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BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
Chairman
WILLIAM MUNDELL
Commissioner
MIKE GLEASON
Commissioner
KRISTIN MAYES
Commissioner
BARRY WONG
Commissioner

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McLEODUSA TELECOMMUNICATIONS SERVICES, INC., **Complainant,** **v.** **QWEST CORPORATION,** **Respondent**	DOCKET NOS. T-03267A-06-0105 T-01051B-06-0105 **QWEST CORPORATION'S NOTICE OF FILING OF SECOND SUPPLEMENTAL AUTHORITY**

Qwest Corporation ("Qwest") hereby files as supplemental authority the "Initial Order: Recommended Decision to Deny Petition for Enforcement" of the Washington State Utilities and Transportation Commission, in *McLeodUSA Telecommunications Services, Inc. v. Qwest Corporation,* No. UT-063013, dated September 29, 2006.

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Arizona Corporation Commission
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RESPECTFULLY SUBMITTED this 2nd day of October, 2006.

QWEST CORPORATION

By: _____

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[Service Date September 29, 2006]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

McLEODUSA TELECOMMUNICATIONS SERVICES, INC.,	)	DOCKET UT-063013
	)	ORDER 03
Petitioner,	)	
v.	)	INITIAL ORDER: RECOMMENDED DECISION TO DENY PETITION FOR ENFORCEMENT
QWEST CORPORATION,	)	
Respondent.	)	
. . . . .	)	

Synopsis: This is an Administrative Law Judge's Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of this Order. If this Initial Order becomes final, the Commission will deny McLeod's petition for enforcement and require McLeod to return the full amount of disputed DC power charges in the amount of $205,019.57 within 30 days after the date of a final order.

SUMMARY

1 **PROCEEDINGS.** The Commission, on due and proper notice, conducted a hearing on this petition for enforcement on June 29-30, 2006 in Seattle, Washington before Administrative Law Judge Theodora M. Mace.

2 This proceeding concerns a billing dispute between McLeodUSA (McLeod) and Qwest Corporation (Qwest) arising out of a difference in their respective interpretations of the DC Power Measuring Amendment (Amendment) to their interconnection agreement. The amendment is Attachment A to this initial order.

McLeod contends that the amendment requires Qwest to bill McLeod for the DC power usage and power plant components of the rate only according to McLeod's measured usage of power. Qwest contends that the amendment changed only the billing for the usage component of the DC power rate and that billing for the power plant component of the rate is governed by the original interconnection agreement which requires billing based on the amount of power initially ordered by McLeod..

3 **JURISDICTION.** The Commission has jurisdiction over this petition under 47 U.S.C. sections 251-252 which address the negotiation, arbitration, state commission approval and enforcement of interconnection agreements; RCW 80.36.150 which identifies Commission authority over interconnection agreements; and WAC 480-07-650 which sets forth the Commission's rules regarding petitions for enforcement of interconnection agreements.

4 **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).

5 **RECOMMENDED DECISION**. This decision recommends that the Commission deny McLeod's petition because McLeod failed to provide extrinsic evidence supporting its interpretation of the Amendment. The decision further recommends denial of McLeod's claim that Qwest's power plant rate is discriminatory because the record in this proceeding is inadequate to support a decision on the issue.

MEMORANDUM

I. BACKGROUND.

6 McLeod filed this petition because of a dispute with Qwest about the DC Power Measuring Amendment (Amendment) to its interconnection agreement (ICA) with

Qwest.[1] McLeod entered into the underlying ICA in 2000 and the amendment was executed on August 18, 2004.[2]

7 The dispute involves the parties' differing interpretations of the amendment's provisions for billing DC power. The billing for DC power is based on a combination of 1) the power plant capacity necessary to supply the required amount of power and 2) the actual amount of DC power used. DC power plant converts AC power from the local electric utility into DC power that is used to operate both the incumbent local exchange carrier's (ILEC's) and the collocated[3] competitive local exchange carriers' (CLECs') central office telecommunications equipment.[4]

8 In order for a CLEC 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. 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.

9 The parties agree that under the original ICA, Qwest billed McLeod for both DC power plant capacity (the amount of plant capacity needed to provide power, determined by the size of feeder cable initially ordered by McLeod) and for DC power usage (the actual amount of power used)[5] according to a rate schedule found in Exhibit A to the ICA.[6] This Exhibit A is the same Exhibit A that is attached to Qwest's SGAT and has been revised several times over the years when Qwest

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[1] Exhibit 24 is a copy of the amendment; it is also included as Attachment A to this initial order.
[2] 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 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. Petition for Enforcement, par 1, 7.
[3] Collocation means that CLECs place their telecommunications equipment physically on the ILEC network so that CLECs may serve their own customers.
[4] *See,* Exhibit 1TC, pp. 8-24 (Morrison) for a detailed explanation of central office power infrastructure.
[5] McLeod Opening Brief, p. 6; Qwest Initial Brief, p. 3; Petition for Enforcement, par. 6.
[6] *See,* Attachment B to this initial order; see also Exhibit 20T (Starkey) p. 5; Exhibit 23T (Starkey), pp. 4-5; Exhibit 26.

submitted compliance filings pursuant to Commission order.[7] The version of Exhibit A that the parties identified on the record as being in effect at the time the parties entered into the DC power measuring amendment was sponsored by McLeod and is numbered Exhibit 26 in this proceeding. The Exhibit A that was in effect at the time of the execution of the initial ICA was submitted by McLeod as an attachment to the McLeod opening brief. McLeod's request that the Commission take official notice of its late-filed version of Exhibit A is addressed in a later section of this recommended decision.

