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BEFORE THE ARIZONA CORPORATION COMMISSION

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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 FOURTH SUPPLEMENTAL AUTHORITY**

Qwest Corporation ("Qwest") hereby files as supplemental authority the "Order Denying Application for Rehearing" of the Iowa State Department of Commerce Utilities Board, *In re McLeodUSA Telecommunications Services Inc. v. Qwest Corporation,* No. FCU-06-20, dated April 17, 2007 ("Iowa Rehearing Order"). In the Iowa Rehearing Order the Iowa Board affirmed its *Final Order* in favor of Qwest, which Qwest previously provided as Attachment A to its Post Hearing Brief in this matter.

The Iowa Board affirmed its finding that McLeod's interpretation of the 2004 amendment to the Interconnection Agreement was not supported by the evidence:

> The Board determined that, taken as a whole, the extrinsic evidence did not support McLeodUSA's interpretation of the 2004 Amendment. McLeodUSA has not provided any additional evidence to prove that at the time the 2004 Amendment was executed, McLeodUSA expected to be billed differently with respect to the disputed charges. Instead, the evidence indicated that McLeodUSA

> was expecting other charges to change, but not the DC Power Plant charge. Therefore, the Board concluded that the 2004 Amendment was only intended to apply to the DC Power Usage Charge and that the DC Power Plant charge was to continue to be billed based on the amount of Power ordered. The Board will not alter its finding on this point." *Iowa Rehearing Order*, pp. 8-9.

The Iowa Board again refused to rule that Qwest unlawfully discriminated against McLeod with respect to power plant charges:

> The Board determined in its July 27, 2006, order that based on the available record, Qwest treats CLECs differently than it treats itself with respect to the power plant charges. (Order, p. 14). However, the Board also determined that the record was not well-developed on this issue and it was not clear whether there is a reasonable basis for this difference. (Id.). The Board agrees with Qwest's assertion that "different" does not always equal "discriminatory." (Footnote omitted).
>
> In addition, neither McLeodUSA nor Consumer Advocate offered significant, relevant authority supporting their position that the prohibition of discrimination is an absolute prohibition of different treatment. As a result, the Board does not agree with McLeodUSA and Consumer Advocate that the term "discrimination" is an absolute standard. *Id.*, pp. 12-13.

The Iowa Board went on to state:

> However, the record in this case does not provide a sufficient basis for the Board to make such a determination. Rather, within the scope of this proceeding, the Board may only determine the intent of the parties with regard to the interconnection agreement and the 2004 Amendment. *Id.*, p. 13.

The Iowa Board refused to adopt the alternative meanings that McLeod proposed for the Amendment:

> In this proceeding, The Board reviewed the 2004 Amendment, the interconnection agreement, and extrinsic evidence regarding the intent of the parties and concluded that the language of the 2004 Amendment and the evidence supported Qwest's interpretation that McLeodUSA's ordered for power feeds are its orders for power plant capacity. McLeodUSA has not provided any additional argument in its request for reconsideration that causes the Board to change its original determination and adopt one of McLeodUSA's alternative interpretations of the disputed term. In addition, the Board agrees with Qwest that adopting one of McLeodUSA's interpretations would amount to a revision of the 2004 Amendment and interconnection agreement and would nullify the Board's decision in the underlying docket. Therefore, the Board finds that its interpretation of the 2004 Amendment and interconnection agreement in the July 27, 2006, order is correct. *Id.*, p. 16.

RESPECTFULLY SUBMITTED this 18th day of April, 2007.

QWEST CORPORATION

By: _____

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STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., Complainant vs. QWEST CORPORATION, Respondent.	DOCKET NO. FCU-06-20

ORDER DENYING APPLICATION FOR REHEARING

(Issued April 17, 2007)

BACKGROUND

On February 9, 2006, McLeodUSA Telecommunications Services, Inc. (McLeodUSA), filed with the Utilities Board (Board) a complaint against Qwest Corporation (Qwest) pursuant to Iowa Code §§ 476.100 and 476.101. The complaint has been identified as Docket No. FCU-06-20. Specifically, McLeodUSA alleged that Qwest continues to bill certain collocation power charges to McLeodUSA using "ordered" levels, rather than actual usage, in violation of its amended interconnection agreement. McLeodUSA also asserted that Qwest is discriminating against McLeodUSA and other competitive local exchange carriers (CLECs) by offering services on terms and conditions that are less favorable than it provides to itself in violation of Iowa Code § 476.100(2).

