STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

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

FINAL ORDER

(Issued July 27, 2006)

PROCEDURAL HISTORY

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. McLeodUSA alleges it is being overcharged by Qwest for collocation power charges in violation of Iowa law and the interconnection agreement between the parties. On March 6, 2006, the Board issued its "Order Docketing Complaint, Granting Partial Dismissal, and Setting Procedural Schedule."

Specifically, McLeodUSA alleges that Qwest, in violation of its amended interconnection agreement with McLeodUSA, has continued to bill certain collocation power charges using "ordered" levels rather than based on actual usage. McLeodUSA suggests that this constitutes a violation of Iowa Code §§ 476.100(2),

476.100(3), 476.100(5), and 476.100(7). Additionally, McLeodUSA claims Qwest's action violates 47 U.S.C. §§ 201(b) and 251(c)(3)(D).

In addition to its allegation that the method of calculating the direct current power charges is incorrect, Count II of McLeodUSA's complaint was based on an argument that the rate being charged per amp is unreasonable.

On February 20, 2006, Qwest filed its answer to the complaint, admitting that it entered into an amendment to its interconnection agreement with McLeodUSA on August 18, 2004. However, Qwest argues that only one element of the direct current power charges was addressed by that amendment. According to Qwest, three separate charges relate to direct current power that are listed in its Statement of Generally Available Terms (SGAT) including "Power Plant," "Power Usage Less Than 60 Amps," and "Power Usage More Than 60 Amps." Qwest argues that the amendment affected only one of the three separate charges related to direct current power, specifically the "Power Usage More Than 60 Amps" charge.

Qwest also filed a motion for partial dismissal, directed at Count II of the complaint, arguing that a two-party complaint docket is not the proper venue for contesting a rate. Instead, Qwest suggested that McLeodUSA should initiate a formal objection to the rate pursuant to Iowa Code § 476.3(1) to begin a limited cost docket proceeding, if McLeodUSA wants to challenge the rate.

Additionally, Qwest filed a counterclaim on February 20, 2006, alleging that McLeodUSA improperly failed to pay amounts withheld from invoices. Qwest asks the Board to direct McLeodUSA to immediately pay all amounts due under Qwest's

invoices, plus interest and late payment fees pursuant to the interconnection agreement.

On February 27, 2006, McLeodUSA filed an answer to Qwest's counterclaim and a response to the motion to dismiss Count II of its complaint.

In response to the counterclaim filed by Qwest, McLeodUSA asserts that, as noted in its initial complaint, McLeodUSA began withholding disputed amounts in September 2005 when McLeodUSA initiated its billing dispute. McLeodUSA also indicates that it ceased withholding disputed amounts in December 2005 while still reserving its right to challenge all the billings.

McLeodUSA urged the Board to deny the partial motion to dismiss, arguing that Iowa Code § 476.3(1) specifically provides for formal complaints to be used to challenge a rate. Further, McLeodUSA reasoned that the numerous provisions of § 476.100 are to ensure interconnecting competitors are treated fairly. Because improperly high rates for collocation power interfere with the provision of adequate and non-discriminatory interconnection and can serve as a barrier to competitors, the rate challenge is entitled to expedited treatment under § 476.101(8), according to McLeodUSA.

On March 6, 2006, the Board issued an order docketing the complaint, dismissing the rate element (Count II) portion of the complaint, and setting a procedural schedule.

The Board granted motions to compel Qwest to respond to data requests on two occasions (March 8, 2006, and April 13, 2006).

A hearing was held on May 10 and 11, 2006. Briefs were filed June 2, 2006, by McLeodUSA, Qwest, and the Consumer Advocate Division of the Department of Justice (Consumer Advocate). Oral argument in lieu of reply briefs was held on June 15, 2006. By agreement of the parties, the Board must issue its order no later than July 28, 2006.

ISSUES AND ANALYSIS

A. Is the language of the DC Power Measuring Amendment to the Interconnection Agreement between Qwest and McLeodUSA clear on its face, such that the Board's analysis is limited to the four corners of the amended agreement?

