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BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

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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

APPLICATION FOR REHEARING OF DECISION NO. 69872

Pursuant to A.R.S. § 40-253, McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") submits its Application for Rehearing of Decision No. 69872 (August 28, 2007). McLeod respectfully requests that the Arizona Corporation Commission (the "Commission") grant this Application and modify Decision No. 69872.

INTRODUCTION

McLeodUSA filed this complaint in an effort to: (i) enforce the terms of its interconnection agreement, as amended in 2004, addressing how Qwest Corporation ("Qwest") bills for DC power provided to McLeodUSA's collocations in Qwest central offices and (ii) ensure that McLeodUSA was receiving that DC power in parity with the terms under which Qwest accesses DC power for its own equipment. Non-discriminatory treatment is both required under the 1996 Telecommunications Act and critical for McLeodUSA to provide effective competition in Arizona. However, Decision No. 69872 has interpreted the amended interconnection agreement at issue in a manner that is: (i) discriminatory in violation of the 1996 Act, placing McLeodUSA at an improper competitive disadvantage; (ii) contrary to the unambiguous language of the amended interconnection agreement; and (iii) contrary to the extrinsic evidence in the record concerning the proper interpretation of the amended interconnection agreement.

1 In fact, the DC Power Measuring Amendment makes clear on its face that it must be
2 construed as part and parcel of the underlying ICA that it amends:

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

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

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

10 Part D, Section (D)2.1 of the ICA obligates Qwest to provide McLeodUSA access to
11 collocation, including DC power, on a nondiscriminatory basis in compliance with federal and
12 state law. Thus, the unquestionable intent of the parties is that Qwest must provide DC power to
13 McLeodUSA collocations on a nondiscriminatory basis. Accordingly, when the 2004 Amendment
14 is interpreted within the context of the ICA as a whole, it unambiguously supports a conclusion
15 that the 2004 Amendment required Qwest to bill all collocation power elements on a measured
16 basis because that is how Qwest provides power to itself.

17 Decision No. 69872 also mistakenly places significant weight on certain extrinsic evidence
18 and ignores more compelling extrinsic evidence to reach the wrong conclusion that the ICA, as
19 amended by the 2004 amendment, permits Qwest to bill McLeodUSA based on the size of the
20 distribution cables, not on the amount of power used. That interpretation leads to Qwest treating
21 McLeodUSA differently than it treats itself with respect to DC power. The extrinsic evidence, in
22 fact, supports an interpretation leading to non-discrimination.

23 For example, Decision No. 69872 erred in relying on Qwest's Change Management
24 Process ("CMP") as extrinsic evidence in support of Qwest's interpretation, and dismissing as "not
25 determinative" or "minor" other extrinsic evidence from that same CMP process. Decision No.

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¹ The "Agreement" referenced is the entire ICA.

1 69872 states, at ¶ 103 that “[o]ther than a minor conflict concerning whether an amendment would
2 be required..., there is no evidence that Qwest had an intent prior to execution of the Amendment
3 other than its current interpretation of the Amendment.” However, to the contrary, the same CMP
4 documentation shows that Qwest specifically refused to agree to bill unified power rates from
5 Oregon and South Dakota on a measured basis.² Yet, between that time and the execution of the
6 2004 Amendment, Qwest manifested a different intent with respect to how these unified power
7 rates would be billed in those two states. Qwest witness Million admitted that the unified DC
8 power rates are billed on a measured basis in Oregon and South Dakota.³ Not only was this a
9 change from Qwest’s position stated during the CMP, it results in precisely the same billing that
10 McLeodUSA expected in Arizona, and is arguing for in this proceeding – billing for power on a
11 measured basis for all power rate elements. Thus, the Decision No. 69872 incorrectly ignored that
12 Qwest materially changed its position from that which it had stated during the CMP process, and,
13 in fact, is billing unified power rates in those states on a measured basis.