Qwest filed a response to McLeodUSA's allegations on February 20, 2006, along with a counter claim alleging that McLeodUSA improperly withheld certain amounts due to Qwest. A hearing was held on May 10 and 11, 2006. Briefs were filed on June 2, 2006, and oral argument in lieu of reply briefs was held on June 15, 2006.

On July 27, 2006, the Board issued a "Final Order" in Docket No. FCU-06-20. In that order, the Board determined that the specific language of the amendment to the interconnection agreement was unclear regarding whether Qwest's collocation power charges to McLeodUSA were appropriate. Therefore, the Board looked to extrinsic evidence in the record and determined that such evidence supported Qwest's interpretation and that the intent of the amendment was to change the billing for other elements, but the collocation power charges were to continue to be billed based on the amount of power ordered.

Also as part of the July 27, 2006, order, the Board determined that while the available evidence in the record raised a valid concern regarding possible discriminatory behavior by Qwest, the record was not fully developed on the issue. The Board found that the issue was not well developed in the pre-filed testimony, but rather evolved as the hearing progressed. In the end, it was reasonably clear that Qwest treats itself differently from the CLECs with respect to power charges, but it was not clear whether the difference was based on reasonable and lawful considerations.

As a result, the Board was uncertain as to the steps it should take to remedy the situation, or if a remedy was even required. While the Board did not make a determination about discriminatory practices in the July 27, 2006, order, the Board suggested that the subject may be revisited and more fully developed in an appropriate docket.

In response to Qwest's counterclaim, the Board concluded that McLeodUSA was required to pay Qwest the amounts that were withheld. The Board also determined that interest was not owed on these amounts because they were properly disputed and the interest clause of the interconnection agreement did not extend to amounts that were properly disputed.

APPLICATION FOR REHEARING

On August 15, 2006, McLeodUSA filed an application for rehearing pursuant to Iowa Code § 476.12 and requested reconsideration of the Board's final order. McLeodUSA argues that the interconnection agreement, as amended, is not ambiguous because it clearly prohibits discrimination by Qwest when it is providing power to McLeodUSA. McLeodUSA argues that it is entitled to power on terms equal to the terms Qwest provides to itself and the interconnection agreement should be interpreted to produce that result.

Next, McLeodUSA argues that the record before the Board is adequate to find unlawful discrimination on the part of Qwest. McLeodUSA asserts that once discrimination is found, then the Board has the authority to address the issue.

McLeodUSA cites Attachment 1, § 2.1 of the interconnection agreement as giving the Board the authority to resolve all disputes concerning the interconnection agreement.

Finally, McLeodUSA argues that the Board should consider and decide the question of what the terms of the amended interconnection agreement mean when they provide that McLeodUSA is to be billed for power capacity as ordered, but Qwest admits that there are no actual orders to be used for this purpose.

On August 17, 2006, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a joinder in McLeodUSA's application for rehearing. Consumer Advocate offers arguments supplementing and expanding upon McLeodUSA's argument regarding discrimination and also asks the Board to reconsider its final order.

On August 31, 2006, Qwest filed its response to McLeodUSA's petition and Consumer Advocate's joinder. As an initial matter, Qwest argues that Consumer Advocate's application for rehearing was filed late and should not be considered. Qwest then generally argues that McLeodUSA and Consumer Advocate are asking the Board to change the interconnection agreement, not interpret it, and the Board does not have the authority to change the agreement.

