BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

McLEODUSA TELECOMMUNICATIONS SERVICES, INC., Petitioner, v. QWEST CORPORATION, Respondent	Docket No. UT-063013

OPENING POST-HEARING BRIEF OF

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

August 11, 2006

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INTRODUCTION

1. The subject of this complaint is DC power, which is required by a collocating CLEC like McLeodUSA. DC power is provided from the DC power plant in the incumbent local exchange carrier's ("ILEC") central office ("CO"), where AC power from the power utility is converted to DC power by rectifiers (backed up by batteries and generators) for use by all communications equipment housed in the CO. That power is delivered over distribution cables to McLeodUSA's collocation cage for use by McLeodUSA's collocated equipment. Power is unquestionably an essential component of collocation to which the ILEC, in this case, Qwest Corporation ("Qwest"), has an obligation to provide to CLECs on a nondiscriminatory basis,[1] which like access to unbundled network elements, includes the requirement that Qwest provide in a manner that provides McLeodUSA a "meaningful opportunity to compete."[2]

2. Qwest, however, makes decisions in engineering (*i.e.*, sizing) its power plant and allocating costs for that power plant to various users, including itself and its CLEC collocators, that discriminate against McLeodUSA. Qwest's erroneous

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[1] *See* 47 U.S.C. § 252(c)(6).

[2] Qwest must provide collocation "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory," *id.*, which is exactly the obligation as Qwest has to provide unbundled network elements under Section 251(c)(3). In interpreting that obligation, the FCC concluded: "The duty to provide unbundled network elements on "terms, and conditions that are just, reasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they *must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.* We also conclude that, because section 251(c)(3) includes the terms "just" and "reasonable," this duty encompasses more than the obligation to treat carriers equally. Interpreting these terms in light of the 1996 Act's goal of promoting local exchange competition, and the benefits inherent in such competition, we conclude that these terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a *meaningful opportunity to compete.* Such terms and conditions should serve to promote fair and efficient competition. This means, for example, that incumbent LECs may not provision unbundled elements that are inferior in quality to what the incumbent provides itself because this would likely deny an efficient competitor a meaningful opportunity to compete." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 & 95-185, FCC 96-325, *First Report and Order*, ¶ 315 (rel. Aug. 8, 1996) (emphasis added).

application of the Power Plant charge results in McLeodUSA paying more than its fair share of the power plant costs and allows Qwest – the carrier using the vast majority of the power in the CO – to enjoy a competitive advantage in the form of a "free ride" for power.

3. The subject matter is DC power, but as a legal matter, this case is first and foremost about the DC Power Measuring Amendment (also referred to in this brief as "2004 Amendment" or "Amendment") that amended the interconnection agreement ("ICA") between McLeodUSA and Qwest. Both McLeodUSA and Qwest presented testimony explaining why their interpretation is correct, but only McLeodUSA's reading of the 2004 Amendment gives effect to all of Amendment's terms, is consistent with sound economic and engineering principles, and perhaps most importantly, is the only reading that is consistent with Qwest's obligations under Section 251 of the federal Telecommunications Act of 1996 ("Act") and Washington law to provide collocators access to DC Power on a nondiscriminatory basis. Hence, the evidence in the record strongly supports McLeodUSA's Complaint and undercuts Qwest's interpretation of the Amendment.

4. Accordingly, the Commission should find that Qwest has taken an improperly restrictive and discriminatory interpretation of the Amendment, and that Qwest's interpretation violates state and federal law by discriminating in its own favor when it allocates costs related to DC power plant between Qwest and McLeodUSA. The Commission should therefore order Qwest to assess the power plant rate element for McLeodUSA on the basis of measured use, consistent with the Amendment, and refund overpayments made by McLeodUSA to Qwest dating back to August 2004 (the date both

parties signed the Amendment). The Commission should also order Qwest to assess its power plant rate element based on measured usage (in the manner dictated by the DC Power Measuring Amendment) on a going-forward basis.

ARGUMENT

I. THE BETTER READING OF THE LANGUAGE OF THE DC POWER MEASURING AMENDMENT IS THAT DC POWER PLANT SHOULD BE BILLED ON A MEASURED USE BASIS.

5. Section 1.1 of the ICA between McLeodUSA and Qwest states that one purpose of the Agreement is to fulfill Qwest's obligations under the Act.[3] Even without this formality, however, principles of contract law dictate that the DC Power Measuring Amendment must be interpreted consistent with applicable law – in this case the Act and applicable Washington statutes, including RCW 80.36.170 and RCW 80.36.186 – which require Qwest to provide nondiscriminatory access to DC power. The Commission thus should interpret the 2004 Amendment to fulfill the clear nondiscriminatory obligations that the Act and Washington law impose on Qwest. The only interpretation available in this proceeding that meets that stricture is McLeodUSA's interpretation.

A. The Language of the DC Power Measuring Amendment and the Structure of the DC Power Usage Charges Require Billing for DC Power Plant on a Measured Usage Rather Than The Size of Power Cables.

6. The stated purpose of the DC Power Measuring Amendment is to establish billing for "-48 Volt DC Power Usage" on an "as measured" basis.[4] Attachment 1, Section 2.0 to that Amendment, addresses the "Rate Elements" at issue, and Section 2.1

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[3] McLeodUSA opted into Qwest's Statement of Generally Available Terms ("SGAT") dated March 22, 2000. McLeodUSA requests that the Commission take official notice of the ICA, which the Commission approved shortly after McLeodUSA adopted it in May 2000.

[4] Exhibit 24 (2004 DC Power Measuring Amendment), Attachment 1, Section 2.1.

specifically identifies "-48 Volt DC Power Usage" as the relevant rates to be impacted. Subsection 2.2.1 then discusses the "-48 Volt DC Power Usage Charge," and explains that the change to be effectuated by the agreement is that "Qwest will determine the ***actual usage*** at the power board . . ." Subsection 2.2.1 goes on to state that the "actual usage" measured at the power board is applied to "-48 Volt DC Power Usage" as "specified in Exhibit A of the Agreement."

7. Exhibit A to the ICA (the pricing appendix) shows that the "-48 Volt DC Power Usage" – the exact same term as used in the Amendment – covers both power plant and usage charges. The following table is a verbatim excerpt from Washington Exhibit A:

		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	

8. Exhibit A shows that the Amendment is referring specifically to line 8.1.4 of Exhibit A when defining the rates to be billed on a measured-use basis. Indeed, Section 8.1.4 is the only place in Exhibit A where the term "-48 Volt DC Power Usage" can be found.[5]

[5] The Exhibit A attached to the McLeodUSA and Qwest ICA includes the above referenced table, which is different than the Exhibit A schedule that McLeodUSA witness Starkey referenced in his testimony, which is the current Exhibit A to Qwest's Washington SGAT. Clearly, the Exhibit A attached to the actual ICA entered into by McLeodUSA is controlling between the parties, and a copy of the relevant page is attached to this brief for the Commission's reference.

