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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 PETITION FOR REVIEW, RECONSIDERATION, OR REHEARING OF REPORT AND ORDER

Pursuant to Utah Code Annotated §§ 63-46b-12 and 54-7-15, McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") provides this Petition for Review, Reconsideration, or Rehearing ("Petition") of the Commission's Report and Order ("Order").

BACKGROUND

McLeodUSA filed a complaint on March 8, 2006, against Qwest Corporation ("Qwest") setting forth two separate grounds for relief. First, McLeodUSA alleged Qwest was breaching the Interconnection Agreement ("ICA") between the parties, as amended by the DC Power Measuring Amendment in August 2004 ("2004 Amendment"), by billing for power charges based on the size of the cable distribution feeder size. Second, McLeodUSA alleged that Qwest was violating Utah and federal law by providing access to power in a discriminatory manner. Qwest filed its Answer on March 20, 2006, and a counterclaim alleging that McLeodUSA had

improperly failed to pay amounts withheld from disputed invoices. The Administrative Law Judge conducted a hearing on May 24 and 25, 2006. McLeodUSA and Qwest filed post-hearing opening and reply briefs on July 14, 2006 and August, 9, 2006, respectively.

On September 28, 2006, the Utah Public Service Commission ("Commission") issued its Order. In its Order, the Commission determined that the 2004 Amendment was ambiguous, and based on extrinsic evidence, concluded that Qwest's interpretation of the 2004 Amendment was proper. The Commission further rejected the claim that Qwest was discriminating against McLeodUSA, finding that the evidence does not support the McLeodUSA claim. McLeodUSA respectfully disagrees, and requests the Commission review, rehear, or reconsider its decision.

ARGUMENT

A. The Commission Erred in its Interpretation of the 2004 DC Power Measuring Amendment as the Text of the Document, Read With the Agreement it is Amending, Supports McLeodUSA's Position.

The Order concludes that "the parties' intent is not clear from the documents themselves."[1] This conclusion reflects error on two grounds: (1) The appropriate inquiry is the language of the entire ICA, not just the DC Power Measuring Amendment; and (2) the language of the ICA plainly supports McLeodUSA's interpretation.

1. The Order Erroneously Interprets the DC Power Measuring Amendment in Isolation from the Other Provisions of the ICA.

The Order errs by interpreting the 2004 Amendment without giving any consideration to the related provisions in the ICA governing Qwest's obligation to provide McLeodUSA access to power for collocations. Instead, the order interprets the Amendment in a vacuum by only considering the words of the Amendment to determine the intent of the parties. The Order thus gives no consideration to the unambiguous intent stated elsewhere in the agreement that Qwest

was obligated to provide power to McLeodUSA on terms that are at least at parity with how Qwest does so for itself in determining whether the Amendment required Qwest to bill both the power usage and power plant rate elements on a measured basis.

The Utah Court of Appeals summarized the principles of contract interpretation hierarchy in *Utah Transit Authority v. Salt Lake City Southern Railroad Company, Inc.*:

> When interpreting a contract, a court *first* looks to the contract's four corners to determine the parties' intentions, which are controlling." *Bakowski v. Mountain States Steel, Inc.*, 2002 UT 62, ¶ 16, 52 P.3d 1179. A trial court must *first* attempt to harmonize all of the contract's provisions and all of its terms' [sic] when determining whether the plain language of the contract is ambiguous." *Gillmor v. Macey*, 2005 UT App 351, ¶ 19, 121 P.3d 57 (citation and quotations omitted), *cert. denied*, 126 P.3d 772. "An ambiguity exists where the language is reasonably capable of being understood in more than one sense." *Dixon v. Pro Image, Inc.*, 1999 UT 89, ¶ 14, 987 P.2d 48 (citation and quotations omitted). "If the language within the four corners of the contract is unambiguous, then a court does not resort to extrinsic evidence of the contract's meaning, and a court determines the parties' intentions from the plain meaning of the contractual language as a matter of law." *Bakowski*, 2002 UT 62 at ¶ 16, 52 P.3d 1179. Additionally, "[w]e will not make a better contract for the parties than they have made for themselves. Nor will we avoid the contract's plain language to achieve an 'equitable' result." *Id.* at ¶ 19 [2]