The Board has heard testimony and argument from both parties regarding the specific language of the DC Power Measuring Amendment (Amendment) to the interconnection agreement, entered into on August 18, 2004.[1] Both McLeodUSA and Qwest argue that the plain language of the amendment supports their individual positions.

McLeodUSA suggests the pertinent language upon which this disagreement is based is contained in "Attachment 1: DC Power Measuring" to the Amendment. The Amendment provides that if a competitive local exchange carrier (CLEC) orders more than sixty (60) amps of power, it will be placed on the power board and Qwest will monitor power usage on a semi-annual basis when requested to do so by the CLEC. The Amendment also provides that "[b]ased on these readings, if CLEC is utilizing less than the ordered amount of power, Qwest will reduce the monthly usage rate to CLEC's actual use." (Exhibit 5 at Attachment 1, Section 1.2).

[1] Exh. 5.

McLeodUSA further argues that Section 2.2.1 of Attachment 1, states that Qwest is initially to bill "-48 Volt DC Power Usage Charge" based on the quantity ordered. However, Section 2.2.1 goes on to state that for the"-48Volt DC Power Usage Charge," Qwest will determine the actual usage at the power board as described in Section 1.2. Section 1.2 provides that once Qwest receives a request from a CLEC to monitor the power usage, it will bill the actual power usage rate from the date of the CLEC monitoring request until the next reading.

There is no dispute that McLeodUSA made a valid monitoring request, nor that Qwest appropriately monitored power usage at the McLeodUSA collocations at which 60 amps had originally been ordered.

The dispute arises because Qwest, in billing McLeodUSA, billed one "-48 Volt DC Power Usage" rate element (Power Usage More Than 60 amps) at the lower usage measurement, but believes the Amendment did not change responsibility for the second "-48 Volt DC Power Usage" rate element (Power Plant). It continued to bill McLeodUSA for that rate element based on the quantity ordered. This resulted in higher bills to McLeodUSA than it believes it is responsible for under the Amendment.[2]

Exhibit A (the pricing pages) to the Interconnection Agreement specifies the following:

8.1.4.1	-48 Volt DC Power Usage	
	Power Plant, per Amp	$12.17
	Power Usage Less Than 60 Amps, per Amp	$2.19
	Power Usage More Than 60 Amps, per Amp	$4.37

[2] The parties did not agree upon a total amount at issue, but during the time that McLeodUSA withheld payment of the disputed amounts (September to December 2005), the total amount withheld was approximately $313,106.33. Tr. 421. McLeodUSA testified that the disputed practice results in excess monthly operating costs to McLeodUSA of over $63,000. Tr. 420.

According to McLeodUSA, the Amendment which specifies that "-48 Volt DC Power Usage" charges are to be billed based on actual usage where more than 60 amps of DC Power is used clearly applies to both the "Power Plant, per Amp" and "Power Usage More Than 60 Amps, per Amp" rate elements.

Qwest argues that the term "-48 Volt DC Power Usage Charge" does not mean the entire group of rate elements in Section 8.1.4.1, but rather refers to only one of those rate elements, specifically, the "Power Usage More Than 60 Amps, per Amp." Both parties agree that prior to the execution of the Amendment, Qwest and McLeodUSA had agreed that McLeodUSA would pay both the DC Power Usage charge and the DC Power Plant charge based on the capacity McLeodUSA specified in its original order for power distribution. According to Qwest, the Amendment changed one of these charges, but did not mention the other. Qwest argues that the Amendment identifies the "DC Power Usage Charge" a number of times within the language of the Amendment, but never mentions the "DC Power Plant" charge, which is therefore a separate charge that was not addressed in the Amendment.

The preliminary question for determination by the Board is whether the language of the Amendment is clear, such that the Board's analysis can be limited to the four corners of the amended agreement. The Board has looked at the specific language of the Amendment and determined that the language of the Amendment is not clear. Each party has provided an interpretation that supports its desired outcome, and both interpretations are reasonable. The terminology of the Amendment does not precisely match the terms used in the pricing pages, creating ambiguity. Indeed, the very fact that either party's interpretation is sustainable leads

to the conclusion that the language is not clear on its face and the Board must therefore look to other evidence in the record to determine the proper interpretation of the Amendment.[3]

B. Does the extrinsic evidence in the record support the interpretation presented by either party?

Qwest argues that it openly disclosed its intent regarding the Amendment prior to its execution through its Change Management Process (CMP) and then with a detailed explanation of the DC Power Measuring Amendment in its product catalog (PCAT). Qwest argues these prior disclosures support its interpretation of the Amendment by making it clear that Qwest intended to amend only one rate element.

