..."); *Diamond B Constructors, Inc. v. Granite Falls Sch. Dist.*, 117 Wn. App. 157, 165, 70 P.3d 966 (2003) ("We must construe a contract to give meaning to every term."); *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 423, 909 P.2d 1323 (1995) ("courts favor the interpretation of a writing which gives effect to all of its provisions over an interpretation which renders some of the language meaningless or ineffective"); *Am. Agency Life Ins. Co. v. Russell,* 37 Wn. App. 110, 114, 678 P.2d 1303 (1984) (it is "our duty to read each contract in such a manner that every section is given effect").

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the Amendment that Qwest is contesting – rather, it is the WSOC itself, as expressly permitted by the Amendment. Qwest did not challenge the Amendment, instead Qwest is actually asking that it be enforced.

25 Paragraph 45 of the Initial Order goes on to state that "[i]t is clear that Qwest agreed to the imposition of the WSOC in exchange for some unspecified concession it received from McLeodUSA." The Initial Oder also states, at paragraph 82, that "Qwest, in a *quid pro quo* arrangement, achieved resolution of other disputed issues." While not entirely clear, the Initial Order reflects the apparent belief that only Qwest benefitted from the Amendment, or at least that the bargain struck in the Amendment must have weighed more heavily in Qwest's favor. That this reasoning underlies the Initial Order is apparent from the language in paragraphs 43 and 72 as well, where the Initial Order refers to the parties' resolution of "unspecified" or "unidentified" business issues. Thus, apparently, the Initial Order concludes that the Amendment should not be enforced to benefit Qwest because Qwest already benefitted from the resolution of other issues.

26 It is true that the Amendment was the result of negotiations and a separate settlement that resolved other issues. However, there is no evidence in the record to suggest that Qwest received more or less for the overall agreement than McLeod did. Further, the thing that is clear from the Amendment is that Qwest agreed to pay the WSOC as part of an integrated agreement that allowed Qwest to challenge the WSOC at a later date. The Initial Order thus deprives Qwest of the rights it negotiated in the Commission-approved Amendment.

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B. The Initial Order Errs By Concluding that the WSOC is Not Discriminatory and that Aspects of Qwest's Non-recurring Charges are Comparable to the WSOC.[12]

27 The Initial Order fails to properly evaluate the evidence regarding how McLeod applies the WSOC. The Initial Order also erred by determining that the WSOC is proper because aspects of Qwest's non-recurring charges are comparable to the WSOC. Proper evaluation of that evidence establishes that the WSOC is discriminatory in both design and application, and that it therefore violates RCW 80.04.110.

28 With regard to this issue, Qwest challenges the Initial Order's discussion at paragraphs 65, 67 – 69, and 73, findings of fact (11) and (12) at paragraphs 85 and 86, and conclusion of law (6) at paragraph 93.

29 The undisputed facts, set forth in the Initial Order at paragraphs 34, 35, and 38, establish that the only time Qwest sends McLeod a local service request ("LSR"), is when a customer is migrating away from McLeod and wants to port his or her telephone number. It is undisputed that Qwest does not purchase facilities or services from McLeod (Initial Order ¶ 21). It is also undisputed that Qwest's Commission approved non-recurring charges are associated with processing an order *for an unbundled loop* or other facility. (Initial Order ¶¶ 22-25). This is not the same as processing an LSR that requests number portability only – Qwest does ***not*** charge a non-recurring charge if the requesting provider asks for number portability only and not for Qwest facilities such as unbundled loops. (Initial Order ¶ 26). The WSOC, by its own terms and by McLeod's application of it, does not apply to any other carrier in the state of Washington. (Initial Order ¶¶ 27-28).

30 In light of these undisputed facts, the Initial Order was still swayed by McLeod's misleading advocacy that the WSOC is somehow comparable to Qwest's non-recurring

[12] See, Initial Order ¶ 1.

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charges for OSS and the unbundled loop. The Initial Order was further persuaded to disregard the absolute lack of legal support for CLEC recovery of the costs that are allegedly recovered by the WSOC. This is completely at odds with the requirements and limitations on Qwest's cost recovery, where Qwest recovers costs only for those items it has a legal mandate to provide, and clear legal authority supporting cost recovery.

31 First, the Initial Order misapprehends Qwest's position regarding the discriminatory nature of the WSOC. The conclusion in ¶ 67 of the Initial Order that the WSOC is not discriminatory because "McLeodUSA 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. . . ." misses the point. Bill and keep is not at issue here – Qwest has not claimed that McLeod's use of "bill and keep" with other carriers makes the WSOC discriminatory. What makes the WSOC discriminatory is that ***even if*** a CLEC charged McLeod a non-recurring charge, the terms of the WSOC mandate that it applies ***only*** to an incumbent LEC from whom McLeod orders unbundled elements.[13] Thus, the "bill and keep" argument is not only a non-sequiter, it is simply inapplicable to the facts. Further, to the extent that bill and keep does apply, Qwest does not bill McLeod for LNP costs and for processing orders that do not include loops – if McLeod truly offered bill and keep, McLeod would not bill Qwest for those functions, but that is exactly what McLeod does.

