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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 MCLEODUSA'S REPLY BRIEF

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

INTRODUCTION

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

But it is not true. By executing the Amendment in August 2004, Qwest received significant legal benefit. The parties' ICA previously was silent with respect to how the DC

power rates were to be applied.[1] The Amendment corrected that deficiency. Qwest also had interpreted the ICA to authorize Qwest to discriminate against McLeodUSA by charging for DC power based on the size of McLeodUSA's power cables, which Qwest does not do to itself and which is fundamentally inconsistent with Qwest's own technical publications and engineering practices. The Amendment, if properly interpreted, brings Qwest's actions with respect to DC power into conformance with the manner in which Qwest treats itself. Qwest thus received more than adequate legal consideration for executing the Amendment.

The benefit that McLeodUSA received, on the other hand, was to no longer be the victim of discrimination and of rates assessed in a manner that provides Qwest with a substantial windfall. Qwest, however, seeks to retract some of that benefit by interpreting the Amendment to relieve only a portion of the discrimination. Qwest then adds insult to injury by suggesting that McLeodUSA is being greedy because it is not satisfied that Qwest is providing some reduction in the unlawfully excessive amount of DC power charges that McLeodUSA has been paying. Only an incumbent like Qwest would expect a CLEC to be satisfied with Qwest's willingness to eliminate only a portion of the discriminatory access to DC power. Fortunately, the law does not share Qwest's expectation that McLeodUSA should be satisfied with merely reducing the unlawful discrimination and instead requires access, including the charges for DC power, be nondiscriminatory (consistent with McLeodUSA's interpretation of the Amendment).

On at least one point McLeodUSA and Qwest agree: this is largely a case of contract interpretation and the Amendment itself is the best source of evidence as to the agreement

[1] Although silent with respect to how rates for power were to be applied, the Interconnection Agreement ("ICA") between the parties is unequivocal that Qwest must provide McLeodUSA access to power at parity with how Qwest provides it to itself. *See infra*, p. 9. Accordingly, any rate application must fulfill this nondiscrimination obligation even if not specified in the ICA.

reached by the parties. The disagreement, however, is about the proper interpretation of the Amendment. If read in its entirety, without manipulation, the DC Power Measuring Amendment requires Qwest to bill McLeodUSA only for the DC power – including power plant capacity – that McLeodUSA actually uses. Contrary to Qwest's gerrymandering, the language of the Amendment is consistent with this requirement. Neither party manifested any contrary intent prior to the execution of the Amendment. McLeodUSA's interpretation of the Amendment is also in full accord with Qwest's engineering principles and practices, as well as Qwest's collocation cost study.

McLeodUSA's interpretation, moreover, is consistent with the legal requirement of nondiscrimination. Noticeably absent from Qwest's Initial Brief is any argument addressing the issue of discrimination head on. That is because Qwest has no answer: Qwest's admitted practice of treating McLeodUSA differently than Qwest treats itself in terms of accessing and paying for DC power plant is clearly discriminatory. While Qwest attempts to argue that its treatment of CLECs is "reasonable," Qwest never once addresses the nondiscrimination requirements of Section 251(c) of the Telecommunications Act of 1996 ("Act"), and the comparable Utah law, governing Qwest's obligation to provide McLeodUSA DC power to operate its collocated equipment.

Qwest tacitly asks this Commission to ignore the clear legal requirement for nondiscriminatory access to the central office power plant in blessing Qwest's interpretation of the DC Power Measuring Amendment. The Commission should reject Qwest's invitation. The Commission should instead adopt the McLeodUSA interpretation which is consistent with these nondiscrimination requirements, consistent with the way in which Qwest designed the power plant rate, consistent with the manner in which Qwest engineers is power plant,

and most importantly, consistent with a plain reading of the Amendment and the underlying Interconnection Agreement ("ICA"). The Commission should, at a minimum, find that Qwest's interpretation of the Amendment results in unlawful discrimination in violation of Utah law. The record demonstrates that Qwest admittedly treats CLECs differently than itself with regard to provisioning DC power plant, which results in much higher power charges for CLECs and a significant windfall for Qwest.

ARGUMENT

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

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

Qwest begins its argument with the principle that ICAs between incumbent local exchange carriers ("ILECs") like Qwest and competitive local exchange carriers ("CLECs") like McLeodUSA are binding contracts. McLeodUSA agrees. Qwest, however, then ignores that concept by claiming that the Commission's decision in the collocation cost proceeding, Docket No. 00-049-106, "precludes both the contract claims and the so-called 'discrimination' claims McLeod asserted in its Complaint."[2] Qwest's reliance on this extrinsic evidence is mistaken as a matter of both fact and law.

Nothing in the ICA between Qwest and McLeodUSA states, much less requires, that DC power plant rates are to be charged based on the size of the power feeder cables that McLeodUSA has ordered.[3] Nothing in Exhibit A – the rate sheet from Qwest's Statement of Generally Available Terms ("SGAT") that is incorporated into the parties' ICA – states,

[2] Qwest Initial Brief at 7.

[3] The ICA between McLeodUSA and Qwest was not introduced as an exhibit into the evidentiary record, but Judge Goodwill agreed to take administrative notice of the agreement, which is on file with the Commission. Tr. at 242.

much less requires, that DC power plant rates are charged on an "as ordered" basis.[4] There is also no statement or requirement in the SGAT itself to that effect.[5] Nor do any of the Commission orders in Docket No. 00-049-106 make any reference whatsoever to how the DC power plant rates are to be charged. The only such reference is in the Excel spreadsheet that summarizes the results of the collocation cost study that Qwest originally filed in Docket No. 00-049-106.[6] That reference is virtually meaningless, and certainly does not have the preclusive effect Qwest claims.

As an initial matter, the Commission never approved or adopted Qwest's collocation cost study. The Commission instead adopted the Division of Public Utilities' ("Division's") version of the cost model (with Commission-specified adjustments), ordered the Division to submit results of the modified model, and ordered Qwest to submit a collocation price summary consistent with the Commission's order.[7] "Upon Commission finding that the DPU and Qwest submissions reflect the rates and policies established in this Order the *filed rates* shall become final."[8] Qwest's compliance filing, as ordered by the Commission, was in the same format as Exhibit A to the SGAT and like Exhibit A did not include any statement or notation about how the DC power plant rates were to be applied.[9] The Commission thus adopted a collocation cost *model* and approved collocation *rates* but never expressly or implicitly approved the *application* of DC power plant rates based on the size of the DC

[4] *See* Hearing Ex. 9 (copy of Exhibit A).

[5] *See* Hearing Ex. 16 (SGAT excerpts).

[6] *See* Hearing Ex. 13.

[7] *In re Application by the Division for Commission Determination of a Model and to Establish Rates for Collocation for Qwest*, Docket No. 00-049-106, Erratum Report and Order at 23, Ordering Paragraphs 1 & 2 (Dec. 4, 2001).

[8] *Id*., Ordering Paragraph 3 (emphasis added).

