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BEFORE THE ARIZONA CORPORATION COMMISSION

2006 OCT 31 A 11: 55

1 JEFF HATCH-MILLER

2 Chairman

3 WILLIAM MUNDELL

4 Commissioner

5 MIKE GLEASON

6 Commissioner

7 KRISTIN MAYES

8 Commissioner

9 BARRY WONG

10 Commissioner

AZ CORP COMMISSION
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Arizona Corporation Commission

DOCKETED

OCT 31 2006

DOCKETED BY

11 McLEODUSA TELECOMMUNICATIONS
12 SERVICES, INC.,

DOCKET NOS. T-03267A-06-0105
T-01051B-06-0105

13 Complainant,

14 v.

MOTION TO STRIKE OR IN THE
ALTERNATIVE MOTION FOR
LEAVE TO FILE REPLY BRIEF

15 QWEST CORPORATION,

16 Respondent

17 Qwest Corporation ("Qwest") moves the Arizona Corporation Commission
18 ("Commission") for an order striking the brief filed by McLeodUSA Telecommunications
19 Services, Inc. ("McLeod") on October 25, 2006, or in the alternative, to permit Qwest to file its
20 reply brief set forth in Part II below.

21 **I. The Commission Should Strike McLeod's "Response to Qwest's Supplemental
22 Authorities" From the Record Because It Is Unauthorized**

23 The Procedural Order issued July 13, 2006 provided for post-hearing briefs to be filed by
24 the parties on September 8, 2006, with Responsive Briefs to be filed on September 22, 2006.
25 Both parties availed themselves of the opportunity to argue the evidence and their respective
26 legal positions. As the Commission was aware from the hearing, Qwest and McLeod are
litigating the same issues in a number of states. Within days after the close of the briefing

1 schedule, significant legal developments with respect to those proceedings occurred in the states
2 of Utah and Washington. Accordingly, on September 29, 2006, Qwest filed as Supplemental
3 Authority the Report and Order of the Public Service Commission of Utah ("*Utah Order*").¹ On
4 October 2, 2006, Qwest filed as its Second Supplemental Authority the Initial Order of the
5 Administrative Law Judge in Washington. ("*Washington Initial Order*").²

6 Parties litigating before the Commission often cite supplemental legal authority which
7 has been decided subsequent to the close of the briefing schedule. This practice is particularly
8 common in the field of telecommunications regulation, where issues are often litigated in other
9 jurisdictions simultaneously. The practice is also accepted in the courts of Arizona. For
10 example, Rule 17 of the Arizona Rules of Civil Appellate Procedure ("*Rule 17*") provides for
11 supplemental citation of legal authority.³ Rule 17 admonishes that the citing party shall cite the

12 ¹ Order, *In the Matter of the Complaint of McLeodUSA Telecommunications Services, Inc. vs.*
13 *Qwest Corporation for Enforcement of Commission-Approved Interconnection Agreement*, No.
14 06-2249-01, Utah PSC, September 28, 2006.

15 ² Initial Order: Recommended Decision, *McLeodUSA Telecommunications Services, Inc. v.*
16 *Qwest Corporation*, No. UT-063013, Washington State Utilities and Transportation
17 Commission, September 29, 2006.

18 ³ Rule 17, Arizona Rules of Civil Appellate Procedure, states:

19 When pertinent and significant authorities come to the attention of a party
20 after the party's brief has been filed, or after oral argument but before decision, a
21 party may supplement the citation of legal authority previously presented in that
22 party's appeal brief or briefs by filing with the appellate court a list of
23 supplemental citations of legal authority. If filed less than 5 days before oral
24 argument, a list shall not be assured of consideration by the court at oral argument
25 unless good cause is shown for a later filing; provided, however, that no
26 supplemental citation of legal authority shall be rejected for filing on the grounds
that it was filed less than 5 days before oral argument. The list of supplemental
citations shall clearly identify by page number which portion or portions of the
party's appeal brief is intended to be supplemented thereby, and the relevant page
or pages of the supplemental authority, and shall further state concisely and
without argument the legal proposition for which each supplemental authority is
cited. The form of such list of supplemental citations shall be governed by Rule
6(c).

1 authority without argument. Qwest's filings were made without argument. Qwest attached the
2 two state agency decisions and let them speak for themselves. Qwest's filings were wholly
3 appropriate.

4 If the party filing the supplemental authority under Rule 17 may not argue the validity of
5 the authority or its applicability, then certainly the Rule would not permit the opposing party to
6 argue against that authority. McLeod's argument is completely inappropriate under the concept
7 of Rule 17. In fact, McLeod doesn't simply argue that the authority is not relevant—McLeod
8 devotes four pages of legal argument attacking the holdings themselves. Moreover, the
9 authorities cited find against McLeod on the very same issues, argued by the very same litigants,
10 over nearly identical facts that are now before the Arizona Commission. In essence, McLeod is
11 using Qwest's supplemental authority filings as an excuse to make McLeod's arguments all over
12 again, more than a month after the date for filing briefs has expired. The Commission should
13 issue an order striking McLeod's Response filed on October 25, and removing it from the record
14 because the Response is unauthorized.

