

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

McLEODUSA TELECOMMUNICATIONS SERVICES, INC., Petitioner, v. QWEST CORPORATION, Respondent.	Docket No. UT-063013 MCLEODUSA’S MOTION TO COMPEL QWEST TO RESPOND TO DATA REQUESTS
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Pursuant to WAC 480-07-425, McLeodUSA Telecommunications Services, Inc. (“McLeodUSA”) hereby moves the Commission for an order compelling Qwest Corporation (“Qwest”) to respond to data requests seeking (1) the cost studies underlying the collocation rates at issue in this docket; and (2) the DC Power capacity in Qwest’s central offices in Washington. As the Iowa Utilities Board previously concluded under the same circumstances, those requests seeks data that is reasonably calculated to lead to the discovery of admissible evidence, and Qwest should be required to produce that information.

ARGUMENT

On February 21, 2006, McLeodUSA filed its petition for enforcement against Qwest seeking to enforce the parties’ interconnection agreement and alleging that Qwest is unlawfully discriminating against McLeodUSA. 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. McLeodUSA also has alleged that Qwest's insistence on charging for DC power plant based on the amount of DC power capacity that McLeodUSA included in its original collocation application is unlawfully discriminatory because it results in McLeodUSA paying Qwest more for DC power than Qwest charges itself.

On March 23, 2006, McLeodUSA propounded its first set of data requests on Qwest. Request No. 3 in that set requests "copies of Qwest cost studies, and supporting documentation, supporting all collocation rates found at Section 8 of Exhibit A to the Qwest and McLeodUSA Washington interconnection agreement." Qwest objected and refused to provide the cost studies, claiming the request "is not reasonably calculated to lead to the discovery of admissible evidence concerning the interpretation of the DC Power Measuring Amendment at issue in this case." Request No. 8 requests, for each Qwest central office in Washington where McLeodUSA has collocation space, the total DC Power capacity, actual measured load, the most recently completed augmentation to the power plant, and any planned power plant augmentation. Again, Qwest objected to the request primarily on the grounds that the information requested "is not reasonably calculated to lead to the discovery of relevant or admissible evidence concerning the interpretation of the DC Power Measuring Amendment at issue in this case." A copy of the requests and Qwest's responses is attached as Exhibit A (without the limited confidential Attachment "A" to Request No. 8).

Qwest has improperly refused to provide any information in response to McLeodUSA's data requests. McLeodUSA has alleged that Qwest is violating the DC Power Measuring Amendment by charging for DC power plant based on the amount of DC power that McLeodUSA originally ordered on its collocation application, rather than on the amount that McLeodUSA actually uses. Complaint §§ 6-9. Qwest has responded, in part,

that such an 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.

Qwest thus has squarely raised the issue of DC power costs, including the nature of those costs and whether they vary with usage. This is precisely the type of information included in Qwest's collocation cost studies that McLeodUSA seeks in response to Request No. 3. In addition, those cost studies will bear on the issue of whether Qwest's interpretation of the DC Power Measurement Amendment is unreasonable and discriminatory. Specifically, the cost studies will demonstrate whether Qwest has modeled power plant costs based on the capacity of the total equipment used by various power users in the central office (including Qwest) – as McLeodUSA alleges is the case and consistent with its interpretation of the Amendment – or is based on the size of collocating carriers' collocation orders, regardless of the amount of power actually used, as Qwest contends. Such evidence thus will bear directly on the issues presented to the Commission for resolution.

Request No. 8, which seeks data on Qwest's DC power plant capacity, is also relevant to the issues in this proceeding. Qwest has taken the position that it often must invest in additional power plant capacity based upon the size of a McLeodUSA order because fulfilling the power capacity consistent with that order would somehow exhaust Qwest's existing plant and require additional investment. Request No. 8 requests the information necessary to test this contention, *i.e.*, to determine the likelihood that a McLeodUSA order

would exhaust the existing power plant in any Washington central office, given current power requirements from Qwest and other collocators. This request thus is reasonably calculated to lead to the discovery of relevant and admissible evidence, and Qwest should be required to provide it.¹

The Iowa Utilities Board recently reached the same conclusion. McLeodUSA propounded virtually identical data requests on Qwest in Iowa in the context of the same complaint filed with the Board, and Qwest objected and refused to respond on the same grounds. The Board, without awaiting a response from Qwest, required Qwest to provide the requested information:

Normally, the Board would wait for Qwest's response before ruling. However, the limited time available for this docket and the nature of the objections raised make it both necessary and possible for the Board to rule immediately. The Board finds that discovery rules should be liberally construed and discovery should be permitted when the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Each of the requests appears to fit within those parameters and the Board will grant the motion to compel requested by McLeodUSA and direct Qwest to immediately provide responses

In re McLeodUSA v. Qwest, Iowa Utils. Bd Docket No. FCU-06-20, Order Granting Motion to Compel Discovery at 3 (March 8, 2006) (attached as Exhibit B). The Commission should reach the same conclusion.

