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ATTORNEYS FOR QWEST CORPORATION

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Complaint of MCLEODUSA TELECOMMUNICATIONS SERVICES, INC. against QWEST CORPORATION for Enforcement of Commission-Approved Interconnection Agreement	Docket No. 06-2249-01 QWEST'S POST HEARING REPLY BRIEF

INTRODUCTION

Qwest Corporation ("Qwest") hereby files its post hearing brief in reply to the opening brief filed by McLeodUSA Telecommunications Services, Inc. ("McLeod"). Qwest asks the Public Service Commission of Utah ("Commission") to deny McLeod's request to re-write the parties' contract, which is essentially what this complaint requests. McLeod's 2006 interpretation of the Power Measuring Amendment is at odds with the language of the Amendment, with McLeod's intent at the time it entered into the Amendment in 2004, and at odds with Qwest's express intent regarding the effect of the Amendment both before and after it was executed. There is simply no basis upon which to hold in McLeod's favor on the contract issues.

And, although McLeod pays lip service to the fact that this case is "first and foremost" about the proper interpretation of the Power Measuring Amendment, the truth

of the matter is that McLeod knows that its contract claim is wholly unsupported, and so McLeod devotes much of its opening brief to its alternative theory – the theory that Qwest's Commission-approved Power Plant rates are discriminatory. This theory also lacks merit.

Qwest's Power Plant rates are a part of the interconnection agreement ("ICA") between Qwest and McLeod – this ICA is a binding contract which the Commission can enforce, but not modify outside the context of an arbitration. The rates and rate design contained in that agreement were approved by the Commission and cannot be modified based on a complaint, as Qwest and McLeod are bound to the terms in that ICA for the duration of the ICA, absent agreement otherwise.

Qwest's Power Plant rate, assessed on an "as-ordered" basis, was vetted through a cost docket and found to be non-discriminatory. Qwest made reasonable assumptions about making power plant capacity available to CLECs based on their orders, and Qwest makes available to McLeod the amount of power plant capacity that McLeod has ordered. Further, Qwest's power plant rates are assessed in the same manner as McLeod assesses power plant rates for its own collocators. In addition, McLeod essentially controls its own fate on this issue, and can reduce its power plant bills by taking advantage of Qwest's Power Reduction offering to reduce the size of its power order.

The Commission should therefore hold that Qwest properly charges for power plant capacity on the basis of the CLEC ordered amount, in accordance with previously-approved rates. Accordingly, the Commission should order McLeod to remit to Qwest the amounts withheld for Power Plant charges in the amount of $146,493.12,[1] and should

[1] Tr. 37.18.

order McLeod to pay the Power Plant charges on the basis of McLeod's power order on a going forward basis.

ARGUMENT

I. THE DC POWER MEASURING AMENDMENT DID NOT CHANGE THE WAY DC POWER PLANT CHARGES ARE TO BE ASSESSED; THOSE CHARGES REMAIN ON AN AS-ORDERED BASIS.

A. The Words of The Amendment Support Qwest's Interpretation.

This Commission must interpret the DC Power Measuring Amendment to effect the intent of the parties at the time the Amendment was executed and approved by the Commission. The evidence of that intent lies first in the words the parties chose to use to express their intent in the Amendment itself, and secondarily in the extrinsic evidence relating to the parties' intent. McLeod does not directly argue this clear and fundamental point of contract law. Indeed, McLeod offers no authority for any other interpretive approach. This approach is consistent with the several Utah and federal authorities cited in Qwest's opening brief, which give effect to the propositions that contracts must be interpreted according to their terms, and that interconnection agreements in particular are "binding" agreements under 47 USC § 252(a)(1). Indeed, the court in *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003) observed that Commissions lack the authority to change the terms of interconnection agreements, and the court in *Verizon Northwest, Inc. v. Worldcom, Inc.*, 61 Fed. Appx. 388, 392 (9th Cir. 2003) held that the issue of "contract interpretation . . . is controlled by the terms of the Agreement and state contract law."

In this light, Qwest's interpretation of the Amendment is more reasonable, and is consistent with the expressed intent of the parties. It gives effect to the entire agreement, and is consistent with the extrinsic evidence of intent. McLeod's arguments rely on twisting the words of the Amendment, ignoring entire sections of the Amendment, and completely discounting the extrinsic evidence of intent. Indeed, the Iowa Utilities Board agreed with Qwest's interpretation of the Amendment in its ruling dated July 27, 2006, which is attached for reference as Attachment A. The Iowa Board concluded that the Amendment was ambiguous – that both McLeod's and Qwest's proffered interpretations were reasonable – but ultimately concluded based on the extrinsic evidence of intent that the parties intended to alter only the power usage charge in the Amendment, and not the power plant charge. Thus, the Iowa Board held that "Qwest's interpretation of the Amendment correctly reflects the intent of the parties at the time the Amendment was executed."[2]

With all due respect to the Iowa Board's conclusion, it is questionable that McLeod's interpretation is reasonable. In this proceeding, McLeod's arguments rely on incomplete and potentially misleading references to the Amendment. For example, McLeod claims at page 4 of its opening brief that the "stated purpose" of the Amendment is to establish billing for "-48 Volt DC Power Usage" on an "as measured" basis. The section to which McLeod cites never states the "purpose" of the Amendment at all. Instead, it merely defines certain terms – and one of the defined terms, AC Power Usage, is not operative in the parties' interconnection agreement in Utah. Second, the Amendment never refers to "-48 Volt DC Power Usage" without also referencing the key term, often capitalized, "Charge." McLeod conveniently omits the reference to the term

[2] Iowa Board Order, Attachment A, at 11.

"Charge" in its interpretive approach to the Amendment, as it must, because to attach significance to the term "Charge" as written in the Amendment would undermine McLeod's interpretation.