32 Paragraph 68 of the Initial Order states that "[w]hile 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, Qwest has not questioned McLeodUSA's affirmation that such bill-and-keep relationships exist." This is inaccurate. Qwest asserted that there

[13] See, Qwest's Motion for Summary Determination (Memorandum in Support), ¶¶ 37 and 42-43, as well as ¶ 61 of Qwest's Answer to McLeod's Motion for Summary Determination.

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could not be a bill and keep arrangement under the terms of the WSOC, because the WSOC would not apply to a CLEC even if the CLEC assessed a charge to McLeod. Further, Qwest asserted, supported by its declaration, that "McLeod sometimes assesses the charge on Qwest even if the customer is leaving McLeod to go to another carrier, not Qwest."[14] McLeod did not challenge this assertion, and it is a clear demonstration that McLeod does not have "bill and keep" with other carriers, it has a "bill Qwest, not the CLEC" approach.[15]

33 The Initial Order goes on in paragraph 68 to state that Qwest had not supported its contention that Qwest's costs of processing an LSR are vastly different from the costs incurred by Qwest. This is error in light of the uncontested facts discussed above, which show that none of the costs that Qwest incurs are attributable to LNP, and that Qwest's nonrecurring costs are associated with provisioning the unbundled loop, or with providing resold service over Qwest's facilities. McLeod has none of these costs, as McLeod provides no wholesale or retail services to Qwest. And, while the Initial Order may be correct that some of the activities are the same type, that does not translate into reciprocal cost recovery. In other words, some of the activities required to provide an unbundled loop may be the same *type* of activities as that required to provide a 1FR, but they are not the same *actual* activities. Qwest's costs are associated with activity that is *required* for the provision of unbundled loops under the Act, and Qwest has received explicit permission from the FCC and the Commission to recover certain of those costs. Other costs, such as the cost of disconnecting its own end user when that end user leaves Qwest to move to another carrier, are not recoverable from the CLEC. Qwest recovers those costs from its end users, as McLeod should in the case of the WSOC costs. Those

[14] Qwest's Memorandum in Support of Motion for Summary Determination, ¶ 5; Declaration of Robert Weinstein.

[15] See also, Stipulated facts, McLeod response to data request 10

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WSOC costs[16] should not be recovered from Qwest, just as Qwest does not recover those costs from CLECs.

34 Further, the OSS cost discussion in both paragraphs 68 and 69 reflects a false analogy – the mere incurrence of OSS costs does not give rise to the right to cost recovery. Qwest recovers certain of its OSS costs for two reasons – first, OSS is a UNE and Qwest is required to allow access to its OSS under the Act; and second, the Commission has conducted a cost proceeding and authorized cost recovery. Contrary to the statement in paragraph 69, it is not "Qwest's position" that it "incurs costs to process an LSR, yet other carriers such as McLeod do not. . . . ." Qwest does not dispute that McLeod may have OSS costs, but the mere existence of costs, especially costs for different functionality,[17] is a far cry from being able to recover them from Qwest on a non-competitively neutral basis. Qwest has not argued that other companies do not incur costs, however, cost recovery must be lawful, which it is not through the WSOC. Also, as previously noted, Qwest does not charge a similar charge to McLeod for processing an LSR for LNP.

[16] Costs 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.

[17] As noted, the costs at issue are not costs for "processing an LSR." Qwest's costs are costs associated with provisioning an unbundled loop. McLeod's costs are costs associated with losing a customer and providing LNP – Qwest does not recover those costs from CLECs when Qwest incurs those same costs in its operations.

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C. The Initial Order Erred by Determining that Qwest Waited Too Long to Challenge and Fails to Give Effect to the WSOC Amendment Allowing Qwest to Challenge the WSOC.[18]

35 The Initial Order appears to conclude that Qwest waived its right to challenge the WSOC because Qwest waited too long to challenge the WSOC. McLeod did not raise this argument, and the Initial Order makes this determination without any evidentiary support. Had Qwest been permitted to provide evidence on this issue, Qwest's evidence would show that it acted diligently and without undue delay in researching the WSOC and disputing that charge with McLeod.

36 The Initial Order, at ¶ 44, fn. 71 states: "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." *** "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."

37 As discussed above, the second quoted sentence is plainly contrary to the agreement of the parties, an agreement that the Initial Order is not at liberty to disregard. This agreement allows Qwest to challenge the WSOC, and prohibits McLeod from asserting defenses against that challenge such as waiver, laches, or estoppel. McLeod did not assert those defenses in its answer. Yet that is exactly what the Initial Order does – it crafts such a defense against Qwest's challenge, even though McLeod did not assert it, and then rules against Qwest based on that defense. This is plainly improper.

