

McLeodUSA®

96-262

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FCC - MAILROOM

November 18, 2004

The Honorable Michael K. Powell
Chairman, Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

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Re: CLEC Access Charges

Dear Chairman Powell:

As Chairman and Chief Executive Officer of McLeodUSA Incorporated, I am writing to request your assistance on a very serious matter that currently threatens the financial viability of McLeodUSA. The issue involves CLEC access charges and the prospective intent of your May 2004 8th Report and Order. Three carriers are selectively interpreting this recent Order and disputing nearly \$22 million for access services provided by McLeodUSA from 2001 through June 2004. They are also engaged in self-help totaling approximately \$15 million to date, and one carrier now threatens to suspend our service starting November 22. Notwithstanding our efforts to resolve this issue, this situation is rapidly deteriorating and risks affecting our customers and is threatening the financial condition of this company.

The dispute involves McLeodUSA's past access charges for traffic when a wireless carrier's customer makes a toll-free call to an IXC's customers ("8YY CMRS traffic"). McLeodUSA believes that the benchmark rate charged from 2001 through June 2004 was just and reasonable and that the new access charge rule adopted in the 8th Report and Order applies only on a going forward basis. McLeodUSA also believes that any "sufficiency of the tariff" claim by these three carriers is irrelevant, because in a permissively detariffed environment, CLECs can charge no greater than the benchmark rate as evidenced below. These three carriers disagree and contend the 8th Report and Order applied the new access charge rule retroactively and that our access tariff was not sufficient, relying on the ITC DeltaCom decision cited in the 8th Report and Order that was subsequently vacated.¹

¹ See *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, 8th Report and Order and Fifth Order on Reconsideration*, CC Docket No. 96-262, ¶ 18, n. 62 (rel. May 18, 2004) ("8th Report and Order")

McLeodUSA believes that these carriers are wrong and that we fully complied with the following CLEC access charge rules that were in effect between 2001 until to date.

First, McLeodUSA believes it was legal for a CLEC to charge the FCC-approved benchmark rate for all traffic, including but not limited to 8YY CMRS traffic from 2001 through June 2004.² The FCC stated in its April 2001 *7th Report and Order* that CLECs were entitled to charge the full benchmark rates.³ Consistent with this Order, McLeodUSA charged the declining benchmark rate over three years, until the FCC adopted a new access charge rate effective in June 2004 in its *8th Report and Order*. We then reduced the access charges for 8YY CMRS traffic in accordance with the FCC's new rule.

Second, McLeodUSA believes the benchmark rate was a just and reasonable rate for access services for 8YY CMRS traffic from 2001 through June 2004. In the *7th Report and Order*, the FCC stated that "CLEC access rates that are at or below the benchmark that we set will be presumed to be just and reasonable."⁴ Again, McLeodUSA fully complied by charging the declining benchmark rate over the three-year period in accordance with the FCC's Order.

The three carriers involved in our current dispute contend the *8th Report and Order* did not finally resolve the issue of whether the benchmark rate was just and reasonable. The *8th Report and Order* provided that under its prior rules, "it would not have been unreasonable" for a CLEC to charge the benchmark rate to an IXC.⁵ We believe this language is entirely consistent with the *7th Report and Order* and supports our position. The carriers' contention has no merit.

Third, because McLeodUSA was permissively detariffed, any claim related to "the sufficiency of our tariff" is irrelevant. The FCC has ruled that CLECs are not required to file tariffs for access services they provide.⁶ This is known as "permissive detariffing" and it gives CLECs the option of filing tariffs for some, all or none of their access services. Accordingly, nothing prevents a CLEC from providing access services, including services for routing 8YY CMRS traffic from a wireless caller to an IXC's customers, without a tariff covering such services. Despite this long-

² *Id.* at p. 3

³ *7th Report and Order*, p. 3, para. 3

⁴ *Id.* (CLEC access rates that are at or below the benchmark that we [the FCC] set will be presumed to be just and reasonable....)

