

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

QWEST CORPORATION,

Complainant,

v.

MCLEODUSA TELECOMMUNICATIONS  
SERVICES, INC., d/b/a PAETEC BUSINESS  
SERVICES.

Respondents.

Docket No. UT- 090892

QWEST CORPORATION'S  
MEMORANDUM IN SUPPORT OF  
MOTION FOR SUMMARY  
DETERMINATION

I. INTRODUCTION

- 1 Pursuant to RCW 80.04.110 and WAC 480-07-305, Qwest Corporation ("Qwest") brought a Complaint against McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services ("McLeod"). In accordance with the agreed upon schedule. Qwest hereby files its Motion for Summary Determination and Memorandum in Support of Motion for Summary Determination.
- 2 Motions for summary determination are governed by WAC 480-07-380.<sup>1</sup> This matter is appropriate for summary determination because there are no genuine issues as to any

<sup>1</sup> WAC 480-07-380 2) **Motion for summary determination.**

(a) **General.** 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 commission will consider the standards applicable to a motion made under CR 56 of the Washington superior court's civil rules.

material fact, and Qwest is entitled to judgment as a matter of law that McLeod's wholesale service ordering charge is unreasonable, discriminatory, and unlawful.

3 Attached to and in support of this Memorandum are three exhibits. Exhibit A is an excerpt from Section 7 of McLeod's Washington "tariff", which contains terms and conditions related to the wholesale service ordering charge. Exhibit B is an amendment to the interconnection agreement between Qwest and McLeod. Exhibits A and B were attached to Qwest's complaint and are provided again here for the Commission's convenience. Exhibit C is the Declaration of Robert Weinstein, with attachments, that supports the facts contained in this Memorandum.

## II. SUMMARY OF ARGUMENT

4 McLeod assesses a wholesale service ordering charge on Qwest when a McLeod end-user customer discontinues service with McLeod and takes service from Qwest. Qwest contends that this charge is unlawfully imposed by McLeod in violation of the Telecommunications Act of 1996, and that it is discriminatory and anti-competitive in violation of state law.

5 McLeod assesses the wholesale service ordering charge on Qwest, but not on other carriers to whom a McLeod customer changes service. In addition, McLeod sometimes assesses the charge on Qwest even if the customer is leaving McLeod to go to another carrier, not Qwest. McLeod can point to no law that authorizes it to assess these charges on Qwest.

6 McLeod initially began charging Qwest on the basis of McLeod's "tariff" in Washington, but McLeod does not have a tariff in Washington, only a catalog, and the rates charged by McLeod are not approved by the Commission. Further, Qwest has not ordered any

services from McLeod that would warrant assessment of these charges, and McLeod may not lawfully assess these charges on Qwest outside of the parties' interconnection agreement.

7 McLeod is wrong in claiming that the rate it assesses is "comparable" to Qwest's rates. Qwest's rates differ from McLeod's charge in several important respects. First, Qwest's rates are Commission-approved rates, based on TELRIC studies, and specifically authorized by the Act. Thus, there is no question about the legal authority, the costs recovered, or the reasonableness of the rates. McLeod's charge has none of these characteristics. Further, Qwest's rates are assessed based on McLeod's decision to *obtain a service* from Qwest, i.e., the lease of unbundled network elements. McLeod's charge is based on the fact that a customer is leaving McLeod, not on any decision by Qwest to obtain products or services from McLeod.

8 The wholesale service order charge operates as a penalty on Qwest when a customer switches local service providers away from McLeod. As such, the charges are discriminatory in that they do not apply to other carriers. They are also anticompetitive in that they operate as a disincentive for Qwest to compete for customers served by other carriers.

### III. FACTS

#### A. Qwest's Rates and Charges

9 McLeod leases UNEs or other facilities from Qwest to provide service for the majority of its end user retail customers.<sup>2</sup> Qwest's role in this relationship is essentially as a

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<sup>2</sup>Weinstein Declaration, McLeod Response to Qwest Data Request No. 6.

wholesaler selling McLeod services at a non-retail rate. McLeod on the other hand, purchases services at wholesale rates from Qwest and provides retail end user local service through the UNEs provided by Qwest. The relationship between McLeod and Qwest is governed by the interconnection agreement between the parties.

- 10 As an example of the relationship, one product McLeod leases from Qwest is an unbundled loop. The loop is essentially the wire from the Qwest central office serving the end user to the demarcation point at the end user premises. McLeod can order a loop to serve its end user customer pursuant to the interconnection agreement ("ICA"). The rate elements listed in the ICA are the rates McLeod will be charged for the loop.
- 11 In Washington, under the parties' ICA and pursuant to various cost docket orders of this Commission, Qwest is permitted to charge McLeod nonrecurring charges associated with installing or disconnecting an unbundled loop, or with converting a customer to resold services. These nonrecurring charges vary depending on whether Qwest processes an order manually or on a mechanized basis. The charges were all established in litigated cost docket proceedings, and were approved by the Commission only after the Commission found that Qwest had a lawful right to recover certain costs from CLECs, and that those costs were fair, just, and reasonable.<sup>3</sup>
- 12 Qwest charges McLeod the Commission-approved installation or disconnect charge for installing or disconnecting the UNE McLeod has ordered. It is important to note that these charges are in direct response to the McLeod order for the wholesale service, the UNE, and are not assessed to an end user for a retail service. In other words, McLeod

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<sup>3</sup> See, generally, the Commission's orders in Docket Nos. UT-960369, et al, and Docket No. UT-003013.

