BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

REPLY POST-HEARING BRIEF OF

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

August 25, 2006

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1. McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") provides the following brief in reply to the initial post-hearing brief of Qwest Corporation ("Qwest").

INTRODUCTION

2. Upon reading the initial post-hearing briefs of both parties, this case undoubtedly appears to be an instance in which the parties appear to be talking past each other. Qwest's Initial Brief argues this case almost exclusively based on its view of amendment language viewed solely in the context of extrinsic evidence of Qwest's intent based on an exchange that occurred with another CLEC in the October 2003 Change Management Process. Throughout its Initial brief, Qwest never acknowledges that it provides McLeodUSA collocation power subject to the requirements of Section 251(c)(6) of the Telecommunications Act of 1996 ("Act"). Nor does Qwest acknowledge that the interconnection agreement ("ICA") between the parties imposes an obligation on Qwest to provide McLeodUSA access to collocation power on nondiscriminatory terms.

3. Obviously, McLeodUSA has a much different view. Any interconnection agreement between an ILEC and a CLEC is a product of the Act. ICAs are instruments arising in the context of ongoing state and federal regulation that have provisions to facilitate competition and ensure that carriers are not treated in a discriminatory manner.[1] Washington courts also recognize that contractual language must be interpreted in light of existing statutes and rules of law.[2]

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[1] *E.Spire Communications, Inc. v. New Mexico Public Regulation Commission*, 392 F.3d 1204, 1207 (10th Cir. 2004) ("'[A]n interconnection agreement is part and parcel of the federal regulatory scheme and bears no resemblance to an ordinary, run-of-the-mill private contract.'") (quoting *Verizon Maryland, Inc. v. RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 552 n.5 (D. Md. 2002)).

[2] *Bort v. Parker*, 110 Wn. App 561, 573, 42 P. 3d 980, 987 (2002) (quoting *Tanner Electric Cooperative v. Puget Sound Power & Light, Co.*, 128 Wn.2d 656, 674, 911 P. 2d 1301 (1996).

4. It is also interesting to note how Qwest attempts to brush aside the issue of discrimination. Qwest boldly tells the Commission that the discrimination issue is a non-issue since the Commission approved its collocation rates. Yet, Qwest's claim hinges on the fact that Qwest inserted a comment in a spreadsheet cell that accompanied its cost study. Qwest produced no evidence that the Commission or its staff were aware of the comment. More importantly, the Commission's orders issued in that docket evidence no explicit or implicit approval of billing the approved power rates based on the amperage of a collocator's distribution cables.

5. Qwest also argues that parties can voluntary agree to an ICA provision that cannot be undone through a complaint. In effect, Qwest is admitting that it is discriminating. Qwest, however, apparently views such discrimination as untouchable because either the Commission approved of it in the cost docket, or McLeodUSA has voluntarily consented to discriminatory treatment. Neither the Commission order from the prior docket nor the parties' interactions remotely supports Qwest's arguments.

6. Qwest's arguments are nonsense. The fact that Qwest may have averted discovery of discrimination that existed in its rate filing is no basis to continue to let Qwest violate the clear requirements of the Act. Likewise, given the existing ICA between the parties and the legal requirement for nondiscriminatory access to power as required by Section 251(c), McLeodUSA had every right to expect that Qwest had to provision power to McLeodUSA on terms equal to how Qwest provides power to itself. Further, McLeodUSA had every right to expect that Qwest would supply an Amendment that would result in a lawful amendment to the ICA that fulfilled its existing nondiscrimination requirements of the ICA. Thus, where, as here, there is no intent

shown that the parties were agreeing to discriminatory treatment, one cannot presume such an agreement was reached, especially when the agreement as a whole clearly states the contrary – Qwest must provide McLeodUSA nondiscriminatory access to collocation power.

7. Qwest closes its Initial Brief by noting what it considers to be the "key fact" that Qwest received no legal consideration for the DC Power Measuring Amendment ("Amendment"). Qwest essentially claims that it executed the Amendment with McLeodUSA out of the goodness of Qwest's heart, without any legal obligation or corresponding benefit to Qwest. If that were true, the Commission *should* take special note because it would be the first time that has ever happened.

8. But it is not true. By executing the Amendment in August 2004, Qwest received significant legal benefit. The parties' ICA previously was silent with respect to how the DC power rates were to be applied.[3] The Amendment corrected that deficiency. Qwest also had unilaterally implemented an application of approved collocation rates that resulted in Qwest providing unlawfully discriminatory access to collocation power by charging for DC power based on the size of McLeodUSA's power cables, which Qwest does not do to itself. That practice was also fundamentally inconsistent with Qwest's own technical publications and engineering practices. The Amendment, if properly interpreted, brings Qwest's actions with respect to DC power into conformance with the manner in which Qwest treats itself. Qwest thus received more than adequate legal consideration for executing the Amendment.

[3] Although silent with respect to how rates for power were to be applied, the ICA between the parties is unequivocal that Qwest must provide McLeodUSA power on nondiscriminatory terms. *See* discussion *infra* at 14. Accordingly, any rate application must fulfill this nondiscrimination obligation even if not specified in the ICA.

9. The benefit that McLeodUSA received, on the other hand, was to no longer be the victim of discrimination and of rates assessed in a manner that provides Qwest with preferential access to collocation power and a substantial windfall. Qwest, however, seeks to retract some of that benefit by interpreting the Amendment to relieve only a portion of the discrimination. Qwest then adds insult to injury by suggesting that McLeodUSA is being greedy because it is not satisfied that Qwest is providing some reduction in the unlawfully excessive amount of DC power charges that McLeodUSA has been paying.

10. Only an incumbent like Qwest would expect a CLEC to be satisfied with Qwest's willingness to eliminate only a portion of the discriminatory access to DC power. Fortunately, the law does not share Qwest's expectation that McLeodUSA should be satisfied with merely reducing the unlawful discrimination and instead requires access, including the charges for DC power, to be nondiscriminatory (consistent with McLeodUSA's interpretation of the Amendment).

11. On at least one point McLeodUSA and Qwest agree: this is largely a case of contract interpretation and the interconnection agreement as amended by the Amendment itself is the best source of evidence as to the agreement reached by the parties. The disagreement, however, is about the proper interpretation of the Amendment. If read in its entirety, without manipulation, the DC Power Measuring Amendment requires Qwest to bill McLeodUSA only for the DC power – including power plant capacity – that McLeodUSA actually uses. Contrary to Qwest's gerrymandering, the language of the Amendment is consistent with this requirement. Neither party manifested any contrary intent prior to the execution of the Amendment.

McLeodUSA's interpretation of the Amendment is also in full accord with Qwest's engineering principles and practices, as well as Qwest's collocation cost study.

12. McLeodUSA's interpretation, moreover, is consistent with the legal requirement of nondiscrimination. Noticeably absent from Qwest's Initial Brief is any argument addressing the issue of discrimination head on. That is because Qwest has no answer: Qwest's admitted practice of treating McLeodUSA differently than Qwest treats itself in terms of accessing and paying for DC power plant is clearly discriminatory. While Qwest attempts to argue that its treatment of CLECs is "reasonable," Qwest never once addresses the nondiscrimination requirements of Section 251(c) of the Act governing Qwest's obligation to provide McLeodUSA DC power to operate its collocated equipment, nor the equivalent Washington law, RCW 80.36.186.

13. By ignoring the discrimination argument, Qwest is tacitly advocating that this Commission ignore the legal requirement that Qwest provide McLeodUSA nondiscriminatory access to the central office power plant in blessing Qwest's interpretation of the DC Power Measuring Amendment. In a case highlighted by Qwest in its Initial Brief, the Iowa Utilities Board accepted Qwest's invitation and interpreted the agreement in accord with Qwest's position based solely on the extrinsic evidence on which Qwest asks this commission to rely. For the reasons discussed herein, McLeodUSA believes the Commission is legally required to reject Qwest's position.

14. The Commission should instead adopt the McLeodUSA interpretation which is consistent with these nondiscrimination requirements, consistent with the way in which Qwest designed the power plant rate, consistent with the manner in which Qwest engineers is power plant, and most importantly, consistent with a plain reading of the

Amendment and the underlying ICA. The Commission should, at a minimum, find that Qwest's interpretation of the Amendment results in unlawful discrimination in violation of federal and state law. The record demonstrates that Qwest admittedly treats CLECs differently than itself with regard to provisioning DC power plant, which results in much higher power charges for CLECs and a significant windfall for Qwest.

ARGUMENT

A. The DC Power Measuring Amendment Requires Power Plant Charges to Be Assessed on a Measured Basis.

1. The Parties' Agreement Is Binding But Does Not Authorize or Allow Discrimination.

15. Qwest begins its argument with the principle that ICAs between incumbent local exchange carriers ("ILECs") like Qwest and competitive local exchange carriers ("CLECs") like McLeodUSA are binding contracts. McLeodUSA agrees. Qwest, however, then ignores that concept by claiming that the Commission's decision in the collocation cost proceeding, Docket UT-003013 (Part A), "precludes both the contract claims and the so-called 'discrimination' claims McLeod asserted in its Complaint."[4] Qwest's reliance on this extrinsic evidence is mistaken as a matter of both fact and law.

16. Nothing in the ICA between Qwest and McLeodUSA states, much less requires, that DC power plant rates are to be charged based on the size of the power feeder cables that McLeodUSA has ordered.[5] Nothing in Exhibit A – the rate sheet from Qwest's Statement of Generally Available Terms ("SGAT") that was incorporated into

[4] Qwest Initial Brief at 6.

[5] *See* Ex. 68 (excerpts from McLeodUSA ICA with Qwest). McLeodUSA requests that the Commission take official notice of the entire ICA, including all exhibits, pursuant to WAC 480-07-495.

the parties' ICA – states, much less requires, DC power plant rates to be charged on an "as ordered" basis.[6] There is also no statement or requirement in Qwest's SGAT, or the current Exhibit A attached to the SGAT, to that effect.[7] Nor do any of the Commission orders in Docket UT-003013 make any reference whatsoever to how the DC power plant rates are to be charged. The only such reference is in the Excel spreadsheet that summarizes the results of the collocation cost study that Qwest originally filed in Docket UT-003013.[8] That reference is virtually meaningless, and certainly does not have the preclusive effect Qwest claims.

17. The Commission approved collocation *rates* but never expressly or implicitly approved the *application* of DC power plant rates based on the size of the DC power feeds ordered by the CLEC.[9] The Exhibit A that Qwest filed to incorporate those rates did not include any statement with respect to how those rates were to be applied.[10] Qwest's substantial reliance on the Commission's "approval" of DC power rates and the subsequent application of those rates in supposed agreement with Qwest's interpretation of the Amendment is illusory.

18. All that said, McLeodUSA agrees completely that the Commission should first consider the actual language of the agreement between the parties for purposes of determining how Qwest should charge McLeodUSA for DC power plant rates. And nothing in the Commission's orders in the collocation cost docket restricts how the

[6] *See* excerpt of Exhibit A to the parties' ICA appended to McLeodUSA's Opening Brief.

[7] *See* Ex. 26 (current Exhibit A to Qwest SGAT). McLeodUSA requests that that the Commission take official notice of the entire SGAT, including all exhibits, pursuant to WAC 480-07-495.

[8] *See* Ex. 53 (Exhibit TKM-2 to the Response Testimony of Teresa Million).

[9] *See* Docket No. UT-003013, Thirteenth Supp. Order; Part A Order Determining Prices for Line Sharing, Operations Support Systems, and Collocation at 131-33 (Ordering paragraphs) (Jan. 2001).

[10] *See, e.g.*, Qwest Washington SGAT Eighth Revision Exhibit A, Section 8.1.4 (Fourth Amended October 16, 2002) (filed in Docket No. UT-003022).

parties could agree on the application of such rates or McLeodUSA's position on the interpretation of that Amendment. Nor does the Commission's establishment of DC power plant rates preclude McLeodUSA's claim that Qwest is unlawfully discriminating against McLeodUSA by charging Commission-approved DC power plant rates on an "as ordered" basis. The Commission has made no prior determination on this issue, and McLeodUSA is fully entitled to raise it in this proceeding.

19. Indeed, the Commission has expressly rejected the argument that Qwest raises here that the Commission's prior approval of rates bars the Commission from granting relief in a complaint. In *AT&T Communications of the Pacific Northwest, Inc. v. Verizon Northwest, Inc.*, Docket No. UT-020406, this Commission held that it has authority to grant relief when the complaint involves allegations that a company's ongoing assessment of previously approved rates violates statutory provisions.[11] In the instant action, McLeodUSA has amply shown that Qwest's application of approved collocation rates (based on the amperage of ordered distribution cables) results in unlawful discriminatory access in violation of Section 251(c) and the equivalent Washington law, RCW 80.36.186.

2. McLeodUSA's Interpretation of the Amendment, Unlike Qwest's Interpretation, Is Fully Consistent with the Legal Standard for Interpreting Interconnection Agreements.

20. Qwest cites numerous Washington court cases detailing the black letter law with respect to interpreting ambiguous contracts.[12] Yet, Qwest cites only one case applicable to interpreting ICAs – *Pacific Bell v. Pac-West Telecom. Inc.*, 325 F.3d 1114

[11] *AT&T Communications of the Pacific Northwest, Inc. v. Verizon Northwest Inc.*, Docket No. UT-020406, Eleventh Supplemental Order (August 12, 2003).

[12] Qwest Initial Brief at 7-10.

(9th Cir. 2003) ("*Pacific Bell*").[13] And contrary to what Qwest claims, that decision does not prevent this Commission from correcting the unlawful discriminatory treatment to which the evidentiary record shows McLeodUSA has been subjected under Qwest's interpretation of the DC Power Measuring Amendment.

