Mark Trinchero, OSB No. 883221
DAVIS WRIGHT TREMAINE LLP
1300 SW 5th Ave Ste 2300
Portland OR 97201
Tel: (503) 241-2300
Fax: (503) 778-5299
Email: marktrinchero@dwt.com

Of Attorneys for McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services

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 MCLEODUSA'S ANSWER OPPOSING QWEST'S PETITION FOR ADMINISTRATIVE REVIEW OF ORDER 05

I. INTRODUCTION

Pursuant to WAC 480-07-825(4), McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") answers Qwest Corporation's ("Qwest") Petition for Administrative Review of Order 05. Because the Administrative Law Judge correctly addressed the issues of law and fact in the Initial Order ("Order"), McLeodUSA requests that the Washington Utilities and Transportation Commission (the "Commission") allow the Order to become final.

II. ARGUMENT

A. The Order Properly Enforces the ICA Amendment, Wherein Qwest Agreed to Pay a $21.24 WSOC as Part of a Comprehensive Settlement.

As the Order recognizes, there are two successive Wholesale Service Order Charges involved in this dispute. First, McLeodUSA's 2004 price list included a $20.00 Wholesale Service Order Charge for processing certain local service requests (the "Price List WSOC"). Complaint, ¶ 8, Exhibit A. Qwest does not allege it ever paid the $20.00 Price List WSOC.

Second, an amendment to the parties' interconnection agreement (the "ICA Amendment") replaced the Price List WSOC with new WSOCs ranging from $13.10 in Utah to $29.23 in New Mexico. Complaint, ¶¶ 8, 16 & Ex. B, Att. 1; Order, ¶ 45. The ICA Amendment memorialized a settlement that resolved numerous disputes. Complaint, ¶¶ 9, 16 & Ex. B. In place of the disputed Price List WSOC, the ICA Amendment expressly establishes a new WSOC in Washington of $21.24 (the "Settlement WSOC"). Complaint, Ex. B, ¶ 3 – 4 & Att. 1. Qwest pays this $21.24 Settlement WSOC, not the Price List WSOC it replaced. Complaint, ¶ 11.

Although the Price List WSOC and Settlement WSOC have different bases and different rates, Qwest often refers to "the WSOC" as if Qwest pays the charge in McLeodUSA's price list. The Complaint refers to a current charge paid by Qwest, stating "McLeod *charges* Qwest a Wholesale Service Order Charge," Complaint, ¶ 7, and that "the Wholesale Service Order Charges are contained in McLeod's tariff, or price list . . ." *Id.* at 8. Moreover, the Complaint is vague as to which WSOC it challenges. First, Qwest alleges that "McLeod's assessment of its Wholesale Service Order Charge" violates RCW 80.04.110, Complaint, ¶ 20. Second, Qwest alleges that "McLeod's imposition of the Wholesale Service Order Processing charge *through a price list or tariff* . . ." violates 47 U.S.C. §§ 251 and 252. Complaint, ¶ 22. Thus, while Qwest expressly limits its federal claim to the Price List WSOC, Qwest does not specify whether the state claim targets the Price List WSOC or Settlement WSOC. *Compare* Complaint, ¶ 20 *with* Complaint, ¶ 22.

In the ICA Amendment, Qwest voluntarily agreed to pay the Settlement WSOC and not to dispute McLeodUSA's proper invoices. Complaint, Ex. B, Att. 1, ¶ 2. Qwest concedes that it made that commitment as part of a broader settlement (Petition, ¶ 26), and the Order properly concluded that Qwest is bound to its word. Order, ¶ 42 ("We reject Qwest's proposal that we ignore a voluntarily-negotiated and fully-executed ICA amendment that had been previously approved by this Commission."). In the same negotiated ICA Amendment, McLeodUSA agreed to discontinue the Settlement WSOC if the Commission issued a Final Order that the original Price List WSOC was unlawful. Complaint, Ex. B, Att. 1. Accordingly, the agreement states that