14 **B. Decision No. 69872 Allows Qwest to Unlawfully Discriminate Against McLeodUSA in**
15 **Violation of the ICA and Applicable Law.**

16 Decision No. 69872 concludes that Qwest may “reasonably” discriminate against
17 McLeodUSA in providing access to power. However, the FCC made it patently clear that the
18 nondiscrimination standard under Section 251(c) of the 1996 Act does not permit incumbent local
19 exchange carriers to “reasonably” discriminate. Using the appropriately “stricter”
20 nondiscrimination standard established by the FCC in the First Report and Order, under Decision
21 No. 69872, Qwest will be allowed to unlawfully discriminate against McLeodUSA by providing
22 access to collocation power, an essential component of interconnection, on terms and conditions
23 that are materially less favorable than Qwest provides itself for accessing the same power for its
24 own use.

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² Hearing Ex. Q-1 (Response Testimony of William Easton, Exhibit WRE-2 at 2).

³ Tr. 322.

1 The interpretation of the 2004 DC Power Amendment adopted by the Decision No. 69872
2 results in discriminatory treatment against McLeodUSA regarding access to DC power.
3 McLeodUSA simply is not provided access to DC power on the same terms that Qwest provides
4 DC power to itself. However, Decision No. 69872 sanctions the discriminatory treatment by
5 applying the wrong legal standard in evaluating whether Qwest is unlawfully discriminating
6 against McLeodUSA in providing access to power wherein it states “[a]n ILEC may charge
7 different rates than it imputes to itself as long as such rates are reasonable.”⁴ Based on an
8 application of this improper “reasonable discrimination” standard, Decision No. 69872 finds
9 Qwest’s discriminatory treatment to be reasonable and rejects McLeodUSA’s complaint.

10 In its Local Competition Order, the FCC expressly rejected use of a “reasonable
11 discrimination” standard under Section 251:

12 The nondiscrimination requirement in section 251(c)(2) is not
13 qualified by the "unjust or unreasonable" language of section
14 202(a). We therefore conclude that Congress did not intend that the
15 term "nondiscriminatory" in the 1996 Act be synonymous with
"unjust and unreasonable discrimination" used in the 1934 Act, but
rather, intended a more stringent standard.⁵

16 Accordingly, Decision No. 69872’s rejection of the discrimination claim based on the use of a
17 “reasonable discrimination” standard is in error and must be corrected.

18 The FCC was equally clear in its Local Competition Order as to what nondiscrimination
19 standard must be applied in evaluating the access to power Qwest is obligated to provide to
20 McLeodUSA under Section 251(c)(6). First, the FCC made it clear that the Section 251(c)
21 nondiscrimination standard “applies to the terms and conditions an incumbent LEC imposes on
22 third parties *as well as on itself*.”⁶ Thus, one cannot deem Qwest’s treatment of CLECs as
23 nondiscriminatory simply because it treats all CLECs equally; the Section 251(c)
24 nondiscrimination standard prohibits an ILEC from advantaging itself simply by treating CLECs

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26 ⁴ Decision No. 69872 at 107.

27 ⁵ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98,
FCC 96-325, First Report and Order, 11 FCC Rcd.15499 (1996) (“Local Competition Order”) at ¶ 217.

⁶ Id. at ¶ 218.

1 equally poorly. The FCC elaborated on the Section 251(c) nondiscrimination standard later in its
2 order by again proclaiming that the incumbent local exchange carrier had to provide CLECs access
3 to these essential elements on terms that, at a minimum, were offered equally to all requesting
4 carriers, and, where applicable, *equal* to the terms and conditions under which the incumbent LEC
5 provisions such elements to itself.⁷ While the FCC made this statement in the context of
6 discussing nondiscriminatory access to UNEs under Section 251(c)(3), Section 251(c)(6) contains
7 the identical “just, reasonable and nondiscriminatory” standard as does Section 251(c)(3). Further,
8 this illumination applies with equal force to Section 251(c)(6) since, as the FCC stated, the Section
9 251 “*unqualified*” non-discrimination standard was identical “throughout Section 251.”⁸