21. The court in *Pacific Bell* reviewed California Public Utilities Commission rulings on the applicability of reciprocal compensation provisions in all ICAs between ILECs and CLECs in California to calls bound for Internet Service Providers ("ISPs"). "[T]hese orders were adopted as part of a generic rule-making proceeding that would affect all existing 'applicable interconnection agreements' in California."[14] The Ninth Circuit invalidated the orders, concluding that the California Commission "lacks authority under the Act to promulgate general 'generic' regulations over ISP traffic" in light of the FCC's determination that such traffic is jurisdictionally interstate "thereby placing it under the purview of federal regulators rather than state public utility commissions."[15] The court also concluded:

> The CPUC's only authority over interstate traffic is its authority under 47 U.S.C. § 252 to approve new arbitrated interconnection agreements and to interpret existing ones according to their own terms. By promulgating a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements, the CPUC acted contrary to the Act's requirement that interconnection agreements are binding on the parties, or, at the very least, it acted arbitrarily and capriciously in purporting to interpret "standard" interconnection agreements.[16]

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[13] Qwest Initial Brief at 5.

[14] *Pacific Bell*, 325 F.3d at 1125.

[15] *Id.*

[16] *Id.* at 1125-26.

22. The Ninth Circuit's decision in *Pacific Bell* is a far cry from the case at hand in this proceeding. McLeodUSA filed a complaint seeking Commission enforcement of the specific Amendment to the ICA between McLeodUSA and Qwest. The ICA expressly provides that a dispute under the ICA can be resolved by a complaint to this Commission.[17] That is entirely different than the generic rules governing all ICAs that were before the court in *Pacific Bell*.[18] Indeed, the Ninth Circuit overturned the California Commission orders, in part, *because* "it did not consider a specific interconnection agreement or even a specific reciprocal compensation provision."[19] Both the Amendment and the ICA between McLeodUSA and Qwest are before the Commission in this docket, and the Commission has full authority to interpret those documents.

23. Moreover, federal law explicitly preserves the Commission's authority at issue. Specifically, 47 U.S.C. § 251(d)(3) preserves State commission authority to enforce any State regulation, order, or policy that is consistent with Section 251. Since Section 251(c) and the equivalent Washington law, RCW 80.36.186 prohibits discrimination by an ILEC in the provision of collocation to a CLEC,[20] Section 251(d)(3) preserves the Commission's authority and duty to enforce the federal prohibition.

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[17] ICA Section 5.18.1. "If a claim, controversy or dispute between the Parties ... should arise ...then it shall be resolved in accordance with the dispute resolution process set forth in this Section, provided, nothing in this Section shall be interpreted to preclude either Party from using available procedure for relief before the Commission."

[18] Nor can Qwest legitimately claim that the *Pacific Bell* decision precludes McLeodUSA's discrimination claim. No such issue was before the Ninth Circuit in that case, and nothing in the parties' ICA condones, much less authorizes, discrimination in the provision of DC power. To the contrary as discussed further below, the ICA expressly requires such provisioning to be nondiscriminatory.

[19] *Id.* at 1128.

[20] RCW 80.36.186 does not specifically address collocation. That section prohibits a telecommunications company providing noncompetitive services from granting any undue preference or advantage to itself in providing access to or pricing of a non-competitive service. Collocation (and the provision of DC power in

24. Qwest's reliance on standard contract interpretation cases is also misplaced. Courts have recognized that ICAs are not traditional contracts. For example, the Tenth Circuit Court of Appeals recognized in a case involving Qwest that an ICA is an instrument arising in the context of ongoing state and federal regulation that have provisions to facilitate competition and ensure that carriers are not treated in a discriminatory manner.[21] That means that in interpreting the Amendment, it must be presumed that the intent of the parties entering into an ICA and any amendment thereto must be to properly implement the Act and comparable state law requirements that give rise to the ICA. Thus, the Amendment must be interpreted consistent with state and federal law requirement of nondiscrimination firmly in mind. Such interpretation is justified and is not an impermissible modification of an interconnection agreement.[22]

25. One of the compelling contract interpretation principles that Qwest cites is that related provisions in a contract must be harmonized, which is equally applicable to ICAs and standard contracts. Qwest, however, makes absolutely no attempt in its brief to follow this principle by squaring its interpretation of the Amendment with ICA other provisions governing its obligation to provide collocation. This principle requires that before determining whether a contract provision is ambiguous, and thus, before one should give any weight to any extrinsic evidence, the court must first review the four

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the Qwest central office) is unquestionably a noncompetitive service since McLeodUSA has no choice but to collocate in a Qwest central office in order to access other ILEC network elements. This section explicitly states that the Commission has primary jurisdiction to hear and remedy any violations of this prohibition.

[21] *E.Spire Communications, Inc. v. New Mexico Public Regulation Commission*, 392 F.3d 1204, 1207 (10th Cir. 2004) ("'[A]n interconnection agreement is part and parcel of the federal regulatory scheme and bears no resemblance to an ordinary, run-of-the-mill private contract.'") (quoting *Verizon Maryland, Inc. v. RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 552 n.5 (D. Md. 2002)).

[22] *See id.* at 1208.

corners of the agreement to determine the parties' intentions, which is controlling.[23] Accordingly, the Amendment must be interpreted in the context of the entire ICA. The ICA between Qwest and McLeodUSA makes it very clear that Qwest must provision collocation power to McLeodUSA on terms that are no worse than the terms Qwest provides power to itself:

> 8.2.1.1 With respect to any technical requirements or performance standards specified in this Section, U S WEST shall provide Collocation on rates, terms and conditions that are just, reasonable and non-discriminatory.

That section of ICA is wholly consistent with the obligation imposed on Qwest by Section 251(c)(6) of the Act. Accordingly, as an amendment to the underlying ICA, the Commission must interpret the Amendment within the context of the entire ICA and harmonize the Amendment with its related provisions.[24]

26. An interpretation that gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation that leaves a part unreasonable, unlawful, or of no effect.[25] Thus, absent an express rebuke of this clear provision in the underlying ICA and federal and Washington law requiring nondiscrimination, the intention of the parties must be presumed to be consistent with the underlying ICA and Qwest's obligation under the Act and Washington statutory law. Qwest's claim that the Amendment permits it to provide McLeodUSA access to DC power on terms less favorable than Qwest provides to itself is inconsistent with the underlying ICA and should be rejected.

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[23] *Carlstrom v. Hanline*, 98 Wn. App. 780, 784, 990 P. 2d 986, 988 (2000); *See, also, James S. Black & Co. v. P & R CO.*, 12 Wn. App. 533, 530 P. 2d 722, 723 (1975).

[24] *See id.*

[25] *E.g., Salvo v. Thatcher,* 116 P. 3d 1019, 1023 (Wash. App. 2005).

27. It is undisputed in the record that Qwest discriminates with respect to access to DC power plant. Qwest admits it sizes DC Power plant for itself based on its List 1 drain. Qwest does not do so for McLeodUSA.[26] Discrimination is also evident from the fact that Qwest obtains and uses the List 1 drain information for its own equipment, but allegedly does not do so for McLeodUSA, even though the ICA in section 8.2.1.1 ("[w]ith respect to any technical requirements . . . U S WEST shall provide Collocation on rates, terms and conditions that are . . . non-discriminatory") and Qwest's own engineering manuals make it clear that it is Qwest's obligation to obtain this information and Qwest could simply ask for this information on its collocation application.

28. As required by law governing interconnection and access to network elements, the ICA embodies Qwest's obligation under section 251(c)(6) of the Act to provide McLeodUSA access to the necessary element of DC power as part of Qwest's obligation to provide collocation "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." The DC Power Measuring Amendment, as interpreted by Qwest, would be at odds with other portions of the parties' ICA. In contrast, the McLeodUSA interpretation harmonizes these sections, maintains the consistency of the entire Agreement, and fulfills the nondiscrimination requirements of federal law. Therefore, McLeodUSA's interpretation is the correct one.

[26] It should be noted that McLeodUSA does not believe the record shows that Qwest actually sizes the DC Power plant for McLeodUSA using the List 2 drain based on the order for distribution cables. In fact, as Mr. Morrison explained in detail, the history shows that Qwest actually does not size its power plant to accommodate the List 2 drain. However, irrespective of what Qwest actually does in sizing its DC power plant, the record is unmistakable that Qwest bills McLeodUSA on terms less favorable than based on the List 1 drain Qwest uses for itself.

3. The DC Power Measuring Amendment Requires Qwest to Charge for DC Power Plant Based on Actual Power Usage.

29. The language in the DC Power Measuring Amendment supports McLeodUSA's interpretation that the Amendment requires Qwest to charge McLeodUSA for power plant based on McLeodUSA's actual usage of DC power. Qwest's interpretation, contrary to its assertions, is neither "simple" nor "straightforward" except that it is simply incorrect.

30. Qwest first maintains that the Amendment mentions "DC Power Usage Charge" five times but does not mention any "Power Plant" charge. Qwest essentially contends that "DC Power Usage Charge" refers only to power usage and that the Amendment would have expressly mentioned "Power Plant Charge" if the intent was to include that charge. Qwest can only make that argument by ignoring the plain language of the Amendment, as well as Exhibit A and the parties' ICA to which it is attached.

31. The term actually used in the Amendment five times is "-48 Volt DC Power Usage Charge" which is not the same thing as the "Usage Charge"; Qwest thoroughly ignores that clear distinction in making its argument. Twice the Amendment refers to that "-48 Volt DC Power Usage Charge" as being "specified" (Section 2.2) or "from" (Section 2.2.1) "Exhibit A of the Agreement." Exhibit A to the Agreement uses the virtually identical term "48 Volt DC Power Usage" in section 8.1.4.[27] Thus, the Amendment and Exhibit A both use the term "48 Volt DC Power Usage" to include the

[27] This refers to the actual Exhibit A that is part of the agreement between the parties. However, even if the Commission upholds Qwest's objection regarding consideration of the Exhibit A originally attached to the ICA, Qwest's argument is still incorrect. The new Exhibit A shows that the identical term "-48 Volt DC Power Usage Charge" in section 8.1.4 that includes three individual rates elements, one of which is the disputed "Power Plant" (Section 8.1.4.1.1). Ex. 20T (McLeodUSA Starkey Direct) at 5.

rates for both power plant and power usage. The Amendment, therefore, did not need to use the term "Power Plant Charge" to include the charge for the DC power plant.

32. The parties' ICA also uses the same term "-48 Volt DC Power Usage," which even Qwest concedes refers to all of the charges for power plant and power usage listed under Exhibit A, section 8.1.4 ("48 Volt DC Power Usage").[28] The definition of "-48 Volt DC Power Usage Charge" in the ICA is virtually identical to the definition of that term in the DC Power Measuring Amendment.[29] Despite the undisputed facts that the exact same "-48 Volt DC Power Usage Charge" is used in both the ICA and the Amendment, and is defined exactly the same in both documents, Qwest is asking the Commission to believe that this term *includes* the power plant charge when used in the ICA but *excludes* that charge when used in the Amendment. Such an interpretation simply is not credible.

33. The Amendment goes even further to remove any confusion. It specifically defines the term "DC Power Usage Charge" (the term upon which Qwest places such dramatic importance in stating that the term is used five times in the Amendment) to include costs associated with the "power plant." Section 2.1 of the Amendment states that "the DC Power Usage Charge is for the ***capacity*** of the power plant available for CLEC's use." (Emphasis added). By defining the same "DC Power Usage Charge" as the charge for which, going forward, rates will be applied on a

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[28] Ex. 68 (ICA excerpts); Tr. at 213 (Qwest Easton). Mr. Easton further conceded that the term "-48 Volt DC Power Usage Charge" is the same in both the parties' ICA and the Amendment. Tr. at 214.

[29] *Compare* Ex. 68 (ICA Excerpts) at Section 8.3.1.6 ("Provides -48 volt DC power to CLEC collocated equipment and is fused at one hundred twenty-five percent (125%) of request.") *with* Ex. 24 (Amendment) Section 2.1 ("Provide -48 volt DC power to CLEC collocated equipment and is fused at one hundred twenty-five percent (125%) of request."). Section 2.1 of the Amendment, however, provides further, "The DC Power Usage Charge is for the capacity of the *power plant* available for CLEC's use," (emphasis added) which clarifies that the power plant charge is included in the "-48 Volt DC Power Usage Charge."

measured-usage basis, it is somewhat perplexing why this language alone does not make the interpretation of the Amendment relatively straightforward for Qwest.

34. Qwest's other attempts to support its construction of the language of the DC Power Measuring Amendment are similarly unpersuasive. For example, Qwest claims that the reference in Section 1.2 of the Amendment to a discount for the power usage rate over 60 amps indicates when "read in the context of the entire agreement" that the Amendment does not apply to the power plant rate because it increases for orders over 60 amps. Qwest misconstrues the Amendment. The relevant portions provide,

> **1.0 Monitoring**
>
> 1.1 CLEC orders DC power in increments of twenty (20) amps whenever possible. If CLEC orders an increment larger than sixty (60) amps, engineering practice normally terminates such feed on a power board. If CLEC orders an increment smaller than or equal to sixty (60) amps, the terminations will normally appear on a Battery Distribution Fuse Board (BDFB).
>
> 1.2 If CLEC orders sixty (60) amps or less, it will normally be placed on a BDFB where no monitoring will occur since the power usage rate reflects a discount from the rates for those feeds greater than sixty (60) amps. If CLEC orders more than sixty (60) amps of power, it normally will be placed on the power board. Qwest will monitor usage at the power board on a semi-annual basis. . . .

