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ATTORNEYS FOR QWEST CORPORATION

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| **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**<br><br>**QWEST'S RESPONSE TO MOTION TO COMPEL** |

## *Introduction*

Qwest Corporation ("Qwest") hereby answers the Motion to Compel filed by McLeodUSA Telecommunications Services, Inc. ("McLeod") on April 12, 2006. McLeod moves the Commission to compel Qwest to respond to two data requests, one seeking cost studies underlying the collocation rates at issue in this docket, and the other seeking Qwest to provide information with regard to the power capacity in Qwest central offices in Utah.

Qwest should not be required to respond to either of those data requests as the information sought in those requests is not relevant to this proceeding and is not reasonably calculated to lead to the discovery of admissible evidence. Indeed, it is significantly outside the scope of this proceeding, so that even with a broad and liberal

interpretation of the rights of discovery, the requests should be denied.

## *Argument*

This case is first and foremost about the proper interpretation of the DC Power Measuring Amendment that the parties entered into in August of 2004. There is no reasonable dispute in this case that, prior to the execution of that amendment, the parties' interconnection agreement provided that Qwest would assess all DC power charges on an "as ordered" basis. The only issue raised in this petition for enforcement is whether the power measuring amendment is limited to the power usage charge, as is Qwest's position, or if it extends more broadly to encompass rates such as power plant (even though those rates are not mentioned in the amendment), as is McLeod's position.

**Data Request No. 3**

Data Request No. 3 asks Qwest to produce copies of its collocation cost study. Qwest objected to that Data Request on the basis that the information sought was not relevant to the issues raised in this proceeding. Qwest continues to believe that the cost studies are not relevant and does not believe that Qwest itself injected the cost issue into this case. As discussed above, this case is about the proper interpretation of the DC Power Measuring Amendment. Qwest believes that in order to address the issue of the scope and interpretation of the amendment, the Commission should look first at the language of the amendment, and may take into account objective manifestations of the parties' intent that were made contemporaneously or prior to the signing of the amendment.

As such, when testimony is filed, Qwest will present evidence with regard to its

intent in entering into the amendment and will present evidence showing that information was available to the CLEC community, including McLeod, at the time McLeod signed the amendment, that made it clear that the power measuring amendment applied, in accordance with its terms, only to the power ***usage*** rate element and not the power ***plant*** rate element.

Plainly, a case of this nature presenting a limited issue such as the one described above, does not lend itself to a full blown exploration of Qwest's costs or an examination of Qwest's cost studies, as McLeod seems to intend with Data Request No. 3. As McLeod is well aware, the Commission in Utah has engaged in extensive cost dockets and has ordered rates for many rate elements, including the collocation rates at issue in this case.

McLeod's attempt to get at cost evidence in this proceeding and make such cost evidence an issue is plainly an attempt to launch a collateral attack on the Power Plant rate element, a rate element that was established by Commission order and which is not modified by the Power Measuring Amendment. Indeed, regardless of how the Power Plant rate element was developed, the only relevant information for this proceeding is that in Docket 00-049-106, the Power Plant rate element was ordered by the Utah Commission to be charged on an "as ordered" basis as opposed to an "as consumed" basis.

As such, Qwest's cost study is immaterial and irrelevant in a dispute regarding a petition for enforcement of an interconnection agreement. Furthermore, this enforcement proceeding is not the appropriate venue in which to launch a collateral attack on rates. If McLeod wishes to investigate costs, potential discrimination, or

change rates for particular rate elements, McLeod must file a complaint against those rates and petition the Commission to open a cost docket to investigate those rates. McLeod, by seeking cost study information, is in fact attempting to broaden the scope of this debate beyond the mere enforcement of the interconnection agreement amendment into a rate investigation. Such an action is not appropriate in a petition for enforcement.

