**BEFORE THE WASHINGTON**
**UTILITIES AND TRANSPORTATION COMMISSION**

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| MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.,<br><br>Petitioner,<br><br>v.<br><br>QWEST CORPORATION,<br><br>Respondent. | Docket No. UT-063013<br><br>MCLEODUSA PETITION FOR ADMINISTRATIVE REVIEW OF ORDER 03 |

1. Pursuant to WAC 480-07-825, McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") submits the following Petition for Administrative Review of Order 03 Initial Order: Recommended Decision to Deny Petition for Enforcement ("Initial Order").

## INTRODUCTION

2. The Initial Order fundamentally errs in two respects. First, the order focuses exclusively on interpreting the language in the DC Power Measuring Amendment to the interconnection agreement ("ICA") between McLeodUSA and Qwest Corporation ("Qwest"). The Commission, however, cannot interpret an amendment to an ICA in isolation, particularly here when the amendment itself states that all provisions of the ICA not modified by the amendment remain in full force and effect. The language of the entire ICA, as amended by the DC Power Measuring Amendment, unambiguously requires Qwest to bill McLeodUSA for DC power – including power plant – based on the amount of power that McLeodUSA actually uses.

3. The Initial Order's second fundamental error is its refusal to consider McLeodUSA's claim of discrimination. Not only are federal and state anti-discrimination laws incorporated into the ICA, but McLeodUSA specifically alleged in its Petition for Enforcement that Qwest's conduct violates both the ICA and applicable law. Qwest never objected to Commission consideration of McLeodUSA's statutory claims in this proceeding, and the parties, by agreement, did not conduct the proceeding within the expedited time-frames established in WAC 480-07-650. The Initial Order thus had no basis for concluding that consideration of McLeodUSA's Petition was limited to "determin[ing] the intent of the parties with regard to the DC power measuring amendment."[1]

4. The Commission, therefore, should review and reverse the Initial Order and should interpret the ICA as a whole, as well as federal and state statutes, to require Qwest to bill McLeodUSA for DC power – including power plant – based on the amount of power that McLeodUSA actually uses.

## DISCUSSION

### A. The ICA as Amended by the DC Power Measuring Amendment Unambiguously Supports McLeodUSA's Petition.

5. The Initial Order provides, "The language of the DC power measuring amendment does not clearly support either party's interpretation." This statement reflects error on two grounds: (1) The appropriate inquiry is the language of the entire ICA, not just the DC Power Measuring Amendment; and (2) the language of the ICA clearly supports McLeodUSA's interpretation.

[1] Initial Order ¶ 68.

### 1. The Initial Order Erroneously Interprets the DC Power Measuring Amendment in Isolation from the Other Provisions of the ICA.

6. The Initial Order errs by interpreting the DC Power Measuring Amendment without giving any consideration to the related provisions in the ICA governing Qwest's obligation to provide McLeodUSA access to power for collocations. Instead, the order interprets the Amendment in a vacuum by only considering the words of the Amendment to determine the intent of the parties. The Initial Order thus gives no consideration to the clear intent stated elsewhere in the agreement that Qwest was obligated to provide power to McLeodUSA on terms that are at least at parity with how Qwest does so for itself in determining whether the Amendment required Qwest to bill both the power usage and power plant rate elements on a measured basis.

7. McLeodUSA explained in its prior briefing the basic principles of contract interpretation that govern the Commission's analysis, including the principle that the Commission must review the contract as a whole – a principle with which Qwest agrees.[2] By failing to consider the four corners of the *entire Agreement – i.e.*, the ICA as amended by the Amendment – the Initial Order's interpretation of the Amendment violates these principles of contract interpretation, and is, therefore, erroneous. The Amendment is not a stand-alone contract; it is but one part of the ICA between Qwest and McLeodUSA. Therefore, the intent of the parties must be ascertained by examining the entire ICA. That is, the Initial Order should have considered the clear intent stated by the parties in the other ICA provision before concluding that the parties' intent with respect to the Amendment was unclear.

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[2] McLeodUSA Reply Post-Hearing Brief at 10-15.