While the Order states that the "four corners" of the agreement were reviewed to determine the parties' intent, the Commission unmistakably limited its analysis to the "four corners" of the 2004 Amendment (and Exhibit A to the ICA), as advocated by Qwest. Once it concluded that both parties' proposed interpretations of the 2004 Amendment were reasonable but unpersuasive, the Commission concluded the "agreement" was ambiguous and next considered the extrinsic evidence. Based on the extrinsic evidence, the Commission adopted the

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[1] Order at 12.

[2] *Utah Transit Authority v. Salt Lake Southern Railroad Company, Inc*. 2006 Utah App. 46, 131 P.3d 288 (emphasis

Qwest interpretation of the 2004 Amendment.[3] By failing to first examine the four corners of the entire Agreement, *i.e.*, the ICA as amended by the 2004 Amendment, the Commission's interpretation violates contract interpretation principles, and is, therefore, erroneous.

The 2004 Amendment is not a stand-alone contract; it is but one part of the ICA between Qwest and McLeodUSA. Therefore, the intent of the parties must first be ascertained by examining the four corners of the entire ICA between Qwest and McLeodUSA. The 2004 Amendment makes it obvious on its face that it must be construed as part and parcel of the underlying ICA that it amends:

> The Agreement[4] is hereby amended by adding the terms, conditions and rates for DC Power Measuring, as set forth in Attachment 1, attached hereto and incorporated herein.
>
> ***
>
> Except as modified herein, the *provisions of the Agreement shall remain in full force and effect*….
>
> ***
>
> The Agreement as amended (including the documents referred to herein) *constitutes the full and entire understanding and agreement between the Parties with regard to the subjects of the Agreement as amended* ….[5]

Accordingly, the Commission erred by limiting its analysis of the "agreement" to an interpretation of only the language of the 2004 Amendment.

Consequently, the Commission's failure to consider the entire agreement in interpreting the 2004 Amendment caused the Commission to violate another fundamental principle of contract interpretation – the Commission failed to harmonize the 2004 Amendment with other

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added).

[3] Order at 13-19.

[4] The "Agreement" referenced is the entire ICA.

provisions in the ICA that govern Qwest's obligation to provide McLeodUSA access to power. Utah courts have held it is "axiomatic" that a contract's provisions should be interpreted so as to harmonize all of its provisions and all of its terms, which terms should be given effect if at all possible.[6]

The ICA between Qwest and McLeodUSA unambiguously states that Qwest is obligated to provide power to McLeodUSA on terms that are no worse than the terms on which Qwest provides access to power for its own use:

> 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.)

The Utah ICA further clarifies that Qwest's duty to provide power at parity includes the obligation for Qwest to "design" access to power on a nondiscriminatory basis:

> 2.6 Each network element provided by USWC to McLeodUSA shall be equal in the quality of *design* ***, including, but not limited to, *** facilities for power *** that USWC uses to provide service to its customers or [provides to USWC's own subscribers, to a USWC affiliate or to any other entity.[7]

The record shows that Qwest designs access to DC power plant for its own use, and therefore, assigns power costs to itself, based on the List 1 drain. Barring an unambiguous statement to the contrary that these ICA provisions are superceded by the 2004 Amendment, the Commission must attempt to harmonize the 2004 Amendment

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[5] Hearing Exhibit 1 at 1 (footnote and emphasis added).

[6] *Gillmor v. Macey*, 121 P.3d 57, 65 (UT App. 2005).