9. Even without further instruction from the Amendment, the simplest, most logical reading of Subsection 2.2.1 is that it applies to "-48 Volt DC Power Usage" at 8.1.4 of Exhibit A. However, there is even more language in the Amendment that supports McLeodUSA's reading. In the same section (i.e., Section 2.1 of Attachment 1), the Amendment removes all possible doubt as to whether the Power Plant rate element should be billed on a measured-use basis when it states unequivocally that "the DC Power Usage charge is for the capacity of the power plant available for CLEC's use." (Emphasis added.)

10. Not only is the legitimacy of McLeodUSA's reading plain on its face, this interpretation is also consistent with past practice. Prior to the Amendment, Qwest billed all DC power elements in a consistent manner. That is, each of the elements was billed based on the size of the power cable connecting McLeodUSA's collocation arrangement to the DC power plant. The Amendment changed the manner in which DC Power Usage was to be billed (i.e., Usage would be billed on a measured-use basis going forward). Accordingly, the only rationale conclusion is that all elements would continue to be treated in the same fashion under the Amendment (*i.e.*, all DC Power elements would be billed on measured-use basis for collocations over 60 Amps). Without any support in the Amendment or elsewhere, Qwest argues that the Amendment somehow changes the way that one of those elements will be assessed (Usage), while maintaining the old, as-ordered structure for the other (Power Plant). But the fact of the matter is that Qwest is unable to point to any language in the Amendment that excludes any elements from the measured-usage billing required by the Amendment.

11. There simply is no language in the Amendment itself and the underlying Exhibit A to the Agreement that plausibly suggests that the "-48 Volt DC Power Usage" element is to be charged on an "as ordered" basis, while the sub-rate element ("Usage – More than 60 Amps"), not otherwise excluded specifically in the Amendment, is meant to be charged on an "as measured" basis. To the contrary, all of the relevant evidence points to McLeodUSA's interpretation of the Amendment as the correct one, including a plain and consistent reading of the language of the Amendment, the structure of the -48V DC Power Usage rate category identified in 8.1.4 of Exhibit A that is the Power Plant rate element, the specific recognition of power plant capacity being included in -48V DC Power Usage under Subsection 2.2.1 of the Amendment, and the history of treating the -48 Volt DC Power Usage elements in a consistent manner.

B. Qwest's Attacks on the Plain Language of the Amendment Improperly Look Outside of the Document, or Otherwise Rely on Strained and Illogical Interpretations; Qwest's Attacks Have No Merit.

12. Because the language and structure of the Amendment and Exhibit A do not support Qwest's position that the Power Plant rate element should be billed based on the size of McLeodUSA's power cable, Qwest relies primarily on information outside of the Amendment for support. Qwest also advocates discounting or altogether ignoring certain language in the Amendment that simply does not square with its position. The fact that Qwest resorts to attacking the very language that Qwest drafted is quite telling.

13. For example, Qwest's primary defense to McLeodUSA's point that the Amendment governs all elements under 8.1.4 is that the Amendment uses the singular "Charge" instead of the plural "charges." According to Qwest, if the Amendment was to apply to both power plant and usage rate elements under Section 8.1.4, the Amendment

would use the plural "charges." Qwest's argument lacks merit for at least two reasons. First, it is just as reasonable to read 8.1.4 as establishing a DC Power Usage Charge (singular) that includes all subtending elements comprising a singular group (which if referred to with the singular "charge" would be grammatically correct). Thus, the use of the singular "charge" would be consistent with McLeodUSA's interpretation that the Amendment applies to this specific (and singular) grouping. Second, the singular or plural is irrelevant to the fact that the language of Section 2.1 of the Amendment explicitly defines "capacity of the power plant available for the CLEC's use" as being within the "DC Power Usage Charge" – again, singular, and again, Qwest's own language. There can be no doubt that the *capacity* of the power plant refers to the power plant charge, which the ICA and Qwest's SGAT clearly acknowledge. Indeed, the ICA and Qwest's SGAT use the same term, "-48 Volt DC Power Charge," in the singular, to refer to this rate element.[6]

14. Qwest's witness Mr. Easton also claimed that the Commission should discount or ignore the fact that the language "-48 Volt DC Power Usage" in the Amendment is identical to the language at Section 8.1.4 of Exhibit A. According to Qwest, the text at 8.1.4 of Exhibit A is merely a "heading," and under the Agreement, headings are given no force or effect.

15. Mr. Easton's testimony is not based on the actual Exhibit A that was attached to the ICA between McLeodUSA and Qwest. Clearly, the language in Section 8.1.4 is not merely heading since there is a specific rate associated with "-48 Volt DC Power Usage." Moreover, treating this reference as a mere "heading" to be ignored in

[6] ICA (and Qwest SGAT) Section 8.3.1.6.

interpreting the Amendment means that Section 2.2.1 of the Amendment contains a meaningless reference. Other than this alleged "heading," Exhibit A contains nothing else called "-48 Volt DC Power Usage." The Amendment makes the text at Section 8.1.4 more than a mere "heading" by using it as the key point of reference. As the unquestioned drafter of the Amendment, Qwest is in no position to argue for effectively negating all of Section 2.2.1, yet that is exactly the argument Qwest advocates be adopted by the Commission.

16. Further, if the reader is forced to ignore "-48 Volt DC Power Usage, per Ampere, per Month" in Section 8.1.4 because it is a mere heading lacking significance to the parties, then the subtending rate elements would lose all meaning. This results from the fact that the description of what type of usage (i.e., -48 Volt DC Power) and how to apply the subtending rates (*i.e.*, per Ampere, per Month) is evident only in this "heading." Note in the excerpt below that without the "heading" to which Qwest suggests no meaning can be applied, the rate itself provides little instruction as to its meaning or application.

8.1.4.1	Usage Less than 60 Amps	$1.57
8.1.4.2	Usage More than 60 Amps	$3.13

Simply put, Qwest's invitation to ignore the very rate description described by the Amendment (*i.e.*, "-48 Volt DC Power Usage") results not only in an illogical result, but also in a situation wherein complete confusion would reign as to how the rate should actually be applied.

17. Failing to explain away the Amendment's language Qwest itself drafted, Qwest asks the Commission, in essence, to rely exclusively on documents beyond the

Amendment itself for purposes of gauging "the intention" of the parties at the time the Amendment was executed. Of course, the Amendment itself expressly states that any such reliance on external documents is misplaced:

> The Agreement as amended. . . constitutes the full and entire understanding and agreement between the Parties. . . and supersedes any prior understandings, agreements, *or representations between the parties*, written or oral. (Emphasis added.)

However, even if the Commission considers the parole evidence, Qwest's arguments are still without merit.