McLeod attempts the tactic of arguing semantics at page 5 of its brief, referring to the several charges in the Exhibit A to the parties interconnection agreement as "subtending elements" beneath the headings at item 8.1.4 and 8.1.4.1 of the Exhibit A.[3] Despite McLeod's claims in its brief that there is a "charge identified at line 8.1.4.1" of the Exhibit A, there is no charge identified with that item. There are several charge**s** (plural) identified with other items beneath the heading, but to call them "subtending elements" is inconsistent with even McLeod's discovery responses in other states. As noted in Qwest's opening brief, in Hearing Exhibit 12, McLeod stated that "Section 8.1.4.1 of exhibit A is a heading entitled "-48 Volt DC Power." **Qwest identifies no particular charge associated with 8.1.4.1** but this heading does include three additional rate elements that include monthly recurring charges. . . ." (emphasis added). For McLeod to now argue the complete opposite – that there is a "charge identified" at item 8.1.4.1 – is disingenuous.

McLeod's reversal of the language it uses to argue against giving effect to the plain meaning of the term "Charge" only underscores the logical problems with its argument on this point. The simple fact is that there are several charges – plural – identified in the Exhibit A, and several charges identified in the section under the heading at item 8.1.4. McLeod argues that the singular term "Charge" could refer to all the "subtending elements" and still be grammatically correct. This fails common sense and

[3] Recall that the underlying interconnection agreement provides that headings "shall in no way define, modify, or restrict the meaning or interpretation of the terms or provisions of this Agreement."

understanding. By this logic, every item in the SGAT could be aggregated into a single "charge." Moreover, while there are arguably several "subtending elements" below the heading at 8.1.4 (though no agreement labels them as such), this fact is irrelevant. The Amendment does not refer to a rate grouping including subtending elements; it refers to a "Charge." The different "subtending elements" are each identified with separately billed (and, under the cost docket, separately determined) charges. McLeod would read the term "Charge" out of the Amendment, as its interpretive approach assigns the term no significance whatsoever. In order to assign meaning to the term "Charge" as written, the Commission must find that the Amendment intended to change the way a single Charge, for -48 Volt DC Power Usage, for orders greater than sixty amps, was to be billed. Qwest's interpretation gives meaning to every one of these key words, and McLeod's does not.

Moreover, McLeod's reading of the Amendment almost completely ignores section 1.2. In its discussion of the operation of section 2.2.1, McLeod overlooks the fact that section 2.2.1 specifically states that "Qwest will determine the actual usage at the power board as described in Section 1.2." Thus, both by its own terms and by the reference in section 2.2.1, section 1.2 is the operative section of the Amendment. In that section, there is no reference to the Exhibit A, but only unadorned references to the "usage rate" or the "power usage rate." As noted in Qwest's opening brief, the very first sentence of the first operative section of the Amendment absolutely excludes any power plant rate from inclusion in the power usage rate. That sentence notes that "the power usage rate [for feeds less than 60 amps] reflects a discount for those feeds greater than sixty (60) amps." Because the power plant rates are actually higher for feeds less than 60

amps, the Amendment cannot refer to "power usage rates" or "usage rates" to include a reference to "power plant rates." McLeod's interpretation would read this sentence right out of the Amendment.

On the surface, McLeod seems to give great importance to the definitions in section 2.1 of the Amendment, particularly the definition for "-48 Volt DC Power Usage Charge," which states that the charge "is for the capacity of the power plant available for CLEC's use." On deeper examination, this definition offers no help to McLeod, because it excludes the actual power used by McLeod, which both parties agree was intended to be included. The "power used by CLEC" is included as part of the "AC Power Usage Charge" definition in section 2.1, and no other provision of the Amendment changes or even mentions the charges for AC Power Usage. These definitions should be viewed in the context of the entire Amendment, particularly since Qwest indisputably makes "power plant available for CLEC's use" at List 2, or ordered, levels. Thus, McLeod's view would also require reading the definitions of section 2.1 out of the Amendment.

B. The Extrinsic Evidence of Intent Exclusively Supports Qwest's Interpretation of the Amendment.

McLeod's next approach is to argue that "past practice" was to charge for both power usage and power plant in the same fashion, *i.e.,* on an as-ordered basis.[4] In contrast to its other arguments that require eliminating or ignoring much of the Amendment, this argument requires adding terms and languages to the Amendment as it was executed. While it is true that Qwest billed power plant charges and power usage charges at as-ordered levels prior to the Amendment, the only rational inference to draw from this fact is the precise opposite of what McLeod argues. McLeod claims that "there

[4] McLeod Opening Brief, at 6.

is every reason to believe" that the power plant and power usage elements would continue to be treated in the same fashion.

There are at least three problems with this argument. First, the argument is another instance of McLeod using extrinsic evidence in one breath and condemning Qwest's use of such evidence in the other. At page 10 of its opening brief, McLeod suggests that Qwest asks the Commission "to rely exclusively on documents beyond the Amendment." This misstates Qwest's position. Qwest believes the Commission should follow Utah law to interpret the Amendment. As discussed at length, and with numerous supporting authorities, in Qwest's opening brief, that requires that the Commission look first to the words of the Amendment, but also requires an examination of extrinsic evidence of intent at the time of contracting to determine whether an ambiguity exists, and if either the language of the agreement or the extrinsic evidence of intent reveal an ambiguity, extrinsic evidence is admissible to establish the parties' intent at the time the Amendment was executed and approved.