35. Read in context, the language states that monitoring of power usage (and thus measurement for purposes of determining the amount of that usage) occurs at the power board and so does not apply to orders of 60 amps or less because those feeds terminate on a BDFB, rather than on a power board (and presumably are less expensive, thus the discount). However, nothing in that language suggests, much less establishes, a limitation on the *rate elements* to which the Amendment applies, which are listed and defined in Section 2.0 – indeed, the term "-48 Volt DC Power Usage" (or any other

defined term) is not even used in Section 1.0. Rather, Section 1.0 limits the applicability of the Amendment to the *size* of the CLEC's order for DC power *feeds*, applying only to orders for feeds that are greater than 60 amps. It is Section 2.0 of the Amendment that then describes the rate elements that will be impacted by the change to measured usage when the feeds at issue exceed 60 amps. And it is within Section 2.0 that the Amendment defines the "DC Power Usage Charge" to include power plant, consistent with McLeodUSA's interpretation.

36. Qwest also claims that Section 1.2 uses the term "usage rate," which "contains no reference to a power plant rate."[30] Again implicit in Qwest's argument is the idea that the word "usage" cannot include "power plant." Qwest's use of the word "usage" in other documents that *Qwest has drafted* is not nearly so constrained. As discussed above, even Qwest agrees that the term "-48 Volt DC Power *Usage*" includes power plant charges, at least in the context of the parties' ICA.

37. Qwest's own collocation cost study also expressly uses the word "usage" to include power plant charges – in fact, as described by Mr. Starkey, Qwest's cost study allocates power plant investments based upon an assumed level of usage (indicating that proper application would likewise need to be based upon usage for proper cost recovery). In commenting on the monthly recurring charges for "Power Usage," for example, Qwest's cost study states, "Power **usage includes** the cost of purchasing power from the electric company and **the cost of the power plant**."[31] Qwest cannot reasonably claim

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[30] Qwest Initial Brief at 11.

[31] Ex. 52 ("Detailed Summary of Results" from Qwest collocation cost study) at 5, Cell: A97 Comment (emphasis added); *see* Ex. 22T (McLeodUSA Starkey Supp. Direct) at 3 (quoting Power Equipment spreadsheet from Qwest collocation cost study developing power plant costs per amp by dividing total equipment costs by "DC Power Usage"); *accord* Ex. 53 (Qwest Response to Iowa DR 03-30); *see also* Ex. 43 (Collocation Power Issues) at 8 (stating under "Power Capacity Issues" that "CLEC Power *Usage* May

that the word "usage" when used in the Amendment cannot include "power plant" when the SGAT and Qwest's collocation cost study all expressly include "power plant" within the meaning of the word "usage." All of these documents were drafted by Qwest, and it strains any sense of credibility to suggest that in only one of these documents drafted by Qwest did it intend for the term "usage" not to embody power plant, especially when the result of such an incredulous claim means that Qwest can charge CLECs much more for DC power than Qwest incurs itself.

38. Finally, Qwest argues that the undefined term "usage rate" in Section 1.2 and the defined term "-48 Volt DC Power Usage Charge" in Section 2.0 are singular, signifying that the terms apply to only one rate. As Qwest concedes, however, the parties' ICA uses the singular term "-48 Volt DC Power Usage Charge" in Section 8.3.1.6 to refer to all charges that are listed under Section 8.1.4 and its subsections in Exhibit A.[32] By using the same term (also in the singular), the DC Power Measuring Amendment simply mirrors the ICA and cannot reasonably be interpreted to mean something different.

39. Qwest's efforts to undermine McLeodUSA's interpretation of the DC Power Measuring Amendment similarly come to naught. While arguing about the revised Exhibit A showing a separate element for Power Plant under the section "–48 Volt DC Power Usage," Qwest quotes the provision in the parties' ICA stating that headings are of no force or effect and argues that "48 Volt DC Power Usage" in Sections 8.1.4 and 8.1.4.1 of Exhibit A is a "heading" and thus can have no substantive meaning,

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Drive Immediate Addition of Power Backup" and listing power plant components as "Backup Power Items Subject to Exhaust") (emphasis added).

[32] Tr. at 213 (Qwest Easton).

even though the Amendment uses virtually the exact same term. As McLeodUSA discussed in its Opening Brief, however, the current Exhibit A to Qwest's SGAT is not the Exhibit A in effect between the parties or the Exhibit A to which the Amendment refers. Even if the Commission were to conclude otherwise, Qwest's argument ignores common sense and the structure of the SGAT Exhibit A.[33]

40. To treat this reference as a mere "heading" to be ignored in interpreting the Amendment means that section 2.2.1 of the Amendment contains a meaningless reference. Other than this alleged "heading," the SGAT Exhibit A contains nothing else called "-48 Volt DC Power Usage." Interpretations that render terms meaningless must be avoided in interpreting the Amendment.[34] Indeed, the Amendment makes the text at 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 of the Amendment, yet that is exactly the argument Qwest advocates be adopted by the Commission.

41. Further, if the reader is forced to ignore *8.1.4.1 -48 Volt DC Power Usage, per Ampere, per Month* because it is a mere heading lacking significance, then the subtending rate elements would lose all meaning. This results from the fact that the description of how to apply the subtending rates (*i.e.*, per *Ampere, per Month*) is evident only in this "heading." If this line is truly only a "heading" that must be ignored, an equally meaningful reading of the SGAT Exhibit A would require that McLeodUSA pay $9.34 only, perhaps, once per month for all Amps it ordered (*i.e.*, a total of $9.34 per

[33] McLeodUSA Opening Brief at 9-10.

[34] *MacLean Townhomes, L.L.C. v. America 1st Roofing & Builders Inc.*, 138 P. 3d, 155, 157 (Wn App. 2006) (citing *Seattle-First Nat'l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985)).

month, not $9.34 per month per each Amp). 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 application.

8.1.4.1.1.	Power Plant	$9.34

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 rates should actually be applied.

42. Qwest also contends that McLeodUSA misplaces reliance on the sentence in Section 2.1 of the Amendment that "The DC Power Usage Charge is for the capacity of the power plant available for CLEC's use," because while it "potentially introduces some ambiguity into the agreement," the sentence is inconsistent with the remainder of the Amendment and thus should be considered essentially meaningless.[35] The only inconsistency made evident by this language is the inconsistency between Qwest's interpretation put forward in this proceeding and the actual language of the Amendment. This sentence does not add ambiguity as Qwest would lead the Commission to conclude but does exactly the opposite by specifically defining the operative term within the Amendment "DC Power Usage Charge" to include Qwest's power plant – thereby *removing* the ambiguity that Qwest is desperately trying to create within the Amendment so that the Commission will primarily focus on the extrinsic evidence that Qwest believes supports its interpretation. As such, that sentence is fully consistent with the use of the

[35] Qwest Initial Brief at 14.

term "-48 Volt DC Power Usage" throughout the Amendment, Exhibit A, and the parties' ICA, as discussed above.

43. Qwest cannot legitimately urge the Commission to ignore a portion of the plain language of the Amendment because it allegedly "makes no sense"[36] when in fact, the sentence only makes "no sense" when viewed in the light of Qwest's interpretation. The sentence itself makes perfect sense when read in conjunction with the language as a whole, the parties' ICA, Exhibit A, and Qwest's cost study and supports the only logical and internally consistent interpretation of the Amendment. Again, the Commission cannot adopt Qwest's interpretation since it admits that its interpretation renders this sentence in the Amendment meaningless.

44. The language of the Amendment requires Qwest to measure McLeodUSA's DC power usage and to charge for "-48 Volt DC Power Usage" – including both power usage and power plant rates – based on the amount of power McLeodUSA actually uses. Qwest can only argue to the contrary by ignoring portions of the Amendment and construing others inconsistently with the same terms used by Qwest in related documents upon which Qwest attempts to rely, unsuccessfully, to bolster its case. The Commission should adopt McLeodUSA's interpretation.

4. Qwest Did Not Objectively Manifest Any Intent Contrary to McLeodUSA's Interpretation of the Amendment.

45. The language of the Amendment, and especially when read in the context of the entire ICA, speaks for itself and fully supports McLeodUSA's interpretation of the Amendment as requiring Qwest to charge all DC power usage rates – including the power plant rate – based on McLeodUSA's actual usage. Qwest, however, claims that Qwest

[36] *Id.*

"plainly, objectively, and openly disclosed its intent regarding the DC Power Measuring Amendment prior to its execution through two avenues" – the Change Management Process ("CMP") and Qwest's product catalog ("PCAT").[37] This statement is false and particularly misleading.

46. Initially and most fundamentally, the CMP documentation that Qwest introduced into the record does not even reference the DC Power Measuring Amendment that the parties executed, much less indicate Qwest's intent with respect to the Amendment. To the contrary, the CMP documentation states in response to the question of whether "the change from non-measured to measured [will] be automatic or will the CLEC be required to amend their Interconnection Agreement," that "Qwest will initiate the DC Power Reading Process *without the CLEC having to amend their Interconnection Agreement.*"[38]

47. It simply is not plausible for Qwest to argue that, after it expressly rejected the notion that an ICA amendment would be required to implement the topic under discussion in the CMP, a CLEC, when confronted with an Amendment drafted by Qwest to measure and assess power on a usage-basis, that McLeodUSA should have recalled and relied on the previous CMP documentation from nearly a year prior and further assumed that it was applicable to the DC Power Measuring Amendment even when that very information indicates no ICA amendment would result from that exchange. Such an assumption is even more strained when the Amendment presented to McLeodUSA by

[37] Qwest Initial Brief at 15.

[38] Ex. 64 (CMP documentation) at 1 (emphasis added).

Qwest specifically identified power plant as a component of the DC Power Usage Charge to which measured usage would apply.[39]

48. Qwest's PCAT does include a link to Qwest's form amendment for a "CLEC wanting to utilize the DC Power Measuring process," but the description of that process is fully consistent with the language in the DC Power Measuring Amendment.[40] That description, like Section 1.2 of the Amendment, merely refers to adjusting the "usage rate to the CLEC's actual usage," without using any defined terms or otherwise excluding the power plant rates that are specifically included as part of "-48 Volt DC Power Usage" as that term is used in the Amendment and the parties' ICA. Again, nothing in the CMP documentation so highly touted by Qwest could have reasonably given McLeodUSA any reason to believe that the language in the Amendment did not mean what it says.

49. Qwest nevertheless contends that the DC Power Element Descriptions in the PCAT differentiate between a "-48 Volt DC Power Usage Charge" (which "recovers the cost of the power used") and "-48 Volt DC Power Capacity Charge" (which "recovers the cost of the capacity of the power plant available") and that McLeodUSA should have known that Qwest intended the term "-48 Volt DC Power Usage Charge" to have the same meaning in the Amendment as it does in the PCAT.[41] Qwest, however, conveniently ignores the language at the beginning of the "DC Power Rate Element

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[39] The CMP, moreover, is a *process* that contemplates changes as the process progresses. See Ex. 23T (McLeodUSA Starkey Rebuttal) at 14-15. Discussions at the beginning of the process, such as those in Exhibit 64, are not necessarily reflective of the result of the process. Indeed, Qwest contends that the end result of this particular CMP process was the PCAT, Qwest Initial Brief at 17, which contains substantially different terms than those described in the CMP documentation.

[40] *Compare* Ex. 63 (PCAT documentation) at 2 (language under heading "Optional DC Power Measuring for feed greater than sixty (60) amps") *with* Ex. 24 (DC Power Measuring Amendment) Section 1.2.

[41] Qwest Initial Brief at 17.

Descriptions" in the PCAT: "The following language applies in all states, where separate charges for DC Power Capacity and DC Power Usage have been established."[42] No separate "DC Power Capacity" rate element has been established in Washington. Indeed, the term "DC Power Capacity" appears nowhere in the ICA between McLeodUSA and Qwest, Exhibit A, or in Qwest's SGAT. The PCAT's description of the "DC Power Measuring" option does not use *any* of the terms defined in "DC Power Rate Element Descriptions" section of the PCAT. McLeodUSA, therefore, had no reason to believe that any of the "DC Power Rate Element Descriptions" in the PCAT had any applicability in Washington in general, or to the Amendment specifically.

50. The fact is that Qwest manifested no intent with respect to the DC Power Measuring Amendment that the parties executed other than the intent included in the language of the Amendment. Even if McLeodUSA had reason to go beyond what McLeodUSA believed to be an unambiguous Amendment, Exhibit A and the underlying ICA, to discover the CMP documentation and the PCAT, this documentation either specifically discounted the need for an Amendment or did not indicate any meaning of the Amendment that varied from its plain language. The CMP documentation and the PCAT thus are not germane to the interpretation of the Amendment (even to the extent that they support McLeodUSA's position).

5. McLeodUSA Did Not Manifest Any Intent Different than Its Current Interpretation of the Amendment.

51. McLeodUSA has consistently taken the position that the DC Power Measuring Amendment means what it says – all DC power usage, including power plant rates, should be charged based on McLeodUSA's actual usage. This understanding is

[42] Ex. 63 (PCAT Document) at 1.

further corroborated by the statement in the ICA that Qwest has to provide McLeodUSA access to power on a non-discriminatory basis. Qwest disputes that claim and contends that McLeod's "internal and unexpressed intent reflects an understanding that the DC Power Measuring Amendment would only affect the power usage charge, not the power plant charge."[43] Qwest even goes so far as to claim that McLeodUSA's interpretation of the Amendment is an "after the fact" interpretation somehow contrived to gain McLeodUSA an advantage over Qwest. The record evidence does not support Qwest's contentions.