only purchases wholesale services and is not purchasing retail local service from Qwest. When an end user retail customer of McLeod's chooses to use a different local service provider, the UNE McLeod has ordered from Qwest to serve that customer is no longer needed by McLeod and the disconnect charge is assessed regardless of whether the departing McLeod customer then takes service from Qwest, from another provider, or if the customer simply disconnects altogether.<sup>4</sup>

13 Qwest imposes an installation or new connection charge on McLeod in accordance with Commission-approved rates, when McLeod orders a new service from Qwest. This is true regardless of whether McLeod has won the customer from Qwest, from another CLEC, or if the customer has never received service before and is a new connection.<sup>5</sup>

14 Qwest does not purchase or lease unbundled network elements from McLeod in Washington, and does not order retail or wholesale services from McLeod.<sup>6</sup> Any costs McLeod incurs are related to the service ordered and purchased by McLeod from the ICA and there are no costs that McLeod may properly impose on Qwest when a customer switches providers away from McLeod.

#### **B. When McLeod Assesses the Charge**

15 A CLEC end-user customer can change its local service provider to any other local service provider, including Qwest, and choose to either keep the same phone number or select a new phone number.<sup>7</sup> This is true for McLeod end user customers. When a

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<sup>4</sup> Qwest's Complaint and McLeod's Answer at paragraph 12.

<sup>5</sup> Id at paragraph 13.

<sup>6</sup> Id at paragraph 14.

<sup>7</sup> Certain requirements apply in order for a customer to keep the same number, but are not relevant in these proceedings.

McLeod end-user customer changes its local service provider and becomes a customer of Qwest and chooses to have a new number assigned, Qwest may advise McLeod of that change through a "loss report" or the end user customer may notice McLeod directly. The loss report does not constitute a service order to McLeod, and does not constitute a request by Qwest for any products or services from McLeod. If a McLeod customer contacts Qwest for local service, and asks to retain the same phone number that they currently have with McLeod, the number will be ported and Qwest submits a "local service request" ("LSR") to McLeod informing McLeod that the customer is leaving McLeod, advising McLeod that McLeod will be required to port the customer's phone number to Qwest<sup>8</sup>, and advising McLeod that the UNE McLeod has purchased from Qwest should be disconnected on a specific due date. Once McLeod receives the LSR, it then has notice that it should initiate its process for the porting of the telephone number, as well as initiating its process for disconnection of the end user customer's local loop that is serving that customer. If McLeod does not process the disconnection of the local loop, Qwest could continue to charge McLeod the monthly recurring charges associated with the UNE that McLeod had purchased from Qwest to serve its end user customer.

16 McLeod charges Qwest the Wholesale Service Order Charge at issue when a McLeod end-user customer switches its local service provider from McLeod to Qwest. Under the Amendment, the amount of the Charge is \$21.24 per occurrence. This is the case regardless of whether Qwest solicited the customer or the customer decided to make the change on his or her own initiative.<sup>9</sup> McLeod states that it assesses this charge to recover

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<sup>8</sup> McLeod is obligated to port telephone numbers under federal law, Title 47, Chapter I, Part 52.26 C.F.R., and under WAC 480-120-146. Neither provision of law gives McLeod the right to recover any costs associated with porting a number from another carrier.

<sup>9</sup> Qwest Complaint and McLeod Answer at paragraph 11.

costs associated with activities involved in accepting, verifying, correcting and processing "orders" that it receives from Qwest.<sup>10</sup> McLeod claims that the activities are comparable to the activities described in Qwest's nonrecurring cost studies.

17 McLeod does not assess this charge on any other carrier to whom a McLeod end-user transfers service. The provisions of Section 7 of McLeod's Washington Local and LD Price List 1 ensure that Qwest is the only carrier charged. Thus, the Wholesale Service Order Charge operates to penalize Qwest for winning a customer from McLeod, but the same penalty is not assessed on any other carrier.

18 Further, McLeod sometimes assesses the charge on Qwest even if the customer is *not* moving to Qwest, but does not assess the charge to other carriers.<sup>11</sup>

### C. The Settlement Agreement and ICA Amendment

19 On or about October 10, 2008, Qwest and McLeod entered into a Settlement Agreement whereby they resolved a number of business disputes between them. In order to reach settlement on other disputed issues, Qwest and McLeod came to an agreement with regard to the Wholesale Service Order Charge(s) ("WSOC"). The Wholesale Service Order Charges are contained in McLeod's catalog in Washington. McLeod does not have a tariff or a price list on file with the Commission in Washington. However, McLeod has what it calls a "Price List" for Washington available at

<http://www.mcleodusa.com/TariffStateDetail?state=48&stateName=Washington>.<sup>12</sup> The

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<sup>10</sup> Weinstein Declaration, McLeod response to Qwest Data Request No. 3.

<sup>11</sup> Id, McLeod response to Qwest Data Request No. 10.

