

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

QWEST CORPORATION,	)	
	)	
Complainant,	)	DOCKET NO. UT-090892
	)	
v.	)	MCLEODUSA RESPONSE TO
	)	QWEST MOTION FOR SUMMARY
MCLEODUSA TELECOMMUNICATIONS	)	DETERMINATION
SERVICES, INC., d/b/a PAETEC BUSINESS	)	
SERVICES.	)	
	)	
Respondent.	)	
_____	)	

1. Pursuant to WAC 480-07-380 and the procedural schedule established in the Prehearing Conference Order in the above-captioned proceeding, McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services (“McLeodUSA”) provides the following response to the motion of Qwest Corporation (“Qwest”) for summary determination of its complaint (“Qwest Motion”).

**INTRODUCTION**

2. McLeodUSA filed its own motion for summary determination of Qwest’s complaint in which McLeodUSA demonstrated that its wholesale service order charge (“WSOC”) is compensatory, as well as just and reasonable, and that the charge is neither discriminatory nor anti-competitive. That motion largely addresses and refutes the arguments in the Qwest Motion, and McLeodUSA will not repeat that discussion here. Rather, McLeodUSA will explain that Qwest incorrectly contends that the WSOC is procedurally improper and that Qwest fails to prove that the WSOC is unjust and unreasonable, discriminatory, or otherwise unauthorized by applicable law. The

Commission, therefore, should deny the Qwest Motion, grant McLeodUSA's motion, and dismiss the complaint.

## **DISCUSSION**

### **A. McLeodUSA Has Complied with the Act's Requirement to Negotiate Interconnection Terms and Conditions.**

3. McLeodUSA established the WSOC in its Washington price list (which McLeodUSA now maintains on its website because competitively classified companies are no longer able to maintain price lists with the Commission) to recover the costs McLeodUSA incurs to process LSRs submitted by other carriers to transfer a customer. Qwest disputed that charge and refused to pay it. As part of a settlement agreement resolving multiple issues, Qwest agreed to pay the WSOC but reserved the right to challenge that charge. The parties amended their interconnection agreement ("ICA") to reflect this agreement, and filed the amendment with the Commission. *See* Qwest Motion ¶¶ 19-20. Qwest now contends that McLeodUSA improperly failed to negotiate an amendment to the parties' ICA to authorize the WSOC as required under Section 252 of the Telecommunications Act of 1996 ("Act"). Such a contention is inconsistent with the facts and defies common sense.
  
4. McLeodUSA and Qwest negotiated an amendment to the parties' ICA in which Qwest agreed to pay the WSOC subject to future Commission action. Both McLeodUSA and Qwest signed that amendment and filed it with the Commission. Qwest attached the amendment to its complaint. Qwest, therefore, has no factual or logical basis on which it can claim that "McLeod seeks to alter the terms of the agreement by circumventing the negotiation process and the intent of the Act," Qwest Motion ¶ 29, when the undisputed

facts demonstrate that McLeodUSA and Qwest engaged in the negotiation process and executed an amendment to the ICA governing the WSOC as contemplated by the Act.

5. Qwest disagrees, claiming “[t]he 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 amendment . . . .” Qwest Motion ¶ 27. The amendment cannot be interpreted to support such a fiction. Paragraph 2a of Attachment 1 to the amendment states,

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 the 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.

In compliance with the amendment, McLeodUSA has not taken the position that the amendment precludes Qwest from challenging the WSOC, nor has McLeodUSA made any argument in support of its price list based on the amendment or Qwest’s agreement to enter into that amendment. But Qwest cannot reasonably claim that the amendment allows Qwest to argue that the parties never executed an amendment.

6. First, the language of the amendment does not support Qwest’s position. The applicable sentence provides, “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 the CLEC's *Wholesale Service Order tariff provisions* in the future." (Emphasis added.) This sentence permits Qwest to challenge the contents of the WSOC provisions in the price list but does not authorize Qwest to claim that McLeodUSA is impermissibly billing Qwest the WSOC out of McLeodUSA's price list. To the contrary, paragraph 1 in Attachment 1 expressly states that Qwest will pay invoices for that charge "according to the payment terms of the Agreement." The amendment, not McLeodUSA's price list, governs Qwest's payment of the WSOC.