Qwest's CMP process involves a forum that includes, among other things, discussions and information about Qwest products or changes to products that Qwest offers.[4] These product changes often require a change to an interconnection agreement and are typically accompanied by a PCAT that is made available on Qwest's Website. Qwest entered into evidence several documents from its CMP website regarding the power measuring product and associated changes.[5] Qwest specifically relied upon a set of questions from CLECs and responses provided by Qwest during the CMP process. Those responses discuss issues such as how power measuring would impact monthly recurring charges, how power measuring relates to cost dockets, how Qwest would measure power, whether the power measuring offering would be optional or required, and whether an interconnection

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[3] *RPC Liquidation v. Iowa Dept. of Transportation*, 2006 Iowa Sup. LEXIS 79, 10.
[4] Tr. 479.
[5] Qwest also provided an email contact list to which CMP notices were distributed that included 16 McLeodUSA employees. *See* Exh. 122.

amendment would be required.[6] In Exhibit 102, the following question was posed by a CLEC and answered by Qwest:

> For the following question, assume the collocation is in AZ, we're ordering 120 Amps, the DC Power Measurement is 53, the Power Plant per amp rate is $10.75, the power usage < 60 amps, per amp is $3.64 and Power Usage > 60 amps, per Amp is $7.27. Currently we are billed 120 Amps at $10.75 and 120 Amps at $7.27. Per this proposal I interpret that we would be billed 120 Amps @ $10.75 and 53 Amps @3.64. Likewise, if the new DC Power Measurement was 87, we would be billed 120 Amps at $10.75 and 87 Amps at $7.27. Is that correct?
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> Qwest Response:
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> The rate that will be applied to the measured amount will be dependent on the amount that was ordered not the amount measured. In other words you would be billed 120 Amps at $10.75 per amp and the measures of 53 amps and 87 amps would have the usage rate or $7.27 per amp because the ordered amount was greater than 60 amp (120).

Qwest argues that this colloquy makes it clear that Qwest always intended that the Amendment should only apply to DC Power Usage Charge and not to the DC Power Plant charge.

McLeodUSA testified at the hearing that it did not see these documents prior to executing the Amendment. McLeodUSA's witness testified that she probably received email notification of these documents, but she receives approximately three to four hundred emails a day and does not always pay close attention to each and every CMP notification.[7]

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[6] *See* Exh. 102.
[7] *See* discussion at Tr. 480-83.

Qwest also presented an Excel spreadsheet that, according to Qwest, shows that McLeodUSA understood that the intent of the Amendment was to change the manner of billing for only one of the "-48 Volt DC Power Usage Charge" rate elements.[8] The spreadsheet, prepared by McLeodUSA for internal use around the time the Amendment was executed, appears to depict the estimated savings McLeodUSA expected from the Amendment. The spreadsheet does not contain any reference to billing the Power Plant rate element on a measured basis. Qwest argues that this shows McLeodUSA did not really expect the Power Plant rate element to change as a result of the Amendment.

McLeodUSA testified that this spreadsheet was prepared by clerical staff, rather than by technical staff, and was simply a ministerial act of placing part of the desired information into spreadsheet form. McLeodUSA argues that the record is therefore not clear that McLeodUSA believed the savings shown on the spreadsheet were all of the power savings it was entitled to pursuant to the Amendment.

The Board has reviewed the extrinsic evidence presented and determines that the majority of the evidence presented supports Qwest's position that the 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 evidence can be summarized as follows.

First, there was a time span of about six months following the first measurement pursuant to the Amendment and McLeodUSA's first protest following the September 2005 billing. If McLeodUSA had really expected the substantial

[8] Exh. 112.

savings it is now claiming, a reasonable person might expect that McLeodUSA would have protested as soon as it received a bill that was higher than expected.