More specifically, however, Qwest argues that the Board interpreted the amended interconnection agreement correctly in its final order. Qwest also argues that its power plant charges are not discriminatory and that its practices do not give any preference or advantage to Qwest; while Qwest is treated differently, the

difference in treatment is a natural consequence of the fact that Qwest does not collocate in its own buildings. Qwest also asks for a correction of the Board's July 27, 2006, order regarding the amount of money withheld by McLeodUSA during this dispute.

On September 12, 2006, the Board issued an order granting McLeodUSA's request for rehearing for purposes of further consideration. None of the parties requested a hearing or additional briefing.

DISCUSSION

1. Did the Board err in its interpretation of the DC Power Measuring Amendment and the Interconnection Agreement?

McLeodUSA's position:

It is McLeodUSA's position that the Board did not use the proper standards of contract interpretation when interpreting the DC Power Measuring Amendment (hereafter referred to as the "2004 Amendment"). McLeodUSA asserts that the Board relied on extrinsic evidence when the language of the contract clearly supports McLeodUSA's position.

McLeodUSA also states that the Board failed to "harmonize" the 2004 Amendment within the entire context of the interconnection agreement. McLeodUSA asserts that because the 2004 Amendment is an amendment to the underlying interconnection agreement, the Board must interpret the 2004 Amendment within the context of the entire agreement and harmonize the 2004 Amendment with its related

provisions.[1] McLeodUSA states that Part IV of the interconnection agreement defines the term "collocation" as being an ancillary function wherein it expressly includes "the [incumbent local exchange carrier] ILEC providing resources necessary for the operation and economical use of collocated equipment."[2] McLeodUSA claims that power is one such resource that is necessary for McLeodUSA to use its collocated equipment.

McLeodUSA also asserts that the Board's interpretation of the 2004 Amendment is at odds with Part IV, Section 40.1 and Attachment 4, Section 2.2.24 of the interconnection agreement as well as being contrary to Qwest's state and federal obligations. McLeodUSA claims that the Board did not give adequate consideration to Qwest's obligations under 47 U.S.C. § 251(c). McLeodUSA states that Section 40 of the interconnection agreement requires that Qwest provide McLeodUSA access to ancillary functions (i.e., collocation power) on non-discriminatory terms. In addition, McLeodUSA states that Section 2.2.24 of Section 40.1, Part IV specifically imposes on Qwest an obligation to be non-discriminatory with respect to Qwest's provision of power to McLeodUSA.

McLeodUSA reasons that the 2004 Amendment must be interpreted in such a way that harmonizes the amendment with Part IV, Section 40.1 and Attachment 4, Section 2.2.24 to ensure that Qwest is providing power to support the McLeodUSA

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[1] McLeodUSA cites to *Greene v. Day*, 34 Iowa 328 (1872).

[2] Interconnection Agreement Section 39.1.

collocated equipment on terms that are equal to the manner in which Qwest provides power to itself. McLeodUSA asserts that the Board erred as a matter of law by failing to review the four corners of the interconnection agreement in interpreting the 2004 Amendment.

McLeodUSA also asserts that the Board erred in its interpretation of the 2004 Amendment by failing to recognize that interconnection agreements are not traditional contracts. Rather, McLeodUSA claims that the interconnection agreement is an instrument arising in the context of ongoing state and federal regulation that has provisions to facilitate competition and ensure that carriers are not treated in a discriminatory manner.[3] McLeodUSA claims that the Board should have presumed the intent of the parties entering into an interconnection agreement and any amendment is to properly implement federal law and comparable state law requirements that give rise to the agreement.

Finally, McLeodUSA argues that the Board erred by interpreting the 2004 Amendment without giving due consideration to Qwest's obligations under 47 U.S.C. § 251(c) that give rise to McLeodUSA's access to collocation power.

Consumer Advocate's position:

Consumer Advocate did not take a specific position on this issue.

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[3] Citing *E.Spire Communications, Inc. v. New Mexico Public Utility Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004).

Qwest's position:

Qwest states that the Board correctly interpreted the amendment and that such an interpretation demonstrates the intent of the parties at the time the amendment was executed and approved. Qwest asserts that the Board's review of the extrinsic evidence in this case was appropriate.