10 The record indicates that under the original ICA, using the rate schedule contained in Exhibit 26, billing for DC power occurred as follows: Assuming that CLEC "A" had ordered 100 amps of DC power, but used only 53 amps, the power plant charge would be $9.34 x 100 amps and the power usage (for orders greater than 60 amps) charge would be $3.13 x 100 amps.[8]

11 In August 2004, the parties entered into the DC power measuring amendment to the ICA.[9] In May 2005, McLeod conducted an audit and came to a determination that Qwest was not billing according to McLeod's interpretation of the amendment.[10] On February 21, 2006, McLeod filed this Petition for Enforcement, claiming that under the amendment, DC power should be billed only according to the measured amount of DC power McLeod actually uses. McLeod appears to contend that under the example above, CLEC "A" should be charged $9.34 x 53 amps and $3.13 x 53 amps for power plant and power usage respectively, under the amendment. McLeod requests the Commission order Qwest to refund $27,000 in overcharges and that, going forward, Qwest bill McLeod for DC power on an "as-used" basis.[11]

12 Qwest responds that only the billing for the usage component of the DC power charge changed under the amendment and that the capacity charge continued to be billed on an "as-ordered" basis, according to the terms of the underlying ICA. In other words, Qwest contends that under the example above, CLEC "A" would be billed for power plant at $9.34 x 100 amps and for power usage $3.13 x 53 amps. Qwest asks that the

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[7] Qwest Motion to Strike McLeod Brief, p. 4.
[8] Exhibit 63, pp. 3-4.
[9] *See,* Attachment A to this order.
[10] Tr. 67-68 (Spocogee).
[11] Petition for Enforcement, p. 5.

Commission order McLeod to return $205,019.57 that McLeod has withheld in connection with this dispute.[12]

13 Each party claims that the language of the DC power measuring amendment is unambiguous and supports its interpretation of the language. Nevertheless, each party also provides extrinsic evidence to support its respective interpretation, in case the Commission finds the amendment ambiguous. In addition to its claim that the amendment requires DC power billing only on the basis of usage, McLeod claims that Qwest's power plant capacity charges are discriminatory because Qwest charges McLeod more than McLeod's fair share for capacity.[13]

II. APPLICABLE LAW.

14 Interconnection agreements are a form of contract created by the federal Telecommunications Act of 1996 (the Act). Under Section 252(a)(1) of the Act, ILECs and CLECs may negotiate interconnection agreements, including amendments to those agreements. Under the Act, state utility commissions have the authority to approve or enforce such agreements.[14] Under Sections 251 and 252 of the Act, state commissions also have the authority to establish interconnection rates that are "just, reasonable, and nondiscriminatory." In this case, the Commission established rates for collocation DC power in Docket UT-003013, Part A, on October 11, 2001.[15] These rates are set forth in Attachment A to Qwest's SGAT, the current version of which is Attachment B to this initial order.

15 Generally, the Commission employs long-established court precedent in interpreting and enforcing interconnection agreements. The Commission first attempts to determine the parties' intent at the time they executed the agreement, as that intent is embodied in the words of the contract.[16] The Commission will measure the parties' expressed intent by giving meaning to every word and provision of a contract, rather

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[12] Tr. 28; Qwest Answer to Petition for Enforcement, p. 4.
[13] McLeod Opening Brief, pp. 29-34.
[14] *See,* Section 252 of the Act and WAC 480-07-650, which governs petitions for enforcement of telecommunications company interconnection agreements.
[15] *In re Continued Costing and Pricing Proceeding, Docket UT-003013, (Docket No. UT-003013) Seventeenth Supp. Order Approving Compliance Tariff Filing (May 8, 2001)*
[16] Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503-504 (2005).

than favoring interpretations which render some language meaningless or ineffective.[17] The Commission will look to extrinsic evidence of the parties' intent when the contract language is ambiguous.[18] However, the Commission will not write a better contract for the parties than they have written for themselves.[19]

III. DISCUSSION AND DETERMINATIONS.

A. WHAT DOES THE DC POWER MEASURING AMENDMENT INCLUDE?

16 In order to determine the parties' intent from the language of the amendment, the Commission must first ascertain exactly what language was included in the amendment. Exhibit 24, included as Attachment A to this initial order, contains the text of the DC power measuring amendment. In this case, the Commission must determine the meaning of Sections 1.0 "Monitoring" and 2.0 "Rate Elements – All Collocation" of the amendment. In addition, Section 2.2 of the amendment refers to "Exhibit A of the Agreement" (Exhibit A) which is part of Qwest's SGAT, the current version of which is designated Exhibit 26 in this record, and is also Attachment B to this initial order .

17 The current version of "Exhibit A of the Agreement" (Exhibit 26) consists of a price table which includes the rates at issue in this proceeding under section 8.1.4. That section reads:

	Recurring charge	Non recurring charge
8.1.4 Power Usage		
8.1.4.1 DC Power Usage per Ampere, per Month		
8.1.4.1.1 Power Plant	$9.34	
8.1.4.1.2 Usage Less than 60 Amps, per Ampere Ordered	$1.57	
8.1.4.1.3 Usage More than 60 Amps, per Ampere Used	$3.13	

[17] Wagner v. Wagner, 95Wn.2d 94, 101, 621 P.2d 1279 (1980).
[18] PanoramaVillage Condo. Owners Ass'n Bd. Of Directors v. Allstate, 144 Wn. 2d 130, 136-137 (Wash. 2001).
[19] *Id.*

18 In its opening brief, McLeod submitted a different version of Exhibit A – the one that was attached to the ICA at the time the ICA was approved by the Commission in 2000. McLeod suggests that the Commission should now consider this late-filed version of Exhibit A because it was approved by the Commission as part of the original ICA and "has the force and effect of law between the parties."[20] Therefore, McLeod asserts, the late-filed version is not "evidence" of the type that would require the Commission to re-open the record. McLeod alternatively suggests the Commission may take official notice of the late-filed version of Exhibit A.