"Qwest reserves its rights to challenge "CLEC's [McLeodUSA's] Wholesale Service Order *tariff provisions*" (emphasis added) and McLeodUSA agreed not to use the ICA Amendment "*in support of its tariffs*" (emphasis added). Complaint, Ex. B, Att. 1, ¶ 2.[1]

Qwest argues that the Order renders this preservation of rights language meaningless. Petition, ¶ 22. Qwest is wrong. The Order properly gives effect to each of the terms, which allow only challenges to WSOC "tariff provisions" (*i.e.*, the Price List WSOC) but do not allow challenges to the new Settlement WSOC established in the ICA Amendment. The problem for Qwest is that rather than limit its challenge to the Price List WSOC (which Qwest does not claim it ever paid), Qwest challenges the $21.24 Settlement WSOC. Complaint, ¶ 11 (noting the amount of the charge is $21.24, the Settlement WSOC amount). It is true that the ICA Amendment, by its terms, expires upon a Final Order invalidating the now-inoperative "tariff" (*i.e.*, the Price List WSOC). Complaint, Ex. B, ¶ 3. However, the same ICA Amendment commits Qwest to pay the Settlement WSOC until such an order issues. Complaint, Ex. B, ¶¶ 1, 3. Having negotiated the ICA Amendment, Qwest cannot argue that the Settlement WSOC was not negotiated (in violation of 47 U.S.C. §§ 251-252), or that it was otherwise unreasonable, discriminatory, illegal, unfair, or anti-competitive (in violation of RCW 80.04.110).

It is *Qwest's* interpretation that would render the ICA Amendment meaningless. Qwest argues that the ICA Amendment is "without prejudice" to the ICA Amendment's own provisions – including Qwest's agreement to pay the Settlement WSOC. In effect, Qwest invites the Commission to treat a negotiated commitment to pay the $21.24 Settlement WSOC as no commitment at all. The Order properly declined this invitation. Order, ¶ 72 ("We find it patently unfair to allow [Qwest] to seek to overturn the effect of its commitment in the Settlement and WSOC [ICA] Amendment, by contesting the WSOC on some sort of post-

[1] While the Order finds that the ICA Amendment "specifically preserves Qwest's right to challenge the WSOC," it is clear from the context that the Order is referring to the "tariff," that is, the Price List WSOC. *See* Order, ¶ 32. Indeed, the Order characterizes Qwest's position that it can challenge the other ICA Amendment provisions as "absurd." Order, ¶ 45. In any case, the ICA Amendment speaks for itself, and its interpretation is a matter of law. *Kelly v. Aetna Cas. & Sur. Co.*, 100 Wash.2d 401, 407 (1983).

concession basis.").

Qwest's own statements confirm that the ICA Amendment, while allowing challenges to the Price List WSOC, precludes challenges to the Settlement WSOC that Qwest now seeks to avoid. Qwest twice states that the ICA Amendment "allows Qwest to challenge the Wholesale Service Order Charge ("WSOC") *on all grounds that Qwest could have challenged it before the WSOC was included in the ICA via an amendment.*" Petition, ¶¶ 4, 11. Logically, there is *no ground* upon which Qwest could have challenged the $21.24 Settlement WSOC before the ICA Amendment was executed, because the $21.24 Settlement WSOC was created by the ICA Amendment. The only WSOC that existed, before the ICA Amendment, was the $20.00 Price List WSOC. Perhaps recognizing this, Qwest denies that it is challenging the ICA Amendment even as it contests "the WSOC." *See* Petition, ¶ 24.

Finally, Qwest argues – without authority – that the ALJ could not determine that Qwest's proposed interpretation is absurd and reject it on that basis. Petition, ¶ 24 ("With all due respect – this determination of absurdity is not within the authority of the Initial Order to make."). In fact, Washington law *requires* rejection of absurd contract interpretations such as that offered by Qwest. *See Spectrum Glass Co. v. Pub. Util. Dist. No. 1 of Snohomish County*, 129 Wash.App. 303, 312, 119 P.3d 854, 859 (Div. 1, 2005) ("Courts may not adopt a contract interpretation that renders a term absurd or meaningless"). The Administrative Law Judge properly rejected Qwest's implausible interpretation of the contract, and the Commission should as well.