[9] *Id.*, Qwest Compliance Filing, Utah Compliance Exhibit (May 1, 2002).

power feeds ordered by the CLEC. As such, Qwest's substantial reliance on the Commission's "approval" of DC power rates and the subsequent application of those rates in supposed agreement with Qwest's interpretation of the Amendment is illusory.

All that said, McLeodUSA agrees completely that the Commission should first consider the actual language used in the DC Power Measuring Amendment for purposes of determining how Qwest should charge McLeodUSA for DC power plant rates. And nothing in the Commission's orders in the collocation cost docket restricts how the parties could agree on the application of such rates or McLeodUSA's position on the interpretation of that Amendment. Nor does the Commission's establishment of DC power plant rates preclude McLeodUSA's claim that Qwest is unlawfully discriminating against McLeodUSA by charging Commission-approved DC power plant rates on an "as ordered" basis. The Commission has made no prior determination on this issue, and McLeodUSA is fully entitled to raise it in this proceeding.

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

Qwest cites numerous Utah court cases detailing the black letter law with respect to interpreting ambiguous contracts.[10] Yet, Qwest cites only one case applicable to interpreting ICAs – *Pacific Bell v. Pac-West Telecom. Inc.*, 325 F.3d 1114 (9th Cir. 2003) ("*Pacific Bell*"). And contrary to what Qwest claims, that decision does not prevent this Commission from correcting the unlawful discriminatory treatment to which the evidentiary record shows McLeodUSA has been subjected under Qwest's interpretation of the DC Power Measuring Amendment.

[10] Qwest Initial Brief at 8-11.

The court in *Pacific Bell* reviewed California Public Utilities Commission rulings on the applicability of reciprocal compensation provisions in all ICAs between ILECs and CLECs in California to calls bound for Internet Service Providers ("ISPs"). "[T]hese orders were adopted as part of a generic rule-making proceeding that would affect all existing 'applicable interconnection agreements' in California."[11] The Ninth Circuit invalidated the orders, concluding that the California Commission "lacks authority under the Act to promulgate general 'generic' regulations over ISP traffic" in light of the FCC's determination that such traffic is jurisdictionally interstate "thereby placing it under the purview of federal regulators rather than state public utility commissions."[12] The court also concluded:

> The CPUC's only authority over interstate traffic is its authority under 47 U.S.C. § 252 to approve new arbitrated interconnection agreements and to interpret existing ones according to their own terms. By promulgating a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements, the CPUC acted contrary to the Act's requirement that interconnection agreements are binding on the parties, or, at the very least, it acted arbitrarily and capriciously in purporting to interpret "standard" interconnection agreements.[13]

The Ninth Circuit's decision in *Pacific Bell* is a far cry from the case at hand in this proceeding. McLeodUSA filed a complaint seeking Commission enforcement of the specific Amendment to the ICA between McLeodUSA and Qwest. The ICA expressly provides that a dispute under the ICA can be resolved by a complaint to this Commission.[14] That is entirely different than the generic rules governing all ICAs that were before the court in

[11] *Id*. at 1125.

[12] *Id*.

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

[14] ICA Section 26.19.1. "If a claim, controversy or dispute between the Parties…cannot be settled through negotiation, it may be resolved by arbitration ….or by complaint to the Public Service Commission of Utah, pursuant to state law."

Pacific Bell.[15] Indeed, the Ninth Circuit overturned the California Commission orders, in part, *because* "it did not consider a specific interconnection agreement or even a specific reciprocal compensation provision."[16] Both the Amendment and the ICA between McLeodUSA and Qwest are before the Commission in this docket, and the Commission has full authority to interpret those documents.

Qwest's reliance on standard contract interpretation cases is also misplaced. Courts have recognized that ICAs are not traditional contracts. For example, the Tenth Circuit Court of Appeals recognized in a case involving Qwest that an ICA is an instrument arising in the context of ongoing state and federal regulation that have provisions to facilitate competition and ensure that carriers are not treated in a discriminatory manner.[17] That means that in interpreting the Amendment, the Commission must bear in mind that the intent of the parties entering into an ICA and any amendment thereto must be to properly implement the Act and comparable state law requirements that give rise to the ICA. Thus, the Amendment must be interpreted consistent with state and federal law requirement of nondiscrimination firmly in mind. Such interpretation is justified and is not an impermissible modification of an interconnection agreement.[18]

One of the compelling contract interpretation principles that Qwest did not cite was that related provisions in a contract must be harmonized, which is equally applicable to ICAs

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

[16] *Id*. at 1128.

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

[18] *See id.* at 1208.

and standard contracts. Before determining whether a contract provision is ambiguous, the court must first review the four corners of the agreement to determine the parties' intentions, which is controlling.[19] Accordingly, the DC Power Measuring Amendment must be interpreted in the context of the entire ICA. The ICA between Qwest and McLeodUSA makes it very clear that Qwest must provision collocation power to McLeodUSA on terms that are no worse than the terms Qwest does for itself.

> 7.1.9 Power as referenced in this Agreement refers to any electrical power source supplied by [Qwest] for McLeodUSA equipment. [Qwest] will supply power to support McLeodUSA equipment *at equipment-specific DC and AC voltages. At a minimum, [Qwest] shall supply power to McLeodUSA at parity with provided by [Qwest] to itself.* (Emphasis added.)

That section of ICA is wholly consistent with the obligation imposed on Qwest by Section 251(c) and Utah law. Thus, the intention of the parties in entering the Amendment must be presumed to be consistent with the underlying ICA and Qwest's obligation under the Act. Qwest's claim that the Amendment permits it to provide McLeodUSA access to DC power on terms less favorable than Qwest provides to itself is inconsistent with the underlying ICA and should be rejected.

It is undisputed in the record that Qwest discriminates with respect to access to DC power plant. Qwest admits it sizes DC Power plant for itself based on its List 1 drain. Qwest does not do so for McLeodUSA.[20] Discrimination is also evident from the fact that Qwest

[19] *E.g., Utah Transit Authority v. Salt Lake Southern Railroad Company, Inc.* 2006 Utah App. 46, 131 P.3d 288.

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

obtains and uses the List 1 drain information for its own equipment, but allegedly does not do so for McLeodUSA, even though Qwest's own engineering manuals make it clear that it is Qwest's obligation to obtain this information and Qwest could simply ask for this information on its collocation application.

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

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

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

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

Exhibit A and the SGAT to which it is attached.

The term actually used in the Amendment five times is "-48 Volt DC Power Usage Charge" which is not the same thing as the "Usage Charge" Qwest contends in making the argument. Twice the Amendment refers to that "-48 Volt DC Power Usage Charge" as being "specified" (Section 2.2) or "from Exhibit A of the Agreement" (Section 2.2.1). Exhibit A to the Agreement uses the virtually identical term "48 Volt DC Power Usage" in section 8.1.4 to include *all* charges associated with DC power in the subsections of that section, both "Power Plant" (Section 8.1.4.1.1) and "Power Usage" (Section 8.1.4.2). The SGAT to which Exhibit A is attached is consistent with this approach, using the exact same term as used in the Amendment – "-48 Volt DC Power Usage Charge" – among the list of rate elements for collocation, but without including any separate rate element for "Power Plant Charge."[21] The Amendment, Exhibit A, and the SGAT thus all use the term "48 Volt DC Power Usage" to include the rates for both power plant and power usage. The Amendment, therefore, did not need to use the term "Power Plant Charge" to include the charge for the DC power plant any more than the SGAT needs to include that term.

