

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

McLEODUSA TELECOMMUNICATIONS
SERVICES, INC.,

Petitioner,

v.

QWEST CORPORATION,

Respondent

Docket No. UT-063013

QWEST'S MOTION TO STRIKE
PORTIONS OF MCLEOD'S OPENING
POST-HEARING BRIEF

OR, IN THE ALTERNATIVE, TO
REOPEN THE RECORD FOR FURTHER
HEARINGS

I. INTRODUCTION

1 Qwest Corporation ("Qwest") hereby moves to strike the Exhibit A attached to the Opening Post Hearing Brief ("Brief") filed by McLeodUSA Telecommunications Services, Inc. ("McLeod"). The Commission should also strike any references to that Exhibit contained in paragraphs 7, 8 and 15 of the Brief.

2 The material should be stricken because it is extra-record evidence submitted without leave to do so and without a proper motion to admit late filed evidence, and because McLeod is incorrect in its representations that the newly filed Exhibit A is the operative rate sheet. If McLeod had properly requested permission to submit late filed evidence in the form of the Exhibit A, Qwest would have opposed that request on the basis that the factual representations made by McLeod with regard to Exhibit A are wrong. The Exhibit A attached to the Brief is

not the applicable Exhibit A to the interconnection agreement. Indeed, McLeod's representations to that effect are contradicted on multiple occasions by Mr. Starkey's sworn testimony. The Exhibit A to McLeod's interconnection agreement has been updated multiple times in compliance with Commission cost docket orders, in accordance with the terms of the interconnection agreement itself, as approved by the Commission. Thus, the updated Exhibit A included in the record as Exhibit 26 is the operative document between the parties.

3 Further, any attempt by McLeod to "correct" the record now are simply too late – the "evidence" upon which McLeod hopes to rely and upon which it makes its contract interpretation arguments was available at the time of the hearing; the Exhibit A that Mr. Starkey quoted from (direct, page 5; rebuttal pages 4 and 5) and that he attached to his Rebuttal testimony as Exhibit MS-4 (Exhibit 26) is the Exhibit A that both parties tried the case on; it is the Exhibit A that informed all of the prefiled testimony, Qwest's included; it is the Exhibit A upon which Qwest and McLeod based all of their cross-examination; it is the Exhibit A upon which every single piece of contract-related testimony and evidence in this case is based; and, it is the Exhibit A that was effective when the parties executed the Amendment at issue.

4 On the one hand, perhaps this is a small issue, as McLeod's newly-presented Exhibit A actually confirms Qwest's interpretation of the DC Power Measuring Amendment. However, it is clearly not a small issue to McLeod, who seems to believe, or would have the Commission believe, that there is a significant difference between the two documents. Thus, McLeod, in a curious attempt to reverse its sworn testimony, and further distance itself from the language of the relevant agreements and its intent with regard to the DC Power Measuring Amendment at issue in this case, unearthed an old and superseded Exhibit A, language that did not inform *any* of its testimony in this case, and has attempted to circumvent all process with regard to the admissibility of new evidence by simply announcing in its Brief that this is "clearly" the

applicable Exhibit A. Under McLeod's methods, hearings are apparently unnecessary as a way of testing the other party's claims.

5 Qwest will explain in detail why the newly-offered Exhibit A is not applicable and should be stricken. But, if the Commission believes, after reading this Motion, that McLeod's new Exhibit A should be allowed, or would in any way affect the outcome as compared to the Exhibit A that is in evidence as Exhibit 26, Qwest asks the Commission to reopen the record so that further cross-examination of McLeod's witnesses may take place with regard to the issues raised by this document.

II. ARGUMENT

A. McLeod Failed to Follow the Procedures for Submitting Late-Filed Evidence

6 Under WAC 480-07-830, a party who wishes to have the Commission consider additional evidence after the close of the record must file a Motion to Reopen. McLeod failed to do so, and in fact, based on McLeod's representations in its Brief with regard to this late filed evidence, McLeod is unable to state any basis for failing to offer this evidence earlier other than its own negligence. Thus, McLeod does not state good and sufficient cause for reopening as required by the rule. Those portions of the Brief should therefore be stricken as extra-record evidence submitted without leave to do so and without a proper motion to admit late filed evidence.