8. Indeed, the DC Power Measuring Amendment makes clear on its face that it must be construed as part and parcel of the underlying ICA that it amends:

> The Agreement[3] is hereby amended by adding the terms, conditions and rates for DC Power Measuring, as set forth in Attachment 1, attached hereto and incorporated herein.
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> ***
>
> Except as modified herein, the *provisions of the Agreement shall remain in full force and effect*….
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> ***
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> The Agreement as amended (including the documents referred to herein) constitutes the full and entire understanding and agreement between the Parties with regard to the subjects of the Agreement as amended ….[4]

9. Section 8.2.1.1. of the ICA (and Qwest's Statement of Generally Available Terms ("SGAT")) expressly obligates Qwest to provide McLeodUSA access to collocation, including DC power, on a nondiscriminatory basis in compliance with federal and state law:

> Qwest shall provide Collocation on rates, terms and conditions that are just, reasonable and non-discriminatory. In addition, Qwest shall provide Collocation in accordance with all applicable federal and state laws.

Thus, the unquestionable intent of the parties is that Qwest must provide DC power to McLeodUSA collocations on a nondiscriminatory basis. This language effectively incorporates the federal statutory language set forth in Section 251(c)(6) requiring nondiscrimination, as well as the Washington statutory language in RCW 80.36.170,

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[3] The "Agreement" referenced is the entire ICA.

[4] Ex. 24 (DC Power Measuring Amendment) at 1 (footnote added).

80.36.180, and 80.36.186 prohibiting discrimination and undue preferences. The ICA as a whole, therefore, fully supports McLeodUSA's Petition.[5]

10. The Initial Order did not look beyond the language in the DC Power Measuring Amendment and thus failed to consider Qwest's interrelated obligation to provide DC power to McLeodUSA on the same basis as Qwest provides such power to itself. Indeed, the Initial Order refused even to consider the issue of whether Qwest is discriminating against McLeodUSA in provisioning – and billing – for DC power based on the mistaken belief that the issues in this docket are limited to the parties intent with respect to the DC Power Measuring Amendment. The Commission, therefore, should review the Initial Order, consider this issue, and find that the ICA, as amended by the DC Power Measuring Amendment, unambiguously requires Qwest to charge McLeodUSA for DC power – including power plant – based on the amount of power McLeodUSA's actually uses, since that is how Qwest assigns power costs to itself.

**2. The Initial Order Erroneously Interprets the DC Power Measuring Amendment as Ambiguous.**

11. The Initial Order finds that the language in the DC Power Measuring Amendment does not support McLeodUSA's interpretation because, the order states, section 1.2 of the Amendment uses the term "usage" and the use of the term "-48 volt DC power usage" in section 2.0 of the Amendment corresponds only with McLeodUSA's "late-filed Exhibit A," not the revised version of Exhibit A:

> McLeod's interpretation fails because Section 1.2 clearly refers only to usage rates and to reductions to the "monthly usage rate" reflecting a CLEC's actual use of power. In addition, although McLeod's late-filed Exhibit A does contain a reference to the "-48

[5] *See, e.g.,* McLeodUSA Opening Post-Hearing Brief at 29-34; McLeodUSA Reply Post-Hearing Brief at 8-10 & 42-46.

> volt DC power usage" at item 8.1.4, which echoes the reference to "-48 volt DC power usage charge" in Section 2.0 of the amendment, the Commission cannot rely on McLeod's late-filed Exhibit A to show the intent of the parties at the time they executed the amendment, since a revised version of Exhibit A was regarded by McLeod as being in effect when the Amendment was executed.[6]

This finding is erroneous on several levels.

12. First, as discussed above, the Initial Order completely ignores the remainder of the ICA. Section 8.3 of the ICA lists the rate elements for collocation, which includes the rate element "-48 Volt DC Power Usage Charge" in Section 8.3.1.6 – the exact same term as used in Section 2.0 of the DC Power Measuring Amendment. Qwest's witness conceded that this term, as used in the ICA, represents all DC power charges, *including power plant charges*.[7] Nothing in the language of the ICA, including the DC Power Measuring Amendment and Exhibit A, indicates that this term has a different meaning in Section 2.0 of the Amendment than the exact same term has in Section 8.3.1.6 of the ICA.

13. The Initial Order's second error on this point is the implication that the reference in Section 1.2 of the Amendment to "usage" somehow excludes power plant charges. Again, the language of the ICA belies that conclusion. The parties agree that the term "-48 Volt DC Power ***Usage*** Charge" as used in Section 8.3.1.6 of the ICA includes the DC power plant charge, even though the word "usage" is included. Even in the Exhibit A attached as Attachment B to the Initial Order, the charge for "power plant" in Section 8.1.4.1.1 is included as a subsection to Section 8.1.4.1 entitled "DC Power ***Usage***, per

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[6] Initial Order ¶ 38.

[7] Tr. at 213 (Qwest Easton).

