BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

McLEODUSA TELECOMMUNICATIONS SERVICES, INC., Petitioner, v. QWEST CORPORATION, Respondent	Docket No. UT-063013 QWEST'S ANSWER TO MCLEOD'S PETITION FOR ADMINISTRATIVE REVIEW OF ORDER 03

I. INTRODUCTION

1 Pursuant to WAC 480-07-825 Qwest Corporation ("Qwest") hereby files its Answer to the Petition for Administrative Review of Order 03 ("Petition for Review") filed by McLeodUSA Telecommunications Services, Inc. ("McLeod"). Qwest asks the Washington Utilities and Transportation Commission ("Commission") to deny McLeod's Petition and to affirm and adopt the findings and conclusions of Order 03.

2 McLeod's Petition for Review is really a request that the Commission re-write the parties' contract – a contract with terms that were undisputed prior to the amendment at issue, a contract which clearly allowed and required Qwest to bill McLeod for both power plant and power usage on the basis of the size of McLeod's power order. Now, having lost on the issue of the interpretation of the Amendment, McLeod pleads with the Commission to analyze and

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interpret the underlying ICA – an issue which McLeod explicitly and clearly represented to the Commission it was *not* raising in this proceeding. *Tr. 26*.

3 McLeod's 2006 interpretation of the Power Measuring Amendment is at odds with the language of the Amendment, with McLeod's intent at the time it entered into the Amendment in 2004, and at odds with Qwest's express intent regarding the effect of the Amendment both before and after it was executed. There is simply no basis upon which to hold in McLeod's favor on the contract issues. Nor is there any merit to McLeod's discrimination claims. The Initial Order ruled correctly on both issues and should be affirmed.

II. ARGUMENT

A. McLeod's Contract Claims are Unfounded

4 McLeod's primary assignment of error regarding the contract issues is that Judge Mace failed to consider the entire interconnection agreement ("ICA") between McLeod and Qwest in deciding whether the parties had agreed that DC Power Plant Charges would be assessed on a measured basis, rather than just the DC Power Measuring Amendment. This argument is inaccurate, because close to three pages of the Initial Order are devoted to the question of whether Qwest's application is discriminatory.[1]

5 The argument is also disingenuous. In its Petition for Enforcement, McLeod alleged: "Under the original arrangements between the parties, Qwest billed McLeodUSA for DC power based on the amount of DC power originally ordered by McLeodUSA on the collocation application." *Petition for Enforcement*, ¶6. Dissatisfied with the "original arrangements" reflected in the ICA, McLeod "requested an amendment to the Interconnection Agreements to reduce collocation power charges in 2004." *Petition for Enforcement,* ¶7. McLeod further

[1] *See* Order No. 03, ¶¶ 64-68, p. 20-22 (Section D, titled "Is Qwest's Application of the DC Power Measuring Amendment Discriminatory?" *See also* ¶ 28, p. 9, discussing section 2.2 of the underlying ICA; ¶ 34, p. 11, discussing Qwest's arguments regarding the parties' agreement regarding DC power usage and power plant charges at as-ordered levels.

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alleged in the original Petition that "Qwest's continued billing of collocation power charges based on "ordered" rather than actual power usage is inconsistent with the terms of the DC Power Amendment. . . ." *Petition for Enforcement*, ¶9. Now, after Judge Mace interpreted the DC Power Measuring Amendment in Qwest's favor, McLeod argues that Judge Mace ignored the underlying ICA, which in McLeod's view provided for DC Power Plant charges at measured levels irrespective of the DC Power Measuring Amendment.

