Decision No. R07-0211

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 06F-124T

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.,

COMPLAINANT,

V.

QWEST CORPORATION,

RESPONDENT.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE G. HARRIS ADAMS DISMISSING COMPLAINT AND GRANTING COUNTERCLAIM

Mailed Date: March 14, 2007

Appearances:

Andrew Newell, Esq., Denver, Colorado, for Complainant, McLeodUSA Telecommunications Services, Inc.; and

Timothy J. Goodwin, Esq., Denver, Colorado, Lisa Anderl, Esq., Seattle, Washington, *pro hac vice,* and Richard Corbetta, Esq., Denver, Colorado, for Respondent, Qwest Corporation.

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I. STATEMENT

1. This docket concerns the complaint by McLeodUSA Telecommunications Services, Inc. (McLeodUSA) against Qwest Corporation (Qwest) filed on March 15, 2006.

2. On March 22, 2006, the Commission entered its Order to Satisfy or Answer. On May 15, 2006, an Order Setting Hearing and Notice of Hearing scheduled a hearing in this matter.

3. On April 11, 2006, Qwest filed its Answer and Counterclaim.

4. On May 1, 2006, McLeodUSA's Answer to Qwest's Counterclaim was filed.

5. By Decision R06-0465-I, the Unopposed Motion for Waiver of Requirement to File Complainant's Witness and Exhibit List under Commission's Default Deadlines was granted.

6. On April 26, 2006, Complainant's Certification of Intent to Proceed to Hearing was filed.

7. By Decision No. R06-0499-I, the procedural schedule governing this proceeding was modified and the hearing was rescheduled to August 16 and 17, 2006.

8. By Decision No. R06-0698-I, McLeodUSA's Motion to Compel Responses to McLeodUSA's First Set of Data Requests to Qwest filed May 15, 2006 was granted in part. By

Decision No. R06-0939-I, McLeodUSA's Motion to Compel Responses to McLeodUSA's Second Set of Data Requests to Qwest was denied.

9. By Decision No. R06-0919-I, the procedural schedule was vacated because it was difficult to prepare for hearing without knowing the outcome of pending discovery motions.

10. By Decision No. R06-1059-I, the Verified Motion for Admission *Pro Hac Vice* filed by Lisa A. Anderl, Esquire, was denied without prejudice for failure to meet the filing requirements of Rule 221 Colo.R.Civ.P. The defect was subsequently corrected and the Verified Renewed Motion for Admission Pro Hac Vic filed by Lisa A. Anderl, Esquire, on September 29, 2006, was granted by Decision No. R06-1202-I.

11. By Decision No. R06-1083-I, the procedural schedule was modified and the hearing was again rescheduled to November 14 and 15, 2006.

12. At the assigned place and time, the undersigned Administrative Law Judge (ALJ) called the matter for hearing. During the course of the hearing, McLeodUSA sponsored the testimony of Ms. Tami Spocogee, Mr. Sidney Morrison, and Mr. Michael Starkey. Qwest sponsored the testimony of Mr. Curtis Ashton, Mr. Michael Starkey (as an adverse witness), and Mr. William R. Easton. Exhibits 1 through 11, 14, and 16 through 35 were identified, offered, and admitted into evidence. Confidential Exhibits 2C, 3C, 5C, 14C, 23C, 31C, and 32C were also identified, offered, and admitted into evidence. Exhibits 8 and 8A were admitted as late-filed Hearing Exhibit 8 to substitute for Exhibit 8 utilized at hearing. At the close of the hearing, McLeodUSA moved to close the record in this docket, with the limited exception of the late filing of Exhibit 8. The unopposed motion was granted and the matter was taken under advisement.

13. McLeodUSA filed its Initial Statement of Position on January 5, 2007. Qwest also filed its Post Hearing Brief on January 5, 2007. The McLeodUSA Telecommunications Service, Inc., Reply Brief and the Reply Statement of Position of Qwest Corporation were each filed on January 19, 2007.

14. Pursuant to § 40-6-109, C.R.S., the record and exhibits of the proceeding, and a recommended decision are transmitted to the Commission.

II. FINDINGS AND ANALYSIS

A. Background

15. Complainant McLeodUSA is an Iowa Corporation with its primary place of business located at 6400 C. Street SW, Cedar Rapids, IA 52406-3177. McLeodUSA is authorized by the Colorado Secretary of State to do business in Colorado and has been issued a Certificate of Public Convenience and Necessity by this Commission to provide competitive local exchange services.

16. Qwest Corporation is a corporation organized and existing under the laws of the State of Colorado that is authorized by the Commission to provide facilities to carriers like McLeodUSA.

17. No party challenges the Commission's jurisdiction in this docket.

18. Pursuant to § 252 of the Telecommunications Act of 1996 (Telecommunications Act or Act), McLeodUSA and Qwest entered into an Interconnection Agreement (ICA, Interconnection Agreement or Agreement) that was approved by the Commission on February 16, 2001 in Docket No. 01T-019. McLeodUSA offers competitive local services in several markets in Colorado using collocation space leased from Qwest pursuant to § 251(c)(6) of the

Telecommunications Act and the Interconnection Agreement, as amended, in connection with McLeodUSA's network facilities.

