- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Complaint of McLeodUSA Telecommunications Services, Inc., vs. Qwest Corporation for Enforcement of Commission-Approved Interconnection Agreement	)))))	DOCKET NO. 06-2249-01 REPORT AND ORDER

ISSUED: September 28, 2006

SYNOPSIS

Having concluded that the parties' DC Power Measuring Amendment does not affect billing for DC power plant rate elements under the parties' interconnection agreement and having concluded that Qwest Corporation's ("Qwest") billing of McLeodUSA Telecommunications Services, Inc. ("McLeod") for DC power plant based upon the amperage of distribution cable ordered is not discriminatory, the Commission dismissed McLeod's complaint and ordered McLeod to pay Qwest $146,493.12 withheld from Qwest as a result of the parties' dispute.

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By The Commission:

I. PROCEDURAL HISTORY

On March 8, 2006, pursuant to *Utah Code Ann.* §§ 54-8b-2.2(1)(e), 54-8b-16, 54-8b-17, and 63-46b-3, McLeodUSA Telecommunications Services, Inc. ("McLeod") filed a Complaint against Qwest Corporation ("Qwest") for enforcement of its Commission-approved interconnection agreement ("ICA" or "Agreement") with Qwest. McLeod's specific allegations relate to the parties' "DC Power Measuring Amendment to the Interconnection Agreement between Qwest Corporation and McLeodUSA Telecommunications Services, Inc." ("DC Power Measuring Amendment" or "Amendment") executed on August 18, 2004. McLeod alleges Qwest has breached the terms of the DC Power Measuring Amendment by continuing to charge McLeod for the "ordered" amount of DC Power Plant at McLeod's Utah collocation spaces leased from Qwest rather than the pro rata share of power actually used by McLeod, resulting in an overcharge of approximately $24,000 per month since August 2004. McLeod also alleges Qwest's continued billing of DC Power Plant based on the amperage of power distribution cable ordered to supply McLeod's collocation spaces constitutes discriminatory conduct in violation of *Utah Code. Ann*. § 5-8b-3.3. McLeod seeks Commission order requiring Qwest to comply with the terms of the DC Power Measuring Amendment by charging McLeod only for the power actually used for all elements, including DC Power Plant, and ordering Qwest to refund the amount Qwest has overcharged McLeod for DC Power Plant from August 18, 2004, to the date of the Commission's order.

On March 20, 2006, Qwest filed its Answer and Counterclaim ("Answer") arguing the DC Power Plant charge was not affected by the DC Power Measuring Amendment and denying Qwest's billing for power plant is contrary to the terms of the DC Power Measuring Amendment. Qwest seeks Commission order denying McLeod's Complaint in its entirety and directing McLeod to immediately pay all amounts due under Qwest's invoices but withheld by McLeod as a result of the parties' dispute, plus interest and late payment fees in accordance with the ICA.

Also on March 20, 2006, following a duly noticed Prehearing Conference, the Administrative Law Judge issued a Scheduling Order providing deadlines for the pre-filing of several rounds of written testimony and setting an evidentiary hearing for May 24-25, 2006. On March 21, 2006, pursuant to request of the parties, the Commission issued a Protective Order to govern the handling and disclosure of confidential information in this docket.

On April 13, 2006, McLeod filed a Motion to Compel Qwest to Respond to Data Requests ("Motion to Compel") seeking Commission order compelling Qwest to respond to McLeod data request numbers 3 and 8 seeking, respectively, (1) the cost studies underlying the collocation rates at issue in this docket, and (2) the DC Power capacity in Qwest's central offices in Utah. In its Response to Motion to Compel filed on April 24, 2006, Qwest argued it should not be required to respond to either data request as the information sought is not relevant to this proceeding and is not reasonably calculated to lead to the discovery of admissible evidence. On May 5, 2006, the Administrative Law Judge issued an Order Denying Motion to Compel Discovery concluding the information sought by McLeod was not relevant to the narrow issue of

the application of the DC Power Measuring Amendment to the DC Power Plant charge and was not reasonably calculated to lead to the discovery of admissible evidence on that issue.

On May 23, 2006, Qwest filed a Motion to Strike Portions of the Surrebuttal Testimonies of Mr. Michael Starkey and Mr. Sidney Morrison ("Motion to Strike") claiming the challenged testimony is irrelevant to the issues before the Commission in this docket, represents an impermissible collateral attack on the Commission-approved Power Plant rates, and is late filed.

Hearing convened on May 24, 2006, before the Administrative Law Judge ("ALJ"). McLeod was represented by Gregory J. Kopta of Davis, Wright, Tremaine, LLP and William A. Haas, McLeod Vice President and Deputy General Counsel. Tami Spocogee, McLeod's Director of Network Cost and Access Billing; Sidney L. Morrison, Senior Consultant and Chief Engineer for QSI Consulting, Inc. ("QSI"); and Michael Starkey, President of QSI testified on behalf of McLeod. Qwest was represented by Gregory B. Monson of Stoel Rives and Timothy J. Goodwin and Lisa A. Anderl, both in-house counsel for Qwest. William R. Easton, Qwest's Director–Wholesale Advocacy; Robert J. Hubbard, a Director of Technical Support in Qwest's Network Public Policy Organization; and Curtis Ashton, Senior Staff Technical Support Power Maintenance Engineer in Qwest's Technical Support Group, Local Network Organization, testified on behalf of Qwest.[1]

[1]Although parties pre-filed and offered into evidence confidential testimony and exhibits, the evidentiary hearing remained open at all times. This Order discloses no confidential information; no confidential order has been prepared or issued in this docket.

