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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** **QWEST'S INITIAL POST-HEARING BRIEF**

Pursuant to the procedural schedule established in this case, Qwest Corporation ("Qwest") files its initial post-hearing brief with the Public Service Commission of Utah ("Commission").

I. Introduction

Fundamental to the Commission's decision in this case is the proper interpretation of the Power Measuring Amendment, the agreement between Qwest and McLeod ("McLeod") that triggered this dispute. The Amendment should be interpreted under Utah law, in accordance with long-established principles of contract interpretation regarding the meaning of the language, the expressed intent of the parties, and the responsibilities of each party. Such an interpretation leads inevitably to the conclusion that Qwest's interpretation of the Amendment is the only one supported by the

document and the law.

The Amendment applies only to the usage component of the power charges, not to the Power Plant rate element. This interpretation is consistent with the language of the Amendment itself and with information that was provided to all CLECs, including McLeod, prior to the execution of the Amendment. Further, information provided by McLeod regarding McLeod's intent at the time it entered into the Amendment clearly shows that McLeod did not seek an amendment to reduce the Power Plant charge and did not anticipate that this Amendment would do so.

To the extent that McLeod had a subjective intent with regard to the effect of the amendment, it did not share that interpretation with Qwest. Such undisclosed intent, even if it existed, may not properly be considered in interpreting the document. However, it is apparent from McLeod's testimony that McLeod's "intent" that the Amendment should apply to the Power Plant charge was not formulated until well after the Amendment was signed, and in fact did not exist at all at the time of the execution of the Amendment. In reality, McLeod is trying to advance a post hoc interpretation of the document that is wholly inconsistent with both the language of the document and the intent of both parties at the time it was executed.

McLeod has not been successful in these efforts. On July 7, 2006, the Iowa Utilities Board announced its ruling on this dispute on a very nearly identical record, rejecting both McLeod's contract claims and its discrimination claims, and ordering McLeod to return monies withheld in connection with this dispute. Qwest will file a copy of the written order with the Commission when it becomes available. The Commission heard this matter over two days of hearings, and must of course decide the issues

based on the testimony and evidence of record in Utah. However, the Iowa Board's decision on these issues should provide helpful and persuasive authority.

II. Summary of Argument

This case involves the interpretation of a contract – specifically, the interconnection agreement and the subsequent DC Power Measuring Amendment between McLeod and Qwest. Most of the positions taken by McLeod and its witnesses in this case reflect either McLeod's dissatisfaction with the Commission-ordered rate for the DC Power Plant charge, or McLeod's desire for usage-based billing for the DC Power Plant charge, irrespective of what the parties actually agreed to in the DC Power Measuring Amendment at issue in this case.

The interpretation of the DC Power Measuring Amendment is a relatively straightforward exercise. It is important to note at the outset that, prior to the parties' execution of the DC Power Measuring Amendment, Qwest and McLeod had agreed that McLeod would pay both the DC Power Usage charges and the DC Power Plant charges based on the quantity of -48 volt capacity McLeod specified in its original orders for power distribution. The Amendment changed *one* of these charges, but did not mention any others. The Amendment identifies the "DC Power Usage Charge" multiple times, but never mentions the "DC Power Plant" charges, which are separate charges reflected in the Exhibit A to the parties' interconnection agreement. Only a strained interpretation of this language could yield the result McLeod seeks in this case, and that is exactly what the dozens of pages of testimony filed by McLeod in this case provide.

McLeod now claims that the DC Power Measuring Amendment changes the Power Plant charge, notwithstanding the absence of any language supporting such a

claim, and claims that McLeod had an "expectation" that the Amendment would result in measured billing for that rate element as well as for the usage rate. The only support for such a belief is provided, strangely enough, by McLeod's retained expert witnesses, who are not employees of McLeod and who did not participate in the negotiations for or execution of the DC Power Measuring Amendment – experts who were in fact retained to assist McLeod in this dispute nearly 15 months after the Amendment was signed.

However, the only McLeod employee to testify confirmed that McLeod's only issue prior to entering the Amendment was a concern that rates not go up. Once this concern was satisfied, McLeod entered into the Amendment with no further questions. Indeed, internal McLeod documentation establishes that no savings on the Power Plant charge were ever anticipated, only savings on the Power Usage charge. McLeod admits it never reached its current interpretation of the Amendment until nine months after its execution, belying any arguments by its retained experts about McLeod's "expectations."

Further, Qwest made it abundantly clear to all CLECs, including McLeod, through the Change Management Process (CMP) and Product Catalog (PCAT) exactly what the DC Power Measuring Amendment would and would not accomplish. McLeod agreed that it should have reviewed this information if the issues involved were important to them, agreed that the DC Power charges at issue in this case were important to them, but mystifyingly either did not read the CMP or PCAT documents – or ignored them.

Nor does the extrinsic evidence support McLeod's interpretation of the Amendment. It is clear from the evidence in this case that Qwest's cost study requested that the Power Plant rates would be charged on a "per amp ordered" basis,

and that the Commission modified Qwest's requested rates and rate structure in Docket No. 00-049-106 prior to approval of those rates as "just, reasonable, and nondiscriminatory". It is also clear that Qwest's real world power plant has capacity available to McLeod to provide the ordered amount of power if McLeod should ever demand it. Thus, McLeod's attempts to pay for far less than the ordered amount of capacity should be rejected for what they are – an after-the-fact challenge to the DC Power Plant rate and not an interpretation of the Amendment itself.

III. Argument

A. Contract Dispute

1. The DC Power Measuring Amendment and the Rates Qwest Charged Are Binding As A Matter of Law.

A proper analysis of the interconnection agreement, and more specifically the DC Power Measuring Amendment between Qwest and McLeod in this case, must begin with a proper understanding of the special legal status of those agreements, and the impact of the Commission's orders approving the agreements and the proposed rates in various dockets. As distinguished from most contracts at common law, interconnection agreements are creatures of federal law, and enjoy the protections of that federal law. Assuming mutual assent, interconnection agreements have the binding force of law under the federal Telecommunications Act of 1996 (the "Act"). Federal policy favors commercial negotiations between carriers, and generally prohibits state commissions from changing agreements resulting from those negotiations. Specifically, Section 252(a)(1) of the Act, 47 USC § 252(a)(1), provides that carriers like Qwest and McLeod may "negotiate and enter into a ***binding*** [interconnection] agreement" (emphasis

added). Neither Qwest nor McLeod may alter the interconnection agreement between them through litigation. Indeed, changing the terms of interconnection agreements "contravenes the Act's mandate that interconnection agreements have the binding force of law." *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003).

The Commission approved the interconnection agreement between the parties in this case, and also specifically approved the DC Power Measuring Amendment.[1] The rates contained in Exhibit A to the parties' interconnection agreement were approved in Docket 00-049-106. Thus, once the parties have mutually assented to their terms, the contracts and rates have the "binding force of law" under federal law, and cannot be changed for any reason.

Indeed, in that docket, and as discussed in section III (C) below, the Commission carefully analyzed the rates Qwest presented for consideration – which included a single $11.2814 rate for DC Power Plant, charged on a "per amp ordered" basis[2] – and made several modifications to the rates as suggested by the Division. Qwest disclosed in its cost study that the rates for Power Plant would be assessed "based on the size of the power feed [or] feeds that the CLEC orders."[3] Based on changes suggested by the Division, the Commission ultimately approved two different power plant rates: $11.7795 per-amp ordered for power feed orders of less than 60 amps, and a $7.927 per-amp ordered rate for orders equal to or greater than 60 amps. The Division did not suggest, and the Commission did not order, a different rate design for the power plant rates – that is, the Commission approved the rates for power plant to be charged based on the

[1] The Amendment was admitted into evidence as Hearing Exhibit 1.

