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ATTORNEYS FOR QWEST CORPORATION

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Complaint of MCLEODUSA TELECOMMUNICATIONS SERVICES, INC. against QWEST CORPORATION for Enforcement of Commission-Approved Interconnection Agreement	Docket No. 06-2249-01 QWEST'S ANSWER TO MCLEODUSA'S PETITION FOR REVIEW, RECONSIDERATION OR REHEARING OF REPORT AND ORDER

I. INTRODUCTION

Pursuant to Utah Code Annotated § 63-46b-129(2)(a) and Utah Admin Code R746-100-11(F), Qwest Corporation ("Qwest") hereby files its Answer to the Petition for Review, Reconsideration, or Rehearing of Report and Order ("Petition for Review") filed by McLeodUSA Telecommunications Services, Inc. ("McLeod"). Qwest asks the Public Service Commission of Utah ("Commission") to deny McLeod's Petition for Review and to affirm the findings and conclusions of the Commission's Report and Order ("Order") dated September 28, 2006.

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 interpret the underlying ICA – an issue which McLeod explicitly and clearly represented to the Commission it was *not* raising in this proceeding.[1] Indeed, as the Commission found, "[t]he parties agree that, under the terms of the ICA, McLeod was obligated to pay Qwest for DC power and power plant on an 'as ordered' basis in accordance with the collocation rate elements listed in section 8.1.4 of Exhibit A to Qwest's Utah Statement of Generally Available Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunications Services ('SGAT')."[2]

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 Order ruled correctly on both issues and should be affirmed.

II. ARGUMENT

A. McLeod's Contract Claims are Unfounded

McLeod's primary assignment of error regarding the contract issues is that the Commission 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 the September 28 Order discusses and analyzes section 7.1.9 of the underlying ICA – the very section McLeod claims the Commission ignored.[3] In its conclusions,

[1] *Tr.* 34.5-9, 34.25 – 35.7.
[2] September 28 Order, p. 5-6.
[3] September 28 Order, p. 19-20.

the Commission specifically identified the ICA as a source of its analysis: "We find 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 on McLeod's orders for power distribution cable."[4]

The argument is also disingenuous. In its Complaint 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. . . . This charge was billed and paid regardless of [the number of] amps McLeod equipment drew . . . in a particular month"[5] Dissatisfied with the "original arrangements" reflected in the ICA, McLeod "requested an amendment to the Interconnection Agreements to reduce collocation power charges in 2004."[6] McLeod further 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. . . ."[7] Now, after the Commission has interpreted the DC Power Measuring Amendment in Qwest's favor, McLeod argues that the Commission ignored the underlying ICA, which in McLeod's revised view provided for DC Power Plant charges at measured levels irrespective of the DC Power Measuring Amendment.

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. As McLeod's witness Tami Spocogee testified:

> Q. And up until the Power Measuring Amendment was executed and approved, the operative document that governs the prices and terms of interconnection between McLeodUSA, was the interconnection agreement between the parties executed, oh, a few years prior to that?

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[4] September 28 Order, p. 26.
[5] *Complaint for Enforcement*, ¶6.
[6] *Complaint for Enforcement,* ¶7.
[7] *Complaint for Enforcement*, ¶9.

> A. I don't understand what you just asked.
>
> Q. In other words, the dispute that we're here about today doesn't come up until -- let me rephrase. The dispute as to whether power plant charges should be charged or assessed to McLeod based on a measured usage basis doesn't come into play until the power plant amendment or Power Measuring Amendment was executed and approved by the Commission, correct?
>
> A. We did not bring the dispute forward with Qwest until the amendment was signed.

Thus, McLeod's Petition not only represents a new argument and inaccurately describes the Commission's analysis, it directly contradicts the testimony of McLeod's 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 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.

McLeod also argues that the September 28 Order erroneously interpreted the DC Power Measuring Amendment as ambiguous.[8] However, McLeod does not contest the findings of the September 28 Order 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 argument against the Order's conclusions regarding ambiguity 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 the "power usage" charge and the "usage"

[8] *Petition for Review*, p. 9-11.

rate multiple times in the Amendment without ever mentioning the separately determined and separately billed Power Plant charge, section 1.2 of the Amendment plainly excludes the possibility that "power usage" include "power plant" rates. 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, the rate for "power usage" is lower for feeds of less than sixty amps ($1.95 per amp ordered) than for feeds of greater than sixty amps ($3.89 per amp ordered). In contrast, the rate for "power plant" in Exhibit A to the underlying interconnection agreement[9] indicates a rate of $11.7795 for orders of 60 amps or less, and a rate of $7.927 for power usage for orders of more than sixty amps. This rate structure indicates a discount for smaller power usage orders, but a higher price for smaller power plant orders. 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. McLeod counters in its Petition that the explicit reference to the "discount" for power usage orders of less than sixty amps does not refer to a rate element, but this argument ignores the key term "discount," which expressly refers to a "Charge" for DC Power Usage – and it is the "Charge" for Power Usage and Power Plant that is at issue in this case. And as the Commission correctly noted at page 13 of the September 28 Order, "it is . . . apparent that there is not "DC Power Usage Charge listed in Exhibit A," later describing it as 'non-existent." At bottom, though Qwest believes the ICA and the DC Power Measuring Amendment unambiguously support its interpretation, neither document supports McLeod's position.