McLeod has no consistent argument regarding extrinsic evidence. While McLeod condemns "reliance on external documents" at page 10 of its opening brief, nearly its entire argument depends on evidence extrinsic to the contract and irrelevant to the parties' intent. The entire testimony of Mr. Morrison, and the vast majority of Mr. Starkey's testimony, consist of nothing but extrinsic evidence offered in support of McLeod's interpretation of the Amendment. However, none of that testimony has any bearing whatsoever on the parties' intent, because there is no evidence any person involved in negotiating or evaluating the Amendment, on either side, ever considered anything approaching the engineering or economic analysis presented by Mr. Starkey or

Mr. Morrison. Indeed, McLeod's only extrinsic evidence that potentially relates to the parties' intent is its discussion of "past practice" with regard to billing, but even this evidence further undermines McLeod's arguments and supports Qwest's interpretation, which is the second problem with the "past practice" argument.

The factual problem with the "past practice" argument is that while McLeod's attorneys now argue that "there is every reason to believe" that the parties intended to change the way power plant charges were to be assessed, the evidence is clear that McLeod did not, in fact, have any belief (a) that the billing practices for power plant and power usage charges were tied to each other; or (b) that the Amendment would change both rates. As noted in Qwest's opening brief, McLeod did not form any such belief until several months after the Amendment was executed.[5] In its opening brief, McLeod attempts to minimize the responsibilities of the persons who evaluated and obtained the DC Power Measuring Amendment for McLeod, but the fact remains that it was these persons, not McLeod's audit group several months later, who established McLeod's intent at the time the Amendment was executed. McLeod even admits that Qwest Exhibit 1.4, the spreadsheets prepared by the group that evaluated and obtained the Amendment "follows Qwest's interpretation of the Agreement."[6] These employees were charged with saving McLeod money on its collocation power expenses, and did so, even under Qwest's interpretation. The Iowa Board took this same view of the spreadsheet information, "find[ing] the McLeodUSA internal spreadsheet tends to support Qwest's interpretation."[7]

[5] Qwest Opening Brief, at 16-23.
[6] McLeod Opening Brief, at 14.
[7] Iowa Board Order, Attachment A, at 10.

Second, the Amendment states that "[e]xcept as modified herein, the provisions of the [underlying interconnection] Agreement shall remain in full force and effect." If the parties intended to modify the way power plant charges were assessed, they would have said so in the Amendment. There is no mention of power plant charges in the Amendment. Indeed, as noted above, contrary to McLeod's assertions at page 7 of its opening brief that there is nothing "in the Amendment that suggests" that power plant charges were to be billed differently than power usage charges, the first sentence of section 1.2 of the Amendment excludes and differentiates power plant charges from the power usage charges to be changed by the Amendment. Thus, the only reasonable inference to draw from the absence of any mention of power plant charges in the Amendment is that the parties did not intend to change them from the way those charges were assessed in "past practice."

Qwest's public statements of its intent regarding the Amendment, made months prior to McLeod's execution of the Amendment, support this interpretation. Qwest provided McLeod with notice of these statements, McLeod agreed these issues were important,[8] and agreed it should pay attention to these important notices and issues.[9] Even McLeod's opening brief admits that these same employees who evaluated and obtained the Amendment had worked on similar DC power issues in other states, suggesting that there was sufficient experience and expertise within this group and within McLeod to evaluate the "important" issues presented in the Amendment.

McLeod attempts to discount the product catalog ("PCAT") and Change Management Process ("CMP") documents in its opening brief by setting up two straw

[8] Tr. 42.13-17. McLeod had also participated in several regulatory dockets pertaining to DC power charges prior to executing the DC Power Measuring Amendment. Tr. 42.18-25.
[9] Tr. 42.10-12.

men in order to knock them down. With respect to the CMP documentation found at Qwest Exhibit 1.2, McLeod contends that the CMP documentation cannot trump an interconnection agreement, and the CMP documentation stated that an amendment would not be required, in order to argue that the CMP documents are meaningless. But there is no dispute as to whether an amendment would be required. The parties executed an amendment. Moreover, the question of whether an amendment would be required is totally irrelevant to whether Qwest intended to change the power plant charges. Even if no amendment were required, Qwest had stated its plain intent to change only the power usage charges, not the power plant charges. In such an event, McLeod would have no contractual argument that the power plant charges should be changed – which further supports that the Amendment itself did not accomplish something Qwest said would not happen even in the absence of an amendment.

The second straw man McLeod sets up is that the PCAT (Qwest Exhibit 1.1) mentions a "Capacity Charge," but the Amendment does not, leading to the conclusion that the Amendment intended to change the power plant charges. First, the PCAT is a document that refers to several DC power product offerings, of which DC Power Measuring is only one. The PCAT only contains a reference to the "Capacity Charge" in the definitional section. Consistent with the Amendment, the Power Measuring product description does not contain a reference to the "Capacity Charge." The inference to be drawn from the absence of the "Capacity Charge" in the Power Measuring section of the PCAT is the same inference the Commission should draw from the absence of a reference to power plant charges in the Amendment: the Amendment did not intend to change these charges.

II. MCLEOD'S INTERPRETATION IS NOT CONSISTENT WITH THE RELEVANT ENGINEERING AND ECONOMIC PRINCIPLES, INCLUDING THOSE IN QWEST'S TECHNICAL PUBLICATIONS AND COST STUDY.

A. Qwest's Interpretation of the Amendment is Consistent with How Qwest Engineered the Power Plant to Accommodate CLEC Orders, and is Non-Discriminatory.

It is telling that in this section of its opening brief, McLeod essentially seems to say "Well, it doesn't really matter what the parties agreed to, the Commission has to rewrite the parties' contract if it is to avoid a discriminatory outcome."[10] In other words, McLeod would have the Commission disregard the fact that the Commission ordered and approved the specific Power Plant rates at issue, disregard the fact that McLeod paid these rates without protest for nearly four years, disregard the fact that McLeod never intended to affect the Power Plant rates at the time it executed the Amendment, disregard the fact that McLeod did indeed order power in the amounts billed, and disregard the fact that McLeod can reduce that ordered amount if it wishes to do so.