[7] Both of these ICA sections are consistent with the obligation imposed on Qwest by Section 251(c) and Utah law to provide access to power a nondiscriminatory basis, detailed in the McLeodUSA written briefs

consistent with the unambiguous intent that Qwest has to "design" access to and provide power at parity with how Qwest does so for itself. The Commission erred by failing to attempt to harmonize the 2004 Amendment with these other ICA provisions stating this understandable intent of the parties. When these principles of contract interpretation are properly applied, the intent of the parties set forth in the ICA, as amended by the 2004 Amendment, is unambiguous and must be given effect. There is no basis for considering any extrinsic evidence. The interpretation adopted by the Commission in the Order should be changed upon review and reconsideration.

Moreover, it is established contract law that an interpretation that gives a reasonable, lawful, and effective meaning to all terms is preferred to interpretation that leaves a part unreasonable, unlawful, or of no effect. Yet, under the interpretation of the 2004 Amendment adopted by the Commission, the obligations imposed on Qwest to (a) design access to power and (b) to actually provide power to McLeodUSA at parity with how Qwest provides power for its own use are thoroughly circumvented because Qwest can bill McLeodUSA on a much different, and distinctly disadvantageous basis, by using the size of feeder cables.

Qwest's recurring answer to the inconsistency created by its interpretation of the 2004 Amendment has been to claim that parties can voluntarily agree to provisions in ICAs, thereby sweeping aside the clearly unfavorable and discriminatory access to power as if McLeodUSA had voluntarily agreed to the resulting discriminatory and unfavorable access to power. In other words, Qwest maintains that McLeodUSA has voluntarily waived its right to nondiscriminatory access to power by signing the 2004 Amendment.

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as explained by McLeodUSA in its Initial and Reply briefs.

The 2004 Amendment most decidedly does ***not*** evidence any intent that the parties were intending to circumvent or otherwise eliminate the intent stated elsewhere in the ICA that Qwest was required to provide power to McLeodUSA on terms and conditions that were no worse than Qwest made power available for its own use. Even the extrinsic evidence offered by Qwest contains no hint that either party intended to circumvent these other provisions governing Qwest's obligation to provide nondiscriminatory access to power. Therefore, any argument based on the presumption that McLeodUSA waived its rights stated elsewhere in the ICA must be rejected as having no basis in fact.

The Commission also erred in its interpretation of the 2004 Amendment by failing to recognize that ICAs are not traditional contracts. The Tenth Circuit Court of Appeals recognized in a case involving Qwest that an ICA is an instrument arising in the context of ongoing state and federal regulation that have provisions to facilitate competition and ensure that carriers are not treated in a discriminatory manner.[8] Utah case law similarly requires the Commission to interpret the 2004 Amendment under the presumption that it reflects applicable statutes in the contracts.[9] That means that in interpreting the 2004 Amendment, the Commission should have presumed that parties entering into the ICA and any amendment thereto intended to properly implement the Act and comparable state law requirements that give rise to the ICA.[10]

Thus, the 2004 Amendment must be interpreted consistent with state and federal law requirement of nondiscrimination firmly in mind. Such interpretation is justified and is not an

[8] *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)).

[9] *Washington National Insurance Company v. Sherwood Associates*, 795 P. 2d 665, 669 (Utah 1990).

[10] *See also*, ICA Section 2.2, which requires the Parties to act "consistently with the intent of the Act."

impermissible modification of an interconnection agreement.[11] The Order is devoid of any discussion of Section 251(c), which gives rise to Qwest's obligation to provide McLeodUSA collocation and access to power to serve its collocated equipment. The parties' intention in entering into the 2004 Amendment must be presumed to be consistent with Qwest's obligation under Section 251(c) of the Act.[12] There is certainly no evidence that either party intended to eliminate Qwest's legal obligations under Section 251(c) and the existing ICA by signing the 2004 Amendment.

To the contrary, given the existing terms of the ICA noted above and the statutory requirement for non-discriminatory access to power required by Section 251(c) and Utah law, McLeodUSA had every right to expect that Qwest had to provision power under the 2004 Amendment to McLeodUSA on terms equal to how Qwest provides power to itself. Further, McLeodUSA had every right to expect that the 2004 Amendment would result in a lawful amendment to the ICA that fulfilled the existing non-discrimination requirements of the ICA since there was no expressed intent in the 2004 Amendment to the contrary.