10 Second, the FCC discussed its rationale for adoption of this unqualified stringent (*i.e.*,
11 absolute) standard of nondiscrimination at several points in its order, and all are instructive and
12 support the McLeodUSA interpretation of the Section 251(c) standard that Qwest has violated by
13 providing discriminatory access to power. For example, the FCC concluded:

14 Given that the incumbent LEC will be providing interconnection to
15 its competitors pursuant to the purpose of the 1996 Act, the LEC
16 has the incentive to discriminate against its competitors by
17 providing them *less favorable terms and conditions of*
interconnection than it provides itself. Permitting such
circumstances is inconsistent with the procompetitive purpose of
the Act.⁹

18 The FCC further explained that a strict prohibition against discrimination under Section
19 251(c) was required to ensure that CLECs have a “meaningful opportunity to compete...Such
20 terms and conditions should serve to promote fair and efficient competition. This means, for
21 example, that incumbent LECs may not provision unbundled elements that are inferior in quality
22 to what the incumbent provides itself because this would likely deny an efficient competitor a
23 meaningful opportunity to compete... Moreover, the *incumbent must provide access to these*

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27 ⁷ *Id.* at ¶ 315.

⁸ *Id.* at ¶ 218.

⁹ *Id.* at ¶ 218 (emphasis added).

1 *functions under the same terms and conditions that they provide these services to themselves* or
2 their customers.¹⁰

3 The record in this case amply demonstrates that Qwest is favoring itself in providing itself
4 access to an essential element – DC power – because Qwest charges McLeodUSA based on the
5 size of the power feeder cables *i.e.*, List 2 Drain, which results in much higher power charges, than
6 the basis on which Qwest assigns costs to itself for using the same DC power. According to Ms.
7 Spocogee’s testimony, that discriminatory treatment costs McLeodUSA nearly \$40,000 in
8 excessive DC Power charges *per month*.¹¹ The fact that the incumbent can foist an extra \$40,000
9 per month in excessive DC power charges onto a single CLEC by providing discriminatory access
10 to power is thoroughly inconsistent with the FCC’s rationale for adopting the stringent
11 nondiscrimination standard in Section 251(c). Such discrimination harms McLeodUSA’s ability
12 to meaningfully compete against Qwest using facilities-based services that require power to
13 operate the McLeodUSA collocations. The legal standard applied in the DECISION NO. 69872
14 on the issue of discrimination is simply at odds with the standard adopted by FCC in the Local
15 Competition Order and must be corrected by the Commission.

16 Moreover, while Decision No. 69872 states that Qwest provided evidence that
17 distinguishes its situation from that of a collocating CLEC, Decision No. 69872 does not identify
18 the evidence relied on for its statement. Qwest’s Post-Hearing Brief argued it was “reasonably”
19 discriminating based on Mr. Ashton’s testimony that it was appropriate for Qwest to use the List 2
20 drain for CLECs since Qwest did not have the List 1 drain, used by Qwest to size power plant for
21 its own equipment, from CLECs. In its Post Hearing Reply Brief, Qwest makes its oft repeated
22 argument that it can treat CLECs differently because CLECs have caged collocation spaces and
23 incumbent local exchange carriers do not house their equipment in that manner. Neither
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26 ¹⁰ Id. at 315 and 316 (emphasis added). As previously explained, while the FCC provided this explanation of the
27 Section 251(c) nondiscrimination standard in the context of 251(c)(3) UNEs, the nondiscrimination standard is
identical “throughout Section 251.” Id. at ¶218.

¹¹ Hearing Ex. M-5 CF (Confidential Direct Testimony of Tami J. Spocogee, pp. 3-4).

1 justification entitles Qwest to discriminate against McLeodUSA under the appropriate standard of
2 nondiscrimination.