Instead, McLeod suggests that it is appropriate to interpret the contract in a way that is at odds with all of these factors in order to avoid what McLeod claims is discrimination in the application of the rate.

However, in a contract interpretation case such as this, the Commission cannot ignore those factors, and is instead bound by them in its interpretation of the Amendment. More importantly, the Commission does not need to rewrite the contract to avoid discrimination, because the Amendment is not discriminatory as intended and interpreted

[10] "If the 2004 Amendment is to be interpreted consistent with Qwest's obligation to provide McLeodUSA non-discriminatory access to DC Power and charged on a TELRIC-compliant basis, then the Amendment must be consistent with the efficient engineering of the central office DC Power Plant. *McLeod Opening Brief, p. 17.*

by Qwest. Furthermore, as Qwest demonstrated in its opening brief, McLeod's proposed result is inconsistent with the engineering testimony of both Qwest's witness and McLeod's witness, and in fact would work a significant preference in McLeod's favor.

McLeod states that the "key disputed engineering principle is whether Qwest engineers (*i.e.*, sizes) its DC Power Plant using the List 1 drain of all telecommunications equipment in the CO (equipment of both Qwest and its CLEC collocators), as Mr. Morrison and numerous Qwest technical documents claim, or based on List 1 Drain for Qwest equipment and the size of the CLEC's power feeder cables (what Qwest assumes to be the CLEC's List 2 drain) for CLEC equipment, as claimed by Qwest witness Mr. Ashton." *McLeod Opening Brief p. 17.*

McLeod is wrong – this engineering principle is not legitimately in dispute. Qwest's witness presented essentially unrebutted testimony establishing that Qwest did indeed take the full amount of the CLEC order into account when designing and engineering its power plant in connection with the requirement to meet CLEC power orders during the 1999-2000 time frame.[11] McLeod may argue that it was unreasonable or unwise for Qwest to do so, or even contrary to Qwest's technical publications, but McLeod has not presented any evidence that Qwest did not do so.

Before discussing the issues around Qwest's technical publications and Qwest's actual practices in designing and engineering its power plant facilities, it is important to note that each and every McLeod "engineering" argument shares two characteristics – none of them has anything to do with the Amendment, and all of them could have been raised in the cost docket. This fact illustrates that McLeod's engineering arguments are simply a collateral attack on the cost docket rates. These are rates that apply equally to

[11] Qwest Exhibit 3, pp. 5-7.

all CLECs, and Qwest has interpreted and applied the Amendment in the same way as to all CLECs.

However, there is ample evidence in the record that McLeod does not comport itself like other CLECs in terms of power ordering, that McLeod tends to over-order capacity, and that McLeod can change its order if it wishes to do so.[12]

In addition, the evidence of record shows not only that McLeod *expects* the ordered amount of power plant capacity to be available to it if it ever demands that capacity, but does not wish to pay for either the ordered amount, or even what it claims is the properly engineered amount (List 1 Drain). Rather, McLeod would pay only for a small percentage of the power plant capacity that it orders – based on actual usage measured at a particular point in time. This amount corresponds to the red line in Qwest's Hearing Exhibit 11, not the List 1 Drain amount reflected by the green line, and not the ordered amount shown by the blue line. As such, it is McLeod's interpretation of the Amendment that is clearly at odds with the engineering principles that McLeod claims should be followed.

Qwest's interpretation of the Amendment, consistent with Qwest's clearly expressed intent, is consistent with how Qwest engineered power plant in response to CLEC orders, and Qwest has presented clear and persuasive evidence in support of the need to engineer in the manner it did. In considering the engineering arguments advanced by McLeod, all of the above points provide critical context within which to evaluate McLeod's arguments.

[12] Mr. Ashton explained how McLeod tends to oversize its cables. Tr. 297-299. Mr. Easton discusses Qwest's Power Reduction option. Qwest Exhibit 1, pp. 16-17; 22-23. Mr. Morrison also testified alternately that McLeod orders according to ultimate List 2 drain (*e.g.*, Tr. 158.24 – 159.8, 167.2-8) and that McLeod orders a larger amount of power based on fuse size, which is at least 125% of List 2 (*e.g.*, Tr. 147.19 – 148.4).

The Technical Publications

At pages 19-20 of its Opening Brief, McLeod argues that all of Qwest's technical publications specify that Qwest should engineer to List 1 drain. From that, McLeod concludes that any Qwest testimony stating that Qwest engineered to List 2 drain for CLECs is simply not credible. However, McLeod ignores several critical facts.

First, when Qwest began receiving orders for CLEC collocation and power, there was no experience upon which Qwest could reasonably make any decisions or judgments to "downsize" the CLEC order for planning purposes. This is discussed in more detail below.

Second, Qwest did not know the List 1 drain of CLEC equipment, and could not reasonably estimate it, also discussed below.

Third, Qwest does not contend that "the power requirements of CLECs were so significant as to create a special engineering scheme for sizing" power plant. *McLeod Opening Brief p. 20.* Indeed, McLeod itself contends that overall CLEC power needs are but a small component of Qwest's overall power capacity.[13] Rather, as Qwest has explained, for the CLEC orders that generally all came in over the same 18-24 month period, Qwest in essence made a "battlefield decision" about how to make sure that it had sufficient capacity to meet CLEC orders. There was simply no need to memorialize that in the technical publications. But it was that decision that informed the subsequent pricing decision, litigated and approved in the cost docket, to charge CLECs in accordance with their ordered amount of power.

[13] Tr. 164.