<sup>12</sup> McLeod's website, <http://www.mcleodusa.com/TariffStates>, contains the following statement: "This site provides access to effective tariff documents of McLeodUSA. The word "tariff", as used on this site, is a generic term that applies to all tariff and tariff-like documents, e.g., tariffs, catalogs, and price schedules."

document (“Local and LD Price List 1”) posted at that location contains a Wholesale Service Order Charge in Section 7. The provisions of Section 7 are attached to this Motion as Exhibit A. That “Price List” bears an effective date of April 10, 2004.<sup>13</sup>

20 The parties’ agreement with regard to the Wholesale Service Order Charges was memorialized in a “Wholesale Service Order Charge Amendment” (“Amendment”) to the parties’ interconnection agreement. The Amendment is attached to this Motion as Exhibit B. The Amendment was filed with this Commission and became effective on May 7, 2009.<sup>14</sup>

21 The Amendment, in Attachment 1, paragraph 2, specifically preserves Qwest’s rights to challenge the Wholesale Service Order Charge. If the Commission determines that the Wholesale Service Order Charge is unjust, unreasonable, unlawful, or otherwise unenforceable, the Amendment is deemed terminated on the effective date of the Commission’s final order.<sup>15</sup>

#### IV. ARGUMENT

##### A. **The Interconnection Process in the Telecommunications Act is the Proper Method for Resolving Interconnection Issues**

22 Section 251(c) of the Telecommunications Act of 1996 (Act) requires Qwest to provide unbundled network elements to requesting telecommunications carriers. The Act requires, and Congress intended, for the rates, terms and conditions of these unbundled network elements to be put through the negotiation and arbitration process outlined in the

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<sup>13</sup> Qwest Complaint and McLeod Answer at paragraph 8.

<sup>14</sup> Id at paragraph 9.

<sup>15</sup> Id at paragraph 10.



Act. This Commission has also held that terms and conditions between carriers related to interconnection must be filed with the Commission for approval.<sup>16</sup>

23 The Act provides that when a carrier requests access to an incumbent's network, the parties will negotiate an interconnection agreement setting forth the rates, terms and conditions by which Qwest and McLeod can interconnect.<sup>17</sup> The Act provides the process by which the parties will negotiate the ICA to establish the terms and conditions for local exchange traffic<sup>18</sup> and that if the parties fail to reach an agreement on all or some of the issues, either party can petition the state commission for an arbitration of the issues.<sup>19</sup> The rates, terms, and conditions of the unbundled network element arrangement between Qwest and McLeod are contained in the ICA. Exhibit A of this Agreement contains the rates for unbundled network elements. The Commission reviews the agreements and approves the rates.

24 Section 251(b)(2) of the Act requires all local exchange carriers, including Qwest and McLeod, to provide number portability.

25 According to the language of McLeod's price list, McLeod's WSOC applies only to an ILEC who supplies an unbundled network element which, as noted above, is required under Section 251 of the Act. The WSOC is charged if the ILEC assesses an installation charge upon McLeod, even if it is a Commission approved charge. When a customer is leaving McLeod and returning to Qwest, Qwest sends an LSR to McLeod if the customer

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<sup>16</sup> See generally the Commission's orders in *Washington Utilities and Transportation Commission v. Advanced Telecom Group Inc., et al.*, Docket No. UT-003011 (unfiled agreements).

<sup>17</sup> 47 U.S.C. §252(a)(1)

<sup>18</sup> 47 U.S.C. §251(C)(1) and §252(a)(1)

<sup>19</sup> 47 U.S.C. §252(b)

has requested local number portability. In this situation, McLeod applies the WSOC to Qwest.

26 The WSOC only applies to unbundled network elements provided under Section 251 of the Act and an LSR is only sent when number portability, also provided under the Act, is involved. It necessarily follows that the interconnection negotiation process required by the Act is mandatory and should have been followed before McLeod could assess the WSOC. Because the WSOC is only assessed in relation to products or services provided under Section 251 of the Act, the process mandated by the Act requires all rates, terms and conditions of the interconnection between the networks of Qwest and McLeod be incorporated into the ICA. The issues of the WSOC are thus required to be determined through the negotiation process and any results incorporated into the contract. McLeod cannot circumvent this process by simply filing a price list with this charge.

27 Prior to asserting that Qwest owes the WSOC, McLeod did not attempt to engage in the interconnection negotiation process. Instead the WSOC was placed into the McLeod "catalog." In Washington, competitively classified companies such as McLeod are not permitted to file price lists or tariffs with the Commission.<sup>20</sup> As such, inclusion of certain rates by McLeod in its catalog, even if McLeod calls that catalog a "price list" or a "tariff", has no legal force or effect. Nor does it have any impact on the merits or the outcome of this complaint that the WSOC is temporarily contained in an amendment to the ICA. The parties executed that amendment simply to settle their dispute on an interim basis, while preserving all of Qwest's rights to challenge the charge. Thus, the WSOC must be considered, for purposes of this complaint, as if it did not exist in an

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<sup>20</sup> RCW 80.36.100(5), .333, and .338.

amendment, and was otherwise being imposed by McLeod simply through the publication in McLeod's catalog. McLeod's failure to engage the negotiation process and attempt to charge Qwest for the WSOC from its catalog circumvents the intent of the Act.

28 McLeod has had opportunity to negotiate an amendment to the current ICA with Qwest but did not do so. In fact, the current agreement is effective on a month-to-month basis because of its expiration several years ago. McLeod could have asked to negotiate a new agreement and have the WSOC as one of the issues.

29 Instead, McLeod seeks to alter the terms of the agreement by circumventing the negotiation process and the intent of the Act. Because the WSOC would need to be part of the rates, terms and conditions of the interconnection service and network element arrangement contained in the ICA, the issues surrounding the WSOC should have been properly put through the negotiation process. This is consistent with how Minnesota addressed this issue when McLeod attempted to tariff the WSOC in that state. In addition to finding that the proposed tariff was unreasonably discriminatory and would impede competition, the Minnesota Commission found that the proposed tariff would violate federal law, which requires that terms such as the WSOC be negotiated or arbitrated as part of an ICA.<sup>21</sup>

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<sup>21</sup> "The Commission agrees with the DOC that the proper recourse in this situation is for the parties to negotiate an amendment to their ICA regarding this matter. First, the subject of disconnection is part of the parties' ICA and federal policy favors the use of the negotiation process set forth in the Act to resolve issues that are the subject of ICA's. Further, in this case both McLeod and Qwest have indicated a willingness to enter into negotiations to amend their ICA. Finally, this is consistent with the Commission's recent action in the *CenturyTel* case and the Commission's recognition that interconnection negotiations are the primary vehicle for resolving interconnection issues. For these reasons, the Commission will reject the proposed tariff." *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,

(continued . . .)