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[18] Initial Order, ¶ 44, fn. 71 states: "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." *** "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."

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38 Furthermore, because McLeod did not assert waiver, laches, or estoppel in its answer to the complaint, or in its motion for summary determination, Qwest did not present evidence on that issue. If McLeod had raised those defenses, Qwest would have introduced evidence to show that the delay between the filing of the price list and the challenge to the price list was not unduly long. Qwest's evidence would show that when McLeod first filed the price list, McLeod did not serve Qwest properly with the change, so that Qwest was not immediately aware of it; that McLeod did not bill Qwest clearly for the charge, so that Qwest had difficulty ascertaining that the charge was being assessed; and, that Qwest disputed the charge to McLeod long before it filed this matter with the Commission.[19] The Initial Order thus penalizes Qwest for seeking to negotiate a business resolution of the issue by stating that Qwest waited too long to challenge the charge, without any information about the basis for the amount of time that elapsed between the assessment of the charge and the complaint in this matter.

D. The Initial Order Erred by Granting Summary Determination If There Are Unresolved Issues Regarding Recovery of Local Number Portability Costs.

39 The Initial Order also erred by granting summary determination at the same time as it held that there were unresolved issues of fact regarding recovery of local number portability ("LNP") costs, and thus failed to make a determination on all of the issues presented. Specifically, the Initial Order fails to determine that McLeod is improperly recovering costs for LNP from Qwest. That issue was squarely presented in Qwest's motion for summary determination, and bears on the lawfulness of the WSOC. If the Initial Order finds that such a determination cannot be made without an evidentiary

[19] Qwest first disputed the charge with McLeod shortly after it appeared on invoices in 2004. McLeod filed for bankruptcy protection in 2005, and did not emerge from bankruptcy until 2007. Multiple issues were preserved between the parties during the bankruptcy proceeding, including the WSOC issue. In 2006, McLeod sued Qwest for recovery of the WSOC, and the parties subsequently entered into the settlement agreement and Amendment, preserving their rights to have the issue addressed at the Commission.

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hearing (as it apparently did), then the order erred by granted summary determination and should have set the matter for hearing.

40 The Initial Order states, at ¶ 70, that "Qwest's argument regarding the composition of the WSOC is also misplaced. 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, that is a factual determination which would need to be addressed outside the context of summary determination." This ruling is in error both substantively and procedurally. McLeod does not dispute that LNP costs are recovered in the WSOC, and in a tariff charge to its end-users.[20] This violates federal law, as discussed in paragraphs 20-26 of Qwest's Answer to McLeod's Motion for Summary Determination. Further, if indeed there are factual determinations that need to be made, the Initial Order should deny the motions for summary determination and set the matter for hearing. It is incorrect to refuse to decide an issue that was plainly raised in the complaint on the basis that fact finding would need to take place, when this is the proceeding in which that fact finding could/should occur.[21]

41 Qwest believes that its Complaint and Motion for Summary Determination can be granted on grounds other than the issue of the recovery of LNP costs. However, the Initial Order did not agree, and found that there are factual determinations that would need to be made regarding LNP cost recovery. In deciding motions for summary determination, the decision-maker is required to conclude that "there is no genuine issue as to any material fact". The Initial Order concludes that there is an issue of fact regarding recovery of LNP costs, and appears to also conclude that it is a material issue, because paragraph 70 of the Initial Order seems to indicate that this concern should be

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[20] Qwest's Answer to McLeod's Motion of Summary Determination, ¶¶ 20-26.

[21] Qwest generally challenged the WSOC in its complaint as being in violation of state and federal law. Complaint, ¶ 23(3). In the subsequent pleadings, Qwest specifically challenged the WSOC as improperly recovering LNP costs. Qwest's Answer to McLeod's Motion for Summary Determination, ¶¶ 20-26.

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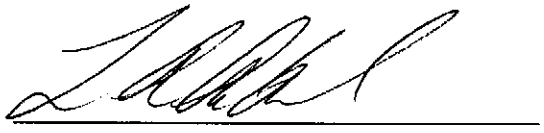
addressed. However, the Initial Order is incorrect that the issue should not be addressed in this proceeding. This proceeding is not limited to motions for summary determination, and if it is necessary to conduct hearings to resolve all the material issues, Qwest stands ready to participate in those hearings.

42 For the reasons set forth herein, the Commission should reverse the Initial Order, and enter an order in favor of Qwest, invalidating McLeod's WSOC. In the alternative, the Commission should remand the matter for hearing to fully explore the facts noted as unresolved in the Initial Order, and with direction that all of the terms of the WSOC Amendment be given effect.

Dated this 20th day of September, 2010.



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