Upon review, the Commission should give proper consideration to the related provisions in the ICA that unequivocally state that Qwest must provide power to McLeodUSA on terms and conditions that are no worse than Qwest provides for itself. This clearly stated intent of the parties must be considered in interpreting the provisions of the 2004 Amendment before the Commission gives any consideration to the extrinsic evidence in accordance with Utah case law. The 2004 Amendment can be interpreted consistent with that unambiguous statement of intent by forbidding Qwest from using the feeder distribution cables amperage (*i.e.*, List 2 drain) to bill McLeodUSA for DC Power Plant capacity since Qwest assigns power plant costs to itself using

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

the List 1 drain.

As required by law governing interconnection and access to elements of the ILEC's local network, the ICA embodies Qwest's obligation under section 251(c)(6) of the Act to provide McLeodUSA access to the necessary element of DC power as part of Qwest's obligation to provide collocation "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." The DC Power Measuring Amendment, as interpreted by the Commission, is at odds with Sections 2.6 and 7.1.9 of the ICA and Qwest's obligations under federal and Utah law. In contrast, the McLeodUSA interpretation harmonizes all ICA provisions governing access to DC Power, maintains the consistency of the entire ICA, and fulfills the nondiscrimination requirements of federal and state law. When the 2004 Amendment is interpreted in accordance with the rules of contract interpretation, there is no basis to look beyond the terms of the 2004 Amendment and the related ICA provisions in Section 2.6 and 7.1.9. The Commission should reconsider its interpretation of the 2004 Amendment, and upon reconsideration, adopt the McLeodUSA interpretation.

2. The Order Erroneously Interprets the DC Power Measuring Amendment as Ambiguous.

The Order finds that the language in the 2004 Amendment does not support McLeodUSA's interpretation because, the order states, "subsection 1.2 specifically limits the measuring and billing activities outlined therein to CLEC orders of 'more than sixty (60) amps of power,'" and the only rate element associated with that amount of power is "Power Usage," not "Power Plant."[13] The Order also states that "there is no 'DC Power Usage Charge' listed in Exhibit A," and "the power plant rate elements listed in Exhibit A are specifically identified as

[12] ICA Section 2.2.
[13] Order at 12.

"Power Plant" rate elements so there would seem to be little point to trying to tie the non-existent "DC Power Usage Charge" of Amendment subsection 2.1 to any power plant rate element in Exhibit A item 8.1.4.1.1."[14] The Commission is incorrect on both counts.

Subsection 1.2 of the 2004 Amendment is part of section 1.0, which is entitled "Monitoring," and merely describes when and how Qwest will monitor the amount of power that McLeodUSA uses. Specifically, the applicable portion provides,

> 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.

The phrases "sixty (60) amps or less" and "more than sixty (60) amps of power" thus refer to the size of the power order, not to any particular rate elements. Indeed, there is no reference whatsoever to rate elements in subsection 1.2 – that issue is addressed in subsection 2.0, which is entitled "Rate Elements – All Collocation." The Order thus creates ambiguity where none exists by misinterpreting the plain language of the 2004 Amendment to apply phrases used to describe *monitoring* in subsection 1.2 to the *rate elements* quantified in Exhibit A to the ICA.

The Order also misconstrues the term "DC Power Usage Charge." The term "48 Volt DC Power Usage" is included multiple times in both subsection 2 of the 2004 Amendment and in Exhibit A to the ICA. The Order incorrectly states that the term is not included in Exhibit A when it is clearly used as the title for sections 8.1.4 and 8.1.4.1. The Order apparently means that there is no dollar figure following that term, but that is irrelevant. The term "48 Volt DC Power Usage" in the Amendment is expressly defined to include power plant, and the exact same term is the title of the sections in Exhibit A that include power plant rates. Indeed, the Order's

[14] *Id*. at 13.

logic would mean that the 2004 Amendment has no application at all because the lines with dollar figures in Exhibit A, *i.e.*, "Power Plant – Equal to or Greater Than 60 Amps" and "Power Usage – More than 60 Amps, per Amp," do not appear in the 2004 Amendment. Obviously, the Commission cannot interpret the 2004 Amendment to be meaningless, but that is the result of the Order's apparent finding of ambiguity in the lack of any dollar amount associated with the term "DC Power Usage" in Exhibit A.