B. The Exhibit A Attached to McLeod's Brief is Not the Applicable Exhibit A Between the Parties

7 If McLeod had properly requested permission to submit late filed evidence in the form of the Exhibit A, Qwest would have opposed that request on the basis that the factual representations made by McLeod with regard to Exhibit A are wrong. The Exhibit A attached to the Brief is not the applicable Exhibit A to the interconnection agreement. Indeed, McLeod's

representations to that effect are contradicted on multiple occasions by Mr. Starkey's sworn testimony. It is also contradicted by the parties' interconnection agreement, by orders of the Commission, and by McLeod's actions in accepting the benefit of updates to Exhibit A over the years.

8 Even a cursory examination by McLeod of the facts would have revealed to McLeod that Mr. Starkey based his testimony on the current, correct, and applicable Exhibit A (pricing exhibit) between the parties. Indeed, it was McLeod itself that offered Exhibit 26 as the operative pricing document for the parties' interconnection agreement. As Mr. Starkey testified, the Exhibit A that Mr. Starkey quoted from (Direct Testimony, page 5; Rebuttal Testimony pages 4 and 5) and that he attached to his Rebuttal testimony as Exhibit MS-4 (Exhibit 26) is the Exhibit A that is applicable between the parties.¹

9 McLeod, in what seems a desperate attempt to further avoid the language of the DC Power Measuring Amendment and the underlying interconnection agreement between the parties, unearthed some old and superseded Exhibit A language, language that did not inform *any* of its testimony in this case, and has attempted to circumvent all process with regard to the admissibility of new evidence by simply announcing in its Brief that this is "clearly" the applicable Exhibit A.

10 McLeod's ICA with Qwest proves otherwise. That ICA contains three separate and specific provisions that provide that the Exhibit A will be updated in accordance with Commission cost docket orders and other proceedings. In accordance with those provisions, Qwest has periodically updated Exhibit A for all CLECs, including McLeod, in accordance with its compliance filings in various cost docket and SGAT proceedings. McLeod has routinely been

¹ *E.g.*, Tr. 156, lines 20-25: "Q. And you also attached to your rebuttal testimony as Exhibit 26, you don't need to look at it, but it's the entirety of the Exhibit A for Washington; is that right? A. Yes, as pulled from the Qwest web site recently."

provided notice of these updates, and has just as routinely accepted the benefit of those updates.

11 The following sections of the parties' ICA are relevant: Section 2.2; Section 6.3.1; Section 9.23.4.2.²

Section 2.2 provides, in part:

It is expressly understood that this Agreement will be corrected to reflect the outcome of generic proceedings by the Commission for pricing, service standards, or other matters covered by this Agreement.”

Section 6.3.1 provides:

The Telecommunications Services identified in Exhibit A are available for resale at the wholesale discount percentage shown in Exhibit A. This Agreement at Exhibit A generally incorporates the Wholesale Discount Rate proposed by U S WEST in the Generic Cost Docket, Docket Number UT-960369. If the Commission takes any action to adjust the rates contained herein, including adopting a wholesale discount rate in the Cost Docket, U S WEST will make a compliance filing to incorporate the adjusted rates into this Agreement. Upon the compliance filing by U S WEST, the Parties will abide by the adjusted rates on a going-forward basis.

Section 9.23.4.2 provides:

If the Commission takes any action to adjust the rates previously ordered, U S WEST will make a compliance filing to incorporate the adjusted rates into Exhibit A. Upon the compliance filing by U S WEST, the Parties will abide by the adjusted rates on a going-forward basis.

12 Section 2.2 is particularly relevant as it contains general rules for interpretation and construction of the agreement. The quoted language above has consistently been interpreted and implemented by Qwest (and until the filing of their initial brief in this case, McLeod) to allow the parties to update the Exhibit A to the ICA without repeating the formal amendment processes for each carrier in Washington each time the Commission issues an order relating to

² Included as Attachment 1. Section 9.23.4.2 was unchanged by a 2003 amendment to the ICA.

interconnection pricing. This is due in part to the fact that no amendment is referenced in that language – rather, the reference is to making a “correction” or an “adjustment” to the agreement.³ Further, the updates to Exhibit A were made to comply with cost docket results and reflect the results of Commission orders approving Qwest’s compliance filings in those dockets.