¹ Qwest also objects on the grounds that the requested data is "extremely confidential trade secret information," but the Commission has already issued a protective order limiting disclosure of that data. If Qwest believes that additional protections are warranted, Qwest should request an amendment to the protective order, not simply refuse to produce the information.

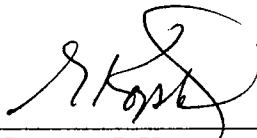
PRAYER FOR RELIEF

WHEREFORE, McLeodUSA prays for the following relief:

- A. An order from the Commission compelling Qwest to provide the information that McLeodUSA has requested in Data Request Nos. 3 and 8; and
- B. Such other or further relief as the Commission finds fair, just, reasonable, and sufficient.

Dated this 18th day of April, 2006.

DAVIS WRIGHT TREMAINE LLP

By: 

Gregory J. Kopta

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SERVICES, INC.

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EXHIBIT A

Washington
Docket No. UT-063013
McLeodUSA 01-003

INTERVENOR: McLeodUSA Telecommunications Services, Inc.

REQUEST NO: 003

Please provide electronic, fully executable copies of Qwest cost studies, and supporting documentation, supporting all collocation rates found at Section 8 of Exhibit A to the Qwest and McLeodUSA Washington interconnection agreement.

RESPONSE:

Qwest objects to this request because it is not reasonably calculated to lead to the discovery of relevant or admissible evidence concerning the interpretation of the DC Power Measuring Amendment at issue in this case.

Respondent: Legal

Washington
Docket No. UT-063013
McLeodUSA 01-008

INTERVENOR: McLeodUSA Telecommunications Services, Inc.

REQUEST NO: 008

For each Qwest central office in Washington wherein McLeodUSA has a collocation space, please provide the following information:

- a. The total installed -48V DC Power capacity considering all individual power plants within the office (in Amps),
- b. Actual measured load, busy day, busy hour (for most recent measurement and date of measurement),
- c. Identify the most recently completed augmentation to the power plant including all supporting documentation. Your complete response will include the planning documentation identifying the impetus for augmentation, the chosen method of augmentation and any forecasts as to the expected timeframe before next expected augmentation.
- d. Identify any power plant augmentation that is being considered or is in process. Your complete response will include planning documentation identifying the criteria being evaluated related to augmentation and any draft augmentation plans or designs.

RESPONSE:

(a) Qwest objects to this request because the total installed power capacity is not relevant to any issue in this case, so the request is not reasonably calculated to lead to the discovery of relevant or admissible evidence.

Subject to and without waiving its objections, please refer to Confidential Attachment "A", for Qwest's power capacity that McLeodUSA has ordered for each Washington collocation site.

(b) Subject to and without waiving its objections, see Qwest's Response to McLeod No.01-002 in this docket, and please refer to Confidential Attachment "B" in response to McLeod Nos.01-002 and 01-008(b) in this docket for documentation reflecting power usage monitoring performed pursuant to the DC Power Measuring Amendment at issue in this proceeding, for McLeodUSA collocation sites only.

(c) Qwest objects to this request because it is not reasonably calculated to lead to the discovery of relevant or admissible evidence concerning the interpretation of the DC Power Measuring Amendment at issue in this case.

(d) Qwest objects to this request because it is not reasonably calculated to lead to the discovery of relevant or admissible evidence concerning the interpretation of the DC Power Measuring Amendment at issue in this case.

Respondent: Legal and Ryan Gallagher

EXHIBIT B

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>McLEODUSA TELECOMMUNICATIONS SERVICES, INC.,</p> <p style="padding-left: 40px;">Complainant,</p> <p style="text-align:center">v.</p> <p>QWEST CORPORATION,</p> <p style="padding-left: 40px;">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-06-20</p>
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**ORDER GRANTING MOTION TO COMPEL DISCOVERY AND
ESTABLISHING PROTECTIVE MEASURES**

(Issued March 8, 2006)

On February 9, 2006, McLeodUSA Telecommunications Services, Inc. (McLeodUSA), filed with the Utilities Board (Board) a complaint against Qwest Corporation (Qwest) pursuant to Iowa Code §§ 476.100 and 476.101. McLeodUSA alleges it is being overcharged by Qwest for collocation power charges in violation of Iowa law and the interconnection agreement between the parties. On March 6, 2006, the Board issued an order docketing the complaint, granting partial dismissal, and setting a procedural schedule.