18. In support of Qwest's argument that McLeodUSA should have been aware of Qwest's intentions with respect to the contested language, Mr. Easton provided documents from the Qwest Change Management Process ("CMP") forum held in 2003.[7] Mr. Easton testified that several McLeodUSA personnel were on a distribution list for an e-mail notification informing CLECs that the issue of collocation power was to be discussed in an October 2003 CMP meeting. Based on these mass e-mail notifications and the content of the October 2003 exchange between Qwest and another CLEC, Qwest effectively claims that McLeodUSA knew or should have known that the 2004 Amendment meant what Qwest says it means. Such a claim is not sustainable. Qwest's conclusion requires the Commission to make several unrealistic assumptive leaps: (i) ignore inconsistent statements contained in the same CMP documentation, (ii) discard the actual language of the Amendment (drafted by Qwest), and (iii) generally cast a blind eye to the self-serving nature of Qwest's CMP forum.

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[7] Exhibits 63 and 64 (CMP/PCAT Exhibits WRE-2 and WRE-3 to the Response Testimony of William Easton).

19. First, while Mr. Easton highlighted the fact that one McLeodUSA employee attended the CMP meeting in question,[8] Ms. Spocogee clarified that this former employee was a member of the Service Delivery organization whose sole purpose in participating in the CMP was to keep abreast of information regarding order processing issues.[9] That employee's narrow focus in the CMP is consistent with Ms. Spocogee's explanation that the CMP is intended to be a forum to discuss Operational Support Systems ("OSS") processes and procedures. Thus, the mere fact that a McLeodUSA employee from the Service Delivery organization participated in the CMP and that McLeodUSA got e-mail notifications of CMP meetings is of little, if any, value in helping the Commission understand how the DC Power Measuring Amendment should be interpreted and provides no credence to Qwest's claim that McLeodUSA should have been on notice as to Qwest's intentions with regard to the power plant rate under the Amendment.

20. Qwest's own CMP-related exhibits (Exhibits 63 and 64) do not support Qwest's interpretation. The CMP documentation makes clear that ICAs and associated amendments trump anything that is developed under the CMP process,[10] which means that Qwest's exhibits are irrelevant. In addition, Qwest's Exhibit 64 states that "no amendment" will be required to implement measurement of the DC Usage charge.[11] Yet, Qwest ultimately determined that an Amendment was required – the very Amendment that Qwest drafted and that is at issue in this proceeding. Hence, Qwest argues that a

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[8] Exhibit 61T (Response Testimony of William Easton) at 10-11.

[6] Exhibit 81T (Rebuttal Testimony of Tami Spocogee) at 3-4.

[10] Exhibit 64 (CMP document, Exhibit WRE-3 to Response Testimony of William Easton). This disclaimer, of course, is wholly consistent with language in the Amendment itself as previously noted. See, Exhibit 24 (DC Power Measuring Amendment) at 2.

[11] Exhibit 64 at 1.

CMP document that clearly stated that no power measuring amendment would be necessary should have instructed McLeodUSA as to Qwest's intentions regarding the DC Power Measuring Amendment that Qwest drafted. Qwest's argument defies logic.

21. Second, if the CMP documentation is worthy of any weight in interpreting the Amendment, then the Commission must give weight to how much of the early language pertaining to power measurement in the CMP process is nowhere to be found in the DC Power Measuring Amendment. In interpreting a contract, changes in language from draft to draft should be given effect. While the CMP document discusses a "Capacity Charge" and indicates that it would not be impacted by measured-use billing,[12] The DC Power Measuring Amendment does not include a reference to a "Capacity Charge," nor does the Amendment exclude Power Plant from the elements billed on a measured-use basis as the language in Qwest's PCAT (Exhibit 63) does. The Commission must presume these omissions from the Amendment are intentional and instructive as to how the Amendment should be interpreted, and these omissions support McLeodUSA's interpretation.

22. In other words, Qwest's PCAT makes clear that Qwest knew how to draft language specifically excluding power plant charges from being applied on a measured-use basis, yet Qwest purposefully used very different language when it drafted the Amendment. In fact, Qwest wrote an Amendment that specifically pointed to the power plant charge as being the "-48 Volt DC Power Usage" element to which the new rate application process would be applied. Therefore, even if McLeodUSA would have been perfectly familiar with the information bandied about at the CMP meetings, and had been

[12] Exhibit 63 (PCAT document, Exhibit WRE-2 to Response Testimony of William Easton) at 1.

perfectly familiar with Qwest's PCAT language, the fact that the Amendment includes very different language specifically discussing the power plant charge as being impacted by the Amendment would have been more meaningful, not less.

23. Qwest will also urge the Commission to give significant weight to Exhibits 65 and 66-C, which consist of spreadsheets that purportedly show McLeodUSA "intended" that only the Usage rate element would be billed on a measured-use basis. As with the CMP/PCAT exhibits, Qwest substantially overstates the value of this other extrinsic evidence in support of its interpretation. And similar to Qwest's claims regarding the CMP/PCAT parole evidence, Qwest's claims regarding the spreadsheets also fail on the merits.

24. Ms. Spocogee explained that the spreadsheets were prepared by the McLeodUSA engineering group based on documents and a tabular format supplied by Qwest. The original Qwest document provided only the single usage charge in its analysis, and as a result, the McLeodUSA engineering group followed suit when it initially estimated the potential savings.[13] Though Qwest trumpets this spreadsheet as evidence showing that McLeodUSA understood and agreed with Qwest's alleged intent by calculating the savings estimates in the same manner, McLeodUSA witness Ms. Spocogee explained that the members of the engineering group who summarized the data in Qwest's initial spreadsheets were not contract or rate specialists. Further, these employees had no reason to question Qwest's inclusion of a single power usage rate element within the spreadsheets given that these same employees had been working with

[13] Exhibit 81-T (Rebuttal Testimony of Tami Spocogee) at 5.

collocation power charges based on a unified power rate element in other states.[14] Accordingly, it is not surprising that the spreadsheet information follows Qwest's interpretation of the Agreement. As the e-mail chain in Exhibit 87 confirms, the concern within the narrow group of McLeodUSA employees doing this analysis that requested the spreadsheets was to simply make sure power charges would not go ***up***, as would have been the case in Michigan.[15] Indeed, shortly after the Amendment was implemented, and within a few weeks after the first audit was reviewed by its employees who *are* contract and rate specialists, McLeodUSA was raising questions and concerns with Qwest about the way in which it was applying its power plant charges.[16]

25. Finally, Qwest argues that power plant should be billed on an "as ordered" basis because those words appear in a rate summary tab of Qwest's 2001 collocation cost study. According to Qwest, the fact that its cost study includes these comments means the Commission approved the application of the rate on an "as ordered" basis (or applied to the capacity, in amps, of CLEC power cables) in Qwest's prior cost docket. First, as will be discussed in more detail in Section II below, while the text column of the cost study uses the term "as ordered," the substance of the Washington cost study shows that the rate was developed to recover the DC power plant investment based on amps ***used.***[17]

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[14] Exhibit 81-T at 6-7.