B. The Commission-approved ICA Amendment Establishing the Settlement WSOC Does Not Unlawfully Discriminate.

Qwest argues that the Order erred in concluding that the WSOC is not discriminatory, claiming that a proper evaluation of the evidence shows "the WSOC" violates RCW 80.04.110. Petition, ¶ 27. Qwest's argument is fundamentally flawed. Once the inoperative $20.00 Price List WSOC is disentangled from the $21.24 Settlement WSOC that Qwest agreed to pay, Qwest's claims that the Settlement WSOC is discriminatory ring hollow. The $21.24 Settlement

WSOC is part of an ICA Amendment that Qwest concedes was submitted to the Commission and approved on May 7, 2009. Complaint, ¶ 9. Qwest concedes that "the Amendment was the result of negotiations and a separate settlement that resolved other issues." Petition, ¶ 26. Therefore, any characterization of the Settlement WSOC as a discriminatory charge "imposed" by McLeodUSA on Qwest rather than other carriers, (Petition, 11), is simply false. Qwest cannot explain how a negotiated bilateral agreement could be discriminatory, and does not cite any authority suggesting that discrimination-by-agreement is even possible. Finally, the fact that Qwest has different arrangements with other carriers (i.e., "bill-and-keep") does not show unlawful discrimination, since Qwest itself remains free to adopt bill-and-keep. *See* Order, ¶ 67; Declaration of August H. Ankum, Ph.D., ¶¶ 11, 61 – 63.

The Telecommunications Act (the "Act") plainly allows Qwest and McLeodUSA the freedom to voluntarily negotiate and enter into an ICA with enforceable terms – even if those terms would otherwise violate the Act's standards for discrimination, number portability, or reciprocal compensation. Section 252(a)(1) of the Act provides:

> [A]n incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers *without regard to the standards set forth in subsections (b) and (c) of section 251* of this title.

47 U.S.C. § 252(a)(1) (emphasis added). Subsection (b) sets forth the non-discrimination standards that Qwest accuses McLeodUSA of violating, as well as standards on local number portability ("LNP") and reciprocal compensation. 47 U.S.C. § 251(b). By the language above, the Act expressly declines to apply those standards to voluntarily-negotiated ICAs like that at issue here. "The Reward for reaching an independent agreement is exemption from the substantive requirements of subsections 251(b) and 251(c)." *MCI Telecomms. Corp. v. U.S. West Commc'ns*, 204 F.3d 1262, 1266 (9th Cir. 2000). Therefore, even if Qwest were correct that the Settlement WSOC is discriminatory, it would not violate the Act. The Settlement WSOC became part of the parties' ICA via the ICA Amendment, which the Commission approved. Complaint, ¶ 9; Petition, ¶ 26. The resulting ICA is an enforceable contract with the

binding force of law. *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1120 (9th Cir. 2003) (stating that "interconnection agreements have the binding force of law").

Qwest's petition states that it does not challenge the Amendment, and asks the Commission "to enforce the ICA amendment in full." Petition, ¶¶ 24, 15. On this single point, McLeodUSA agrees. The ICA Amendment is valid and enforceable. It does not discriminate against Qwest, and any discriminatory terms in the Amendment would not violate the Act. Accordingly, the ALJ properly rejected Qwest's discrimination claims. Order, ¶ 71 ("If Qwest believed, at the time it was negotiating the WSOC [ICA] Amendment, that the WSOC was discriminatory and anti-competitive, it should never have agreed to the charge . . . .").

C. The Order Does Not Depend on Qwest's Unreasonable Delay in Contesting the Price List WSOC.

Qwest speculates that "[t]he Initial Order appears to conclude" that Qwest waived rights by delaying any challenge to the 2004 price list for over five years. Petition, ¶ 35. Qwest's speculation is based on a single footnote that is inessential to the decision. *Id.* ¶ 36. The Order makes no express finding as to waiver, laches or estoppel; nor is there any indication that such a finding is essential to the Order. Therefore, even if Qwest could explain the delay, the Order would stand.