The 2004 Amendment is not ambiguous. Section 1.2 defines monitoring requirements and cannot be applied to rate elements. Both the Amendment, in subsection 2, and Exhibit A use the term "48 Volt DC Power Usage" expressly to include power plant rates. The Commission, therefore, should review, rehear, or reconsider the Order's conclusion on this issue and conclude that the language of the ICA, as amended by the 2004 Amendment, unambiguously requires Qwest to apply all DC power charges – including power plant – to the amount of DC power that McLeodUSA actually uses.

B. <u>The Record is Adequate to Find Unlawful Discrimination</u>.

In rejecting McLeodUSA's discrimination claim, the Order relies on certain findings that are not supported by the record. For example, the Commission begins its discrimination analysis by "noting the parties' agreement that the ICA obligated McLeod to pay for DC Power Plant on an 'as ordered' basis and that not until the filing of the current Petition dealing specifically with the DC Power Measuring Amendment did McLeod register any type of formal complaint with the Commission…"[15] The Order does not cite an exhibit or transcript to identify the evidentiary basis for its finding that there was such an "agreement" between the parties. Qwest has

[15] Order at 24.

consistently made this assertion in its filed briefs,[16] but Qwest's briefs are also devoid of any record citation. The omission is not surprising given that McLeodUSA never made any such agreement with Qwest.

While McLeodUSA has admitted that it had not formally disputed billings prior to the 2004 Amendment and acknowledged that it was not seeking to recoup any potential overpayment related to the period prior to signing the 2004 Amendment as part of its current complaint, at no point has McLeodUSA entered into an agreement that authorizes Qwest to bill for power on an "as ordered" basis, much less on an "as ordered" basis using power cable size as a proxy for power orders. The fact that McLeodUSA had not previously disputed prior billings cannot be construed as an "agreement" that it was proper for Qwest to use the feeder cables to bill for power plant before the 2004 Amendment. Moreover, McLeodUSA had no way to know the full magnitude of Qwest's discrimination until discovery and examination occurred in the present cases.

The ICA between Qwest and McLeodUSA contains a standard integration clause stating that the ICA consists of the written documents and attachments.[17] Yet, the Order appears to be relying on a lack of a prior billing dispute to find that there was some "agreement" between the parties that Qwest was entitled to bill for power charges on an "as ordered" basis before the 2004 Amendment. There is no legal or factual basis for declaring such an "agreement" exists between the parties.

McLeodUSA has consistently pointed out that the ICA, the attachments, pricing sheets and amendments that make up the ICA contain no term stating that Qwest was authorized to bill for DC Power Plant based on the size of McLeodUSA's cable feeder orders. Throughout this

[16] See Qwest Initial Post-Hearing Brief at 3.

proceeding Qwest has been unable to identify any such provision in the ICA. The only thing Qwest is able to cite is a comment cell in its cost study, which plainly is not part of the ICA.

The Commission further erred by declaring that there was no evidence that Qwest applied the rate approved in the cost docket in a discriminatory manner. The Order appears to have adopted Qwest's erroneous claim that the only prohibited discrimination is discrimination by Qwest amongst CLECs, and that discriminatory access to power may be permitted if the discrimination is "reasonable."[18] The Commission erred by applying the wrong legal standard in reviewing the discrimination claim.

Under Section 251(c) a finding of unlawful discrimination is required if the evidence shows that Qwest is providing McLeodUSA access to power on terms and conditions that are less favorable than the terms and conditions it makes power available to other CLECs, as well as for itself. In the Local Competition Order, the FCC plainly set forth that this was the appropriate test of nondiscrimination under Section 251(c):

> 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).[19]

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

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[17] ICA Section 2.1.