19. In the context of rules 2530 through 2579, Rule 2531(b) defines an interconnection agreement, for purposes of § 252(e)(1) of the Telecommunications Act of 1996, as "a binding contractual agreement or amendment thereto, without regard to form, whether negotiated or arbitrated, between an ILEC and a telecommunications carrier or carriers that includes provisions concerning ongoing obligations pertaining to rates, charges, terms, and/or conditions for interconnection, network elements, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, or collocation." *Rule 2531(b) of the Rules Regulating Telecommunications Providers, Services, and Products*, 4 *Code of Colorado Regulations* (CCR) 723-2.

20. Pursuant to § 252(i) of the Act, McLeodUSA elected to adopt the previously approved interconnection agreement between Qwest and Pathnet, Inc., Docket No. 99T-599, which was approved by Decision C00-0069 (dated January 21,2000), as amended and approved by Decision C00-0875 (dated August 22, 2000). *See*, Decision No. C01-0156 and Hearing Exhibit 8. The agreement has been amended many times by the parties' express agreement as well as in accordance with Commission decisions.

21. The Agreement was negotiated in accordance with the terms of the Act and the laws of Colorado. "It shall be interpreted solely in accordance with the terms of the Act and the applicable state law in the state where the service is provided." Section 3.18 of the Pathnet ICA in Exhibit 8.

22. "The headings of Sections of this Agreement are for convenience of reference only, and shall in no way define, modify or restrict the meaning or interpretation of the terms or provisions of this Agreement." Section 3.28 of the Pathnet ICA in Exhibit 8.

23. McLeodUSA and Qwest negotiated for, and entered into, the DC Power Measuring Amendment to the Interconnection Agreement between Qwest Corporation and McLeodUSA Telecommunications Services, Inc. for the State of Colorado (DC Power Amendment), admitted to be attached as Exhibit A to McLeodUSA's Complaint (Hearing Exhibit 7).

24. McLeodUSA installs various pieces of equipment in its collocation sites. Most of such equipment requires electrical power for operation. The usage charges giving rise to the Complaint are distinct from the charges associated with building the infrastructure necessary to deliver DC power to McLeodUSA's collocation. Such charges are assessed on a non-recurring basis and have already been paid by McLeodUSA.

25. By Decision No. C04-1493 (dated December 17, 2004), the DC Power Amendment that gives rise to this proceeding was approved. This decision granted the jointly-filed Motion for Approval of Amendment filed by Qwest and McLeodUSA. The Commission recited the requirement for Commission review under the Act and the criteria for approval including: "rates in negotiated agreements must be just and reasonable, nondiscriminatory, and based on the cost of providing the interconnection or network element." Decision No. C04-1493 at 2. Supporting the proposed rates, the Commission found that "[t]he proposed rates are supported by cost studies on file in Docket No. 99A-577T." *Id.*

26. McLeod implicitly alleges that the parties elected to put the amendment into effect upon execution (August 18, 2004), rather than upon Commission approval (December 17,

2004), under the terms of the DC Power Amendment. McLeodUSA contends that Qwest began violating the amendment effective August 2004.

27. Hearing Exhibit 8 reflects the parties' current understanding of the Agreement. Without specification, some additional information is included in Hearing Exhibit 8 about which the parties take no position.[1] The Power Reduction Amendment was provided as part of Hearing Exhibit 8 (noted as Exhibit 8A), although it had not been approved by the Commission at the time of filing.

28. Except as specifically modified by the DC Power Amendment, the provisions of the Agreement remain in full force and effect. See Hearing Exhibit 8.

29. The DC Power Amendment resulted in certain rates being billed based upon actual usage, versus a historical "as ordered" basis. The parties disagree as to which rates were affected by the amendment. Qwest monitored power usage at those McLeodUSA collocations that were originally ordered with more than 60 amps service. Qwest admitted that charges for DC power in a collocation cage are established in Exhibit A to both McLeodUSA's Interconnection Agreement with Qwest, and the DC Power Amendment attached as Exhibit A to McLeodUSA's Complaint.

B. Charged as Ordered

30. It is not disputed that under the Agreement, Qwest billed McLeodUSA for DC power based on the ordered amount of power by McLeodUSA on the collocation application (*i.e.* if McLeodUSA ordered 100 amps for a collocation location, Qwest billed DC collocation power charges at 100 amps each month. See, *e.g.* Confidential Exhibit WRE_5, Hearing Exhibit 23C).

[1] McLeodUSA and Qwest' Joint Notice of Filing Exhibits 8 and 8A, filed November 29, 2006.

Qwest billed such charge, and McLeodUSA paid such charge, regardless of whether the McLeodUSA's equipment consumed 20 or 90 amps of current in a particular month.

31. Before, during, and after Docket No. 99A-577T, power usage rates were applied on a per-amp-ordered basis. Transcript Vol. II at 139, lines 13-17. McLeodUSA does not dispute power plant charges invoiced by Qwest on the number of amps specified in the power feed orders on an as-ordered basis before the DC Power Amendment in this docket. Transcript Vol. I at 16, lines 14-24. Ms. Spocogee contends that was the case because McLeodUSA considered the power plant as part of the power usage charges listed in the Agreement. Transcript Vol. I at 19-20. Once the DC Power Amendment was signed for the power usage components, McLeodUSA expected the power plant to also be billed on a measured basis because it was a component of the power usage.

32. The Collocation rates in Exhibit A to the Statement of Generally Available Terms and Conditions (SGAT) were approved by the Commission in Docket No. 99A-577T. Following the Commission's decision in Docket No. 99A-577T, Qwest's rate structure changed and created a separate rate for power plant and usage. Transcript Vol. II at 116.