6 McLeod never claimed or proved any intent that the underlying ICA would or did provide for charging DC Power Plant at measured levels prior to the execution of the DC Power Measuring Amendment. The evidence is to the contrary. At page 26 of the hearing transcript, the following testimony by McLeod witness Tami Spocogee reflects (emphasis added):

> Q. Prior to the amendment in question in this case, Qwest billed McLeod USA for the power plant charge based on the number of amps McLeod USA requested for its power feed or feeds, correct?
>
> A. Correct.
>
> Q. And McLeod USA never objected to Qwest's interpretation of how the underlying interconnection agreement provided for power plant to be charged prior to this amendment, correct?
>
> A. Correct.
>
> ***Q. And McLeod USA is not objecting to that interpretation in this proceeding, correct?***
>
> ***A. Correct.***

7 Thus, McLeod's Petition not only represents a new argument, it directly contradicts the testimony of its own witnesses. In the face of this testimony that it was not objecting to Qwest's interpretation of the underlying ICA that it provided for DC Power Plant to be charged at as-ordered levels, McLeod cannot now claim that the DC Power Measuring Amendment and the parties' demonstrated intent with regard to that amendment is irrelevant, such that the parties had agreed that DC Power Usage and Power Plant charges would be assessed at measured levels in the original ICA. This argument would render the entire DC

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Power Measuring Amendment nugatory, and must be rejected in favor of Qwest's interpretation, which gives effect to the language of the ICA and the DC Power Measuring Amendment, and is consistent with the extrinsic evidence of intent with respect to both documents.

8 McLeod also argues that Order 03 erroneously interpreted the DC Power Measuring Amendment as ambiguous. *Petition for Administrative Review*, ¶¶ 11-16. However, McLeod does not contest the findings of Order 03 that the extrinsic evidence of intent reveals that the parties intended only that the Power Usage charges would be changed, not the Power Plant charges. McLeod's arguments that Judge Mace erred center on two arguments it never raised at or before the hearing: the argument that the ICA provides for Power Plant charges to be assessed at measured levels irrespective of the DC Power Measuring Amendment, an argument raised for the first time after the Order was issued, and the argument that a superseded Exhibit A pricing document controls the interpretation of the DC Power Measuring Amendment, made for the first time in post-hearing briefs despite McLeod's own introduction of a later Exhibit A prior to and during the hearing itself.

9 Both new arguments fail. McLeod's argument that the ICA requires Power Plant to be assessed at measured levels fails for the reasons set forth above. The argument that the superseded Exhibit A controls the interpretation of the Amendment and the ICA fails for the reasons set forth in the Order. As the Order observes, no witness ever testified that the old Exhibit A influenced McLeod's thinking or intent at the time the Amendment was discussed and executed. *E.g., Order 03*, ¶ 27-28. This is because McLeod itself introduced the then-current Exhibit A in prefiled testimony, referred to it several times during the hearing, and only attempted to inject the old Exhibit A after the hearing. At the hearing, McLeod's witnesses testified that the persons charged with negotiating and obtaining the Amendment examined a copy of Exhibit 26, the new Exhibit A, as they evaluated their decision to enter the

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Amendment. *Tr. 67; Order 03,* ¶ 27, p.9. Moreover, the changes in the Exhibit A over time actually support Qwest's interpretation of the Amendment. While some versions of the Exhibit A pricing document in existence before the Amendment was executed were unclear about the distinction between Power Plant and Power Usage charges, the Exhibit A in effect at the time the Amendment was executed clearly set forth separate charges for Power Plant and Power Usage. McLeod argues at page 8 of its Petition for Review that the "rates" did not change between the different versions of the Exhibit A, but only the "language used to describe those rates." This argument proves too much. It is, in fact, the ***language*** of the ICA and the Amendment that the Commission is charged with interpreting, and this ***language*** clearly set forth differences between Power Usage charges and Power Plant charges – differences McLeod improperly chooses to ignore.