At hearing, having considered the parties' oral argument, the Administrative Law Judge denied Qwest's Motion to Strike. At the conclusion of hearing, the Administrative Law Judge requested an updated listing of the Universal Service Order Codes for collocation power charges listed on Qwest's bills to McLeod. The ALJ informed parties that, absent objection, he intended to admit said listing into evidence for consideration by the Commission. On July 28, 2006, McLeod filed said listing. Qwest having filed no objection, this listing is hereby admitted into evidence as Hearing Exhibit 24.

On July 14, 2006, McLeod and Qwest filed their initial post-hearing briefs in this matter.

On July 26, 2006, Qwest filed a Motion to Admit Late Filed Exhibits ("Motion to Late File") seeking admission of McLeod's responses to Qwest Data Requests 16 and 19 in a parallel Washington proceeding and nine pages of transcript from the Washington evidentiary hearing, numbered Hearing Exhibit 25, 26, and 27, respectively.

On August 1, 2006, McLeod filed its Opposition to Qwest's Motion to Admit Late Filed Exhibits ("Opposition") arguing the evidentiary record has long been closed in this proceeding and Qwest has provided no compelling reason for reopening that record to admit additional evidence, particularly where said evidence is not relevant to the proceeding and where Qwest was aware of said evidence prior to the hearing in this docket.

On August 2, 2006, the ALJ issued an Order Granting Motion to Admit Late-Filed Exhibits, admitting into evidence the offered McLeod response to Qwest Data Request 16,

McLeod response to Qwest Data Request 19, and transcript extract from the parties' parallel Washington proceeding as Hearing Exhibits 25, 26, and 27, respectively.

On August 9, 2006, McLeod, having conferred with Qwest and the ALJ, filed for admission into evidence as Hearing Exhibits 28 and 29, respectively, the Arizona Rebuttal Testimony of Michael Starkey and excerpts from the parallel evidentiary hearing in Arizona. There being no objection to their admission, these documents are hereby admitted into evidence as marked. Also on August 9, 2006, McLeod and Qwest filed their post-hearing reply briefs.

On September 13, 2006, McLeod filed as Supplemental Authority an Order Granting Rehearing for Purposes of Reconsideration of the Iowa Utilities Board, dated September 12, 2006, Docket No. FCU-06-20.

II. BACKGROUND, DISCUSSION, FINDINGS, AND CONCLUSIONS

A. The ICA, Exhibit A, and the DC Power Measuring Amendment

Qwest and McLeod are party to an ICA acknowledged by this Commission[2] on July 10, 2000, in Docket No. 00-2249-01, as amended in Docket No. 00-049-63 on July 11, 2000. Said dockets are a matter of public record and we herein take administrative notice of the ICA, amendment, record, and decisions in said dockets to the extent necessary to resolve the matter before us.

The parties agree that, under the terms of the ICA, McLeod was obligated to pay Qwest for DC power and power plant on an "as ordered" basis in accordance with the collocation rate elements listed in section 8.1.4 of Exhibit A to Qwest's Utah Statement of

[2] As McLeod had opted into an existing agreement previously approved by the Commission, the Commission acknowledged but did not approve the agreement.

Generally Available Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunication Services ("SGAT").[3] Exhibit A, incorporated by reference in the ICA, lists the recurring charges for the rate elements in question as follows:

8.1.4	48 Volt DC Power Usage		
8.1.4.1	-48 Volt DC Power Usage, per Ampere, per month		
	8.1.4.1.1 Power Plant		
	8.1.4.1.1.1	Power Plant – Less than 60 Amps	$11.7795
	8.1.4.1.1.2	Power Plant – Equal to or Greater Than 60 Amps	$7.7927
8.1.4.2	Power Usage		
	8.1.4.2.1	Power Usage – 60 Amps or Less, per Amp	$1.95
	8.1.4.2.2	Power Usage – More than 60 Amps, per Amp	$3.89

As a result of proceedings conducted under the auspices of Qwest's Change Management Process ("CMP"), Qwest developed and offered to various competitive local exchange carriers ("CLECs") a DC Power Measuring Amendment to the ICA which McLeod and Qwest executed on August 18, 2004. Attachment 1 to the Amendment, titled "DC Power Measuring", contains the language at issue in this docket, which reads as follows:

> 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. However, Qwest also agrees to take a reading within thirty (30) Days of a written CLEC request, after CLEC's installation of new equipment. Qwest will perform a maximum of four (4) readings per year on a particular collocation site. Based on these readings, if CLEC is utilizing less than the ordered amount of power, Qwest will reduce the monthly usage rate to CLEC's actual use. If CLEC is utilizing

[3] At hearing, the ALJ notified parties the Commission would take administrative notice of the SGAT and we hereby do so to the extent necessary to resolve the matter before us.

more than the ordered amount, Qwest will increase the monthly usage rate to the CLEC's actual use. Until such time that CLEC places equipment and a request is received from CLEC to monitor, Qwest will bill CLEC based on the amount of power ordered. Once Qwest receives a CLEC monitoring request, it will bill the actual power usage rate from the date of the CLEC's monitoring request until the next reading. The next reading date may be generated as a result of the CLEC request or a Qwest routine reading and Billing will be adjusted on whichever date comes first.