Discussion:

The Board reviewed the 2004 Amendment and the interconnection agreement in detail and concluded that the language of the 2004 Amendment did not provide a clear expression of the intent of the parties at the time the 2004 Amendment was executed. The parties were able to offer at least two alternative interpretations of the key language and neither interpretation was shown to be incorrect based on the language of the agreement alone. McLeodUSA has not provided any additional argument in its request for reconsideration that causes the Board to change its original determination that the language of the amendment is susceptible to multiple interpretations. Therefore, the Board's review of extrinsic evidence was appropriate to determine the intent of the parties and interpret the interconnection agreement.

The Board determined that, taken as a whole, the extrinsic evidence did not support McLeodUSA's interpretation of the 2004 Amendment. McLeodUSA has not provided any additional evidence to prove that at the time the 2004 Amendment was executed, McLeodUSA expected to be billed differently with respect to the disputed charges. Instead, the evidence indicated that McLeodUSA was expecting other

charges to change, but not the DC Power Plant charge. Therefore, the Board concluded that the 2004 Amendment was only intended to apply to the DC Power Usage Charge and that the DC Power Plant charge was to continue to be billed based on the amount of power ordered. The Board will not alter its finding on this point.

2. Is the record adequate to support a finding of unlawful discrimination?

McLeodUSA's position:

McLeodUSA acknowledges that the Board stated in its July 27, 2006, order that the underlying record was not fully developed on the issue of discrimination, but McLeodUSA also points out that the Board admitted that Qwest treats CLECs differently insofar as it assigns power plant costs to itself based on List 1 drain (which approximates its actual use), but charges CLECs based on the amount of power ordered (which approximates List 2 Drain).[4] McLeodUSA argues that if there was enough information in the record to determine that Qwest was treating CLECs differently than it was treating itself, then there was enough information in the record to determine that Qwest was behaving in a discriminatory manner.

In addition, McLeodUSA states that the issue of discrimination was clearly presented in its initial complaint.[5] McLeodUSA argues that Qwest had every opportunity to defend the allegation of discrimination in this docket and McLeodUSA

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[4]Tr., 658-59.

[5]The Board assumes McLeodUSA is referencing ¶¶ 17 and 18 of its initial complaint, although McLeodUSA did not specify where and how the issue was raised.

states that Qwest should not be given another opportunity to justify or defend its discriminatory behavior in another docket. McLeodUSA also asserts that the prohibition of discriminatory behavior is absolute and that there is no room for "justified" discrimination.

Finally, McLeodUSA states that the Board has ample authority to address Qwest's alleged discriminatory practices in this proceeding.

Consumer Advocate's position:

Consumer Advocate states that the Board was able to cite to evidence in the record when establishing that Qwest was treating itself differently than other similarly situated CLECs and that the Board's "reasonable basis for this difference" lacks any foundation in law or in the evidence. Consumer Advocate asserts that there is no "reasonableness" standard applicable to the discrimination proscribed in Iowa Code § 476.100(2) or in 47 U.S.C. § 251(c)(2). Consumer Advocate argues that the prohibition of discriminatory behavior is absolute and that the Board's acknowledgment that Qwest is acting in a discriminatory manner is enough; there is no need to look to further evidence to determine if that discrimination is justified or reasonable.

In addition, Consumer Advocate states that while the Board did not cite evidence or law to support its concern about the significance of the discrimination, uncontroverted facts recited in the July 27, 2006, order show that the impact of the discriminatory behavior is substantial.

Finally, Consumer Advocate states that the Board has the proper authority to enforce the prohibition of discrimination in the interconnection agreement. Consumer Advocate cites to Iowa Code § 476.1 as giving the Board the appropriate statutory authority to enforce the prohibition of discrimination in § 476.100(2). In addition, Consumer Advocate states that since both Iowa Code § 476.100(2) and 47 U.S.C. § 251(c)(2) prohibit discrimination by an ILEC in the provision of interconnection with a CLEC, 47 U.S.C. § 251(d)(3) preserves the Board's authority and duty to enforce both the Iowa and federal prohibitions.

