BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., Petitioner, v. QWEST CORPORATION, Respondent.	Docket No. UT-063013 MCLEODUSA'S OPPOSITION TO QWEST'S MOTION TO STRIKE STARKEY SUPPLEMENTAL DIRECT TESTIMONY

Pursuant to WAC 480-07-375, McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") hereby provides the following opposition to the motion of Qwest Corporation ("Qwest") to strike the Supplemental Direct Testimony of Michael Starkey filed June 5, 2006 ("Qwest Motion"). That testimony directly supports McLeodUSA's interpretation of the contract amendment at issue in this case and McLeodUSA's discrimination and undue preference claim and raises no new or improper issues. Accordingly, as the Administrative Law Judge in Utah decided, the Commission should deny Qwest's Motion.

BACKGROUND

1. On February 21, 2006, McLeodUSA filed its petition seeking to enforce the parties' interconnection agreement and alleging that Qwest is unlawfully discriminating against McLeodUSA and has created an undue preference. Specifically, McLeodUSA seeks to enforce Qwest's obligation under the DC Power Measuring Amendment to the interconnection agreement to charge for the DC power plant used to provide electricity to

McLeodUSA's collocated equipment in Qwest central offices according to the amount of power that McLeodUSA actually uses, rather than on the amount of DC power capacity of the power cables that McLeodUSA originally ordered on its collocation application. Petition §§ 6-9. McLeodUSA also has alleged that Qwest's insistence on charging for DC power plant based on the capacity of the power cables is unlawfully discriminatory and unduly prejudicial because it results in McLeodUSA paying Qwest more for DC power than Qwest charges itself. *Id.* § 12.

2. Qwest responded, in part, that McLeodUSA's interpretation of the Amendment is unreasonable because the charge for DC power plant is calculated to recover fixed equipment costs that are not usage sensitive:

> [T]he underlying purpose of the charge was to recover the fixed costs of equipment required to provide the amount of DC power capacity requested by McLeod in its collocation application to Qwest. It would not have been appropriate to prorate the recovery of these fixed costs based on actual usage because they do not vary with usage.

Qwest Answer § 9.

3. McLeodUSA filed direct testimony in support of its petition on April 28, 2006, including the Direct Testimony of Michael Starkey. In that testimony, Mr. Starkey stated that incumbent local exchange carrier ("ILEC") cost studies with which he is familiar do not support Qwest's interpretation of its DC Power charges but that he had not been able to review Qwest's Washington-specific cost study to confirm that this study is consistent with his experience. Starkey Direct at 14-16. Mr. Starkey's Supplemental Direct Testimony reflects his analysis of that Washington-specific cost study and his conclusion that this study "develops the Power Plant rate on the basis of DC power usage – not the size of the power feeder cables – which supports McLeodUSA's interpretation of the *Power Measuring*

Amendment, wherein the Power Plant rate should be assessed based on measured usage." Starkey Supp. Direct at 1, lines 12-15. This testimony further supports McLeodUSA's discrimination and undue preference claim by demonstrating that Qwest's application of the Power Plant rate approved by the Commission is discriminatory and creates an undue preference because it results in McLeodUSA and other collocating competitors paying far more than their proportionate share of Qwest's power plant costs. *Id*. at 7-9.

ARGUMENT

4. Qwest identifies two reasons why it believes that the Commission should strike Mr. Starkey's Supplemental Direct Testimony: "first, the cost study testimony is irrelevant; second, it is an impermissible collateral attack on the Commission-approved Power Plant rate." Qwest Motion ¶ 2. Neither reason withstands scrutiny. Indeed, the Administrative Law Judge in Utah denied the same motion when Qwest raised it in the comparable proceeding in that state. *McLeodUSA v. Qwest*, Utah PSC Docket No. 06-2249-01, Hearing Transcript at 21 (May 24, 2006).

A. The Testimony Is Relevant to Both of McLeodUSA's Claims.

5. The analysis of Qwest's collocation cost study in Mr. Starkey's Supplemental Direct Testimony directly supports McLeodUSA's interpretation of the DC Power Measuring Amendment, as well as McLeodUSA's discrimination and undue preference claim. Qwest, in its Answer, contended that McLeodUSA's interpretation of that Amendment is unreasonable because the charge for DC power plant is calculated to recover fixed equipment costs that are not usage sensitive and thus application of that charge to the power actually used would result in under-recovery of Qwest's costs. Qwest Answer § 9. Mr. Starkey's analysis of the cost study on which those charges are based shows that the opposite is true.

6. That analysis demonstrates that Qwest's rate for power plant was developed by dividing the total plant costs by an assumed level of power usage (measured in amps), ultimately resulting in a per amp charge for DC power plant. Starkey Supp. Direct at 2-4. As Mr. Starkey explains, the development of the rate is consistent with the application of the resulting charges to the amount of DC power actually used – which is how McLeodUSA interprets the DC Power Measuring Amendment. Qwest's interpretation of the Amendment, on the other hand, would result in Qwest applying charges developed based on actual usage to the total capacity of the power cables that deliver the power to the collocated equipment and thus substantially over-recovering its power plant investment. *Id*. at 4-7. The testimony supports McLeodUSA's position that the Commission should not interpret the Amendment establishing application of DC power charges in a manner that is inconsistent with how those charges were developed, which is directly relevant to the issue of contract interpretation at the core of McLeodUSA's petition.