2.0 Rate Elements – All Collocation

2.1 -48 Volt DC Power Usage and AC Usage Charges. Provide -48 volt DC power to CLEC collocated equipment and is fused at one hundred twenty-five percent (125%) of request. The DC Power Usage Charge is for the capacity of the power plant available for CLEC's use. The AC Usage Charge is for the power used by CLEC. Both the DC Power Usage Charge and the AC Usage Charge are applied on a per ampere basis.

2.2 The -48 Volt DC Power Usage Charge is specified in Exhibit A of the Agreement and applies to the quantity of -48 Volt Capacity specified by the CLEC in its order.

2.2.1 -48 Volt DC Power Usage Charge – Applies on a per amp basis to all orders of greater than sixty (60) amps. Qwest will initially apply the -48 Volt DC Power Usage Charge from Exhibit A to the Agreement to the quantity of power ordered by CLEC. Qwest will determine the actual usage at the power board as described in Section 1.2. There is a one (1) amp minimum charge for -48 Volt DC Power Usage.

McLeod and Qwest agree the Amendment changed the billing method for the Exhibit A rate element "8.1.4.2.2 Power Usage – More than 60 Amps, per Amp" from an "as ordered" to an "as measured" basis.[4] However, the parties disagree as to the meaning and effect

[4]For example, prior to execution of the Amendment, if McLeod ordered 120 amps of DC power for a particular collocation space, Qwest would thereafter bill McLeod at the "8.1.4.2.2 Power Usage – More than 60 Amps, per Amp" rate for 120 amps of power regardless of how much power McLeod actually used. Under the Amendment, Qwest now measures McLeod's actual DC power usage so that if, for example, McLeod only uses 87 amps Qwest

of the Amendment in relation to Exhibit A's DC Power Plant rate element "8.1.4.1.1.2 Power Plant – Equal to or Greater Than 60 Amps". McLeod argues the Amendment requires that charges for this element also be billed on an "as measured" basis. Qwest argues the Amendment does not affect the "as ordered" billing for any DC Power Plant rate element. McLeod further argues that Qwest's billing of DC Power Plant is discriminatory in that Qwest charges McLeod more for said power plant than it charges itself.

B. Commission Jurisdiction

As an initial matter, Qwest argues the Commission's decision in cost Docket No. 00-049-106 precludes both McLeod's contract claims and its claim of discrimination. Qwest notes it is undisputed that Qwest has been charging McLeod the Commission-approved rate per amp ordered for DC Power Plant ever since Exhibit A implementing the Commission's decisions in Docket No. 00-049-106 was approved and incorporated into the parties' ICA. Therefore, Qwest cannot be held to have discriminated against McLeod, nor can the Commission retroactively change that rate. Likewise, Qwest notes it is well settled that changing the terms of interconnection agreements contravenes the mandate of the Telecommunications Act of 1996 ("Act") that ICA's have the binding force of law.[5] Therefore, the Commission is precluded from changing the terms of either the ICA or the Amendment as McLeod would have the Commission do.

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bills McLeod at the "8.1.4.2.2 Power Usage – More than 60 Amps, per Amp" rate for the 87 amps of power actually used rather than the 120 amps McLeod had ordered.

[5]Citing *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003).

McLeod responds that the Commission in Docket No. 00-049-106 never approved or adopted Qwest's collocation cost study. Instead, the Commission adopted a collocation cost model developed by the Division of Public Utilities and approved collocation rates derived from that model, but never expressly or implicitly approved Qwest's charging DC Power Plant rates based on the size of the power distribution cables ordered by a CLEC. It is this practice that McLeod believes is discriminatory and McLeod sees nothing in the Commission's orders in Docket No. 00-049-106 that would preclude its claim of discrimination.

Having considered the parties' arguments, we are satisfied that McLeod's contract and discrimination claims are not precluded by prior Commission order or by the Act. In rendering our decisions herein, we do not, as suggested by Qwest, seek to change the terms of the Amendment but to interpret them in order to resolve the parties' dispute. Likewise, McLeod's claim of discrimination goes not to the rates approved by the Commission in Docket No. 00-049-106 but to Qwest's application of those rates to McLeod's collocation facilities. We have both the authority and a duty to investigate such a claim.