Consumer Advocate requests the Board prohibit Qwest from continuing this discriminatory behavior and asks the Board to prescribe modifications of Qwest's interconnection agreement with McLeodUSA and other affected CLECs to set forth a billing method that provides access to DC Power Plant on terms and conditions no less favorable to CLECs than Qwest provides to itself.

Qwest's Position:

Qwest states that McLeodUSA agreed in the interconnection agreement to pay the power plant charges on an "as ordered" basis. Qwest contends that McLeodUSA cannot unilaterally amend the underlying agreement by claiming that an agreed-upon term is now discriminatory. Qwest states that it does not provide collocation to itself, so it is difficult to draw the comparison that McLeodUSA seeks to make with regard to the equality of collocation.

Qwest also states that it is not state law that Qwest must treat McLeodUSA in a manner that is identical to how it treats itself. Qwest asserts that no case or FCC opinion has ever imposed an "absolute" standard of non-discrimination as McLeodUSA and Consumer Advocate contend. Qwest states that differences do not always equate to discrimination.

Qwest states that it makes available to CLECs the amount of power plant capacity they ordered and charges them in accordance with the Board-approved rates. Qwest also states that McLeodUSA failed to take advantage of an alternative offered to them, that being to use lower-capacity fuses in existing power cables, thereby lowering the "ordered amount" and the amount billed.

Discussion:

The Board determined in its July 27, 2006, order that based on the available record, Qwest treats CLECs differently than it treats itself with respect to the power plant charges. (Order, p. 14). However, the Board also determined that the record was not well-developed on this issue and it was not clear whether there is a reasonable basis for this difference. (Id.). The Board agrees with Qwest's assertion that "different" does not always equal "discriminatory."[6]

[6] Black's Law Dictionary defines "discrimination" as "a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored." (Black's Law Dictionary, 5th Ed., p. 420) (emphasis added, citation omitted). This definition supports the notion that different treatment is not always "discriminatory"; there must be a finding regarding the reasonableness of the distinction.

In addition, neither McLeodUSA nor Consumer Advocate offered significant, relevant authority supporting their position that the prohibition of discrimination is an absolute prohibition of different treatment. As a result, the Board does not agree with McLeodUSA and Consumer Advocate that the term "discrimination" is an absolute standard.

The Board also expressed concern in its July 27, 2006, order that it was uncertain as to the extent of its jurisdiction to give McLeodUSA any immediate relief because the power plant charges are terms of the interconnection agreement between the parties and, pursuant to federal law, the Board cannot change the terms of an approved interconnection agreement. It may be possible for the Board to require Qwest to implement a nondiscriminatory rate pursuant to Iowa Code § 476.1 and 47 U.S.C. § 251(d)(3), since it is within the Board's authority to make certain that companies are complying with state and federal laws. However, the record in this case does not provide a sufficient basis for the Board to make such a determination. Rather, within the scope of this proceeding, the Board may only determine the intent of the parties with regard to the interconnection agreement and the 2004 Amendment. In this limited context, revisiting a single charge and possibly changing it would raise issues of jurisdiction, authority, and the fairness of charging only one term in a negotiated agreement without considering the give-and-take of the negotiations. An interconnection cost docket or an arbitration proceeding would be a

more appropriate forum for judging whether the differences in the power plant charges are unreasonably discriminatory, because in a cost docket all rates can be considered together or in an arbitration proceeding the entire agreement can be considered.

This issue was not fully developed in this docket (the Board was quite clear in its July 27, 2006, order that the record was limited regarding this issue). Because the issue was not sufficiently developed in this proceeding, McLeodUSA is not precluded from raising the issue again in a subsequent proceeding. Therefore, the Board again offers to revisit this issue in an appropriate docket; that is, a docket in which the issue can be examined in context with all related matters.

3. Are McLeodUSA's orders for Power Feeds also its orders for Power Plant Capacity?

McLeodUSA's position:

McLeodUSA asserts that the Board failed to address a necessary issue in this case, the question of what "as ordered" means in the context of the 2004 Amendment. McLeodUSA contends that Qwest does not receive "orders" for an amount of power plant and because the term "as ordered" is not defined in the agreement, the Board must determine how Qwest should apply the term. McLeodUSA also contends that reaching this issue is another way the Board can immediately remedy the alleged discrimination.