10 With respect to the dispute over the Exhibit A, Qwest would note two additional matters not centrally relevant to the resolution of this dispute, but which are important. First, Judge Mace properly held that the underlying ICA provided for updates and corrections to the Exhibit A "to reflect the outcome of generic proceedings by the Commission for pricing, service standards, *or other matters covered by this Agreement." Order 03,* ¶ 28, p. 9 (*emphasis in Order, but not in underlying ICA (Attachment 1 to Qwest's Opening Brief*)). This is consistent with the significant history of orders and approvals of new Exhibit A documents filed by Qwest over the years, and the tariffs Qwest filed in compliance with those orders. McLeod seems to argue that the tariffs are irrelevant – that old Exhibit A documents remain operative despite the filed rates that set forth current rates and pricing structures reflected in new Exhibit A documents. Any such argument fails even the slightest scrutiny.

11 Second, McLeod seems to question the fact that the Exhibit A it introduced and relied upon in its prefiled and hearing testimony was dated in 2006, not the 2004 timeframe during which the Amendment was negotiated and executed. This argument only underscores the fact that

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McLeod should not have been permitted to introduce the earlier Exhibit A after the hearing in the first place. The 2006 Exhibit A is identical to the Exhibit A that was in effect in 2004 in the relevant sections related to DC Power Charges. Because McLeod waited until its post-hearing brief to mention the old Exhibit A, Qwest was deprived of the opportunity to cross-examine McLeod witnesses on the document and introduce appropriate exhibits to clear up any confusion. McLeod caused the confusion with respect to the Exhibit A pricing documents, and cannot now seek to benefit from that confusion, especially when it never relied on the old Exhibit A in connection with the negotiation, consideration, or execution of the DC Power Measuring Amendment.

12 McLeod's third argument against the Order's conclusions is that the term "power usage" in the DC Power Measuring Amendment includes Power Plant charges, even though Power Plant charges are never mentioned in the Amendment. Not only does the Amendment repeatedly mention "power usage" charges and "usage" rates multiple times in the Amendment without ever mentioning the separately determined and separately billed Power Plant charge, as the Order observes, section 1.2 of the Amendment plainly excludes the possibility that "power usage" rates include "power plant" rates. *Order 03* ¶ 38. That section, the first operative section of the Amendment, provides that "the power usage rate reflects a discount from the rates for those feeds greater than sixty (60) amps." In the Exhibit A (Exhibit 26), the rate for "power usage" is lower for feeds of less than sixty amps than for feeds of greater than sixty amps. In contrast, the rate for "power plant" is the same regardless of the number of amps specified in a CLEC's power feed order. Thus, the term "power usage rate" as used throughout the Amendment cannot include or refer to any "power plant" charges without ignoring the plain language of section 1.2. At bottom, though Qwest believes the ICA and the DC Power Measuring Amendment unambiguously support its interpretation, neither document supports McLeod's position.

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13 Before turning to McLeod's arguments regarding discrimination, it is important to observe one final misstatement in McLeod's Petition for Review. In ¶ 10, McLeod asserts that the ICA and the DC Power Measuring Amendment require Qwest to charge McLeod for "power plant" charges on a measured basis, "since that is how Qwest assigns power costs to itself." This statement is absolutely incorrect. Qwest does not assign power plant costs to itself based on usage, but rather Qwest is responsible for the total costs of the power plant capacity, which do not vary with usage. Even McLeod's witness Michael Starkey admitted that power plant costs, once incurred, do not vary depending on power usage.[2]

B. McLeod's Discrimination Claims are Unfounded

14 In paragraphs 17-24 of the Petition for Review, McLeod renews its discrimination claim, claiming that Order 03 incorrectly determined that no discrimination claim arises under the Amendment, and that such a determination may only be made in a cost docket or similar proceeding. *Petition for Review ¶ 17*. McLeod is wrong for multiple reasons. First, McLeod does not always accurately represent the actual holdings in Order 03. Second, to the extent that McLeod does accurately describe the conclusions of Order 03 regarding the discrimination claims, Order 03 is correct, and McLeod's challenges to that order are without basis.