7. McLeodUSA thus is not engaging in "a full blown exploration of Qwest's costs" as Qwest contends. Qwest Motion ¶ 4. Rather, McLeodUSA has prepared testimony to demonstrate that based on the manner in which Qwest's collocation cost study models power plant costs, the only reasonable interpretation of the Amendment governing how "DC Power Usage" charges are to be assessed is that *all* such charges – including the DC Power Plant charge – apply on an "as used," not an "as ordered," basis. Qwest interprets the Amendment as not including power plant charges, but Qwest's disagreement with McLeodUSA's contrary interpretation does not render irrelevant evidence that supports McLeodUSA's position.

8. In addition, nothing in the oral ruling on McLeodUSA's motion to compel

Qwest to provide McLeodUSA with a copy of the collocation cost study in any way precluded the presentation of such testimony. Far from ruling that the collocation cost study was irrelevant, the Administrative Law Judge required McLeodUSA to obtain a copy of the nonconfidential study from Commission records – but with assistance from Qwest if McLeodUSA was unable to find it. Qwest's representations to the contrary are simply false.

9. Qwest, moreover, completely ignores McLeodUSA's discrimination and undue preference claim. McLeodUSA alleges that Qwest is discriminating against McLeodUSA when charging for DC Power Plant based on the number of amps of capacity that could be delivered over the DC power cables that McLeodUSA ordered. Such an application of the DC power plant charge requires McLeodUSA to pay far more for DC power in a Qwest central office than Qwest pays itself. Mr. Starkey's analysis of the collocation cost study supports that claim. Starkey Supp. Direct at 7-9. Qwest has not even attempted to explain how this testimony is not relevant to McLeodUSA's discrimination and undue preference claim.

10. Mr. Starkey's Supplemental Direct Testimony supports McLeodUSA's interpretation of the DC Power Measuring Amendment and McLeodUSA's allegations that Qwest is discriminating against McLeodUSA and granting itself an undue preference by applying the per amp power plant charge to the number of amps of capacity of the power cables to McLeodUSA's collocation space, rather than to the number of amps of power McLeodUSA actually uses. Such testimony is unquestionably relevant.

B. McLeodUSA Is Not Collaterally Attacking Commission-Approved Rates.

11. Qwest's second basis for seeking to strike the June 5, 2006 testimony is that "Mr. Starkey's cost testimony is nothing more than a thinly veiled, or perhaps not veiled at

all, attack on the actual Commission-approved Power Plant rates." Qwest Motion ¶ 7. The testimony itself demonstrates that this contention has no merit. Mr. Starkey testifies that nothing in his testimony "is critical of the actual Power Plant rate approved by the Commission, or the manner by which the rate is developed." Starkey Supp. Direct at 9, lines 172-73. Mr. Starkey pointedly explains, "It is Qwest's *misapplication* of its Power Plant rate that causes the discrimination discussed above and likewise, it is this same *misapplication* that should have been (and McLeodUSA believes was) rectified by the DC Power Measuring Amendment." *Id*. at 9, lines 179-82 (emphasis added).

12. Qwest cites to no Commission cost docket order that considered, much less expressly approved, Qwest's application of the DC power rate elements to the total amperage capacity of the power cables. The Commission's cost docket orders approved only the per amp rates themselves, not the specific amps to which the rates apply. McLeodUSA is not disputing the rates the Commission approved. McLeodUSA is challenging Qwest's *application* of those rates under the DC Power Measuring Amendment. Nothing in that challenge implicates or collaterally attacks any Commission cost-docket order.

13. Qwest nevertheless complains that Mr. Starkey's "criticisms would have been equally applicable to the rates as they existed before the amendment." Qwest Motion ¶ 8. As discussed above, however, Mr. Starkey's criticisms do not go to the rates at all. It is irrelevant, moreover, whether Mr. Starkey's analysis *could* apply to Qwest's *application* of the DC power charges prior to the effective date of the DC Power Measuring Amendment. McLeodUSA is not making that claim in this proceeding. Qwest's argument also misses the point. McLeodUSA is challenging Qwest's interpretation of the Amendment as authorizing Qwest to apply the Commission-approved DC Power Plant rate to the total amperage

capacity of the power cables from that power plant to McLeodUSA's collocation space. Mr. Starkey's Supplemental Direct Testimony explains that such an interpretation results in an application of that rate that is inconsistent with how the rate was developed and that is discriminatory and results in an undue preference to Qwest. The testimony thus supports McLeodUSA's position on the issues raised in the Petition and does not broaden the scope of this proceeding.

CONCLUSION

Mr. Starkey's Supplemental Direct Testimony is relevant to McLeodUSA's contract interpretation and discrimination and undue preference claims and does not collaterally attack Commission cost docket orders or otherwise expand the issues to be considered in this docket. Qwest, therefore, has identified no legitimate basis on which that testimony should not be received into evidence, and the Commission should deny Qwest's Motion.

Dated this 21st day of June, 2006.

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