On March 6, 2006, McLeodUSA filed a motion to compel responses from Qwest to certain data requests. McLeodUSA indicates that it served Qwest its first set of data requests, numbered 1-8, on February 17, 2006. According to

McLeodUSA, Qwest served its responses on February 22, 2006, those responses consisting almost entirely of objections. Specifically, McLeodUSA requests the Board compel Qwest to immediately respond to Data Request Nos. 1, 3, 4, 5, 6, 7, 8(c), and 8(d).

It appears that Qwest makes two objections to each of the requests.¹ The first of these objections states:

Qwest objects to this request because it seeks information that is reasonably calculated to lead to the discovery of relevant or admissible evidence only as to its challenge to the Board-approved rate for the rate element DC Power Plant. This request is not reasonably calculated to lead to the discovery of relevant or admissible evidence concerning the interpretation of the DC Power Measuring Amendment at issue in this case.

Qwest also objects to the requests on the grounds that the information is "extremely confidential trade secret information."

McLeodUSA maintains that the information sought through these data requests is just as relevant to Count I of its initial complaint as it is to Count II, noting that the subject matter of Count I is the nature of the allocation of the DC Power Plant costs. Underlying cost data may potentially be relevant to the allocation of those costs. As to the question of confidentiality, McLeodUSA points out that this can be addressed with an appropriate protective agreement.

¹ "Qwest Corporation's Responses to McLeodUSA's First Set of Discovery Requests," dated February 22, 2006, is attached to McLeodUSA's motion to compel.

Normally, the Board would wait for Qwest's response before ruling. However, the limited time available for this docket and the nature of the objections raised make it both necessary and possible for the Board to rule immediately. The Board finds that discovery rules should be liberally construed and discovery should be permitted when the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Each of the requests appears to fit within those parameters and the Board will grant the motion to compel requested by McLeodUSA and direct Qwest to immediately provide responses to Data Request Nos. 1, 3, 4, 5, 6, 7, 8(c), and 8(d).

Qwest's second objection relates to the confidentiality of the information. In previous proceedings, parties before the Board have routinely executed confidentiality agreements to facilitate the exchange of information. In order to enable production while an agreement is negotiated and executed in this case, the Board will enter an interim order that the information produced by Qwest pursuant to this order may be viewed only by counsel and witnesses for McLeodUSA and may be used only for purposes directly related to this docket.

IT IS THEREFORE ORDERED:

1. The motion to compel responses filed by McLeodUSA Telecommunications Services, Inc., on March 6, 2006, is granted. Qwest Corporation is directed to immediately respond to Data Request Nos. 1, 3, 4, 5, 6, 7, 8(c), and 8(d).

2. The information produced by Qwest pursuant to this order may be viewed only by counsel and witnesses for McLeodUSA and may be used only for purposes directly related to this docket. This protective order shall continue until modified by the Board or until the parties have negotiated and executed a protective agreement for this purpose.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 8th day of March, 2006.

CERTIFICATE OF SERVICE
Docket No. UT-063013

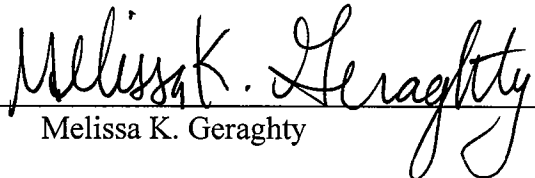
I hereby certify that on the date given below, in the docket referenced above, the original and 5 true and correct copies of: (1) McLeodUSA's Motion to Compel Qwest to Respond to Data Requests; and (2) this Certificate of Service, were sent by Federal Express, and by email to:

Ms. Carole J. Washburn, Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, WA 98504-7250
Email: records@wutc.wa.gov

On the same date, a true and correct copy was sent by regular U.S. Mail, postage prepaid, and by email to:

Lisa Anderl Qwest Corporation 1600 Seventh Avenue, Room 3206 Seattle, WA 98191 Email: lisa.anderl@qwest.com	Sally Johnston Office of the Attorney General PO Box 40128 Olympia WA 98504 Email: sjohnston@wutc.wa.gov
Simon ffitch Public Counsel Section Office of the Attorney General 900 Fourth Avenue, Suite 2000 Seattle, WA 98164-1012 Email: simonf@atg.wa.gov	

DATED this 18th day of April, 2006.

By: 
Melissa K. Geraghty