7. Nor is Qwest's position sustainable as a practical matter. The parties executed a settlement agreement in which Qwest agreed to pay the WSOC pending any challenge Qwest might bring to the Commission in the future. There would have been no need for the parties to amend their ICA if Qwest had only agreed to pay McLeodUSA the WSOC pursuant to the price list. The parties, however, negotiated, executed, and filed the amendment to require Qwest to pay that charge as an obligation under their ICA unless and until such time, if any, as the Commission concludes the WSOC is unlawful. Qwest cannot now pretend the amendment does not exist and argue that the WSOC should be part of the ICA when Qwest participated in making the WSOC part of the ICA.

8. Qwest, therefore, can bring its other challenges to the WSOC, but Qwest cannot take the position that McLeodUSA has circumvented the interconnection agreement requirements in federal law when McLeodUSA and Qwest have amended their ICA in compliance with those requirements.

**B. The WSOC Is Just and Reasonable.**

9. McLeodUSA demonstrated in its own motion, including the declaration of Dr. August Ankum, that the WSOC is based on the costs that the Commission has approved

for the same or similar functions that Qwest provides when it processes local service requests (“LSRs”) and thus is just and reasonable. McLeodUSA Motion ¶¶ 12-17; Ankum Decl. ¶¶ 21-27 & 36-55. Qwest contends that the LSRs McLeodUSA submits to Qwest to order or disconnect unbundled loops are different from the LSRs that Qwest submits to McLeodUSA when transferring a customer and thus are not “comparable orders” for which McLeodUSA can charge Qwest. Qwest misses the point.

10. The orders are “comparable” for purposes of determining whether any charge applies as long as they require the carrier to undertake the same or comparable activities. The WSOC recovers the costs that McLeodUSA incurs to process the LSRs that Qwest submits to McLeodUSA. As demonstrated by Dr. Ankum, Qwest’s non-recurring charges (“NRCs”) recover costs for comparable activities, as well as other costs associated with provisioning or disconnecting service. McLeodUSA’s WSOC does not include these other costs but is established at a level equal to the Commission-approved costs for the same or comparable activities that Qwest undertakes to process the LSRs that McLeodUSA and other carriers submit to Qwest. *See* Ankum Decl. § IV (b) and (c). Qwest cannot reasonably claim that the WSOC is unjust and unreasonable when it recovers the same costs that the Commission has authorized Qwest to recover.

11. Qwest also contends that the WSOC is unjust because McLeodUSA cannot charge Qwest for porting telephone numbers and thus McLeodUSA allegedly is attempting “to charge Qwest for its disconnection process, even though the process would be the same as when McLeod disconnects without porting a number.” Qwest Motion ¶ 36. This contention is not entirely clear and is made without any support or reference to either FCC or Commission orders, and so McLeodUSA is unable to assess

what Qwest is asserting, much less the basis for those assertions. McLeodUSA's WSOC nevertheless seeks to recover only costs for activities associated with processing the LSR Qwest submits, as identified in Qwest's own studies, and for which Qwest itself assesses charges on other carriers, such as McLeodUSA. Furthermore, as McLeodUSA explained in its motion and the declaration of Patricia Lynott, McLeodUSA follows standard industry practice in requiring all carriers to submit an LSR when requiring McLeodUSA to undertake an activity on their behalf. McLeodUSA Motion ¶¶ 3-5; Lynott Decl. ¶¶ 8-12. Again, McLeodUSA is simply seeking to recover the costs it incurs with respect to such orders, just as Qwest recovers its costs for providing the same or similar functions.

12. Nor is McLeodUSA attempting "to charge Qwest for its disconnection process," as Qwest contends. The WSOC does not apply when the customer simply disconnects service from McLeodUSA or when Qwest notifies McLeodUSA that a customer McLeodUSA services by reselling Qwest service has chosen another carrier. The WSOC only applies when McLeodUSA is required to process an LSR and undertake activities to ensure that a customer being served using McLeodUSA's own switching is able to transition its service seamlessly to another provider. Reply Declaration of Patricia Lynott ¶ 4. There is nothing remotely unjust or unreasonable in McLeodUSA seeking to recover its costs for providing these activities when Qwest – or any other carrier – recovers the same costs from McLeodUSA.

