

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 ANSWER TO
MCLEOD'S MOTION FOR SUMMARY
DETERMINATION

I. INTRODUCTION

- 1 In accordance with the agreed upon schedule, Qwest hereby files its Answer to the Motion for Summary Determination filed by McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services (“McLeod”). This Answer is supported by the Declaration of Robert H. Weinstein and the Declaration of Christopher Viveros filed herewith.
- 2 McLeod’s Motion, including the declarations of Ms. Lynott and Dr. Ankum, fails to support McLeod’s request for relief. The Motion itself is utterly devoid of any legal basis upon which McLeod can claim that it has a right to assess the Wholesale Service Order Charge (“WSOC”) on Qwest. McLeod’s factual support fails to establish any costs that McLeod incurs that are “comparable” to costs that Qwest recovers from McLeod, or that are recoverable from Qwest. Furthermore, unlike the WSOC, any costs that Qwest

recovers from McLeod are costs established in Qwest's Commission-approved TELRIC rates, and are set forth in the parties' interconnection agreement ("ICA").

3 The only conclusions that can be reached in this matter are that:

- a. Any rates the parties charge each other must be contained in an ICA;
- b. McLeod's WSOC is not in the ICA;
- c. Qwest does not purchase any "wholesale services" from McLeod;
- d. McLeod has not established any legal basis upon which to impose an "ordering" or other non-recurring charge on Qwest when a customer leaves McLeod;
- e. The WSOC that McLeod seeks to recover from Qwest is not comparable to costs that Qwest recovers through its non-recurring charges for resold services or unbundled network elements ("UNEs");
- f. If McLeod were to win a customer from Qwest and serve that customer over its own facilities, Qwest would perform the exact same functions that McLeod does when a McLeod customer changes to Qwest, and under those circumstances Qwest would not assess a non-recurring charge on McLeod;
- g. Under the circumstances described above, McLeod's WSOC must be found to violate federal law as an improper and unlawful attempt to assess a charge outside of the parties' ICA, and without the requisite negotiation and arbitration process;
- h. Under the circumstances described above, McLeod's WSOC must be found to be unjust, unreasonable, and discriminatory, in violation of state law.

II. SUMMARY OF ARGUMENT

- 4 McLeod's Motion for Summary Determination should be denied. McLeod attempts to support the WSOC with irrelevant arguments regarding a "policy justification" for the WSOC, and with patently incorrect arguments about the costs that Qwest recovers in its non-recurring charges. While Qwest will address these arguments as well, it is important to keep in mind that McLeod has not established any legal basis upon which it may assess charges on Qwest. A legal basis to assess these charges is the very first thing that McLeod must establish, and McLeod has completely failed to offer any basis in law upon which it may unilaterally begin imposing these charges on Qwest.
- 5 As such, any argument that there is an appropriate policy justification for McLeod's WSOC is irrelevant – whether there is such a justification or not is an issue that would have been addressed had McLeod properly put the issue before the Commission in an interconnection proceeding. Nevertheless, Qwest will briefly address McLeod's policy arguments.
- 6 Qwest will also address McLeod's allegation that Qwest charges McLeod a fee or fees in like circumstances – as was shown in Qwest's Motion, Qwest does not assess a like fee. Qwest's non-recurring charges and OSS charges are Commission-approved charges that allow Qwest to recover TELRIC costs for activities Qwest is required by law to perform, and for which Qwest is permitted by law to recover its costs. Moreover, these costs were established after a litigated proceeding where opposing parties, including McLeod as an intervenor, were able to challenge all facets of Qwest's cost studies. These costs are different from the costs that McLeod seeks to recover, and McLeod's analysis that purports to show otherwise is based on a misinterpretation of Qwest's cost studies.

Furthermore, unlike McLeod's charge, Qwest's charges are contained in the parties' ICA and are not unilaterally imposed by Qwest without McLeod's agreement.

- 7 Finally, Qwest would not assess either a non-recurring charge or an OSS charge on McLeod under the circumstances that McLeod assesses the WSOC on Qwest – that is, where a customer leaves Qwest to take services from a new carrier where the new carrier provides services entirely over its own facilities. Thus, it is clear that the non-recurring charges that Qwest imposes, non-recurring charges for work associated with provisioning UNEs or resold services, are not comparable to the WSOC, which is a charge McLeod assesses to recover McLeod's purported internal costs and, McLeod's internal costs do not reflect services provided to Qwest.