Before turning to McLeod's arguments regarding discrimination, it is important to observe one final misstatement in McLeod's Petition for Review. At page 8, continuing to page 9, 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 Qwest assigns power costs to itself" using List 1 drain. First, this statement is incorrect. Qwest does not assign power plant costs to itself

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[9] Hearing Exhibit 9.

based on either usage or List 1 drain, 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.[10] Second, even if it were true that Qwest's power plant capacity costs were limited to List 1 drain, McLeod does not even want to pay for the List 1 drain amount attributable to its equipment – rather, McLeod insists that it should pay only the measured amount, which may in fact be far less than List 1 drain. Thus, McLeod seeks an improper preference in advocating its interpretation of the Amendment.

B. McLeod's Discrimination Claims are Unfounded

At pages 11-20 of the Petition for Review, McLeod renews its discrimination claim, arguing that the record in this case is adequate to find discrimination and that the Order incorrectly relies on certain findings that are not supported by the record. *Petition for Review, p. 11.* McLeod is wrong on both counts. As the Order clearly held, there is 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."[11]

1. The parties agreed to bill power on an "as ordered" basis, and the Commission's findings on that issue are supported by the record.

McLeod's first claim regarding "findings not supported by the record" is aimed at the Commission's finding that the parties had previously agreed that McLeod would be billed on an "as ordered" basis. Order, p. 24. McLeod claims that this finding is not supported by the record. However, it is McLeod's claim that is not supported by the record, not the Commission's finding. The record in this case is replete with support for the Commission to find, as it did, that

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[10] Tr. 213.
[11] Order, p. 26.

the underlying ICA provided for power to billed on an "as ordered" basis prior to the power measuring amendment.

First, the ICA (official notice of this document was taken by Judge Goodwill, without objection by either party) is clearly an agreement between the parties – it is a document signed by both parties, containing various rights and responsibilities in connection with Qwest's Section 251 obligations. The Commission approved that agreement, and McLeod is asking the Commission to enforce it. McLeod is not claiming that the ICA is void or voidable because of fraud or mistake or lack of mutual assent. Thus, it is beyond reasonable dispute that the ICA and the Amendment constitute an "agreement" between Qwest and McLeod.

The next inquiry then is whether the agreement between the parties provided for power to be billed on an "as ordered" basis. The first piece of evidence in the record that supports this finding is the Power Measuring Amendment, Hearing Exhibit 1. That document, as interpreted by both parties, changed at least some of the power rate elements from "as ordered" to "measured". If the previous agreement did not provide for power to be billed on an "as ordered" basis, the Amendment would be meaningless, and no party is asserting that the Amendment was meaningless. Indeed, McLeod's very petition to enforce the Amendment can be seen as clear evidence that the prior agreement provided for power to be billed on an "as ordered" basis. The Commission could rely on this information alone as sufficient to support its findings that the parties had agreed in the ICA to bill power on an as ordered basis. But there is even more support for this finding as well.

Support for the Commission's finding is also found in McLeod's behavior since the original ICA was implemented. McLeod never previously disputed any billings for power on an "as ordered" basis, thereby lending support to the Commission's finding that indeed this is what the parties agreed to. McLeod tries to brush aside its prior behavior, claiming only that it never "agreed" to the arrangement, without citing any supporting evidence, without refuting any of the existing

evidence, and without a rational explanation as to why it would have paid bills on an "as ordered" basis for years and years if in fact it did not believe that the ICA called for that.

McLeod next claims that the ICA itself, and the Exhibit A, do not contain the words "as ordered", and that Qwest has only been able to support the "as ordered" billing by pointing to a cell in its cost study. *Petition for Review, p. 12.* While it is true that the ICA does not use the words "as ordered", it is also true that it does not say "per amp used" as McLeod wishes it did. The Amendment itself is clear though that the billing for the power usage, (as opposed to the power plant) will shift from as ordered to a usage based charge. The fact that McLeod signed the amendment confirms its understanding of the terms of the prior agreement. Furthermore, McLeod cannot so lightly dismiss Qwest's evidence as "a comment cell in its cost study." This cost study was the study upon which the Commission-ordered rates were based. As McLeod has pointed out in other portions of its pleadings in this case, Qwest is bound to implement the ICA in a manner consistent with the law. Implementation of the power rates on an "as ordered" basis was consistent with the law in Utah, as ordered by the Utah Commission when it established the power rates in the cost docket. This also supports the Commission's finding in this case that the parties' agreement was to bill power on an "as ordered" basis, as that agreement was consistent with the evidence upon which the Commission based and established the power rates.[12]

2. The Commission did not apply the wrong legal standard to the discrimination claim

McLeod next claims, at pages 13-15 of its Petition for Review, that the Commission applied the wrong legal standard to the discrimination claim. McLeod claims that it has shown that Qwest provides power to McLeod on terms and conditions less favorable than it does to itself and that a finding of discrimination must therefore follow. McLeod is wrong for at least two reasons. First, Qwest is not providing power to CLECs on terms and conditions less favorable than it does

[12] See, Hearing Exhibit 13 and Tr. 204.

to itself. Qwest allows the CLEC to specify the amount of power it orders and will be billed for, as it does for itself (generally of course, since Qwest does not technically collocate in its own central offices and does not actually "order" power from itself). Qwest allows the CLECs to reduce the amount of power ordered through a power reduction amendment. If anything, Qwest provides a *superior* level of power capacity to CLECs, and charges for that capacity in accordance with Commission-approved rates under a Commission-approved ICA. Such conduct is specifically permitted under the Act and does not call discrimination issues into play.