Nonetheless, the Amendment goes further to remove any confusion. It specifically defines the term "DC Power Usage Charge" (the term upon which Qwest places such dramatic importance in stating that the term is used five times in the Amendment) to include costs associated with the "power plant." Section 2.1 of the Amendment states that "the DC Power Usage Charge is for the capacity of the power plant available for CLEC's use." By defining the same "DC Power Usage Charge" as the charge for which, going forward, rates will be applied on a measured-usage basis, it is somewhat perplexing why this language

[21] Hearing Ex. 16 (SGAT excerpts) at 98, Section 8.3.1.6.

alone does not make the interpretation of the Amendment relatively straightforward for Qwest. Indeed, it seems clear that the ALJ in this proceeding pondered the same simplicity required by this language when he asked McLeodUSA witness Michael Starkey whether he would agree that the Amendment actually seems more clear with respect to its application to power plant charges, than it does for the power usage charges upon which agreement of the parties is not in dispute.[22]

Qwest's interpretation is likewise at odds with the very extrinsic evidence it attempts to rally to its defense. Qwest agrees that "-48 Volt DC Power Usage Charge" as used in Qwest's SGAT refers to all of the charges for power plant and power usage listed under Exhibit A, section 8.1.4 ("48 Volt DC Power Usage").[23] The definition of "-48 Volt DC Power Usage Charge" in the SGAT is virtually identical to the definition of that term in the DC Power Measuring Amendment.[24] Despite the undisputed facts that the exact same "-48 Volt DC Power Usage Charge" is used by Qwest in both the SGAT and the Amendment, and is defined exactly the same in both documents, Qwest is asking the Commission to believe that this term *includes* the power plant charge when used in the SGAT but *excludes* that charge when used in the Amendment. Such an interpretation simply is not credible.

Qwest's other attempts to support its construction of the language of the DC Power Measuring Amendment are similarly unpersuasive. For example, Qwest claims that the

[22] Tr. at 216-217 (McLeodUSA Starkey).

[23] Tr. at 239-40 (Qwest Easton).

[24] *Compare* Hearing Ex. 16 (SGAT Excerpts) at 98, Section 8.3.1.6 ("Provides -48 volt DC power to CLEC collocated equipment and is fused at one hundred twenty-five percent (125%) of request.") *with* Hearing Ex. 1 (Amendment) Section 2.1 ("Provide -48 volt DC power to CLEC collocated equipment and is fused at one hundred twenty-five percent (125%) of request."). Section 2.1 of the Amendment, however, provides further, "The DC Power Usage Charge is for the capacity of the *power plant* available for CLEC's use," (emphasis added) which clarifies that the power plant charge is included in the "-48 Volt DC Power Usage Charge." Mr. Easton further testified that the definition of the term "-48 Volt DC Power Usage Charge" in the SGAT "is referring to plant, power plant." Tr. at 248, line 20.

reference in Section 1.2 of the Amendment to a discount for the power usage rate over 60 amps indicates when "read in the context of the entire agreement" that the Amendment does not apply to the power plant rate because it increases for orders over 60 amps. Qwest misconstrues the Amendment. The relevant portions provide,

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

Read in context, the language states that monitoring of power usage (and thus measurement for purposes of determining the amount of that usage) occurs at the power board and so does not apply to orders of 60 amps or less because those feeds terminate on a BDFB, rather than on a power board (and presumably are less expensive, thus the discount). However, nothing in that language suggests, much less establishes, a limitation on the *rate elements* to which the Amendment applies, which are listed and defined in Section 2.0 – indeed, the term "-48 Volt DC Power Usage" (or any other defined term) is not even used in Section 1.0. Rather, Section 1.0 limits the applicability of the Amendment to the *size* of the CLEC's order for DC power *feeds*, applying only to orders for feeds that are greater than 60 amps. It is Section 2.0 of the Amendment that then describes the rate elements that will be impacted by the change to measured usage when the feeds at issue exceed 60 amps. And it is within Section 2.0 that the Amendment defines the "DC Power Usage Charge" to include power plant, consistent

with McLeodUSA's interpretation.

Qwest also claims that Section 1.2 uses the term "usage rate," which "contains no reference to a power plant rate."[25] Again implicit in Qwest's argument is the idea that the word "usage" cannot include "power plant" even though Exhibit A to the Agreement includes Power Plant charges under the larger grouping entitled "-48 Volt DC Power Usage" – the exact term used in the Amendment. Nonetheless, Qwest's use of the word "usage" in other documents that *Qwest has drafted* is not nearly so constrained. As discussed above, even Qwest agrees that the term "-48 Volt DC Power *Usage*" includes power plant charges, at least in the context of the SGAT.

Qwest's own collocation cost study also expressly uses the word "usage" to include power plant charges – in fact, as described by Mr. Starkey, Qwest's cost study allocates power plant investments based upon an assumed level of usage (indicating that proper application would likewise need to be based upon usage for proper cost recovery). In commenting on the monthly recurring charges for "Power Usage," for example, Qwest's cost study states, "Power **usage includes** the cost of purchasing power from the electric company and **the cost of the power plant**."[26] Qwest cannot reasonably claim that the word "usage" when used in the Amendment cannot include "power plant" when the SGAT, Exhibit A, and Qwest's collocation cost study all expressly include "power plant" within the meaning of the word "usage." All of these documents were drafted by Qwest, and it strains any sense of credibility to suggest that in only one of these documents drafted by Qwest did it intend for

[25] Hearing Ex. 16 (SGAT excerpts) at 98, Section 8.3.1.6.

[26] Hearing Ex. 13 ("Detailed Summary of Results" from Qwest collocation cost study) at 6, Cell: A97 Comment (emphasis added); *see* Hearing Ex. 21 (Power Equipment spreadsheet from Qwest collocation cost study developing power plant costs per amp by dividing total equipment costs by "DC Power Usage"); *accord* Hearing Ex. 20 (Qwest Response to Iowa DR 03-30).

the term "usage" not to embody power plant, especially when the result of such an incredulous claim means that Qwest can charge CLECs much more for DC power than Qwest incurs itself.

Finally, Qwest argues that the undefined term "usage rate" in Section 1.2 and the defined term "-48 Volt DC Power Usage Charge" in Section 2.0 are singular, signifying that the terms apply to only one rate. As Qwest concedes, however, the SGAT uses the singular term "-48 Volt DC Power Usage Charge" in Section 8.3.1.6 to refer to "the grouping which would include power usage and power plant" rates in Exhibit A.[27] By using the same term (also in the singular), the DC Power Measuring Amendment simply mirrors the SGAT and cannot reasonably be interpreted to mean something different.