List 1 Drain for CLEC Equipment

McLeod next contends that Qwest should have or could have known the List 1 drain for CLEC equipment. *McLeod Opening Brief pp. 21-24.* That is not the case. Again, here McLeod makes a number of arguments that it could have made in the cost docket, alleging that McLeod's order for power cables "is not an order for power plant capacity." *McLeod Opening Brief p. 21*. Contrary to McLeod's assertion, the order for power cable is precisely that – an order for power plant capacity. Qwest explained this in the cost docket (Hearing Exhibit 13) and the Commission accepted Qwest's proposal with regard to the application of the Power Plant rates on an as-ordered basis, even as the Commission undertook substantial revisions to other aspects of those same Power Plant rates.

With regard to the argument that Qwest could have known or calculated List 1 drain for the CLEC equipment, Qwest disagrees, and McLeod's own evidence supports Qwest. Qwest presented evidence showing that it is not familiar with a significant amount of the CLEC equipment, and that Qwest did not (and does not) know when or whether any particular CLEC might demand power at the ordered level of capacity.[14] Nor does the other information that McLeod provides in terms of forecasts for trunks and circuits shed any light on the timing of when McLeod might demand power plant capacity at its ordered level. Further, the fact that Qwest *now* has CLEC power usage information cannot be used to reengineer the power plant with the benefit of hindsight. In addition, all of the proxies that McLeod contends would have worked to produce a List 1 drain for CLEC equipment (*McLeod Opening Brief p. 23*) fail in connection with McLeod's own equipment. If Qwest had used a 30-40% factor to estimate List 1 drain

[14] Tr. 165; 300-301.

from the stated List 2 drain in Figure 6 in Mr. Morrison's testimony, Qwest would have been wrong by a factor of nearly 100%. Thus, McLeod's suggestion that Qwest could have estimated McLeod's List 1 drain is disproved by McLeod's own evidence.

McLeod next contends that because Qwest erred in failing to request List 1 drain, Qwest should bear the responsibility of that error. *McLeod Opening Brief p. 22.* Qwest disputes that any error was made. The fact that Qwest might, at some point in time, with all of its accumulated experience, decide to provide only List 1 drain to the CLECs, does not change Qwest's decision, reasonable at the time, to engineer to List 2 for CLEC orders. The fact is that McLeod candidly admits that it *expects* to have the ordered capacity available to it if it should ever demand it.[15] This alone supports Qwest's engineering decisions, and establishes that Qwest did not unreasonably fail to capture necessary information at the time it was fulfilling CLEC power orders.

Again, the application of the Power Plant rate is an issue for a cost docket. All of the engineering arguments that McLeod makes could have been presented in that docket, and McLeod could have advocated for a rate that would be applied on a measured basis, or on the basis of List 1 drain, or some other way. That would have been the appropriate place to raise these issues, not in a case ostensibly brought to enforce an interconnection agreement but that is really an attack on the rate itself.

The simple solution for McLeod is to take advantage of the Power Reduction Amendment, as Qwest has explained in its testimony. Because McLeod controls this option, McLeod cannot simply refuse to take advantage of it and then cry that Qwest is discriminating by charging McLeod for the amount of power plant that McLeod ordered and has available to it.

[15] Tr. 102.

Actual Construction of Power Plant Facilities.

Surprisingly, McLeod next argues the question of whether Qwest has actually had to add power plant capacity as a result of CLEC orders. *McLeod Opening Brief pp. 24-25.* This is surprising because it is entirely irrelevant to the issue of the interpretation of the Amendment or the proper application of Power Plant rates. McLeod has admitted that Qwest does not necessarily have to invest in additional power plant equipment relative to a particular CLEC's collocation order before it can legitimately assess its collocation power rates.[16] As such, this issue does not seem to be legitimately in dispute.

If, for example, Qwest's 2000 amp power plant has 1000 amps of capacity available, it will not necessarily add capacity in response to a McLeod order for 200 amps. Qwest will, however, be 200 amps closer to needing additional capacity than it otherwise would be. If the power plant did not have sufficient capacity to accommodate McLeod's order, Qwest would in fact augment.[17] McLeod agrees that power plant additions do not dictate whether Qwest can charge power plant rates. Thus, the question of when and whether Qwest's engineering practices and the management of its power facilities necessitates a power plant addition has no real bearing on any of the questions presented in this case.

Power Plant as a Shared Resource

Finally, McLeod argues that Qwest is not justified in charging its Power Plant rate on an "as ordered" basis because the power plant capacity is pooled and shared by all telecommunications equipment in the office, regardless of ownership. *McLeod Opening*

[16] McLeod Exhibit 3-SR, p. 31.
[17] "Qwest plans its DC power plant capacity so that if a CLEC orders a certain amount of power capacity in its power feeds, that amount of power capacity is made available to them in the power plant." Qwest Exhibit 3, p. 5.

Brief p. 25. McLeod contends that because it is not possible to "reserve" or "assign" a given level of power plant capacity for any individual users, it is inappropriate to charge based on the ordered amount. Instead, McLeod would correlate the amount of power consumed at any given point in time to the amount of power plant capacity "consumed" by that particular user.

Again, although it is wrong, this argument might legitimately have been made in the cost docket, or in ICA negotiations, in opposition to Qwest's proposed rate design. However, made in the context of this proceeding, this argument does not shed any light on the interpretation of the language of the Amendment and does not tend to prove or disprove McLeod's discrimination claim. It also provides no basis upon which to conclude that the application of the rate "as ordered" is improper.

Perhaps the most telling information on this "shared resource" argument is that even though McLeod wants to be *charged* on a usage basis, McLeod very specifically states that it would *not* recommend that Qwest base its engineering decisions on McLeod's usage characteristics.[18] This supports a conclusion that McLeod would like to have plenty of spare power plant capacity available to it, and have Qwest bear the costs.