McLeod goes on to claim that Qwest injected the cost issue into this proceeding by virtue of its statement at paragraph 8 of its answer wherein Qwest states "the underling purpose of the charge was to recover the fixed cost of the equipment in order to provide the amount of DC Power capacity requested by McLeod in its collocation application to Qwest. It would not have been appropriate to prorate the recovery of these fixed costs based on actual usage because they do not very with usage." Qwest disagrees with McLeod that this information in Qwest's answer makes the cost study relevant.

First, Qwest does not believe any information in or about the cost study has relevance to either McLeod's attempts to revise the DC Power Measuring Amendment or to any Qwest's defense of McLeod's claims, except for the fact that the Commission has approved the rate, at ordered (not measured) levels. The only party attempting to inject the cost study as an issue in this case is McLeod. Second, McLeod takes Qwest's quote out of context. The statements in paragraphs 7 and 8 of Qwest's answer merely describe the contested cost docket proceedings that resulted in the DC power rates. McLeod should not be permitted to take these two sentences by Qwest, which were offered purely for contextual purposes and greater clarity, and suggest that an explanation of Qwest's rate structure somehow puts those rates at issue in this

proceeding. Qwest's mention of the cost docket, and the issues that were discussed and decided in that cost docket, in no way injects those issues into this proceeding.

Furthermore, as noted above, the cost study was evaluated in the cost docket and the Commission ordered rates that resulted from that cost docket, including the method of charging for those rates, is well established and not subject to dispute. Moreover, the Commission ultimately rejected Qwest's cost studies, models, and advocacy for the DC Power elements, and accepted the Division of Public Utilities' ("DPU's") models and proposed rates. As a result, it is difficult to imagine how Qwest's cost study could be relevant to examining the rate proposed by DPU and approved by the Commission.[1]

In any event, if it has been McLeod's consistent contention that the DC Power Plant charge should be assessed on a measured usage basis, McLeod could have raised that point in the cost docket proceedings. However, even though McLeod intervened, McLeod did not raise these claims in that docket, and may not do so at this juncture in a petition for enforcement of the DC Power Measuring Amendment. For all of these reasons, Qwest respectfully suggests to the Commission that the demand for cost information in this docket is outside the scope of this proceeding and not reasonably designed to lead to the discovery of admissible evidence or evidence that is relevant to the limited issues presented to the Commission in this case.

Without waiver of this objection, Qwest states that, as noted above, its cost

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[1] McLeod mentions the ruling of the Iowa Utilities Board in a similar discovery dispute in a similar dispute between McLeod and Qwest in that state. In Iowa, however, the Board accepted the Qwest testimony, rates, and studies, such that those studies are at least somewhat connected to the approved rate in that state. There is no such connection here.

studies, and the cost studies presented by the other parties, as well as those of the Division, whose costs were ultimately approved by the Commission, are all part of the record in Docket No. 00-049-106. Qwest's cost studies were filed along with the testimony of Mr. Robert Brigham in that docket. Those cost studies were not designated as confidential and are equally available to McLeod as they are to Qwest. McLeod should not be permitted to require Qwest to do its own research. If McLeod wishes to evaluate the cost study information and present evidence or testimony on those issues in the hearing, Qwest believes that it has every ability to do so at this point (subject to a motion to strike by Qwest) without any requirement on Qwest that it produce any additional information to McLeod.

**Data Request No. 8**

McLeod claims that Data Request No. 8, which seeks data on Qwest's DC Power Plant capacity, is also relevant to the issues in this proceeding. McLeod claims that Qwest has "taken the position that it often must invest in additional power plant capacity based upon the size of a McLeod order because fulfilling the power capacity consistent with that order would somehow exhaust Qwest's existing plant and would require additional investment." *Motion to Compel at p. 3.* Qwest would like to clarify two things with regard to this allegation.

First, Qwest is unaware that it has taken the position that McLeod describes in this proceeding. McLeod does not cite to any portion of Qwest's Answer or otherwise support this allegation. Second, whether or not Qwest must invest in additional power plant capacity based on the size of the McLeod order is largely irrelevant to the issues in this proceeding. This case is about the interpretation of the Power Measuring

Amendment. Whether Qwest must actually invest in the real world in power plant equipment to fulfill each of McLeod's orders is not germane to the lawful charges that Qwest is permitted to assess under the parties' interconnection agreement and pursuant to rates established by the Commission in a cost docket.