Qwest's efforts to undermine McLeodUSA's interpretation of the DC Power Measuring Amendment similarly come to naught. Qwest quotes the provision in the parties' ICA stating that headings are of no force or effect and argues that "48 Volt DC Power Usage" in Sections 8.1.4 and 8.1.4.1 of Exhibit A is a "heading" and thus can have no substantive meaning, even though the Amendment uses virtually the exact same term. As McLeodUSA explained in its Initial Brief (and will not repeat here), that argument ignores common sense and the structure of Exhibit A.[28] Qwest, moreover, conceded that the term "-48 Volt DC Power Charge" as used in Section 8.3.1.6 of the SGAT is *not* a heading and refers to the multiple DC power charges in Section 8.1.4 of Exhibit A.[29] The same term has the same meaning in the Amendment, and the restriction on the meaning given to headings under the agreement is inapplicable.

[27] Tr. at 239-240 (Qwest Easton).

[28] McLeodUSA Initial Brief at 9-10.

[29] *Id*. at 255, lines 16-23 & 259, lines 12-17.

Qwest also contends that McLeodUSA misplaces reliance on the sentence in Section 2.1 of the Amendment that "The DC Power Usage Charge is for the capacity of the power plant available for CLEC's use," because while it "potentially introduces some ambiguity into the agreement," the sentence is inconsistent with the remainder of the Amendment and thus should be considered essentially meaningless.[30] The only inconsistency made evident by this language is the inconsistency between Qwest's interpretation put forward in this proceeding and the actual language of the Amendment. This sentence does not add ambiguity as Qwest would lead the Commission to conclude but does exactly the opposite by specifically defining the operative term within the Amendment "DC Power Usage Charge" to include Qwest's power plant – thereby *removing* the ambiguity that Qwest is desperately trying to create within the Amendment so that the Commission will primarily focus on the extrinsic evidence that Qwest believes supports its interpretation. As such, that sentence is fully consistent with the use of the term "-48 Volt DC Power Usage" throughout the Amendment, Exhibit A, and the SGAT, as discussed above. Qwest cannot legitimately urge the Commission to ignore a portion of the plain language of the Amendment because it allegedly "makes no sense"[31] when in fact, the sentence only makes "no sense" when viewed in the light of Qwest's interpretation. The sentence itself makes perfect sense when read in conjunction with the language as a whole, the SGAT, Exhibit A, and Qwest's cost study and supports the only logical and internally consistent interpretation of the Amendment.

The language of the Amendment requires Qwest to measure McLeodUSA's DC power usage and to charge for "-48 Volt DC Power Usage" – including both power usage and power plant rates – based on the amount of power McLeodUSA actually uses. Qwest

[30] Qwest Initial Brief at 15.

can only argue to the contrary by ignoring portions of the Amendment and construing others inconsistently with the same terms used by Qwest in related documents upon which Qwest attempts to rely, unsuccessfully, to bolster its case. The Commission should adopt McLeodUSA's interpretation.

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

The language of the Amendment speaks for itself and fully supports McLeodUSA's interpretation of the Amendment as requiring Qwest to charge all DC power usage rates – including the power plant rate – based on McLeodUSA's actual usage. Qwest, however, claims that Qwest "plainly, objectively, and openly disclosed its intent regarding the DC Power Measuring Amendment prior to its execution through two avenues" – the Change Management Process ("CMP") and Qwest's product catalog ("PCAT").[32] This statement is false and particularly misleading.

Initially and most fundamentally, the CMP documentation that Qwest introduced into the record does not even reference the DC Power Measuring Amendment that the parties executed, much less indicate Qwest's intent with respect to the Amendment. To the contrary, the CMP documentation states in response to the question of whether "the change from non-measured to measured [will] be automatic or will the CLEC be required to amend their Interconnection Agreement," that "Qwest will initiate the DC Power Reading Process *without the CLEC having to amend their Interconnection Agreement*."[33] Qwest cannot plausibly claim that after Qwest dismissed in its CMP discussion the notion that an Amendment would be required to implement measuring, that when confronted with an

[31] *Id*.

[32] *Id*. at 16.

Amendment drafted by Qwest to measure and assess power on a usage-basis, McLeodUSA should have recalled the previous CMP documentation from nearly a year prior and further assumed that it was applicable to the Amendment. Such an assumption is even more strained when the Amendment presented to McLeodUSA by Qwest specifically identified power plant as a component of the DC Power Usage Charge to which measured usage would apply.[34]

Qwest's PCAT does include a link to Qwest's form amendment for a "CLEC wanting to utilize the DC Power Measuring process," but the description of that process is fully consistent with the language in the DC Power Measuring Amendment [35] That description, like Section 1.2 of the Amendment, merely refers to adjusting the "usage rate to the CLEC's actual usage," without using any defined terms or otherwise excluding the power plant rates that are specifically included as part of "-48 Volt DC Power Usage" as that term is used in the Amendment, Exhibit A, and the SGAT. Again, nothing in the CMP documentation so highly touted by Qwest could have reasonably given McLeodUSA any reason to believe that the language in the Amendment did not mean what it says.

Qwest nevertheless contends that the DC Power Element Descriptions in the PCAT differentiate between a "-48 Volt DC Power Usage Charge" (which "recovers the cost of the power used") and "-48 Volt DC Power Capacity Charge" (which "recovers the cost of the capacity of the power plant available") and that McLeodUSA should have known that Qwest

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[33] Qwest Ex. 1.2 (CMP documentation) at 1 (emphasis added).

[34] The CMP, moreover, is a *process* that contemplates changes as the process progresses. Discussions at the beginning of the process, such as those in Qwest Exhibit 1.2, are not necessarily reflective of the result of the process. Indeed, Qwest contends that the end result of this particular CMP process was the PCAT, Qwest Initial Brief at 17, which contains substantially different terms than those described in the CMP documentation.

[35] *Compare* Qwest Ex. 1.1 (PCAT excerpts) at 2 (language under heading "Optional DC Power Measuring for feed greater than sixty (60) amps") *with* Hearing Ex. 1 (DC Power Measuring Amendment) Section 1.2.

intended the term "-48 Volt DC Power Usage Charge" to have the same meaning in the Amendment as it does in the PCAT.[36] Qwest, however, conveniently ignores the language at the beginning of the "DC Power Rate Element Descriptions" in the PCAT: "The following language applies in all states, where separate charges for DC Power Capacity and DC Power Usage have been established." [37] No separate "DC Power Capacity" rate element has been established in Utah. Indeed, the term "DC Power Capacity" appears nowhere in the ICA between McLeodUSA and Qwest, Exhibit A, or the SGAT. The PCAT's description of the "DC Power Measuring" option does not use *any* of the terms defined in "DC Power Rate Element Descriptions" section of the PCAT. McLeodUSA, therefore, had no reason to believe that any of the "DC Power Rate Element Descriptions" in the PCAT had any applicability in Utah in general, or to the Amendment specifically.

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

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

McLeodUSA has consistently taken the position that the DC Power Measuring

[36] Qwest Initial Brief at 17-18.

[37] Qwest Ex. 1.1 (PCAT excerpts) at 1.