In fact, the power plant capacity that is made available to the CLEC corresponds to the ordered amount, in accordance with Qwest's testimony on this issue. On an order of 100 amps, McLeod might be consuming 18 amps of power during one measurement, 37 amps the next, and 42 amps the next time a measurement is taken. But Qwest has made 100 amps of power plant capacity available to McLeod, in accordance with its order. That power plant is in place, ready to provide the requested capacity, regardless of how much power is actually consumed. Regardless of whether this capacity is reserved

[18] McLeod Exhibit SR-2, p. 10, fn. 10 and Tr. 140-142.

or dedicated, it is nevertheless appropriate for McLeod to pay for the amount it orders and expects to be made available should the need arise. On the other hand, McLeod's position would require Qwest to make available *and bear the costs for* the difference between the amount of power plant capacity McLeod orders and McLeod's actual level of power consumption at any given point in time.

Qwest knows that McLeod's demand on the capacity of the power plant will be bounded on the upper end by the size of the cable feed. In other words, if McLeod orders a 100 amp cable, Qwest can be reasonably sure that McLeod will not draw more than 100 amps unless McLeod ignores engineering and safety standards. This allows Qwest to make rational decisions about the need to size its power plant, and provides an upper limit beyond which Qwest would not be responsible to plan for. The question then becomes "If McLeod wants to order spare power plant capacity, who should bear the cost for that?" And the answer must be that McLeod does – otherwise, McLeod has little incentive to size its cable and its demand for power plant capacity appropriately.

B. Qwest's Use of Cable Orders to Charge for Power Plant is Consistent with Qwest's Cost Study and Non-Discriminatory.

McLeod's arguments on the cost study fall into two main categories. First, McLeod argues that Qwest's application of the rate is inconsistent with how the rate was developed in the cost study. *McLeod Opening Brief pp. 27-28*. Next, McLeod argues that the application of the rate on an as-ordered basis is discriminatory. *McLeod Opening Brief pp. 28-30.* Qwest disagrees.

The cost study is relevant, if at all, only to corroborate Qwest's position that its interpretation of the Amendment is consistent with how Qwest told the Commission the rate would be applied, and it does in fact do just that. To go further, as McLeod does,

and challenge the application of the rate, is to attack the rate itself. This is especially true here, where if McLeod's arguments are correct, they would have applied with equal force prior to the execution of the Amendment,[19] yet McLeod paid the Power Plant rates on an as ordered basis for years without complaint.[20] This is a clear illustration that McLeod, now unhappy with the effect and intent of the Amendment, is seeking to force Qwest to lower its rates by claiming discrimination. Again, McLeod's arguments on this point are nothing more than a collateral attack on the Commission's cost docket order.

The simple fact of the matter is that the cost study is neither usage-based nor is it order-based in terms of the actual cost calculation. As Qwest explained in the hearing, the cost study simply develops a cost per amp of capacity.[21] The question of how to apply that cost per amp was also a part of the cost docket though, and information about Qwest's proposed rate design (i.e., that the rate applied on a per amp ordered basis), was contained in the cost study documentation, in evidence as Hearing Exhibit 13.

However, for McLeod to say that the study is usage-based is simply wrong. The study does not contain usage assumptions.[22] Nor does it employ a fill factor,[23] even though use of a fill factor is a hallmark of a usage-based study.[24] And, the study assumes that all of the investment to provide the power plant capacity is added at once, not incrementally or based on demand. In addition, Qwest explained that the study was not usage based in two separate data request responses, admitted into evidence as Hearing Exhibits 18 and 19.

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[19] Tr. 334-335.
[20] Tr. 336.
[21] Tr. 290.
[22] Id.
[23] Id.
[24] McLeod Exhibit 3-SR, p. 18.

McLeod's discrimination arguments are also not supported by the cost study. McLeod's arguments rely on McLeod's erroneous conclusion that the cost study develops a cost on a "per amp used" basis. As shown herein, and in Qwest's Opening Brief, that is simply not the case. Thus, McLeod's Examples A, B, and C in its Opening Brief, relying as they do on this incorrect assumption, are not helpful in evaluating McLeod's claims. As Mr. Ashton explained, Example A is incorrect because if Qwest were to determine that the demand on its power plant was going to be 1000 amps, it would install more than 1000 amps of power plant capacity.[25] Thus, the baseline "facts" that are assumed to support the examples are wrong – Qwest would have assumed an installed capacity of greater than 1000 amps on these facts, thereby increasing the investment, and rendering the resulting examples meaningless. In fact, McLeod's over-recovery claims, purportedly illustrated by Example C, are pure speculation, as there is simply no evidence in this record that supports Example C, or suggests that it is even vaguely grounded in fact.

III. QWEST IS NOT VIOLATING THE LANGUAGE OF THE AMENDMENT AND IS NOT DISCRIMINATING AGAINST MCLEOD.

In Section III of its Opening Brief, McLeod asserts that Qwest is in violation of the language of the Amendment, and is discriminating against McLeod in the application of the Power Plant rate on an as-ordered basis. *McLeod Opening Brief pp. 30-35.* McLeod's discrimination claim must fail for a number of reasons:

First, and most importantly, McLeod *agreed*, in its ICA, to pay the Power Plant charges on an as-ordered basis. Once the Commission has found that the Amendment did

[25] Tr. 294.

not alter those charges, McLeod cannot unilaterally amend the underlying agreement by claiming that a term to which it previously *freely agreed* is discriminatory.