[18] Order at 24-25.

[19] See, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, First Report and Order, 11 FCC Rcd.15499 para. 218 (1996) ("Local Competition Order") *Id*. (emphasis added).

> We also conclude that, because section 251(c)(3) includes the terms "just" and "reasonable," this duty encompasses ***more than the obligation to treat carriers equally***…..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*.**[20]

While the FCC provided this context in discussing nondiscriminatory access to UNEs under 251(c)(3), Section 251(c)(6) contains the identical "just, reasonable and nondiscriminatory" standard as does Section 251(c)(3). Further, the FCC's illumination applies with equal force to Section 251(c)(6) since, as the FCC stated, the Section 251 "*unqualified*" non-discrimination standard was the same "throughout Section 251."[21]

Moreover, the ICA itself imposes the identical nondiscrimination standard on Qwest for providing access to power wherein the ICA requires Qwest to provide power to McLeodUSA at parity with how Qwest provides power for its own use.[22] The ICA was submitted to, and approved by, the Commission as required by Section 252 and applicable Utah law. The ICA, therefore, has the force and effect of "law" between the parties. Accordingly, the "law" between Qwest and McLeodUSA with respect to power is that Qwest must treat McLeodUSA in the same manner as it does itself.

The Commission further erred by employing a "reasonableness" standard in evaluating whether Qwest was discriminating against McLeodUSA.[23] Section 251(c) of the federal Telecommunications Act does not distinguish between "reasonable" and "unreasonable"

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[20] *Id.* ¶ 315 (emphasis added).
[21] *Id ¶ 218.*
[22] ICA Section 7.1.9.
[23] The Order determined it was "reasonable" for Qwest to use the cable order to bill McLeodUSA for its power plant. Order at 25.

discrimination – the prohibition on discrimination is ***absolute***:

> By comparison [with section 202], section 251(c)(2) creates a duty for incumbent LECs "to provide . . . any requesting telecommunications carrier, interconnection with a LEC's network on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." The nondiscrimination requirement in section 251(c)(2) is not qualified by the "unjust or unreasonable" language of section 202(a). We therefore conclude that Congress did not intend that the term "nondiscriminatory" in the 1996 Act be synonymous with "unjust and unreasonable discrimination" used in the 1934 Act, but rather, intended a more stringent standard.[24]

The Qwest-McLeodUSA ICA contains the same unqualified non-discrimination requirement with regard to power.[25] The law and existing ICA are unambiguous - Qwest must provide power to McLeodUSA on terms and conditions that are at least equal to the terms and conditions with how Qwest access to power for its own use.

In its Local Competition Order, the FCC concluded that the prohibition against discrimination that appears throughout Section 251 of the Act is "unqualified."[26] "Unqualified" means "[n]ot modified by conditions or reservations; **absolute***:* an *unqualified* refusal." AMERICAN HERITAGE COLLEGE DICTIONARY 1479 (3rd Edition) (bold added; italics in original). The FCC compared this "unqualified" or absolute prohibition contained in Section 251(c) with the Section 202 prohibition that includes qualifying terms such as "undue" or "unjust and unreasonable." Thus, under the FCC's determination that Section 251(c) contains an unqualified or absolute prohibition against discrimination, it was erroneous for the Commission to employ a "reasonableness" standard in evaluating whether Qwest was discriminating against McLeodUSA by using the size of the cable feeders to bill for access to power when Qwest does not use the

[24] Local Competition Order at ¶ 217
[25] ICA Section 7.1.9.
[26] *Id.* ¶ 217.
[26] *Id*. ¶ 218.

same method for assigning such costs to itself.

The Order also erred by finding that McLeodUSA "effectively orders 'power plant' by means of its power distribution cable orders"[27] because the only order for power plant submitted by McLeodUSA is the order for cable orders. The Commission then finds it was reasonable for Qwest to rely on these "power orders" to bill McLeodUSA for the power plant.