Second, as discussed in Qwest's post hearing briefing in this matter[13], the parties to an ICA are free to agree to terms and conditions *without regard* to the non-discrimination provisions of the Act.[14] Though McLeod spends a considerable amount of time discussing what it calls the "absolute" non-discrimination requirements set forth the First Report and Order, it utterly ignores the language of the Act itself, the law that the First Report and Order implements. That law, at its very heart, allows parties to agree to all manner of terms and conditions in an ICA, including those at issue here, and if agreed to (and McLeod cannot really escape the conclusion that it agreed to these terms, in spite of its post-hoc protests to the contrary), the non-discrimination provisions are not even the subject of objection or inquiry.

3. McLeod's order for power cables is its "power order", and the Commission was correct in making that finding.

McLeod claims, at page 16 and again at page 19, of its Petition for Review, that the Commission erred in finding that McLeod's order for power plant capacity is effectively accomplished by its order for power distribution cables. McLeod further claims that such a finding is not supported by the record. Again, McLeod is wrong on both counts. As noted above, there is ample basis to find that Qwest advised the Commission, and the Commission fully understood, that power plant

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[13] See, Qwest Corporation's Post-Hearing Reply Brief, discussion at p.25.

[14] See, e.g., Section 252(a)(1) which provides that "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title." Of course Section 251(b) and (c) contain the non-discrimination provisions upon which McLeod relies so heavily.

capacity would be billed on an "as ordered" basis, with the "order" being the order for power distribution cables. This understanding was effectively a part of the cost docket rate order, and Qwest's implementation of that order has at all times been consistent with what it told the Commission it would be doing. McLeod is many years late to challenge that understanding, or its agreement to those terms in the ICA.

4. Qwest had no obligation to request or engineer for McLeod's List 1 drain.

McLeod further claims that the Order "blames" McLeod for failing to provide List 1 drain, when instead the Commission should hold Qwest accountable for failing to do so and should find that such conduct is discriminatory. *Petition for Review, pp. 16-18.* Again, this argument misses a number of points, already considered by the Commission in entering its Order. First, McLeod never challenged the application of the Power Plant rate element prior to the Amendment – thus, the Order is more than justified in concluding that the "as ordered" billing was an agreed-upon term. Second, Qwest established on this record that the way it asks CLECs to order power plant capacity, and the way it bills that capacity, is exactly the same as how McLeod offers and bills power plant capacity to its own collocators.[15] That evidence supports a Commission conclusion that Qwest's practices are both reasonable and non-discriminatory. Finally, as also discussed above, nothing prohibits Qwest from providing and billing for a superior level of power plant capacity to CLECs than it does to itself – and McLeod's previous lack of protest to these ICA terms confirms that it freely agreed to them.

5. The Commission's Order is Not Inconsistent with Qwest's Technical Publications.

McLeod's final protest concerns whether the Commission's Order is consistent with Qwest's technical publications. *Petition for Review, p. 19.* There is ample evidence in the record to

[15] Hearing Exhibits 25-27.

support a conclusion, as discussed in Qwest's prior briefing, that the technical publication addressed only how Qwest would size power plant for its own demand[16], that the methodology Qwest chose for sizing power plant for CLEC demand was reasonable[17], and that sizing power plant in accordance with the way McLeod advocates would have resulted in under-sizing based on the amount of power McLeod equipment uses compared to the List 1 drain information that McLeod provided.[18] Furthermore, there is McLeod's clear expectation that List 2 drain will be available to it if McLeod were ever to demand it.[19]

III. CONCLUSION

For the reasons stated herein, the Commission should deny McLeod's Petition for Review and affirm its September 28, 2006 Report and Order denying McLeod's complaint on both the contract interpretation issues and McLeod's discrimination claim, and sustaining Qwest's counterclaim on these issues.

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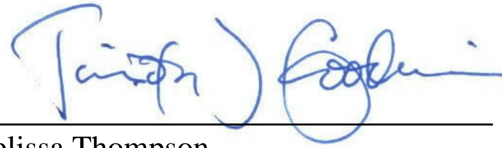
[16] See, Qwest's Post-Hearing Brief, discussion at p. 28.
[17] Id.
[18] Id., fn. 54.
[19] Tr. 102.

DATED this 13th day of November, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that the original and five copies of the foregoing were hand delivered on November 13, 2006 to:

Julie P. Orchard
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And a true and correct copy was sent by U.S. mail, postage prepaid, on August 9, 2006, to:

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