III. THE WSOC VIOLATES FEDERAL LAW

- 8 McLeod makes a blanket argument that the WSOC is just and reasonable. In support of this argument, McLeod makes a number of arguments regarding alleged "public policy" reasons that support the charge, including the broad and otherwise unsupported contention that the charge is necessary for the health of the economy as a whole (Ankum Declaration ¶ 15). McLeod also contends that the WSOC is just and reasonable because it is based on cost, that those costs are comparable to costs Qwest recovers from McLeod, and that imposition of the charge is therefore justified.
- 9 McLeod's arguments are both incorrect and beside the point. If McLeod wanted to assess a wholesale service order charge, the proper venue to request authority to impose it is an interconnection arbitration. Because McLeod circumvented that process, no justification it can now offer can make the charge permissible. An ICA arbitration would have been the venue to assert policy arguments, legal arguments, and cost arguments in support of the charge, but McLeod did not follow that process. Now, even if McLeod had the law,

the facts, and public policy in support of the charge, it could not succeed. But that is not the case. As will be discussed, McLeod's public policy arguments are not persuasive; McLeod's legal support is non-existent, and McLeod's cost analysis is wrong.

1. The WSOC violates Federal Law because the Interconnection Negotiation Process was not used.

- 10 Qwest alleged in paragraph 22 of its Complaint that "McLeod's imposition of the Wholesale Service Order Processing charge through a price list or tariff violates the Telecommunications Act of 1996, 47 U.S.C. 151, et seq., specifically sections 251 and 252 which require such charges to be negotiated or arbitrated."
- 11 Qwest established, at paragraphs 22-31 of its Motion, that under Sections 251 and 252, terms such as the WSOC must be contained in the parties' ICA.
- 12 McLeod failed to address this allegation. Thus, even if all of the facts in McLeod's Motion are deemed true, there is still no genuine issue of material fact. The issue of law is whether the interconnection negotiation process was required to be utilized prior to assessing any charges against Qwest, and the answer is undeniably that it must be. Accordingly, the Commission should grant Qwest's Motion for Summary Determination and declare the WSOC and Section 7 of the price list invalid.
- 13 Because there is no dispute over this issue, the Commission does not need to consider the rest of McLeod's arguments. As noted above, granting Qwest's Motion on this basis does not deny McLeod an opportunity to present these arguments. To the contrary, if McLeod believes its additional arguments are valid, McLeod can use the proper forum – the interconnection negotiation process – to assert its claims. Following this procedure would not only allow Qwest the opportunity to negotiate and to challenge the validity of these arguments, if necessary, it would require both parties to present evidence to prove

their case in arbitration before the Commission. Thus, McLeod does not suffer harm and the Commission's actions remain consistent with the Act.

- 14 Although McLeod does not address its failure to use the Interconnection Negotiation Process in violation of the requirements of the Act, Qwest anticipates McLeod may address the issue in its Answer to Qwest's Motion for Summary Determination. In fact Qwest's position is clearly stated in the Complaint. However, McLeod has long known that the Minnesota Commission ruled against McLeod for the same reason Qwest asserts here. The Minnesota Commission held that the Interconnection Negotiation Process was the proper forum for determining issues involving the WSOC and McLeod violated the federal law by unilaterally putting it in the tariff.¹
- 15 The Act requires the parties to have an interconnection agreement. Section 251 and Section 252 of the Act provide for negotiation or arbitration of such agreement that shall include "a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement." Further, Qwest is required by Section 251(c)(3) of the Act to provide UNEs to McLeod on "rates, terms and conditions ...in accordance with the terms and conditions of the agreement and the requirements of this

¹ "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 ICAs. 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, July 22, 2004

section and section 252.” Thus, the Act requires that any charge arising from or related to the UNE provided by Qwest be put through the negotiation process and/or arbitrated by the Commission and included within the ICA. The application of the WSOC is clearly based on “interconnection and each service or network element included in the agreement.” The language of Section 7 of the Price List states that the WSOC applies due to a charge for processing orders submitted by McLeod “to initiate service using network elements leased from the incumbent local exchange carrier (“ILEC”).” In other words, the WSOC can *only* apply when McLeod has ordered a “network element” from Qwest. McLeod orders the network element service by submitting an LSR. The UNE is thus leased from Qwest at the rates, terms and conditions in accordance with the terms and conditions of the ICA.²