30 McLeod's language in the description of the WSOC also demonstrates why the ICA is the proper venue. McLeod's catalog sets the charge for the WSOC to be "equal to the Service Order Charge (or a comparable charge assessed upon receipt of an order) contained in the ICA. . . ."<sup>22</sup>

31 The WSOC is intractably linked to interconnection and services provided under the Act, and therefore the ICA is the proper place for any "rate" that may be charged. McLeod cannot unilaterally decide to alter the interconnection relationship by implementing additional terms and conditions. This is improper, in the same way that Qwest cannot simply enact additional terms and conditions for UNE's that McLeod purchases from the ICA. By imposing its WSOC by catalog and avoiding the required process, McLeod violates the Act. The WSOC is thus unlawful and must be rejected.

**B. The WSOC is Unjust and Unreasonable**

32 McLeod assumes that its orders for UNEs are comparable to the LSR that Qwest submits when a customer leaves McLeod, and therefore assesses the charge on Qwest when a McLeod customer chooses Qwest for local service. McLeod's assumption is wrong.

33 McLeod's price list applies by its terms to companies that ". . . assess a nonrecurring charge on McLeod[] for *comparable* orders submitted by McLeod [] to initiate service using unbundled network elements leased from the incumbent local exchange carrier (emphasis added)." Section 7.1. of McLeod's "price list" for Washington. McLeod states that "comparable orders" include LSRs that are submitted by McLeod to Qwest to

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(. . . continued)

July 22, 2004.

<sup>22</sup> See Exhibit A.

facilitate an end user switching service from Qwest to McLeod, and that a “comparable” LSR is submitted by Qwest to McLeod via the McLeod website to facilitate a customer moving from McLeod to Qwest.<sup>23</sup>

34 McLeod’s interpretation of a “comparable order” is simply wrong. The purpose of the LSR submitted by McLeod to Qwest is not to facilitate a retail end-user moving its service from Qwest to McLeod. The purpose of the LSR submitted by McLeod to Qwest is to order a wholesale service by purchasing the UNE. This is regardless of whether the customer is a new end-user, an existing Qwest retail customer, or the customer of another CLEC. When a retail end-user of McLeod chooses to switch local service to Qwest, Qwest does not submit an LSR to McLeod to order a UNE. Qwest does not purchase a UNE, or any other service from McLeod. Qwest’s LSR, in the case of number porting, is simply used to notify the old service provider (McLeod) that a number is to be ported, what the desired due date is, and that McLeod should begin its porting process. The LSR also advises McLeod that the UNE is to be disconnected and that notice needs to be sent to the proper organizations that keep databases of numbers and carriers for various uses.<sup>24</sup> If the notice was not provided or disconnection of the UNE did not occur, the port might not occur correctly and McLeod would be paying a monthly recurring charge for a service it does not use. In general, McLeod seeks to equate the porting of a number with the order for a loop. This comparison fails.

35 Qwest’s installation charge is not based on whether an end user customer is leaving or going to McLeod, or whether the end user is going from a CLEC, a wireless carrier or is a

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<sup>23</sup> Weinstein Declaration, McLeod response to Qwest Data Request No. 5.

<sup>24</sup> For example, the Number Portability Administration Center (NPAC) receives notice from both Qwest and McLeod prior to porting.

first time connection. McLeod orders the service in accordance with the terms and conditions of the ICA, and the charge is for installing a UNE and is a direct result of McLeod ordering the UNE. By contrast, Qwest purchases no unbundled loops or similar local services in the state of Washington from McLeod. When Qwest connects a loop for McLeod, it incurs costs, and appropriately assesses a Commission-approved installation charge as contained in the ICA. When Qwest disconnects a loop provided to McLeod, it incurs costs, and assesses a Commission-approved disconnect charge contained in the ICA. At no point is McLeod expending resources to provide any products or services to Qwest, or to connect or disconnect a Qwest local service customer – the function of connecting and disconnecting Qwest customers is performed by Qwest.

36 In addition, the disconnection of the UNE takes place any time an end user customer leaves McLeod, whether a number is ported or not. Since McLeod is obligated to port the number and is not authorized to recover the porting costs<sup>25</sup>, McLeod cannot apply the WSOC to a number portability request in the LSR. Thus, McLeod is trying to charge Qwest when Qwest provides McLeod notice that a disconnection will take place. This means McLeod wants to charge Qwest for its disconnection process, even though the process would be the same as when McLeod disconnects without porting a number.

37 Similarly, the same steps are taken whether the customer is going to Qwest, another CLEC or a wireless carrier. By writing the terms of the WSOC to apply to Qwest only, McLeod has dictated an unjust result. Because the WSOC does not apply to other carriers in the state, this works as a disincentive for Qwest to compete for customers who might be served by McLeod.

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<sup>25</sup> See Footnote 4

38 It is unreasonable for McLeod to charge Qwest simply because McLeod ordered a product from Qwest.

39 According to the catalog, the WSOC is only applied to carriers who assess "a non-recurring charge on McLeod for the processing of comparable orders submitted by McLeodUSA to initiate service using network elements leased from the incumbent local exchange carrier." Thus, according to the language, the WSOC applies when (1) McLeod orders a UNE from Qwest; (2) Qwest assesses the Commission approved rate for installation of the UNE; and (3) the orders are comparable.