33. While the approved amendment references Exhibit A to the Agreement (*i.e.* Exhibit A to the SGAT), no part of Exhibit A was included with the amendment. Versions of SGAT Exhibit A have been provided in Hearing Exhibits 10, 11, and 26. The current SGAT has been incorporated into Qwest Local Network Interconnection and Service Resale Tariff, Colo. P.U.C. No. 22. McLeodUSA contends that the organization of the rates and rate groupings at issue in this case did change from one version of SGAT Exhibit A to the next. Qwest does not oppose such contention, acknowledges that the versions differ insignificantly in structuring or organization of the power rate elements over time, and presents argument based upon the

February 2005 version of the SGAT Exhibit A (Hearing Exhibit 11). Qwest admitted that the capacity charge referenced in the product catalog is the same as the power plant charge in the Hearing Exhibit 11 and that such version of the Exhibit A is nearly identical to all versions of the Exhibit A since the last cost docket in Colorado. Transcript Vol. II, page 105, lines 19-23; and page 106, lines 12-17. For ease of reference, the current version of Exhibit A to the SGAT will be used and referenced for analyzing the amendment.

34. Qwest's DC Power offering, which provides -48 volt DC power to a CLEC's collocation equipment, has two rate elements: one for the power plant capacity itself and another for power usage. Qwest assessed two separate per amp, per month, charges for -48 volt DC power usage.

35. After the DC Power Amendment, Qwest began billing the second element of -48 volt DC power usage using the monitored power usage (in most instances). Qwest continued to bill for the first element, "Power Plant" -- at the ordered level of power.

36. Qwest witnesses testified that Qwest's cost study, which was adopted by the Commission, incorporates the sizing of the power plant based upon the feeder line order. Transcript Vol. II at 114-115. Because the Qwest cost model, included power plant charges on a per-amp-ordered basis, Mr. Ashton believes that Qwest is ordered to charge power plant on a per-amp-ordered basis. Transcript Vol. II at 48, lines 9-12. Transcript Vol. II at 137, lines 15-20.

37. Qwest acknowledges that technical publications were not modified following the Commission's decision in Docket No. 99A-577T with regard to how Qwest engineers power plant to accommodate CLEC capacity. Existing publications state that the power plant is to be sized based on List 1 drain. Although not explicitly documented in technical publications, Qwest argues that Qwest power engineers work for one director and that the director applies

Commission rules, decisions and laws without regard to technical documentation. Transcript Vol. II at 49.

38. Mr. Ashton acknowledged that Qwest maintains forms for field technicians to record metered usage (approximate List 1 drain) and List 2 drains (Forms 840 and 841). However, he also states that there is no way for a field technician to know List 2 drains, that those forms are rarely used, and that the forms are not required to be used. Form 840 is often used as a power inventory form that is reported back to the engineers so they can keep track of exactly what equipment is in the office. Form 841 is really not a power plant form, it is a battery distribution fuse board (BDFB) form to track loads on a BDFB, if the engineers feel they may overload the BDFB. Transcript Vol. II at 55-56.

C. Burden of Proof.

39. Except as otherwise provided by statute, the Administrative Procedure Act imposes the burden of proof in administrative adjudicatory proceedings upon "the proponent of an order." § 24-4-205(7) C.R.S. McLeodUSA bares the burden of proof by a preponderance of the evidence as to claims stated in the Complaint. Section 13-25-127(1), C.R.S.; *Rule 1500 of the Rules of Practice and Procedure*, 4 CCR 723-1. Qwest bears the burden of proof by a preponderance of the evidence as to claims stated in the Counterclaim. Section 13-25-127(1), C.R.S.; *Rule 1500 of the Rules of Practice and Procedure*, 4 CCR 723-1. The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Department of Revenue*, 717 P.2d 507 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole, slightly tips in favor of that party.

D. Alleged Breach of Interconnection Agreement.

40. McLeodUSA alleges that because Qwest has continued to charge McLeodUSA the "ordered" amount for the "Power Plant" rate element for –48 volt DC power usage, Qwest breached the Agreement, as amended by the DC Power Amendment.

41. McLeodUSA alleges that Qwest has overcharged McLeodUSA in the approximate amount of $44,000 per month since August 2004, and continues to overcharge McLeodUSA on a monthly basis. McLeodUSA seeks a refund of the excessive charges in through the Commission's authority to enforce the interconnection agreement approved pursuant to 47 U.S.C. §§ 251- 252.

42. McLeodUSA primarily contends that the amendment is clear and should be enforced upon its terms. Attachment 1, Section 2.0 to the DC Power Amendment,

> addresses the 'Rate Elements' at issue, and Section 2.1 specifically identifies '-48 Volt DC Power Usage' as the relevant rates to be impacted. Subsection 2.2.1 then discusses the '-48 Volt DC Power Usage Charge,' and explains that the change to be effectuated by the Amendment is that 'Qwest will determine the **actual usage** at the power board . . .' Subsection 2.2.1 goes on to state that the 'actual usage' measured at the power board is applied to '-48 Volt DC Power Usage' as 'specified in Exhibit A of the Agreement. Exhibit A of the Agreement (or the pricing appendix) shows that '-48 Volt DC Power Usage' - the exact same term as used in the Amendment - covers both power plant and usage charges.

McLeodUSA's Initial Statement of Position at 4-5 (emphasis original).

43. After discovering that Qwest was billed certain collocation power charges using ordered levels, rather than based on actual usage, McLeodUSA initiated a billing dispute in September 2005 and began withholding disputed amounts equal to the amount of alleged overcharges since the effective date of the DC Power Amendment. McLeodUSA ceased withholding disputed amounts in December 2005, while reserving its right to challenge all such billings. Qwest denied the billing dispute and insists the charges are valid.