[2] *See* Hearing Exhibit 13, which is the summary of detailed results presented to the Commission.

[3] Hearing Exhibit 13.

amount of amps specified in a CLEC's power feed orders. These rates were ultimately approved by the Commission as "just, reasonable, and nondiscriminatory" as required by 47 USC §§ 251and 252 and Utah Code Ann. 54-8b-1.1.

The Commission's orders in Docket 00-049-106 preclude both the contract claims and the so-called "discrimination" claims McLeod asserted in its Complaint. It is undisputed that Qwest has been charging McLeod the Commission-approved rate of $7.79 (for orders greater than 60 amps) and $11.78 (for orders less than 60 amps), per amp ordered, for DC Power Plant since the Exhibit A[4] implementing the rulings in Docket 00-049-106 was approved and implemented into McLeod's interconnection agreement. Qwest cannot be held to have engaged in discrimination by implementing a DC Power Plant charge according to the rate and rate design, and the Commission cannot retroactively change the rates associated with either the underlying interconnection agreement or the DC Power Measuring Amendment. The Commission has already determined is just, reasonable, and nondiscriminatory under both Utah and federal law.

McLeod's arguments are nothing more than an attack on the rate itself. Such claims require a different statutory basis than alleged in this proceeding. As such, under both federal and state statutes, the only proper resolution of this case is to determine the terms and conditions to which the parties actually agreed through the DC Power Measuring Amendment. What McLeod now believes the parties might have agreed to, or even should have agreed to, whether for reasons revealed in engineering manuals or a dissection of the cost study supporting the Commission-approved rates in

[4] Hearing Exhibit 9.

Docket 00-049-106, is ultimately irrelevant. This case is ultimately a fairly straightforward contractual interpretation case, and the result is controlled by the parties' intent as expressed in the written words of the DC Power Measuring Amendment and the parties' conduct surrounding the execution of that Amendment.

2. Legal Standards for Contract Interpretation.

Consistent with these authorities, the key issue before the Commission in this case is the determination of what the binding agreement between the parties was intended to mean, through a proper interpretation of the Amendment. In interpreting a contract, Utah courts "'look to the writing itself to ascertain the parties' intentions, and we consider each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none.'"[5] The primary focus of contract interpretation is ascertaining the parties' intention at the time they executed the agreement.[6]

In this case, both sides have presented a significant amount of evidence extrinsic to the Amendment and underlying interconnection agreement. This evidence is admissible only for limited purposes under Utah law. One of these purposes is to determine whether the contract is ambiguous – and then, if the contract is ambiguous, to determine its meaning. "Because the parties have conflicting interpretations of the [DC Power Measuring Amendment], this [Commission] must determine whether the language of the term provision is ambiguous in that it could reasonably support both

[5] *WebBank v. Metropolitan Insurance and Annuity Co.*, 54 P.3d 1139, 1144 (Utah 2002), quoting *Jones v. ERA Brokers Consol., 2000 UT 61, P12, 6 P.3d 1129* (Utah 2000) (further quotation omitted).

[6] *Du Bois v. Nye,* 584 P.2d 823, 824-25 (Utah 1978).

interpretations."[7]

"A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms or other facial deficiencies."[8] Under Utah law, "[i]n determining whether a contract is ambiguous the court is not bound to consider only the language of the contract."[9] "When determining whether a contract is ambiguous, any relevant evidence *must* be considered."[10] "Rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intentions of the parties . . . so that the court can 'place itself in the same situation in which the parties found themselves at the time of contracting.'"[11]

In examining the extrinsic evidence in this case, the Commission must focus its attention on what the parties actually intended at the time the contract was executed. This is because Utah law forbids imposing on parties an agreement they did not actually reach. Courts will not "make a better contract for the parties than they have made for themselves."[12] 5-24 CORBIN ON CONTRACTS § 24.5 notes this same principle:

> If the parties attach different meanings to a contract term at the time of formation and one party is aware of the second party's meaning or has reason to know of it, and provided the converse is not true, a contract is formed, and the term is interpreted in accordance with the second party's meaning. The United States Supreme Court has acknowledged this approach as "hornbook contract law" [footnote omitted] citing the Restatement (Second) of Contracts.

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[7] *Canopy Corp. v. Symantec Corp.,* 395 F. Supp. 2d 1103, 1107 (C.D. Utah 2005).

[8] *Winegar v. Froerer Corp.,* 813 P.2d 104, 108 (Utah 1991).

[9] *Peterson v. The Sunrider Corp.,* 48 P.3d 918, 925 (Utah 2002).

[10] *Ward v. Intermountain Farmers Ass'n,* 907 P.2d 264, 268 (Utah 1995).

[11] *Id.*

[12] *Bakowski v. Mountain States Steel,* 52 P.3d 1179, 1185 (Utah 2002) (Cited with approval (by the court of appeals) for the same proposition in *UTA v. SLC Southern RR Co,* 131 P.3d 288 (Utah App. 2006)).

. . . .

> Cardozo described the rule thus: "The promise, if uncertain, was to be taken in the sense 'in which the promisor had reason to suppose it was understood by the promisee.'' [footnote omitted].
>
> This approach is the logical expression of a court's belief that the parties, in good faith, understood the words of their contract differently at the time of formation and that one party is in some way at fault in having attached a meaning that does not match that attached by the other party. This is expressed in various ways: the court may hold that the former party was negligent,[footnote omitted] or had reason to know, or should have known the other's meaning. Instead of expressing its belief in terms of fault, the court may explain that the general welfare requires it to preserve the security of the expectations reasonably induced by that former party's assent to the words used by both.

Farnsworth noted the same principle in his treatise on contract law:

> Perhaps the contract is embodied in a printed form that neither party prepared; perhaps its clauses have been lifted from a form book; perhaps the deal is a routine one struck by minor functionaries. . . . The court will then have no choice but to look solely to a standard of reasonableness. Interpretation cannot turn on meanings that the parties attached if they attached none, but must turn on the meaning that reasonable persons in the positions of the parties would have attached if they had given the matter thought.[13]

As noted in the Corbin treatise, these principles are also embodied in the RESTATEMENT (SECOND) OF CONTRACTS § 201,[14] which provides in relevant part:

> (1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.
> (2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
>
> (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party;

[13] E. Farnsworth, *Contracts* § 7.9 (2d ed. 2001).

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

or

(b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

(3) Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.

As discussed below, application of these authorities requires rejecting McLeod's claims and granting Qwest's counterclaim.

3. The Language of the DC Power Measuring Amendment Does Not Modify The DC Power Plant Charge.

Qwest's interpretation of the DC Power Measuring Amendment is also the simplest, most straightforward interpretation. It gives effect to the entire agreement, and requires no extrinsic evidence – though Qwest's interpretation is consistent with the extrinsic evidence of intent, as well. The DC Power Measuring Amendment mentions the "DC Power Usage Charge" five times, and mentions the "usage rate" another two times, for a total of seven mentions in less than one page of text. There is no mention of a "Power Plant" charge. Qwest's simple interpretation is supported by the objective manifestations of its intent both before and after the Amendment was executed and approved.