C. Interpretation of the DC Power Measuring Amendment

In interpreting a contract, we "first look[] to the contract's four corners to determine the parties' intentions, which are controlling."[6] "A contract's interpretation may be

[6] *Swenson v. Erickson*, 2006 UT App 34, ¶11 (quoting *Fairbourn Commercial, Inc. v. American Housing Partners, Inc.*, 2004 UT 54, ¶ 10, 88 P.3d 350 (quotations and citations omitted)).

either a question of law, determined by the words of the agreement, or a question of fact, determined by extrinsic evidence of intent."[7]

1. McLeod's Plain Reading of the Texts

McLeod argues the operable change to the parties' ICA wrought by the Amendment is contained in Amendment subsection 2.2.1, entitled "-48 Volt DC Power Usage Charge", under which Qwest agrees to bill on an "as used" basis for all orders greater than 60 amps. McLeod notes this same language is used at Exhibit A item "8.1.4.1 -48 Volt DC Power Usage, per Ampere, per Month". Therefore, according to McLeod, the simplest, most logical reading of subsection 2.2.1 is that it applies to all of the rate elements under Exhibit A item 8.1.4.1 relating to service of 60 amps or more, including "8.1.4.1.1.2 Power Plant–Equal to or Greater Than 60 Amps".

McLeod also points out that Amendment subsection 2.1 states "the DC Power Usage charge is for the capacity of the power plant available for CLEC's use." According to McLeod, the word "capacity" in this subsection can only refer to power plant such that the Amendment must be read as affecting the Power Plant rate elements.

According to McLeod, there simply is no reading of the language in the Amendment itself and the underlying Exhibit A that suggests that power plant is to be charged on an "as ordered" basis, while power consumption is meant to be charged on an "as measured" basis. Indeed, McLeod argues everything about the language of the Amendment and the structure of the charge identified as 8.1.4.1 "-48 Volt DC Power Usage" supports its

[7] *Peterson v. Sunrider Corp.*, 2002 UT 43, ¶14, 48 P.3d 918 (quoting *Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985)).

interpretation of the Amendment as intended to equally affect Power Usage and Power Plant rates by billing both on an "as measured" basis.

2. Qwest's Plain Reading of the Text

In support of its assertion that the Amendment was intended to affect only the Power Usage rate element, Qwest notes Amendment subsection 1.2 generally describes how the usage measuring process will be implemented. The first sentence of this section states "the power usage rate [for orders of 60 amps or less] reflects a discount from the rates for those feeds greater than sixty (60) amps." Exhibit A of the parties' ICA reflects this discount in that the rate per amp ordered for Power Usage for orders of 60 amps or less is less than the rate per amp ordered for Power Usage for orders greater than 60 amps. In contrast, the rates for Power Plant indicate the opposite; the Power Plant rate is higher for orders of less than 60 amps. Therefore, according to Qwest, read in the context of the entire agreement, this section plainly excludes Power Plant rates from the rates affected by the Amendment.

In addition, Qwest notes Amendment subsection 1.2 states "Qwest will reduce the monthly usage rate to CLEC's actual use" while making no mention of the Power Plant rate. Qwest further notes the term "usage rate" is singular and can therefore only reasonably refer to the Power Usage rate at Exhibit A item 8.1.4.2.2. Likewise, the Amendment refers several times to the "Charge" affected by the Amendment. Had the parties intended the Amendment to apply to more than one charge, they would have used the plural "Charges". That they did not do so indicates that Qwest's interpretation of the Amendment is the correct one. McLeod's interpretation, on the other hand, would require the Commission to ignore or give plural effect to

the singular reference to "Charge" throughout the Amendment, which, according to Qwest, would violate a cardinal principle of contract interpretation.[8]

3. The Parties' Intent Is Not Clear from the Four Corners of the Text

Having reviewed these documents in detail, and having considered the parties' arguments on this point, we must conclude the parties' intent is not clear from the documents themselves.

McLeod makes much of the fact that the term "-48 Volt DC Power Usage" appears in the heading of Amendment subsection 2.1 and also appears, relatively unchanged, at item 8.1.4 of Exhibit A. Therefore, the Amendment's command to bill "as measured" must apply to each of the Usage and Power Plant rate elements under Exhibit A item 8.1.4 for orders greater than 60 amps. However, Amendment subsection 1.2 specifically limits the measuring and billing activities outlined therein to CLEC orders of "more than sixty (60) amps of power". The only rate element under Exhibit A item 8.1.4 that applies expressly to orders of "more than sixty (60) amps" is "8.1.4.2.2 Power Usage – More than 60 Amps, per Amp". In contrast, Power Plant item 8.1.4.1.1.2, is described as applying to "Equal to or Greater Than 60 Amps". "More than" and "Equal to or Greater Than" are not the same thing and it is not at all clear that the parties must have intended the former to include the latter.

We are likewise not convinced by McLeod's reliance on the third sentence in Amendment subsection 2.1: "The DC Power Usage Charge is for the capacity of the power plant available for CLEC's use." McLeod believes this sentence can only refer to the Power Plant rate

[8]Citing *WebBank v. Metropolitan Insurance and Annuity Co.*, 54 P.3d 1139, 1144 (Utah 2002).

elements in Exhibit A. While this interpretation is not unreasonable on its face, it is equally apparent that there is no "DC Power Usage Charge" listed in Exhibit A. Indeed, subsection 2.1 also states that the "AC Usage Charge is for the power used by the CLEC", but there is no AC Usage Charge listed in Exhibit A. Furthermore, the power plant rate elements listed in Exhibit A are specifically identified therein as "Power Plant" rate elements so there would seem to be little point in trying to tie the non-existent "DC Power Usage Charge" of Amendment subsection 2.1 to any power plant rate element in Exhibit A item 8.1.4.1.1.