44. McLeodUSA contends that the interpretation proffered, that the reference to -48 Volt DC Power Usage applied to all rates grouped under 8.1.4.1 of SGAT Exhibit A, is the simplest and most logical result. It is argued that the language of the amendment unequivocally supports this outcome as well. Because the amendment acknowledges that the DC Power Usage charge is for the capacity of the power plant available for CLEC use, it cannot be intended that capacity of the power plant references charges in 8.1.4.1.1. Further, the rate grouping at 8.1.4.1 uses the identical term as the amendment. Thus, it is argued there is no basis to determine how the Power Plant rate (8.1.4.1.1) is charged unless the amendment refers to 8.1.4.1.

45. McLeodUSA argues that Section 2.1 reads "-48 volt DC power usage and AC usage charges." Because the precise term "-48 volt DC power usage" appears only once in section 8.1.4, McLeodUSA contends that the reference is intended to be to all rates within the grouping at 8.1.4. Transcript Vol. II at 131-132.

46. McLeodUSA argues that its proffered interpretation is consistent with past practices. Historically, charges for all elements in the rate grouping were based upon feeder size. The amendment was to change the basis of the charges to usage, rather than feeder size.

47. Qwest also primarily contends that the amendment is clear and should be enforced upon its terms. Qwest contends that the language of the DC Power Amendment does not modify the DC Power Plant Charge:

> Counted conservatively, the DC Power Measuring Amendment mentions the 'DC Power Usage Charge' five times, and mentions the 'usage rate' another two times, for a total of seven mentions in less than one page of text. There is no mention of a 'Power Plant' charge. Thus, the simplest interpretation of this language is that the Amendment changes the 'power usage charge' for orders greater than sixty amps, but no other charge - not the power plant charge or any other charge.

Qwest Post Hearing Brief at 10-11.

48. Qwest contends that the language in section 2.2.1 of the DC Power Amendment regarding the -48 volt DC power usage charge must apply to the rate at section 8.1.4.1.2.2 of Exhibit A to the SGAT. Considering Exhibit A, Qwest finds that usage charges listed in 8.1.4 include two usage charges: power usage less than 60 amps and power usage more than 60 amps. Qwest contends there are no other charges containing the phrase "power usage." Based upon his understanding that the power measuring applies only to usage greater than 60 amps, Mr. Easton concludes that that rate of $4.50 is the power usage charge referenced in section 2.2.1 of the amendment. Transcript Vol. II at 126.

49. Mr. Easton contends that because there is no charge associated with SGAT 8.1.4.1, it is a heading having no force or effect. Transcript Vol. II at 126. He also contends that any language in Exhibit A not having associated charges is a heading having no force and effect under section 3.28 of the Agreement. Transcript Vol. II at 126.

50. Qwest argues that the binding Agreement of the parties cannot be changed by the Commission. Such argument disregards the nature of the complaint requiring interpretation of the parties' agreement. In fact, Qwest's own statement refutes the argument and properly characterizes that "[t]his Commission must interpret the DC Power Measuring Amendment to effect the intent of the parties at the time the Amendment was executed and approved by the Commission." Reply Statement of Position of Qwest Corporation at 2.

1. Discussion

51. It is clearly the Commission's responsibility to arbitrate, approve, and enforce interconnection agreements under § 252 of the Act. Pac. Bell v. Pac-West Telecomm., Inc., 325 F.3d 1114, 1126 (9th Cir. 2003). It has been recognized that "'this grant to the state commissions to approve or reject and mediate or arbitrate interconnection agreements necessarily implies the

authority to interpret and enforce specific provisions contained in those agreements.'" e.spire Communs., Inc. v. N.M. Pub. Regulation Comm'n, 392 F.3d 1204, 1207 (10th Cir. 2004) *quoting* Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc., 235 F.3d 493, 497 (10th Cir. 2000); see also BellSouth Telcoms., In v. MCIMetro Access Transmission Servs., Inc., 317 F.3d 1270, 1274 (11th Cir. 2003).

52. The 10th Circuit Court of Appeals has explained the context of interconnection agreements:

> '[T]he Interconnection Agreement did not arise in a vacuum; it was but one step in a complex and on-going regulatory process.' Aplt. App., Vol I., at A37 (E.spire v. Baca, 269 F. Supp. 2d. 1310, 1329 (D.N.M. 2003)). An interconnection agreement is not an ordinary private contract. It is a document resulting from arbitration authorized and required by federal law which cannot be viewed in isolation. An interconnection agreement is not to be construed as a traditional contract but as an instrument arising within the context of ongoing federal and state regulation. Verizon Maryland, Inc. v. RCN Telecom Servs., Inc., 232 F. Supp. 2d 539, 552 n.5 (D. Md. 2002) ('An interconnection agreement is part and parcel of the federal regulatory scheme and bears no resemblance to an ordinary, run-of-the-mill private contract.'). It is counterintuitive to require a state commission to interpret such a document without the benefit of the circumstances giving rise to the agreement.

e.spire Communs., Inc. v. N.M. Pub. Regulation Comm'n, 392 F.3d 1204, 1207 (10th Cir. 2004)

53. Consistent with the Agreement and the parties' arguments, it is also appropriate to consider the DC Power Amendment under Colorado contact law.