⁵ *8th Report and Order*, p. 10, para. 18

⁶ See *In the Matters of Hyperion Telecommunications, Inc. Petition Requesting Forbearance, Time Warner Communications Petition for Forbearance, Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, FCC 97-219, 12 FCCR 8596, 8608 - 8611 (June 19, 1997) ("*Hyperion Order*") (finding that CLECs may permissively detariff interstate access service).

standing FCC policy, these three carriers argue that the FCC's 8th *Report and Order* only permits a CLEC to charge access for 8YY CMRS traffic if the CLEC has a sufficient tariff.⁷

These IXCs' arguments are wrong. The sufficiency of a CLEC's tariff for access services for 8YY CMRS traffic is relevant *only* if a CLEC has a tariff that specifically covers such traffic. Accordingly, if, as permitted under the current FCC permissive detariffing rules, a CLEC has no applicable tariff, the "sufficiency of a tariff" is irrelevant.

Supporting our interpretation of the 8th *Report and Order* is the *Hyperion Order* allowing permissive detariffing. There is nothing in the 8th *Report and Order* that even remotely suggests that the FCC was overturning or even limiting its permissive detariffing conclusions from the *Hyperion Order*. Indeed, if the FCC had contemplated such a result, it certainly would have indicated that was the case in the 8th *Report and Order*. Quite to the contrary, paragraph 4 of the 8th *Report and Order* illustrates the FCC's understanding that CLECs are subject to permissive detariffing by finding that a CLEC must charge the IXC the appropriate benchmark rate in the event the parties are unable to reach a negotiated agreement governing such access charges. Accordingly, the IXCs' claim that McLeodUSA may not charge the benchmark rate for this type of traffic when not covered by the tariff is false.

Fourth, self-help, under Commission precedent, is an unjust and unlawful practice in violation of Section 201(b) of the Act. This Commission has consistently declared that if an IXC disputes a CLEC's presumptively reasonable charges, which the benchmark rates were in this case for 8YY CMRS traffic, the IXC must pay the charges first and protest them later.⁸

In our case, the IXCs are illegally granting themselves, without benefit of any Commission clarification, interim injunctive relief from paying the presumptively lawful benchmark rates. The FCC has stated that IXCs do not have the right to unilaterally grant themselves injunctive relief from paying presumptively reasonable rates in circumstances where they continue to receive and benefit from the services. Self-help in such circumstances constitutes a violation of Section 201(b) of the Act.

Finally, we urge the FCC to affirm on its own motion the following:

- (1) it was legal for a competitive LEC to charge the FCC-approved benchmark rate for all traffic, including but not limited to 8YY CMRS traffic, from 2001 through June 2004;

⁷ 8th *Report and Order*, para. 18, n. 62

⁸ *Broton v. AT&T*, Memorandum Opinion and Order, 13343, 12 FCC Rcd 1335, n.53.; see also *In the Matter of MGC Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 11647, 11659 ¶ 27 (1999), recon. denied, 15 FCC Rcd. 308 (2000) (AT&T's self help violated Section 201(b) of the Act).

- (2) the benchmark rate was a just and reasonable charge for all access services during this time period prior to June 22, 2004;
- (3) CLECs could charge the benchmark rates for all access services pursuant to (a) an access tariff, (b) a written agreement for access services with an IXC or (3) in the absence of a tariff or written agreement, a CLEC could charge no higher than "the appropriate benchmark rate" during this time period prior to June 22, 2004;
- (4) CLECs are permissively detariffed for access services and therefore there is no legal basis to dispute payment for benchmark rates charged from 2001 through June 2004; and
- (5) self-help is an unjust and unlawful practice in violation of Section 201(b) of the Act when disputing previous payments of CLEC access charges set at the benchmark rate.

Given the crucial importance to McLeodUSA, Mr. Forstmann and I would like to discuss this issue with you.

Sincerely,



Chris A. Davis
Chairman and Chief Executive Officer

cc: Theodore J. Forstmann, Chairman of the Executive Committee
Stephen C. Gray, President