There is ample support for Qwest's interpretation in the plain language of both sections 1.0 and 2.0 of the Amendment. By way of illustration, Section 1.2 of the Amendment, which generally describes how the measuring process would be implemented, addresses the meaning of the power usage rate to be changed by the Amendment in the first sentence. That sentence provides in relevant part that "the power usage rate [for orders of 60 amps or less] reflects a discount from the rates for

those feeds greater than sixty (60) amps." Exhibit A to the underlying interconnection agreement[15] indicates a rate of $1.95 per amp ordered for power usage for orders of 60 amps or less at item 8.1.4.2.1, and a rate of $3.89 per amp ordered for power usage for orders of more than sixty amps at item 8.1.4.2.2. This clearly reflects a discount from rates for those feeds greater than sixty amps. In contrast, the rates for power plant indicate the opposite – the power plant rate is higher for orders of less than sixty amps, and thus does not reflect a discount from the rate for "those feeds greater than sixty (60) amps". This language, read in the context of the entire agreement, plainly excludes the power plant rate from the rates that would be affected by the DC Power Measuring Amendment.

In addition, later in section 1.2, the Amendment indicates that "Qwest will reduce the monthly usage rate to CLEC's actual use" based on the measurements taken. The reference to "usage rate" contains no reference to a power plant rate, and is also in the singular, which indicates only one charge or rate would be affected. The plain meaning of "usage rate" can only refer to the Power Usage charge at item 8.1.4.2.2. To include "power plant" rates based on this reference strains credulity.

In addition, the reference to "Charge" in the Amendment is in the singular. If the parties had intended more than one charge to be impacted by the Amendment, that could and would have been accomplished simply by referring to the "-48 Volt DC Power Usage Charge**S**" in the plural. Qwest's interpretation gives proper effect to the phrasing the parties actually used. McLeod's interpretation would require the Commission to ignore or give no effect to the singular reference to "Charge" throughout the

[15] Hearing Exhibit 9.

Amendment, which would violate a cardinal principle of contractual interpretation.[16]

McLeod now appears dissatisfied with Qwest's simple interpretation. McLeod's theories on why the Commission should ignore the simple phrasing of the Amendment, and conclude that the parties intended to modify not only the Power Usage Charge, but also the Power Plant Charge for orders of more than 60 amps (Exhibit A Item 8.1.4.1.1.2), would require ignoring (a) the language of the Amendment, (b) the language of the ICA to which the Amendment relates, (c) the extrinsic evidence related to the parties' intent – and perhaps all three – in favor of recently developed (and incorrect) theories of how competitive carriers ***should*** pay incumbent carriers for unbundled DC Power elements.

First, McLeod argues that the reference to the singular "-48 Volt DC Power Usage Charge" refers to and alters several rates under the heading "Power Usage" in the Exhibit A. Paragraph 26.30 of the underlying interconnection agreement specifically defeats this claim:

> **26.30. Headings of No Force or Effect**
>
> The headings of Articles and Sections of this Agreement are for convenience of reference only, and shall in no way define, modify, or restrict the meaning or interpretation of the terms or provisions of this Agreement.[17]

Even a cursory examination of the Exhibit A to the interconnection agreement reveals that items 8.1.4 ("48 Volt DC Power Usage") and 8.1.4.1 ("-48 Volt DC Power Usage, per ampere, per month") are mere headings. No "Charge" is associated with either item, and the charges for Power Plant and Power Usage are indented beneath these

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[16] *See, e.g. WebBank v. Metropolitan Insurance and Annuity Co.*, 54 P.3d 1139, 1144 (Utah 2002) (cited p. 8, *supra*).

[17] Utah courts specifically enforce these provisions. The court in *Bakowski v. Mountain States Steel*, 52 P.3d at 1184 (*supra*, n.13, p.9), applied a contractual provision limiting the effect of headings and captions to reach its interpretation of the contract at issue in that case.

section headings. McLeod even used the term "heading" to describe these items in response to Qwest's discovery request No. 13 in Iowa , stating: "Section 8.1.4.1 of Exhibit A is a ***heading*** entitled '-48 Volt DC Power.' Qwest identifies no particular charge associated with 8.1.4.1 but this ***heading*** does include three additional rate elements that include monthly recurring charges."[18] Once confronted with the language of section 26.30 of the interconnection agreement, McLeod attempted to attach different labels to these headings, such as a "grouping of rate elements,"[19] or a "category of rates."[20] However, these labels are indistinguishable from the term "heading," and reflect nothing more than an attempt to spin McLeod's earlier, accurate assessment of section 8.1.4.1 of the Exhibit A. Those section headings simply cannot "define, modify, or restrict the meaning or interpretation of the terms or provisions" of the DC Power Measuring Amendment.

McLeod's argument that the section headings in the Exhibit A should control the interpretation of the DC Power Measuring Amendment fails even within the language of the Amendment itself. The Amendment refers to the "-48 DC Power Usage Charge" five times as the charge that would be changed to reflect measured usage. There is no "Charge" associated with either section 8.1.4 or 8.1.4.1 of the Exhibit A. The only "Charges" associated with "Power Usage" are in items 8.1.4.2.1 and 8.1.4.2.2, and the parties agree that 8.1.4.2.1 is not changed by the Amendment. This fact underscores the fact that the headings are meaningless – under the Amendment, only the power

[18] Hearing Exhibit 12 (emphasis added).

[19] *E.g.,*Tr. 190.14-17. References to the hearing transcript will be in the form "Tr. Page.Line; and references to prefiled testimony will be in the format "Witness Prefiled Direct/Rebuttal Page.Line. Some references to transcripts are to entire pages without line descriptions for purposes of context.

[20] Tr. 217.5.

usage “Charge” for orders of more than sixty amps is affected.

In response to this plain language, McLeod claims that section 2.1 of the agreement defines the “DC Power Usage Charge” to be “for the capacity of the power plant available for CLEC’s use.” Thus, McLeod argues, the parties intended that the “DC Power Usage Charge” to be modified is actually the “Power Plant” charge. This sentence potentially introduces some ambiguity into the agreement, because interpreting the entire agreement based on that single sentence according to McLeodUSA’s position would produce a result that neither party intended, in violation of the Utah authorities cited in subsection 2 above. First, it makes no sense for the parties to have defined “Power Usage” to actually mean “Power Plant.” The so-called definition of “DC Power Usage Charge” in section 2.1 would specifically exclude the actual charges for power usage under McLeodUSA’s view, because section 2.1 states that the “AC Usage Charge is for the power used by CLEC,” and the Amendment does not change or otherwise mention the “AC Usage Charge.” All parties agree that “the power used by CLEC” is reflected in the “Power Usage” rate elements at sections 8.1.4.2.1 and 8.1.4.2.2. Similarly, all parties agree that the Amendment changes the Power Usage charge for item 8.1.4.2.2 to a measured usage basis. Applying the interpretation McLeod suggests to section 2.1 is inconsistent with every other remaining provision of the Amendment, because it would yield a result whereby the Amendment that mentions “usage rate” twice and “DC Power Usage Charge” five times would not actually change any Power Usage charge reflected in Exhibit A. McLeod’s view of section 2.1 is simply

not sustainable.[21]

4. Qwest Objectively Manifested Its Intent That The Amendment Would Alter Only the Power Usage Charge, Not The Power Plant Charge, And Could Reasonably Suppose That McLeod Understood That Expressed Intent.