54. "In determining whether a provision in a contract is ambiguous, the instrument's language must be examined and construed in harmony with the plain and generally accepted meanings of the words used, and reference must be made to all the agreement's provisions. Fibreglas Fabricators, Inc. v. Kylberg, 799 P.2d 371, 374 (Colo. 1990)....The intention of the parties must appear expressly or by clear implication. Charles Ilfeld Co. v. Taylor, 156 Colo. 204, 397 P.2d 748, 750 (Colo. 1964)." Lake Durango Water Co. v. PUC, 67 P.3d 12 (Colo. 2003).

55. "A contract is ambiguous when it is reasonably susceptible to more than one meaning. KN Energy, Inc. v. Great W. Sugar Co., 698 P.2d 769, 777 (Colo. 1985). To decide whether a contract is ambiguous, a court may consider extrinsic evidence regarding the meaning of the written terms, including evidence of local usage and of the circumstances surrounding the making of the contract. Id. The court may not, however, consider the parties' extrinsic expressions of intent. Id." Water Rights of Pub. Serv. Co. v. Meadow Island Ditch Co. No. 2, 132 P.3d 333, 339-340 (Colo. 2006).

56. The foundation of McLeodUSA's argument is based upon the identity of terms between the DC Power Amendment and Section 8.1.4.1 of SGAT Exhibit A. McLeodUSA argues that Section 8.1.4.1 is a substantive rate grouping that describes how rates are applied within that grouping. Qwest contends that 8.1.4.1 is merely a heading that must be disregarded in interpreting the amendment, as agreed in Section 3.28 of the Pathnet ICA in Exhibit 8, because it is merely a heading that shall in no way define, modify or restrict the meaning or interpretation of the terms or provisions of the Agreement. McLeodUSA counters that, if 8.1.4.1 is disregarded as a heading, the link between the amendment and Exhibit A would be severed. Further, without reference to Section 8.1.4.1 of Exhibit A, a portion of Section 2.2.1 of the amendment becomes meaningless.

57. Upon approval of the DC Power Amendment, the Agreement, as amended, becomes the integrated agreement of the parties. See Hearing Exhibit 7 at 2. Beyond the amendment, the remainder of the Agreement must be reviewed to determine whether the parties' intent is expressed or implied. Extrinsic evidence will only be relied upon if there is ambiguity found in the Agreement that cannot be resolved by the entirety of the integrated agreement.

58. The crux of the dispute is whether reference to -48 Volt DC Power Usage in section 2 of the amendment is intended to refer to the -48 Volt DC Power Usage category (*i.e.* 8.1.4.1 in SGAT Exhibit A), or Power Usage rates within the -48 Volt DC Power Usage category (*i.e.* 8.1.4.1.2 in SGAT Exhibit A).

59. Section 8.1.4.1 reference -48 volt DC power usage per ampere per month and that is the only line in Section 8 of SGAT Exhibit A that uses the term -48 volt DC power usage. Transcript Vol. II at 126.

60. The ALJ finds that Section 8.1.4.1 is not a mere heading within the scope of Section 3.28 of the Pathnet ICA in Exhibit 8. First, it is not clear that such reference in the Agreement applies to Exhibit A. Second, headings are not intended to add substance. Rather, they are utilized for convenience and points of reference. To interpret Exhibit A without reference to any lines not associated with a rate, under Qwest's interpretation, would render a meaningless exhibit and an absurd result. McLeodUSA illustrated that Section 8.1.4.1 adds intended meaning to the Exhibit A in questioning Mr. Easton regarding the reference that specifies the DC power usage charges are to be charged on a per-amp per-month basis.

61. Qwest points to the grammatical use of terms. Because reference in Section 1.2 is made to usage rate (singular), it is argued that only one rate in Exhibit A is affected. A similar argument is made with reference to -48 Volt DC Power Usage Charge. It is argued that use of the singular must be disregarded to support McLeodUSA's interpretation.

62. Both parties make arguments regarding the statement in Section 2.1 that "[t]he DC Power Usage Charge is for the capacity of the power plant available for CLEC's use." Qwest contends it is senseless that the parties would have defined Power Usage to mean Power Plant. In any event, the Agreement does not supersede the Commission's determination in Docket No.

99A-577T as to what costs are recovered by rates and the record in this docket does not include such foundation.

63. Reviewing similar amendments and the integrated Agreement, and the lack of evidence regarding the application thereof, the ALJ finds no informative or determinative pattern demonstrating intent as to the rates affected by executing the DC Power Amendment. However, more likely than not, the weight of evidence indicates that the DC Power Amendment was not drafted with the specificity of references to Exhibit A that McLeodUSA depends upon. Over time, the parties have not consistently applied several terms (*i.e.* rate, charge, element, or rate element) to make any intention clear regarding the pending dispute. The lack of consistency and specificity of terms in other amendments indicates that the DC Power Amendment was similarly drafted.

64. The parties' arguments that the precise wording of the amendment is controlling in applying Exhibit A, or determinative of the parties' intent in entering the amendment, is not compelling. Both parties offered extensive testimony regarding the precise phase "-48 Volt DC Power Capacity" in the DC Power Amendment and the SGAT. However, the ALJ does not find it reasonable to interpret the phrase -48 Volt DC Power Usage Charge with great precision to the language in Exhibit A while that adjacent reference to an AC Usage Charge appears nowhere in Exhibit A.

65. More times than not, the prior amendments to the Agreement have not been as precisely aligned with the pricing exhibit as McLeodUSA contends as to the DC Power Amendment. The ALJ finds that the parties, more likely than not, intended a description of rates for power usage in SGAT Exhibit A, reflected in 8.1.4.1.2.