19 Qwest opposes Commission consideration of the earlier Exhibit A without reopening the record to allow for cross-examination on the document.

20 The late-filed version of Exhibit A reads:

	Recurring charge	Non recurring charge
8.1.4 -48 Volt DC Power Usage	$9.34	
8.1.4.1 Usage Less than 60 Amps	$1.57	
8.1.4.2 Usage More than 60 Amps	$3.13	

21 The primary difference between the two versions of Exhibit A is that in the current version "charges previously labeled as 'power usage' were more accurately described as power plant charges, and the charges were separated from usage rates in the SGAT Exhibit A…to demonstrate that there is a difference between power plant charges and power usage charges…"[21]

22 McLeod contends that the more recent changes Qwest made to the language and structure of the DC power rate in Exhibit A are not effective because they have not been authorized by the Commission and have not been the subject of any negotiated amendments to the ICA. McLeod points out that Qwest first began to include structural changes to the DC power section of Exhibit A when it filed its fifth

[20] McLeod Opposition to Qwest Motion to Strike, p. 2.
[21] Qwest's Motion to Strike, par. 15.

amended Exhibit A on July 11, 2003.[22] McLeod also asserts that the version of Exhibit A sponsored as Exhibit 26 by its own witness Mr. Starkey was dated

February 15, 2005, approximately six months after the parties executed the DC power measuring amendment in August 2004.[23]

23 Qwest requests that any discussion of the original Exhibit A be stricken from McLeod's brief or, in the alternative, that the Commission re-open the record to allow cross-examination on the document. Qwest contends that the original Exhibit A attached to McLeod's brief is extra-record evidence that cannot be admitted now without a proper motion to re-open under WAC 480-07-380, the Commission's rule governing such motions. Qwest further asserts that McLeod's Exhibit A is not the current operative rate sheet because Qwest has updated the SGAT Exhibit A several times since the execution of the ICA[24] in compliance with Commission orders and the terms of the ICA itself.[25]

24 Qwest contends that McLeod had the original Exhibit A available to it at the time of hearing in this case, but that nevertheless McLeod's own witness Mr. Starkey, sponsored the current version of Exhibit A which became Exhibit 26. Qwest also points out that all cross-examination during hearing was based on Exhibit 26. Qwest asserts that McLeod witness, Ms. Spocogee, testified that prior to McLeod's execution of the amendment, when McLeod engineers evaluated its cost effect, they used Exhibit 26 as the basis for their analysis.[26]

25 **Discussion.** Under WAC 480-07-495(2)(a)(i)(C), the Commission may take official notice of "Tariffs, classifications, and schedules regularly established by or filed with the commission as required or authorized by law."[27]

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[22] McLeod Opposition to Quest Motion to Strike, p. 7.
[23] *Id.*, p. 8.
[24] Qwest contends that prior practice has been to correct Exhibit A when compliance filings are made and that notices of updates are provided to CLECs. Qwest's Motion to Strike, par. 13.
[25] Qwest points out that Section 2.2 of the ICA provides, in part, "It is expressly understood that this agreement will be corrected to reflect the outcome of generic proceedings by the Commission for pricing, service standards, or other matters covered by this agreement." Motion to Strike, par 11.
[26] Tr. 67.
[27] WAC 480-07-495(2)(b) requires that the presiding officer notify the parties of material officially noticed and its source and afford the parties an opportunity to contest "facts and materials so noticed." The parties

26 It is appropriate for, and recommended that, the Commission take official notice of McLeod's late-filed version of Exhibit A because 1) it falls into the category of documents – "schedules regularly established by or filed with the Commission" – of which the Commission may take notice under WAC 480-07-495 and 2) it has direct relevance to the issues in this case. McLeod's Exhibit A is a rate schedule of the type commonly filed by regulated companies in compliance with Commission orders. Qwest does not contest that the version of Exhibit A that McLeod filed with its opening brief is the version that was in existence at the time the parties first entered into their ICA.

27 Although it is recommended that the Commission take notice of the McLeod late-filed Exhibit A to provide historical context for the arguments in this proceeding, McLeod's exhibit must be regarded with caution for the following reasons: McLeod's own witness Starkey relied only on Exhibit 26 as the operative rate schedule and McLeod witness Spocogee testified that McLeod engineers based their evaluation of the amendment on the language in Exhibit 26.[28] While it is unclear how the engineers could have used Exhibit 26, if it is true, as McLeod points out, that the date of that version of Exhibit A is February 15, 2006, McLeod witnesses did not question the language in Exhibit 26 as representing their understanding of the structure of the DC power rates and charges in effect at the time of the amendment.

28 Moreover, McLeod's argument that Qwest's changes to the language describing the charges included in the current version Exhibit A are of no force and effect is without merit. Section 2.2 of the ICA permits updating or correcting Exhibit A "to reflect the outcome of generic proceedings by the Commission for pricing, service standards, *or other matters covered by this agreement*."[29] (emphasis added). McLeod made no apparent objection to earlier Qwest updates to the DC Power rate structure which first occurred, by McLeod's account, in 2003, at least a year prior to the execution of the Amendment. In addition, the Commission is charged with determining the parties' intent based on the language of the amendment, including Exhibit A. The parties'

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may respond to this official notice of McLeod's late-filed version of Exhibit A if they seek Commission review of this recommended decision.

[28] Tr. 67 (Spokogee); Tr. 135; 156-157 (Starkey).