Qwest's position is equally untenable. We simply cannot reasonably conclude from a reading of the text that the Amendment unambiguously changes the billing method for the Power Usage rate element but has no impact on the Power Plant rate element. While we disagree with McLeod's reliance on Amendment subsection 2.1, one can not deny that on its face it plainly refers to some charge pertaining to the "capacity of the power plant", yet Qwest would have us conclude based on these texts alone that the Amendment has nothing to do with power plant charges. Nor, given the many instances of apparently erroneous rate element labels and inartful phrasing evident in the Amendment, are we willing to base a decision in favor of Qwest's position on some number of singular, rather than plural, references plucked from the text.

Given these numerous inconsistencies, we are not able to determine the parties' intent solely from within the four corners of the documents. We therefore must look to extrinsic evidence of the parties' intent in order to give meaning and affect to the Amendment.

4. Examination of Extrinsic Evidence[9]

a. McLeod's Position

McLeod argues its reading of the Amendment is consistent with past practice in that, prior to the Amendment, Qwest billed for all elements under Exhibit A item 8.1.4.1 in a consistent manner; that is, Qwest billed for both Power Usage and Power Plant elements based on the size of the distribution cable ordered by McLeod. Absent express language to the contrary, one would expect this billing practice to continue under the Amendment, with both Power Plant and Usage being assessed on an "as measured" basis. Indeed, McLeod notes the Amendment specifically excludes those Power Plant and Power Usage rate elements applicable to 60 amps or less. Therefore, it is reasonable to conclude that Qwest could have easily and explicitly excluded all Power Plant rate elements from the Amendment had it wished to do so. Instead, Qwest would have this Commission read the Amendment as changing the billing structure for some elements while leaving others unchanged. Nowhere in the Amendment is this departure from past practice described, nor can Qwest point to anywhere in the Amendment where the Power Plant charge for orders greater than or equal to 60 amps is specifically excluded from billing on an "as measured" basis.

b. Qwest's Position

Qwest notes the only McLeod employee to testify in this docket confirmed that McLeod's sole concern prior to entering into the DC Power Measuring Amendment was that its

[9]We note our examination is limited by the fact that neither McLeod nor Qwest presented the testimony of any persons involved in drafting, negotiating, or agreeing to the DC Power Measuring Amendment.

rates not increase, and that once this concern had been satisfied McLeod entered into the Amendment without further questions. Furthermore, Qwest notes that a spreadsheet prepared by McLeod prior to execution of the Amendment and used by McLeod to analyze anticipated cost savings refers to "metered amps used" but makes no reference to power plant rates or savings. Qwest argues this spreadsheet proves the only savings McLeod anticipated from the Amendment were related to the Power Usage charge, not the Power Plant charges. In addition, Qwest points to McLeod's admission that it did not focus on the specific Power Plant element and attempt to calculate any power plant savings from the Amendment until May 2005, nine months after entering into the Amendment. According to Qwest, this delay belies any claimed "expectation" by McLeod regarding the Amendment and treatment of power plant rate elements.[10]

Qwest also argues that, through its Change Management Process and Product Catalog ("PCAT"), it plainly, objectively, and openly manifested its intent that the Amendment would alter only the Power Usage charge, not the Power Plant charge, and reasonably expected that McLeod understood this intent. Through its CMP, Qwest operates a forum for the CLECs with which it does business that includes discussions and information about Qwest products or changes to those products. These changes are typically accompanied by a PCAT available on Qwest's website. In this case, Qwest made several documents available on its CMP website regarding its proposed power measuring product and changes thereto, and notified sixteen

[10]McLeod claims the members of the engineering group that built this spreadsheet, based on documents provided by Qwest, were not contract or rate specialists and were not even familiar with the multiple power rate elements billed separately by Qwest. McLeod admits the concern within the narrow group at McLeod doing this analysis was to make sure power charges would not increase, as had already been encountered in the analysis of a proposed amendment in Michigan, but notes that shortly after execution of the Amendment, and only weeks after the first audit was reviewed by contract and rate specialists, McLeod began raising questions and concerns with Qwest about the way in which it was applying its power plant charge.

McLeod employees of their availability. Qwest specifically notified McLeod that discussions regarding the proposed changes would include how power measuring would impact monthly recurring charges, how power measuring relates to cost dockets, how Qwest would measure power, whether the power measuring offering would be optional or required, and whether an interconnection amendment would be required. Qwest also admitted into evidence the following CLEC question and Qwest response concerning whether the Power Plant charge would continue to be charged "as ordered":

> For the following question, assume the collocation is in AZ, we're ordering 120 Amps, the DC Power Measurement is 53, the Power Plant per amp rate is $10.75, the power usage [less than] 60 amps, per amp is $3.64 and Power Usage [greater than] 60 amps, per amp is $7.27. Currently we are billed 120 Amps at $10.75 and 120 Amps at $7.27. Per this proposal I interpret that we would be billed 120 Amps @ $10.75 and 53 Amps @ 3.64. Likewise, if the new DC Power Measurement was 87, we would be billed 120 Amps at $10.75 and 87 Amps at $7.27. Is that correct?