66. Section 1.2 of the DC Power Amendment states that orders for sixty (60) amps or less will not be monitored because the power usage rate reflects a discount from the rates for those feeds greater than sixty (60) amps. Contrary to McLeodUSA's interpretation, this statement is not true for the Power Plant rates in 8.1.4.1.1.

67. "Extrinsic evidence is admissible to prove intent when there is an ambiguity in the terms of the agreement." Cherokee Metro. Dist. v. Simpson, 148 P.3d 142, 146 (Colo. 2006), *citing* USI Props. E., Inc. v. Simpson, 938 P.2d 168, 173 (Colo. 1997). Both parties present plausible interpretations over aspects of the amendment in support of their interpretation thereof. After consideration of the arguments submitted, the ALJ finds that the lack of specificity and identity of terms between the DC Power Amendment and SGAT Exhibit A creates an unmistakable ambiguity in the terms of agreement. Extrinsic evidence must also be considered to determine the parties' intent as to the DC Power Amendment.

68. Neither McLeodUSA nor Qwest offered testimony of direct participants in the negotiations for the DC Power Amendment or the Agreement.

69. Ms. Spocogee admitted that the subject in dispute never was discussed in the course of negotiations, and Qwest was not aware of McLeodUSA's interpretation, because understanding was assumed.

70. The expectation that power plant would be billed on a measured basis following the amendment is called into question based upon the timing and presentation of its claim. The breach was alleged to have accrued in August 2004, yet no contest was raised until September 2005. It seems unlikely that McLeodUSA would have waited almost a year to confirm the expected benefits of the amendment and there is little evidence of an unexpected outcome of the amendment.

71. Hearing Exhibit 22 and Exhibit WRE_4 to Hearing Exhibit 23 are likely the best evidence presented as to McLeodUSA's intent because they record events by persons involved in the adoption of the amendment and were created at a time near in proximity to execution of the amendment.

72. Qwest argues that Hearing Exhibit 22 comprises internal communications relating to the DC Power Amendment prior to its execution. While McLeodUSA designed a spreadsheet to estimate and track savings after the amendment to bill on metered usage, Qwest properly contends that the spreadsheet is not consistent with McLeodUSA's interpretation of the amendment. See emails in Hearing Exhibit 22.

73. Exhibit WRE_4 to Hearing Exhibit 23 is a spreadsheet that was provided to Qwest in discovery. It was compiled by McLeodUSA to calculate the monthly savings from billing based upon usage. Notably, the USOC amount at 8.1.4.1.2.2 of $4.50, consistent with Qwest's interpretation of the amendment, was used by McLeodUSA to determine "Calculated Monthly Savings." The estimate of savings only calculates savings from the power usage charge, not the power plant charge that McLeodUSA now argues was affected. Ms. Spocogee admitted that no analysis of power plant savings was ever done prior to the execution of the DC Power Amendment. It is inexplicable why those representing McLeodUSA at that time would have disregarded power plant savings in calculating the monthly savings. In any event, there is no indication that those representing McLeodUSA did not understand and agree to the calculated savings.

74. Application of the more descriptive reference to -48 DC Power Usage is also supported by reviewing dealings of the parties prior to the execution of the DC Power Amendments. Exhibit WRE_5 (Hearing Exhibit 23C) is a representative Qwest Price Quote

provided to McLeodUSA months prior to the amendment giving rise to the present dispute. Recurring charges are quoted at the ordered amount (as both parties agree was appropriate at the time), but it is notable that the USOC C1FP5 rate element is described in the same term as is used in the amendment. While the USOC C1FQ6 rate element makes no reference to power usage -- this is the element McLeodUSA contends was intended to be affected by the amendment. In the dealings between the parties, it has not been shown that USOC C1FQ6 was understood to be within the terms of DC power usage at 8.1.4.1.

75. Qwest properly notes that its interpretation is also consistent with the singular -48 Volt DC Power Usage Charge found in Section 2.2 that references Exhibit A using identical terminology as previously used by the parties in their dealings evidenced by Exhibit WRE_5.

76. Qwest contends that pronouncements and discussions in the nonbinding Change Management Process evidences the intent of the amendment. However, unilateral expressions of one's intent, without more, do not evidence a meeting of the minds in agreement by contracting parties. Western Air Lines, Inc. v. Hollenbeck, 124 Colo. 130 (Colo. 1951). In absence of this information being associated with the negotiation and adoption of the contract, it does not provide extrinsic evidence of the parties' intent in entering the amendment.

77. Based upon all of the evidence presented, the ALJ finds that the DC Power Amendment only modified the DC power usage rate at 8.1.4.1.2.2 of Exhibit A to the SGAT.

E. Alleged Discrimination in Violation of C.R.S. § 40-6-119, 47USC §§ 251(c)(6) and 252(d)).

78. McLeodUSA alleges that Qwest's continued billing of DC Power Plant at ordered levels rather than actual usage results in McLeodUSA paying more than its share for the costs of the DC Power Plant, which was modeled as a usage-sensitive charge. As such, Qwest is

discriminating against McLeodUSA in favor of itself and any other carrier that is using more of the amps of DC Power it originally ordered in a given month than McLeodUSA. This practice results in charges to McLeodUSA that are excessive and discriminatory in violation of C.R.S. § 40-6-119 and 47 U.S.C. § 251(c)(6).