**C. The WSOC Is Not Discriminatory.**

13. McLeodUSA established in its motion that the WSOC is not discriminatory because it applies to all carriers that submit LSRs to McLeodUSA and charge McLeodUSA for processing comparable orders, rather than engage in a bill-and-keep

arrangement in which neither carrier charges the other. Qwest is the only such carrier, but that is a result of Qwest's decision not to opt for a bill-and-keep arrangement, not unlawful discrimination. McLeodUSA Motion at ¶¶ 18-22. Qwest nevertheless asserts, "The McLeod price list is specifically crafted to target one company," and "The language applies only to an ILEC, and only to a carrier providing UNEs." Qwest Motion ¶ 42. These statements are flatly incorrect.

14. Section 7.1 of McLeodUSA's Washington price list provides, "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')." Qwest Motion, Exhibit A. By its plain terms, the WSOC applies to *all* telecommunications carriers, not just Qwest or ILECs or carriers who provide UNEs. The language does not mention Qwest and only references ILECs to describe what constitutes a "comparable order" for purposes of determining when the charge applies. Qwest is the only carrier required to pay a WSOC because Qwest is the only carrier that charges McLeodUSA for comparable orders. As McLeodUSA explained in its motion, Qwest could avoid the WSOC by processing comparable LSRs on a bill-and-keep basis like other carriers, but Qwest has chosen not to do so. McLeodUSA Motion ¶¶ 19-21. The WSOC, therefore, is not discriminatory.<sup>1</sup>

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<sup>1</sup> Qwest further alleges that "[b]ecause the WSOC does not apply to other carriers in this state, this works as a disincentive for Qwest to compete for customers who might be served by McLeod." Qwest Motion ¶ 37. Qwest, however, has not produced any evidence to demonstrate that the WSOC has any effect whatsoever on Qwest's ability, efforts, or incentive to market its services to McLeodUSA subscribers. Qwest thus has

**D. The WSOC Is Consistent with Applicable Law.**

15. McLeodUSA explained in its motion that its WSOC recovers the costs for performing the same LSR processing functions for Qwest that Qwest performs for McLeodUSA and that McLeodUSA is no less entitled to recover these costs than Qwest. McLeodUSA Motion ¶¶ 11-17. Qwest incorrectly claims that “[n]othing in the Act provides for McLeod to recover the costs it seeks.” Qwest Motion ¶ 46. McLeodUSA, like Qwest, is entitled to recover the costs it incurs as a result of order activity generated by other carriers. McLeodUSA, like Qwest, is a telecommunications carrier under state and federal law, and as such, is authorized to charge just and reasonable rates for the services and functionalities it provides in response to customer demand. *See, e.g.*, 47 U.S.C. § 201; RCW 80.36.080-090. Once Qwest submits an LSR to McLeodUSA, Qwest is obligated to compensate McLeodUSA to fulfill that order, no less than McLeodUSA must compensate Qwest for the LSRs that McLeodUSA submits to Qwest.

16. Qwest also claims that “[n]either the WSOC nor its rate is approved by the Commission,” *id.*, but that is the reason Qwest brought its complaint – to have the Commission determine whether the WSOC is unlawful. McLeodUSA established its WSOC to recover the same costs that Qwest recovers for the same LSR processing and OSS development costs at the same levels that the Commission has approved for Qwest. Qwest has had every opportunity in this proceeding to demonstrate that McLeodUSA is not entitled to charge the WSOC or to any cost recovery. Qwest has failed to do so. The Commission, therefore, should refuse to treat McLeodUSA any differently than it has treated Qwest with respect to recovering its LSR processing and OSS development costs.

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not met its burden of proof with respect to this allegation, and the Commission should afford it no weight.

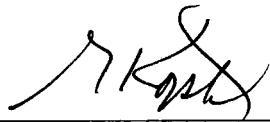


**CONCLUSION**

17. For the foregoing reasons, and the reasons described in McLeodUSA's motion and supporting declarations, the Commission should deny the Qwest Motion, grant the McLeodUSA Motion, and dismiss Qwest's complaint.

Dated this 23rd day of November 2009.

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By:   
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