[15] Exhibit 81-T at 7. As Ms. Spocogee explained, before this preliminary analysis was being done with Qwest, this same group had been reviewing collocation power costs in Michigan where the cost of collocation would have increased if an amendment was signed to reduce power costs (due to other collocation elements increasing). Further, as elicited during cross examination, the Michigan power rate was a unified rate, so these people doing their limited analysis would not even had known of a separate rate element that was not reflected on the information provided by Qwest.

[16] Exhibit 81T at 8-9.

[17] Exhibit 22T (Supplemental Direct Testimony of Michael Starkey) at 2-3.

26. Second, and perhaps more importantly, Qwest itself clearly believes that such language from the cost study comments is not controlling. The same schedule provides that DC Power Usage More Than 60 amps will also be billed on an "as ordered" basis. Given that McLeodUSA and Qwest agree that the Amendment changed the application of Usage More Than 60 Amps so that it would, on a going forward basis, be applied on a measured-use basis (despite the "as ordered" label in the cost study), the labels in the cost study examined by the Commission are obviously not controlling. Qwest cannot have it both ways. Entering into the Amendment concedes that the language in the rate summary tab of the cost study at issue is not controlling as to the subsequent Amendment between the parties, and that flexibility to make revisions through the Amendment must extend to both power usage and power plant. It is pure sophistry to believe that a comment made by Qwest in its 2001 cost study is evidence of what the 2004 Amendment means.

27. It is telling that Qwest relies primarily on parole evidence to support its interpretation of the Amendment, and that it seeks to discount the plain language of the Amendment where it references the key "-48 Volt DC Power Usage" rate element. Further, Qwest's position is further flawed in that it forces the Commission to ignore the clear discussion in the Amendment wherein it details the fact that the affected charge is for the capacity of the power plant. The McLeodUSA reading of the Amendment, on the other hand, is consistent with a plain reading of the Amendment's language and gives meaning to all the language. Should the Commission nonetheless find that the Amendment is ambiguous, any ambiguity should be resolved by looking to which interpretation best complies with sound economic and engineering principles, as well as

applicable law. As explained below, each of those criteria favors the McLeodUSA interpretation.

II. MCLEODUSA'S INTERPRETATION IS THE ONLY ONE CONSISTENT WITH SOUND ENGINEERING AND ECONOMIC PRINCIPLES, INCLUDING QWEST'S OWN TECHNICAL PUBLICATIONS AND COST STUDY.

A. Interpreting the Amendment to Permit Qwest to Bill McLeodUSA for DC Power Plant Based on Distribution Cable Size Amperage Has No Basis In Sound Engineering Principles And Results In Discriminatory Treatment.

28. If the 2004 Amendment is to be interpreted consistent with Qwest's obligation to provide McLeodUSA nondiscriminatory access to DC power and charged in compliance with total element long-run incremental cost ("TELRIC") requirements, then the Amendment must be consistent with the efficient engineering of the central office DC power p lant.[18] McLeodUSA witness Mr. Sid Morrison provided detailed testimony explaining from an engineering perspective why Qwest's interpretation of the Amendment is inconsistent with sound engineering principles and the proper sizing of Qwest's DC power plant.

29. The key disputed engineering principle is whether Qwest engineers (*i.e.*, sizes) its DC power plant using the List 1 drain of all telecommunications equipment in the CO (equipment of both Qwest and its CLEC collocators), as Mr. Morrison and numerous Qwest technical documents claim, or based on List 1 drain for Qwest equipment and the size of the CLEC's power feeder cables (what Qwest assumes to be the CLEC's List 2 drain) for CLEC equipment, as claimed by Qwest witness Mr. Ashton. Fortunately for the Commission, this dispute is easily resolved. Qwest's own technical

[18] Exhibit 23-T (Rebuttal Testimony of Michael Starkey) at 29-31.

manuals belie Mr. Ashton's claims and are wholly consistent with Mr. Morrison's explanation.

30. Before addressing the inaccuracies in Mr. Ashton's testimony, it is important to understand why this issue - the manner in which Qwest sizes its power plant – is relevant. Qwest maintains that the proper manner by which it should recover its power plant investments is via a charge assessed on the size of a CLEC's order for its power feeder cables. Because, according to Qwest, it sizes its power plant based upon the size of a CLEC's power cable, Qwest claims it is reasonable to assess power plant rate on that same basis so as to properly recover its investment. However, Mr. Morrison's testimony convincingly shows that Qwest does not size its power plant on the basis of CLEC orders for distribution cables. Instead, Mr. Morrison, with the help of Qwest's own technical documentation, demonstrates that Qwest sizes its power plant based upon the peak usage under normal operating conditions (or List 1 drain) of the entire central office (including the List 1 drain of both the Qwest and the CLEC equipment). Since List 1 drain is a measure of electrical usage (*i.e.*, the electrical usage drawn by the equipment in the CO at the peak operating period), the fact of the matter is that Qwest sizes its power plant based upon the total electrical usage load demanded within each office.

31. Accordingly, the proper manner by which Qwest should recover its investment in power plant is by assessing charges to various users of the power plant (both Qwest and other collocators) based upon their relative power plant usage. Of course, this is completely consistent with the language of the Amendment, as described

above, wherein the parties agreed that the "-48 Volt DC Power Usage" element would be assessed based upon the relative measured usage.

32. With that in mind, we return to the question of whether Mr. Morrison or Mr. Ashton is right with respect to the manner by which Qwest sizes its power plant facilities. The analysis begins with Qwest's own technical publications.

> **2.4 Engineering Guidelines**
>
> When sizing power plants, the following criteria *shall* be used:
>
> **List 1** drain is used for sizing batteries and chargers. . .
>
> **List 2** drain is used for sizing feeder cables, circuit breakers, and fuses . . . .[19]

33. The excerpt above, taken from Qwest's primary technical publication used to instruct its own engineers in building and sizing central office power systems, clearly indicates that the "batteries and chargers" (terms to which Mr. Ashton has agreed refer to the power plant), are to be sized based upon List 1 drain. Only the feeder cables (not the power plant) should be sized to the larger List 2 drain that is necessary only in a worst case scenario.