- 16 Because the WSOC can only be applied where the interconnection of the two networks per Section 251 occurs, can only be applied when McLeod orders a UNE per Section 251 and can only be applied when the terms and conditions of the ICA apply per Sections 251 and 252, the WSOC and the whole of Section 7 of the McLeod price list fall under the provisions of Sections 251 and 252 and are required to go through the negotiation process specified by the Act prior to any charges being applied. A carrier contending that a charge related to the interconnection of two carrier’s networks is owed or is even recoverable from another carrier is the exact set of circumstances anticipated by the Act. The facts and the law are clear and McLeod’s failure to obey the requirements of the Act

² McLeod and Qwest are parties to an ICA and McLeod leases UNE’s from Qwest to provide service to the majority of its end user retail customers, see McLeod Response to Qwest DR #6, Qwest Complaint ¶16, McLeod Answer ¶ 16.

is clear. Thus, McLeod cannot plausibly prove or even construct a genuine issue of material fact and the Commission should deem the WSOC improper and order it stricken.

2. The WSOC is Not Authorized by Law

- 17 As noted above, McLeod provides no citation to any legal authority which would allow it to impose the WSOC, or would even allow the Commission to approve such a charge if it were proposed in the context of an interconnection arbitration.
- 18 Indeed, the only citation to law that McLeod does offer proves why the WSOC is *not* authorized. At paragraph 16 of its Motion, McLeod cites and discusses 47 C.F.R. § 51.711 in support of the notion that it is reasonable for McLeod to use Qwest's costs as proxies for its own. Of course this is entirely beside the point if McLeod has no legal authority upon which to claim that it is entitled to cost recovery. And McLeod simply does not have any such authority to point to.
- 19 To the contrary, if 47 C.F.R. § 51.711 illustrates a point relevant to this case, it is the point that when the FCC allowed CLECs to recover their costs on a reciprocal basis with the costs of the ILEC, the FCC was very clear about putting that in a Rule. The FCC placed no such authorization for any of McLeod's claimed costs in any Rule. And, contrary to the very explicit allowance of cost recovery for the ILECs contained in Section 252 of the Act, McLeod can point to no such allowance for CLEC costs. Indeed, the costs that McLeod seeks to recover are either expressly prohibited from recovery from Qwest (the LNP costs discussed immediately below) or are costs that McLeod incurs for its own internal benefit or the benefit of its end users, and are neither caused by nor recoverable from Qwest.

3. The WSOC Violates Federal Law by Including Costs for Number Portability

- 20 Section 251(b)(2) requires all local exchange carriers including McLeod to provide number portability. Federal law requires the costs of number portability be borne by carriers on a competitively neutral basis.³ 47 C.F.R. § 52.33 states that telecommunications carriers, other than ILECs, may recover their number portability costs in any manner consistent with state and federal law. The FCC stated that continued costs of providing number portability are part of these costs.⁴ McLeod can point to no law that allows McLeod to recover number portability costs from Qwest through its WSOC. Furthermore, McLeod's tariff provides for a LNP surcharge on all customers. In Washington, the surcharge is \$0.43 per month per line, with higher charges applicable to T1 and ISDN lines.⁵ This surcharge presumably recovers McLeod's LNP costs, and recovery of those costs through the WSOC, besides being otherwise prohibited, would be double recovery of those costs.
- 21 McLeod claims the WSOC is intended to recover the costs of processing the LSR Qwest sends to McLeod when a McLeod end user chooses to use Qwest for local service.⁶ Yet Qwest only submits an LSR to McLeod when the end user returning to Qwest wants to keep or port the current telephone number. Thus, it is only in this number portability situation that an LSR is sent to McLeod by Qwest.

³ 47 U.S.C. §251(e)(2)

⁴ "Furthermore, we conclude that the costs of establishing number portability include not just the costs associated with the creation of the regional databases and the initial physical upgrading of the public switched telephone network for the provision of number portability, but also the continuing costs necessary to provide number portability." In the Matter of Telephone Number Portability, Third Report and Order, CC Docket No. 95-116, May 12, 1998, ¶8

⁵ [http://www.paetec.com/static-
assets/notice/ML_FCC_Interstate%20and%20International%20Rates%20and%20Services.pdf](http://www.paetec.com/static-assets/notice/ML_FCC_Interstate%20and%20International%20Rates%20and%20Services.pdf), pages 7 and 8.

⁶ McLeod Motion for Summary Determination, ¶11.