52. The basis for Qwest's bold assertion is a spreadsheet that a McLeodUSA employee prepared to estimate the cost impacts that would result from execution of the Amendment. Qwest maintains that the only rates reflected on this spreadsheet are those billed for power usage, not power plant, allegedly demonstrating that McLeodUSA did not expect to accrue savings based upon Qwest's power plant rates. Qwest, however, ignores the fact that the rate information in the spreadsheet came from price quotes provided by Qwest to McLeodUSA. Indeed, the purpose of the spreadsheet was to track those price quotes and only those price quotes.[44] The McLeodUSA engineering group did not conduct any independent inquiry into all of the rate elements that would be impacted but simply relied on the documentation provided by Qwest.[45] Indeed, as Ms. Spocogee testified, such independent analysis would not be consistent with the engineers'

[43] Qwest Initial Brief at 19.

[44] Ex. 81T (McLeodUSA Spocogee Rebuttal) at 5; Ex. 82 (Qwest price quotes); *see* Tr. at 64 (McLeodUSA Spocogee). The internal e-mail exchange within the McLeodUSA engineering group corroborates Ms. Spocogee's testimony. When Brian Vanyo, Director of Engineering e-mailed Mark McCune, Systems Engineer, Mr. Vanyo asked the group to check the "rate per amp" and asked whether the "rate per amp" would increase. *See* Ex. 87 (McLeodUSA Response to Qwest data requests) at 3. This exchange shows the mindset of the engineering group was that, like the Michigan example Ms. Spocogee explained in her testimony, there was but single power rate element.

[45] Ex. 81T (McLeodUSA Spocogee Rebuttal) at 5.

job description – such analysis is left to her organization that ultimately identified the problem and disputed Qwest's charges. Nothing about this spreadsheet, therefore, indicates McLeodUSA's intent with respect to the DC Power Measuring Amendment.

53. McLeodUSA further explained that its engineering group's primary concern leading to the development of the spreadsheet was to ensure that rates would not increase as a result of the Amendment, *i.e.*, they were simply asked to give a "thumbs up" or "thumbs down" analysis with the sole criteria being lower, as opposed to higher, collocation power bills.[46] Qwest misconstrues this evidence as somehow confirming that "McLeod had no intent to reduce power plant charges through the Amendment" and that "Qwest's interpretation of the DC Power Measuring Amendment is entirely consistent with that claimed intent" to avoid price increases.[47] The evidence demonstrates no such thing.

54. The McLeodUSA engineering group was charged with ensuring that the Amendment would not have a negative impact. To make this simple determination, the McLeodUSA engineers used Qwest's own quote documents to do a crude analysis that indicated lower, as opposed to higher, collocation power charges. The analysis stopped there because the immediate question had been answered. The spreadsheet, however, does not indicate – and there is no evidence that Qwest has been able to produce that this analysis was intended to indicate – the total amount of the reduction of DC power charges that McLeodUSA would realize once the Amendment was in effect. Such an analysis is not the domain of McLeodUSA's engineers, just as interpreting or implementing the rate provisions of contracts through a review of charges ultimately

[46] *Id.*

[47] Qwest Initial Brief at 22.

assessed by Qwest is not the purview of McLeodUSA engineers. As Ms. Spocogee testified, those questions fall within her jurisdiction and when confronted with Qwest's bills rendered in conflict with what McLeodUSA believed it had agreed to via the Amendment, Ms. Spocogee filed a dispute.

55. Qwest further mischaracterizes the evidence by stating that "Ms. Spocogee admitted the first time McLeod formulated an intent that the DC Power Measuring Amendment should reduce power plant charges was after she conducted her audit in May 2005."[48] Ms. Spocogee essentially testified that the first time *she* ever looked at the specific power plant element and calculated power plant savings was in connection with her audit. She also explained that it is common practice to take months and sometimes years to discover and raise billing disputes as her group focuses on certain parts of the bill throughout the year (*i.e.*, Ms. Spocogee's group simply hadn't reviewed the collocation power component of the bill until the timeframe immediately preceding the dispute).[49] The fact that McLeodUSA did not dispute Qwest's failure to bill McLeodUSA for power plant based on actual usage until May 2005 (nine months after the Amendment was signed) indicates only that it took McLeodUSA that long to discover the error, not that McLeodUSA interpretation was somehow "post hoc."

56. In short, nothing in McLeodUSA's internal communications or analysis is inconsistent with McLeodUSA's position that its understanding of the Amendment is and has always been to require all DC power charges – including power plant rates – to be billed based on actual power usage. Moreover, there is certainly no evidence that it was the intent of McLeodUSA in entering into the Amendment that it was agreeing to Qwest

[48] *Id.*

[49] Ex. 81T (McLeodUSA Spocogee Rebuttal) at 8-9.

providing DC power to McLeodUSA on terms less favorable than Qwest provides power to itself. In other words, there is no indication that McLeodUSA intended to obliterate its right under Section 251(c), RCW 80.36.186, and as embodied elsewhere in the ICA, to access power on nondiscriminatory terms and conditions.

B. Undisputed Engineering Evidence Supports McLeodUSA's Contract Interpretation and Discrimination Claim.

57. Engineering principles with which both parties largely agree demonstrate that Qwest should be charging for power plant based on the amount of DC Power McLeodUSA actually uses. Qwest mischaracterizes the evidence by asserting, "The essence of McLeod's testimony regarding engineering issues is simply that McLeod wants to place a power order for its ultimate capacity needs, McLeod expects Qwest to make that capacity available, but McLeod only wants to pay based on measured usage, even though Qwest does in fact make the ordered capacity available."[50] The record does not support this statement. McLeodUSA orders power distribution cables, not power plant capacity to meet the simultaneous List 2 drain that Qwest alleges would occur in the virtually nonexistent circumstance of a complete central office AC power failure.[51] To the extent that CLECs have any expectations about Qwest's ability to provide power plant capacity, it is that Qwest will make such capacity available to CLEC equipment as it does to Qwest's own central office equipment.[52] Qwest, not McLeodUSA, is the party seeking a free ride at the other's expense.

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[50] Qwest Initial Brief at 23.

[51] Ex. 5TC (McLeodUSA Morrison Rebuttal) at 39; *see* Tr. at 123, line 13 through 124, line 10 (McLeodUSA Morrison).

[52] Ex. 5TC (McLeodUSA Morrison Rebuttal) at 42-43.

1. McLeodUSA Does Not Order Power Plant Capacity.

58. McLeodUSA orders power distribution cables when it collocates equipment in Qwest's central offices. Indeed, that is the only information regarding McLeodUSA's power needs that Qwest requires a collocating CLEC to submit on the collocation application form written by Qwest. Qwest does not even give McLeodUSA the option to order power plant capacity via its collocation application. Yet, throughout this proceeding, Qwest repeatedly (and without any basis in fact) refers to McLeodUSA's request for power feeder cable amperage as McLeodUSA's "power order." Such references are inaccurate, misleading and willfully inconsistent with the record.

59. Qwest's assumption that the McLeodUSA order for distribution cables is an order for power capacity is without basis in fact. McLeodUSA does not consider an order for power cables an order for power plant capacity, and there is nothing in the ICA or relevant documentation to indicate that Qwest is making such a misguided assumption with respect to the request for distribution cables. The Qwest collocation application form certainly does not give a CLEC any clue Qwest would construe the order for distribution cables as an order for power capacity.

60. Indeed, such an assumption by Qwest would be in direct violation of its own internal technical documentation and the manner by which it constructs power plant. The technical documents would not lead anyone to believe that an order for distribution cables would be assumed to be an order for power capacity by Qwest. However, because, according to Qwest, it makes this amount of power plant capacity available to McLeodUSA (a fact that Qwest has never proven or substantiated), Qwest argues that it is justified in charging McLeodUSA the full amount for that much power plant capacity, whether McLeodUSA ever uses it or not. Nonetheless, Qwest does not dispute that its

own technical publications require any central office power plant (even power plants which will support collocated carriers) to be designed to "List 1 drain" and that Qwest does not use the List 2 drain of the power cable capacity to size the power plant for Qwest's own equipment in the central office (it uses the List 1 value required by its technical documentation). On its face, such DC power provisioning is discriminatory.

61. Qwest attempts to defend this obvious discrimination by claiming that the Commission sanctioned such discrimination in its adoption of collocation power rates. As discussed above, however, the Commission has never considered, much less approved, Qwest's application of power plant rates to the amperage capacity of the power cables the CLEC orders. Nor does any provision in the parties' ICA authorize such an application of the power plant rates. To the contrary, as previously highlighted, Section 8.2.1.1 of the ICA provides that Qwest will provide collocation on a rates and terms that are nondiscriminatory Qwest's charges for DC power to McLeodUSA based on List 2 drain are discriminatory against what Qwest does for itself. Indeed, as Mr. Starkey demonstrated, Qwest's practice results in Qwest using the majority of the power generated by its power plant, while CLECs like McLeodUSA who use only a small fraction of that used by Qwest, end up paying for the bulk of the power plant capacity they share.[53] Therefore, if the DC Power Measuring Amendment is not interpreted as McLeodUSA proposes and as the plain language of the Amendment warrants, there can be no question that Qwest is unlawfully discriminating against McLeodUSA in violation of Washington statutes and the parties' ICA.

[53] Ex. 22T (McLeodUSA Starkey Supp. Direct) at 5-9.

62. Qwest also attempts to suggest that this discrimination is reasonable from an engineering perspective because a majority of collocators' orders for power cables were received in the 1999-2000 and Qwest had no idea what to expect in terms of collocators' usage, so according to Qwest, the only reasonable option was to build power plant to the capacity of the CLEC power cables. Qwest's revisionist history does not pass muster. If Qwest actually built power plant to the capacity of the CLEC power cables as it claims because there was no usage over these cables to measure, this would have been a critical mistake on Qwest's part, and directly inconsistent with Qwest's engineering guidelines, as well as applicable law. No reasonable Qwest engineer would have assumed that CLECs would use anything close to the full List 2 drain associated with their power cables given that engineering requirements require power *cables* to be sized on a higher List 2 drain, while power *plant* is sized on a lower List 1 drain – a standard that Qwest was well aware of back in 1999-2000.

63. Instead, a reasonable Qwest engineer would have simply observed the load on the power plant at the busy-hour derived from all equipment in the central office (including the equipment served by the CLEC power cables ordered in 1999-2000) and ensured that the power plant of the central office could handle this load. Qwest nevertheless takes another tack in this regard. It boldly contends that (a) McLeodUSA expects to have the List 2 drain capacity of its power cables available, (b) that Qwest makes that power plant capacity available, and as a result (c) McLeodUSA should be financially responsible for that capacity. Qwest again is incorrect and its argument shows a lack of understanding regarding the engineering requirements embodied in its own technical documentation.

64. The power plant capacity engineered within Qwest's central office is a shared resource, with both Qwest and its collocating CLECs sharing the available capacity.[54] Each power user has access to the full capacity of the power plant. Contrary to Qwest's assertion, power plant capacity is a shared resource and cannot be reserved or partitioned to any individual user absent the immediate need for current drawn by the equipment.[55] As such, there is no basis to find that Qwest can guarantee McLeodUSA special priority with respect to power plant capacity during a rare List 2 event. McLeodUSA will have the exact same access to power as will Qwest's equipment. Accordingly, there is no basis for Qwest charging McLeodUSA as if it has power plant capacity allotted for its use in an amount equal to the size of its power feeder cables (*i.e.*, List 2 drain), while allotting to Qwest only the amount necessary to sustain a much lower, and less expensive, List 1 drain.

65. Nor does McLeodUSA have any expectation or desire to have Qwest size its power plant to accommodate the List 2 drain of McLeodUSA's collocated equipment – McLeodUSA, like Qwest, does not want to have to pay for excess power plant capacity that for all intents and purposes will never be used. To do so conflicts with good engineering judgment, including the judgment rendered by Qwest's own internal engineering documents. Even if Qwest does undertake such an engineering practice (in conflict with every engineering document its own engineers have authored on the subject), Qwest is doing so unilaterally, in conflict with the parties' ICA and without any contractual or other legal obligation or authority. At a minimum, the Amendment should

[54] Ex. 1TC (McLeodUSA Morrison Direct) at 6, 16, 20, 27, 30, 54, and 59.

[55] Ex. 5TC (McLeodUSA Morrison Rebuttal) at 35. As discussed *infra*, the Iowa Utilities Board findings on the engineering of the DC power plant were consistent with Mr. Morrison's testimony.

have remedied that situation and does so under McLeodUSA's interpretation. If the Amendment did not provide such a remedy, the Commission should.[56]

2. Qwest Charges to McLeodUSA for DC Power Based on Power Feed Capacity Are Discriminatory.

66. Qwest's technical publications require Qwest to size the shared power plant in its central offices based on the List 1 drain of the equipment in that office, including CLEC collocated equipment.[57] Indeed, Qwest's own engineering witness confirmed that Qwest would extend its practice of engineering its power plant to the List 1 drain of CLECs' collocated equipment if Qwest only knew the List 1 drain of that equipment.[58] Qwest claims erroneously that it does not know this information, yet even if it does not, it is only because Qwest does not want to know or has failed to ask.

67. Qwest has a list of all equipment that McLeodUSA collocates in each Qwest central office.[59] Qwest knows the List 1 drain of the equipment McLeodUSA uses that is the same equipment that Qwest uses.[60] Qwest could also seek the List 1 drain for this equipment from the manufacturer, which Qwest concedes "usually . . . can be

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[56] Qwest's claim to engineer its power plant to CLEC List 2 drain, moreover, is simply an effort to distract from the fact that its technical manuals do not support Qwest's completely unsupported assertion that it should be able to charge McLeodUSA for power plant capacity equal to the higher List 2 drain. Of course, other than the Qwest witness statements that they engineer the DC Power to the List 2 drain for CLECs, there is nothing in the record to support that claim. That's why the extensive evidence detailed by Mr. Morrison showing that Qwest does not actually augment its power plant to accommodate large CLEC orders for distribution cables is so telling. It proves that Qwest's claim of "engineering" to List 2 drain for CLECs is the quintessential smokescreen. Qwest does not do anything to the DC Power plant unless the List 1 drain of the power plant capacity is not capable of meeting the List 1 drain of the all the equipment on the CO, as the Qwest technical manuals clearly spell out. Thus, Qwest's claim that it "engineers" to List 2 drain for CLECs should be seen by the Commission for what it is: at best, an unsupported assertion with significant information showing that the assertion is plain wrong, or at worst, an intentionally misleading claim on Qwest's part to attempt to justify its discriminatory treatment of McLeodUSA in the provisioning of DC power.