Second, there is absolutely no evidence in the record to establish that Qwest treats McLeod differently than other similarly situated CLECs, which is the essence of a discrimination claim. To the extent that McLeod is alleging that Qwest grants itself a preference, Qwest's evidence shows that McLeod is wrong. Qwest does not actually provide "collocation" to itself – Qwest owns the central offices in which CLECs are collocated – thus, it is difficult to draw the comparison that McLeod seeks with regard to Qwest's provision of collocation to itself. Nevertheless, Qwest's provision of power plant capacity to itself is not preferential vis-à-vis its provision of capacity to CLECs.

Third, Qwest makes available to CLECs the amount of power plant capacity they ordered, and charges in accordance with Commission-approved rates.

Fourth, when McLeod allows collocators in its facilities, McLeod charges its collocators for power plant capacity in accordance with the size of their power cables, exactly the same way that Qwest's Power Plant rates are structured.

Fifth, McLeod has failed to take advantage of Qwest's offer to re-fuse its existing power cables, thereby lowering the "ordered amount" and correspondingly lowering the amount billed.

Sixth, and finally, the Commission cannot and should not make conclusions about discriminatory impacts based on the experience of only one CLEC, McLeod, whose practices may or may not be reflective of the larger CLEC community as a whole.

Qwest will discuss each of these points in greater detail below.

A. McLeod Consented to Having the Power Plant Rate Assessed on an As-Ordered Basis

McLeod's discussion of discrimination contains a very telling admission, set forth here in its entirety. McLeod states, at page 35 of its Opening Brief, that "[t]he nondiscrimination mandate of § 251 of the Act is unconditional. If Qwest sizes DC power plant for itself at List 1 drain, and would therefore impute (at a maximum) the related costs at List 1 drain, then Qwest *must* impute the same costs to McLeodUSA as well. Any other course, *absent the consent of the CLEC,* is a clear violation of § 251 of the Act and Utah Code Ann. Sections 54-8b-3.3(a) and (b)" (second emphasis added).

That is just the point. McLeod *did* consent to the application of the power plant rates on an as-ordered basis in its interconnection agreement. There is no evidence that McLeod tried to obtain a different rate or rate design at the time the contract was formed. There is no evidence that Qwest has failed to apply the rate as originally agreed. There is no evidence that Qwest somehow changed the way it operates between the execution of the interconnection agreement and the present to somehow shift the playing field to disadvantage McLeod. To the contrary, the bargain that the parties struck is the one that is still in place, on terms and conditions and with rates already determined by the Commission to be non-discriminatory.

As noted above, the Commission does not have jurisdiction to rewrite the parties' Commission-approved interconnection agreement. That agreement is a binding contract that the Commission has authority to enforce, but not change outside the context of an arbitration.[26] Once the Commission has found that the Amendment did not alter those charges, as it must, McLeod cannot unilaterally amend the underlying agreement by claiming that a term to which it previously *freely agreed,* regarding a rate approved by

[26] Changing the terms of interconnection agreements "contravenes the Act's mandate that interconnection agreements have the binding force of law." *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003).

the Commission as non-discriminatory, within an agreement separately approved by the Commission as non-discriminatory, is discriminatory. Which brings us back to what this case is really all about, and that is what the parties consented to in the ICA and the Amendment. As McLeod correctly observes in the above-quoted passage, the parties can consent to any manner of terms and conditions and rates,[27] and with consent, there is no discrimination.

McLeod's only real "remedy" (though remedy seems an odd word since McLeod has not been harmed) in connection with its complaint about Power Plant rates is to negotiate and arbitrate this issue at the termination of its current interconnection agreement.

B. Qwest Provides Collocation and DC Power Plant on a Non-Discriminatory Basis

There is absolutely no evidence in the record to establish that Qwest treats McLeod differently than other similarly situated CLECs, which is the essence of a discrimination claim. All CLECs are treated the same under Qwest's Power Plant rate structure, and billed in accordance with the ordered amount. Nor does McLeod seem to contend that it is treated differently from other CLECs. Rather, McLeod contends that Qwest prefers its own operations in the provision of collocation and DC power plant capacity. As noted though, Qwest does not actually provide "collocation" to itself – Qwest owns the central offices in which CLECs are collocated – thus, it is difficult to draw the comparison that McLeod seeks with regard to Qwest's provision of collocation

[27] Qwest does not agree that the Power Plant rate structure disadvantages McLeod, for all the reasons discussed in this and Qwest's Opening Brief. Nevertheless, assuming, *arguendo*, that it does, it is nevertheless non-discriminatory because of McLeod's voluntary agreement to that rate structure. See, e.g., Section 252(a)(1) which provides that "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title." Subsections (b) and (c) of Section 251 contain the non-discrimination standards upon which McLeod relies.

to itself. Nevertheless, Qwest's provision of power plant capacity to itself is not preferential vis-à-vis its provision of capacity to CLECs.

Although McLeod makes a number of claims to the effect that Qwest must treat McLeod in a manner that is identical to how it treats itself, that is clearly not the state of the law. For example, with caged collocation, CLECs who are physically collocated place their equipment in locked cages. Clearly Qwest does not place its own equipment in locked cages, and just as clearly this practice does not constitute discrimination.

If anything, Qwest has chosen to make available to the CLECs a higher level of confidence and security that the requested power plant capacity will be available. This does not constitute granting a preference to itself. Rather, with full disclosure in terms of how it planned to apply the power plant rates, Qwest received approval for that proposal, and in fact McLeod consented to it. That the CLECs should pay in accordance with the power plant capacity made available to them does not disadvantage them in any way, especially because Qwest offers a way to reduce the ordered amount, as described below and in Mr. Easton's testimony.