22 Accordingly, McLeod cannot recover from Qwest the costs of its responsibility to port the number. The WSOC is an LSR processing charge and is without a doubt part of continued cost of providing number portability. McLeod's own declarants emphasize this point. Dr. Ankum states the objective of the LSR is to allow the end user to switch to Qwest's network:

the general objective of Qwest's LSRs is to request that McLeodUSA notify the rest of the world that the customer is henceforth being served by Qwest and to facilitate the migration of the customer in the public switched network.⁷

And he further agrees:

These LSRs are requests for McLeodUSA to perform a number of activities that will permit Qwest to migrate customers to its network and offer those customers services off the Qwest switch (as opposed to the McLeodUSA switch). Many of the subsequent activities and services rendered by McLeodUSA have to do with McLeodUSA notifying the rest of the world (other carriers, 911, etc.) on behalf of Qwest that a customer will henceforth be served by Qwest and to facilitate the migration of the customer across the public switched network.⁸

23 Patricia Lynott echoes Ankum's statement:

Based on a LEC LSR, the system initiates, and in some cases completes, various tasks that must be completed to ensure that end users can seamlessly move their local service (and other services as the case may be) to their new chosen service provider.⁹

24 In addition to McLeod's own declarants affirming that the LSR is part of number portability, the ICA between Qwest and McLeod requires the LSR be used for porting a number. The requirement that an LSR be used further demonstrates why the

⁷ Ankum Declaration, ¶21

⁸ Id at ¶17

⁹ Lynott Declaration, ¶9

interconnection negotiation process is the appropriate venue to discuss the WSOC. The ICA states in Section 10.2.5:

Both Parties shall comply with ordering standards as developed by the industry. LNP service is ordered via a Local Service Request and associated Number Portability forms.

- 25 The Minnesota Commission reached a similar conclusion finding “that portions of the new charge would be used to defray costs of McLeod meeting its obligation to provide local number portability, in violation of the Act’s exclusive jurisdiction over local number portability.”¹⁰
- 26 The facts are not in dispute that Qwest sends an LSR to McLeod when a customer chooses to leave McLeod and use Qwest as its local exchange carrier and wishes to keep the same number. Even McLeod’s own declarants agree the LSR is part of the number portability process. The law clearly states that McLeod cannot use the WSOC to recover the costs of number portability. Accordingly, there are no facts in dispute with regard to the question of whether the WSOC violates federal law.

4. There is no Public Policy Support for the WSOC

- 27 McLeod argues that recovery of the WSOC is consistent with economic principles and sound policy. (Ankum Declaration at ¶¶ 11-16.) However, McLeod does not rely on these paragraphs in support of its Motion. Furthermore, these policy arguments, even if they are not well-taken, belong in an ICA arbitration, not in a post-hoc justification for an

¹⁰ In the Matter of McLeodUSA’s Tariff Filing Introducing Wholesale Order Processing Charges that Apply When McLeodUSA’s Customers Shift to Other Telecommunications Carriers, Docket No. P-5323/M-04-395, Order Rejecting Proposed Wholesale Service Charge, July 22, 2004, page 5.

unlawful charge. Finally, it is worth noting that all of McLeod's policy arguments are predicated on the incorrect assumption that McLeod is providing *services* to Qwest for which it should be compensated. But McLeod does not provide services to Qwest¹¹, and Qwest does not impose costs on McLeod which would otherwise justify the WSOC.

IV. QWEST DOES NOT IMPOSE COSTS ON MCLEOD

- 28 McLeod spends a great deal of time in its Motion and in the Ankum Declaration paragraphs 17 – 59 attempting to establish 1) that Qwest issues LSRs to McLeod (Ankum Declaration ¶¶ 17-24); 2) that Qwest causes McLeod to incur costs (Ankum Declaration ¶¶ 25-27;) 3) that McLeod is not required to provide evidence of its costs, and can rely on Qwest's costs as proxies (Ankum Declaration ¶¶ 28-30); and 4) that McLeod's WSOC is generally commensurate with Qwest's non-recurring charges for customer transfers, OSS, and loop installation charges (Ankum Declaration ¶¶ 31-59).
- 29 Because McLeod is wrong about all of these points except the first one, McLeod cannot establish that Qwest causes McLeod to incur any costs, and cannot establish that the WSOC is just or reasonable. This is of course assuming that McLeod had met the precondition showing some legal entitlement to cost recovery in the first instance, which it has not.
- 30 Qwest agrees that it submits LSRs to McLeod. These local service requests are required by the ICA when a customer leaves McLeod to take service from Qwest and the customer

¹¹ McLeod's Answer at ¶14, admitting ¶14 of the Complaint: "Qwest does not purchase or lease unbundled network elements from McLeod in Washington, and does not order retail or wholesale services from McLeod."

wishes to retain the same telephone number. However, McLeod makes a number of incorrect statements in connection with the LSR process.