[57] Ex. 1TC (McLeodUSA Morrison Direct) at 31-35; *see* Ex. 5TC (McLeodUSA Morrison Rebuttal) at 4-6.

[58] Tr. 242, lines 15-20 (Qwest Ashton).

[59] Ex. 23T (McLeodUSA Starkey Rebuttal) at 27-28; *see* Ex. 27 (Qwest Collocation Application).

[60] Tr. 242-43 (Qwest Ashton).

obtained."[61] On the rare occasions when Qwest cannot otherwise obtain that information, Qwest's technical publications authorize Qwest to estimate the List 1 drain of the equipment, and Qwest would size its power plant to such estimates rather than to List 2 drain.[62] Finally, Qwest could request that McLeodUSA provide the List 1 drain of its equipment in the very collocation application on which Qwest requires McLeodUSA to list each piece of equipment it will collocate (and further asks McLeodUSA to size its power feeder cables). Mr. Ashton never explained why Qwest's collocation application form does not request that information, although he confirmed that as a power plant engineer, he would prefer to size power plant for all equipment in the central office, including CLEC equipment, consistent with Qwest's own technical publications (at least one of which Mr. Ashton himself authored). [63]

68. Qwest's insistence that it must size power plant to the List 2 drain of McLeodUSA's collocated equipment is patently unreasonable under these circumstances.[64] Indeed, Qwest's position on this issue stands in stark contrast to Qwest's contention that given the importance of the issue to McLeodUSA, it should be required to have used "reasonable thought and diligence" to "discover[] the intent Qwest attached to the DC Power Measuring Amendment in the CMP documents and PCAT."[65] The engineering of Qwest's power plant is no less important to Qwest than the amount McLeodUSA pays for DC power. Qwest, therefore, cannot reasonably rely on its self-

[61] Ex. 5TC (McLeodUSA Morrison Rebuttal) at 28.

[62] *Id.* at 10-11.

[63] Tr. 242, lines 15-20 (Qwest Ashton).

[64] As explained *infra*, federal and state law governing access to DC power does not require the Commission to find that Qwest's practice is "unreasonable" to rule in favor of McLeodUSA.

[65] Qwest Initial Brief at 19.

imposed ignorance, especially when such ignorance results in Qwest discriminating against McLeodUSA in violation of the ICA as well as federal and state law. Instead, Qwest can, and should be required to, determine the List 1 drain of McLeodUSA's collocated equipment for purposes of properly sizing Qwest's power plant and charging McLeodUSA accordingly as Qwest does for itself and as its own technical documentation, the DC Power Measuring Amendment, the parties' ICA, and Washington law require.

3. The Amendment Requires Qwest to Size and Bill McLeodUSA for the Same Amount of Power Plant.

69. McLeodUSA interprets the DC Power Measuring Amendment, the parties' ICA, and applicable law to require Qwest to provision and charge for DC power in the same manner as Qwest provisions and effectively "pays" for DC power for its own central office equipment. Qwest contends that McLeodUSA, by advocating that the power plant be sized according to the List 1 drain and charged only for measured usage, is actually interpreting the Amendment to give McLeodUSA better treatment than Qwest provides itself. That is not the case.

70. Qwest engineers its power plant to the highest historical load on the power plant over the last year, plus the List 1 drains of the expected Qwest equipment over the next one to two years, plus the List 2 drain of the collocators.[66] In other words, Qwest primarily uses the *actual measured usage* of the DC power consumed by all of the existing equipment in the central office to size its power plant. While Qwest also includes the List 1 drain of equipment Qwest intends to install in the central office in the future and (allegedly) the List 2 drain of collocating CLECs, Qwest in practice relies on

[66] Tr. at 243 (Qwest Ashton).

actual usage, rather than on any hypothetical List 1 drain, to determine how much power plant is needed to supply DC power to its own (and CLEC collocated) existing equipment.[67] That is exactly what the DC Power Measuring Amendment requires Qwest to do for McLeodUSA. The amount of power plant for which Qwest should be billing McLeodUSA, therefore, should not be significantly different than the amount of power plant capacity that Qwest actually has constructed to provide power to McLeodUSA's collocated equipment.

71. Qwest, however, observes that Section 1.2 of the Amendment provides that "Qwest will perform a maximum of four (4) readings per year on a particular collocation site," and Qwest argues that accordingly the usage for which McLeodUSA pays will necessarily be less than the List 1 drain of its equipment. Except when McLeodUSA installs new equipment, however, Section 1.2 of the Amendment provides only that "Qwest will monitor usage at the power board on a semi-annual basis."[68] The Amendment thus affords Qwest a great deal of discretion to determine when Qwest will measure McLeodUSA's DC power usage. Qwest obviously wanted to ensure that it has the maximum flexibility to monitor McLeodUSA's actual usage at the point in time when it is at its peak (and thus matches the highest historical load for the equipment that Qwest uses to size the power plant). Contrary to Qwest's arguments, therefore, McLeodUSA's advocacy and interpretation of the DC Power Measuring Amendment gives Qwest the

[67] To the extent that Qwest is actually doing what it says it is doing, therefore, Qwest is constructing even more excess power plant capacity for CLECs than McLeodUSA realized. Qwest is sizing the power plant to accommodate the actual power consumption of McLeodUSA's (and other collocating CLECs) *plus* the List 2 drain capacity of the power distribution cables (*id.* at 245-46) – vastly more capacity than McLeodUSA and other collocating CLECs ever would or could use and more than even the exorbitant amount of capacity to which Qwest is applying its power plant rates.

[68] Section 1.2 of the Amendment states that in addition to semi-annual monitoring, "Qwest also agrees to take a reading within thirty (30) Days of a written CLEC request, after CLEC's installation of new equipment."

ability to ensure that the amount of DC power for which McLeodUSA is billed is as close as possible to being the same as the amount of power plant capacity that Qwest has constructed – just as Qwest does for its own central office equipment.

72. McLeodUSA's engineering testimony and exhibits, therefore, provide far more than the "ancillary extrinsic evidence"[69] that Qwest characterizes them to be. The evidence demonstrates that McLeodUSA's interpretation of the DC Power Measuring Amendment is consistent not only with the language of the Amendment but with Qwest's own engineering principles and practices. The evidence also shows that Qwest's interpretation of the Amendment results in discrimination because Qwest provisions DC power to itself far more favorably than it does to McLeodUSA. The Commission, therefore, should rely on this evidence to interpret the Amendment as McLeodUSA has proposed or to find that Qwest is engaged in unlawful discrimination in violation of the parties' ICA and Washington statutes.

C. Qwest's Collocation Cost Study Support's McLeodUSA's Interpretation of the DC Power Measuring Amendment and Discrimination Claim.

73. McLeodUSA's Initial Brief included a detailed discussion of how Qwest's collocation cost study supports McLeodUSA's positions in this proceeding, and substantial additional discussion is not warranted. McLeodUSA has already dealt with most of the points that Qwest attempts to make on this issue in its Initial Brief. As discussed above, the Commission never considered or approved Qwest's *application* of the DC power rates in the collocation cost docket, which is Qwest's primary contention with respect to the collocation cost study. Qwest, however, also raises an argument in its

[69] Qwest Initial Brief at 23.

Initial Brief that it did not raise at hearing or anywhere in its testimony, *i.e.*, that adopting McLeodUSA's position would somehow result in rates set on short-run marginal costs, not total element long-run incremental cost ("TELRIC"). The Commission should not permit Qwest to raise such an issue for the first time in its post-hearing brief, but even considered on the merits, the Commission should reject this argument.

74. Qwest explains its argument as follows: "McLeodUSA wants the Power Plant charge to be assessed so that McLeodUSA only pays for each additional increment of power consumed, but pays nothing for the underlying power plant capacity that is available to meet McLeodUSA's power needs."[70] Once again, Qwest is mistaken. McLeodUSA has argued no such thing, nor does any evidence support Qwest's claim.

75. Mr. Starkey testified that the Qwest cost study, by dividing total power plant investment by the total output of the power plant (*i.e.*, the 1,000 amps), did so in compliance with the TELRIC standard which requires that the "total element" be studied.[71] Mr. Starkey went on to explain that the Qwest cost study identifies the 1,000 amps as "usage" by which Qwest, via the resultant rate, intends to recover its investment (*i.e.*, on a "usage basis"). McLeodUSA's position that it should pay for power plant costs based upon its usage is not a short run marginal request, but is instead, perfectly consistent with TELRIC and the Qwest cost study used to establish the power plant rates in question.

76. The Commission should reject out of hand Qwest's ineffectual attempt to counter the compelling cost study evidence provided by Mr. Starkey that supports the

[70] Qwest Initial Brief at 34.

[71] Ex. 22T (McLeodUSA Starkey Supp. Direct) at 3-4.

McLeodUSA complaint and should find that Qwest's collocation cost study provides one more piece of evidence in support of the relief that McLeodUSA has requested.

D. The Method Used by McLeodUSA to Bill Collocators in its Own Central Offices Is Irrelevant and Does Not Excuse Qwest's Discriminatory Practices.

77. In a further effort to distract the Commission from Qwest's own discriminatory conduct in charging McLeodUSA for DC power plant based on the capacity of McLeodUSA's power cables rather than on usage as Qwest does for itself, Qwest has claimed that McLeodUSA follows the same practices as Qwest when charging for DC power in McLeodUSA switching centers. Qwest's claims are deficient as a matter of both law and fact.

78. McLeodUSA and Qwest are not subject to the same legal requirements for providing collocators access to DC power. Section 251(c)(6) of the Act obligates Qwest to provide collocators nondiscriminatory access to DC power and, as previously explained, Qwest cannot use "reasonable" discrimination as the basis for disparate treatment of collocators. In contrast, McLeodUSA is not subject to Section 251(c). Thus, from the very beginning, the usefulness of comparing how McLeodUSA bills for DC power with how Qwest bills for DC power is of no value to the Commission in this proceeding.

79. As a factual matter, McLeodUSA does not bill collocators for DC power the same way that Qwest bills McLeodUSA. McLeodUSA asks collocators for the amount of power they anticipate needing (and for which they will be billed) and then McLeodUSA calculates the size of the fuses and feeder cables needed to supply that power. McLeodUSA explained, "it is the policy of McLeodUSA to bill collocation

customers for power on a usage basis, which usage is self-reported by the collocation customer. . . . For example, a customer that orders 20A of usage will be billed for 20A of usage but the breaker is typically sized for 30A and the feed size will typically support up to 60A."[72] In other words, McLeodUSA effectively asks the collocator for its anticipated actual DC power usage, which Qwest never asks of its collocators. McLeodUSA then sizes the distribution cables based on the usage identified by the collocator. Such a procedure stands in sharp contrast to Qwest's procedure, under which Qwest never asks the CLEC how much power it will need but simply bills the CLEC for the much greater capacity of the power cables the CLEC orders. Or to use McLeodUSA's example, while McLeodUSA would bill the collocator for 20 amps of power, Qwest would bill the collocator for 60 amps. McLeodUSA's practices thus support its discrimination claim.

E. The Iowa Utilities Board Order Is Not Dispositive of, But Provides Support for, McLeodUSA's Complaint in Washington.

80. In its initial brief, Qwest highlighted the fact the Iowa Utilities Board ("IUB" or "Board") adopted the Qwest interpretation of the DC Power Measuring Amendment.[73] On July 27, 2006, the IUB issued its written order in Docket No. FCU-06-20 ("Iowa Order"). In its decision, the IUB concluded that since the Amendment existed, the Board could not remedy any discrimination. The IUB stated it could not determine whether the discrimination was unreasonable or not without further

[72] Ex. 83 (McLeodUSA Response to Qwest DR 16). Qwest claims that McLeodUSA bills based on the cable size just like Qwest does based on an incorrect interpretation of an answer given by Ms. Spocogee concerning how McLeodUSA completes its collocation form. *See* Qwest Initial Brief at 25, n.48 (citing Tr. at 30-34). On redirect, however, Ms. Spocogee re-clarified that the number provided by the collocator is not the size of the power feed but is really the amount of DC Power the collocator claims will be used. Tr. at 70-71. Her later answer is consistent with the data request completed by the engineers responsible for collocation charges as reflected in the discovery responses. Exs. 83 & 84. While Ms. Spocogee's clarifying testimony and the overwhelming additional evidence confirms that McLeodUSA in fact bills based on the estimated usage by the collocator, not based on List 2 drain as Qwest bills its collocators.

[73] Qwest Initial Brief at 2.

development of the record.[74]

81. McLeodUSA believes the Iowa Order is noteworthy in several key respects. Most importantly, McLeodUSA believes the Iowa Order supports McLeodUSA in its complaint if this Commission properly interprets the DC Power Measurement Amendment in accordance with the nondiscrimination requirements of Section 251(c) of the Act and in harmony with the underlying ICA.

82. It is evident from the Iowa Order that the IUB did not interpret the Amendment within the context of the entire underlying ICA, as is required by Washington case law as previously noted. The Iowa ICA, much like the Washington ICA, contains provisions that make it unmistakably clear that Qwest was contractually obligated to provide McLeodUSA collocation power on a non-discriminatory basis.[75]

83. The Iowa Order also shows that the IUB did not consider Qwest's obligations under Section 251(c)(6) in interpreting the Amendment. Again, Washington case law previously cited directs the Commission to do so. Attached is the Application for Rehearing filed by McLeodUSA on August 15, 2006, that details the legal errors in the Iowa Order.