3 First, Mr. Ashton's claim was thoroughly inconsistent with Qwest's own engineering
4 guidelines.¹² No reasonable engineer would size power plant to List 2 drain associated with their
5 power distribution cables (whether those cables are CLEC cables or Qwest cables) given that
6 Qwest's engineering requirements require power *cables* to be sized on a higher List 2 drain, while
7 Qwest's manuals direct that power *plant* be sized on a lower List 1 drain – a standard that Qwest
8 was well aware of back in 1999-2000.¹³

9 Second, excusing discrimination on this basis emasculates the more stringent Section
10 251(c) nondiscrimination standard. In essence, it effectively endorses Qwest's position that the
11 nondiscrimination prohibition of Section 251(c) can be circumvented by an incumbent local
12 exchange carrier's failure (intentional or not) to secure information that would otherwise enable
13 the incumbent LEC to provide access to power on the same terms and conditions as provided for
14 its own use. It is undisputed that Qwest's collocation order form only asked for the size of the
15 cable order; the List 1 drain of CLEC equipment was never requested by Qwest.¹⁴ Nor does
16 Qwest's collocation order form state anywhere that the order for power feeder cables would be
17 construed by Qwest an order for power plant capacity.¹⁵

18 For example, Qwest witness Mr. Ashton admitted that if Qwest knew the List 1 drain of
19 CLEC equipment when evaluating the power plant capacity that would be required to support that
20 equipment, Qwest would design power plant required by the CLEC to the CLEC's List 1 drain
21 (*i.e.*, a measure of the CLEC's power *usage*).¹⁶ However, Mr. Ashton admitted that Qwest never
22 asked McLeodUSA for its List 1 drain information, nor provided any means on the collocation
23 application it designed where a CLEC could provide this information if it so desired. Qwest
24 cannot be rewarded for its self-serving ignorance illustrated by its failure to gather the necessary

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26 ¹² Hearing Ex. M-3 CF (Confidential Direct Testimony of Sidney Morrison, pp. 31-36).

¹³ Hearing Ex. M-2 (Rebuttal Testimony of Michael Starkey, pp. 32-33).

¹⁴ Hearing Ex. M-2 (Rebuttal Testimony of Michael Starkey, pp. 26-27).

¹⁵ Hearing Ex. M-2 (Rebuttal Testimony of Michael Starkey, Exhibit MS-4).

¹⁶ Tr. at 344-345.

1 information and admitted defiance of its own Technical Publications for proper engineering.
2 Furthermore, McLeodUSA provided evidence from Qwest's own Technical Publications –
3 documentation written by Qwest's engineering witness, Mr. Ashton, showing that Qwest could
4 estimate List 1 drain based on information that Qwest actually had in hand. Thus, Qwest could
5 have estimated every CLEC's List 1 drain to size power plant in a nondiscriminatory fashion in
6 fulfillment of its duty to provide access to power on equal terms to how Qwest provides access to
7 power for itself – using List 1 drain.¹⁷ Qwest's claims regarding the way it sizes and charges for
8 power plant differently for CLECs than it does for itself defines the very type of discriminatory
9 treatment the FCC said was improper under Section 251(c).

10 Indeed, there is no debate that Qwest's charging McLeodUSA for power plant capacity
11 based on the size of the power feeder cables (which Qwest assumes is List 2 drain) violates the
12 nondiscrimination prohibition of Section 251(c)(6) as explained by the FCC. List 2 Drain is the
13 current equipment draws when the power plant is in "worst case" condition of voltage and traffic
14 distress, when the DC power plant's batteries are approaching a condition of total failure.¹⁸ In
15 other words, List 2 is an extreme circumstance and rarely if ever occurs. It is economically
16 inefficient to size power plant based on a "worst case" scenario.¹⁹ TELRIC pricing principles
17 require the assumption of an economically efficient network. In fact, Qwest uses that assumption
18 in planning DC Power Plant capacity for its own use, as demonstrated by its Technical
19 Publications that power plant capacity is sized using List 1 drain.²⁰ It simply makes economic
20 sense to size power plant capacity using the List 1 drain since the cost of building DC power plant
21 to constantly have capacity available to satisfy an extremely rare List 2 drain event far exceeds the
22 benefits of building power plant capacity of that size.