A. The LSRs submitted by Qwest are not “Service Orders”

- 31 McLeod argues (Ankum ¶ 17-24) that the LSRs submitted by Qwest are requests that McLeod perform activities that will allow the end user to migrate to the Qwest network. At Ankum Declaration ¶ 21, and Lynott Declaration ¶ 13, McLeod details the seven steps that are supposedly done by McLeod to “notify the rest of the world” that Qwest will now be serving this customer. In the discussion to follow, Qwest will explain why these activities are not ones for which McLeod has any right to recover its costs, and how these activities are not “comparable” to the activities for which Qwest assesses non-recurring charges when McLeod chooses to serve its customer over Qwest facilities.
- 32 McLeod contends that the first two steps that it takes in the activities that support its WSOC are the “release of triggers in the McLeodUSA switch”, and “grant concurrence in the NPAC”. (Ankum Declaration ¶ 21 and Lynott Declaration ¶ 12). These two activities are specifically associated with number portability and are costs which McLeod is not permitted to recover from other carriers. Furthermore, if McLeod failed to perform these activities, the customer could still transfer service to Qwest, but McLeod would be out of compliance with the ICA, the Act and industry requirements. Thus, these activities, to the extent that they are components of the WSOC, demonstrate why the WSOC is unlawful. Moreover, these activities are not wholesale services that McLeod provides to Qwest.
- 33 McLeod’s theory is that McLeod is doing work on Qwest’s behalf and as such, is due compensation. Dr. Ankum declares that McLeod’s basic contention is:

In the telecommunications industry, as in other industries, when companies provide wholesale services for one another, compensation is due.¹²

- 34 Although this statement may be true in general, McLeod does not provide wholesale services to Qwest. McLeod admits that Qwest does not purchase or lease any product or service from McLeod and does not order retail or wholesale services from McLeod.¹³ Thus, even under Dr. Ankum's theory, McLeod would not be due compensation.
- 35 McLeod next contends that it has to "pull the telephone number from the PAETEC switch", "change McLeodUSA's internal facility assignment", "delete LIDB (outgoing caller ID) record", and "send care records". Qwest does not dispute that these events happen. However, these events are associated with *any* disconnect activity, and are triggered by the fact of the end user customer leaving McLeod, they are *not* by Qwest's submission of an LSR. These activities are internal to McLeod's record keeping and administrative processes for its own benefit and the benefit of its other customers. They do not enable the customer to transfer to Qwest. Finally, McLeod contends that it must "unlock the 911 record." Again, this may be true, but it is not a service that McLeod provides for Qwest, but rather is associated with the porting of the end user's telephone number.
- 36 McLeod next contends (Ankum Declaration ¶ 22) that McLeod needs to process a large number of variables to accurately carry out the specifics of Qwest's service request. McLeod then includes a large table that details various "fields" that are populated on the LSR. This is misleading at best, because there is no field that has anything to do with the

¹² Ankum Declaration ¶11.

¹³ Answer ¶14.

provision of a service to Qwest. In fact, McLeod does not provide service to Qwest. These fields are populated so that McLeod can properly port the telephone number, stop billing its end user, and maintain its administrative records. Thus, this information does not support the WSOC.

B. Qwest is not the Cost Causor

- 37 McLeod claims (Ankum Declaration ¶¶ 25-27) that Qwest imposes costs on McLeod – McLeod states that it “would not engage in the aforementioned activities” “but for the LSRs submitted by Qwest”. This is patently untrue. McLeod is obligated to port telephone numbers even if Qwest did not submit an LSR to trigger that port, and McLeod would clearly perform its own administrative activities to discontinue billing its customers even if the customer left McLeod and took service from a wireless carrier, or did not take service from any carrier at all. Thus, it is clear that the activities McLeod is discussing are caused by the fact of an end user disconnecting service, not by Qwest’s submission of an LSR.
- 38 As will be discussed below, the WSOC is not comparable to Qwest’s OSS charges and its non-recurring charges. Qwest does not seek to recover costs from McLeod when a customer leaves Qwest’s network and is served over McLeod’s own facilities – rather, it is McLeod’s purchase of UNEs or resold services from Qwest that result in non-recurring charges to McLeod. But, as already discussed, Qwest does not purchase any wholesale services from McLeod, and any attempt to draw a parallel is simply a misrepresentation of the facts.