Qwest's response:

> The rate that will be applied to the measured amount will be dependent on the amount that was ordered not the amount measured. In other words you would be billed 120 Amps at $10.75 per amp and the measures of 53 amps and 87 amps would have the usage rate or [*sic*] $7.27 per amp because the ordered amount was greater than 60 amp (120).

Qwest asserts it is reasonable that any CLEC reading this question and response would conclude that Qwest intended the proposed change apply only to measured power usage, not to charges for power plant ordered.

In addition, Qwest's PCAT defined the "Capacity Charge" as recovering "the cost of the capacity of the power plant available for [CLEC] use" while the "Usage Charge" was

defined as recovering "the cost of the power used." Qwest also notes that where the PCAT deals specifically with the DC Power Measuring product it clearly states that only the "usage rate" would be impacted. McLeod claims it never saw this document prior to executing the Amendment. However, Qwest argues McLeod's failure in this regard is unreasonable in that McLeod was aware of the CMP and PCAT processes generally and there has been no evidence offered to indicate that McLeod could not or should not have been aware of this dialog. Qwest also notes the evidence is absolutely clear that McLeod never communicated to Qwest the intent that it now claims it had in entering into the Amendment.

Regarding the CMP and PCAT, McLeod notes that the sole McLeod employee who attended the CMP meeting had a very narrow job focus that would not have enabled the employee to grasp the larger issues relating to the proposed Amendment. McLeod also notes the CMP documents state no ICA amendment will be necessary to implement measurement of the DC Usage charge, but that Qwest ultimately drafted and offered such an amendment. McLeod believes Qwest defies logic in arguing that a discussion of a process that Qwest said could be implemented without the need of an amendment gave McLeod notice as to Qwest's intentions concerning a process that ultimately did result in an amendment.

McLeod also argues that if the Commission gives any weight to the CMP process it should consider the fact that while the PCAT, the final product of the CMP, specifically refers to a "Capacity Charge" and excludes such charge from "as measured" billing, the Amendment makes no reference to such a charge, thereby supporting McLeod's conclusion that the Amendment pertains to both usage and capacity charges. Even if, as suggested by Qwest,

McLeod had been perfectly familiar with the CMP process and products, the Amendment drafted by Qwest was very different from that discussed in the CMP and PCAT.

However, Qwest points to the fact that those charged with negotiating the DC Power Measuring Amendment on behalf of McLeod were instructed to ensure any amendment did not result in increased power charges. According to Qwest, these instructions, along with the experience of McLeod personnel in negotiating similar agreements in other jurisdictions, demonstrate the importance McLeod placed on the Amendment and should cause this Commission to conclude that if McLeod had given the matter reasonable thought and proceeded with reasonable diligence it would have been aware of Qwest's intent as provided in the CMP communications and PCAT. McLeod's unexpressed intent should therefore have no bearing on the Commission's decision.

Finally, Qwest points out that charging for power plant as consumed rather than as ordered would allow McLeod to pay for less capacity than is actually available for its use. Even if Qwest were to design power plant to List 1 drain[11], as advocated by McLeod, there is no dispute that actual measured usage would almost always fall below List 1 drain, often far below List 1 drain. Thus, McLeod seeks to pay for capacity based on a measured usage that would typically fall far below the power capacity McLeod expects Qwest to provide. According to Qwest, no interpretation of the Amendment could support such a result.

[11]List 1 drain is the average busy day/busy hour current during normal plant operations.

c. The Extrinsic Evidence Supports Qwest's Position

The evidence of record supports Qwest's assertion that it intended the DC Power Measuring Amendment to have no affect on Power Plant rate elements while also showing that McLeod should have been aware of that intent. In contrast, McLeod has provided no evidence to prove that at the time of execution it believed the Amendment would change how it was billed for the Power Plant rate elements. Given this, it is reasonable that we interpret the Amendment in conformance with Qwest's interpretation as the party that authored and offered the Amendment, and undertook reasonable efforts to make its intent known to those to whom the Amendment would be offered.[12] Thus, we find and conclude the evidence supports Qwest's stated intent at the time of execution such that the Amendment changes the billing from "as ordered" to "as measured" for only Exhibit A item 8.1.4.2.2 "Power Usage – More than 60 Amps, per Amp".

D. McLeod's Claim of Discrimination

Utah Code Ann. § 54-8b-2.2(1)(b)(ii) provides

> [e]ach telecommunications corporation shall permit access to and interconnection with its essential facilities and the purchase of its

[12] RESTATEMENT (SECOND) OF CONTRACTS § 201 provides:

> (2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
> (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or
> (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

As noted by Qwest, Utah state courts have not decided whether Section 201 of the Restatement should be incorporated as part of Utah law. However, the court in *Flying J, Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 834 (10th Cir. 2005) observed in applying a different part of section 201 to resolve that dispute: "The Utah Supreme Court has not specifically adopted Restatement (Second) of Contracts § 201; however, it has consistently adopted other Restatement provisions."

> essential services on terms and conditions, including price, no less favorable than those the telecommunications corporation provides to itself and its affiliates.

Commission Rule 746-348-7 lists physical collocation as an essential facility or service pursuant to this section. Likewise, Section 7.1.9 of the ICA requires Qwest to provide collocation power to McLeodUSA on terms that are no worse than the terms Qwest provides for itself:

> Power as referenced in this Agreement refers to any electrical power source supplied by [Qwest] for [McLeod] equipment. [Qwest] will supply power to support [McLeod] equipment at equipment-specific DC and AC voltages. At a minimum, [Qwest] shall supply power to [McLeod] at parity with that provided by [Qwest] to itself.