40 The "order" McLeod wants to compare is derived from the price list language "One LSR must be submitted for each retail end user switching from McLeodUSA to the Requesting Carrier." Thus, McLeod requires submission of an LSR, and then seeks to charge Qwest for that submission. The LSR from Qwest cannot be mistaken for an order for a wholesale product or service. This LSR tells McLeod about the number port so that McLeod can ensure the transfer is completed in a timely fashion. The LSR does not order a UNE and does not ask McLeod to provide any retail local service.

41 The language of the WSOC attempts to equate Qwest's approved installation charge for a loop with McLeod's loss of an end user customer to allow McLeod to recover costs from Qwest to which it is not legally entitled.

### **C. The Wholesale Service Order Charge is Discriminatory**

42 The McLeod price list is specifically crafted to target one company. McLeod has worded the price list so Qwest is the only LEC that is charged. The language applies only to an ILEC, and only to a carrier providing UNEs. Qwest is the only carrier who has this relationship with McLeod.

43 McLeod admits it only serves end users in Washington through the use of Qwest products or services.<sup>26</sup> Any time a retail customer of McLeod's decides to change its local service provider, Qwest will have to pay a penalty whether or not Qwest has solicited the customer. Qwest is at a competitive disadvantage to any other CLEC who may solicit a McLeod customer.

44 Qwest does not charge McLeod anything for processing an LSR to change service providers when a Qwest retail customer switches its service to McLeod.<sup>27</sup> Accordingly, Qwest stands in precisely the same position as other telecommunications carriers when it obtains a former McLeod customer. Imposing a charge of \$20 or more on Qwest in such a situation is discriminatory and creates an uneven playing field when Qwest is competing for Washington customers.

**D. McLeod's WSOC is Not Authorized by Law**

45 The Commission allows Qwest to assess a non recurring charge for installation and disconnection of a UNE to recover the costs of these actions. These rates were established by the Commission in Docket Nos. UT-960369, et al., and Docket No. UT-003013.

46 Nothing in the Act provides for McLeod to assess the WSOC. Nothing in the Act provides for McLeod to recover the costs it seeks. Even if such recovery was permissible under the Act, it would obviously be subject to interconnection negotiation process.

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<sup>26</sup> Weinstein Declaration, McLeod's Response to Qwest Data Request No. 7.

<sup>27</sup> As previously noted, Qwest would charge McLeod for a UNE if McLeod serves the customer by ordering a UNE from Qwest. Qwest does not charge McLeod because the end user is leaving Qwest or any type of charge similar to the WSOC.



47 No cost information has been submitted by McLeod to justify the rate. The WSOC is not for installing or disconnecting a UNE. Neither the WSOC nor its rate is approved by the Commission. Had the issue been brought correctly under the interconnection negotiation process, both Qwest and McLeod could have presented their respective positions properly. However, by avoiding the process, McLeod has not had to provide support for its rates or any justification for the charge itself. The charges are not authorized by law.

## V. CONCLUSION

48 McLeod's wholesale order processing charge is discriminatory, anticompetitive and unreasonable. McLeod has no right under state or federal law to impose this charge on Qwest, and can point to no provisions of the Telecom Act or other legal authority that would authorize it to assess these charges on one of its competitors. The charge violates RCW 80.04.110 and Section 252 of the Telecom Act. The Commission should therefore reject McLeod's wholesale order processing charge and declare it unenforceable.

DATED this 19th day of October, 2009.

QWEST



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Lisa A. Anderl, WSBA #13236  
Adam L. Sherr, WSBA #25291  
1600 7<sup>th</sup> Avenue, Room 1506  
Seattle, WA 98191  
Phone: (206) 398-2500

Attorneys for Qwest Corporation



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7.0 Wholesale Services7.1 Wholesale Service Order Processing:

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 ("ILEC"). A Requesting Carrier may submit an LSR during regular business hours of McLeodUSA. One LSR must be submitted for each retail end user switching from McLeodUSA to the Requesting Carrier. McLeodUSA will process an LSR and return a firm order commitment (FOC) to the requesting carrier within 48 hours of receipt. A Wholesale Service Order Charge shall be charged for each LSR received, whether accepted as valid or rejected as invalid. LSRs may be rejected for inaccurate, incomplete, or repetitive LSRs. An additional Service Order Charge applies when the Requesting Carrier cancels an LSR request. A separate Service Order Supplemental Charge applies when a Requesting Carrier submits an LSR that modifies or supplements the initial LSR. A Requesting Carrier may request expedited processing of the LSR within 24 hours for an additional Expedite Fee. A Forced Expedite Fee applies if the Requesting Carrier converts a retail customer's service before the Firm Order Commitment Date that causes McLeodUSA to expedite its required activities. An additional charge also applies to an LSR Expedite Order that involves a loop disconnect. A full set of Business Rules is available from McLeodUSA.

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7.0 Wholesale Services7.1 Wholesale Service Order Processing: (cont'd)7.1.1 Rates:

The Wholesale Service Order charge is equal to the Service Order Charge (or a comparable charge assessed upon receipt of an order) contained in the ICA between McLeodUSA and the incumbent local exchange carrier for the state in which the retail end user resides.

If the ICA does not set forth non-recurring charges identified as a Service Order Charge, Service Order Supplemental Charge, Expedite Fee, or Forced Expedite Fee charge, or comparable items, the following charges apply:

Wholesale Service Order	\$20
Service Order Supplemental Charge	\$15
Expedite Fee*	\$40
Forced Expedite Fee*	\$75

For Expedite or Forced Expedite Request involving Loop Disconnect, the applicable charge applies in addition to a pass through of any monthly recurring charges for an unbundled loop charged by the ILEC after Customer conversion to Requesting Carrier's service.