Amendment means what it says – all DC power usage, including power plant rates, should be charged based on McLeodUSA's actual usage. Qwest disputes that claim and contends that "McLeod's internal and unexpressed intent reflects an understanding that the DC Power Measuring Amendment would only affect the power usage charge, not the power plant charge."[38] Qwest even goes so far as to claim that McLeodUSA's interpretation of the Amendment is an "after the fact" interpretation somehow contrived to gain McLeodUSA an advantage over Qwest. The record evidence does not support Qwest's contentions.

The sole basis for Qwest's bold assertion is a spreadsheet that a McLeodUSA employee prepared to estimate the cost impacts that would result from execution of the Amendment. Qwest maintains that the only rates reflected on this spreadsheet are those billed for power usage, not power plant, allegedly demonstrating that McLeodUSA did not expect to accrue savings based upon Qwest's power plant rates. Qwest, however, ignores the fact that the rate information in the spreadsheet came from price quotes provided by Qwest to McLeodUSA. Indeed, the purpose of the spreadsheet was to track those price quotes and only those price quotes.[39] The McLeodUSA engineering group did not conduct any independent inquiry into all of the rate elements that would be impacted but simply relied on the documentation provided by Qwest.[40] Indeed, as Ms. Spocogee testified, such independent analysis would not be consistent with the engineers' job description – such analysis is left to her organization which ultimately identified the problem and disputed

[38] Qwest Initial Brief at 20.

[39] Tr. at 57-58 and 67-70 (McLeodUSA Spocogee); Hearing Ex. 8 (Qwest price quotes). The internal e-mail exchange within the McLeodUSA engineering group corroborates Ms. Spocogee's testimony. When Brian Vanyo, Director of Engineering e-mailed Mark McCune, Systems Engineer, Mr. Vanyo asked the group to check the "rate per amp" and asked whether the "rate per amp" would increase. Hearing Ex. 3 (McLeodUSA responses to Qwest Iowa DRs) at 3. This exchange shows the mindset of the engineering group was that, like the Michigan example Ms. Spocogee explained in her testimony, there was but single power rate element.

[40] Tr. at 70, line 23, through 71, line 3 (McLeodUSA Spocogee).

Qwest's charges. Nothing about this spreadsheet, therefore, indicates McLeodUSA's intent with respect to the DC Power Measuring Amendment.

McLeodUSA further explained that its engineering group's primary concern leading to the development of the spreadsheet was to ensure that rates would not increase as a result of the Amendment, *i.e.*, they were simply asked to give a "thumbs up" or "thumbs down" analysis with the sole criteria being lower, as opposed to higher, collocation power bills.[41] Qwest misconstrues this evidence as somehow confirming that "McLeod had no intent to reduce power plant charges through the Amendment" and that "Qwest's interpretation of the DC Power Measuring Amendment is entirely consistent with that claimed intent" to avoid price increases.[42] The evidence demonstrates no such thing.

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

[41] *E.g.*, Tr. at 77-78 (McLeodUSA Spocogee).

McLeodUSA believed it had agreed to via the Amendment, Ms. Spocogee filed a dispute.

Qwest further mischaracterizes the evidence by stating that "Ms. Spocogee admitted the first time McLeod formulated an intent that the DC Power Measuring Amendment should reduce power plant charges was after she conducted her audit in May 2005."[43] That statement is blatantly false. Ms. Spocogee testified that the first time *she* "ever looked at the specific power plant element and calculated power plant savings was in connection with [her] audit."[44] She also explained that it is common practice to take months and sometimes years to discover and raise billing disputes as her group focuses on certain parts of the bill throughout the year (*i.e.*, Ms. Spocogee's group simply hadn't reviewed the collocation power component of the bill until the timeframe immediately preceding the dispute).[45] The fact that McLeodUSA did not dispute Qwest's failure to bill McLeodUSA for power plant based on actual usage until May 2005 (nine months after the Amendment was signed) indicates only that it took McLeodUSA that long to discover the error, not that McLeodUSA interpretation was somehow "post hoc."

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

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[42] Qwest Initial Brief at 23.

[43] *Id*.

[44] Tr. at 85, lines 9-15 (McLeodUSA Spocogee).

[45] Tr. at 64-66 (McLeodUSA Spocogee).

words, there is no indication that McLeodUSA intended to obliterate its right under Section 251(c), and as embodied elsewhere in the ICA, to access power on nondiscriminatory terms and conditions.

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

Engineering principles with which both parties largely agree demonstrate that Qwest should be charging for power plant based on the amount of DC Power McLeodUSA actually uses. Qwest mischaracterizes the evidence by asserting, "The essence of McLeod's testimony regarding engineering issues is simply that McLeod wants to place a power order for its ultimate capacity needs, McLeod expects Qwest to make that capacity available, but McLeod only wants to pay based on measured usage, even though Qwest does in fact make the ordered capacity available."[46] The record does not support this statement. McLeodUSA orders power distribution cables, not power plant capacity, and expects the full capacity of those feeds to be available only in the virtually nonexistent circumstances for which those feeds are designed – and then, only to the same extent that Qwest makes such capacity available to its own central office equipment. Qwest, not McLeodUSA, is the party seeking a free ride at the other's expense.

1. McLeodUSA Does Not Order Power Plant Capacity.

McLeodUSA orders power distribution cables when it collocates equipment in Qwest's central offices. Indeed, that is the only information regarding McLeodUSA's power needs that Qwest requires a collocating CLEC to submit on the collocation application form written by Qwest. Qwest does not even give McLeodUSA the option to order power plant capacity via its collocation application. Yet, throughout this proceeding, Qwest repeatedly

[46] Qwest Initial Brief at 24.

(and without any basis in fact) refers to McLeodUSA's request for power feeder cable amperage as McLeodUSA's "power order." Such references are inaccurate, misleading and willfully inconsistent with the record of this case.

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

Indeed, such an assumption by Qwest would be in direct violation of its own internal technical documentation and the manner by which it constructs power plant. The technical documents would not lead anyone to believe that an order for distribution cables would be assumed to be an order for power capacity by Qwest. However, because, according to Qwest, it makes this amount of power plant capacity available to McLeodUSA (a fact that Qwest has never proven or substantiated), Qwest argues that it is justified in charging McLeodUSA the full amount for that much power plant capacity, whether McLeodUSA ever uses it or not. Nonetheless, Qwest does not dispute that its own technical publications require any central office power plant (even power plants which will support collocated carriers) to be designed to "List 1 drain" and that Qwest does not use the List 2 drain of the power cable capacity to size the power plant for Qwest's own equipment in the central office (it uses the List 1 value required by its technical documentation). On its face, such DC power provisioning is discriminatory.

