

[Service Date February 16, 2007]

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

McLEODUSA	)	DOCKET UT-063013
TELECOMMUNICATIONS	)	
SERVICES, INC.,	)	ORDER 04
	)	
Petitioner,	)	
	)	FINAL ORDER AFFIRMING
v.	)	INITIAL ORDER; DENYING
	)	PETITION FOR ENFORCEMENT
QWEST CORPORATION,	)	
	)	
Respondent.	)	
.....	)	

1     *Synopsis: This Order affirms the initial order denying McLeodUSA’s petition for enforcement of the DC Power Measuring Amendment to its interconnection agreement with Qwest.*<sup>1</sup>

**I. INTRODUCTION**

2     **Nature of Proceeding.** This docket involves a petition for enforcement of an amendment to an interconnection agreement between McLeodUSA (McLeod) and Qwest Corporation (Qwest). In its petition, McLeod alleges that the DC power measuring amendment between McLeod and Qwest requires Qwest to bill McLeod for collocation DC power on a usage basis. Qwest responds that the amendment calls for a two-part bill, billing for DC power plant on the basis of capacity originally ordered and for DC power supply on a usage basis.

3     **Appearances.** Gregory Kopta, Davis Wright Tremaine, attorney, Seattle, Washington, represents McLeodUSA (McLeod), the petitioner. Lisa Anderl, Associate general counsel, Qwest Corporation, represents respondent Qwest Corporation (Qwest).

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4 **Initial order.** The initial order, by Administrative Law Judge Theodora M. Mace, would deny the petition for enforcement. The order ruled that the language of the amendment was ambiguous and that the Washington Utilities and Transportation Commission (Commission) should rely on extrinsic evidence to determine the intent of the parties. The order found the extrinsic evidence supported Qwest's interpretation and that Qwest should bill McLeod for DC power plant on an as ordered basis, and for DC power supply on a usage basis.

5 **Petition for administrative review.** McLeod filed a petition for administrative review of the initial order and Qwest filed an answer opposing the petition.

6 **Decision on review.** We affirm the initial order.

## II. BACKGROUND

7 Under Section 251 of the Telecommunications Act of 1996 (the Act), competitive local exchange carriers ("CLECs," such as McLeod) may enter interconnection agreements with incumbent local exchange companies ("ILECs" such as Qwest) to receive services from the incumbents that enable them to serve their own customers. From time to time, the CLEC and the ILEC enter into amendments to the underlying interconnection agreements. Under the Act, state commissions are charged with enforcement of interconnection agreements.<sup>2</sup>

8 In addition, the Commission approved a statement of generally accepted terms (SGAT) for Qwest, pursuant to Section 271 of the Act. The SGAT is a form of interconnection agreement that CLECs can adopt to govern their commercial relationship with Qwest. In this case, the underlying interconnection agreement is based on the Qwest SGAT. Attached to the SGAT is a schedule of rates applicable to services provided (Exhibit A). Exhibit A to the SGAT is revised from time to time as new rates and services are approved by the Commission.

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<sup>1</sup> Technical telecommunications terms used in this Order are defined in the glossary at the end of the Order.

<sup>2</sup> The Commission's jurisdiction to hear and resolve such matters is confirmed in RCW 80.36.610.

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**A. The petition for enforcement.**

- 9 This petition for enforcement arose out of dispute between McLeod and Qwest about the meaning of the DC power measuring amendment (amendment) to their underlying interconnection agreement (ICA).<sup>3</sup>
- 10 The dispute involves the parties' differing interpretations of the amendment's provisions for billing DC power. DC power is billed based on both 1) the power plant capacity necessary to supply the required amount of power and 2) the actual amount of DC power used. The DC power plant converts AC power from the local electric utility into DC power that is used to operate central office telecommunications equipment belonging to both the ILECs and collocated<sup>4</sup> competitive local exchange carriers (CLECs).
- 11 When a CLEC desires to collocate its equipment in a Qwest central office, the CLEC places an order for distribution cables sized according to its ultimate need for DC power to run the collocated equipment. DC power is then delivered to CLEC collocation sites by means of these distribution cables. Qwest takes the ordered size of CLEC distribution cable into account when determining how much power plant capacity is required to provide DC power at its central offices. The amount of DC power CLECs actually use is routinely different from the capacity of the distribution cable they have ordered.
- 12 Under the original interconnection agreement, Qwest billed McLeod for DC power under a bifurcated DC Power Usage Rate, which was composed of a power plant charge and a usage charge. However, both charges were calculated by applying the plant and usage rates against the amount of cable plant *capacity* originally ordered by the CLEC.

