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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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COMMISSIONERS

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AZ CORP COMMISSION
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IN THE MATTER OF THE COMPLAINT OF)
 MCLEODUSA TELECOMMUNICATIONS)
 SERVICES, INC. AGAINST QWEST)
 CORPORATION.)

DOCKET NO. T-03267A-06-0105
 DOCKET NO. T-01051B-06-0105

**RESPONSE TO QWEST'S
 SUPPLEMENTAL OF
 AUTHORITIES**

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), through undersigned
 counsel, files its Response to Qwest's Supplemental Authorities. In support of its Response,
 McLeodUSA states:

I. INTRODUCTION

On September 28, 2006 and October 2, 2006, Qwest submitted additional authorities from
 Utah and Washington. The Washington "Initial Order" is subject to adoption by the WUTC and is
 not yet a final decision. The Utah Report and Order is subject to a request for reconsideration that
 McLeodUSA will be filing. McLeodUSA requests that the Commission: (i) accept and consider
 this Response identifying errors in the orders and (ii) should give no weight in these orders in
 reaching its decision.

**II. THE ORDERS DID NOT INTERPRET THE DC POWER AMENDMENT IN A
MANNER TO PROVIDE MCLEODUSA ACCESS TO DC POWER ON NON-
DISCRIMINATORY TERMS.**

Both the Utah Public Service Commission ("Utah PSC") Report and Order and the
 Washington Initial order make the same legal error - both orders interpret the 2004 Amendment
 without giving any consideration to the related provision in the Interconnection Agreement
 ("ICA") governing Qwest's obligation to provide McLeodUSA access to power for collocations.
 Instead, both orders interpret the 2004 Amendment in a vacuum by only considering the words of

1 the 2004 Amendment to determine the intent of the parties. When the Utah PSC concluded that
2 the 2004 Amendment was itself unclear, the Utah PSC only considered the extrinsic evidence and
3 ruled in Qwest's favor. The Initial Order in Washington followed the same limited analysis. Both
4 orders show no consideration was given to the clear intent stated elsewhere in the agreement being
5 amended that Qwest was obligated to provide power to McLeodUSA on terms that are at least at
6 parity with how Qwest does so for itself in determining whether the amendment required Qwest
7 bill both the power usage and power plant rate elements on a measured basis.

8 By failing to consider the four corners of the entire Agreement, *i.e.*, the ICA as amended by
9 the 2004 Amendment, the interpretation of the 2004 Amendment violates several principles of
10 contract interpretation, and is, therefore, erroneous. The 2004 Amendment is not a stand-alone
11 contract; it is but one part of the ICA between Qwest and McLeodUSA. Indeed, the 2004
12 Amendment makes it clear on its face that it must be construed as part and parcel of the underlying
13 ICA that it amends:

14 The Agreement¹ is hereby amended by adding the terms,
15 conditions and rates for DC Power Measuring, as set forth in
Attachment 1, attached hereto and incorporated herein.

16 ***

17 Except as modified herein, the *provisions of the Agreement shall*
18 *remain in full force and effect....*

19 ***

20 The Agreement as amended (including the documents referred to
21 herein) *constitutes the full and entire understanding and agreement*
between the Parties with regard to the subjects of the Agreement
as amended

22 That neither order gave any consideration to the related provision governing access to
23 power is unquestionable on the face of the respective orders. Neither order mentions the related
24 provision governing access to collocation power until *after* the 2004 Amendment has been
25 interpreted in Qwest's favor based on extrinsic evidence.

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¹ The "Agreement" referenced is the entire ICA.

1 Both the Utah and Washington ICAs -- like their Arizona counterpart (Part D, Section
2 (D)2.1 of Arizona McLeod/Qwest ICA (excerpts attached to McLeod Post-Hearing Reply Brief at
3 Appendix A) -- expressly obligate Qwest to provide McLeodUSA access to power at parity with
4 how Qwest provides power to itself: For example, the Utah ICA provided:

5 7.1.9 Power as referenced in this Agreement refers to any electrical power source
6 supplied by USWC for McLeodUSA equipment. USWC will supply power to
7 support McLeodUSA equipment at equipment-specific DC and AC voltages. At a
8 minimum, USWC shall supply power to McLeodUSA at parity with provided by
9 USWC to itself. (Emphasis added.)

8 Such language effectively incorporates the federal statutory language set forth in Section
9 251(c)(6), which the FCC has interpreted to require access to collocation power at parity.

10 The 2004 Amendment can be interpreted consistent with that clear statement of intent (and
11 legal and statutory obligation) of non-discrimination by forbidding Qwest from using the feeder
12 distribution cables amperage (*i.e.*, List 2 drain) to bill McLeodUSA for DC Power Plant capacity
13 since Qwest assigns power plant costs to itself using the List 1 drain. Yet, neither the Utah Report
14 and Order nor the Washington Initial Order give any consideration to this clearly stated intent and
15 legal obligation but instead relied solely on extrinsic evidence to ascertain Qwest's intent
16 (primarily from Qwest's CMP process nine months prior) to conclude that the parties agreed not to
17 use measured usage to bill the power plant rate. Moreover, neither the Utah Report and Order nor
18 the Washington Initial Order provide legal justification for limiting the determination of the
19 parties' intent to a consideration of the 2004 Amendment as if it were a stand-alone contract in
20 spite of the fact: (i) all the ICAs between McLeodUSA and Qwest have an integration clause
21 stating that the agreement between the parties consists of all the documents that make up the ICA,
22 and that the written agreement supersedes all prior oral or written understandings and (ii) the 2004
23 Amendment reiterates the integration of that amendment as part of the ICA and states that all other
24 terms remain in full force and effect. McLeodUSA's position on this issue is set forth in its Post-
25 Hearing Reply Brief at pages 12 to 15.

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1 **III. THE ORDERS IMPROPERLY FOUND THAT MCLEODUSA WAIVED ITS**
2 **RIGHT TO NON-DISCRIMINATORY TREATMENT.**

3 Qwest's position, as reflected in the analysis of both Utah Report and Order and the
4 Washington Initial Order, essentially claims that, by signing the 2004 Amendment, McLeodUSA
5 voluntarily waived its rights granted by other sections of the ICA and by Section 251(c)(6) of the
6 Federal Telecommunications Act of 1996. This assumed waiver is accepted as the basis for
7 dismissing the resulting discrimination and inconsistency created within the ICA in both the Utah
8 and Washington orders, even though both orders recognized that the McLeodUSA interpretation of
9 the 2004 Amendment was reasonable. Thus, not only does McLeodUSA lose the interpretation
10 argument based on extrinsic evidence, but both orders then presume McLeodUSA voluntarily
11 agreed to discriminatory treatment by signing the amendment even though there is no contractual
12 language or extrinsic evidence indicating that McLeodUSA waived its contractual and statutory
13 right to non-discriminatory treatment. Those results are incorrect and patently unfair.

14 **IV. CONCLUSION**

15 The orders from Utah and Washington are flawed and do not represent any binding
16 precedent on this Commission. The Commission should conduct an independent review and
17 analysis of the record in this docket and conduct its own legal and policy analysis in determining
18 the proper outcome of this complaint docket.

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RESPECTFULLY SUBMITTED this 25th day of October 2006.

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

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