Second, the Board finds the McLeodUSA internal spreadsheet tends to support Qwest's interpretation. The spreadsheet is dated August 12, 2004, very close to the execution of the Amendment on August 18, 2004.[9] It does not show, or even contemplate, savings associated with the Power Plant rate element. The Board understands McLeodUSA's explanation that the spreadsheet is, in effect, the result of a clerical error, but if that is the case, one would expect to see a corrected spreadsheet showing larger projected savings. The absence of a contemporaneous correction lends support to Qwest's interpretation of the facts and undercuts McLeodUSA's explanation.

On McLeodUSA's side of the balance, the only significant extrinsic evidence appears to be the very existence of the Amendment. It could be argued that if the Amendment were only intended to change the one rate element, then the same or similar result could have been achieved through the documents developed through Qwest's CMP process and presented in Qwest's PCAT. Therefore, according to this line of reasoning, the Amendment must have been intended to accomplish something more. The problem with this argument is that McLeodUSA's witness testified that she was unaware of the CMP notices on this issue,[10] so McLeodUSA cannot really rely on this logic.[11]

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[9] *See* Exh. 5 and 112.
[10] Tr. 480-83.
[11] McLeodUSA has not, in fact, made this argument in these terms; the Board includes it here only because it is the one item of extrinsic evidence that conceivably weighs on McLeodUSA's side.

Thus, the language of the Amendment is ambiguous and the extrinsic evidence supports Qwest's interpretation that the Amendment was intended to affect only the Power Usage More Than 60 amps power charge rate element. The Board finds that Qwest's interpretation of the Amendment correctly reflects the intent of the parties at the time the Amendment was executed.

C. Is there a violation of Iowa Code § 476.100(2)? The statute provides that a local exchange carrier shall not discriminate against a CLEC by offering services on terms and conditions that are less favorable than the ILEC provides to itself.

Iowa Code § 476.100 prohibits local exchange carriers from conduct that is harmful to local exchange competition and specifies a number of prohibited acts. Section 476.100(2) provides that a local exchange carrier shall not:

> Discriminate against another provider of communications services by refusing or delaying access to essential facilities on terms and conditions no less favorable than those the local exchange carrier provides to itself and its affiliates.

Consumer Advocate presents the issue to the Board as follows:

> Does Qwest's application of the DC power plant rate to the amps of current capacity of the DC power distribution cables ordered by McLeodUSA (or any CLEC) violate any provision of Iowa Code § 476.100 (2005)?

According to Consumer Advocate, the answer depends upon Qwest's actual sizing of DC power plant to serve both its own equipment and the equipment of CLECs and, therefore, the costs Qwest incurs for itself and for CLECs.[12]

DC power plant is designed to provide sufficient power to accommodate the peak requirements of all DC-powered telecommunications equipment in a central

[12] Consumer Advocate brief, p. 5.

office, including Qwest equipment and all CLEC equipment, where peak usage is measured by the busy day/busy hour for the central office.[13] Qwest's engineering standards for DC power plant equipment state the criteria to be used when sizing the equipment to serve the maximum power draw that occurs on the busy day/busy hour. This maximum power draw is referred to as the "List 1 Drain." Qwest confirmed that it sizes its power plant to meet the List 1 Drain[14] or an approximation of it by sizing the power plant at 40 to 70 percent of "List 2 Drain."[15]

The List 2 Drain is the total current the equipment will draw in a worst-case scenario. According to Qwest's engineering documents, the List 2 Drain is used for sizing the feeder cables, circuit breakers, fuses, and other components that make up the DC Power distribution system.

McLeodUSA points out that Qwest bills McLeodUSA for DC power plant based on the size of the delivery cables McLeodUSA orders when it establishes collocation.[16] This equates to being charged based on List 2 Drain for power plant that has been sized, purchased, and installed based on List 1 Drain. McLeodUSA argues that this allows Qwest to overcharge McLeodUSA and all other CLECs.