[29] Qwest Opening Brief, Attachment 1.

intent about the meaning of the amendment cannot be gleaned from a document that they did not believe reflected the amendment at the time the amendment was executed and approved.[30]

B. CAN THE COMMISSION DETERMINE THE MEANING OF THE DC POWER MEASURING AMENDMENT BY REVIEWING THE AMENDMENT ITSELF?

29 McLeod claims that the clear purpose of the DC power measuring amendment is to establish billing for "-48 volt DC power usage" on an "as-measured" rather than an "as-ordered" basis. McLeod asserts that Section 2.0 addresses "rate elements," and that under that heading, Section 2.1 identifies "-46 volt DC power usage" as the rate in question.[31] Section 2.2.1 refers to the "-48 volt DC power usage charge" and states that Qwest will determine the "actual usage" at the power board and apply the -48 volt DC power usage charge to that actual usage as a result of the amendment.

30 McLeod also points out that Section 2.2 of the amendment states that the "-48 volt DC power usage charge is specified in Exhibit A of the agreement." McLeod asserts that under Exhibit A of the original ICA, section 8.1.4 establishes a "-48 volt DC power usage" charge that covered both power plant and usage charges.

31 McLeod asserts that the language of Section 2.1 further supports its interpretation of the amendment. In that section, the amendment states "The DC power usage charge is for the capacity of the power plant available for CLEC's use." McLeod claims that this language removes all doubt that the amendment intended that McLeod be billed power plant capacity on an "as measured" basis.

32 Finally, McLeod contends that its interpretation is consistent with past Qwest billing practice. McLeod states that prior to the amendment, both capacity and usage were billed on an "as-ordered" basis. That is, the capacity charge was billed based on the amount of capacity.[32] McLeod had initially ordered and the usage charge was billed

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[30] *See*, fn. 28.
[31] *See,* Attachment A to this decision to review the language of specific sections of the amendment.
[32] When McLeod first ordered service from Qwest under its ICA in 2000-2001, it placed an order for feeder cable. The size of that ordered cable is what Qwest uses to determine the "capacity" of power plant needed to serve McLeod. *See*, Exhibit 1TC, pp. 22-24 (Morrison).

based on the amount of capacity ordered, whether the usage was greater or less than 60 amps. McLeod claims that the amendment signified that both power plant capacity and usage should have been billed based on McLeod's usage going forward.[33]

33 McLeod concludes by saying that "there is simply no language in the amendment itself and the underlying Exhibit A to the agreement that plausibly suggest that the '-48 volt DC power usage' element is to be charged on an 'as ordered' basis…"

34 Qwest responds that prior to execution of the amendment, the parties agreed that McLeod would pay for DC power usage and DC power plant based on the quantity of -48 volt capacity specified in McLeod's original orders for power distribution.[34] Qwest claims that the amendment changed only the way the DC power usage charge would be billed and never mentions the DC power plant charges, both of which are included as separate charges in Exhibit A to the ICA.[35]

35 Qwest points out that the amendment mentions the "DC power usage charge" five times and the "usage rate" two times, but never mentions a "power plant charge."[36] Qwest also asserts that that the term "charge" is always used in the singular, and that if it was meant to include both power plant and usage elements, it would be pluralized.[37]

36 Qwest further suggests that the plain language of Section 1.2 which describes the measurement process states that "the power usage rate reflects a discount from the rates for those feeds greater than sixty (60) amps." The "discount" is demonstrated by looking at Exhibit A (Exhibit 26). There the power usage rate for feeds over 60 amps is $3.13. Therefore, Qwest contends, billing for this level of power usage on an "as-measured" basis might result in a discount to the carrier. However, the rate for power plant is the same for all levels of ordered amps, with no discount depending on the level of the order.

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[33] For collocations cable orders over 60 Amps. *See,* Attachment A, DC power measuring amendment, section 1.2.
[34] Qwest Initial Brief, p. 3.
[35] *Id.*, pp. 10-11.
[36] *Id.*
[37] *Id.,* p. 12.

37 In addition, Qwest states that later in section 1.2, the amendment reads: "Qwest will reduce the monthly usage rate to the CLEC's actual use," based on Qwest's measurement of usage. Qwest asserts that the reference is to a singular "usage" rate, and that there is no reference to a power plant rate. Qwest contends that the term "usage rate" can only mean the power usage charge in Exhibit 26 at item 8.1.4.1.3.

38 **Discussion.** The language of the DC power measuring amendment does not clearly support either party's interpretation. McLeod's interpretation fails because Section 1.2 clearly refers only to usage rates and to reductions to the "monthly usage rate" reflecting a CLEC's actual use of power. In addition, although McLeod's late-filed Exhibit A does contain a reference to the "-48 volt DC power usage" at item 8.1.4, which echoes the reference to the "-48 volt DC power usage charge" in Section 2.0 of the amendment, the Commission cannot rely on McLeod's late-filed Exhibit A to show the intent of the parties at the time they executed the amendment, since a revised version of Exhibit A was regarded by McLeod as being in effect when the Amendment was executed.[38]

39 However, Qwest's interpretation also fails because the rate element to be altered by the amendment is referred to in Section 2.0 as the -48 volt DC power usage charge, which is a term not found on Exhibit 26. Instead, Exhibit 26 shows 1) Item 8.1.4 referring to "power usage;" 2) Item 8.1.4.1 referring to "DC power usage;" and, 3) Items 8.1.4.1.2 and 8.1.4.1.3 referring only to "usage less than (or More than) 60 amps." In addition, Section 2.2 of the amendment states that the DC power usage charge "is for the capacity of the power plant available for CLEC's use," and thus seems to indicate that the amendment covers billing for capacity on a usage basis as well.

40 In summary, the language of the amendment does not provide a clear objective expression of the intent of the parties at the time they executed it. The Commission must look to extrinsic evidence to determine the parties' intent.

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[38] Tr. 67.