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<sup>3</sup> McLeod adopted Qwest's Statement of Generally Available Terms (SGAT) as the ICA between it and Qwest on March 22, 2000. The SGAT is a type of generic agreement required under the federal Telecommunications Act of 1996 that competitive local exchange carriers (CLECs) may adopt without engaging in protracted individual negotiations with ILECs. The Commission approved the McLeod-Qwest ICA on August 30, 2000 in Docket UT-993007. The parties executed the DC Power Measuring Amendment on August 18, 2004 and the Commission approved it on September 29, 2004.

<sup>4</sup> Collocation means that CLECs place their telecommunications equipment on the ILEC network so that CLECs may serve their own customers.

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13 McLeod alleges that the DC power measuring amendment now requires that both the power plant rate and the usage rate should be applied to *measured* usage, rather than the originally ordered capacity. Qwest contends that under the amendment, the actual DC power supplied should be billed on a usage basis, but the power plant capacity component should be billed according to the capacity originally ordered by the CLEC.

14 McLeod further alleges that Qwest charges CLECs more for DC power than Qwest imputes to itself and that this constitutes discriminatory or preferential treatment in violation of the interconnection agreement, as well as state and federal law.<sup>5</sup>

#### **B. The initial order.**

15 The initial order ruled that: 1) the language of the DC power measuring amendment was ambiguous as to its meaning ; 2) determination of the intent of the amendment required review of extrinsic evidence; 3) the extrinsic evidence supported Qwest's interpretation that the DC power rate was composed of a capacity rate billed according to originally ordered capacity and a usage rate billed according to a usage-based factor; 4) there was insufficient evidence to support McLeod's claim of discrimination; and 5) a cost or rate proceeding is the proper forum to present a challenge to the DC power rate.

### **III. ADMINISTRATIVE REVIEW**

16 McLeod seeks administrative review of the initial order on grounds that the initial order: 1) improperly interpreted the DC power measuring amendment in isolation; 2) improperly refused to consider McLeod's claim of discrimination; and 3) improperly found that a petition for enforcement was not the correct forum for determining the DC power rate. Qwest responds that the initial order correctly determined the intent of the DC power measuring amendment and properly addressed the discrimination and rate claims.

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<sup>5</sup> Sections 251 and 252 of the Act and RCW 80.36.180, 80.36.170, 80.36.186.

### **A. Interpretation of DC power measuring amendment**

- 17 We hold that the initial order was correct in its interpretation of the amendment. The initial order properly found that the language of the amendment on its face did not clearly demonstrate what the parties intended to be the proper application and calculation of DC power rates. Because the meaning of the amendment was ambiguous, the initial order then reviewed all the extrinsic evidence the parties submitted. This included the historic method of calculating the charge under the underlying interconnection agreement, emails exchanged at the time of the negotiation of the amendment; a spreadsheet rate analysis conducted by McLeod engineers; the change management process that contained information about how Qwest expected to calculate the rate; Qwest's 2001 collocation study; and Qwest's power plant engineering practices.
- 18 The key piece of extrinsic evidence was the rate analysis McLeod engineers conducted in 2004 when the amendment was executed. In preparing their analysis the engineers relied on the description and rate schedule attached to the interconnection agreement.<sup>6</sup> The rate schedule provided for a DC power usage rate composed of a power plant component and a usage component.
- 19 We agree with the initial order that the McLeod engineers' spreadsheet analysis demonstrates McLeod's understanding that only the usage rate calculation would change as a result of the amendment because the projected savings only related to the

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<sup>6</sup> McLeod witness Spocogee testified that the McLeod engineers reviewed the interconnection agreement, the amendment, and Exhibit A to the interconnection agreement. Exhibit A was admitted as Exhibit 26, and consists of an SGAT rate schedule identifying all rates including collocation rates. McLeod later argued that the Commission should actually consider the version of Exhibit A that was in effect at the time the original interconnection agreement was signed. McLeod submitted that original version with its opening brief. The Commission subsequently requested the parties to respond to Bench Request No. 1 which asked for the versions of Exhibit A that were in effect at the time of the negotiation and execution of the amendment. The parties submitted "8<sup>th</sup> revised 7<sup>th</sup> Amended Exhibit A" effective May 26, 2004 and "8<sup>th</sup> revised 8<sup>th</sup> Amended Exhibit A" effective August 11, 2004. The description and rates applicable to collocation DC power in these responses to the Bench Request are identical to the description and rates in Exhibit 26. The parties' response to Bench Request 1 is admitted in evidence.

In its petition for administrative review McLeod renews its argument that the Commission should consider the original Exhibit A in interpreting the DC power measuring amendment. This argument was addressed and rejected in the initial order, and is rejected here, because it is contrary to principles of contract interpretation requiring determining intent either from the four corners of the document or from extrinsic evidence regarding what the parties intended when they entered into the amendment.