34. Mr. Morrison also identified a Bellcore technical document upon which Qwest's engineers rely entitled "Power Systems Installation Planning" BR-790-100-652, describing the power study procedure used for sizing DC power plant. BR-790-100-652 provides as follows: Step 1: Identify *all* DC operated telecommunications equipment that needs power, Step 2: determine operating voltages (nominal and limits) of *all* DC-

[19] Exhibit 1TC (Direct Testimony of Sidney Morrison) at 32. Although McLeodUSA designated excerpts from Qwest's technical publications as confidential, Qwest later clarified that this information is not confidential.

operated telecommunications equipment, Step 3: determine List 1 drains of *all* telecommunications equipment, Step 4: compute and plot all busy-hour and power failure drains, Step 5: Select DC plants.[20]

35. It is indisputable that these technical documents demonstrate that DC power plant is not sized based on List 2 drain for CLECs (or the size of the power distribution cables), as Mr. Ashton claims, but on List 1 drain of all equipment in the central office. All told, Mr. Morrison identified five (5) separate Qwest power engineering manuals used to size DC power plant that are on all fours with Mr. Morrison's testimony, none of which Mr. Ashton refuted.[21] In contrast, Qwest failed to produce a single document which supported its contention that Qwest undertakes very different power plant sizing criteria when it engineers power plant for CLEC collocators – even though Qwest's witness Mr. Ashton is an internal Qwest engineer who should have complete access to any such documentation if it actually existed.

36. Since Qwest cannot dispute the written word of its own engineering manuals, it must rely upon other means to attempt to discount Mr. Morrison's testimony. Qwest does so by suggesting that its engineering manuals do not apply to sizing DC power plant for collocators. Additional claims were made that the manuals do not reflect the advent of collocated CLEC equipment. However, at least some of these engineering manuals cited by Mr. Morrison were either authored or updated as recently as 2006, more than a decade after collocation for CLECs was first required of Qwest by the Act, and years after CLECs began collocating in Qwest COs. Presumably, if the power requirements of CLECs required a special engineering scheme for sizing DC power plant,

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[20] Exhibit 1TC at 34.

[21] Exhibit 5TC (Rebuttal Testimony of Sidney Morrison) at 4.

as Qwest claims, one would reasonably expect that Qwest's technical publications, published after its primary experience with sizing power plant for CLECs (1999-2001), would reflect the engineering disparity touted by Qwest. Yet, Qwest produced no such documentation to back up its claims. Qwest's belated claim that these technical documents do not apply to CLECs is simply not credible.

37. Instead, after Qwest started making this claim after the Iowa hearing, McLeodUSA further demonstrated, again with Qwest's own Technical Publications, that Qwest's own engineering standards that require power plant to be sized based on peak usage do in fact *apply* to collocated CLECs.[22] Therefore, sizing power plant for CLECs based on the size of their power cables would be a clear violation of Qwest's engineering guidelines.

38. Qwest's other engineering justification for billing McLeodUSA for Power Plant based on the distribution cable amperage is that Qwest does not know the List 1 drain of McLeodUSA's collocated equipment. According to Qwest, when it first engineered power plant relative to McLeodUSA's collocation applications, it assumed the power feeder cable sized by McLeodUSA was in fact its List 2 drain, and engineered power plant capacity for McLeodUSA's use to that level. Qwest claims it must make List 2 drain available to McLeodUSA because McLeodUSA ordered this level of power, and therefore, it is proper to charge McLeodUSA as if McLeodUSA uses List 2 drain.

39. This argument, however, falls flat when one properly rejects Qwest's unsupported claims that McLeodUSA's order for power feeder cables is an order for power plant capacity. Indeed, Mr. Morrison testified in detail that very good engineering

[22] Exhibit 5TC at 5-6.

reasons require McLeodUSA to size its power feeder cables at substantially larger amperages (*i.e.*, List 2 drain) than it would ever require under normal operating conditions (even under peak operating conditions of List 1 drain) from the power plant. Hence, to the extent Mr. Ashton is right that Qwest did interpret McLeodUSA's power feeder cable sizing as a need for equivalent power plant capacity, (a) Qwest did so without consulting McLeodUSA, (b) Qwest did so in contravention of its own technical publications which require sizing power plant based upon List 1 drain and (c) Qwest did so in contravention of solid engineering practice which dictates that power distribution cables far exceed any expected normal load amperage.

40. Indeed, Qwest witness Mr. Ashton admitted that if Qwest knew the List 1 drain of CLEC equipment when evaluating the power plant capacity that would be required to support that equipment, Qwest would design power plant required by the CLEC to the CLEC's List 1 drain (*i.e.*, a measure of the CLEC's power *usage*).[23] However, Mr. Ashton admitted that Qwest never asked McLeodUSA for its List 1 drain information, nor provided any means on the collocation application it designed where a CLEC could provide this information if it so desired.

41. Given Mr. Ashton's answer, the only question that remains is which party should bear the responsibility for Qwest's failure to capture this vital information necessary to properly engineer Qwest's power plant? Indeed, Mr. Ashton's argument can be summarized as follows: (a) Qwest didn't ask for the information it needed to properly size its power plant for CLEC use, (b) instead, Qwest assumed (incorrectly) that CLECs would require power plant capacity matching the amperage of the power feeder cables

[23] Tr. at 242.

they requested, (c) Qwest's assumption was very wrong and resulted in too much power plant being assigned to the CLEC, yet (d) nonetheless, Qwest takes the position that the CLECs should pay for the entire amount of power plant Qwest assigned for their use. Clearly, Qwest's argument in this regard must fail. It must fail not only because it is unreasonable on its face (*i.e.*, Qwest cannot be rewarded for its self-serving ignorance illustrated by its failure to gather the necessary information and admitted defiance of its own Technical Publications for proper engineering), but also because it defines the very type of discriminatory treatment Congress, the FCC, and Washington statutes prohibit.

42. Moreover, Qwest's claim that it cannot size DC power plant to List 1 drain for CLECs because it does not have the List 1 drain information for all CLEC collocated equipment is also inconsistent with undisputed facts in this case. Mr. Ashton admitted that Qwest uses some of the same pieces of equipment that are housed in a typical McLeodUSA collocation, for which Qwest knows precisely the List 1 drain.[24] However, even for McLeodUSA equipment that Qwest may not also use, Mr. Ashton admitted that List 1 Drain for the equipment can be obtained by Qwest from the equipment manufacturer.[25] Mr. Ashton's unmistakable admissions fatally undercut Qwest's claim that it must size power plant to List 2 drain for CLECs due to lack of List 1 drain information. There is simply no excuse for Qwest ignoring these sources of sound engineering information and instead, assuming CLECs will use DC power in a very different, and far more expensive manner, than does Qwest, who uses largely the same types of equipment.

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[24] Tr. at 242-43.

[25] Id.