Ampere, per Month" (emphasis added), which in turn is a subsection to Section 8.1.4 entitled "Power ***Usage***" (emphasis added). The terms "usage" and "monthly usage rate" in Section 1.2 of the DC Power Measuring Amendment are not capitalized and thus must be used as the word "usage" is used throughout the ICA – to include power plant.

14. Third, the Initial Order errs by refusing to give full effect to the version of Exhibit A that McLeodUSA provided with its Opening Brief. The Initial Order finds that McLeodUSA's witness testified that "McLeod engineers based their evaluation of the amendment on the language in Exhibit 26," but even the Initial Order questions how this could be true when that document is dated February 15, 2006 – a year and a half after McLeodUSA executed the DC Power Measuring Amendment.[8] The Initial Order nevertheless opines that "McLeod witnesses did not question the language in Exhibit 26 as representing their understanding of the structure of the DC power rates and charges in effect at the time of the amendment."[9] McLeodUSA, however, has never questioned the structure of the DC power rates, *i.e.*, that there are two separate charges in Washington. The issue is whether the term "usage" used throughout the ICA – including the DC Power Measuring Amendment and Exhibit A – includes the charge for power plant. The currently effective Exhibit A (attached to McLeodUSA's Opening Brief) is clearer, but regardless of which version of Exhibit A the Commission considers, the term "usage" as used throughout the ICA refers to both power plant and the amount of power used.[10]

15. Finally and ominously, the Initial Order errs in concluding that Qwest's periodic changes to Exhibit A to its SGAT operate to revise all ICAs between Qwest and other

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[8] Initial Order ¶ 27.

[9] *Id*.

[10] *See* Tr. at 213 (Qwest Easton).

carriers. The Commission has concluded that *rates* established in generic cost dockets apply to all carriers without amendment to the ICAs, but the Commission required Qwest to file a *tariff* for that purpose. The Commission has *never* held that Qwest's filings of revised Exhibit A to its SGAT apply to existing ICAs. Particularly with respect to changes made to aspects of Exhibit A other than the rates themselves, the Commission could not make such a determination consistent with federal law.[11] The *rates* for DC power are exactly the same in the original Exhibit A attached to McLeodUSA's Opening Brief and in Exhibit 26. The *language* used to describe those rates, however, is different. Because there was no written amendment to the ICA altering the rate element descriptions in Exhibit A, the language in the Exhibit A when the ICA was executed and approved by the Commission is legally operative and in full effect, and this Exhibit A is the version the Commission should consider when interpreting the language of the amended ICA in its entirety.[12]

16. The Initial Order erred in finding that the language of the ICA in its entirety does not unambiguously support McLeodUSA's interpretation. The Commission, therefore, should review the Initial Order, reverse this finding, and conclude that the language of the ICA is consistent with McLeodUSA's interpretation and fully supports granting the relief that McLeodUSA has requested in its Petition.

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[11] McLeodUSA Opposition to Qwest Motion to Strike Portions of Opening Brief ¶¶ 9-12 (and cases cited therein) (Aug. 25, 2006).

[12] Which version of Exhibit A was considered by the McLeodUSA engineers is irrelevant when determining the meaning of contract language. Even if the Commission considers extrinsic evidence, there is no evidence in the record of which version of Exhibit A was reviewed by the McLeodUSA engineers. The Commission, however, could draw a reasonable inference that Exhibit 26 could not have been considered by the McLeodUSA engineers because that document post-dates their analysis.

### B. Qwest is Unlawfully Discriminating Against McLeodUSA in Violation of the ICA and Applicable Law.

17. The Initial Order refuses to consider McLeodUSA's claims of discrimination under either the ICA or federal and state statutes apparently based on the belief that no such claim arises under the DC Power Measuring Amendment and that the scope of this docket is limited to a determination of the intent of the parties to that amendment.[13] The Initial Order further provides, "A cost docket, or similar cost review, is the forum for judging the adequacy of rates and rate structures for CLEC access to ILEC networks."[14] The Initial Order is incorrect for multiple reasons.

18. First with respect to the scope of this proceeding, McLeodUSA brought its petition to enforce the ICA – not just the DC Power Measuring Amendment – and Qwest's nondiscrimination obligations under applicable statutes. McLeodUSA's testimony and briefing is consistent with, and fully supports, those claims. Qwest has never sought to strike McLeodUSA's discrimination claims or otherwise objected to Commission consideration of those issues in the context of this docket. There is no basis in the record or applicable law to limit the issue in this proceeding to the parties' intent with respect to the DC Power Measuring Amendment alone.