Qwest plainly, objectively, and openly disclosed its intent regarding the DC Power Measuring Amendment prior to its execution through two avenues in addition to the language of the Amendment. Qwest offers a forum called the Change Management Process (CMP) to the CLECs it does business with. The CMP forum includes, among other things, discussions and information about Qwest products or changes to products that Qwest offers.[22] These changes are typically accompanied by a product catalog (PCAT) made available on Qwest's website.

In this particular case, Qwest offered several documents on its CMP website regarding the power measuring product and associated changes, and notified sixteen McLeod employees of their availability (including McLeod's deputy general counsel and Ms. Spocogee).[23] Included among these documents was Exhibit WRE-2 to William Easton's prefiled testimony (admitted as Qwest Exhibit 1.2), which was Qwest's response to several of these issues. The issues Qwest notified McLeod would be discussed included how power measuring would impact monthly recurring charges, how power measuring relates to cost dockets, how Qwest would measure power, whether the power measuring offering would be optional or required, and whether an

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[21] Furthermore, Qwest's interpretation of the language in Section 2.1 that references the "capacity of the power plant available for CLEC's use" is consistent with Qwest's actual practices. Even after the DC Power Measuring Amendment, Qwest continues to make power plant capacity available to CLECs at the number of amps specified in their power feed orders.

[22] Tr. 39.25 – 40.18.

[23] Easton Prefiled (Qwest Exhibit 1) 12.1-6.

interconnection amendment would be required. Most specifically, in Qwest Exhibit 1.2, another CLEC posed the following question:

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

Qwest's response was:

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

This response made clear that the Power Plant charge ($10.75 in the above example, $7.7927 in Utah) would continue to be charged at the level of amps ordered. Even though (1) this information would have alerted McLeod that Qwest's expressed intent at the time differs from the interpretation McLeod now claims; (2) McLeod admitted that charges for DC power were important to McLeod;[24] and (3) McLeod admitted it should pay attention to "the important things" in the CMP process;[25] McLeod now claims it did not meaningfully participate in this CMP process.

Qwest followed the CMP process with a detailed explanation of the DC Power Measuring Amendment in its PCAT.[26] That document clearly delineated and defined the "Capacity Charge" to "recover[] the cost of the capacity of the power plant available for

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

[25] Tr. 42.10-12.

[26] Exhibit WRE-1 (Qwest Exhibit 1.1).

your use," and the "Usage Charge" to "recover[] the cost of the power used."[27] In the portion specific to the DC Power Measuring option, the PCAT is clear that only the "usage rate" would be impacted. The PCAT uses language substantively identical to that appearing in the DC Power Measuring Amendment, and specifically separates the definition of the -48 DC Volt Power Usage Charge from the definition of the -48 Volt Capacity Charge. Consistent with the PCAT, the Amendment only changes the Power Usage charges to a measured basis, and omits any mention of changes to the Power Capacity, or power plant, charge. Had McLeod seen this document, they would reasonably understand that the DC Power Measuring Amendment would not affect power plant charges.

McLeod attempts to sidestep Qwest's clear and objective manifestations of intent by belatedly claiming it never saw these documents prior to executing the Amendment. Even if true, McLeod's failure in this regard was unreasonable, such that McLeod had reason to know Qwest's interpretation, and Qwest had reason to suppose McLeod was aware of its expressions of intent. Under the RESTATEMENT (SECOND) CONTRACTS § 201 and the other authorities cited above, the Commission need not resolve that question. The Commission need only determine whether McLeod had "reason to know the meaning attached by" Qwest.[28] The evidence is clear that McLeod had reason to know Qwest's intent, objectively manifested in the CMP documentation and PCAT. The evidence is similarly clear that McLeod never communicated the intent it now claims to Qwest prior to the Amendment's execution.[29]

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[27] Qwest Exhibit 1.1, page 1.

[28] RESTATEMENT (SECOND) CONTRACTS § 201(2)(b).

[29] Tr. 32.3-10.

McLeod's instructions to the persons charged with negotiating and obtaining the DC Power Measuring Amendment also reveal that understanding the provisions of the contract were important to them – those persons were instructed to make sure that the DC Power Measuring Amendment did not result in potentially increased power charges, as had been the case in a similar agreement negotiated in Michigan.[30] As noted above, Ms. Spocogee also testified that McLeod had been involved in regulatory proceedings involving power plant charges in several other states for some time prior to executing the DC Power Measuring Amendment. Thus, McLeod had experience in negotiating and obtaining interconnection agreements or amendments on the issue of DC power charges, and the issues and potential pitfalls they had confronted in contracting for DC power charges were sufficiently important to warrant instructions to its employees to research potential contracts accordingly. Ultimately, however, the sheer amount of dollars at stake – McLeod claims almost $400,000 in overcharges in Utah alone, and almost $5 million for all Qwest states[31] – provides objective evidence of the importance of this issue to McLeod. McLeod cannot credibly claim that the issue of DC power charges was unimportant to them, and has admitted that important issues require reasonable diligence in the CMP and PCAT processes. Consistent with Professor Farnsworth's conclusion that contract interpretation "must turn on the meaning that reasonable persons in the positions of the parties would have attached if they had given the matter thought," the Commission must conclude that if McLeod had given the matter reasonable thought and diligence, it would have discovered the intent Qwest attached to the DC Power Measuring Amendment in the CMP documents and PCAT. Accordingly,

[30] Tr. 77.24 – 78.16.

[31] Tr. 36.11-24.

under the several Utah authorities cited above, Qwest cannot be burdened with McLeod's unexpressed intent.

5. McLeod's Intent With Regard To The Amendment Was Limited To Altering Power Usage Charges, Not Power Plant Charges – Until Many Months After the Amendment Was Executed.

To a certain extent, the above arguments accept for purposes of argument only that McLeod actually possessed an intent at variance with Qwest's interpretation of the DC Power Measuring Amendment, but never expressed it. The evidence shows that not only did McLeod never express a contrary intent to Qwest prior to disputing the charges in mid-2005, 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.

Hearing Exhibit 3 contains McLeod's response to Qwest's discovery request seeking non-privileged internal communications within McLeod relating to the DC Power Measuring Amendment prior to its execution. Importantly, none of these communications contains any reference to potential savings on power plant charges. More specifically, however, these communications reveal an understanding that the DC Power Measuring Amendment would ***only*** affect power usage charges. Contained in that response is a chain of emails[32] in which McLeod employees discussed the proffered Amendment[33] and were instructed to estimate the potential savings that could be

[32] Hearing Exhibit 4.

[33] Hearing Exhibit 7, a draft of the Power Measuring Amendment supplied by Qwest for McLeod's consideration, was attached to this email chain, and differs from the DC Power Measuring Amendment actually executed only in that blanks identifying the state and specific CLEC are not filled in.

realized through the Amendment. In that chain, a spreadsheet[34] was developed by a McLeod employee and attached that "should work to track our estimate."[35] Though the spreadsheet in Qwest Exhibit 1.3 is unpopulated, according to discovery responses,[36] the spreadsheet was "renamed" and saved as the document appearing in Qwest Exhibit 1.4.