13 Implementation of corrections to Exhibit A has been accomplished by virtue of compliance filings as noted above, which updated Qwest’s wholesale tariffs⁴, and by virtue of notices to CLECs advising them of those updates. An example of one of these notices, sent to McLeod during the relevant time frame, is attached hereto.⁵ As with the CMP process, those notices were sent to multiple employees at McLeod, including Ms. Spocogee and Mr. Haas.⁶ And, McLeod has obtained significant benefits from those updates. Many updates to the Exhibit A have implemented rate reductions. Because the implementation is necessarily after the effective date of the ordered rates, rate reductions, once implemented, produce a credit to the CLEC to account for the time between the effective date of the rate and the implementation of the rate reduction on a going forward basis. Qwest’s records reflect that McLeod has received numerous such credits – credits that would not be due if in fact McLeod is correct that the Exhibit A from 2000 had never been updated.

14 Moreover, Qwest believes that the process it has followed is entirely consistent with how the Commission contemplated these updates would take place, and that the Commission understood that this is how Qwest was implementing its cost docket orders. Qwest made multiple filings with the Commission of its updated Exhibit A, representing to the Commission

³ This is in contrast to other provisions in that same section 2.2 that refer to amending the agreement.

⁴ An example of a cover letter for such a cost docket compliance filing is included as Attachment 2.

⁵ Attachment 3.

⁶ In fact, Ms. Spocogee testified during the hearing that Exhibit 26 is the document that the McLeod engineers had and referred to when preparing their estimates of savings as a result of the Amendment. Tr. 67.11-16.

on more than one occasion that the updates were prompted by cost docket compliance filings.⁷ And, the Commission had made it clear from the very beginning that rates in arbitrations were to be interim, pending the establishment of final rates in the generic proceedings. There is simply no basis whatsoever for McLeod to claim that the document attached to its Opening Brief is the operative Exhibit A between the parties.

15 Finally, the superseded Exhibit A actually provides further support for Qwest's interpretation of the DC Power Measuring Amendment at issue. The cost dockets and compliance filings mentioned above resulted in a change to the structure of the Exhibit A prior to the execution of the DC Power Measuring Amendment. Relevant to this case, the key change was that charges previously labeled as "power usage" were more accurately described as power plant charges, and the charges were separated from usage rates in the SGAT Exhibit A. This change in structure further demonstrates that there is a difference between power plant charges and power usage charges for purposes of the cost docket and related compliance filings, and that difference carries through to the interpretation of the Amendment. The addition of power plant charges to the descriptions in the Exhibit A makes it even more clear that all of the references to usage rates and -48 Volt DC Power Usage Charges in the Amendment referred only to power usage charges, and not to power plant charges.

C. **In the Alternative, the Commission Must Reopen the Record to Consider McLeod's Late Filing**

16 Qwest has explained why the newly-offered Exhibit A is in fact not applicable to the parties' relationship and why it should be stricken. But, if the Commission believes, after reading this Motion, that McLeod's new Exhibit A should be allowed, or would in any way affect the outcome as compared to the Exhibit A that is in evidence as Exhibit 26, Qwest asks the Commission to reopen the record so that further cross-examination of McLeod's witnesses

⁷ An example a cover pleading for such a filing is included as Attachment 4.

may take place with regard to the issues raised by this document.

17 This is essentially a private complaint by McLeod against Qwest, in which McLeod is asking the Commission to take significant adverse action against Qwest. Fundamental to Qwest's right to defend itself against McLeod's allegations is the right to be presented with McLeod's evidence, to examine McLeod's case via discovery, to test the evidence through the rigors of cross-examination, and to present its own witnesses to testify in support of its position. If the Commission considers the information presented in McLeod's Brief (that is directly in conflict with its own testimony) to be of any value whatsoever, Qwest believes that the record must be reopened in order for Qwest to present its factual case in connection with that new information.

III. CONCLUSION

18 For the reasons stated herein, the Commission should strike Exhibit A to McLeod's Opening Post Hearing Brief, as well as the references to that Exhibit in paragraphs 7, 8, and 15 of the Brief.

DATED this 18th day of August, 2006.

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