84. Even though the IUB interpreted the 2004 Amendment as advocated by Qwest, the IUB still raised questions about the legality of Qwest's actions. For example, the IUB concluded that Qwest was in fact treating McLeodUSA differently than Qwest

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[74] Iowa Order at 14.

[75] Attachment A at 3-5. The Iowa agreement pre-dates the Washington agreement and contains more explicit provisions governing collocation power. 2.2.24 Power as referenced in this document refers to any electrical power source supplied by the ILEC for the CLEC equipment. It includes all superstructure, infrastructure, and overhead facilities, including, but not limited to cable, cable racks and bus bars. The ILEC will supply power to support the CLEC equipment at equipment specific DC and AC voltages. ***At a minimum, the ILEC shall provide power to the CLEC at parity with that provided by the ILEC to itself or to any third party***. While the Iowa ICA is more explicit, the Washington agreement has an equivalent provision requiring non-discrimination in the provision of collocation to McLeodUSA.

treats itself.[76] The Washington record supports the same conclusion.[77] Further, the IUB concluded that while Qwest assigns the cost of the DC power plant to McLeodUSA using List 2 drain, Qwest assigns power plant to itself based on List 1 drain.[78] The Washington record supports the same conclusion. The IUB also rejected Qwest's claims that it allocates a portion of the DC power plant to McLeodUSA and CLECs in general. All in all, the IUB agreed with McLeodUSA that Qwest actually engineers its DC power plant as explained by Mr. Morrison in Washington.

85. Unfortunately, and inexplicably, despite these findings the IUB interpreted the DC Power Measuring Amendment as advocated by Qwest. In doing so, the IUB failed to apply the correct legal standard in interpreting the Amendment. Most importantly, the Iowa Order thoroughly ignored the requirement that Qwest provide McLeodUSA nondiscriminatory access to DC Power in accordance with Section 251(c) of the Act and the equivalent Iowa law. That the IUB applied the wrong legal standard is further demonstrated by the IUB's statement that the discrimination might be shown to "reasonable" upon a further developed record.[79] "Reasonable" discrimination is not permitted under Section 251(c) of the Act, or under the equivalent Iowa law.[80] Again, this shows the IUB simply ignored the controlling law governing interconnection agreements and access to network elements in ruling for Qwest.

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[76] *Id.*

[77] Tr. 242, lines 10-14 (Qwest Ashton).

[78] Iowa Order at 14.

[79] Iowa Order at 14.

[80] Iowa Code Section 476.100(2) (2005) prohibits discrimination by an ILEC "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." (Emphasis added).

86. The Act requires competitive parity between ILECs and CLECs with respect to occupation and use of ILEC central offices. The FCC has established that the prohibition against discrimination that appears throughout Section 251 of the Act is *unqualified and absolute*; unlike Section 202 of the Act, Section 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, 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.[81]

87. 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).[82]

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

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[81] *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*").

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

> 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.*[83]

88. 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. Indeed, that is exactly why the underlying ICA requires Qwest to provide McLeodUSA access to power on nondiscriminatory terms, *i.e.* on the same terms that Qwest provides power to itself. As previously noted, Washington state law imposes the same obligation on Qwest.[84] Unfortunately, the IUB accepted Qwest's invitation to interpret the Amendment with complete disregard of Qwest's obligation to provide McLeodUSA nondiscriminatory access to collocation power. The IUB held that Qwest discriminated against McLeodUSA, but decided to do nothing about it at this time – while strongly suggesting it would in a separate future case. McLeodUSA urges this Commission not to make the same mistake. Such an error violates the clear requirements of the Act, as well as the language of the Amendment and the ICA.

CONCLUSION

89. The only reasonable interpretation of the language in the DC Power Measuring Amendment, especially when interpreted in the context of the nondiscrimination obligations already contained in the ICA and imposed statutorily by Section 251(c)(6), supports McLeodUSA's position that the Amendment requires Qwest

[83] *Id.* ¶ 315.

[84] RCW 80.36.186.

to charge for DC power, including power plant, based on the amount that McLeodUSA actually uses. Only McLeodUSA's interpretation gives meaning and effect to all of the language, while Qwest would have the Commission simply disregard provisions that are inconsistent with Qwest's interpretation. The Commission thus need not consider evidence of the parties' intent when agreeing to this language, but that evidence nevertheless is not inconsistent with the language of the Amendment. Qwest's engineering principles and practices, as well as Qwest's collocation cost study, also support McLeodUSA's position.

90. The Commission, therefore, should adopt McLeodUSA's interpretation of the DC Power Measuring Amendment. If the Commission does not adopt that interpretation for some reason, the Commission should nevertheless find that Qwest's provisioning of DC power plant capacity to McLeodUSA is discriminatory in violation of Section 251(c)(6) and the parties' ICA. Under either scenario, the Commission should grant the relief that McLeodUSA has requested in its Complaint.

Dated this 25th day of August, 2006.

DAVIS WRIGHT TREMAINE LLP

By: _____
Gregory J. Kopta

McLEODUSA TELECOMMUNICATIONS SERVICES, INC.

By: WILLIAM A. HAAS
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Date: August 15, 2006

Company Name: McLeodUSA Telecommunications Services, Inc.

Subject Matter: Application for Rehearing

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ATTACHMENT A

STATE OF IOWA
DEPARTMENT OF COMMERCE
IOWA UTILITIES BOARD

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.	)	DOCKET NO. FCU-06-20
v.	)	APPLICATION FOR REHEARING
QWEST COMMUNICATIONS, INC.	)	

COMES NOW McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), and pursuant to Iowa Code § 476.12 files this Application for Rehearing in Docket FCU-06-20. In support of its Application, McLeodUSA states:

BACKGROUND

McLeodUSA filed a complaint on February 8, 2006, against Qwest Corporation ("Qwest") alleging violations of Iowa and federal law in applying an amendment to the Interconnection Agreement executed by the parties in August 2004. McLeodUSA also filed a separate count alleging that Qwest had improperly high collocation power rates. On Februrary 20, 2006, Qwest filed its Answer and a counterclaim alleging that McLeodUSA had improperly failed to pay amounts withheld from disputed invoices.

On March 6, 2006, the Iowa Utilities Board ("IUB") issued an order dismissing without prejudice Count II, dealing with the collocation rate level, and setting a procedural schedule. A hearing was held on May 10 and 11, 2006. Briefs were filed by McLeodUSA, Qwest, and the Office of Consumer Advocate on June 2, 2006. Oral arguments were held on June 15, 2006, in lieu of reply briefs.

On July 27, 2006, the IUB issued its written Final Order. In its Final Order, the IUB discussed the facts but did not reach any particular holdings on the law. The IUB determined that the 2004 Amendment was ambiguous, and based solely on extrinsic evidence, concluded that Qwest's interpretation of the 2004 Amendment was proper. The IUB further determined that although it appears that Qwest is treating McLeodUSA differently than it treats itself, the IUB did not believe the record on this issue had been fully developed. The IUB further stated that it was not *clear* that it had the authority to grant McLeodUSA immediate relief. McLeodUSA respectfully disagrees, and requests the Board reconsider its decision.

With respect to applications for reconsideration, Board Rule 7.27(2) provides

> [a]pplications for rehearing or reconsideration shall specify the findings of fact and conclusions of law claimed to be erroneous, with a brief statement of the alleged grounds of error.

The Final Order did not separately specify any factual findings or legal conclusions. McLeodUSA makes the following specification of the issues and aspects of the Board's decision that McLeodUSA believes are in error and should be reconsidered by the Board.

A. <u>The Board Erred in Its Interpretation of the 2004 DC Power Measuring Amendment as the Text of the Document, Read With the Agreement it is Amending, Supports McLeodUSA's Position.</u>

The Board did not apply proper standards of contract interpretation when interpreting the 2004 Amendment. The Board erred by relying on extrinsic evidence to rule in Qwest's favor when in fact the contract itself clearly supports the McLeodUSA interpretation of the 2004 Amendment.

Before determining that a contract provision is ambiguous, and consequently, before it is permissible for the Board to rely on extrinsic evidence to ascertain the parties' intent in

interpreting the 2004 Amendment, the Board must first review the four corners of the agreement to determine the parties' intentions. The parties' intent is controlling.[1]

It is black letter contract law that related provisions in a contract must be harmonized.[2] The DC Power Measuring Amendment amends the interconnection agreement ("ICA") between Qwest and McLeodUSA. As an amendment to the underlying ICA, the Board must interpret the 2004 Amendment within the context of the entire ICA and harmonize the 2004 Amendment with its related provisions.[3] Iowa case law makes it clear that an interpretation that gives a reasonable, lawful, and effective meaning to all terms is preferred to interpretation that leaves a part unreasonable, unlawful, or of no effect.[4]

Part IV of the ICA[5] defines Collocation as an Ancillary Function. Collocation expressly includes "the ILEC providing resources necessary for the operation and economical use of collocated equipment." ICA Section 39.1. It is indisputable that power is one such resource that is necessary for McLeodUSA to use its collocated equipment.

Section 40 of the ICA is entitled "Standards for Ancillary Functions." This section of the ICA unequivocally states that Qwest must provide McLeodUSA access to ancillary functions, *i.e.* collocation power in this instance, on non-discriminatory terms. "Each Ancillary Function provided by ILEC to CLEC shall be at least equal in the quality of design, performance, features, functions and other characteristics, including, but not limited to levels and types of redundant equipment and facilities for diversity and security, that the ILEC provides in the ILEC network

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[1] *Iowa National Mutual Insurance Company, v. Fidelity and Casualty Company of New* York, 256 N.W.2d 723, 726 (Iowa 1964). It is improper to consider extrinsic evidence to change the meaning of the actual agreement in absence of an ambiguity. *RPC Liquidation v. Iowa Department of Transportation*, 717 N.W.2d 317 (Iowa 2006).
[2] *Greene v. Day,* 34 Iowa 328 (1872).
[3] *Id.*
[4] *FashionFabrics of Iowa, Inc. v. Retail Investors Corp,* 266 N.W.2d 22, 26 (Iowa 1978).
[5] The Board took official notice of the entire ICA between Qwest and McLeodUSA. The relevant sections of Part IV of the ICA discussed herein are attached as Reconsideration Exhibit A for ease of reference. The relevant section

to itself and to any other party." ICA Section 40.1 (emphasis added).[6]

Additionally, Attachment 4 to the ICA contains service descriptions of the Ancillary Functions and imposes the identical non-discrimination obligation on Qwest as that imposed in Section 40.1, Part IV. This section specifically imposes the non-discrimination obligation with respect to Qwest's provision of power to McLeodUSA:

> 2.2.24 Power as referenced in this document refers to any electrical power source supplied by the ILEC for the CLEC equipment. It includes all superstructure, infrastructure, and overhead facilities, including, but not limited to cable, cable racks and bus bars. The ILEC will supply power to support the CLEC equipment at equipment specific DC and AC voltages. ***At a minimum, the ILEC shall provide power to the CLEC at parity with that provided by the ILEC to itself or to any third party*****.....**(emphasis added).[7]

Barring a clear statement to the contrary in the 2004 Amendment, the 2004 Amendment must be interpreted in a manor that harmonizes the 2004 Amendment with Part IV, Section 40.1 and Attachment 4, Section 2.2.24 governing Qwest's obligation to provide McLeodUSA access to power to support its collocation equipment. In other words, the 2004 Amendment must be interpreted to ensure that Qwest is providing power to support the McLeodUSA collocated equipment on terms that is equal to how Qwest provides such power to itself. Interpreting the 2004 Amendment as Qwest advocated results in inconsistent provisions within the ICA governing access to this Ancillary Function of collocation power.

The Board's Final Order provides no indication, and Qwest has never argued, that the 2004 Amendment contains any language that either expressly or impliedly undoes or in any way alters the Standards of Ancillary Functions set forth in Section 40.1, or the clear non-

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to Attachment 4 of the ICA is attached as Reconsideration Exhibit B.

[6] Reconsideration Exhibit A.

[7] Reconsideration Exhibit B. Both sections of the ICA make it clear that Qwest cannot validly claim that its discrimination is lawful since it is equally discriminating amongst CLECs.

discrimination obligation with respect to power in Attachment 4, Section 2.2.24, or otherwise exempts collocation power as an Ancillary Function subject to the non-discrimination requirement. That is not surprising because the 2004 Amendment does not contain any provision indicating that it is the intent of the parties to amend or alter Part IV, Section 40.1 or Attachment 4, Section 2.2.24 of the ICA. Nor has Qwest ever identified another provision within the ICA or the 2004 Amendment that would support a conclusion that the parties intended to create an exception to either of these other ICA provisions governing Qwest's obligations to provide McLeodUSA collocation power on a non-discriminatory basis.

By failing to review the four corners of the ICA in interpreting the 2004 Amendment that requires Qwest to provide McLeodUSA non-discriminatory access to power, the Board erred as a matter of law in interpreting the 2004 Amendment. Unless the ruling is changed upon reconsideration, the Board is sanctioning Qwest to provide McLeodUSA access to power on terms less favorable than Qwest provides to itself under the 2004 Amendment. Such a result is wholly inconsistent with the clear intent of the parties as evidenced by the language in Part IV, Section 40.1, and Attachment 4, Section 2.2.24 of the ICA. The Board's interpretation is, therefore, erroneous as a matter of law and should be reconsidered.