These documents track savings on only one rate element – the power usage charge. The unpopulated spreadsheet from Qwest Exhibit 1.3 contains only one column for determining the billing amount. This single column is carried over in Qwest Exhibit 1.4 to reflect a single USOC code: the code for the power usage charge.[37] If the spreadsheet from Qwest Exhibit 1.3 or 1.4 was ever populated with a column in it that reflected savings on power plant charges, that would have been responsive to Qwest's discovery request and should have been produced. But no other version of these spreadsheets exists,[38] which explains why one was not produced. The lack of any calculation of power plant savings prior to the execution of the DC Power Measuring Amendment is consistent with Ms. Spocogee's testimony that the persons charged with obtaining the Amendment did not even realize that there were other charges associated with the usage other than the power usage rate as calculated in Qwest Exhibit 1.4.[39] The evidence is clear: The spreadsheet that was developed to track McLeod's estimated savings from the DC Power Measuring Amendment tracked only savings

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[34] Qwest Exhibit 1.3.

[35] *See* third page of Hearing Exhibit 4; third page of Exhibit B to Hearing Exhibit 5.

[36] Hearing Exhibit 5.

[37] Tr. 61.5-8. Testimony at pages 60 and 61 of the Transcript and Hearing Exhibit 9 establish that the single rate reflected in Exhibit 1.4 is the power usage rate for orders of greater than sixty amps in Utah.

[38] Tr. 59.1-4.

[39] Tr. 84.5-14.

from the power usage charge, not the power plant charge. McLeod cannot now claim that it "expected" to see savings on the power plant element.

McLeod's attempts to distance itself from the savings calculations in these spreadsheets are ineffectual. Ms. Spocogee attempted to minimize the level of responsibility the people on the email chain were assigned, but it is clear from the email chain that one of the persons involved, Jody Ochs, was charged to work with another person on the email chain, Sherry Krewett (a contract administrator for McLeod[40]) "on this Qwest Amendment for Power Measurement," and was instructed that she "will likely need to get in touch with Kathy Battles [of Qwest]."[41] McLeod assigned these employees the responsibility to negotiate and obtain the DC Power Measuring Amendment contract, and they determined the savings McLeod expected it would realize from the Amendment.[42] Their determinations were limited to the power usage charges to the exclusion of power plant charges, and this Commission should reach the same determination.

McLeod's remaining tactic to distance itself from its calculation of savings is to claim that the persons charged with negotiating the DC Power Measuring Amendment were charged solely with making sure that the rates for DC power did not increase, as they had in a similar negotiation in Michigan.[43] But again, this evidence only provides

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[40] Hearing Exhibit 5, response to Request 45.

[41] Hearing Exhibit 4; Tr. 52.2-6.

[42] Regardless of the titles of the McLeod employees involved in the negotiations and analysis of the Amendment prior to its execution, the Farnsworth treatise cited above notes that the determination of intent turns on what "reasonable persons" would have done "had they given the matter thought." On this point, both Qwest and McLeod agree that (a) McLeod should have reviewed the CMP and PCAT documents if the issues were important, and (b) the issues surrounding DC power charges were important to McLeod.

[43] Tr. 467.2-22.

further support for Qwest's arguments in this case. Beyond establishing a background against which it would have been unreasonable for McLeod to fail to examine the CMP and PCAT documentation prior to entering the DC Power Measuring Amendment, this evidence confirms that McLeod had no intent to reduce power plant charges through the Amendment. Even under Qwest's interpretation of the Amendment, McLeod accomplished its task of avoiding "another Michigan." That was the extent of their intent prior to negotiations, and Qwest's interpretation of the DC Power Measuring Amendment is entirely consistent with that claimed intent.

Perhaps most damaging to McLeod's claim of its intent that power plant charges be reduced to measured levels, however, was the testimony of Ms. Spocogee. In the following exchange, 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:

> Q. Right. So you said the engineering group had made those calculations and determined they were going to save money, but that was the first time that you ever looked at the specific power plant element and calculated power plant savings was in connection with your audit?
>
> A. Correct.[44]

This testimony should end the Commission's inquiry on the parties' intent. McLeod never internally or externally expressed the intent it now advances – that the "DC Power Usage Charge" actually refers to both the power usage and the power plant charges – until May 2005, nine months after the Amendment was executed. McLeod simply never intended the Amendment to modify the power plant charge, as their internal

[44] Tr. 87.9-15.

communications and hearing testimony confirm.

B. Qwest's Interpretation Of The Amendment Is Consistent With Qwest's Actual Network.

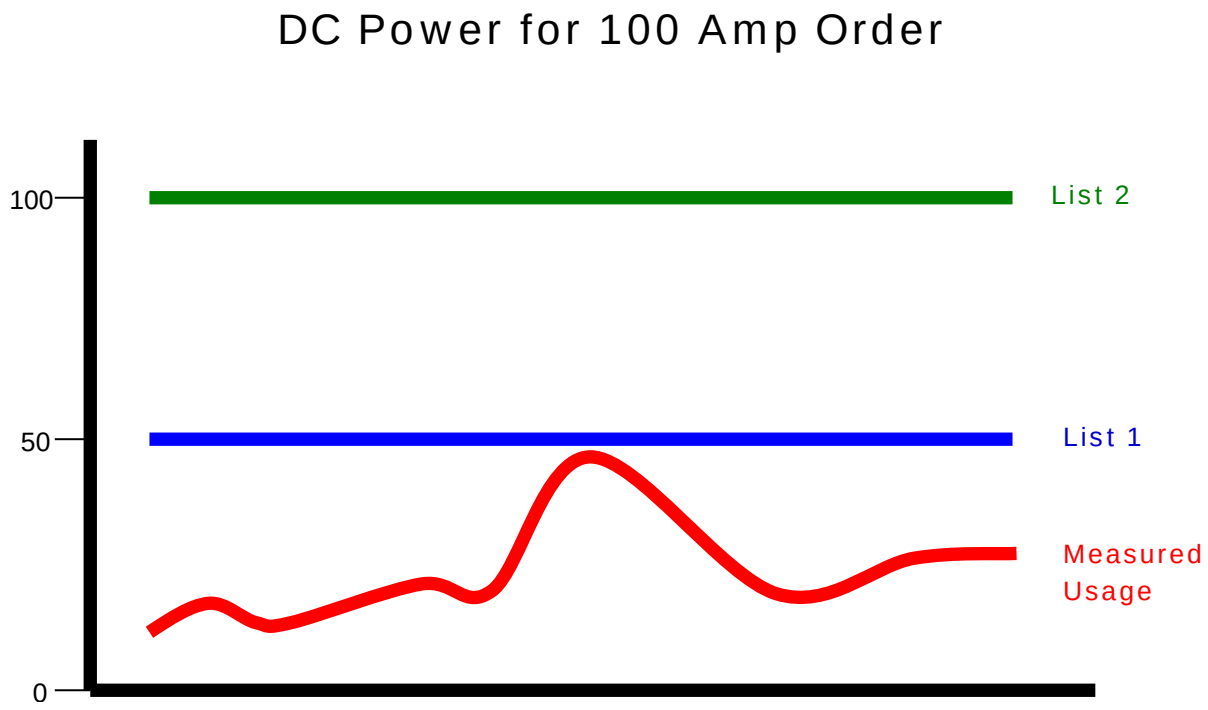
Nor does any of the ancillary extrinsic evidence offered by McLeod support its interpretation of the Amendment. McLeod asserts that Qwest is charging for more power plant capacity than is appropriate, and provides the testimony of Sidney Morrison in support of the contention that Qwest's charges are inconsistent with the proper design of a power plant. These allegations simply do not hold water. It is clear from the evidence in this case that Qwest's real world power plant has capacity available to McLeod to provide the ordered amount of power if McLeod should ever demand it.[45] Thus, McLeod's attempts to pay for far less than the ordered amount of capacity should be rejected for what they are – an after-the-fact challenge to the DC Power Plant rate and not an interpretation of the Amendment itself.