McLeodUSA argues that there are two reasonable ways to define the term "as ordered." First, McLeodUSA suggests that the actual real-time draw of power from the power plant can be viewed as the "order," which would result in McLeodUSA being charged for actual consumption. Second, McLeodUSA suggests that the CLEC "order" could reasonably be defined as being the sum of the List 1 drain of the CLEC's equipment. McLeodUSA asserts that either result resolves the ambiguity of the use of the term "as ordered" and either result minimizes the alleged discriminatory behavior.

Consumer Advocate's position:

Consumer Advocate does not take a specific position on this issue.

Qwest's position:

Qwest states that the alternative interpretations of the term offered by McLeodUSA amount to revisions to both the 2004 Amendment and to the Interconnection Agreement. Qwest asserts that the "actual real-time draw of power" as suggested by McLeodUSA is not supported by the interconnection agreement or the 2004 Amendment. Qwest states that there is no evidence in the record that any party ever intended or requested such a result. Qwest also states that defining the term "as ordered" to mean "List 1 draw" is also not supported by any evidence. Qwest claims that this alternative interpretation is inconsistent with the way that Qwest charged and McLeodUSA paid power plant and power usage charges for four years without complaint. Qwest states that the record

demonstrates that both parties agreed that the purpose of the 2004 Amendment was to change the power usage rate from "as ordered" to a "measured" basis. Qwest contends that if "as ordered" in the original agreement is now determined to mean "measured," then the entire amendment has no meaning under either party's interpretation.

Discussion:

In this proceeding, the Board reviewed the 2004 Amendment, the interconnection agreement, and extrinsic evidence regarding the intent of the parties and concluded that the language of the 2004 Amendment and the evidence supported Qwest's interpretation that McLeodUSA's orders for power feeds are its orders for power plant capacity. McLeodUSA has not provided any additional argument in its request for reconsideration that causes the Board to change its original determination and adopt one of McLeodUSA's alternative interpretations of the disputed term. In addition, the Board agrees with Qwest that adopting one of McLeodUSA's interpretations would amount to a revision of the 2004 Amendment and interconnection agreement and would nullify the Board's decision in the underlying docket. Therefore, the Board finds that its interpretation of the 2004 Amendment and interconnection agreement in the July 27, 2006, order is correct.

4. What is the correct amount that McLeodUSA withheld from Qwest?

Qwest's position:

Qwest states that it is not clear regarding the amounts McLeodUSA withheld and now must return to Qwest. Qwest cites to page 15 of the Board's July 27 order where the amount withheld is described as $326,116.04. Qwest then cites to the ordering clause on page 16 where McLeodUSA is directed to pay Qwest the amount withheld, "shown on this record to be $313,106.33." Qwest also states that the testimony of Ms. Spocogee was corrected on page 435, lines 7-23, and that the correct amount withheld was $326,859.04. Qwest requests a clarification to the July 27, 2006, order regarding this amount.

Discussion:

The Board has reviewed the transcript of Ms. Spocogee's testimony and finds that Qwest is correct in its assertion that the correct amount withheld by McLeodUSA is $326,859.04. Therefore, the Board will correct the July 27 order to specify that the amount to be refunded by McLeodUSA to Qwest is $326,859.04.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The application for rehearing filed by McLeodUSA Telecommunications Services, Inc., on August 15, 2006, is denied as described in this order.

2. The Ordering Clause in the "Final Order," issued in this docket on July 27, 2006, is corrected to read as follows:

McLeodUSA Telecommunication Services, Inc., is directed to pay to Qwest Corporation the amount withheld from September 2005 through December 2005 in connection with the disputed collocation power charges, shown on this record to be $326,859.04.

UTILITIES BOARD

/s/ John R. Norris

/s/ Curtis W. Stamp

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 17th day of April, 2007.