43. Though Qwest's own Technical Publications requires Qwest to make "every effort ... to obtain the List 1 drains from suppliers,"[26] For those few instances where Qwest cannot obtain the List 1 drain from an equipment manufacturer, McLeodUSA showed that Qwest's Technical Publications explain that a List 1 drain proxy can be derived based on the known List 2 drain data provided by the CLEC.[27] Of course, in addition to using the List 1 drain proxy when necessary in those "rare" circumstances, Qwest has lots of other information from McLeodUSA that informs Qwest that McLeodUSA would not require power equal to the List 2 drain associated with McLeodUSA's power cables. Messrs. Morrison and. Starkey both detail the extensive information McLeodUSA provides to Qwest by which any interested power engineer, were they so inclined, could ascertain a reasonably accurate estimate of List 1 drain for collocated equipment.[28] The information concerning the trunks and circuits ordered into the collocation and the types of equipment, some of which Qwest uses in its own network, should permit Qwest to treat McLeodUSA on par with how Qwest treats itself by engineering the DC power plant at List 1 drain.

44. Aside from having the information necessary to engineer the DC power plant for McLeodUSA based on the same List 1 drain as Qwest does for its own equipment, the record shows that, contrary to Qwest's unsupported contention, Qwest in fact practices what its engineering manuals command. Qwest initially claimed in the companion Iowa complaint case that it was proper to bill McLeodUSA based on List 2 drain, or the size of the distribution cables, because a CLEC order for large cables

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[26] Exhibit 5TC (Rebuttal Testimony of Sidney Morrison) at 12.

[27] Exhibit 5TC at 10-12.

[28] see *e.g.*, Exhibit 5TC (Rebuttal Testimony of Sidney Morrison) at 25; Exhibit 23T (Rebuttal Testimony of Michael Starkey) at 28.

"*definitely*" required Qwest to augment its power plant capacity. Qwest quickly backed off that claim in Washington for the simple reason that the claim made by Qwest in Iowa was shown to be patently incorrect.

45. Mr. Morrison explained that despite several large cable distribution orders placed by McLeodUSA in Qwest COs, Qwest virtually never augmented its power plant to accommodate the List 2 drain of the McLeodUSA orders for distribution cables.[29] Accordingly, Qwest's rationale for billing McLeodUSA at List 2 drain because it has to add every amp it claims McLeodUSA "orders" proved simply to be false. Qwest does ***not*** incur augmentation costs directly and proportionately related to any McLeodUSA *order*. Instead, it is clear that Qwest's engineers anticipate the impact McLeodUSA's equipment will have on the overall power plant load (or usage) in the relevant central office and size the power plant facilities accordingly.

46. Qwest's additional defense for charging its power plant rate on an "as ordered" basis stems from its argument that it must have unique capacity available to meet each CLEC's maximum List 2 demand (a value Qwest assumes is equal to the power feeder cable ordered by the CLEC). This claim is also false. The CO power plant capacity is pooled and shared by all telecommunications equipment in the CO, regardless of ownership. As such, it is simply not possible for Qwest to "reserve" or "assign" a given level of power plant capacity for any individual user(s). Instead, all equipment in the central office has equal access to the power plant capacity on an "as needed" basis, and as such, the cost of that equipment is best distributed based upon the relative use of the equipment by each user (*i.e.*, on an "usage" or "as measured" basis as opposed to an

[29] Exhibit 1TC (Direct Testimony of Sidney Morrison) at 43-44; See also, Exhibit 5TC at 45-47.

"as ordered" basis wherein the "order" was for a feeder distribution cable having nothing to do with power plant capacity).[30]

48. In summary, interpreting the Amendment as advocated by Qwest results in McLeodUSA receiving discriminatory access to DC power. Qwest admits that it engineers its power plant on a discriminatory basis[31] when it claims that it sizes power plant for itself using List 1 drain and for McLeodUSA using the far more expensive List 2 drain level. Yet, as described above, it seems clear that this is not actually the practice Qwest follows. It appears Qwest is willing to argue that it sizes its power plant in a discriminatory manner, simply because the alternative (*i.e.*, that it sizes power plant for all users based on List 1 drain in a nondiscriminatory fashion) is fatal to its interpretation of the Amendment. That aside, even assuming that Qwest actually engineers to List 1 drain for its own equipment and List 2 drain for CLECs, the result is that Qwest provisions DC power to McLeodUSA in a clearly discriminatory manner.

49. Qwest seeks to justify this discrimination by claiming Qwest does not have the information it needs to do otherwise. Yet, those claims also are inconsistent with the testimony of its own witness. Finally, even if it were true that Qwest engineered differently for CLECs, the fact of the matter is that Qwest does not actually incur costs to provide unique power capacity to meet the List 2 needs of CLECs as any capacity it adds to its power plant in this regard is equally available to its own equipment given the shared nature of the facility. Accordingly, the Qwest interpretation under which it provides McLeodUSA access to DC power on terms less favorable than Qwest provides to itself

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[30] Exhibit 20T (Direct Testimony of Michael Starkey) at 15.

[31] As previously noted, what Qwest claims it does from an engineering standpoint and what the facts show that Qwest actually does in sizing the power plant are two very different things.

must be rejected by the Commission via any number of arguments. McLeodUSA's interpretation of the Amendment, on the other hand, is the only interpretation that is internally consistent with the language of the Amendment itself, consistent with sound engineering principles, consistent with Qwest's engineering Technical Publications, and consistent with federal and Washington law requirements for nondiscriminatory access to DC power in Qwest's COs.

B. Qwest's Use of Cable Orders to Determine Billings for Power Plant is Contrary to Sound Economics and Qwest's Own Cost Study.

50. Qwest's interpretation of the Amendment is also at odds with its cost study that underlies the rates charged for power. While Qwest characterizes Mr. Starkey's analysis as an attack on the power rate approved by the Commission, Qwest's argument is off the mark.

51. First, Mr. Starkey made it abundantly clear that he was not challenging the $9.34 rate for power plant. Instead, Mr. Starkey is challenging Qwest's application of the rate as being discriminatory and inconsistent with how the rate was developed. Qwest claims that the Commission approval of the rate in the cost docket necessarily encompassed approval of Qwest's application of the rate on what Qwest characterizes as an "ordered basis." No Commission order supports that claim, which is inconsistent with how Qwest's cost study actually develops the power plant rate. The manner by which the rate is established dictates the manner by which it must be assessed if it is to recover the intended level of DC power plant investment.[32] As Mr. Starkey explained, Qwest's cost study develops the power plant rate by using the amount of power plant capacity actually

[32] Exhibit 22T (Supplemental Direct Testimony of Michael Starkey) at 4.

"used."[33] Accordingly, applying the Commission-approved power plant rate based upon the size of McLeodUSA's order for power feeder cables (consistent with Qwest's reading of the Amendment) results in Qwest recouping power plant costs from McLeodUSA substantially in excess of the level intended by the cost study.

52. The bottom line result of Qwest's application of the rate in a manner that is inconsistent with how the rate was developed is that McLeodUSA is paying far more for DC power plant than Qwest does, even though both rely upon the exact same DC power plant to power their respective telecommunications equipment. Again, this discriminatory treatment runs afoul of Qwest's obligation to provide McLeodUSA and CLECs non-discriminatory access to power in the central office. Therefore, Qwest's interpretation of the Amendment that permits this discriminatory treatment must be rejected.