Mr. Morrison testified at length about power plant from an engineering standpoint. As demonstrated by Qwest's relatively brief rebuttal testimony, Qwest does not disagree with much of what he says, particularly since it is based on Qwest's own technical publications. However, more importantly, much, if not all, of what he says is also irrelevant to the question of the proper interpretation of the Amendment.

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.

[45] Ashton Rebuttal, Qwest Exhibit 2, 7.12-14.

The manifest inequity of this position is evident, and is illustrated by Hearing Exhibit 11, reproduced below.



In this document, McLeod's power order is the top, green line, showing that McLeod has ordered 100 amps. Qwest reasonably used the ordered amount in its power planning process, and made decisions about power plant capacity based on the need to be able to provide the ordered amount if required. The middle, blue line represents the amount of power plant capacity that McLeod claims Qwest should assume for engineering purposes, even though Qwest does not have sufficient information to know the List 1 Drain for all of McLeod's equipment or when McLeod would expect to draw that amount. Finally, the lowest, red line reflects the actual power consumption over a period of time.

McLeod wants the Commission to require that power plant charges be assessed based on a single point along the red line at the bottom of the chart – an amount that is

generally far below what even McLeod contends is the engineering standard. Under McLeod's advocacy, if McLeod ordered 100 amps, and Qwest made that capacity available to McLeod, McLeod would pay only on the 18 or 20 amps that they might draw at any particular point in time. And McLeod takes this position even though McLeod's own expert contends that Qwest should engineer to provide List 1 drain, a capacity of 50 amps in this example – which McLeod agreed would be greater than measured usage except at the point of peak usage, *e.g.,* noon on Mother's Day.[46] In addition to being inconsistent with even McLeod's view of the language of the Amendment, such a result would be wrong because it would not provide any incentive to McLeod to properly size its power orders, and it would require Qwest to assume all of the risk of having sufficient power plant capacity available to meet those orders, without compensation, essentially requiring Qwest to plan for and make available spare capacity at no cost to any other provider.

1. McLeod's Power Order is the Order that McLeod Itself Specifies for Power Cables, and Reflects the Capacity that McLeod Expects to Have Available to It.

McLeod claimed during the hearing that it does not place orders for power plant capacity, but rather only orders power distribution cables. While it is correct that McLeod's power order specifies the size of the distribution cables requested, it is also correct that this is McLeod's power plant order. Qwest's Commission-ordered and approved rates, discussed below, were implemented based on the express representation by Qwest that the size of the power feed specified by the CLEC would

[46] Tr. 144.10-15.

constitute the ordered amount for purposes of assessing the Power Plant rates.[47] Qwest sizes its power plant to accommodate the ordered amount, and makes that capacity available to McLeod. Qwest and McLeod agree that the ordered amount is the List 2 drain expected on the power plant.[48]

While McLeod contends that Qwest should (and does) design its plant in accordance with List 1 drain[49] for both itself and expected CLEC power loads, it is clear from the testimony that it is reasonable for Qwest to size its plant based on CLEC orders.[50] In fact, although McLeod testified on the one hand that it was unreasonable for Qwest to assume that McLeod might need 200 amps of power if McLeod ordered 200 amps of power,[51] McLeod also clearly stated during the hearing that McLeod would expect that it "would have the List 2 drain available to it in terms of capacity of the power plant".[52] Consistent with that expectation, Qwest designs its power plant to make List 2 drain available simultaneously to all CLECs in a List 2 event.[53]

2. It is Reasonable for Qwest to Size its Power Plant based on CLEC Power Orders.

McLeod argues that Qwest should size its power plant based on the expected

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[47] Hearing Exhibit 13 and Tr. 204.

[48] List 2 drain is a "worst case scenario" drain on the power plant. One typical example of when List 2 drain is demanded is associated with the start up of telecommunications equipment after a power outage. In this scenario, the central office runs off AC power supplied by the back up generator until the fuel runs out. If for some reason the generator cannot be refueled, the office would run entirely off of the power supplied by the batteries. After about four hours, the batteries would be unable to provide enough power to run the telecommunications equipment, and the equipment would shut down. When AC power is restored and the equipment begins to power back up, there is a List 2 drain on the power plant. Qwest Exhibit 2, 7.3-14, Tr. 97-99.

[49] List 1 drain is the average busy day/busy hour current during normal plant operations. Tr. 120.

[50] Qwest Exhibit 2, 6.14-19.

[51] Tr. 194-195.

[52] Tr. 102.

[53] Qwest Exhibit 2, 7.12-14.

List 1 drain of the CLECs' equipment.[54] The flaw with this assertion is that Qwest does not know the List 1 drain of the CLECs' equipment.[55] Qwest is not familiar with all of the equipment that the CLECs use, and cannot know how fast the CLECs will grow or when to anticipate the amount of power they may need.

McLeod has suggested that because Qwest now has five or six years worth of experience with CLEC collocation and power usage, and almost two years worth of experience measuring CLEC power consumption, Qwest should consider that data in sizing its power plant. What McLeod neglects to mention here is that all of McLeod's collocation power orders were placed in 1999 and 2000, and Qwest had to make decisions about sizing the power plant at that time, not with six years of hindsight. At the time Qwest made decisions about sizing the power plant, Qwest had no idea of how fast the CLECs would grow, how much power they would consume, or what their power usage characteristics would be.[56]

The issues that Qwest faced in 1999-2000 when it received collocation power orders from McLeod (and many other CLECs as well) were that Qwest did not know the List 1 drain of the McLeod equipment; Qwest did not know the types of customers McLeod would obtain; Qwest did not know how fast McLeod would grow, or whether

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[54] The technical publications and other material suggesting that plant should be designed to List 1 drain necessarily assume that List 1 drain is known, which is not the case with CLEC orders for power capacity. Indeed, even though Qwest's own technical publication indicates that List 1 may be estimated at 30-40% of List 2 (Hearing Exhibit 22), it is only necessary to refer to Mr. Morrison's confidential Figure 6 (McLeod Exhibit 2, 47) to see that that relationship does not always hold for CLEC equipment. In fact, the actual measurements (which are lower than List 1 drain) shown in that illustration are almost double this amount. Mr. Morrison also agreed that for some of McLeod's equipment, List 1 drain very closely approached List 2 drain. Tr. 123.

[55] Qwest Exhibit 2, 13.16-23; Tr. 300.14-19.

[56] Mr. Morrison explains how difficult it is to forecast usage, describing how two identical pieces of equipment can have very different usage characteristics. (McLeod Exhibit 2, 11) Mr. Starkey also explained that the ordered amount of power may have no direct relationship to the amount of power that will be used in the future. McLeod Exhibit 3-SR.1, Starkey Rebuttal, 25.

growth would be linear or "spiky." No subsequent orders for power have been submitted by McLeod for most central offices, and McLeod has not reduced its power orders, so Qwest is left with the fact that it had to make engineering decisions in 1999, based on the information provided by McLeod at that time.

Under these circumstances, the only reasonable approach was the one Qwest took – size to McLeod's power order, which is List 2 drain.[57] This approach meets the CLECs' expectations with regard to the availability of power plant capacity and is consistent with the rate structure ordered by the Commission in Docket No. 00-049-106 which calls for Power Plant to be charged (and presumably made available) at the number of amps specified in CLEC power feed orders. Qwest's approach is also one which allows the CLEC to control and dictate how much power plant capacity will be available to it. Qwest, who has no visibility to the CLECs' marketing plans or forecasts of future growth, cannot be expected to know and plan for power needs other than those specified by the company placing the power order.