Qwest's collocation power provisioning is also non-discriminatory because the CLECs are getting what they pay for, and paying for what they get. Mr. Ashton's testimony explains how Qwest makes available to CLECs the amount of power plant capacity they ordered. Qwest then charges for power plant in accordance with Commission-approved rates. Both Qwest and the CLECs incur power plant costs relative to the amount of power plant capacity made available to them. Of course it may be that in the real world Qwest also incurs costs for the spare capacity of the plant, and costs for the central office to house the plant, and costs associated with planning for future power

needs, all of which benefit the CLECs in some non-quantifiable way. Thus, there is simply insufficient basis upon which to find that Qwest's pricing structure for power plant is discriminatory, which is why these rates are set in a cost docket in the first instance, where these types of issues can be explored.

One thing that *can* be evaluated in this docket is McLeod's own practices regarding collocation pricing, and those practices undercut McLeod's discrimination claims. When McLeod allows collocators into its own facilities, McLeod's pricing practices are similar to Qwest's. McLeod also charges its collocators for power plant capacity in accordance with the size of their power cables, exactly the same way that Qwest's Power Plant rates are structured. McLeod contends that Qwest's Commission-approved rates for power plant at the level of amps specified in CLECs' power feed or cable orders are improper, but Exhibits 25-27 show that in order to obtain a power feed or cable of a certain size, McLeod's collocators *must report and be billed for* "usage" at the level of the desired cable size. Because McLeod's collocators must report usage at X amps in order to obtain a cable size of X amps, McLeod's claim that it offers usage-based power pricing is illusory.[28] Thus, McLeod charges for both power usage and power plant based on the amount of amps reflected in their own collocators' power feed orders, not on a measured basis – the precise practice McLeod condemns as discriminatory by Qwest. And there is no evidence that McLeod offers its collocators the power reduction option Qwest makes available.

McLeod failed to take advantage of Qwest's offer to re-fuse its existing power cables, thereby lowering the "ordered amount" and correspondingly lowering the amount

[28] McLeod's Exhibits 28 and 29 do nothing to alter this fact. Mr. Starkey and Mr. Morrison state that McLeod *says* it bills on a "usage" basis, but it is evident from both the Washington and Arizona transcripts that when McLeod says "usage" it really means "size of the cable feed".

billed.[29] McLeod cannot be heard to claim that Qwest is overcharging it for power plant when the ability to lower those charges is in McLeod's control.

Finally, the Commission cannot and should not make conclusions about discriminatory impacts based on the experience of only one CLEC, McLeod, whose practices and claims may or may not be reflective of the larger CLEC community as a whole. As Qwest has previously explained, McLeod's power ordering practices may or may not be reflective of what other CLECs do, and in fact it is likely, based on Mr. Morrison's testimony, that McLeod oversizes its cable. The terms and conditions and prices for power plant are the same for all CLECs – they are billed on an "as ordered" basis. The Commission should not make decisions about that pricing scheme outside of a cost docket with broad participation. This is particularly true in a case such as this one where a significant number of CLECs have the same Amendment terms as McLeod, yet none is making the same complaint.[30]

SUMMARY AND CONCLUSION

The only interpretation of the Power Measuring Amendment that is consistent with all of the language in the Amendment is Qwest's. Qwest's interpretation is also consistent with Qwest's obligation to provide collocation on a non-discriminatory basis. Contrary to McLeod's contentions, Qwest does not obtain a windfall from the

[29] Power Reduction is an option that allows a CLEC to change its power capacity by reducing its ordered amps. Power Reduction can either be ordered "with Reservation" or "without Reservation". DC Power Reduction with Reservation allows a CLEC to reduce ordered amps on a secondary feed to zero while at the same time reserving the fuse position on the Power Distribution Board. The charge for this reservation holds the power cabling and fuse positions in place for potential future power restoration requests. Power Reduction without Reservation allows a CLEC to reduce the power on primary and secondary feeds down to a minimum of 20 amps. Billing for the initial power ordered at the collocation site will be modified to reflect the reduced amount of power. Qwest Exhibit 1, pp. 16-17

[30] Qwest Exhibit 1, p. 14.

Commission-approved, cost-docket-vetted Power Plant rates that it charges to McLeod. McLeod knows, when it places a cable order, that it will be billed in accordance with the size of that order for the power plant component of the DC power rates.

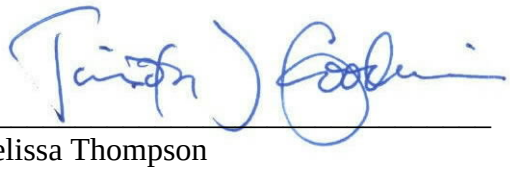
Nor does Qwest treat itself "better" than McLeod in this regard, as McLeod has available to it the full amount of power plant capacity ordered. McLeod's interpretation of the agreement is simply not grounded in either the language of the Amendment or the parties' actual intent when the Amendment was executed. McLeod's interpretation is neither equitable nor is it non-discriminatory – in fact, McLeod recommends an interpretation that would allow it to pay for far less power plant capacity than is actually available to it, and even far less than McLeod claims that Qwest should make available from an engineering standpoint.

Further, the way Qwest assesses power plant charges is precisely the same way that McLeod assesses power plant charges to the collocators in McLeod's own facilities. It is unlikely that McLeod believes that it is discriminating against its collocation customers by employing a rate structure that charges for power plant on a "per amp ordered" basis. Finally, Qwest's reading of the Amendment is also more consistent with Qwest's own cost model and with how Qwest actually incurs power plant costs.

The Commission should thus deny McLeod's complaint, and hold that Qwest has properly implemented the Power Measuring Amendment by assessing the usage rate, but not the power plant rate, on a measured basis.

DATED this 9th day of August, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that the original and five copies of the foregoing were hand delivered on August 9, 2006 to:

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And a true and correct copy was sent by U.S. mail, postage prepaid, on August 9, 2006, to:

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