Qwest attempts to defend this obvious discrimination by claiming that the Commission sanctioned such discrimination in its adoption of collocation power rates. As discussed above, however, the Commission has never considered, much less approved, Qwest's application of power plant rates to the amperage capacity of the power cables the CLEC orders. Nor does any provision in the parties' ICA authorize such an application of the power plant rates. To the contrary, Section 7.1.9 of the ICA provides in the context of Qwest's collocation obligations, "At a minimum, [Qwest] shall supply power to McLeodUSA at parity with that provided by [Qwest] to itself." Qwest's charges for DC power to McLeodUSA based on List 2 drain is not "at parity" with Qwest's practice of installing (and paying for) only the power plant required to meet the List 1 drain of its own equipment. Indeed, as Mr. Starkey demonstrated, Qwest's practice results in Qwest using the majority of the power generated by its power plant, while CLECs like McLeodUSA who use only a small fraction of that used by Qwest, end up paying for the bulk of the power plant capacity they share.[47] Therefore, if the DC Power Measuring Amendment is not interpreted as McLeodUSA proposes and as the plain language of the Amendment warrants, there can be no question that Qwest is unlawfully discriminating against McLeodUSA in violation of Utah statutes and the parties' ICA.

Qwest also attempts to suggest that this discrimination is reasonable from an engineering perspective because a majority of collocators' orders for power cables were received in the 1999-2000 and Qwest had no idea what to expect in terms of collocators' usage, so according to Qwest, the only reasonable option was to build power plant to the capacity of the CLEC power cables. Qwest's revisionist history does not pass muster. If

[47] McLeodUSA Exhibit 3SR at 14-17.

Qwest actually built power plant to the capacity of the CLEC power cables as it claims because there was no usage over these cables to measure, this would have been a critical mistake on Qwest's part, and directly inconsistent with Qwest's engineering guidelines. No reasonable Qwest engineer would have assumed that CLECs would use anything close to the full List 2 drain associated with their power cables given that engineering requirements require power *cables* to be sized on a higher List 2 drain, while power *plant* is sized on a lower List 1 drain – a standard that Qwest was well aware of back in 1999-2000. Instead, a reasonable Qwest engineer would have simply observed the load on the power plant at the busy-hour derived from all equipment in the central office (including the equipment served by the CLEC power cables ordered in 1999-2000) and ensured that the power plant of the central office could handle this load. Qwest nevertheless takes another tack in this regard. It boldly contends that (a) McLeodUSA expects to have the List 2 drain capacity of its power cables available, (b) that Qwest makes that power plant capacity available, and as a result (c) McLeodUSA should be financially responsible for that capacity. Qwest again is incorrect and its argument shows a lack of understanding regarding the engineering requirements embodied in its own technical documentation.

The power plant capacity engineered within Qwest's central office is a shared resource, with both Qwest and its collocating CLECs sharing the available capacity. Each power user has access to the full capacity of the power plant. [48] Contrary to Qwest's assertion, as a shared resource power plant capacity cannot be reserved or partitioned to any individual user absent the immediate need for current drawn by the equipment.[49] As such,

[48] McLeodUSA Exhibit 2 (Morrison Direct) at 8, 15, 22, 27 & 30.

[49] McLeodUSA Exhibit 2SR (Morrison Surrebuttal) at 4. As discussed *infra*, the Iowa Utilities Board findings on the engineering of the DC power plant were consistent with Mr. Morrison's testimony.

there is no basis to find that Qwest can guarantee McLeodUSA special priority with respect to power plant capacity during a rare List 2 event. McLeodUSA will have the exact same access to power as will Qwest's equipment. Accordingly, there is no basis for Qwest charging McLeodUSA as if it has power plant capacity allotted for its use in an amount equal to the size of its power feeder cables (*i.e.*, List 2 drain), while allotting to Qwest only the amount necessary to sustain a much lower, and less expensive, List 1 drain.

Nor does McLeodUSA have any expectation or desire to have Qwest size its power plant to accommodate the List 2 drain of McLeodUSA's collocated equipment – McLeodUSA, like Qwest, does not want to have to pay for excess power plant capacity that for all intents and purposes will never be used. To do so conflicts with good engineering judgment, including the judgment rendered by Qwest's own internal engineering documents. Even if Qwest does undertake such an engineering practice (in conflict with every engineering document its own engineers have authored on the subject), Qwest is doing so unilaterally, in conflict with the parties' ICA and without any contractual or other legal obligation or authority. At a minimum, the Amendment should have remedied that situation and does so under McLeodUSA's interpretation. If the Amendment did not provide such a remedy, the Commission should. [50]

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

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

Qwest's technical publications require Qwest to size the shared power plant in its central offices based on the List 1 drain of the equipment in that office, implicitly including CLEC collocated equipment.[51] Indeed, Qwest's own engineering witness confirmed that Qwest would extend its practice of engineering its power plant to the List 1 drain of CLECs' collocated equipment if Qwest only knew the List 1 drain of that equipment. This admission relegated Qwest to take the position that it does not follow its own engineering guidelines because it does not have the necessary information (i.e., List 1 drain for CLEC equipment).[52] Qwest claims erroneously that it does not know this information, yet even if it does not, it is only because Qwest does not want to know or has failed to ask.

Qwest has a list of all equipment that McLeodUSA collocates in each Qwest central office.[53] Qwest knows the List 1 drain of the equipment McLeodUSA uses that is the same equipment that Qwest uses.[54] Qwest could also seek the List 1 drain for this equipment from the manufacturer, which "usually . . . can be obtained" except "on rare occasions."[55] On such rare occasions, Qwest's technical publications authorize Qwest to estimate the List 1 drain of the equipment, and Qwest would size its power plant to such estimates rather than to List 2 drain.[56] Finally, Qwest could request that McLeodUSA provide the List 1 drain of its

[51] McLeodUSA Ex. 2 (Morrison Direct) at 32-36.

[52] Tr. at 315, lines 7-10 (Qwest Ashton).

[53] McLeodUSA Ex. 3SR (Starkey Surrebuttal) at 27-29. *See also* McLeodUSA Exhibit 3SR.1 (Qwest collocation application).

[54] Tr. at 315, lines 15-25 (Qwest Ashton).

[55] *Id*. at 317, lines 11-22.

[56] *Id*. at 318.

equipment on the very collocation application wherein Qwest requires McLeodUSA to list each piece of equipment it will collocate (and further asks McLeodUSA to size its power feeder cables). Mr. Ashton had "no idea" why Qwest's collocation application form does not request that information, although he confirmed that as a power plant engineer, that type of information "would be nice to have" and would be the best information for purposes of engineering Qwest's power plant (even for CLECs) consistent with Qwest's own technical publications (at least one of which Mr. Ashton himself authored).[57]

Qwest's insistence that it must size power plant to the List 2 drain of McLeodUSA's collocated equipment is patently unreasonable under these circumstances.[58] Indeed, Qwest's position on this issue stands in stark contrast to Qwest's contention that given the importance of the issue to McLeodUSA, it should be required to have used "reasonable thought and diligence" to "discover[] the intent Qwest attached to the DC Power Measuring Amendment in the CMP documents and PCAT."[59] The engineering of Qwest's power plant is no less important to Qwest than the amount McLeodUSA pays for DC power. Qwest, therefore, cannot reasonably rely on its self-imposed ignorance, especially when such ignorance results in Qwest discriminating against McLeodUSA in violation of the ICA as well as federal and state law. Instead, Qwest can, and should be required to, determine the List 1 drain of McLeodUSA's collocated equipment for purposes of properly sizing Qwest's power plant and charging McLeodUSA accordingly as Qwest does for itself and as its own technical documentation, the DC Power Measuring Amendment, the parties' ICA, and Utah law require.