In sum, the "power plant capacity that is available for the CLECs use" (see the second sentence in paragraph 2.1 of the Amendment) is the power capacity that the CLEC ordered. This is consistent with how Qwest designed both its power plant and its cost study. McLeod's interpretation of the Amendment language simply does not square with either the language in the Amendment or with real life.

3. Charging for Power Plant "As Consumed" As Opposed to "As Ordered" Would Allow McLeod to Pay for Less Capacity than is Available to McLeod for Its Use.

As is apparent from the testimony, argument, and briefing to date, Qwest strongly

[57] Qwest Exhibit 2, 6.12-19.

disagrees with McLeod's assertions that it should pay for power plant capacity on an "as consumed" basis.[58] Upon closer examination, it is apparent that McLeod's position is itself contrary to how McLeod claims Qwest should (or does) construct its power plant. To examine that contention a bit further, Mr. Morrison's testimony is instructive.

McLeod asserts again and again that Qwest should construct power plant capacity in accordance with the CLEC's List 1 drain.[59] There is no dispute between Qwest and McLeod that List 1 drain may be approximated by the busy day/busy hour drain on the power plant during normal operation, for example, the peak load on Mother's Day. And, there is also no dispute that under the Power Measuring Amendment, Qwest is required to measure power usage at least twice and as many as four times a year based on CLEC request.[60]

Yet, if McLeod is billed for power plant on the basis of actual measured power usage, that actual measured usage will fall below List 1 drain, sometimes *far below* List 1 drain. Mr. Morrison makes this clear in his testimony on several occasions. For example, he states that "actual measured usage at any particular point in time will fall below List 1 drain . . . and sometimes far below that."[61] Thus, unless Qwest was somehow able to show up and take a measurement at the exact time of the List 1 drain, the number of amps that measured will not be "anywhere close to the List 1 drain"[62] – the amount of capacity that even McLeod contends that Qwest constructs and makes

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[58] Indeed, the very contention is contrary to reality – power plant, a fixed investment as discussed below, is not "consumed" per se (Tr. 97, lines 10-14), and the costs associated with power plant do not vary with power usage.

[59] *E.g.,* Tr. 130; McLeod Exhibit 2-SR, 7-9.

[60] Hearing Exhibit 1, paragraph 1.2.

[61] McLeod Exhibit 2-SR, 30.669.

[62] Tr. 139.

available to CLECs. Even then, Qwest is required to measure at least twice and up to four times per year, so it is guaranteed that the measured amounts will not always be the List 1 drain. Moreover, even Mr. Morrison agreed that "the DC power plant is not based or not sized based on actual power measurement, but what power engineers actually do is they engineer and size DC power plant based on the power requirement needed at that List 1 moment."[63]

So, while the parties may debate whether Qwest should or does construct to List 1 drain or List 2 drain, it is inescapable that actual usage at any particular point in time is likely to be far below either level. Thus, McLeod's position in this case would have it pay for *far less* power plant capacity than even McLeod claims Qwest engineers for and is made available.[64] No interpretation of the Amendment supports such a result.

What matters in this case is that the CLEC placed an order for power distribution, knowing that the order would also apply to the power plant, and Qwest made (and makes) power plant capacity available in accordance with the amperage requirements specified in that order. This has been true both before and after the Amendment, and nothing in the Amendment changed the way power plant capacity is charged, in accordance with Qwest's Commission-approved rates and Qwest's cost study.

C. Qwest's Interpretation Of The Amendment Is Consistent With Its Filed And Approved Cost Study.

As discussed above, because the interconnection agreement between Qwest and McLeod, including the Commission-approved rates incorporated in that agreement, carries the binding force of law, McLeod should not be permitted, in this expedited

[63] Tr. 139-140.

[64] Tr. 144.

proceeding, to launch a collateral attack on the previously filed and approved Power Plant rate. McLeod attempts nevertheless to argue that Qwest's cost studies do not support charging power plant on an as ordered basis. This argument is based on a flawed logical premise. The Commission already determined what rates and rate designs Qwest's cost study did and did not support when it reached its decision in the cost docket – and required some modifications to the rates based on those determinations. McLeod cannot now collaterally attack the Commission's decision. Arguing about Qwest's cost studies asks the wrong question. The real question is what rates did the Commission approve, and the Commission indisputably approved the power plant rates, at as-ordered levels, both in the cost docket, and its approval of Qwest's compliance filings. But McLeod's after-the-fact assertions with regard to how the contract should be interpreted amount to just that – a collateral attack on approved rates. As such, the Commission should give little if any weight to McLeod's arguments regarding Qwest's cost support for the Power Plant rate and how that rate was developed in the cost study.

That said, to the extent that the Commission does consider the cost study, two things are readily apparent. First, the Power Plant rate is a lawful rate, approved by the Commission after full disclosure as to how it was developed, and paid by McLeod on a per-amp-ordered basis for years prior to the execution of the Amendment at issue here. Second, to the extent that the cost study is evidence of the parties' intent regarding how the costs should be applied, the study is clear that the costs were developed to recover a fixed investment that does not vary with usage, and the rate is to be applied on a "per-amp-ordered" basis, not on a usage sensitive basis.

1. The Cost Study Supporting the Power Plant Rate Element was Filed with the Commission and Approved in a Cost Docket.

Collocation costs were the subject of a cost docket in Utah in 2000 and 2001. Docket No. 00-049-106 established Qwest's collocation costs and rates for Utah, and those rates were incorporated into the pricing exhibits (the Exhibit A) in McLeod's ICA. That docket was a fully contested proceeding in which McLeod had an opportunity to participate. In that proceeding, all parties had the right and the opportunity to evaluate Qwest's cost study and advocate for the proper rates relative to that study. McLeod did not do so, and the Commission-approved rates should not be subject to attack in this proceeding.

In Docket No. 00-049-106, Qwest filed cost support for a number of rate elements, including collocation rates. The testimony and exhibits filed in that docket make it clear that Qwest's cost studies properly model costs in accordance with TELRIC (total element long run incremental costs) principles. There was ample opportunity in that docket for any interested party to evaluate and challenge both the costs and the resulting proposed rates. Indeed, Qwest's Power Plant costs were evaluated and modified in that docket, to produce two separate rates (for "less than 60 amps" and for "equal to or greater than 60 amps") instead of the one rate proposed by Qwest. The Commission subsequently approved a compliance filing containing Qwest's collocation rates, including the modified Power Plant rates. However, as noted above, this proceeding does not constitute a proper venue to complain against the rates.

Because the Power Measuring Amendment in this case does not discuss the Power Plant rate element, and because McLeod did not bargain for or expect a

reduction in that Commission-approved rate element, McLeod should not be permitted to bootstrap a challenge to that rate into this proceeding simply by alleging discrimination.[65]

2. The Cost Study is Very Clear that the Power Plant Rate is Developed to Recover Fixed Investment and is to be Charged on a Per Amp Ordered Basis.

McLeod claims that Qwest's cost study for the Power Plant rate element somehow supports McLeod's position that the rate should be charged on a usage sensitive basis. McLeod is incorrect, as Qwest's cost study contradicts this assertion in several important respects.