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(M)

Issued: March 31, 2004

Effective: April 10, 2004

BY: General Counsel  
One Martha's Way, P.O. Box 3177  
Hiawatha, Iowa 52233

**Wholesale Service Order Charge Amendment  
To the Interconnection Agreement between  
Qwest Corporation and McLeodUSA Telecommunications Services, Inc.  
dba PAETEC Business Services  
for the state of Washington**

This is an Amendment ("Amendment") to the Interconnection Agreement between Qwest Corporation ("Qwest"), a Colorado corporation, and McLeodUSA Telecommunications Services, Inc. dba PAETEC Business Services ("CLEC"), an Iowa corporation. CLEC and Qwest shall be known jointly as the "Parties".

**RECITALS**

WHEREAS, CLEC and Qwest entered into an Interconnection Agreement ("Agreement") for service in the state of Washington which was approved by the Washington Utilities and Transportation Commission ("Commission"); and

WHEREAS, CLEC maintains a tariff or price list on file in the State of Washington which requires Qwest, when submitting orders to process a customer conversion from CLEC to Qwest to compensate CLEC for the activities that CLEC claims is required to process the order (the "Wholesale Service Order Charge"); and

WHEREAS, Qwest has disputed the lawfulness of the CLEC tariff or price list and its application to Qwest, resulting in litigation filed by CLEC against Qwest and subsequently a settlement between Qwest and CLEC regarding, among other issues, CLEC's claim for compensation for Wholesale Service Order Charges; and

WHEREAS, the Parties wish to amend the Agreement further under the terms and conditions contained herein to implement the terms of the settlement related to this particular dispute.

**AGREEMENT**

NOW THEREFORE, in consideration of the mutual terms, covenants and conditions contained in this Amendment and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

**Amendment Terms**

The Agreement is hereby amended by adding terms, conditions and rates pursuant to which CLEC will invoice Qwest for and Qwest will pay Wholesale Service Order Charges. The terms of the Parties' agreement are set forth and specified in Attachment 1 and the Pricing Exhibit to this Amendment, which is incorporated herein by this reference.

**Effective Date**

This Amendment shall be deemed effective upon approval by the Commission; however, the Parties may agree to implement the provisions of this Amendment upon execution, with such implementation relating to payment of charges contemplated in this Amendment being subject to true-up with an effective bill date of August 1, 2008. To accommodate this need, CLEC must generate, if necessary, an updated Customer

Questionnaire. In addition to the Questionnaire, all system updates will need to be completed by Qwest. CLEC will be notified when all system changes have been made. Actual order processing may begin once these requirements have been met. Additionally, Qwest shall implement any necessary billing changes within two (2) billing cycles after the latest execution date of this Amendment, with a true-up back to the latest execution date of this Amendment by the end of the second billing cycle. The Parties agree that so long as Qwest implements the billing changes and the true-up as set forth above, the CLEC's bills shall be deemed accurate and adjusted without error.

**Further Amendments**

Except as modified herein, the provisions of the Agreement shall remain in full force and effect. The provisions of this Amendment, including the provisions of this sentence, may not be amended, modified or supplemented, and waivers or consents to departures from the provisions of this Amendment may not be given without the written consent thereto by both Parties' authorized representatives. No waiver by any Party of any default, misrepresentation, or breach of warranty or covenant hereunder, whether intentional or not, will be deemed to extend to any prior or subsequent default, misrepresentation, or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence.

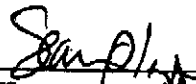
**Entire Agreement**

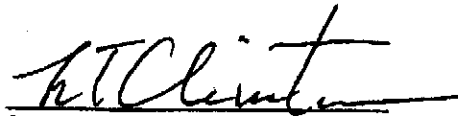
The Agreement as amended (including the documents referred to herein) constitutes the full and entire understanding and agreement between the Parties with regard to the subjects of the Agreement as amended and supersedes any prior understandings, agreements, or representations by or between the Parties, written or oral, to the extent they relate in any way to the subjects of the Agreement as amended.

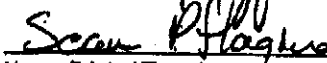
The Parties intending to be legally bound have executed this Amendment as of the dates set forth below, in multiple counterparts, each of which is deemed an original, but all of which shall constitute one and the same instrument.

**McLeodUSA Telecommunications.  
Services, Inc.  
dba PAETEC Business Services**

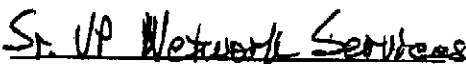
**Qwest Corporation**

  
\_\_\_\_\_  
Signature

  
\_\_\_\_\_  
Signature

  
\_\_\_\_\_  
Name Printed/Typed

L. T. Christensen  
\_\_\_\_\_  
Name Printed/Typed

  
\_\_\_\_\_  
Title

Director - Wholesale Contracts  
\_\_\_\_\_  
Title

12/18/08  
\_\_\_\_\_  
Date

1/12/09  
\_\_\_\_\_  
Date

## ATTACHMENT 1

## TO WHOLESALE SERVICE ORDER CHARGE AMENDMENT

1. **CLEC Wholesale Service Order Charges** Qwest agrees that pursuant to the terms of the Amendment, Qwest will not dispute CLEC's properly stated and documented invoices for Wholesale Service Order charges associated with orders submitted by Qwest to transfer a CLEC customer to Qwest, and will pay such invoices according to the payment terms of the Agreement. The invoices will be deemed properly stated and documented if they are provided by McLeod in electronic spreadsheet format (e.g., Excel, Access or equivalent format) and, for each charge, McLeod provides Qwest with Qwest's PON, the phone number to which the service applies, and the date McLeod provides the service for that phone number. The rates applicable to CLEC's Wholesale Service Order charges to Qwest are as listed in Exhibit 1 hereto. The Parties agree that Qwest has not waived its rights to dispute invoices for Wholesale Service Order charges for accuracy or other such reasons not related to the applicability of the Amendment.
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 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.