McLeodUSA argues that Qwest's practice of billing CLECs for power plant based on the amount of power ordered is discriminatory because it charges CLECs for additional investment in power plant when none is actually incurred and because

[13] Tr. 53.
[14] Tr. 544.
[15] Tr. 599-600.
[16] Tr. 643.

Qwest imputes to itself only the costs of power consumed.[17] Thus, McLeodUSA argues, Qwest is offering this service to CLECs on terms less favorable than it provides to itself.

Qwest states that the claim of discrimination brought by McLeodUSA and Consumer Advocate is an attack on the practice of charging the power plant rate based on an "as ordered" basis. Qwest believes that the Board has already addressed these discrimination claims through its dismissal of Count II of the Complaint, involving a challenge to Qwest's power rates.[18]

While the Board declined to hear Count II at the complaint, that does not preclude examination of the manner in which Qwest engineers and allocates cost for power plant. It appears that Qwest has not expended capital on power capacity augmentation that would equate to McLeodUSA power ordered.[19] Only one instance of power plant augmentation (directly attributable to McLeodUSA) was shown at the hearing and that installation was necessary due to the age and obsolescence of the existing power plant.[20]

Further, power plant facilities are not dedicated to individual companies, but are common to all those within a central office. This includes Qwest and all CLECs collocating in that office. Typically, an order for power from an individual CLEC does not require additional investment in power plant facilities. Instead, it is the total power

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[17] Exhibit 103 shows that McLeodUSA has 54 collocations with Qwest in Iowa. Exhibit 105 was produced to show augmentations Qwest attributed to McLeodUSA orders. However, testimony showed that the jobs were to add circuit breaker panels, fuse panels, and battery distribution fuse bays, which are not power plant capacity. *See* Tr. 586; 605-08.
[18] Tr. 741.
[19] *See* Exh. 105.
[20] Tr. 618; Exh. 105.

consumption by Qwest and all the CLECs that would trigger the need for additional power plant facilities. As a result, the sum of the total power ordered is typically greater than the total of the power plant available.[21] However, Qwest charges each CLEC on the basis of the power ordered.

Because Qwest is assessing the power plant based on the number of amps included in a CLEC's original order for power delivery cables, the CLECs may be subsidizing Qwest and thereby reducing Qwest's cost of providing service to its own end users. Moreover, Qwest admits that 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).[22]

The available evidence indicates a valid concern exists regarding possible discrimination, but the record has not been fully developed on this issue. Although it is clear that Qwest treats CLECs differently in this respect, it is not so clear whether there is a reasonable basis for this difference or that the resulting difference is significant. This issue was not well developed in the prefiled testimony; instead, it evolved as the hearing progressed. As a result, it is not clear what, if any, steps the Board should take to remedy the situation, if a remedy is required.

Additionally, it is not clear that the Board <u>can</u> remedy the situation. The Board may lack jurisdiction to give McLeodUSA any immediate relief because these charges are terms of the interconnection agreement between the parties. Under federal law, the Board cannot change the terms of an approved interconnection

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[21] *See* Tr. 631-35.
[22] Tr. 658-59.

agreement. A state commission's only authority "over interstate traffic" under 47 U.S.C. § 252 is its authority "to approve new arbitrated interconnection agreements and to interpret existing ones according to their own terms."[23] The Amendment was filed with the Board, no party filed comments claiming discrimination existed, and the Amendment was approved, so it is now a binding part of the interconnection agreement between the parties.

Based on the limited record available in this docket, the Board is concerned about Qwest's practices in this respect. This subject should be revisited, and more fully developed, in an appropriate docket, that is, one in which the Board can order relief, if appropriate. That may be an interconnection cost docket, an arbitration docket, or some other proceeding.

D. Is McLeod required to pay or credit Qwest the amounts withheld ($326,116.04), plus interest for the amounts withheld?

McLeodUSA began withholding disputed amounts in September 2005 and ceased withholding disputed amounts in December 2005.[24] Qwest has argued that Section 15 of Attachment 7 to the interconnection agreement requires that interest be paid on the amounts withheld.