[57] *Id*. at 319, lines 11-17.

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

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

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

Qwest engineers its "power plant to the highest historical load on the power plant over the last year, plus the List 1 drains of the expected Qwest equipment over the next 18 to 36 month forecast, plus the List 2 drain of the collocators."[60] In other words, Qwest primarily uses the *actual measured usage* of the DC power consumed by all of the existing equipment in the central office to size its power plant. While Qwest also includes the List 1 drain of equipment Qwest intends to install in the central office in the future and (allegedly) the List 2 drain of collocating CLECs, Qwest in practice relies on actual usage, rather than on any hypothetical List 1 drain, to determine how much power plant is needed to supply DC power to its own (and CLEC collocated) existing equipment.[61] That is exactly what the DC Power Measuring Amendment requires Qwest to do for McLeodUSA. The amount of power

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[59] Qwest Initial Brief at 19.

[60] Tr. at 314, lines 21-25 (Qwest Ashton).

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

plant for which Qwest should be billing McLeodUSA, therefore, should not be significantly different than the amount of power plant capacity that Qwest actually has constructed to provide power to McLeodUSA's collocated equipment.

Qwest, however, observes that Section 1.2 of the Amendment provides that "Qwest will perform a maximum of four (4) readings per year on a particular collocation site," and Qwest argues that accordingly the usage for which McLeodUSA pays will necessarily be less than the List 1 drain of its equipment. Except when McLeodUSA installs new equipment, however, Section 1.2 of the Amendment provides only that "Qwest will monitor usage at the power board on a semi-annual basis." [62] The Amendment thus affords Qwest a great deal of discretion to determine when Qwest will measure McLeodUSA's DC power usage. Qwest obviously wanted to ensure that it has the maximum flexibility to monitor McLeodUSA's actual usage at the point in time when it is at its peak (and thus matches "highest historical load" for that equipment that Qwest uses to size the power plant). Contrary to Qwest's arguments, therefore, McLeodUSA's advocacy and interpretation of the DC Power Measuring Amendment gives Qwest the ability to ensure that the amount of DC power for which McLeodUSA is billed is as close as possible to being the same as the amount of power plant capacity that Qwest has constructed – just as Qwest does for its own central office equipment.

McLeodUSA's engineering testimony and exhibits, therefore, provide far more than the "ancillary extrinsic evidence"[63] that Qwest characterizes them to be. The evidence demonstrates that McLeodUSA's interpretation of the DC Power Measuring Amendment is

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

[63] Qwest Initial Brief at 24.

consistent not only with the language of the Amendment but with Qwest's own engineering principles and practices. The evidence also shows that Qwest's interpretation of the Amendment results in discrimination because Qwest provisions DC power to itself far more favorably than it does to McLeodUSA. The Commission, therefore, should rely on this evidence to interpret the Amendment as McLeodUSA has proposed or to find that Qwest is engaged in unlawful discrimination in violation of the parties' ICA and Utah statutes.

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

McLeodUSA's Initial Brief included a detailed discussion of how Qwest's collocation cost study supports McLeodUSA's positions in this proceeding, and substantial additional discussion is not warranted. McLeodUSA has already dealt with most of the points that Qwest attempts to make on this issue in its Initial Brief. As discussed above, the Commission never considered or approved Qwest's *application* of the DC power rates in the collocation cost docket, which is Qwest's primary contention with respect to the collocation cost study. Qwest, however, also raises an argument in its Initial Brief that it did not raise at hearing or anywhere in its testimony, *i.e.*, that adopting McLeodUSA's position would somehow result in rates set on short-run marginal costs, not total element long-run incremental cost ("TELRIC"). The Commission should not permit Qwest to raise such an issue for the first time in its post-hearing brief, but even considered on the merits, the Commission should reject this argument.

Qwest explains its argument in this regard as follows: "McLeodUSA wants the Power Plant charge to be assessed so that McLeodUSA only pays for each additional increment of power consumed, but pays nothing for the underlying power plant capacity that is available to meet McLeodUSA's power needs." Once again, Qwest does not cite any

evidence to support its belated claim that McLeodUSA has taken this position, and once again, Qwest is mistaken. McLeodUSA has argued no such thing, nor does any evidence support Qwest's claim.

Mr. Starkey testified that the Qwest cost study, by dividing total power plant investment by the total output of the power plant (i.e., the 1,000 amps), did so in compliance with the TELRIC standard which requires that the "total element" be studied.[64] Mr. Starkey went on to explain that the Qwest cost study identifies the 1,000 amps as "usage" by which Qwest, via the resultant rate, intends to recover its investment (*i.e.*, on a "usage basis"). McLeodUSA's position that it should pay for power plant costs based upon its usage is not a short run marginal request, but is instead, perfectly consistent with TELRIC and the Qwest cost study used to establish the power plant rates in question.

Qwest is simply making up claims in its brief that are unsupported by record evidence. Qwest's only witnesses offering any testifying about power plant costs made no such claims in their filed or sworn testimony. The Commission should reject out of hand Qwest's, desperate attempt to counter the compelling cost study evidence provided by Mr. Starkey that supports the McLeodUSA complaint and should find that Qwest's collocation cost study provides one more piece of evidence in support of the relief that McLeodUSA has requested.

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

In a further effort to distract the Commission from Qwest's own discriminatory conduct in charging McLeodUSA for DC power plant based on the capacity of

[64] McLeodUSA Ex. 3SR (Starkey Surrebuttal) at 12.

McLeodUSA's power cables rather than on usage as Qwest does for itself, Qwest has belatedly claimed that McLeodUSA follows the same practices as Qwest when charging for DC power in McLeodUSA switching centers. Qwest's claims are deficient as a matter of both law and fact.

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

As a factual matter, McLeodUSA does not bill collocators for DC power the same way that Qwest bills McLeodUSA. McLeodUSA asks collocators for the amount of power they anticipate needing (and for which they will be billed) and then McLeodUSA calculates the size of the fuses and feeder cables needed to supply that power.[65] McLeodUSA explained, "it is the policy of McLeodUSA to bill collocation customers for power on a usage basis, which usage is self-reported by the collocation customer. . . . For example, a customer that orders 20A of usage will be billed for 20A of usage but the breaker is typically sized for 30A and the feed size will typically support up to 60A."[66] In other words, McLeodUSA

[65] Hearing Exs. 28 (McLeodUSA Starkey Arizona Rebuttal excerpts) & 29 (Arizona transcript excerpts at 181-82).