In addition, McLeod notes the Federal Communications Commission ("FCC") has concluded that § 251 of the Act prohibits discrimination in an unqualified and absolute manner[13] such that it rejected

> 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).[14]

[13] Citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-235, First Report and Order, 11 FCC Rcd. 15499 ¶ 217 (1996) ("*Local Competition Order*").

[14] *Id*. ¶ 218.

The FCC went on to make clear that the terms and conditions by which an incumbent LEC offers unbundled network elements "must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself."[15]

The parties agree Qwest bills McLeod for DC Power Plant based on the amperage of power distribution cable ordered by McLeod for each collocation space. For example, if McLeod orders a 180 amp distribution cable, Qwest will bill McLeod for 180 amps of power plant using the rate element at Exhibit A item 8.1.4.1.1.2. Qwest claims it then engineers McLeod's collocation space power plant to be able to supply 180 amps of power if needed. McLeod disputes this claim, noting that, rather than engineering a specific collocation space power plant tailored to a CLEC's distribution cable order for that space, Qwest actually engineers the power plant for its entire central office based upon the List 1 drain of the entire central office, including the List 1 drain of all Qwest and CLEC equipment, which equates to the total electrical usage load demanded within each office.

1. McLeod's Position

Based on these facts and arguments, McLeod appears to advance two related claims of discrimination: (1) although McLeod may order a specific amperage distribution cable, Qwest should know that McLeod's collocation facility will not actually require that much DC power under normal operating conditions and should therefore engineer, and bill, the DC power plant for that collocation space according to the smaller List 1 drain of the equipment McLeod actually intends to collocate; and (2) Qwest admits it engineers its own power plant using the

[15] *Id.* ¶ 315.

List 1 drain of its own equipment but bills McLeod for collocation power plant based on the size of McLeod's distribution cable order, acting as a proxy for the List 2 drain[16] of McLeod's collocation equipment. In both cases, according to McLeod, the resulting DC Power Plant charges are higher than they would be if Qwest engineered McLeod's power plant as it does its own.

McLeod argues its orders for distribution cables are not orders for power plant capacity and should therefore not be used to size its power plant. McLeod notes nothing in the ICA, the SGAT, or Exhibit A requires Qwest to charge McLeod for DC power plant based on the size of its power distribution cable orders. According to McLeod, sound engineering principles dictate that McLeod size its distribution cables at substantially larger amperages than it would ever require under normal power plant operating conditions, but that Qwest unreasonably uses the amperage of the distribution cable order to bill McLeod for its collocation space power plant. In support of this position, McLeod points to Qwest's own technical publications instructing engineers to size "batteries and chargers" to List 1 drain while only using the larger List 2 drain to size "feeder cables, circuit breakers, and fuses".

Furthermore, McLeod notes that, contrary to Qwest's claims, Qwest virtually never augments its power plant to accommodate the List 2 drain represented by McLeod distribution cable orders. Therefore, Qwest does not incur power plant augmentation costs

[16] List 2 drain is a "worst case scenario" drain on the power plant. One typical example of when List 2 drain is demanded is associated with the start up of telecommunications equipment after a power outage. In this scenario, the central office runs off of AC power supplied by the backup generator until the fuel runs out. If for some reason the generator cannot be refueled, the office would run entirely off of battery power. After about four hours, the batteries would be unable to provide enough power to run the telecommunications equipment, and the equipment would shut down. When AC power is restored and the equipment begins to power back up, there is a List 2 drain on the power plant. The parties agree List 2 drain is significantly higher than List 1 drain. Therefore, power plant bills calculated using List 2 drain would be higher than those calculated using List 1 drain.

directly and proportionately related to any McLeod distribution cable order. McLeod also disputes Qwest's claim that Qwest must maintain a unique amount of capacity available to meet each CLEC's List 2 drain. Instead, according to McLeod, central office power plant capacity is pooled and shared by all equipment in the central office such that the cost of that capacity should be based upon the relative use of the power plant by each collocator and Qwest should bill each collocator accordingly. Such a practice would also be consistent with the language of the Amendment referring to assessing "-48 Volt DC Power Usage" charges based on measured use.

McLeod further argues Qwest should determine the List 1 drain of the equipment McLeod intends to collocate and size and bill McLeod's power plant accordingly. According to McLeod, this List 1 drain information would not be difficult for Qwest to obtain. First, Qwest could simply ask McLeod for this information. Second, Qwest uses several pieces of equipment common to a typical McLeod collocation so it already knows the List 1 drain for that equipment. Furthermore, Qwest admits it can usually obtain the List 1 drain for other equipment from the equipment manufacturer. Thus, there is no excuse for Qwest's not using this information in billing McLeod for power plant facilities. The fact that Qwest chooses instead to charge McLeod for DC Power Plant based on the size of its distribution cable orders while sizing its own power plant based on the List 1 drain of its equipment is proof of discrimination since the result is that Qwest provides power plant to itself on more favorable terms than it makes available to CLECs such as McLeod.