C. DOES THE COMMISSION'S REVIEW OF THE EXTRINSIC EVIDENCE SUPPORT MCLEOD'S INTERPRETATION OF THE AMENDMENT?

41 McLeod and Qwest each provide extrinsic evidence that they claim supports their respective interpretations of the contract. The extrinsic evidence relates to past billing practice, the Qwest change management process and product catalog documents, McLeod's spreadsheet analysis of the affect of the rate, Qwest's collocation cost study, and Qwest's method of engineering the power plant capacity of its central offices. Each of these will be addressed below.

42 **1. Past Billing Practice.** McLeod states that its reading of the amendment is correct – that both power plant capacity and usage for orders over 60 amps should be billed on an "as-measured" rather than and "as-ordered" basis – because in the past, both the capacity and usage charges were assessed on an "as ordered" rather than an "as measured basis." McLeod claims that under the original ICA, power plant and power usage were billed based on the size of the CLECs' initial order for power cable.[39] Under the amendment, the same rationale should be used, and all charges should be based on the actual amount of power a CLEC uses.[40]

43 Qwest rejects this argument because it does not demonstrate that at the time the amendment was executed McLeod actually believed that billing practices for power plant and power usage were tied to each other, or that the amendment would change both rates.[41] Qwest contends that the amendment contains no language altering the existing ICA power plant capacity charge and thus that charge, assessed as approved by the Commission,[42] on an as-ordered basis, remains effective.[43]

44 **Discussion.** McLeod's argument is unpersuasive, particularly in light of the fact that its witnesses relied on Exhibit 26, or on a similar version of Exhibit A that differentiated between power plant capacity charges and usage charges for DC power. Moreover, McLeod has admitted that in the past it was billed separately for capacity

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[39] McLeod Opening Brief, p. 6
[40] *Id.*
[41] Qwest Reply Brief, p. 10
[42] Docket UT-003013, Seventeenth Supplemental Order Approving Compliance Tariff Filings, May 8, 2001.
[43] *Id.*, p. 11.

and usage on an as-ordered basis.[44] Therefore, McLeod was aware that there were two separate rate elements associated with DC power billing. In this context, relying on past practice could just as easily result in a conclusion that after the amendment there would continue to be two separate charges with each billed on a different basis.

45 **2. Change Management Process and Product Catalog.** Qwest contends that it made it clear to McLeod prior to the execution of the DC power measuring amendment that the amendment was intended to change only the power usage charge. Qwest pointed out that it communicated this intention through its change management process (CMP) and its product catalog (PCAT).[45]

46 The CMP is a forum available to all CLECs on Qwest's network, including McLeod.[46] The CMP offers discussion and information about Qwest's products and services, and provides CLECs with answers to questions about how Qwest products will function.[47] Qwest asserts that it notified sixteen McLeod employees about the DC power measuring option, providing information on how the option would affect monthly recurring charges and whether an amendment to the ICA would be required to implement the option.[48] In addition, Qwest points out that CMP documents dated October 6, 2003 included a specific example demonstrating how capacity and usage charges would be calculated once the option was effective.[49]

47 Qwest further asserts that the PCAT confirmed there was a difference between the capacity charge and the usage charge, and that only the usage rate would be affected by the power measuring option.[50] Moreover, Qwest points out that the PCAT information about the option is identical to that appearing in the actual amendment.[51]

48 McLeod responds that the CMP documents Qwest alludes to are irrelevant because they do not refer to the actual DC power measuring amendment the parties executed

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[44] *See,* Exhibit 63, pp. 3-4, for an example of how the DC power charge was calculated prior to the amendment.
[45] Qwest Initial Brief, p. 15.
[46] *Id.*
[47] Exhibit 63.
[48] *Id.*, Qwest Opening Brief, p. 16.
[49] Exhibit 63, pp. 3-4.
[50] Exhibit 62, Qwest Initial Brief, p. 17.
[51] *Id.*

and they provide no information as to Qwest's intent with regard to the amendment. McLeod points out that while the CMP documents state that no amendment to the ICA is necessary to implement DC power measuring, a year later, in 2004, Qwest proceeded to offer an amendment to the ICA to cover DC power measuring.[52]

49 McLeod agrees that the PCAT language is identical to language in the actual amendment, but that it therefore contains the same ambiguities as the actual amendment because it fails to define or differentiate between capacity and usage rates.[53] McLeod further suggests that the PCAT states it applies to all states where separate charges for DC power capacity and DC power usage have been established. McLeod claims that no separate DC power capacity rate element has been established in Washington.[54]

50 **Discussion.** McLeod's arguments are convincing. The CMP document clearly contains much language and information that does not appear in the amendment. The CMP is contradictory in that it indicates no amendment to the ICA is even necessary, and is also unreliable because it was issued a year prior to the execution of the amendment and does not help with determining the parties' intent at the time of the amendment.

51 Nor is the PCAT helpful in determining intent. It contains the same ambiguities as the actual amendment, and reliance on the PCAT would result in the same lack of clarity about intent.

52 **3. McLeod Spreadsheet Analysis of the Rate Effect of the Amendment.** McLeod witness Ms. Spocogee testified that, when the amendment was presented to McLeod, several of the McLeod engineering staff were assigned to analyze the amendment to see whether it would result in an increase in power charges for McLeod.[55] The engineers prepared spreadsheets analyzing the effect of the amendment,[56] relying on the ICA, a revised version of the ICA Exhibit A rate schedule, and price quote sheets

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[52] McLeod Reply Brief, p. 24
[53] McLeod Reply Brief, p. 26.
[54] *Id.*
[55] Tr. 74.
[56] Exhibits 64 and 65; Tr. 63-67.

supplied by Qwest.[57] Their analysis identified only changed usage charges.[58] By this time, McLeod had been dealing with power measurement issues in a number of jurisdictions, including Iowa and Michigan, and sought in Washington to avoid the problem that occurred in Michigan where adoption of the amendment caused McLeod's power charges to increase.[59] McLeod contends that the engineers who prepared the spreadsheet analysis were not contract or rate specialists and would not have been aware of the idiosyncracies of the DC power rate.[60]