As the Commission is aware from the many prior cost dockets in this state, costs and prices for collocation and network elements are established under a total element long run incremental cost ("TELRIC") methodology. That methodology is not based on Qwest's embedded costs in the network or its actual experience in regard to a particular McLeod collocation order. In other words, it is not an "actual cost" standard. Thus, whether Qwest invests or augments relative to a particular McLeod order does not have any bearing on the rate elements that are affected by the power measuring amendment.

An example may show why McLeod's contentions of relevance should be rejected. For example, Qwest does not necessarily build a new loop or new transport capacity when an order for loops or transport is placed by McLeod or any other CLEC. Yet, it is appropriate that McLeod pay Qwest the TELRIC rates for loops and transport because, once McLeod orders those loops and transport, they are available for McLeod's use. This is true whether or not McLeod uses the loop immediately, or whether or not Qwest has available inventory at the time of McLeod's order.

The same principle applies with regard to DC power. Once McLeod places an order for DC power, the DC power distribution and plan facilities are available for McLeod's use and McLeod should be required to pay for those elements. In this case, McLeod should be required to pay the Commission-ordered rates for DC Power Plant, which is not a variable rate based on usage, but rather is a rate based on the "as

ordered" amount.

Thus, while it may be interesting to explore the issues around Qwest's real world experience in augmenting its power plant, that information is no more relevant to the resolution of this particular dispute in this particular docket than the question of whether in fact Qwest has to build a loop to fulfill a particular order or is merely able to provision it out of its existing loop inventory. Either way, the CLEC should pay for the facilities ordered. Thus, the information requested in Data Request No. 8 is not relevant, will not lead to admissible evidence, and will only serve to expand the testimony and argument presented in this case far afield of the issue before the Commission: the interpretation of the DC Power Measuring Amendment.[2]

## *Conclusion*

In arguing against McLeod's Motion to Compel, Qwest is mindful that the discovery rules and the discovery processes at the Commission are broad. Qwest is also aware that the Commission, in general, encourages disclosure of information through the discovery process and usually defers a determination as to relevancy at the hearing after material has been disclosed. However, there are some requests, such as the ones made by McLeod in this case, that simply are too far afield or would serve to expand the proceeding so significantly, that Qwest simply must make its relevancy objections at this juncture.

While encouraging broad discovery, the Commission should not allow discovery

[2] Qwest also notes that in footnote 1 of the Motion, McLeod states that Qwest has interposed a confidentiality objection as well, but that is incorrect – Qwest's objections to these data requests are not based on any claim of confidentiality. Rather, the sensitive nature of the information involved, combined with the remoteness of its relevance, counsels rejecting discovery.

so far ranging as to go beyond the scope of legitimate issues raised in this proceeding. In this case, the issues raised focus on the interpretation of the Power Measuring Amendment. The primary focus should therefore be on the language of that amendment and the parties' objective manifestations with regard to the intent of that amendment. In no way does the data requested by McLeod illuminate either of those questions. For those reasons, the Commission should deny the Motion to Compel.

DATED this 24th day of April, 2006.

Respectfully submitted,

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ATTORNEYS FOR QWEST CORPORATION

# CERTIFICATE OF SERVICE

I certify that the original and five copies of the foregoing were sent by overnight delivery on April 24, 2006 to:

Julie P. Orchard
Commission Administrator
Utah Public Service Commission
Heber M. Wells Building, 4th Floor
160 East 300 South
Salt Lake City, UT 84111

And a true and correct copy was sent by U.S. mail, postage prepaid, on April 24, 2006, to:

Mark P. Trinchero
DAVIS WRIGHT TERMAINE LLP
1300 SW Fifth Ave., Suite 2300
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and

Gregory J. Kopta
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