15 Indeed, if Order 03 is deficient in any regard, it is because it did not go far enough in detailing the reasons McLeod's discrimination claims should be rejected. But the important point here is that those claims were considered and rejected – the Order clearly states that "McLeod failed to demonstrate on the record of this proceeding that Qwest's DC power rate and rate structure were discriminatory." *Order 03, ¶ 87.* This is consistent with the Commission's order in the Utah proceeding, where the Utah Commission concluded that McLeod's discrimination claims simply have no basis – any reading of that Order (previously submitted

[2] Tr. 182.7-17.

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by Qwest as supplemental authority in this proceeding) leads to two simple and inexorably conclusions – first, McLeod's discrimination claims, and the record upon which they are based, are virtually identical to those in Washington; second – McLeod's claims have no basis in either law or fact.

16 Indeed, the Utah Commission evaluated all of McLeod's claims and concluded that there was "nothing in the ICA, statute, regulation, or Commission order that would require Qwest to do more than it is now doing; namely, billing McLeod for its collocation power plant based upon McLeod's orders for power distribution cable. We therefore conclude Qwest's billing to McLeod for DC Power Plant does not constitute discriminatory conduct."[3]

17 McLeod claims, in paragraph 18 of its Petition, that it "brought its petition to enforce the ICA – not just the DC Power Measuring Amendment – . . . ." This statement is demonstrably false, as discussed above. The Petition for Enforcement that initiated this proceeding clearly acknowledged that under the ICA, all power was billed on an "as ordered" basis. *See, Petition for Enforcement, ¶ 6.* No claim whatsoever was made under the ICA, and McLeod's claim was clearly based solely on the Amendment. *See, Petition for Enforcement, ¶ 9.* McLeod's allegations regarding overcharges were based on the Amendment, not the ICA. See, ¶ 12 of the Petition for Enforcement where McLeod claims that "[a]ccordingly, Qwest is in violation of DC Power Plant Amendment . . . ." McLeod's testimony and briefing is consistent with its Petition for Enforcement. Claims now to the contrary must be disregarded.

18 McLeod also claims that it brought its Petition for Enforcement in order to enforce "Qwest's nondiscrimination obligations under applicable statutes," and that "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." While it is true that Qwest simply

[3] McleodUSA v. Qwest Corporation for Enforcement, Public Service Commission of Utah, Docket No. 06-2249-01, Report and Order, September 28, 2006, p. 26.

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defended against the discrimination claims rather than seeking to formally strike them, it is also true that Qwest presented evidence and argument in this case sufficient for the ALJ and the Commission to come to either (or both) of the following conclusions – first, as the ALJ did, that this type of proceeding is simply not the proper forum to decide issues that impact cost-docket approved rates, even if they are packaged as discrimination issues; second, as the ALJ also did, that the record created by McLeod in this case, who undeniably has the burden of proof, is simply insufficient to sustain any allegations of discrimination. *See, Order 03, ¶¶ 83 and 87.* Thus, there is no support for McLeod's allegation that the ALJ improperly limited the issue in this proceeding to the parties' intent with respect to the DC Power Measuring Amendment alone, as McLeod suggests in paragraphs 18 and 19 of its Petition for Review.

19 McLeod's next challenge to the findings and conclusions of Order 03 is based on McLeod's incorrect assertion that it never agreed to be billed on an "as ordered" basis. *Petition for Review ¶¶ 20-22*. McLeod claims that the Initial Order errs when it suggests that McLeod agreed to permit Qwest to discriminate against McLeod 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. *Petition for Review ¶ 20.* McLeod goes on to claim that "[a]t 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." *Petition for Review ¶ 21.*

20 These assertions are simply false, as discussed in Section A above. McLeod has admitted that it is not disputing the year's worth of Qwest's bills for power plant capacity that assessed the charges on an "as ordered" basis. The fact of McLeod's consent to be billed on an as ordered basis, contrary to its current assertions, is evidenced by its operation under the ICA without dispute as to the terms, until well after the Amendment.