53. The following example illustrates the over-recovery and resulting discriminatory behavior:

> *Assume four CLECs and Qwest share a central office power plant. Each CLEC "orders" 200 amps (that is, they order a 200 amp cable); Qwest "requires" 200 amps (however that is determined). According to Qwest, it builds power plant to the sum of CLEC orders plus Qwest's requirements, so it builds a 1000 amp plant. For simplicity, assume it costs $5,000 to build.*
>
> *Assume that Qwest and each of the CLECs' measured usage is only 50% of capacity – 100 amps per LEC. The total measured use for the power plant on average is 500 amps.*
>
> *Qwest needs to recover the $5,000 cost of the power plant investment. It can logically do this in two ways, but both should be "apples to apples." First, it can set the rate based on the ordered amount and then bill based on the ordered amount (example A below), or it can set the rate based on*

[33] Exhibit 22T at 2-3.

measured use and bill based on measured use (example B below).

Example A – consistent use of "ordered" amount results in correct recovery:

Calculating the Rate:
$5,000 cost/1000 amps ordered = $5/amp rate
Applying the Rate to CLECs' Bills:
*$5 per amp rate * 800A ordered = $4,000 recovery. Qwest presumably pays for its 200 amps to recoup the remaining $1,000 investment.*

Example B – consistent use of measured quantity results in correct recovery:

Calculating the Rate:
$5,000 cost/500 amp measured = $10/amp rate
Applying the Rate to CLECs' Bills:
*$10 per amp rate * 400 amps measured = $4,000 recovery. Qwest presumably pays for its 100 amps measured usage to recoup the remaining $1,000 investment.*

What Qwest should **not** be allowed to do, however, is mix apples and oranges, *i.e.*, develop a rate to recover cost based on amps used and bill based on cable orders. This is exactly what Qwest is presently doing under its interpretation of the Amendment, which permits Qwest to realize a significant over-recovery as demonstrated in Example C:

Example C – inconsistent methodology results in unfair over recovery:

Calculating the Rate:
$5,000 cost/500amps used = $10/amp rate
Applying the Rate to CLECs' Bills:
*$10 per amp rate * 800 amps ordered = $8,000 recovered. Qwest recoups an excess $3,000 from CLECs, and therefore, has no need to charge itself and its end users to use the DC power plant.*

Using one type of value (usage) to set the rate, and then applying it to a larger measure of the quantity on which a CLEC is billed (ordered cable size) results in a mismatch between the nature of how the cost is incurred and how it is recovered, and as in example

C, results in a significant over-recovery for Qwest.

54. The inequity is made even worse, however, because while Qwest bills CLECs based on the size of cable ordered, it "bills" itself based on something much smaller. At the most, Qwest might incur DC power plant costs at List 1 drains, or quite possibly, Qwest takes advantage of the excess charges it foists on CLECs and uses the DC power plant essentially for free. As a result, CLECs have higher input costs than Qwest for the same network element, and actually subsidize the larger, established incumbent with whom they are trying to compete and who uses much more power. Qwest's collocation cost study thus supports McLeodUSA's interpretation of the Amendment, as well as McLeodUSA's alternative discrimination claim.

III. THE RESULT OF QWEST'S VIOLATION OF THE LANGUAGE OF THE DC POWER MEASURING AMENDMENT AND THE LACK OF ECONOMIC OR ENGINEERING SUPPORT FOR ITS POWER PLANT CHARGES VIOLATES STATE AND FEDERAL LAW ON DISCRIMINATION, JUST RATES, AND TREATMENT OF CLECS; QWEST'S INTERPRETATION MUST BE REJECTED AND MCLEODUSA MUST BE MADE WHOLE.

55. As a general principle of contract law, agreements are interpreted in light of the body of law existing at the time the agreement was executed.[34] More specifically, the Parties' good faith negotiation obligation under the Act requires such an interpretation. As one federal court of appeals concluded, "the 1996 Act requires both the ILEC and CLECs to negotiate in good faith ... when the parties are so negotiating,

[34] *See Southwestern Bell Tel. Co. v. Brooks Fiber Comms. of Oklahoma, Inc.*, 235 F.3d 493, 499 (10th Cir. 2000) (concluding that a state commission was required to interpret a voluntary agreement "within the bounds of existing federal law."); Williston on Contracts § 30:19 (4th ed. 2003) (incorporating existing applicable law into a contract does not require a deliberate expression of the Parties); *id.* ("valid applicable laws existing at the time of the making of a contract enter into and form a part of the contract as fully as if expressly incorporated in the contract.").

many of their disputes will have been previously resolved by, among other things, FCC Rules and interpretations."[35]

56. The North Carolina commission has articulated this principle well, stating that "the standard set forth by Section 251(c) of the Act and the Commission's rules and orders . . . govern[s] the interpretation of the Parties' obligations even if the Parties ha[ve] not specifically incorporated such language."[36] The Illinois Commerce Commission reached a similar conclusion when it said that "when interpreting tariffs and other provisions under our supervision, this Commission ought to scrutinize such materials through the lens of our legislative mandate."[37] This Commission should take the same approach.

A. The Law Requires Non-Discriminatory Collocation.

57. As McLeodUSA pleaded in its Complaint, both the Act and Washington law require competitive parity between ILECs and CLECs with respect to occupation and use of ILEC central offices. The FCC, for example, has established that the prohibition against discrimination that appears throughout Section 251 of the Act is *unqualified and absolute*; unlike § 202 of the Act, § 251 does not qualify the term "nondiscriminatory" with the words "undue" or "unjust and unreasonable."

> By comparison [with section 202], section 251(c)(2) creates a duty for incumbent LECs "to provide . . . any requesting telecommunications carrier, interconnection with a LEC's network on rates, terms, and conditions that are just,

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[35] *AT&T Comms of the Southern States, Inc. v. BellSouth Telecommunications, Inc.*, 229 F.3d 457, 465 (4th Cir. 2000).

[36] *BellSouth Telecomms., Inc. v. NewSouth Comms. Corp.*, NCUC Docket No. P-772, SUB 7, 2003 N.C. PUC LEXIS 1500 (Dec. 31, 2003).

[37] *Globalcom, Inc v. Illinois Bell Tele. Co., d/b/a Ameritech Illinois, Ill.*, C.C. Docket No. 02-0365, Order on Rehearing, 2002 Ill. PUC LEXIS 1195 *33 (Dec. 11, 2002).