53 Qwest counters that these McLeod spreadsheets are consistent with Qwest's interpretation of the amendment because they analyze only power usage costs and the analysis of those costs occurred at the time the amendment was executed.[61] Qwest points out that at that time McLeod had already had significant experience with the terms of various power measuring amendments in other jurisdictions, as well as the prior billing for DC power in Washington, so McLeod was familiar with the different power and usage elements involved in the assessment of DC power charges. In fact, Qwest argues, it was not until much later, when McLeod conducted its May 2005 audit, that McLeod developed its current interpretation of the amendment as requiring charges for both capacity and usage to be billed on an "as-ordered" basis.[62]

54 **Discussion.** In this instance, Qwest's arguments are the more convincing. McLeod admits that the spreadsheets its engineers prepared analyzed only for a change in power usage charges. Given that: 1) McLeod relied on language that apparently reflected the rate structure set forth in Exhibit 26 for its analysis of the cost effect of the amendment; 2) that rate structure differentiated between charges for power usage and charges for power plant; 3) the rate structure in effect before the amendment differentiated between the two components of the rate; and 4) McLeod by the time it

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[57] Exhibit 81T, p 5, Exhibits 88 and 26; Tr 63-67.
[58] *Id.*
[59] Tr. 63-67. It is noted that the Iowa Utility Board recently addressed the identical issues presented in this case. In *State of Iowa Department of Commerce Utilities Board (IUB) Docket No. FCU-06-20, July 27, 2006,* the IUB issued a final order finding that "the language of the amended interconnection agreement is ambiguous and that extrinsic evidence supported Qwest's proposed interpretation." On September 12, 2006, the IUB issued an Order Granting Rehearing for Purposes of Reconsideration, pursuant to McLeod's application for rehearing. It is further noted that in Michigan, the DC power rate is a unified rate. *See,* Exhibit 82T, p. 7.
[60] McLeod Opening Brief, p. 13.
[61] Qwest Opening Brief, pp. 18-22.
[62] *Id.*

executed the Washington Amendment had had significant experience with the vagaries of power plant rate issues in other jurisdictions, McLeod's claims about the limitations of its spreadsheet analysis lack credibility.

55 **4. Qwest 2001Collocation Cost Study.** Qwest contends that the Commission approved collocation rates and rate design for DC power in the Thirteenth Supplemental Order in Docket UT-003013, Part A,[63] and required Qwest to make a compliance filing limited to the rates determined in that order.[64] Qwest asserts that these collocation rates are incorporated in the ICA and carry the binding force of law. Qwest points out that the cost study it submitted to the Commission in support of the collocation rates indicated that power plant rates would be charged on a "per amp ordered" basis and that McLeod's enforcement petition is in reality a collateral attack on the established collocation rates and rate design.[65] Finally, Qwest asserts that McLeod's own DC power rate calls for billing other CLECs for DC power on an "as-ordered" basis.[66]

56 McLeod argues that even though the cost study states that the power plant rate should be assessed on an "as-ordered" basis, the rate itself was developed on an "amps-used" basis and the amendment must be interpreted consistent with the way the rate was developed.[67] McLeod witness Starkey testified that the formula used to develop the power plant rate required Qwest's investment in power plant to be divided by its estimate of DC power usage. Mr. Starkey states that: "fundamental cost study construction requires rates to be assessed consistent with the manner in which they are developed, with the overarching objective being the ultimate recovery of total investment."[68] According to Mr. Starkey, the failure to charge power plant on a usage basis, consistent with the actual development of the rate, results in Qwest's over-recovery of its investment from CLECs, because CLECs actually use much less power than they initially ordered.[69] McLeod identifies several examples of how the

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[63] January 31, 2001.
[64] Docket UT-003013, Seventeenth Supplemental Order Approving Compliance Tariff Filing (May 8, 2001).
[65] Qwest Initial Brief, p. 4.
[66] Qwest Reply Brief, pp.23-24.
[67] McLeod Opening Brief, p. 14, Exhibit 22 T (Starkey) at 2-4.
[68] *Id.*, p.4.
[69] *Id.*, pp.5-7.

rate results in a Qwest over-recovery.[70] Finally, McLeod denies that it bills collocators for DC power on an "as-ordered" basis as Qwest does.[71] Rather, McLeod contends that it asks collocators to indicate the amount of power they will actually need, and for which they will be billed. From that information, McLeod then determines the size of the power plant it will need to provide that power.

57 Qwest responds that McLeod's arguments about the development of the DC power rate are suspect because they would have applied with equal force to the period before the amendment was adopted.[72] Qwest points out that McLeod had paid power plant charges on an "as-ordered" basis for several years.[73] Moreover, Qwest explains that the cost study is neither usage-based nor order-based in terms of development of the collocation rate.[74] Rather, as Qwest witness Million testifies, even though the label for one of the components of the formula used to develop the rate includes the word "usage," the formula itself is designed to produce a per amp rate for power plant based on the amount of power plant necessary to produce a hypothetical 1000 amps of power capacity in any given location.[75] Qwest further contends that McLeod's examples of over-recovery are wrong because McLeod ignores the fact that the power plant rate is not developed on an "as-used" basis in the first place.

58 **Discussion.** McLeod's arguments fail for several reasons. The Qwest collocation power plant rate was not developed on a "usage" basis, as McLeod claims. Even though the word "usage" is found in the formula, the rate was developed to get at what the cost of hypothetical power plant would be on a per amp basis, without regard to usage. In addition, whether the power plant rate was developed on an "as-used" or an "as-ordered" basis has little bearing on whether McLeod and Qwest intended at the time of the amendment that the power plant charge would be assessed only on an "as-used" basis.