19. Nor are McLeodUSA's claims more properly brought in a generic cost proceeding. McLeodUSA has repeatedly made clear that it does not challenge the *amount* of the rates that Qwest is charging for power plant but disputes the *application* of those rates to the capacity of the power cables. The Commission has specifically permitted a company to challenge the application of a competing company's rates as

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[13] Initial Order ¶ 68.

[14] *Id.*

discriminatory and unduly preferential outside the context of a cost docket or other rate-setting proceeding.[15] McLeodUSA similarly should not be precluded from bringing its own individual proceeding to challenge Qwest's application of DC power rates to McLeodUSA under the parties' ICA and applicable statutes.

20. The Initial Order nevertheless suggests that McLeodUSA agreed to permit Qwest to discriminate against McLeodUSA prior to the execution of the DC Power Measuring Amendment by not disputing the power plant capacity charges that Qwest imposed on an "as ordered" basis and that the amendment did not change that agreement. Any such finding is false.

21. At no point has McLeodUSA entered into any agreement that authorizes Qwest to bill for power on an "as ordered" basis, much less on an "as ordered" basis using power cable size as a proxy for power orders. McLeodUSA has consistently pointed out that the ICA, the attachments, pricing sheets and amendments that make up the ICA contain no term stating that Qwest was authorized to bill for DC Power Plant based on the size of McLeodUSA's cable feeder orders.[16] Throughout this proceeding Qwest has been unable to identify any such provision in the ICA. The only thing Qwest is able to cite is a comment cell in its cost study, which clearly is not part of the ICA.

22. Nor can any agreement by McLeodUSA to permit Qwest to discriminate be implied. While McLeodUSA has admitted that it had not formally disputed billings prior to the Amendment and acknowledged that it was not seeking to recoup any potential overpayment related to the period prior to signing the Amendment as part of its current

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[15] *AT&T v. Verizon Northwest Inc.*, Docket No. UT-020406, Eleventh Supp. Order (Aug. 12, 2003).

[16] *E.g.*, McLeodUSA Reply Post-Hearing Brief at 8-10.

complaints, the lack of any previous dispute of the prior billings cannot be construed as an "agreement" that it was proper for Qwest to use the feeder cables to bill for power plant before the Amendment. McLeodUSA, moreover, had no way to know the full nature and magnitude of Qwest's discrimination until discovery and examination occurred in the present cases. Qwest may have avoided detection of its discriminatory treatment of McLeodUSA (and other CLECs) for an extended period of time, but that does not mean that McLeodUSA agreed to such treatment or provide an excuse for not correcting Qwest's conduct at this time.

23. Finally, the Initial Order states that "the record in this case does not provide a sufficient basis" for "the Commission to require Qwest to implement a nondiscriminatory rate for DC power."[17] Again, this statement is incorrect. The record evidence demonstrates that Qwest constructs power plant sufficient to provide power to meet the actual usage of its equipment in the central office while requiring CLECs to pay for power plant sufficient to supply the full capacity of their power cables – an amount, in McLeodUSA's case, that vastly exceeds the amount of power that McLeodUSA's collocated equipment actually uses.[18] Such conduct is discriminatory and unduly preferential on its face, in violation of the Section 8.2.1.1 of the ICA, Section 251(c)(6) of the federal Telecommunications Act of 1996, and RCW 80.36.170, 80.36.180, and 80.36.186. The record provides a more than ample basis for the Commission to find that Qwest is in violation of its obligations under applicable law.

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[17] Initial Order ¶ 68.

[18] *E.g.*, Exs. 1TC-12 (McLeodUSA Morrison Testimony and Exhibits); McLeodUSA Opening Post-Hearing Brief at 16-26; McLeodUSA Reply Post-Hearing Brief at 30-39.

24. The Initial Order erroneously concludes that McLeodUSA may not make, and has not supported, its contract and statutory claims of discrimination in this proceeding. The Commission, therefore, should review the Initial Order, reverse this finding, and conclude that Qwest has unlawfully discriminated against McLeodUSA by billing for DC power based on the capacity of McLeodUSA's power cables, rather than on the amount of power McLeodUSA actually uses.

## CONCLUSION

25. For the foregoing reasons and the reasons set forth in McLeodUSA's opening and reply briefs, the Commission should review the Initial Order, should reverse that order, and should find that the ICA and applicable law require Qwest must charge McLeodUSA for DC power, including power plant, based on the amount of power that McLeodUSA actually uses.

DATED this 19th day of October, 2006.

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