The Board also erred in its interpretation of the 2004 Amendment by failing to recognize that ICAs are not traditional contracts. As highlighted in the concurring opinion of Boardmember Stamp, the Tenth Circuit Court of Appeals recognized in a case involving Qwest that an ICA is an instrument arising in the context of ongoing state and federal regulation that have provisions to facilitate competition and ensure that carriers are not treated in a discriminatory manner.[8] Iowa case law similarly requires the Board to interpret the 2004

[8] *E.Spire Communications, Inc. v. New Mexico Public Regulation Commission*, 392 F.3d 1204, 1207 (10th Cir.

Amendment under the presumption that it incorporates applicable statutes into the contracts.[9] That means that in interpreting the 2004 Amendment, the Board should have presumed the intent of the parties entering into an ICA and any amendment is to properly implement the Act and comparable state law requirements that give rise to the ICA. Thus, the 2004 Amendment must be interpreted consistent with state and federal law requirement of nondiscrimination firmly in mind. Such interpretation is justified and is not an impermissible modification of an interconnection agreement.[10]

The Board also erred by interpreting the 2004 Amendment without giving due consideration to Qwest's Section 251(c) obligations that give rise to McLeodUSA's access to collocation power. The Board's Final Order is devoid of any discussion of Section 251(c). The parties' intention in entering into the 2004 Amendment must be presumed to be consistent with Qwest's obligation under Section 251(c) of the Act.[11] There is certainly no evidence that either party intended to eliminate Qwest's legal obligations under Section 251(c) and the existing ICA by signing the 2004 Amendment.[12]

To the contrary, given the existing ICA between the parties and the legal requirement for non-discriminatory access to power as required by Section 251(c), McLeodUSA had every right to expect that Qwest had to provision power under the 2004 Amendment to McLeodUSA on

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2004) ("'[A]n interconnection agreement is part and parcel of the federal regulatory scheme and bears no resemblance to an ordinary, run-of-the-mill private contract.'") (citations omitted).

[9] *Miller v. Marshall County*, 641 N.W.2d 742, 751 (Iowa 2002).

[10] *See E Spire*, 392 F.3d at 1208.

[11] *Miller*, 641 N.W.2d at 751.

[12] Moreover, while McLeodUSA acknowledges that the ICA includes a provision that it was jointly negotiated and therefore ambiguity should not be resolved against either party, the evidence was clear on the record that with respect to the DC Power Measuring Amendment, Qwest drafted and presented that document. At the very least, it should not get the benefit of any ambiguity or be permitted to take shelter in drafting problems that are of its own making.

terms equal to how Qwest provides power to itself. Further, McLeodUSA had every right to expect that the 2004 Amendment would result in a lawful amendment to the ICA that fulfilled the existing non-discrimination requirements of the ICA since there was no expressed intent in the 2004 Amendment to the contrary. Indeed, there is not one scintilla of evidence that McLeodUSA intended to agree to discriminatory access to power by signing the 2004 Amendment.[13]

As required by law governing interconnection and access to elements of the ILEC's local network, the ICA embodies Qwest's obligation under section 251(c)(6) of the Act to provide McLeodUSA access to the necessary element of DC power as part of Qwest's obligation to provide collocation "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." The DC Power Measuring Amendment, as interpreted by the Board, is at odds with Part IV, Section 40.1 and Attachment 4, Section 2.2.24 of the ICA and Qwest's obligations under federal and Iowa law. In contrast, the McLeodUSA interpretation harmonizes all ICA provisions governing access to DC Power, maintains the consistency of the entire ICA, and fulfills the nondiscrimination requirements of federal and state law. When 2004 Amendment is interpreted in accordance with the rules of contract interpretation, there is no basis to look beyond the terms of the 2004 Amendment and the related ICA provisions, Part IV, Section 40.1 and Attachment 4, Section 2.2.24 of the underlying ICA. The Board should reconsider its interpretation of the 2004 Amendment, and upon reconsideration, adopt the McLeodUSA

[13] In addition, it is noteworthy that even if the Board were permitted to consider extrinsic evidence proferred by Qwest in interpreting the 2004 Amendment, there is no evidence that either party, including Qwest, was intending to void Qwest's legal obligation to provide CLECs non-discriminatory access to collocation power by executing the 2004 Amendment. If there is no evidence that either party expressed an intent to void this clear legal obligation under Section 251(c), then it would be improper to find that such an intent was implicit within the language drafted by Qwest. Along similar lines, once it reached the issue of extrinsic evidence, the Board failed to properly weigh the uncontradicted testimony that McLeodUSA's intent was to get power plant charges in Iowa treated more like they are treated in Illinois: on a measured basis. The Board's interpretation of the intent of the parties requires

interpretation.

B. The Record is Adequate to Find Unlawful Discrimination, and Qwest is Not Entitled to a Chance to Change its Discredited Explanation for its Discriminatory Practices.

In its Final Order, the Board made the following findings with respect to DC Power Plant and the access Qwest provides to McLeodUSA:

- DC power plant is designed to provide sufficient power to accommodate the peak requirements of all DC-powered telecommunications equipment in a central office, including Qwest and CLEC equipment.
- Peak usage is measured by the busy day/busy hour for the central office
- Qwest's engineering standards for DC power plant equipment state the criteria to be used when sizing the equipment to serve a maximum power draw that occurs on the busy day/busy hour.
- Qwest sizes its power plant to meet List 1 Drain or an approximation of it by sizing the power plant at 40-70 percent of List 2 Drain.
- List 2 Drain is used to size power cables and other components that make up the feeder distribution system.
- Qwest has not expended capital on power plant capacity augmentation that would equate to McLeodUSA "ordered power."[14]
- Power plant facilities are not dedicated to individual companies but are common to all those within the central office, including Qwest.
- Qwest charges CLECs based on the basis of "power ordered," or List 2 Drain, while Qwest assigns the same costs to itself at List 1 drain.

Despite these findings, the Board stated that, with regard to discrimination, "the record has not been fully developed on this issue." *Final Order* at 14. The Board went on to state that "[a]lthough ***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. . ." *Id* (emphasis added). The Board concludes that "[t]his subject should be revisited. . . in an appropriate docket". *Id.* at 15. McLeodUSA respectfully asserts that the Board's conclusion is in error.

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believing the unlikely scenario that McLeodUSA intended to perpetuate its own subsidy of Qwest.

[14] McLeodUSA has consistently maintained throughout this proceeding that its order for distribution cables amperage cannot and should not be construed as an order for DC power capacity. The collocation form evidences no indication that an order for such cables is an order for "power." Without any explanation or record citation, the Board adopts this Qwest misnomer in its analyses on discrimination. There is no basis to find that an order for

The record is certainly developed as to the fact that discrimination exists. Qwest admits as much in numerous places in the record. The Board finds this to be the case in the Final Order. Yet, the Final Order inexplicably indicates that Qwest should have an additional opportunity to present reasons in a future proceeding for discrimination that the Board might find acceptable. The Board should reconsider its ruling with respect to its analyses of discriminatory access to power provided by Qwest to McLeodUSA.

First, the issue of discrimination was clearly presented in the Complaint. Qwest had every opportunity and an obligation to present its full defense to the evidence of discrimination entered into the record by McLeodUSA. And indeed, Qwest did so: Qwest witness Hubbard testified extensively that the reason CLECs had to be billed for power plant based on the size of their power cable order is that each time "McLeod submits orders asking for large amounts of DC power. . . even 175 amps, this will definitely trigger a power plant capacity growth job." *See* Tr. 579:12-14. It just so happens that Qwest's chosen defense against the discrimination claim completely fell apart under cross-examination. However, that does not mean the Board lacks an adequate record; the Board has an adequate record upon which it should be concluded that Qwest's discrimination is indefensible. There is no precedent in the law for telling a complainant to "come back later and let the defendant produce evidence supporting a different theory." Such a result is clearly prejudicial to McLeodUSA and there is no basis in law for the Board's decision to give Qwest a second bite at the apple in proving the reasonableness of its discrimination. Certainly, the Board cites no evidence nor provides any legal justification for granting Qwest an opportunity to come up with a better theory and supporting evidence in the next case; nor did Qwest provide support for such a theory in its post-hearing briefing.

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distribution cables is an order for "power".

More importantly, however, is that under the controlling law and the ICA between the parties, it is wholly irrelevant whether Qwest can subsequently produce a reasonable excuse for its discriminatory treatment of McLeodUSA that it was unable to explain in the current proceeding. Section 251(c) of the federal Telecommunications Act does not distinguish between "reasonable" and "unreasonable" discrimination – the prohibition on discrimination is ***absolute.*** As explained in detail in the McLeodUSA Post hearing brief, the FCC has stated

> 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, 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.[15]

Furthermore, as previously detailed, the Qwest-McLeodUSA ICA contains the same unqualified non-discrimination requirement with regard to collocation power.[16] So even if Qwest were somehow entitled to proffer a different defense in a future case, and even were Qwest somehow able to provide evidence of a reasonable basis for discrimination in that future proceeding, such evidence could not change the lawful outcome. The law and existing ICA are absolutely clear: Qwest must provide power to McLeodUSA on terms and conditions that are on equal terms to how Qwest provides itself access to power.

Upon reconsideration, the Board should, consistent with Section 251(c) and the ICA, find that Qwest is unlawfully discriminating against McLeodUSA in the providing access to power.

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[15] 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). *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 para. 217 (1996)("*Local Competition Order*")

C. The Board Has Ample Authority to Address Qwest's Discrimination in this Proceeding.

As previously discussed, the Board erred in interpreting the 2004 Amendment by failing to interpret it within the context of the four corners of the integrated ICA and in accordance with federal and state law. Upon reconsideration if the Board properly interprets the 2004 Amendment, then the discrimination issue discussed below is moot. The discrimination is eliminated by the proper implementation of the 2004 Amendment. However, upon reconsideration if the Board continues to interpret the 2004 Amendment as an agreement between Qwest and McLeodUSA for Qwest to bill McLeodUSA for the power plant element based on the size of the distribution cables originally ordered by McLeodUSA, then the Board must still address the discrimination issue set forth below on reconsideration to remedy the discrimination on a going forward basis.

In the Final Order, although the Board conceded that it appears that Qwest is treating McLeodUSA different than Qwest treats itself, the Board– the sole regulator of telecommunications services in Iowa – finds "it is not clear that the Board can remedy the situation." *Id.* It is an untenable result that the Board can find discrimination by the ILEC– discrimination which diminishes the ability of competitors to compete, discrimination that results in an improper subsidy to Qwest, discrimination that ultimately raises rates for consumers in Iowa – and then state an unwillingness to promptly require the ILEC to immediately cease the unlawful discrimination. If the Board cannot fulfill this function, who can? Boardmember Stamp in concurrence states that he has "trouble accepting that if an agreement is being applied in a discriminatory manner that a CLEC has no remedy for relief other than waiting for the next

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(emphasis added).

[16] Part IV: Ancillary Functions, Section 40.1 discussed *supra.*

round of negotiations" of its interconnection agreement. *See Final Order* at 19-20. Boardmember Stamp is correct: the Board should not accept such a result. The Board should reconsider its erroneous conclusion that it lacks legal authority to remedy the unlawfully discriminatory treatment.

Pacific Bell v. Pac-West Telecom. Inc., 325 F.3d 1114 (9th Cir. 2003) ("*Pacific Bell*") does not stand for the principle that an agency cannot remedy discrimination it has already found to exist. Contrary to what Qwest claimed, that decision does not prevent this Board from correcting the unlawful discriminatory treatment to which the evidentiary record shows McLeodUSA has been subjected under Qwest's interpretation of the DC Power Measuring Amendment.

The court in *Pacific Bell* reviewed California Public Utilities Commission rulings on the applicability of reciprocal compensation provisions in all ICAs between ILECs and CLECs in California to calls bound for Internet Service Providers ("ISPs"). "[T]hese orders were adopted as part of a generic rule-making proceeding that would affect all existing 'applicable interconnection agreements' in California." *Id.* at 1125. The Ninth Circuit invalidated the orders, concluding that the California Commission "lacks authority under the Act to promulgate general 'generic' regulations over ISP traffic" in light of the FCC's determination that such traffic is jurisdictionally interstate "thereby placing it under the purview of federal regulators rather than state public utility commissions."[17] The court also concluded:

> The CPUC's only authority over interstate traffic is its authority under 47 U.S.C. § 252 to approve new arbitrated interconnection agreements and to interpret existing ones according to their own terms. By promulgating a generic order binding on existing interconnection agreements without reference to a specific agreement

[17] *Id.*

> or agreements, the CPUC acted contrary to the Act's requirement that interconnection agreements are binding on the parties, or, at the very least, it acted arbitrarily and capriciously in purporting to interpret "standard" interconnection agreements.[18]

The Ninth Circuit's decision in *Pacific Bell* is a far cry from the case at hand in this proceeding.

The Ninth Circuit based its ruling on the fact that the FCC declared that ISP traffic was interstate in nature, and therefore, outside of the California PUC's authority. In contrast, there is no doubt that the Board has jurisdiction over disputes involving the ICA between Qwest and McLeodUSA. In fact, the ICA expressly provides that a dispute under the ICA can be resolved by a complaint to this Board.[19] That is entirely different than the generic rules governing all ICAs that were before the court in *Pacific Bell*.[20] Indeed, the Ninth Circuit overturned the California Commission orders, in part, *because* "it did not consider a specific interconnection agreement or even a specific reciprocal compensation provision."[21] Both the Amendment and the ICA between McLeodUSA and Qwest are before the Board in this docket, and the Board has full authority to interpret those documents.[22]

Therefore, the Board's refusal to redress the unlawful discrimination due to a perceived lack of authority to do so must be reconsidered. The Board does, in fact, have proper jurisdiction and authority to remedy the discrimination found to exist in this proceeding, and in fact the

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[18] *Id.* at 1125-26.