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21 McLeod further claims that "Qwest has been unable to identify any such provision [allowing as-ordered billing] in the ICA." Again, McLeod's argument begs the question of how McLeod could possibly have paid these charges for many years if what they say is true. Further, McLeod's claim is not true – the Exhibit A to the ICA must be applied and interpreted in a manner consistent with Qwest's wholesale tariffs, tariffs that were filed in compliance with the Commission's cost docket orders. Qwest's interconnection tariff, WN U-42 Section 3.2 A.1, Sheet 15, very clearly states (and has stated) that the power plant charges are assessed "per ampere ordered". Thus, the ICA provides for power plant charges to be assessed on a "per ampere ordered" basis. And, the conclusion that McLeod freely agreed to that term is inescapable.

22 Finally, McLeod challenges the Initial Order's conclusion that "the record in this case does not provide a sufficient basis" for "the Commission to require Qwest to implement a non-discriminatory rate for DC power." *Petition for Review ¶ 23, citing Initial Order ¶ 68.* McLeod's selection of phrases suggests that the Initial Order concluded that the existing rate is discriminatory but cannot be corrected in this proceeding. Again, this statement is incorrect. The Initial Order actually held that McLeod had not established any discrimination based on the record in this case. "McLeod failed to demonstrate on the record of this proceeding that Qwest's DC power rate and rate structure were discriminatory." *Order 03, ¶ 87.* Moreover, in this regard, McLeod also overlooks the conclusions of the Initial Order that "Section 252 of the Act allows that in the give and take of negotiations for an ICA, the parties may agree to terms which might be discriminatory because they otherwise receive benefits from the agreement." *Order 03*, ¶ 68, p. 22.

23 McLeod contends that there is discrimination because Qwest constructs power plant sufficient to provide power to meet the actual usage[4] of its equipment in the central office while

[4] McLeod is wrong on this point – the record clearly establishes that Qwest constructs capacity in excess of its actual

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requiring CLECs to pay for power plant sufficient to supply the full capacity of their power cables – an amount, in McLeod's case, that exceeds the amount of power that McLeod's collocated equipment actually uses. However, this conduct is not discriminatory – the Initial Order noted Qwest's arguments that Qwest offers McLeod the opportunity to reduce the ordered amount of power, as well as the fact that the terms of the ICA on this issue were freely negotiated. Further, a finding of discrimination on a record such as that presented here would not be proper because the present record fails to consider the impact of the way DC power plant is provisioned and charged on other CLECs – the Commission would likely want to consider that before making a finding that one CLEC was discriminated against. This is especially true where the claimed discriminatory rates apply equally to all other (non-complaining) CLECs and those rates are Commission-approved rates resulting from a contested cost docket which necessarily found the rates to be reasonable, just and non-discriminatory.

24 McLeod claims that the Initial Order erroneously concludes that McLeod may not make, and has not supported, its contract and statutory claims of discrimination in this proceeding. To the contrary, the Initial Order's conclusions that McLeod did not support or establish its discrimination claim on this record are correct. Based on the record, the Initial Order could have gone further, as the Utah Commission did, in explaining why Qwest's rates and practices are not discriminatory, but such an explanation is not necessary to the decision. Finally, although this does not appear to be the case, the Initial Order also could have correctly held that McLeod may not prosecute its discrimination claims in an enforcement action. A ruling along those lines would certainly be consistent with the Commission's prior disallowance of claims in such proceedings that are not directly related to enforcement of the disputed contract

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usage, capacity sufficient to accommodate List 1 drain, plus additional capacity for planned equipment additions.

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terms.[5] And, as noted above, those terms are limited to the disputed terms in the Amendment, which is the portion of the ICA that McLeod sought to enforce, not the ICA as a whole, over which the parties had no prior dispute. The Commission, therefore, should affirm the Initial Order.

Dated this 30th day of October, 2006.

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[5] See, e.g., the Commission's orders in Docket Nos. UT-053036 and UT-53039, enforcement actions by PacWest and Level 3 respectively. The Commission refused to consider Qwest's counterclaims in those proceedings, stating they were outside the proper scope of an enforcement action.

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