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usage portion of the DC power charge.<sup>7</sup> The engineers' analysis did not calculate savings related to the power plant segment of the charge. If McLeod had understood that the amendment would change both the power plant and usage components of the calculation, it is reasonable to conclude that the engineers' analysis of benefits from the amendment would have included savings from both components. McLeod only developed its current interpretation of the amendment - that both power plant and usage should be billed on a usage basis - as a result of its May 2005 audit, well after the amendment had been executed.

20 McLeod contends that the term "usage" throughout both the interconnection agreement and the DC power measuring amendment encompasses both power plant and usage elements of the DC power usage rate. McLeod points out that the term "usage" in the interconnection agreement: "-48 Volt DC Power Usage Charge" includes power plant charges even though it is captioned a "usage" charge. Similarly, the language describing the DC power charge in Exhibit A terms the charge a "Power Usage" charge, even though it includes both power plant and usage components. McLeod argues that because "usage" means the same in the agreement and the amendment there is no ambiguity and the amendment requires billing for both plant and usage based on actual usage.

21 McLeod is correct that the term "usage" as it is incorporated into the interconnection agreement includes both power plant and usage, but McLeod misses the point that the meaning of the amendment, as related to the underlying agreement, must be determined according to the meaning attributed to the amendment when it was formed, not at some later time or under some subsequent legal analysis. The McLeod engineering analysis shows that the parties understood that the amendment applied only to the usage portion of the DC power usage charge.

## **B. Discrimination**

22 McLeod asserts that the initial order failed to construe the DC power measuring amendment as a part of the whole interconnection agreement. McLeod claims that the terms of the underlying interconnection agreement require Qwest to provide

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<sup>7</sup> Exhibit 65.

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collocation services, including DC power, on a nondiscriminatory basis and that the DC power measuring amendment did not change Qwest's obligation in that regard.

23 McLeod contends the evidence demonstrates that Qwest charges CLECs much more for DC power (because of the way Qwest calculates the rate) than Qwest imputes to itself for DC power. McLeod asserts that because Qwest fails to provide DC power to McLeod on the same basis as Qwest provides such power to itself, Qwest violates the interconnection agreement and the amendment, as well as federal and state anti-discrimination laws.

24 McLeod provided evidence intended to show that Qwest's power plant rate, applied on an "as-ordered" basis, may be higher than necessary for Qwest to recover its costs. However, this evidence does not necessarily dictate a conclusion that improper discrimination or preference has occurred. We have long held that a utility may charge different rates for the same service if it is reasonable to do so. In this case, Qwest does not "collocate" equipment, hence its imputed rates for DC power may reasonably differ from the rates it charges CLECs under negotiated interconnection agreements. Moreover, Qwest provided evidence that it does not assign power costs to itself solely on a measured basis, but rather that it takes into account the total costs for power plant which do not vary with usage.<sup>8</sup> The fact that Qwest does not impute to itself the same costs for DC power that it charges McLeod does not of itself constitute improper discrimination. We conclude that McLeod failed to meet its burden to show that Qwest's DC Power rate is improperly discriminatory.

### **C. Proper forum.**

25 McLeod further contends that the initial order erred in concluding that a rate proceeding or cost docket would be the necessary forum for challenging Qwest's DC power rate. First McLeod asserts that it is not challenging the rate, but rather the application of the rate. Second, McLeod contends that in *AT&T v. Verizon* (AT&T complaint),<sup>9</sup> the Commission permitted AT&T to challenge Verizon's application of access rates as discriminatory and unduly preferential even though the proceeding was initiated as a complaint and not a cost docket or rate proceeding.

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<sup>8</sup> Exhibit 41T (Ashton), pp. 5-7; Exhibit 51T (Million).

<sup>9</sup> *AT&T v. Verizon Northwest Inc.*, Docket UT-020406, Eleventh Supp. Order (August 12, 2003).

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- 26 We find disingenuous McLeod's insistence that it is not challenging the DC power rate, but rather merely the application of the rate. A good measure of McLeod's testimony in this proceeding involves how Qwest developed the rate in question and why the plant capacity rate is improper. The DC power rate structure as well as the rates charged are intertwined with the actual application of the rate and cannot be separated as McLeod contends.
- 27 We further conclude that this matter is distinguishable from the AT&T complaint case. There, we allowed a CLEC to challenge Verizon's access rates, departing from our usual caution about "single-issue" ratemaking. In addition, in the AT&T complaint, Verizon admitted that its access rates needed revision, and in fact, the issue of access charge levels had gained national notoriety. Moreover, the record in the AT&T complaint case was voluminous and contained significant information about access charge costs and rates.
- 28 In this case, we have a petition for enforcement by a single carrier. While there is some evidence addressing Qwest's cost to provide DC power capacity to CLECs and to itself, the evidence does not rise to the level that would allow us to determine a proper CLEC rate for DC power. The rate approach proposed by McLeod, to charge for both plant capacity and power usage based on measured usage ignores the fact that there is a fixed plant capacity cost that should properly be included in determining the DC power rate. We conclude that our order in the AT&T complaint case is not applicable to the situation in this case and that the initial order was correct that a more appropriate forum for determining a DC power rate is a rate proceeding.