## PRICING EXHIBIT

<u>State</u>	<u>McLeodUSA Rate</u>
Arizona	\$ 24.24
Idaho	\$ 16.22
Iowa	\$ 20.70
Montana	\$ 23.94
Nebraska	\$ 24.87
New Mexico	\$ 29.23
North Dakota	\$ 24.87
Oregon	\$ 17.09
South Dakota	\$ 24.87
Utah	\$ 13.10
Washington	\$ 21.24
Wyoming	\$ 17.36



BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

QWEST CORPORATION,

Complainant,

v.

MCLEODUSA TELECOMMUNICATIONS  
SERVICES, INC., d/b/a PAETEC  
BUSINESS SERVICES.

Respondents.

Docket No. UT-090892

DECLARATION OF ROBERT H.  
WEINSTEIN IN SUPPORT OF QWEST  
CORPORATION'S MOTION FOR  
SUMMARY DETERMINATION

I, Robert H. Weinstein declare as follows:

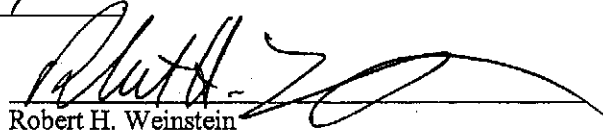
1. My name is Robert Weinstein. I work for Qwest Corporation ("Qwest") in the Wholesale Markets organization as a witness for Qwest with respect to FCC orders, state commission decisions, and other legal and regulatory matters. My business address is 1801 California Street, 24th Floor, Denver, Colorado, 80202. I received a Bachelor of Science Degree in Business Administration from the University of Colorado in 1985. In June 1990, I earned a Juris Doctorate from the University Of Denver College Of Law and worked in the legal profession until 1998, when I joined U S WEST (now known as Qwest) in its software development organization. In 2001, I left Qwest to implement and convert billing systems for several national broadband companies as a consultant. I returned to Qwest in my current capacity in July 2003.
2. In my capacity as a witness for Qwest, I have reviewed the Interconnection Agreement between Qwest and McLeod, the Qwest Complaint, the McLeod Answer and the Responses to Discovery Requests. I am also familiar with the rates Qwest is allowed to charge under the

Interconnection Agreement, the Qwest processes used to fulfill orders for unbundled network elements and for notifications between carriers. I have also reviewed Qwest's Corporation's Motion and Memorandum for Summary Determination and I attest that the facts stated within are true and accurate to the best of my knowledge.

3. I have also attached to this Declaration, a true and complete copy of PAETEC's Responses to Qwest Data Requests numbers 3, 5, 6, 7, 8, 9, 10, and 11.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Denver, Colorado on 12-16-09

  
Robert H. Weinstein

BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION

QWEST CORPORATION, )  
 )  
 Complainant, ) DOCKET NO. UT-090892  
 )  
 v. ) PAETEC RESPONSES TO QWEST  
 ) FIRST DATA REQUESTS  
 )  
 MCLEODUSA TELECOMMUNICATIONS )  
 SERVICES, INC., d/b/a PAETEC BUSINESS )  
 SERVICES, )  
 )  
 Respondent. )  
 )  
 \_\_\_\_\_ )

McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services  
("PAETEC") provides the following responses to the first set of Data Requests propounded by  
Qwest Corporation ("Qwest").

WUTC Docket No. UT-090892  
PAETEC Responses to Qwest First Data Requests  
September 4, 2009

Data Request No. 3:

If not already provided in response to the previous questions, please fully describe the costs that are recovered by the WSOC. Your answer should include, but is not necessarily limited to, information that would be contained in a non-recurring cost study for such activities, regardless of whether such a cost study exists or not.

Response:

See Response to Request No. 1. The WSOC recovers costs associated with PAETEC's operational support systems and order processing activities involved in accepting, verifying, correcting, and processing orders and subsequent technical activities to execute orders, which are comparable to the activities described in Qwest's non-recurring cost studies.

Prepared by: Patty Lynott and Dr. August Ankum, QSI Consulting  
Date: September 4, 2009

**WUTC Docket No. UT-090892**  
**PAETEC Responses to Qwest First Data Requests**  
**September 4, 2009**

**Data Request No. 5:**

Explain the term “comparable orders” as used in section 7 of McLeod’s tariff, Exhibit A to Qwest’s complaint.

**Response:**

“Comparable orders” as that term is used in the tariff include orders such as Local Service Requests (“LSRs”) that are submitted by PAETEC to Qwest to facilitate an end user switching local services from Qwest local service to PAETEC. Qwest submits a comparable LSR to PAETEC via the PAETEC website to facilitate a customer moving its local service from PAETEC to Qwest.

Prepared by: Patty Lynott  
Date: September 4, 2009

**WUTC Docket No. UT-090892**  
**PAETEC Responses to Qwest First Data Requests**  
**September 4, 2009**

**Data Request No. 6:**

Please admit that McLeod leases unbundled network elements and or other facilities from Qwest in order to provide service to end user customers in each of the states listed in question 1.