79. Pricing standards under the Act require the Commission to set just and reasonable rates for the interconnection of facilities and equipment, for purposes of § 251(c)(2), that are nondiscriminatory. 47 U.S.C. § 252(d)(1)(A)(ii) and 47 CFR 51.503.

80. The FCC has provided guidance to state Commissions regarding the pricing of elements. 47 C.F.R. 51.501 et seq. State commissions are specifically authorized to require Qwest to recover nonrecurring costs through recurring charges over a reasonable period of time. Nonrecurring charges must be allocated efficiently among requesting telecommunications carriers, and shall not permit an incumbent LEC to recover more than the total forward-looking economic cost of providing the applicable element. 47 C.F.R. 51.507(e).

81. The Commission described Total Element Long Run Incremental Cost (TELRIC) in the cost docket, Docket No. 99A-577T:

> TELRIC is a "forward-looking" methodology that estimates the cost of providing network elements at the level of output provided by the current network, using current wire center locations and the least cost, most efficient, currently available technology and procedures.
>
> Prices are set based upon what it would cost to provide the products and services starting in the present and going forward. The prices are not to be based on the historical costs or investment costs. TELRIC assumes that the company is efficient and is utilizing the most up-to-date, commercially available technology, and network design.

Decision No. C01-1302, 2001 Colo. PUC LEXIS 1140, 9-12 (Colo. PUC 2001).

82. Reviewing Exhibit 14, Mr. Starkey summarized and illustrated the allegations of discrimination. Hearing Exhibit Nos. 14 and 14C. Exhibit 14 is a discovery request focusing

upon comparing how Qwest engineers power plant for CLECs at the size of the power cables that are ordered by the CLEC in the collocation application (*i.e.* List 2 drain) as opposed to the very different engineering standard that Qwest has suggested it applies to its own equipment (*i.e.* List 1 drain).

83. As a result of these differing standards, because there are a number of CLECs collocated in many central offices and because the feeder orders often substantially exceed the actual List 1 drain or use anticipated by those CLECs, McLeodUSA contends that there may be Qwest central offices wherein the total CLEC orders and the List 1 drain of the ILEC may exceed the total capacity of the central office. Exhibit 14C illustrates that this scenario has occurred at least once in Colorado. For example, Column B of Exhibit 14C identifies "All CLEC Orders." Column A identifies the DNVRCOCHHGE central office. The column of total CLEC orders for power feeder cables is the CLEC order for power cables. McLeodUSA contends that the closest analog to this number is the List 2 drain.

84. Column C, Load for Power Plants in CO, is the total load on the plant, including Qwest's load.

85. Column D, List 1 Planning, is some additional load that Qwest plans over their planning horizon.

86. Column E is the summation of columns B, C and D.

87. Column F is the total plant capacity available to CLECs – notably not the total plant at the central office because additional plant might be in that same office that is not available to CLECs. Multiple numbers in Column F indicates that multiple power plants are available within the office. Mr. Ashton clarified that Column F references the total power plant in each central office referenced. Transcript Vol. II at 79-80.

88. Based upon Qwest's internal documents, McLeodUSA contends that it is reasonable to assume that CLECs actually use approximately 40 percent of the total orders (*i.e.* the List 1 drain).

89. The List 1 drain of all CLECs at the DNVRCOCHHGE central office would be about 12 percent of the total load for the central office. Yet, McLeodUSA contends that Qwest's interpretation of the amendment results in CLECs being charged for about 30 percent of the total load when only approximately 12 percent is being used. On the other hand, Qwest estimates base load on actual usage and McLeodUSA contends that including Qwest's feeder cables instead of the load in Column C, that number would drastically decrease the CLEC portion of the load.

90. McLeodUSA contends that designing central offices in this manner is inconsistent with every technical document in this record that indicates Qwest should engineer the entire power plant based on the List 1.

91. Thus, McLeodUSA contends that Qwest's engineering of plant for CLECs (*i.e.* List 2 drain) differently than for themselves (*i.e.* List 1 drain) is unjustly discriminatory.

92. The Commission reaffirmed its adoption of Qwest's Collocation Study in C02-0409 at 67, Docket No. 99A-577T. Mr. Ashton testified that he is familiar with the study and that he provided inputs for the model. While the model does not explicitly state that power plant is charged on a per amp ordered basis, Mr. Ashton testified that the assumption is implicit because that is how the cost study was modeled. Transcript Vol. II at 40-48. He generally believes and assumes that the Commission ordered Qwest to charge on a per-amp-ordered basis because the Commission adopted the Qwest cost model which says that power plant is charged on a per-amp-ordered basis.

93. Although technical publications were admittedly not modified, Qwest believed that "order" meant "feeder cable." Transcript Vol. II at 49. Mr. Ashton acknowledged that the written rule for sizing power plant says to try to design plant based on List 1 drain; however he states that he follows the Commission's order where it conflicts with Qwest written technical documentation. Transcript Vol. II at 50-51.

94. The only documentation that Qwest provided supporting the statement that power plant is sized by taking into account the List 2 drain of CLECs is Confidential Hearing Exhibit 14C. Mr. Ashton further described spreadsheets that provide the foundation for such discovery response to track existing load, what the collocation orders were in that site, and what planned loads Qwest planned for each central office.

95. Mr. Ashton testified that Qwest engineers take the total requirement of power needs into consideration when designing the power plant for a central office. Such needs consider Qwest's requirements as well as CLECs' requirements for power. As for CLECs, Qwest relies upon the power feed ordered and "**assumes** that the order is based upon List 2 Drain - - the current the equipment will draw under the most power demanding conditions, such as initial power-up after a power failure." Hearing Exhibit 31 at 4. Mr. Ashton contends that such an assumption is reasonable because Qwest does not know, and cannot reasonably forecast, the draw that CLEC equipment requires.