V. MCLEOD’S WSOC IS NOT JUST OR REASONABLE

- 39 McLeod argues that as a CLEC, it is not required to provide cost support for its rates, and that it is appropriate for the WSOC to mirror Qwest’s rates. (Ankum Declaration ¶¶ 28-

30). As noted above, this argument misses the point in several respects. First, McLeod has not shown that it has a legal right to recover its costs from Qwest. While it may be that McLeod incurs costs, it does so based on actions of its end user customers, and McLeod can recover those costs through either non-recurring charges assessed when those customers first take service from McLeod, or as a part of McLeod's general overhead costs. Second, the following discussion will show that the WSOC is not comparable to the charges that Qwest assesses.

A. The WSOC is Not Comparable to Qwest's Charges

- 40 McLeod's WSOC states that it is assessed on LECs who assess charges on McLeod for "comparable orders." In order for McLeod's argument to succeed, the LSR submitted by Qwest must be sent to McLeod for the same purpose as the LSR submitted to Qwest by McLeod. If however, one LSR is for ordering a service or product and the other LSR is for notifying the customer's old carrier that the customer is transferring onto a new carrier's network, McLeod's argument fails. That is what occurs in this case.
- 41 When a Qwest customer decides to move to McLeod for local service, McLeod submits an LSR to Qwest to order a UNE. The Qwest cost studies cited in McLeod's Motion, are related to McLeod's order for a UNE from Qwest, and are not related to a notification of the disconnection of a customer.
- 42 In contrast, when a McLeod customer chooses to leave McLeod and use Qwest for local service and keep their number, Qwest sends the LSR to McLeod not to order a UNE or in fact, any service, but the LSR is for a different purpose – notification of the discontinuance of the end user's McLeod service due to the customer's decision to move to a new carrier. As McLeod declarant Dr. Ankum explains:

When a customer decides to move to another local exchange carrier ("LEC"), the

customer's new carrier must notify the customer's old carrier by means of a local service request ("LSR") that the customer is to be transferred from the old carrier's network onto the new carrier's network. This is true irrespective of the LECs involved.¹⁴

- 43 Thus, McLeod wants the Commission to ignore the obvious problem with its claim – the LSRs are not "comparable orders". McLeod submits an LSR to order a loop from Qwest, while Qwest's "LSR" is a "local service request" in name only – McLeod has already agreed that Qwest does not order any products or any services from McLeod.
- 44 Furthermore, contrary to McLeod's allegations, Qwest would not charge McLeod either an OSS charge, a customer transfer charge, or a loop non-recurring charge if McLeod simply advised Qwest that a Qwest end user was disconnecting, and did not order any wholesale products or services. This would be true even if the end user wanted to port his telephone number. Thus, the "comparable order" to Qwest's LSR to McLeod would not result in Qwest assessing any charges on McLeod.

1. Operations Support Systems ("OSS") Charges

- 45 McLeod claims that it incurs OSS costs, and that it should be permitted to recover those costs from Qwest. McLeod points to Qwest's Commission-approved OSS charges as justification (Ankum Declaration ¶¶ 32-35). McLeod's argument is wrong for several reasons.
- 46 First, Qwest is required by the Act to develop and make available its OSS so that CLECs can place orders for unbundled network elements and resold services. The OSS charges that Qwest assesses are explicitly permitted by the FCC and were approved in Washington

¹⁴ Declaration of August H. Ankum ¶¶ 17-19

by Commission order, after a lengthy, contested cost proceeding, and are contained in the parties' ICA. McLeod is under no legal obligation to create OSS, and has no legal right to recover its expenses for the development of those OSS.