In any case, the long delay between the 2004 Price List WSOC and the 2009 ICA Amendment and Settlement WSOC highlights the central flaw in Qwest's arguments, as discussed above. Namely, Qwest fails to distinguish the $20.00 Price List WSOC from the negotiated $21.24 Settlement WSOC that superseded it. After it committed itself to the Settlement WSOC, Qwest improperly sought to escape its commitment based on perceived flaws in the now-inoperative Price List WSOC. The ALJ could have reasonably concluded that the delay reinforces that the target of Qwest's Complaint is the terms of the negotiated ICA Amendment, rather than a price list "imposed" on Qwest. In sum, the Order's comments on the delay, while not essential, serve to underscore Qwest's use of the Price List WSOC as a red herring to distract from its own settlement commitments.

D. There Are No Unresolved Genuine Material Issues of Fact Regarding Recovery of Local Number Portability Costs.

Qwest's final argument is that the Order failed to make a determination as to factual issues concerning local number portability ("LNP") costs. Petition, ¶ 39. Qwest states: "Specifically, the Initial Order fails to determine that McLeod is improperly recovering costs for LNP from Qwest." *Id.* Qwest infers from this, without further support, that the Administrative Law Judge "apparently" determined that an evidentiary hearing was required, but then failed to hold one. *Id.*

Qwest's speculation is no basis for modifying the Order. At best, Qwest has pointed out that the Order "failed" to make a determination *in favor of Qwest*, not that the ALJ found that the LNP issue was inconclusive– and certainly not that a hearing was required to resolve disputed material issues of fact. Qwest's speculation that the ALJ determined a hearing was needed, but then failed to hold one, is a strained and implausible interpretation of the single paragraph on which it relies. A more plausible interpretation is that the ALJ found there were no material issues to resolve. As stated above, the Act exempts voluntarily-negotiated ICAs from LNP standards. *See* 47 U.S.C. § 252(a)(1) (exempting such agreements from 47 U.S.C. § 251(b)-(c)).

Moreover, Qwest mischaracterizes the record in support of this supposedly unresolved issue. Qwest erroneously states that "McLeod does not dispute that LNP costs are recovered in the WSOC, *and* in a tariff charge to its end-users." Petition, ¶ 40 (emphasis added). As support, Qwest cites six paragraphs of argument from its own Answer to McLeodUSA's Motion for Summary Determination, in which Qwest mischaracterizes the testimony of Dr. Ankum in a failed attempt to show that McLeodUSA uses the WSOC (as opposed to the $0.43 tariff charge Qwest identifies) to recover LNP costs. In fact, Dr. Ankum's declaration shows that McLeodUSA's charges correspond to services that McLeodUSA performs. Ankum Decl., § III. Qwest's argument did not create a genuine issue of material fact. The Order was free to reject Qwest's mischaracterization of Dr. Ankum's declaration, and apparently did so.

Far from being an issue that "McLeod does not dispute," there is simply *no* evidence in the record that McLeodUSA illegally recovers LNP costs via the WSOC. As such, there is no

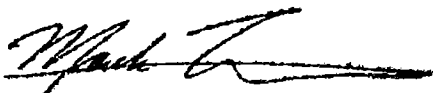
genuine issue of fact concerning LNP costs, much less a material issue. Accordingly, there was nothing improper about the Order's grant of summary determination to McLeodUSA, and denying summary determination to Qwest. *See* WAC 480-07-380(2) (citing CR 56 of the Washington Superior Court's Civil Rules).

III. CONCLUSION

For the reasons stated herein, Qwest's petition fails to identify any error in Administrative Law Judge Friedlander's Initial Order Denying Qwest's Motion for Summary Determination and Granting McLeodUSA's Motion for Summary Determination. Accordingly, McLeodUSA respectfully requests that the Commission allow the Initial Order to become final without substantive modification.

DATED this 30th day of September, 2010.

DAVIS WRIGHT TREMAINE LLP

By 

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