Based on the previous determinations, the Board concludes that McLeodUSA is required to pay Qwest the amounts that were withheld. However, the section of the interconnection agreement cited by Qwest as requiring the payment of interest involves "Late Payment Charges" and does not appear to apply to amounts withheld

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[23] *Pac. Bell v. Pac-West Telecomm, Inc.,* 325 F.3d 1114, 1125 (9th Cir. 2003). *See also, e.spire Communs., Inc. v. N.M. Pub. Regulation Comm'n*, 392 F.3d 1204 (10th Cir. 2004) and *Southwestern Bell Tel. Co. v. Brooks Fiber Communs. of Okla., Inc.*, 235 F.3d 493 (10th Cir. 2000).

[24] Complaint ¶ 9.

pursuant to a good faith billing dispute. Section 2.1 of the Interconnection Agreement indicates that amounts payable are due within 30 days after receipt of the ILEC's invoice "unless properly disputed." McLeodUSA notified Qwest of the dispute involving these amounts and filed its complaint with the Board in a timely manner, making the withheld amounts "properly disputed," rather than "late." The Board concludes that interest is not owed on these properly disputed withheld amounts.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

McLeodUSA Telecommunications Services, Inc., is directed to pay 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 $313,106.33.[25]

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

[25] Tr. 421.

CONCURRENCE OF CURTIS W. STAMP

Power Measuring Amendment

While I support the result in this case, I do so reluctantly. I think the interpretation of the Power Measuring Amendment (Amendment) offered by McLeodUSA is reasonable and reflective of the practices employed for power plant construction and utilization in collocations; however, the record developed in this case was not sufficient to get the Board to that result. As a quasi-judicial body, the Board must make its decisions on the record presented.

One of the more challenging parts of this case was the lack of consistent language between the various documents that refer to pricing for collocation power (e.g., original interconnection agreement, SGAT, PCAT, and the Amendment). For example, Section 2.1 of the Amendment states the Power Usage Charge is for the capacity of power plant available, which seems to imply that McLeodUSA's interpretation that both the Power Plant and Usage rate elements would be impacted by the Amendment. At the same time, in Section 1.2 of the Amendment, the language that states the monthly usage rate will be reduced to reflect McLeodUSA's actual use could be said to weigh in Qwest's favor because a reasonable reading of that section could lead one to conclude that only the Power Usage More Than 60 Amps element was impacted by the Amendment.

Making the whole thing even more confusing are Sections 2.2 and 2.2.1 of the Amendment. Section 2.2 states that the –48 Volt DC Power Usage Charge applies to the quantity of –48 Volt Capacity specified in the McLeodUSA order. Of course,

there is no rate element on the pricing pages (Exhibit A to the Interconnection Agreement) that is a reference to "-48 Volt Capacity." While the Amendment may be read to only apply to the "monthly usage" rate element, it is quite reasonable to accept McLeodUSA's interpretation that the Amendment applied both to the Power Plant and Power Usage rate elements.

Section 8.1.4.1 of Exhibit A represents the pricing pages from the interconnection agreement between Qwest and McLeodUSA. Section 2.2 of the Amendment specifically states that the pricing under the Amendment shall be in accordance with Exhibit A. The Power Plant, Power Usage Less Than 60 Amps, and Power Usage More Than 60 Amps all appear under the general heading "-48 Volt DC Power Usage" which is slightly different than the term "-48 Volt DC Power Usage Charge" which is used in the Amendment, but more like that term than the individual Power Plant and Power Usage terms listed for the various rate elements.

From the discussion above, it is clear that the only thing about this Amendment that is abundantly clear is its ambiguity. When interpreting a written contract, the intent of the parties controls, and unless the contract is ambiguous, the intent of the parties is determined from the contract itself. *Estate of Pearson v. Interstate Power and Light,* 700 N.W.2d 333, 343 (Iowa 2005) (*citing* Iowa R. App. P. 6.14(6)(n)). A contract that is not ambiguous will be enforced as written. *RPC Liquidation v. Iowa Dept. of Transportation*, 2006 Iowa Sup LEXIS 79 *10 (2006). When a contract is ambiguous, extrinsic evidence is used to interpret any language or terms contained in a contract. *Echols v. State of* Iowa, 440 N.W.2d 402, 405 (Iowa 1989).