[19] ICA Attachment 1, Section 2.1. "Either party to this Agreement may invoke the informal and formal complaint procedures of the Iowa Utilities Board for <u>any</u> dispute arising out of this Agreement. (emphasis added).

[20] Nor can Qwest legitimately claim that the *Pacific Bell* decision precludes McLeodUSA's discrimination claim. No such issue was before the Ninth Circuit in that case, and nothing in the parties' ICA condones, much less authorizes, discrimination in the provision of DC power. To the contrary as discussed further below, the ICA expressly requires such provisioning to be nondiscriminatory.

[21] *Id.* at 1128.

[22] Again, it is important to note that the *Pacific Bell* decision has no relevance with respect to the proper interpretation of the 2004 Amendment. That ruling has absolutely no bearing on the interpretation of an ICA amendment. And for the reasons stated in this section, the *Pacific Bell* ruling also does not prohibit this Board from resolving a dispute under the ICA. The ICA expressly provides the Board the authority to do so.

Agreement requires the Board to do so.

D. The Record Does not Support a Finding that Exhibit A "As Ordered" Should be Based on the Order for Distribution Cables; Reaching this Necessary Issue Allows the Board Another Avenue to Remedy the Discrimination.

Assuming the Board was correct that Qwest's interpretation of the DC Power Measuring Amendment is proper (something McLeodUSA disputes), that means that power plant is to be billed on an "as ordered" rather than an "as measured" basis. ***But the Board failed to address a necessary issue in this case: what does "as ordered" mean?*** McLeodUSA and the Consumer Advocate demonstrated – and Qwest ultimately conceded – that Qwest receives no such thing as an order for an amount of power plant. Because the term "as ordered" is not defined anywhere, because the Agreement is silent on that issue, the Board still must determine how Qwest can apply the term "as ordered." Reaching this issue is yet another way the Board can, and should, immediately remedy the discrimination it has found exists in this case even if the Board does not change its interpretation of the 2004 Amendment on reconsideration.

There are two reasonable answers supported by the record. One, the actual real-time draw of power from the power plant can be viewed as the "order," which would result in McLeodUSA being charged for actual consumption. It is likely that this most closely approximates what Qwest actually imputes to itself. Alternatively, because Qwest concedes that it builds power plant to List 1 drain, the CLEC "order" could reasonably defined consistent with that as the sum of the CLEC equipment's List 1 drain. Either result resolves the ambiguity in the use of the term "as ordered," and either minimizes the discrimination presently occurring. What is clear is that Qwest's current practice of using initial power cable orders as a proxy for the "as ordered" power plant capacity requirements is improper.

The record confirms that McLeodUSA orders power distribution cables when it

collocates equipment in Qwest's central offices. Indeed, that is the only information regarding McLeodUSA's power needs that Qwest requires a collocating CLEC to submit on the collocation application form written by Qwest. Qwest does not give CLECs the option to order "power plant capacity" via its collocation application. Yet, throughout this proceeding, Qwest repeatedly (and without any basis in fact) refers to McLeodUSA's request for power feeder cable amperage as McLeodUSA's "power order." Such references are inaccurate, misleading and willfully inconsistent with the record of this case.

Qwest's assumption that the McLeodUSA order for distribution cables is an order for power capacity is without basis in fact. There is nothing in the ICA or relevant documentation to indicate that Qwest is making such a misguided assumption with respect to the request for distribution cables. The Qwest collocation application form certainly does not give a CLEC any clue Qwest would construe the order for distribution cables as an order for power capacity.

In point of fact, such an assumption is in direct violation of Qwest's internal technical documentation and the manner by which it constructs power plant. The technical documents would not lead anyone to believe that an order for distribution cables would be assumed to be an order for power capacity. It is undisputed in this record that Qwest's technical publications state that central office power plant are to be designed to "List 1 drain," and that the List 2 drain of the power cable capacity is not used to size the power plant capacity. There simply is no evidentiary basis to find that the "as ordered" means List 2 drain.

Upon reconsideration, if the Board does not change its interpretation of the 2004 Amendment, the Board should construe "as ordered" to be the actual amount of the power used by McLeodUSA since that is what McLeodUSA is actually "ordering" from Qwest as it is being

used.

CONCLUSION

In summary, the Board should reconsider its interpretation of the DC Power Measuring Amendment in light of the totality of the Interconnection Agreement between the parties, and the requirements of Iowa law on contracts, as well as the state and federal telecommunications laws requiring non-discriminatory treatment of competitors. Should the Board maintain its interpretation of the Agreement, the Board should reconsider the separate issue of unlawful discrimination. The record is strong that discrimination exists; the Board erred in asking whether such discrimination is "reasonable." In any event, the Board can resolve this issue by looking at the application of the term "as ordered," and ordering that presently undefined term to be applied in a competitively neutral manner. The Board should reconsider its decision, and should grant McLeodUSA the appropriate relief requested in its Complaint.

Respectfully submitted this 15th day of August, 2006.

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ATTORNEYS FOR MCLEODUSA

37.14.11 In the event of a dispute under this Section 37.14, the Parties agree to seek expedited Board resolution of the dispute, with a request to the Board to be completed within twenty (20) days of the ILEC's response that declined the CLEC's BFR, and in no event more than thirty (30) days after the the filing of the CLEC's petition.

PART IV: ANCILLARY FUNCTIONS

38. Introduction

38.1 This Part IV sets forth the Ancillary Functions that the ILEC agrees to offer to the CLEC so that the CLEC may obtain and use unbundled Network Elements or the ILEC services to provide services to its customers.

39. The ILEC Provision of Ancillary Functions

The ILEC will offer Ancillary Functions to the CLEC on rates, terms and conditions that are just, reasonable, and non-discriminatory and in accordance with the terms and conditions of this Agreement. The ILEC will permit the CLEC to interconnect the CLEC's equipment and facilities or equipment and facilities provided by the CLEC or by third parties at any point designated by the CLEC that is technically feasible.

The CLEC may use any Ancillary Function to provide any feature, function, or service option that such Ancillary Function is capable of providing.

Subsections 39.1 through 39.3 below list the Ancillary Functions that the CLEC and the ILEC have identified as of the Effective Date of this Agreement. The CLEC and the ILEC agree that the Ancillary Functions identified in this Part IV are not exclusive. Either party may identify additional or revised Ancillary Functions as necessary to improve services to customers, to improve network or service efficiencies or to accommodate changing technologies, customer demand, or regulatory requirements. Upon the identification of a new or revised Ancillary Function, the party so identifying the new or revised Ancillary Function shall notify the other party of the existence of and the technical characteristics of the new or revised Ancillary Function. If the parties do not agree on the existence of and the technical characteristics of the newly identified or revised Ancillary Function, any issues that have not been resolved by the parties within thirty days of notification shall be submitted to the Dispute Resolution Procedures as set forth in Attachment 1. Within thirty (30) days of the CLEC and the ILEC agreeing on the technical characteristics of the new or revised Ancillary

Function, the parties will attempt to agree on the rates, terms and conditions that would apply to such Ancillary Function and the effects, if any, on the price, performance or other terms and conditions of existing Network Elements or Ancillary Functions. If the parties do not agree on rates, terms and conditions and other matters set forth herein, any issues that have not been resolved by the parties within thirty days shall be submitted to the Dispute Resolution Procedures as set forth in this Agreement. Additionally, if the ILEC provides any Ancillary Function that is not identified in this Agreement to itself, to its own customers, to a ILEC affiliate or to any other entity, the ILEC will provide the same Ancillary Function to the CLEC at rates, terms and conditions no less favorable to the CLEC than those provided by the ILEC to itself or to any other party. The Ancillary Functions are described below. Additional descriptions, and requirements for each Ancillary Function are set forth in Attachment 4.

39.1 Collocation

"Collocation" is the right of the CLEC to obtain dedicated space in the ILEC Local Serving Office (LSO) or at other ILEC locations and to place equipment in such spaces to interconnect with the ILEC network. Collocation also includes the ILEC providing resources necessary for the operation and economical use of collocated equipment.

39.2 Right of Way (ROW), Conduits and Pole Attachments

"Right of Way (ROW)" is the right to use the land or other property of another party to place poles, conduits, cables, other structures and equipment, or to provide passage to access such structures and equipment. A ROW may run under, on, or above public or private property (including air space above public or private property) and may include the right to use discrete space in buildings, building complexes or other locations.

"Conduit" is a tube or protected trough that may be used to house communication or electrical cables. Conduit may be underground or above ground (for example, inside buildings) and may contain one or more inner ducts.

"Pole attachment" is the connection of a facility to a utility pole. Some examples of facilities are mechanical hardware, grounding and transmission cable, and equipment boxes.

39.3 Unused Transmission Media

"Unused Transmission Media" are physical inter-office transmission media (e.g., optical fiber, copper twisted pairs, coaxial cable) which have no lightwave or electronic transmission equipment terminated to such media

to operationalize their transmission capabilities. This media may exist in aerial or underground structure or within a building.

Dark Fiber, one type of unused transmission media, is unused strands of optical fiber. Dark Fiber also includes strands of optical fiber existing in aerial or underground structure which have lightwave repeater (regenerator or optical amplifier) equipment interspliced to it at appropriate distances, but which has no line terminating elements terminated to such strands to operationalize its transmission capabilities. Alternately, Dark Fiber means unused wavelengths within a fiber strand for purposes of coarse or dense wavelength division multiplexed (WDM) applications. Typical single wavelength transmission involves propagation of optical signals at single wavelengths (1.3 or 1.55 micron wavelengths). In WDM applications, a WDM device is used to combine optical signals at different wavelengths on to a single fiber strand. The combined signal is then transported over the fiber strand. For coarse WDM applications, one signal each at 1.3 micron and 1.55 micron wavelength are combined. For dense WDM applications, many signals in the vicinity of 1.3 micron wavelength or 1.55 micron wavelength are combined. Spare wavelengths on a fiber strand (for coarse or dense WDM) are considered Dark Fiber.

40. Standards for Ancillary Functions

40.1 Each Ancillary Function shall meet the requirements set forth in the technical references, as well as the performance and other requirements, identified herein. If another Bell Communications Research, Inc. ("Bellcore"), or industry standard (e.g., American National Standards Institute ("ANSI")) technical reference sets forth a different requirement, the later requirement applies unless the parties mutually elect a different standard.

Each Ancillary Function provided by the ILEC to the CLEC shall be at least equal in the quality of design, performance, features, functions and other characteristics, including, but not limited to levels and types of redundant equipment and facilities for diversity and security, that the ILEC provides in the ILEC network to itself and to any other party.

The ILEC shall provide to the CLEC, upon reasonable request, such engineering, design, performance and other network data sufficient for the CLEC to determine that the requirements of this Agreement are being met. In the event that such data indicates that the requirements of this Agreement are not being met, the ILEC shall, within 30 days, cure any design, performance or other deficiency and provide new data sufficient for the CLEC to determine that such deficiencies have been cured.

The ILEC agrees to work cooperatively with the CLEC to provide Ancillary

Functions that will meet the CLEC's needs in providing services to its customers.

Unless otherwise designated by the CLEC, each Ancillary Function provided by the ILEC to the CLEC shall be made available to the CLEC on a priority basis that is at least equal to the priorities that the ILEC provides to itself and to any other party.

PART V: PRICING

41. General Principles

41.1 All services currently provided hereunder (including resold Local Services), Network Elements, and all new and additional services or Network Elements to be provided hereunder, shall be priced in accordance with all applicable provisions of the Act and the rules and orders of the Board.

All services that the ILEC provides at retail to subscribers who are not telecommunications carriers shall be provided at wholesale rates. Wholesale rates shall be determined on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the ILEC.

All such charges for Network Elements shall be nondiscriminatory.

42. Price Schedules

Local Service Resale - Schedule 1

Unbundled Network Elements - Schedule 2

Charges for Network Elements will be based on rates as determined by the Board.

43. Construction Charges

43.1 All rates, charges and initial service periods specified in this Agreement contemplate the provision of network interconnection services and access to Network Elements to the extent existing facilities are available. In addition, the ILEC will provide modifications to existing facilities necessary to accommodate Interconnection and access to Network Elements provided for in this Agreement. ILEC will consider requests to build additional or further facilities for network Interconnection and access to

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2.2.23.6 Installer access restrictions.

2.2.23.7 Vendor/supplier certification requirements.

2.2.23.8 Installation intervals from the application date through the completion date.

2.2.24 Power as referenced in this document refers to any electrical power source supplied by the ILEC for the CLEC equipment. It includes all superstructure, infrastructure, and overhead facilities, including, but not limited to, cable, cable racks and bus bars. The ILEC will supply power to support the CLEC equipment at equipment specific DC and AC voltages. At a minimum, the ILEC shall supply power to the CLEC at parity with that provided by the ILEC to itself or to any third party. If the ILEC performance, availability, or restoration falls below industry standards, the ILEC shall bring itself into compliance with such industry standards as soon as technologically feasible.

2.2.24.1 Central office power supplied by the ILEC into the CLEC equipment area, shall be supplied in the form of power feeders (cables) on cable racking into the designated CLEC equipment area. The power feeders (cables) shall efficiently and economically support the requested quantity and capacity of the CLEC equipment. The termination location shall be as requested by the CLEC.

CERTIFICATE OF SERVICE

I hereby certify that I have this day hand delivered a copy of the document attached to the following person at the address below. Further, I have supplemented service by hand delivery with delivery by electronic mail to the address listed below:

Mr. Tim Goodwin
Qwest Communications
925 High Street, 9S9
Des Moines, Iowa 50309
tim.goodwin@qwest.com

I hereby certify that I have this day hand delivered a copy of the document attached to the following person at the address below.

Office of the Consumer Advocate
310 Maple Street
Des Moines, Iowa 50319

Dated in Des Moines, Iowa, on August 15, 2006.

BRET A. DUBLINSKE

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