15 **II. Qwest's Reply Brief**

16 In Part III of its *authorized* brief filed by McLeod on September 8, 2006, McLeod argued
17 its theories about nondiscrimination at length. Now, in its brief filed on October 25, 2006,
18 McLeod argues that the *Utah Order* and the *Washington Initial Order* are both erroneous, for
19 "failing to consider the four corners of the entire Agreement."⁴ McLeod specifically points out
20 the section of the Interconnection Agreement ("ICA") which obligates Qwest to supply power to
21 McLeod "at parity" to that which it provides to itself.⁵ McLeod seems to believe that once that
22 obligation is read along with the DC Power Amendment, it is clear that the DC Power
23 Amendment must be interpreted as McLeod reads it. These recent arguments, however, are only
24 the old discrimination theories packaged a little differently. Once the package is opened,

25 ⁴ McLeod Brief, p. 2.

26 ⁵ *Id.*, p. 3.

1 underneath are all the same arguments. Those are the same discrimination arguments that the
2 *Utah Order* and the *Washington Initial Order* considered and disposed of.

3 **A. The *Utah Order***

4 The *Utah Order* specifically addresses McLeod's discrimination argument. At page 23,
5 the Utah Commission took notice of McLeod's position that Qwest's charges to McLeod for DC
6 Power Plant based on the size of its distribution cable orders, while sizing Qwest's own power
7 plant based on the List 1 drain of Qwest's equipment is proof of discrimination since the result is
8 that Qwest provides power plant to itself on more favorable terms than it makes available to
9 CLECS such as McLeod. However, the Utah Commission considered and rejected that
10 argument, ruling that the evidence does not support McLeod's claim.

11 The Utah Commission began its analysis of McLeod's discrimination claim by noting
12 what the ICA provided for *before* the DC Power Measuring Amendment existed. Specifically,
13 the Utah Commission found that "*the ICA obligates McLeod to pay for DC Power Plan on an 'as*
14 *ordered' basis and that not until the filing of the current Petition dealing specifically with the DC*
15 *Power Measuring Amendment did McLeod register any type of formal complaint with the*
16 *Commission regarding Qwest's billing for DC Power Plant"*⁶ Clearly, therefore, the Utah
17 Commission took into account the "four corners" of the agreement, and did not focus solely on
18 the Amendment, as McLeod complains.

19 In addition to its finding that the ICA obligates McLeod to pay for DC Power on an "as
20 ordered" basis, the Utah Commission further found that (i) McLeod never previously complained
21 about a lack of parity under the ICA;⁷ (ii) the rate element to be charged on a recurring basis for
22 CLEC DC Power plant orders was approved by the Utah Commission;⁸ (iii) "McLeod has made
23 no showing that Qwest's charging this rate on an 'as ordered' basis for distribution cable orders
24

25 ⁶ *Utah Order*, p. 24. (Emphasis added).

26 ⁷ *Id.*, pp. 24-25.

⁸ *Id.* p. 25

1 is contrary to our decision in Docket No. 00-049-106 and we find nothing in the record to
2 indicate Qwest has applied this rate in a discriminatory manner;”⁹ (iv) it is “reasonable Qwest
3 uses [McLeod’s] order to bill McLeod for its power plant;”¹⁰ and (v) McLeod never asked Qwest
4 to size its collocation power plant to an amount less than that indicated by its ordered distribution
5 cable amperage.¹¹

6 Upon these findings, the Utah Commission ruled:

7 We find nothing in the ICA, statute, regulation, or Commission order that would
8 require Qwest to do more than it is now doing; namely, billing McLeod for its
9 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.*¹²

10 Regardless of how McLeod reformulates its arguments, the Utah Commission squarely answered
11 the allegations of discriminatory conduct. Qwest did not discriminate.

12 **B. The Washington Initial Order**

13 The *Washington Initial Order* analyzes the issues by examining first whether the dispute
14 may be resolved by the language of the Amendment, and concludes that it must look to extrinsic
15 evidence to determine the parties’ intent.¹³ Therefore, the ALJ turned her attention to evidence
16 of the parties’ intent that was gleaned from outside of the Amendment itself. The first place she
17 looked was how the original ICA treated power plant and usage charges. The ALJ concluded
18 that McLeod admitted that in the past it was billed for usage on an as-ordered basis.¹⁴ By
19 examining the past practice *under the ICA*, it is clear that the ALJ examined the issue in the
20 context of the “four corners” of the ICA, contrary to McLeod’s assertions.