- 47 The FCC specifically authorized the ILEC's recovery of the reasonable costs of their OSS.¹⁵ There is no such authorization applicable to McLeod. The Commission issued an order allowing Qwest OSS cost recovery after extensive evidence, argument and cost studies were presented.¹⁶ No such order or authorization from the Commission and no such hearing was held related to McLeod's OSS. So while Qwest is legally entitled to recover the costs of development and ongoing operations of its OSS, McLeod is not. McLeod's claim that it is entitled to recover costs simply because Qwest does is without merit.¹⁷
- 48 If such charges were permissible for McLeod to assess, they too would have some legal authority upon which to assess them, and such charges would be contained in an arbitrated or negotiated ICA. Regardless, note that McLeod does not provide such legal authority because none exists.
- 49 Furthermore, Qwest does not assess OSS charges for an LSR on a port unless the request involves a UNE. In other words, if the only thing that happens is that a customer ports a telephone number and migrates away from Qwest, and is served by the facilities of

¹⁵ See, 47 C.F.R. §51.319(g) requiring unbundled access to OSS, and §51.503 for the general pricing standard. These rules do not apply to authorize cost recovery of OSS expenditures by CLECs.

¹⁶ 13th Supp Order ¶144

¹⁷ Contrary to McLeod's advocacy in this case, Dr. Ankum filed testimony in Colorado on October 30, 2009 in which he argues that OSS systems are a shared resource that should be recovered through recurring charges, not non-recurring charges. See, Rebuttal Testimony of August H. Ankum, (Public Version) CO PUC Docket No. 07A-211T, page 48.

another carrier, the “winning” carrier does not pay OSS charges. This is comparable to what happens when Qwest submits an LSR to McLeod for porting, and no charge should be imposed.

2. Customer Transfer Charges

- 50 McLeod next argues that it “engages in a host of activities to transfer a customer to Qwest” and that it expects compensation for those activities. (Ankum Declaration ¶¶ 36-47). McLeod then purports to examine Qwest’s customer transfer charge cost support. McLeod incorrectly interprets the cost support provided by Qwest, and McLeod’s analysis does not support its position.
- 51 McLeod accurately notes that Qwest’s customer transfer charges apply when a Qwest customer transfers to a CLEC under a *resale* arrangement. However, McLeod mistakenly contends that this is a parallel situation to when a customer leaves McLeod to transfer to Qwest. It is not. Qwest’s customer transfer charge applies when a customer moves to a CLEC and Qwest provides resold retail services to the CLEC so the CLEC can serve the customer. This charge is not applied if the CLEC provides service over its own facilities, and therefore reflects costs associated not with the disconnection of a customer (as McLeod’s claimed costs do) but costs associated with Qwest fulfilling its legal mandate to allow other carriers to purchase retail services at a wholesale discount and resell those services to end users. This is not at all comparable to the WSOC.
- 52 McLeod alleges that “Qwest assesses the customer transfer charge when the customer moves to a CLEC *and again* when the customer moves to Qwest.” This is absolutely untrue – the charge is assessed only when the CLEC orders resold service. Finally, unlike McLeod’s WSOC, Qwest’s charges are Commission-approved and contained in the parties’ ICA.

3. Loop Non-Recurring Charges

- 53 McLeod argues that it engages in activities comparable to those for which Qwest assesses UNE loop non-recurring charges. McLeod states that “to transfer a customer to Qwest, McLeodUSA needs to release the customer’s telephone number from the McLeodUSA switch in which it resides, in part so that the rest of the world knows that Qwest is now the serving carrier, 911 calls can be routed correctly, etc. These activities are comparable to Qwest’s for which Qwest expects to be compensated.” (Ankum Declaration ¶ 48). McLeod points to documentation from Qwest’s non-recurring cost study in support of this contention.
- 54 McLeod either misunderstands or misinterprets Qwest’s cost study. McLeod cites a definition of the FACS system contained in Qwest’s cost study in support of the contention that Qwest recovers switch related costs in its loop installation and disconnection charges. (Ankum Declaration ¶ 52). Qwest’s documentation book states that “[f]or switched customer service requests SOAC sends the telephone number, office equipment and features to MARCH for translation to the physical switch.” However, the cited definition does not apply to UNE loop requests, which are not included in the definition of “switched customer service requests.” Anything more than a cursory review of the cost studies and documentation cited would have shown McLeod’s witness that his testimony is in error.
- 55 Furthermore, contrary to Dr. Ankum’s contention, releasing a number from the switch does not have anything to do with routing 911 calls. Even if McLeod failed to perform this activity, 911 calls would still complete correctly as long as Qwest properly programmed its own switch.

56 Finally, McLeod claims that Qwest commingles costs for LSRs with costs for other activities. (Ankum Declaration ¶ 56-58). This is not correct. Qwest processes orders for resold services and UNEs, and charges Commission-approved rates to do so. McLeod does not provide Qwest with either resold services or UNEs, and any attempt to draw a parallel between the two and McLeod’s WSOC is off the mark. McLeod tries to distract from this point by saying that “the superficial asymmetry” between Qwest’s non-recurring charges and McLeod’s WSOC should not justify the contention that the charges are different. (Motion at ¶ 15). However, the asymmetry is not superficial – it is fundamental, and illustrates that the charges are in no way the same.