23 Further, the Commission has already recognized that using cable amperage to bill for DC
24 power was inconsistent with TELRIC pricing principles in Qwest's prior cost docket, which ruling

25 ¹⁷ Hearing Ex. M-4 (Public Rebuttal Testimony of Sidney Morrison, p. 10).

26 ¹⁸ Hearing Ex. M-3 CF (Confidential Direct Testimony of Sidney Morrison, pp. 21-22 and 32 and Ex. SLM-3).

27 ¹⁹ Id. at 12 and 46.

²⁰ See Hearing Ex. M-2 (Rebuttal Testimony of Michael Starkey, p. 29) and Hearing Ex. M-3 CF (Confidential Direct Testimony of Sidney Morrison, pp. 32-35).

1 Qwest apparently chose to ignore. The Commission said it was **not** approving billing for power
2 based on the “maximum capacity of the cabling.” *In The Matter Of The Investigation Into Qwest*
3 *Corporation's Compliance With Certain Wholesale Pricing Requirements For Unbundled Network*
4 *Elements And Resale Discounts*, Docket No. T-00000A-00-0194; Decision No. 64922 at 43-44
5 (Arizona Corporation Commission June 12, 2002). Yet, that is exactly the basis of how Qwest has
6 billed McLeodUSA since Qwest implemented the rates approved in the 2002 proceeding, and it
7 continues to do so under the 2004 Amendment– based on the “maximum capacity of the cabling.”
8 Decision No. 69872 completely failed to explain why, given the Commission’s explicit ruling
9 against using cabling size as the basis for billing for DC power, it was permissible to Qwest to bill
10 McLeodUSA on that basis since that cost docket.

11 This Commission’s prior ruling is on all fours with the FCC’s Section 251(c)
12 nondiscrimination analysis, wherein the FCC explained that the nondiscrimination requirement
13 throughout Section 251(c) was *unqualified* because it was intended to ensure that CLECs had a
14 “meaningful opportunity to compete.”²¹ By charging McLeodUSA for power plant capacity using
15 the maximum capacity of the power feeder cables, Qwest is requiring McLeodUSA to pay for
16 power plant capacity as if Qwest were designing power plant on an inefficient basis for
17 McLeodUSA (*i.e.*, equal to List 2 drain, the worst case scenario), when Qwest does not do so for
18 itself. Thus, Qwest is foisting inefficient network costs onto McLeodUSA under its interpretation
19 of the ICA as amended by the 2004 Amendment.

20 The FCC stated unequivocally in its Local Competition Order that when an ILEC provides
21 interconnection to a competitor in a manner that is less efficient than the ILEC provides to itself,
22 the ILEC is violating the duty to be “just” and “reasonable” under section 251(c)(2)(D).²² Qwest
23 can, and should be required to size power plant for McLeodUSA as Qwest does for itself in accord
24 with its own technical documentation, the DC Power Measuring Amendment, the parties’ ICA,
25 and federal law. And even if Qwest actually overbuilds central office power plant in contravention

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27 ²¹ Local Competition Order ¶ 315.

²² Local Competition Order ¶ 218. Thus, not only is Qwest providing unlawfully discriminatory access, it is also violating the just and reasonable standard established by the FCC under Section 251.

1 of engineering requirements, the parties' ICA and the FCC's rules and orders preclude Qwest from
2 charging McLeodUSA for this inefficiency. As such, Qwest's interpretation of the Interconnection
3 Agreement, as amended by the 2004 Amendment, to allow Qwest to charge for power plant based
4 on the size of McLeodUSA's power distribution cables, should be rejected.

5 **RELIEF REQUESTED**

6 McLeodUSA requests that the Commission grant this application and modify Decision No.
7 69872 to provide proper interpretation of the 2004 DC Power Amendment and to eliminate the
8 unlawful discrimination against McLeodUSA by Qwest with respect to access to DC Power.

9 RESPECTFULLY SUBMITTED this 14th day of September 2007.

10 MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

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12
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