Nothing in the ICA states that McLeodUSA has an obligation to "order" power plant capacity.[28] Second, the ICA squarely places the burden on Qwest to provide nondiscriminatory access to power, as does Section 251(c)(6). The ICA further clarifies that this duty to provide power at parity includes Qwest's obligation to "design" access to power on a nondiscriminatory basis. Yet, the Order excuses Qwest's performance because it finds that McLeodUSA did not give Qwest "direction" or information needed to size power plant at List 1 drain of the McLeodUSA equipment.

In laying blame on McLeodUSA for Qwest's non-performance, the Order failed to consider that Qwest took it upon itself to create the collocation application order form. The only power related information requested on that form *created by Qwest* is for a CLEC to order cable distribution feeders. Nothing in the ICA informs McLeodUSA or authorizes Qwest to unilaterally transform the order for cable feeders into an order for power plant capacity. If Qwest needed McLeodUSA to order "power plant" capacity or to specify the List 1 drain of all its collocated equipment in order for Qwest to design and provide power on terms that were at parity with how it did so for itself, then it was incumbent upon Qwest to inform McLeodUSA of that need or request the required information. There was no basis in the ICA for Qwest to simply

[27] Order at 25.

[28] ICA Section 7.3.11 lists various McLeodUSA Responsibilities with respect to physical collocations, none of which include a duty to provide the List 1 drain to Qwest.

assume an order for cable feeds was a proxy for power plant capacity.

The Order further erred by effectively reversing the performance obligation set forth in the ICA wherein it states:

> Instead, McLeod expects Qwest, on its own and with no direction from McLeod, to determine the List 1 drain for McLeod's equipment and engineer the DC power plant for that collocation accordingly, despite the higher amperage of the distribution cable McLeod has ordered. We find nothing in the ICA, statute, regulation or Commission order that would require Qwest to do more than it is now…..[29]

The Order's conclusion that McLeodUSA had not given Qwest any "direction" ignores the explicit terms of the ICA. The ICA provides direction to Qwest by unequivocally directing Qwest to provide power under the same terms and conditions as it does for itself. At the time it was allegedly sizing power plant for McLeodUSA, Qwest's own Technical Publication 77835 required Qwest to size power plant using the List 1 drain. Likewise, the FCC had already interpreted Section 251(c)(6) to require ILECs to provide collocation on unequivocally nondiscriminatory terms, again directing Qwest to size power plant for McLeodUSA on the same *i.e.*, List 1, basis as Qwest did for itself. With both the contract and the governing law giving this unambiguous "direction" to Qwest, there is no valid basis to conclude that McLeodUSA voided Qwest's obligation by not providing information that Qwest never requested or sought. Indeed, such a ruling would encourage any party with a contractual duty to circumvent that duty by simply not requesting or gathering information it needs to meet its contractual obligations.

That is all the more true in this instance where Qwest took it upon itself to ask for power related information on its collocation application form. The record unmistakably shows that Qwest never asked for the List 1 drain information on its collocation application form. If McLeodUSA was required to "order" power plant or supply List 1 drain information in order for

Qwest to perform its unmistakably stated obligation, then it was incumbent on Qwest to have the ICA or the collocation application form so state. The record does show that McLeodUSA provides Qwest with a list of equipment that will be collocated. Mr. Morrison testified that Qwest should be able to determine List 1 drain from its knowledge of the equipment. Further, Qwest witness Ashton admitted that Qwest can estimate List 1 Drain based on the List 2 drain. Given that Qwest never followed up with additional requests for information, it was reasonable to assume Qwest had the information it needed to follow its own engineering guidelines and comply with the obligations it had agreed to in ICA Sections 2.6 and 7.1.9.