VI. MCLEOD’S WSOC IS DISCRIMINATORY

- 57 McLeod fails to address the fact that the WSOC only applies to Qwest even though an end user can move its local service to a wireless carrier, a CLEC or a cable company, and McLeod does not assess the charge. But because Qwest does not charge McLeod for processing an LSR that requests only number portability, as is the case with Qwest’s LSRs to McLeod, the WSOC imposes a penalty and higher cost on Qwest. The only way Qwest could avoid the WSOC would be to not solicit or accept McLeod customers.
- 58 McLeod claims it has bill and keep agreements with other CLECs for processing LSRs (Ankum Declaration ¶ 7) and because Qwest does not have that arrangement, McLeod must recover the processing costs by assessing the WSOC. (Ankum Declaration ¶ 8.) McLeod, however, “is willing to extend the “in kind” arrangements with other CLECs – under which carriers mutually absorb certain wholesale costs as a cost of doing business – to Qwest *provided that it is mutual.*” (Ankum Declaration ¶ 63.)
- 59 Dr. Ankum’s own words demonstrate the misleading nature of this argument – he describes “in kind” arrangements with other CLECs as being where carriers “mutually

absorb certain **wholesale costs** as a cost of doing business”(emphasis added). However, McLeod does not provide wholesale services to Qwest. The bill and keep discussion is a false analogy that requires the Commission to ignore the obvious difference between Qwest and the CLECs – McLeod’s bill and keep arrangements with CLECs regarding processing of LSRs have nothing to do with McLeod ordering UNEs from Qwest.

- 60 As discussed above, there is a significant difference between the LSR submitted by Qwest for number portability and the LSR submitted by McLeod for a UNE. McLeod glosses over the distinction and claims that a “bill and keep” arrangement with Qwest would be equivalent to one with a CLEC. Yet the relationship between McLeod and a CLEC is obviously not the same as that of Qwest to McLeod. McLeod and the CLECs do not purchase §251 UNEs from each other. Bill and keep arrangements for processing LSRs submitted by CLECs are not in any way analogous to McLeod sending Qwest an LSR ordering a UNE and Qwest sending an LSR for porting a number.
- 61 McLeod’s bill and keep analogy is also damaged by the fact that the WSOC could never apply to a CLEC. McLeod’s claim is that it recovers LSR processing costs through the WSOC. However, the WSOC only applies to a carrier who charges McLeod for orders to initiate service from an ILEC through UNEs, in other words, Qwest. Thus, if a CLEC chose to charge McLeod for processing McLeod’s number portability LSRs, McLeod could not rely on the WSOC to recover its costs of processing the CLEC’s LSRs. That CLEC would have a definite competitive advantage in attracting customers. The bill and keep argument is simply a distraction to attempt to cover the discriminatory nature of the narrowly tailored language of the WSOC.

VII. CONCLUSION

62 After consideration of all of the arguments and declarations in this matter, Qwest respectfully requests that the Commission make the following conclusions, and invalidate McLeod's WSOC:

- a. Any rates the parties charge each other must be contained in an ICA;
- b. McLeod's WSOC is not in the ICA;
- c. Qwest does not purchase any "wholesale services" from McLeod;
- d. McLeod has not established any legal basis upon which to impose an "ordering" or other non-recurring charge on Qwest when a customer leaves McLeod;
- e. The WSOC that McLeod seeks to recover from Qwest is not comparable to costs that Qwest recovers through its non-recurring charges for resold services or unbundled network elements ("UNEs");
- f. If McLeod were to win a customer from Qwest and serve that customer over its own facilities, Qwest would perform the exact same functions that McLeod does when a McLeod customer changes to Qwest, and under those circumstances Qwest would not assess a non-recurring charge on McLeod;
- g. Under the circumstances described above, McLeod's WSOC must be found to violate federal law as an improper and unlawful attempt to assess a charge outside of the parties' ICA, and without the requisite negotiation and arbitration process.

h. Under the circumstances described above, McLeod's WSOC must be found to be unjust, unreasonable, and discriminatory, in violation of state law.

DATED this 23rd day of November, 2009.

QWEST

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

Attorneys for Qwest Corporation