59 **5. Qwest's Power Plant engineering practices.** McLeod points out that Qwest claims to size CLEC power plant based on the size of cable equipment the CLECs

[70] McLeod Opening Brief, pp. 27-29.
[71] McLeod Reply Brief, pp. 41-42.
[72] Qwest Reply Brief, p. 21.
[73] Tr. 26.
[74] Qwest Reply Brief, p. 21.
[75] Exhibit 51T, p 7-8.

initially ordered to meet List 2 drain[76] requirements, even though CLECs never use, nor would they be expected to use, List 2 drain power capacity except under extreme catastrophic conditions. On the other hand, McLeod asserts Qwest sizes its own power capacity to serve the List 1 drain[77] of its equipment. Moreover, McLeod maintains that in spite of claiming that it sizes central office power plant based on List 2 and List 1 drain, Qwest does not actually augment its power plant capacity based on a CLEC order for power, but rather performs augments only based on overall expected usage of the central office equipment.[78] McLeod claims that because Qwest actually sizes central office power plant on a usage basis, the amendment must be construed as requiring billing for DC power on a usage basis.

60 Qwest responds that when it initially received CLEC orders for cable during the 1999-2001 period, when CLECs began connecting to Qwest's network, Qwest needed to immediately engineer its power plant at that time to meet CLEC needs.[79] It cannot now re-engineer that plant. Qwest argues that it did not know the List 1 drain for CLEC equipment at that earlier time and engineered DC power plant according to List 2 drain, as it continues to do. Moreover, Qwest contends that it makes available to CLECs the List 2 power capacity they have ordered, so CLECs have the capacity they pay for. Qwest points out that if the amendment intended billing on a "usage" basis only, it would mean Qwest would under-recover its power plant investment, since pure "usage" based billing would not correspond with List 1 drain, which engineers power plant to meet peak hour usage – a higher level of capacity than mere "usage."[80] However, Qwest states that it offers CLECs an opportunity to reduce their power order levels if they wish to do so.[81] In any event, Qwest asserts that McLeod had ample opportunity to dispute power plant engineering practices and rates in the cost docket.[82]

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[76] List 2 drain is the level of capacity required to provide power according to the size of cable initially ordered by CLECs regardless of how much DC power they actually use. *See*, Exhibit 41T, p. 4 (Ashton); McLeod Opening Brief, p. 17

[77] List 1 drain is the level of power plant capacity required to meet the peak operating period DC power needs of the central office.

[78] McLeod Opening Brief, p. 45.

[79] Qwest Reply Brief, p. 14.

[80] Qwest Initial Brief, pp. 24-25.

[81] Qwest Reply Brief, p. 2; Qwest offers CLECs a power reduction option which allows a CLEC to change its power capacity by reducing its ordered amps. This option is described more fully in Qwest's reply brief at fn. 31.

[82] *Id.*, pp. 14-20.

61 In addition, Qwest points out that Qwest itself does not require power for collocated equipment as CLECs do, so it stands in a different situation with regard to power plant capacity requirements and engineering needs. Nor does Qwest actually need to add power plant as the result of a CLEC order.[83] Qwest contends that whether it actually adds power capacity when it receives a CLEC order for power is irrelevant to determining the parties' intent in the first place.[84]

62 **Discussion.** McLeod's arguments are generally unpersuasive. McLeod contends that the way Qwest engineers its plant is somehow instructive as to the parties' intent at the time the amendment to the ICA was executed. However, McLeod supplies no evidence directly connecting Qwest's power plant engineering practices to the parties' intent. Rather, McLeod's arguments are better directed to issues that the Commission addressed in the cost docket and should have been raised in that proceeding or in a similar forum.

63 **CONCLUSION.** Taken as a whole, the extrinsic evidence does not support McLeod's interpretation of the DC power amendment. Most convincing is the evidence that McLeod's engineering staff, at the time the amendment was executed, prepared a rate analysis that included only usage rate changes, to determine the cost effect of the amendment, even though they were by that time familiar with the idiosyncracies of the DC power charges in other jurisdictions. The fact that McLeod's 2005 audit produced a different interpretation does not support a finding that at the time they executed the amendment the parties believed it required only usage-based DC power billing.

D. IS QWEST'S APPLICATION OF THE DC POWER MEASURING AMENDMENT DISCRIMINATORY?

64 McLeod contends that a general principle of contract law is that agreements are interpreted[85] in light of the body of law existing at the time the agreement was executed. McLeod argues that the body of law in effect pertaining to this case

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[83] *Id.*
[84] *Id.*
[85] McLeod Opening Brief, p. 29; *see*, also Southwestern Bell Tel. Co. v. Brooks Fiber Comms. of Oklahoma, Inc., 235 F.3d 493, 499 (10th Cir. 2000).

includes the federal Telecommunications Act and Washington law.[86] McLeod asserts that Section 251 of the Act and Washington law require competitive parity between ILECs and CLECs.[87] McLeod contends that the ILEC's obligation under section 251(c)(2) of the Telecommunications Act unconditionally prohibits an ILEC from providing competitors with less favorable terms and conditions of interconnection than it provides itself and that this mandate.applies to collocation."[88]

65 McLeod marshals the following facts in support of its claim of discrimination: 1) Qwest admits that it engineers its own power plant capacity to serve List 1 drain, while it engineers CLEC power plant capacity to serve List 2 drain;[89] 2) Qwest charges McLeod on the basis of distribution cable amps ordered, while Qwest imputes power plant costs to itself based List 1 drain;[90] 3) Qwest only actually augments central office power plant based on an increase in capacity required to serve central office usage as a whole, not in relation to individual CLEC orders for power plant capacity.[91] McLeod concludes that therefore Qwest charges CLECs more for power plant capacity than is required to recover Qwest's investment in power plant and more than Qwest imputes to itself. McLeod contends that under the nondiscrimination provisions of Section 251, Qwest must charge the same power plant costs to McLeod and other CLECs as it imputes to itself.[92]