21 After examining all of the rest of the extrinsic evidence, the ALJ found that the parties
22

23 ⁹ *Id.*

24 ¹⁰ *Id.*

25 ¹¹ *Id.*

25 ¹² *Id.* p. 26. (Emphasis added).

26 ¹³ *Washington Initial Order*, ¶40.

26 ¹⁴ *Id.*, ¶44.

1 never intended that usage based billing should be applied.¹⁵

2 The *Washington Initial Order* then proceeds to analyze McLeod's arguments that "as
3 ordered" billing violates the non-discrimination obligations Qwest must meet under law. The
4 ALJ concluded that McLeod paid power plant charges under the ICA on an "as-ordered" basis
5 for several years prior to executing the DC power measuring amendment, and the Amendment
6 did not change that:

7 The parties do not dispute that McLeod paid power plant capacity charges under
8 the ICA on an "as-ordered" basis for several years prior to executing the DC
9 power measuring amendment. As discussed above the extrinsic evidence
10 supports Qwest's interpretation that only the power usage element of the DC
11 power rate was changed under amendment.¹⁶

12 The *Washington Initial Order* holds that "McLeod failed to demonstrate on the record of
13 this proceeding that Qwest's DC power rate and rate structured were discriminatory."¹⁷ But
14 regardless, the *Washington Initial Order* observes that parties are free to agree to terms in and
15 ICA which "might appear to be discriminatory, as part of the give and take of negotiations for an
16 ICA which is permitted under the Act."¹⁸

17 ¹⁵ The *Washington Initial Order* concludes as follows at ¶63:

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

27 ¹⁶ *Id.*, ¶68.

28 ¹⁷ *Id.*, ¶87. See also, ¶83, "The record in this proceeding does not support a claim that Qwest's
29 DC power plant rate or rate structure is discriminatory." See also ¶69, "Finally, it is concluded
30 that within the scope of this proceeding the Commission cannot determine whether the DC
31 power plant rate is discriminatory."

32 ¹⁸ *Id.*, ¶68. The ALJ concluded as follows::

33 **Discussion and decision.** Section 252 of the Act allows that in the give and take
34 of negotiations for an ICA, the parties may agree to terms which might appear to

1 It is apparent therefore that the *Washington Initial Order* determined that McLeod agreed to be
2 billed on an as-ordered basis, and having so agreed, it should not then be heard to complain of
3 discrimination.

4 **III. Conclusion**

5 McLeod's arguments are simply repeated from its opening and responsive briefs, *and are*
6 *the same arguments that McLeod made to the Washington and Utah Commissions.* Repetition
7 of its weak theories cannot supply new facts, and cannot change the fact that it agreed to be
8 billed on an as-ordered basis. In its unauthorized filing, McLeod unnecessarily lectures the
9 Arizona Corporation Commission, "The Commission should conduct an independent review and
10 analysis of the record in this docket and conduct its own legal and policy analysis in determining
11 the proper outcome of this complaint docket."¹⁹ Qwest submits that when the Commission
12 completes its independent review of the facts and law in this complaint docket, it will find in
13 Qwest's favor. The *Utah Order* and the *Washington Initial Order* are well reasoned decisions
14 that the Commission may find useful.

15 RESPECTFULLY SUBMITTED this 31st day of October, 2006.

16 QWEST CORPORATION

17
18
19 By: 
20 Norman G. Curtright
21 Corporate Counsel
22 20 East Thomas Road, 16th Floor
Phoenix, Arizona 85012
Telephone: (602) 630-2187

23 be discriminatory because they otherwise receive benefits from the agreement.
24 The parties do not dispute that McLeod paid power plant capacity charges under
25 the ICA on an "as-ordered" basis for several years prior to executing the DC
26 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 amendment.

¹⁹ McLeod Brief, p. 4.

1 ORIGINAL and 13 copies hand-delivered
2 for filing this 31st day of October, 2006, to:

3 Docket Control
4 ARIZONA CORPORATION COMMISSION
5 1200 West Washington Street
6 Phoenix, AZ 85007

7 Copy of the foregoing hand-delivered/mailed/emailed
8 this 31st day of October, 2006 to:

9 Amy Bjelland
10 Administrative Law Judge
11 Hearing Division
12 Arizona Corporation Commission
13 1200 West Washington Street
14 Phoenix, AZ 85007

15 Maureen A. Scott, Esq.
16 Legal Division
17 Arizona Corporation Commission
18 1200 West Washington Street
19 Phoenix, AZ 85007

20 Ernest G. Johnson
21 Director, Utilities Division
22 Arizona Corporation Commission
23 1200 West Washington Street
24 Phoenix, AZ 85007

25 Michael W. Patten, Esq.
26 Roshka Dewulf & Patten, PLC
One Arizona Center
400 E. Van Buren Street, Suite 800
Phoenix, AZ 85004
Email: mpatten@rdp-law.com