While Utah case law states that one party's performance can be excused when the other party to the agreement hinders, obstructs or delays the obligor's performance,[30] there is certainly no evidence in this case that McLeodUSA did anything that prevented Qwest from performing the obligation imposed by the ICA of providing access to power at parity *i.e.*, using the List 1 Drain. Everything McLeodUSA was asked to provide by Qwest on the collocation form was provided. Qwest's performance cannot be excused simply because Qwest failed to ask for the List 1 Drain information that its own Technical Publications required it to have to properly size the power plant.

Indeed, if any party should be found to have made a willful omission that prevented performance, the record unmistakably shows that that party is Qwest. Qwest designed the collocation application form, and it intentionally did not request the List 1 drain information, for reasons that were unclear to Mr. Ashton. Thus, if the Commission is correct that there was some unstated obligation on McLeodUSA to provide the List 1 drain to enable Qwest to perform its obligation under the ICA, then McLeodUSA's performance of that obligation must be excused

[29] Order at 25-26.

by Qwest's performance in creating the collocation order.[31]

The Order's finding also ignores that when McLeodUSA ordered collocations and distribution cable feeders into its collocations in the 2000 time frame, there was not a separate "power usage" and "power plant" rate. The only charge that existed was a charge for "–48 Volt DC Power Usage."[32] Qwest did not institute separate charges for DC Power Usage and DC Power Plant elements until separate charges were approved in its 2001-2002 cost dockets. Thus, not only did the terms of the ICA and Qwest's collocation order form from 2000 not impose an obligation on McLeodUSA to order "power plant capacity," the ICA pricing schedule and the ICA itself gave every indication that there was no such thing as an order for "power plant capacity." McLeodUSA would have no reason to believe that it was "*ordering* power plant capacity" by virtue of an order for distribution cables. Accordingly, there is no basis to assume that the ICA required McLeodUSA to "order" power plant capacity, and therefore, no basis to find that McLeodUSA "effectively ordered power plant capacity" by submitting its order for cable feeds.

Finally, the Commission's finding is also inconsistent with Qwest's Technical Publication 77385, which document did exist at the time collocations orders were submitted. That document provides just the opposite of the Commission's finding – that Qwest would size the power plant based on the busy day/busy hour drain, and not the size of a CLECs' cable distribution orders.

The Order's conclusion that "nothing in the ICA, statute, regulation or Commission order

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[30] *Cahoon v. Cahoon*, 641 P.2d 140 (Utah 1982).
[31] *See, Reed v. Alvey*, 610 P.2d 1374 (Utah 1980)
[32] See ICA, Attachment A (Judge Goodwill previously agreed to take official notice of the ICA, which includes this attachment, but McLeodUSA has appended this Attachment A to this Petition for the Commission's reference).

that would require Qwest to do more than it is now" is thoroughly at odds with express terms of the Utah ICA, Section 251(c)(6) and Utah statutory law requiring nondiscriminatory access to non-competitive services, and general principals of contract performance.[33] These laws and the ICA term impose a duty on Qwest to provide nondiscriminatory access to power and cannot be excused by simply stating Qwest did not have adequate information to meet those obligations.

Upon review and reconsideration, the Commission should apply the correct legal standard for evaluating whether Qwest was unlawfully discriminating against McLeodUSA, and find that Qwest is unlawfully discriminating by using the size of the cable feeders as the basis to bill McLeodUSA for power plant capacity when Qwest plainly does not do so for itself.

CONCLUSION

In summary, the Commission should review and reconsider its interpretation of the DC Power Measuring Amendment in light of the totality of the ICA between the parties, and the requirements of Utah law on contracts, as well as the state and federal telecommunications laws requiring non-discriminatory treatment of competitors. Should the Commission maintain its interpretation of the Agreement, the Commission should reconsider the separate issue of unlawful discrimination. When the correct legal standard is applied, the record shows that Qwest is unlawfully discriminating against McLeodUSA in providing access to power. The Commission should reconsider its decision, and should grant McLeodUSA the appropriate relief requested in its Complaint.

[33] Utah Code Ann. Sections 54-8b-3.3(a) and (b).

Dated this 26th day of October, 2006.

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