[66] Hearing Ex. 25 (McLeodUSA Response to Qwest Washington DR). Since this material is being submitted after Qwest filed its initial brief, it is difficult to anticipate how Qwest will characterize the evidence from the Washington proceeding in an attempt to support Qwest's position. Qwest will likely claim that McLeodUSA bills based on the cable size just like Qwest does based on an incorrect interpretation of an answer given by Ms. Spocogee concerning how McLeodUSA completes its collocation form. *See* Hearing Ex. 27 (WUTC transcript excerpts). On redirect, however, Ms. Spocogee re-clarified that this number is really the amount of DC Power

effectively asks the collocator for its anticipated actual DC power usage, which Qwest never asks of its collocators. McLeodUSA then sizes the distribution cables based on the usage identified by the collocator. Such a procedure stands in sharp contrast to Qwest's procedure, under which Qwest never asks the CLEC how much power it will need but simply bills the CLEC for the much greater capacity of the power cables the CLEC orders. Or to use McLeodUSA's example, while McLeodUSA would bill the collocator for 20 amps of power, Qwest would bill the collocator for 60 amps.

Qwest may also argue that McLeodUSA's billing based on the estimated usage of collocators provides McLeodUSA higher charges than billing based on the collocator's actual usage as advocated by McLeodUSA based on the Amendment. Stated differently, however, the only difference between McLeodUSA's proposal and its practices with respect to collocators in its wire center is that McLeodUSA has taken Qwest up on its offer to measure actual usage while McLeodUSA asks its collocators to estimate the amount of DC power usage they will have. McLeodUSA is still billing its collocators based on the amount of power to be used, which is well below the List 2 drain that Qwest is billing McLeodUSA. There is no fundamental distinction between McLeodUSA's billing of DC power to its collocators and McLeodUSA's position that Qwest is discriminating against McLeodUSA by billing for DC power that McLeodUSA in all likelihood would never use when that is not how Qwest builds or pays for power plant to serve its own central office equipment.

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the collocator claims will be used. Id. at 70-71. Her later answer is consistent with the data request completed by the engineers responsible for collocation charges as reflected in the discovery responses. Hearing Exs. 25 & 26. While Ms. Spocogee's initial answer may seem to support Qwest billing based on the size of distribution cables, her clarifying testimony and the overwhelming additional evidence confirms that McLeodUSA in fact bills based on the estimated usage by the collocator, not based on List 2 drain as Qwest bills its collocators.

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

In its initial brief, Qwest highlighted the fact the Iowa Utilities Board ("IUB" or "Board") adopted the Qwest interpretation of the DC Power Measuring Amendment.[67] On July 27, 2006, the IUB issued its written order in Docket No. FCU-06-20 ("Iowa Order"). In its decision, the IUB concluded that since the Amendment existed, the Board could not remedy any discrimination. The IUB stated it could not determine whether the discrimination was unreasonable or not without further development of the record.[68]

McLeodUSA believes the Iowa Order is noteworthy in several key respects. Most importantly, McLeodUSA believes the Iowa Order supports McLeodUSA in its complaint if this Commission properly interprets the DC Power Measurement Amendment in accordance with the nondiscrimination requirements of Section 251(c) of the Act and in harmony with the underlying ICA. The IUB did not adopt such an interpretation, yet the Board still raised questions about the legality of Qwest's actions.

First, the IUB concluded that Qwest was in fact treating McLeodUSA differently than Qwest treats itself.[69] The Utah record supports the same conclusion.[70] Further, the IUB concluded that while Qwest assigns the cost of the DC power plant to McLeodUSA using List 2 drain, Qwest assigns power plant to itself based on List 1 drain.[71] The Utah record supports the same conclusion. The IUB also rejected Qwest's claims that it allocates a portion of the DC power plant to McLeodUSA and CLECs in general. All in all, the IUB

[67] Qwest Initial Brief at 2-3.

[68] Iowa Order at 14.

[69] *Id*.

[70] Qwest Exhibit 2 (Ashton Rebuttal) at 6.

[71] Iowa Order at 14.

agreed with McLeodUSA that Qwest actually engineers its DC power plant as explained by Mr. Morrison in Utah. Unfortunately, and inexplicably, despite these findings the IUB interpreted the DC Power Measuring Amendment as advocated by Qwest. In doing so, the IUB failed to apply the correct legal standard in interpreting the Amendment. Most importantly, the Iowa Order thoroughly ignored the requirement that Qwest provide McLeodUSA nondiscriminatory access to DC Power in accordance with Section 251(c) of the Act and the equivalent state law. Indeed, the Iowa Order shows that the IUB does not discuss Section 251 of the Act. That the IUB applied the wrong legal standard is further demonstrated by the IUB's statement that the discrimination might be shown to "reasonable" upon a further developed record.[72] "Reasonable" discrimination is not permitted under Section 251(c) of the Act. Again, this shows the IUB simply ignored the controlling law governing interconnection agreements and access to network elements in ruling for Qwest.

The Act and Utah law require competitive parity between ILECs and CLECs with respect to occupation and use of ILEC central offices. The FCC has established that the prohibition against discrimination that appears throughout Section 251 of the Act is *unqualified and absolute*; unlike Section 202 of the Act, Section 251 does not qualify the term "nondiscriminatory" with the words "undue" or "unjust and unreasonable."

> By comparison [with section 202], section 251(c)(2) creates a duty for incumbent LECs "to provide . . . any requesting telecommunications carrier, interconnection with a LEC's network on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." The nondiscrimination requirement in section 251(c)(2) is not qualified by the "unjust or unreasonable" language of section 202(a). We therefore conclude that Congress did not intend that the term "nondiscriminatory" in the 1996 Act be synonymous with

[72] Iowa Order at 14.

> "unjust and unreasonable discrimination" used in the 1934 Act, but rather, intended a more stringent standard.[73]

Accordingly, in interpreting the prohibition on discrimination under Section 251 of the Act, the FCC stated that:

> we reject for purposes of section 251, our historical interpretation of "non-discriminatory," which we interpreted to mean a comparison between what the incumbent LEC provided other parties in a regulated monopoly environment. We believe that the term 'nondiscriminatory,' *as used throughout section 251*, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself. In any event, by providing interconnection to a competitor in a manner less efficient than an incumbent LEC provides itself, the incumbent LEC violates the duty to be "just" and "reasonable" under section 251(c)(2)(D).[74]

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

> The duty to provide unbundled network elements on "terms, and conditions that are just, reasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be *equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.*[75]

This interpretation of nondiscriminatory treatment applies equally to collocation under Section 251(c)(6) of the Act as it does to all the various obligations imposed on ILECs under Section 251(c) of the Act. Indeed, that is exactly why the underlying ICA requires Qwest to provide McLeodUSA access to power on terms no less favorable than Qwest provides to itself. Unfortunately, the Iowa Board accepted Qwest's invitation to interpret the Amendment with complete disregard of Qwest's obligation to provide McLeodUSA

[73] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325, First Report and Order, 11 FCC Rcd.15499 ¶ 217 (1996) ("*Local Competition Order*").

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

[75] *Id*. ¶ 315.

nondiscriminatory access to power. The Iowa Board held that Qwest discriminated against McLeodUSA, but decided to do nothing about it at this time – while strongly suggesting it would in a separate future case. McLeodUSA urges this Commission not to make the same mistake. Such an error violates the clear requirements of the Act, as well as the language of the Amendment and the ICA.

CONCLUSION

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

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

Dated this 9th day of August, 2006.

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