Qwest's collocation cost study for power plant rate elements models a power plant with a hypothetical capacity of 1000 amps. The study, a portion of which was identified as Hearing Exhibit 13, shows that the Power Plant rate is to be charged on a per-amp-ordered basis. Qwest explained in discovery that the cost study is not usage-based, and makes no assumptions about the amount of power usage.[66]

The cost study assumes that the power plant is built all at once, and that costs are incurred, up front, by Qwest, to make power plant capacity available. McLeod agreed that the cost study calculates a per-amp rate on the power plant and that the rate will be charged on an as-ordered basis.[67] McLeod further agreed that the study

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[65] Nor is McLeod saved by a positioning its challenge as a challenge to the rate design as opposed to the rate itself. It is readily apparent that a challenge to the "per-amp-ordered" aspect of the rate is as much a challenge to the rate itself as a direct attack on the Power Plant rate would be – either challenge is an attempt to reduce the billing to McLeod, and effectively change the rate under the contract.

[66] Hearing Exhibits 18 and 19.

[67] Tr. 205.

contains no assumptions about McLeod's or any other CLEC's level of usage.[68] Finally, McLeod agreed that the power plant investment does not vary with usage after it is installed.[69]

In spite of this evidence, Mr. Starkey asserted that the cost study employs a fill factor, thereby suggesting it is usage-based. His claim is based on his belief that the cost study models 1000 amps of "usage" on a total of 1200 amps of capacity, and he believes that the modeled power plant has 1200 amps of capacity because it assumes the use of six (6) 200 amp rectifiers. Mr. Starkey's conclusion is based on an incorrect premise, and is also incorrect. The cost study properly assumes that six (6) 200 amp rectifiers are necessary for a 1000 amp capacity plant. The "extra" rectifier modeled in the study is required per Qwest's engineering specifications, and is necessary to properly design a 1000 amp capacity plant. This engineering requirement is supported by Mr. Morrison's testimony at Tr. 104-106. Even though Mr. Starkey is not a power engineer, and even though he relied on Mr. Morrison for proper engineering assumptions, Mr. Starkey persisted in asserting that the study employed a fill factor just a few hours after Mr. Morrison testified that a 1000 amp capacity plant would require at least six rectifiers, not five. Thus, there is no evidence upon which to base a conclusion that Qwest's cost study uses a fill factor, or is otherwise usage-based.[70]

Under these circumstances, it is preposterous to claim that the cost study supports charging the Power Plant rate element on a usage basis. It is a capacity charge, designed to recover fixed costs that do not vary with usage. Thus, it is

[68] Tr. 207.

[69] Tr. 213.

[70] See also, Mr. Ashton's explanation on this same issue at Tr. 286.19 – 290.24.

consistent with the cost study that Qwest would assess this rate on a per-amp-ordered basis. As discussed above in Section B., this ordered amount is the amount of capacity available to the CLEC. And, as noted in Section A., this is consistent with the reference to "power plant" in the Amendment – though the language in the Amendment contains a reference to "power plant", it is clear that the Amendment does not operate to change the Power Plant rate to a measured charge.

3. McLeod's Interpretation of the Cost Study, and its Recommendation for Charging Power Plant on a Measured Basis, Violate TELRIC Costing and Pricing Principles.

Even beyond the fact that McLeod finds no support in the cost study for its positions, McLeod's interpretation of the cost study, and its recommendation for charging Power Plant on a measured basis, violate TELRIC costing and pricing principles. During discovery in this matter, McLeod compared TELRIC principles with other costing and pricing principles, including short run marginal costs. McLeod's response is included in Hearing Exhibit 12, response to request 24.

Consistent with that data request response, which contains a description of TELRIC compared to short run marginal costs, McLeod's advocacy would require the Commission to order Qwest to price at short run marginal costs, in violation of the Act. McLeod wants the Power Plant charge to be assessed so that McLeod only pays for each additional increment of power consumed, but pays nothing for the underlying power plant capacity that is available to meet McLeod's power needs.

In sum, Qwest does not believe that the cost study is relevant to determining the central issue in this case, which is the proper interpretation of the contract. Proper interpretation of the contract should give effect to the mutual intent of the parties, and

that intent may be discerned by extrinsic evidence of objective manifestations of intent in connection with the formation of the contract. The collocation cost study was filed in 2000, and has no connection with the parties' discussions of the Amendment in 2004. McLeod is not claiming that it relied on the cost study in any way, only that the study supports McLeod's after-the-fact interpretation of the Amendment. Because McLeod did not rely on the cost study in connection with its negotiations, and because the study in fact supports Qwest's position, the Commission should not give any weight to McLeod's claims about the study.

IV. Conclusion

The change initiated by the DC Power Measuring Amendment is limited to the power usage charge. This conclusion is reasonable, logical, and gives effect to the entire Amendment. Qwest's intent with respect to the Amendment is clear, and was reasonably available to McLeod, which in the exercise of reasonable business prudence, should have learned before entering the Amendment. Qwest's interpretation of the Amendment is also consistent with its practice in making List 2 drain available to CLECs according to their power orders, which is consistent with the Commission's approval of the power plant rates in Docket 00-049-106. In contrast, McLeod's current interpretation of the Amendment ignores its plain language, would give effect to only portions of the agreement, and is contradicted by the evidence of McLeod's internal but unexpressed intent that it only expected savings on power usage charges, not power plant charges. McLeod's current view of the Amendment was not formulated until nine months after the Amendment was executed and approved. Moreover, McLeod's interpretation of the Amendment is inconsistent with how even its own expert witnesses

testify that Qwest should engineer its power plant.

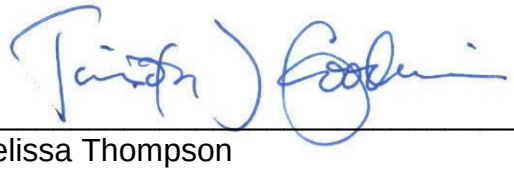
In resolving these evidentiary issues, Qwest would note one key fact in closing. McLeod gave up nothing in order to gain the savings on power usage charges it has realized over the past two years. McLeod did not have to pay a higher rate for power usage, or agree to purchase additional quantities or commit to longer terms, or agree to more onerous conditions for the offering of any DC Power element or other element of interconnection. Qwest was not ordered or otherwise forced to provide the Amendment to CLECs like McLeod. Indeed, but for the Commission's approval of the interconnection agreement, Qwest might successfully argue that the Amendment was not supported by any consideration from McLeod. Despite this lack of legal consideration, McLeod has saved more than $13,000 per month in Utah alone,[71] and more than $162,000 per month throughout Qwest's operating region.[72] McLeod has not been injured, discriminated against, or otherwise disadvantaged by the DC Power Measuring Amendment; it has only benefited. Against this backdrop, the evidence of the Amendment's language and the parties' intent is even more compellingly in Qwest's favor. Qwest asks that the Commission deny McLeod's claims in their entirety, and grant Qwest's claims as indicated above.

[71] Qwest Exhibit 1.4; Tr. 61.21-25.

[72] Qwest Exhibit 1.4; Tr. 62.19-23.

DATED this 14th day of July, 2006.

Respectfully submitted,



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ATTORNEYS FOR QWEST CORPORATION

CERTIFICATE OF SERVICE

I certify that the original and five copies of the foregoing were sent by overnight delivery on July 14, 2006 to:

Julie P. Orchard
Commission Administrator
Utah Public Service Commission
Heber M. Wells Building, 4th Floor
160 East 300 South
Salt Lake City, UT 84111

And a true and correct copy was sent by U.S. mail, postage prepaid, on July 14, 2006, to:

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