**Response:**

PAETEC admits that it leases unbundled network elements or other facilities from Qwest to serve the majority of end user customers PAETEC serves.

Prepared by: Bill Haas  
Date: September 4, 2009

WUTC Docket No. UT-090892  
PAETEC Responses to Qwest First Data Requests  
September 4, 2009

**Data Request No. 7:**

Does McLeod serve end users in any of the states listed in question 1 by means other than leasing unbundled network elements or other facilities from Qwest? If so, please fully describe the method of serving those customers.

**Response:**

Yes, PAETEC also provides services to end users via resale of Qwest retail services, through commercial services from Qwest, or by leasing special access circuits from Qwest.

Prepared by: Bill Haas  
Date: September 4, 2009

WUTC Docket No. UT-090892  
PAETEC Responses to Qwest First Data Requests  
September 4, 2009

**Data Request No. 8:**

For purposes of this question, please assume that a McLeod retail end-user customer contacts McLeod and disconnects its service, without porting its number, and the customer subsequently takes service from Qwest.

- a. If McLeod was originally serving this customer with facilities leased from Qwest, does McLeod charge Qwest the WSOC in this instance?
- b. If so, why does McLeod assess this charge?
- c. If McLeod was serving this customer in a manner that did not involve facilities leased from Qwest, does McLeod charge Qwest the WSOC in this instance?
- d. Is your answer different if the customer wishes to port its telephone number to Qwest?

**Response:**

PAETEC objects to this request on the grounds that it is vague and ambiguous in failing to state the period of time between the customer direction to disconnect PAETEC service and the customer order for service from Qwest. Subject to, and without waiver of, this objection, PAETEC provides the following response based on its understanding that the request assumes a substantial period of time between those two activities:

- a. No, as long as the timing of the disconnect is processed prior to the new service installed with Qwest.
- b. Not applicable.
- c. See Response to subpart a above.
- d. No.

Prepared by: Counsel (objections); Patty Lynott  
Date: September 4, 2009



WUTC Docket No. UT-090892  
PAETEC Responses to Qwest First Data Requests  
September 4, 2009

Data Request No. 9:

For purposes of this question, please assume that a McLeod retail end-user customer contacts Qwest and advises Qwest that it wishes to switch its service from McLeod to Qwest.

- a. If McLeod was originally serving this customer with facilities leased from Qwest, does McLeod charge Qwest the WSOC in this instance?
- b. If so, why does McLeod assess this charge?
- c. If McLeod was serving this customer in a manner that did not involve facilities leased from Qwest, does McLeod charge Qwest the WSOC in this instance?
- d. Does your answer change if the customer does or does not wish to port its telephone number?

Response:

- a. The answer depends, in part, on what facilities that PAETEC was leasing from Qwest and whether or not those facilities included the lease of a switch port under a commercial agreement. Without specifying which facilities are being leased, PAETEC cannot fully respond. PAETEC, however, charges the WSOC in such circumstances when PAETEC is leasing certain Qwest facilities, including unbundled loops, to serve that retail end user.
- b. PAETEC assesses the WSOC pursuant to an interconnection agreement amendment to recover costs that Qwest causes PAETEC to incur. *See* Response to Request No.3.
- c. Yes, if Qwest submits an LSR to PAETEC to disconnect service.
- d. No.

Prepared by: Patty Lynott  
Date: September 4, 2009

WUTC Docket No. UT-090892  
PAETEC Responses to Qwest First Data Requests  
September 4, 2009

**Data Request No. 10:**

For purposes of this question, please assume that a McLeod retail end-user customer contacts another CLEC and advises the CLEC that it wishes [*sic*] to switch its service from McLeod to the CLEC.

- a. If McLeod was serving this customer with facilities leased from Qwest, does McLeod charge Qwest the WSOC in this instance?
- b. If so, why does McLeod assess this charge?
- c. If McLeod was serving this customer in a manner that did not involve facilities leased from Qwest, does McLeod charge Qwest the WSOC in this instance?
- d. Is your answer different if the customer wishes to port its telephone number to the new carrier?

**Response:**

- a. No, unless Qwest submits an LSR to disconnect the service.
- b. If PAETEC charges Qwest, it does so because Qwest submitted the LSR to PAETEC and caused PAETEC to incur costs to process Qwest's order, and the parties' interconnection agreement authorizes PAETEC to recover those costs from Qwest.
- c. Yes, if Qwest submitted the LSR to PAETEC to disconnect service.
- d. No.

Prepared by: Patty Lynott  
Date: September 4, 2009

WUTC Docket No. UT-090892  
PAETEC Responses to Qwest First Data Requests  
September 4, 2009

**Data Request No. 11:**

For purposes of this question, please assume that a McLeod retail end-user customer contacts a wireless carrier and advises the wireless carrier that it wishes to switch its service from McLeod to the wireless carrier.

- a. If McLeod was originally serving this customer with facilities leased from Qwest, does McLeod charge Qwest the WSOC in this instance?
- b. If so, why does McLeod assess this charge?
- c. If McLeod was serving this customer in a manner that did not involve facilities leased from Qwest, does McLeod charge Qwest the WSOC in this instance?
- d. Does your answer change if the customer does or does not wish to port its telephone number?

**Response:**

- a. PAETEC does not charge Qwest a WSOC when an end user leaves to move service to a wireless carrier. It should be noted that only a very small number of end users have terminated local service from PAETEC and requested porting their phone number to a wireless carrier.
- b. Not applicable.
- c. See response to a. above.
- d. No.

Prepared by: Patty Lynott and Bill Haas  
Date: September 4, 2009