2. Qwest's Position

Qwest believes it is reasonable for Qwest to size its plant based on CLEC orders. In support of this position, Qwest notes McLeod's expectation that Qwest should make List 2 drain available for McLeod's use if the need ever arises. Furthermore, Qwest does not know the List 1 drain of the CLECs' equipment when orders for distribution cable are placed. Qwest states that if it knew the List 1 drain of McLeod's equipment it would size the power plant accordingly. However, since McLeod does not provide this information with its distribution cable orders,[17] Qwest must use those orders as a proxy for the List 2 drain it is obligated to provide and therefore engineers McLeod's power plant to that level. Qwest argues this practice is entirely consistent with the Commission's order in Docket No. 00-049-106 requiring power plant to be charged based on the number of amps specified in the CLEC power plant order.

Finally, Qwest argues that McLeod gave up nothing in order to gain the savings on power usage charges realized via the Amendment. McLeod has not been injured, discriminated against, or otherwise disadvantaged by the Amendment; it has only benefitted, as it intended to do when it entered into the Amendment.

3. The Evidence Does Not Support McLeod's Claim

In reviewing this matter, we start by noting the parties' agreement that the ICA obligated McLeod to pay for DC Power Plant on an "as ordered" basis and that not until the filing of the current Petition dealing specifically with the DC Power Measuring Amendment did McLeod register any type of formal complaint with the Commission regarding Qwest's billing

[17] Qwest points out McLeod has never provided List 1 drain information with its distribution cable orders, but Qwest also admits it has never asked McLeod to provide this information.

for DC Power Plant. Nor does the record contain any evidence that McLeod, prior to May 2005, raised any concern of discriminatory conduct with Qwest pertaining to its collocation power plant engineering or billing.

In Docket No. 00-049-106, this Commission approved a "DC Power Plant – Equal to or Greater Than 60 Amps" rate element to be charged on a recurring basis for CLEC DC power plant orders. McLeod has made no showing that Qwest's charging this rate on an "as ordered" basis for distribution cable orders is contrary to our decision in Docket No. 00-049-106 and we find nothing in the record to indicate Qwest has applied this rate in a discriminatory manner.

McLeod effectively orders "power plant" by means of its power distribution cable orders and sizes these cable orders based on both the List 2 drain of the equipment it intends to collocate in the short-term and the List 2 drain of additional equipment it may collocate in the future in that space. The only power plant order McLeod then provides to Qwest is its order for distribution cable. It is therefore reasonable Qwest uses this order to bill McLeod for its power plant.

Nothing in the record suggests that McLeod has ever asked Qwest to size its collocation power plant to an amount less than that indicated by its ordered distribution cable amperage. Nor does McLeod provide Qwest the List 1 drain of its collocation equipment when ordering distribution cable.[18] Instead, McLeod expects Qwest, on its own and with no direction from McLeod, to determine the List 1 drain for McLeod's equipment and engineer the DC power

[18]Were McLeod to provide this information, Qwest has testified that it would engineer McLeod's power plant and bill McLeod accordingly. Indeed, if McLeod had provided the List 1 drain for its equipment when placing its distribution cable orders, our conclusion concerning McLeod's discrimination claim might be different.

plant for that collocation accordingly, despite the higher amperage of the distribution cable McLeod has ordered. We find nothing in the ICA, statute, regulation, or Commission order that would require Qwest to do more than it is now doing; namely, billing McLeod for its collocation power plant based upon McLeod's orders for power distribution cable. We therefore conclude Qwest's billing to McLeod for DC Power Plant does not constitute discriminatory conduct.

E. Qwest's Counterclaim

Qwest counterclaims for the amounts withheld by McLeod as a result of this dispute. According to McLeod, it has withheld $146,493.12 billed by Qwest. Qwest seeks payment of this amount, plus any applicable interest and late payment fees pursuant to the parties' ICA. Because we agree with Qwest's interpretation of the DC Power Measuring Amendment and find that Qwest has billed McLeod appropriately in accordance with the parties' ICA and Commission order, we find and conclude that McLeod owes Qwest the $146,493.12 it withheld from Qwest as a result of the parties' dispute. ICA section 11.10.1 provides that disputed amounts will be paid within thirty (30) days following resolution of the dispute. We therefore order McLeod to make payment to Qwest within 30 days from the date of this Order. However, we do not order McLeod to pay Qwest any interest or late payment fees. Qwest points to no specific ICA provisions to support its request for these payments and, having reviewed the ICA, we find no such provisions. We therefore deny Qwest's claim for said interest or fees.

Wherefore, based upon the foregoing information, and for good cause appearing, the Administrative Law Judge enters the following proposed:

III. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

- The complaint filed herein is dismissed.
- McLeodUSA Telecommunications Services, Inc., shall pay Qwest Corporation $146,493.12 no later than thirty days from the date of this Order.

Pursuant to *Utah Code Annotated* §§ 63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of *Utah Code Annotated* §§ 63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

Dated at Salt Lake City, Utah, this 28th day of September, 2006.

/s/ Steven F. Goodwill
Administrative Law Judge

Approved and Confirmed this 28th day of September, 2006, as the Report and Order of the Public Service Commission of Utah.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#50659