> reasonable, and nondiscriminatory." The nondiscrimination requirement in section 251(c)(2) is not qualified by the "unjust or unreasonable" language of section 202(a). We therefore conclude that Congress did not intend that the 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.[38]

58. The FCC realized that, by requiring ILECs to provide interconnection to their competitors, the Act creates an opportunity as well as an incentive "for the LEC to discriminate against its competitors by providing them with less favorable terms and conditions of interconnection than it provides itself."[39] That manifest incentive warrants strict enforcement of the unqualified prohibition on discrimination in Section 251 of the Act. Accordingly, in interpreting the prohibition on discrimination under Section 251 of the Act, the FCC stated that:

> we reject for purposes of section 251, our historical interpretation of "non-discriminatory," which we interpreted to mean a comparison between what the incumbent LEC provided other parties in a regulated monopoly environment. We believe that the term 'nondiscriminatory,' *as used throughout section 251*, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself. In any event, by providing interconnection to a competitor in a manner less efficient than an incumbent LEC provides itself, the incumbent LEC violates the duty to be "just" and "reasonable" under section 251(c)(2)(D).[40]

Later in the *Local Competition Order*, the FCC refined this principle by stating that:

> The duty to provide unbundled network elements on "terms, and conditions that are just, reasonable, and

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[38] See *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 ¶ 217 (1996) ("*Local Competition Order*").

[39] *Id.* ¶ 218.

[40] *Id.* (emphasis added).

> nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be *equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.*[41]

This interpretation of nondiscriminatory treatment applies equally to collocation under Section 251(c)(6) of the Act as it does to all the various obligations imposed on ILECs under Section 251(c) of the Act.

59. Given this requirement to assure reasonable and unconditional nondiscriminatory physical collocation in ILEC central offices, the Commission's decision in interpreting the 2004 Amendment must reflect terms and conditions for access to DC Power that will achieve competitive parity between Qwest and McLeodUSA. The statutory requirement that ILECs provide physical collocation can mean no less.

B. The Record Amply Demonstrates that Qwest is Not providing McLeodUSA Non-Discriminatory Access to DC Power Plant in Violation of Federal and State Law.

60. As described throughout this Opening Brief, McLeodUSA objects to Qwest's practice of charging for DC Power Plant based on the total capacity of McLeodUSA's power cables. Not only is this practice contrary to the plain meaning of the Amendment, but it is unreasonable on its face and results in discrimination between Qwest and McLeodUSA, in violation of the laws and principles discussed in the previous sections of this brief.

61. The record shows that Qwest is unlawfully discriminating against McLeodUSA in several respects. First, even according to Qwest's own testimony it does not make any effort to engineer power plant for CLECs like it does for itself. While

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[41] *Id.* ¶ 315.

Qwest derives List 1 drain for its own equipment, Qwest does not do so for CLECs. Instead, Qwest makes an unreasonable, self-serving assumption that a CLEC's order for distribution cable amperage is an order for power plant capacity. Indeed, rather than simply require a CLEC to provide the List 1 drain information that Qwest's own technical documents indicate is necessary to properly engineer DC power plant, Qwest assumes a worst case scenario for power consumption for CLECs.

62. Second, Qwest assesses charges for power plant costs to McLeodUSA based on the total amount of distribution cables amperage *ordered*, while Qwest presumably imputes power plant costs for itself at no greater than the List 1 drain that Qwest uses to size the DC power plant for itself. Qwest has no justification for its discriminatory practices. Instead, Qwest effectively urges the Commission to ignore this discrimination and rely solely on Qwest's interpretation of the Amendment. The Commission should not tolerate Qwest's discriminatory treatment of CLECs in accessing power that is an essential element for a facilities-based CLEC to compete with Qwest.

63. To summarize, DC power plant is not dedicated to individual collocators, but is instead common to all residents of the office, including Qwest. The entire Qwest CO shares the same underlying power plant infrastructure in order to get DC power. There are no power plant investments specific to McLeodUSA, regardless of the size of its original order. Power plant infrastructure is sized according to actual DC power usage spread across the entire CO (in sufficient capacity to accommodate the requirements of the entire office during the busiest hour of the busiest day of the year). When this capacity is augmented, it is in response to a requirement to increase the capacity of the *entire central office*, rather than a particular collocation arrangement.

64. Therefore, an order for power cables from an individual CLEC, or even groups of CLECs, does not generate additional investments in power plant facilities. Instead, it is only the actual power consumption of McLeodUSA's equipment that is critical in sizing Qwest's power plant, not the size of the power cable order. As such, power plant costs are incremental to the overall level of power usage, not the size of an order. Thus, costs generated by those power plant facilities should be (and generally are) recovered based upon an individual user's relative use of those facilities (in this case, the number of amps consumed by each party).[42]

65. However, this is not how Qwest charges CLECs for power plant. Instead, Qwest assesses the power plant charge based on the number of amps included in a CLEC's original order for power delivery cables (as opposed to its actual usage), and therefore recovers more than the investment reasonably attributable to the CLEC. In other words, CLECs in general, and McLeodUSA in particular, are paying a disproportionate amount of Qwest's power plant costs. Consequently, those carriers are subsidizing Qwest and reducing its costs of providing service to its own end users, while at the same time those CLECs' costs are artificially increased.

66. The nondiscrimination mandate of Section 251 of the Act is unconditional. If Qwest sizes DC power plant for itself at List 1 drain, and would therefore impute (at a maximum) the related costs at List 1 drain, then Qwest *must* impute the same costs to McLeodUSA as well. Any other course, absent the consent of the CLEC, is a clear violation of Section 251 of the Act and RCW 80.36.170 & 80.36.186.

[42] Exhibit 20T (Direct Testimony of Michael Starkey) at 12-13.

SUMMARY AND CONCLUSION

67. The only interpretation of the DC Power Measuring Amendment that is consistent with Qwest's obligation to provide nondiscriminatory access to DC power is the interpretation put forth by McLeodUSA that requires both power-related rates to be applied on a measured usage basis. Qwest has no legitimate excuse for obtaining the windfall that results when it bills McLeodUSA based on the size of distribution cable orders, or treating McLeodUSA worse than Qwest treats itself. McLeodUSA's interpretation of the agreement is more equitable and nondiscriminatory; it is also the more logical reading of the Amendment. McLeodUSA's interpretation also follows Qwest's own cost model, as well as how Qwest actually incurs power plant costs.

68. For the foregoing reasons, the Commission should order Qwest to bill for all DC power charges, including power plant, on a measured use basis, and should require Qwest to "true up" its charges to McLeodUSA from the date of the Amendment to the date of the Order.

Dated this 11th day of August, 2006.

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CERTIFICATE OF SERVICE
Docket No. UT-063013

I hereby certify that on the date given below, in a new docket, the original and 12 true and correct copies of: (1) Opening Post-Hearing Brief of McLeodUSA Telecommunications Services, Inc.; and (2) this Certificate of Service, were sent by Federal Express, and by email to:

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On the same date, a true and correct copy was sent by regular U.S. Mail, postage prepaid, and by email to:

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DATED this 11th day of August, 2006.

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