As discussed in the Order, little extrinsic evidence was presented by McLeodUSA that was helpful in the Board's interpretation of the Amendment. At the same time, the extrinsic evidence offered by Qwest is a little thin in spots. For example, I do not find it overly telling that because McLeodUSA did not notice the alleged overbilling for nearly six months as acquiescence to Qwest's interpretation of the Amendment. I would tend to accept McLeodUSA's explanation that given the volume of bills it receives, it may very well take six months or longer for an auditor to discover a discrepancy.

As a matter of policy, McLeodUSA's interpretation of the Amendment makes sense. The nonrecurring charges are (or should be) sufficient to allow Qwest to recover the cost of constructing and making power available for collocation. McLeodUSA should not be charged for power plant it is not using, but the record before us is not sufficient to yield that outcome.

Iowa Code § 476.100(2)

I agree with my colleagues that there may be a reasonable or justifiable reason for Qwest treating itself differently when it comes to engineering and installing power plant than it does for collocators such as McLeodUSA. Sufficient time was not given to this issue, and thus the record as it relates to the issue was not fully developed. I am hopeful that sooner, rather than later, the issue can be addressed more fully before the Board.

While some would argue that the Board cannot alter the terms of a negotiated or arbitrated interconnection agreement, I have trouble accepting that if an

agreement is being applied in a discriminatory manner that a CLEC has no remedy for relief other than waiting until the next round of negotiations.

Section 252 of the Telecommunications Act of 1996 grants to the states the authority to approve, reject, and arbitrate interconnection agreements. Implicit in that authority is also the authority to interpret and enforce the specific provisions of those agreements. *E.Spire Communications, Inc. v. New Mexico Public Regulation Commission*, 392 F.3d 1204, 1207 (10th Cir. 2004).

Interconnection agreements are not the same as traditional contracts but rather an instrument arising in the context of ongoing state and federal regulation. *Id*. State and federal law to facilitate competition and ensure that carriers are not treated in a discriminatory manner in the marketplace bind us. *See, e.g.,* Iowa Code § 476.100 et seq. and 47 U.S.C. § 251 et seq. If no justifiable reason for the way in which Qwest discriminates against McLeodUSA and other CLECs in the way it engineers, and more importantly allocates costs, for central office power plant exists, the Board would have the duty to order Qwest to remedy the situation. Interpretation consistent with Board orders and state and federal law would be justified as such, and not as impermissible modifications of the interconnection agreement. 392 F.3d at 1208.

I struggle with the argument that the parties negotiated the Amendment and are therefore bound by the results, even if it means Qwest is treated differently (and perhaps to its competitive advantage). An interconnection agreement is essentially the terms and conditions under which the parties will interconnect their networks and the prices Qwest will charge McLeodUSA for various services provided (such as

collocation power). What is absent in the interconnection agreement is the price and terms under which Qwest governs itself; i.e., nowhere does the Amendment mention how Qwest engineers or bills itself for DC Power. Even when the provisions of the Amendment are voluntarily negotiated, they are cabined by the obvious recognition that the parties had to agree within parameters of state and federal law. *MCI Worldcom Communications, Inc. v. Dept. of Telecommunications and Energy*, 810 N.E.2d 802, 810 (Mass. 2004). For that reason, the Board has the authority and obligation to correct matters of unfair discrimination that are inconsistent with state and federal law even in the context of a negotiated and approved interconnection agreement.

As was stated in the Order, however, the record on this issue was not fully developed and it is unclear as to whether the discrimination in this case is reasonable and consistent with state and federal law. For that reason, I do not disagree with the result on this issue, but clarify that given a fully developed record, the Board would have the authority to order the parties to comply with state and federal law, even if to do so might be inconsistent with an interconnection agreement. It would be my thought that any remedy ordered would only be prospective in nature.

/s/ Curtis W. Stamp

ATTEST:

/s/ Margaret Munson
Executive Secretary, Deputy

Dated at Des Moines, Iowa, this 27th day of July, 2006.