96. From an engineering standpoint, Qwest admits that "Qwest designs a Central Office based upon List 1 drain -- the current the equipment will draw when operating normally at maximum capacity." Id. Designing central offices in this manner assures CLECs that the ordered amount of power will be available to them at all times.

97. Mr. Ashton contends that Qwest receives a CLEC order for power and has no way of knowing whether the ordered amount is the List 1, List 2, something less, or something more. All is known is that it is an ordered amount of power. Thus, Qwest assumes that the ordered amount is the List 2, for sizing cable; however, this provides no information as to actual load (*i.e.* approximately List 1 Drain). Transcript Vol. II at 77. Therefore, he contends that one would not know how to amend technical documentation based upon these circumstances.

1. Discussion

98. Without identifying any legal basis, Qwest generally contends that McLeodUSA should not be able to challenge Commission approved collocation rates adopted in Docket No. 99A-577T. It is contended that those rates were determined in a fully contested proceeding and incorporated into the pricing exhibits (SGAT Exhibit A) in McLeodUSA's ICA.

99. The Commission has broad rate authority to avoid discrimination under federal and Colorado law. See, 47 U.S.C. , C.R.S. §§ 40-3-101, 40-3-102, 40-3-111, 40-3-111, and 40-6-119. In absence of any supporting authority for its contention, Qwest fails to demonstrate that any challenge to collocation rates is beyond the scope of this proceeding and Commission authority.

100. Presenting evidence and argument on several issues, the parties blur ratemaking considerations with facility or engineering considerations. Both parties presented evidence regarding the appropriate manner to recover costs in rates based upon a measured or an ordered basis. Extensive evidence and argument has been offered regarding the design, construction, and use of facilities. While these issues may impact cost recovery and rate design, these matters add little to this proceeding because there is no basis for comparison to existing rates in the record. Collocation rates were approved in Docket No. 99A-577T based upon the Commission's

adoption of Qwest's collocation cost study. The cost support for the collocation rates in the Agreement is not in the record. Generally speaking, ordered versus usage may both theoretically be allocators over which costs may be recovered. The record in this docket does not demonstrate the modeling, assumptions, conditions, and calculations for the recovery of costs designed therein. This is not to say that the rate cannot be considered in this complaint docket; rather, that McLeodUSA failed to meet its burden of proof to demonstrate the basis upon which rates were approved in 99A-577T, how such rates are discriminatory, and how they result in McLeodUSA paying more than its share for the costs of the DC Power Plant under the amendment in violation of law.

F. Counterclaim

101. Qwest alleges that McLeodUSA has been properly charged for DC Power in accordance with the Interconnection Agreement, specifically the DC Power Amendment, in an amount not less than $355,827.15.

102. McLeodUSA admits withholding disputed amounts equal to the amount of overcharges since the effective date of the DC Power Amendment.

103. Qwest alleges that McLeodUSA disputed such charges and improperly failed to pay these withheld amounts in breach of the DC Power Amendment.

104. Qwest requests that McLeodUSA be ordered to pay the balance due in accordance with the terms of the Agreement.

105. McLeodUSA generally denied the counterclaim, but admits withholding disputed amounts in accordance with the terms of the parties' interconnection agreement. McLeodUSA also notes that it voluntarily resumed payments in December 2005 while reserving its right to challenge all such amounts.

106. Based upon the findings above regarding the DC Power Amendment, Qwest has met its burden of proof on its counterclaim as to the scope of DC power charges modified by the amendment. McLeodUSA will be ordered to pay the balance due in accordance with the terms of the Interconnection Agreement.

III. CONCLUSIONS

107. The DC Power Amendment resulted in the DC power usage charge specified at 8.1.4.1.2 of Exhibit A to Qwest's SGAT and McLeodUSA's Interconnection Agreement with Qwest being billed based upon actual measured usage, versus a historical as-ordered basis.

108. McLeodUSA failed to meet its burden of proof to show that Qwest breached the interconnection agreement between McLeodUSA and Qwest.

109. McLeodUSA failed to meet its burden of proof to demonstrate that the rates approved in Docket No. 99A-577T are discriminatory in violation of law.

110. Qwest met its burden to show that disputed charges for DC power at issue in this docket were appropriately charged in accordance with the Agreement.

IV. ORDER

A. It Is Ordered That:

1. The Complaint by McLeodUSA Telecommunications Services, Inc. (McLeodUSA) against Qwest Corporation (Qwest) is dismissed.

2. The Counterclaim by Qwest against McLeodUSA is granted. Qwest is entitled to charge McLeodUSA for DC power in accordance with this decision and the Interconnection Agreement approved by the Commission in Docket No. 01T-019. McLeodUSA shall pay the balance due for such charges in accordance with such agreement.

3. Docket No. 06F-124T is closed.

4. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

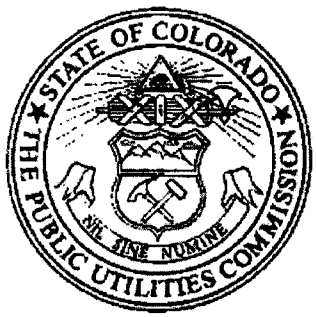
5. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

6. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



ATTEST: A TRUE COPY

Doug Dean.
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge

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