66 Qwest responds that McLeod agreed to pay the Commission-approved power plant charges on an as-ordered basis in the initial ICA.[93] Qwest maintains that that obligation remains in effect because the DC power measuring amendment only changed billing for power usage. Qwest contends the Commission may not alter the terms of the ICA, only enforce them. Qwest denies that its method of sizing power plant or its charges to CLECs for power plant are discriminatory. Nevertheless,

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[86] Telecommunications Act, sections 251 and 252; RCW 80.36.180, 80.36.170, 80.36.186.
[87] McLeod Opening Brief, p. 30-32
[88] *Id.*
[89] McLeod Opening Brief, pp. 31-33.
[90] *Id.*
[91] *Id.*
[92] *Id.*, p. 34.
[93] Qwest Reply Brief, pp. 23-29.

Qwest asserts that Section 252 of the Act permits an ILEC and a CLEC to agree to terms in an ICA which may appear to be discriminatory or otherwise violate the Act.[94]

67 Qwest further maintains that it has different power plant requirements than CLECs because it does not "collocate" on its own network.[95] Qwest states that by engineering CLEC power plant to serve List 2 drain it provides a superior level of capacity to that which Qwest provides itself. Qwest contends that CLECs receive the level of capacity – List 2 drain – that they pay for. In any event, Qwest asserts that this is not the docket to determine the appropriate price structure and charges for power plant capacity. Qwest contends that the Commission generally opens cost dockets to allow for a detailed exploration of what are the appropriate costs and price structure to cover CLEC access to ILEC networks.

68 **Discussion and decision.** Section 252 of the Act allows that in the give and take of negotiations for an ICA, the parties may agree to terms which might appear to be discriminatory because they otherwise receive benefits from the agreement. The parties do not dispute that McLeod paid power plant capacity charges under the ICA on an "as-ordered" basis for several years prior to executing the DC power measuring amendment. As discussed above, the extrinsic evidence supports Qwest's interpretation that only the power usage element of the DC power rate was changed under the amendment. Although it may be possible for the Commission to require Qwest to implement a nondiscriminatory rate for DC power, the record in this case does not provide a sufficient basis for such a determination. Within the scope of this docket, the Commission may only determine the intent of the parties with regard to the DC power measuring amendment. A cost docket, or similar cost review, is the forum for judging the adequacy of rates and rate structures for CLEC access to ILEC networks.

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[94] *Id.*; *See*, also, Section 252 (a)(1) 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* [non-discrimination] *standards* set forth in subsections (b) and (c) of this title." (emphasis added).
[95] *Id.*

E. CONCLUSION.

69 It is concluded that the DC power measuring amendment is ambiguous on its face and that extrinsic evidence is required to determine the parties' intent. It is further concluded that the extrinsic evidence supports Qwest's interpretation of the amendment – that it was intended to alter only the power usage element of the DC power rate. Finally, it is concluded that within the scope of this proceeding the Commission cannot determine whether the DC power plant rate is discriminatory. The Commission denies McLeod's petition for enforcement.

IV. RECOMMENDED FINDINGS OF FACT

70 (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.

71 (2) Interconnection agreements are a form of contract and are subject to interpretation according to the law of contract interpretation.

72 (3) Qwest is an ILEC subject to the jurisdiction of the Commission.

73 (4) McLeod is a CLEC subject to the jurisdiction of the Commission with regard to enforcement of interconnection agreements.

74 (5) Qwest and McLeod entered into an interconnection agreement approved by the Commission on August 30, 2000 in Docket UT-993007.

75 (6) The interconnection agreement provided for the billing of DC power charges for both power plant capacity and usage on an "as-ordered" basis.

76 (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.

77 (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.

78 (9) 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.

79 (10) 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.

80 (11) 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.

81 (12) 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.

82 (13) The parties to an interconnection agreement may agree to terms that might otherwise be considered discriminatory.

83 (14) The record in this proceeding does not support a claim that Qwest's DC power plant rate or rate structure is discriminatory.

V. RECOMMENDED CONCLUSIONS OF LAW

84 (1) The Commission may grant or deny CLEC petitions for enforcement of interconnection agreements under the federal Telecommunications Act of 1996 and Washington law.

85 (2) The Commission has the authority to address claims of discrimination under both the federal Telecommunications Act of 1996 and Washington law.

86 (3) 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.

87 (4) McLeod failed to demonstrate on the record of this proceeding that Qwest's DC power rate and rate structure were discriminatory.

V. DECISION

88 The Commission denies McLeod's petition for enforcement and requires McLeod to return the full amount of disputed DC power charges in the amount of $205,019.57, within 30 days after the date of a final order in this proceeding.

Dated at Olympia, Washington, and effective September 29, 2006.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

THEODORA M. MACE
Administrative Law Judge

NOTICE TO PARTIES

This is an initial order. The action proposed in this initial order is not yet effective. If you disagree with this initial order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this initial order, and you would like the order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this initial order to file a *Petition for Administrative Review*. What must be included in any petition and other requirements for a petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a petition for review within (10) days after service of the petition.

WAC 480-07-830 provides that before entry of a final order, any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3), as amended in the 2006 legislative session, provides that an initial order will become final without further Commission action if no party seeks administrative review of the initial order and if the Commission does not exercise administrative review on its own motion. You will be notified if this order becomes final.

One copy of any petition or answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An original and eight copies of any petition or answer must be filed by mail delivery to:

Attn: Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
PO Box 47250
Olympia, WA 98504-7250

ATTACHMENT A

ATTACHMENT B