### **C. Conclusion.**

- 29 We conclude that the initial order correctly determined that Qwest's interpretation of the DC power measuring amendment reflects the intent of the parties at the time of the amendment, and that McLeod failed to carry its burden to show that Qwest's application of the DC power rate is improperly discriminatory or preferential.



#### IV. FINDINGS OF FACT

- 30 (1) The Washington Utilities and Transportation Commission (Commission) has the authority to enforce interconnection agreements between CLECs and ILECs under the federal Telecommunications Act of 1996 and Washington law.
- 31 (2) Interconnection agreements are a form of contract and are subject to interpretation according to the law of contract interpretation.
- 32 (3) Qwest is an ILEC subject to the jurisdiction of the Commission.
- 33 (4) McLeod is a CLEC subject to the jurisdiction of the Commission with regard to enforcement of interconnection agreements.
- 34 (5) Qwest and McLeod entered into an interconnection agreement approved by the Commission on August 30, 2000 in Docket UT-993007.
- 35 (6) The interconnection agreement provided for the billing of DC power charges for both power plant capacity and usage on an “as-ordered” basis.
- 36 (7) Qwest and McLeod entered into the DC power measuring amendment to the interconnection agreement which was approved by the Commission on September 29, 2004.
- 37 (8) The rate schedule relied on by the parties at the time the amendment was executed reflected the language contained in Exhibit 26 admitted into the record of this proceeding.
- 38 (9) The extrinsic evidence regarding the amendment demonstrates that when the amendment was executed, the parties intended that it would bill McLeod on a usage basis only for the power usage element of Qwest’s DC power rate and that the power plant element of the DC power rate would continue to be billed on an “as-ordered” basis.

## V. CONCLUSIONS OF LAW

- 39 (1) The Commission may grant or deny CLEC petitions for enforcement of interconnection agreements under the federal Telecommunications Act of 1996 and Washington law.
- 40 (2) The Commission has the authority to address claims of discrimination under both the federal Telecommunications Act of 1996 and Washington law.
- 41 (3) The law of contract interpretation requires the Commission to first determine the intent of the parties by reviewing the four corners of the contract itself.
- 42 (4) If the Commission determines that the contract is ambiguous on its face, the Commission may rely on extrinsic evidence to determine the intent of the parties with respect to the contract.
- 43 (5) The language of the amendment and the rate schedule relied on by the parties is ambiguous on its face as to the intent of the parties in entering into the agreement.
- 44 (6) McLeod failed to demonstrate that the intent of the parties when the amendment to the interconnection agreement was executed required Qwest to bill all DC power charges on an “as used” basis.
- 45 (7) McLeod failed to demonstrate on the record of this proceeding that Qwest’s DC power rate and rate structure were discriminatory.

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**VI. ORDER**

46 We deny McLeod's petition for enforcement and order McLeod to return the full amount of disputed DC power charges in the amount of \$205,019.57, within 30 days of the date of this Order.

Dated at Olympia, Washington, and effective February 15, 2007.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

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**NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.**

## GLOSSARY

TERM	DESCRIPTION
Central Office	A building where the local loops are connected to switches to allow connection to other customers; also referred to as a wire center where there are several switches functioning as a switch exchange. ( <i>From Newton's, at page 157.</i> )
CLEC	Competitive local exchange company. Not an ILEC, and generally subject to very limited regulation.
ILEC	Incumbent local exchange company; a company in operation at the time the Act was enacted (August 1996).
Interconnection Agreement	An agreement between an ILEC and requesting telecommunications carrier (which may be a CLEC) addressing terms, conditions and prices for interconnection, services or network elements pursuant to Section 251.
Section 251(c)(3)	The section of the Act that requires ILECs to provide unbundled access to network elements, or UNEs.
Section 271	The portion of the Act under which Bell Operating Companies, or BOCs, could obtain authority from the FCC to provide long distance service in addition to service within their in-state service areas.
Telecom Act or "Act"	Telecommunications Act of 1996, 110 Stat. 56, Public Law 104-104; Feb. 8, 1996.