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BEFORE THE ARIZONA CORPORATION COMMISSION

2006 SEP -8 P 4: 02

JEFF HATCH-MILLER
Chairman
WILLIAM MUNDELL
Commissioner
MIKE GLEASON
Commissioner
KRISTIN MAYES
Commissioner
BARRY WONG
Commissioner

AZ CORP COMMISSION
DOCUMENT CONTROL

Arizona Corporation Commission

DOCKETED

SEP 08 2006

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**MCLEODUSA TELECOMMUNICATIONS
SERVICES, INC.,**

DOCKET NOS. T-03267A-06-0105
T-01051B-06-0105

Complainant,

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

v.

QWEST CORPORATION,

Respondent

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

1 leads inevitably to the conclusion that Qwest's interpretation of the Amendment is the only one
2 supported by the document and the law.

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

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

18 McLeod has not been successful in these efforts. On July 27, 2006, the Iowa Utilities
19 Board issued its ruling on this dispute on a very nearly identical record, rejecting both McLeod's
20 contract claims and its discrimination claims, and ordering McLeod to return monies withheld in
21 connection with this dispute. A copy of the written order is attached hereto for the
22 Commission's reference as Attachment 1. The Commission heard this matter over two days of
23 hearings, and must of course decide the issues based on the testimony and evidence of record in
24 Arizona. However, the Iowa Board's decision on these issues should provide helpful and
25 persuasive authority.

26

1 **II. SUMMARY OF ARGUMENT**

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

8 The interpretation of the DC Power Measuring Amendment is a relatively straightforward
9 exercise. It is important to note at the outset that, prior to the parties’ execution of the DC Power
10 Measuring Amendment, Qwest and McLeod had agreed that McLeod would pay both the DC
11 Power Usage charges and the DC Power Plant charges based on the quantity of -48 volt capacity
12 McLeod specified in its original orders for power distribution.¹ The Amendment changed *one* of
13 these charges, but did not mention any others. The Amendment identifies the “DC Power Usage
14 Charge” multiple times, but never mentions the “DC Power Plant” charges, which are separate
15 charges reflected in the Exhibit A to the parties’ interconnection agreement. Only a strained
16 interpretation of this language could yield the result McLeod seeks in this case, and that is
17 exactly what the dozens of pages of testimony filed by McLeod in this case provide.

18 McLeod now claims that the DC Power Measuring Amendment changes the Power Plant
19 charge, notwithstanding the absence of any language supporting such a claim, and claims that
20 McLeod had an “expectation” that the Amendment would result in measured billing for that rate
21 element as well as for the usage rate. The only support for such a belief is provided, strangely
22 enough, by McLeod’s retained expert witnesses, who are not employees of McLeod and who did
23 not participate in the negotiations for or execution of the DC Power Measuring Amendment –
24 experts who were in fact retained to assist McLeod in this dispute nearly 15 months after the

25 _____
26 ¹ Tr. 221.18 – 222.8. References to the hearing transcript will be in the form “Tr. Page.Line;” some references to
transcripts are to entire pages without line descriptions for purposes of context.

1 Amendment was signed.

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

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

15 Nor does the extrinsic evidence support McLeod's interpretation of the Amendment. It is
16 clear from the evidence in this case that Qwest's cost study requested that the Power Plant rates
17 would be charged on a "per amp ordered" basis, and that the Commission reviewed Qwest's
18 requested rates and rate structure in Phase II of Docket No. T-00000A-00-0194 prior to approval
19 of those rates. It is also clear that Qwest's real world power plant has capacity available to
20 McLeod to provide the ordered amount of power if McLeod should ever demand it. Thus,
21 McLeod's attempts to pay for far less than the ordered amount of capacity should be rejected for
22 what they are – an after-the-fact challenge to the DC Power Plant rate and not an interpretation
23 of the Amendment itself.

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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."²

The Commission approved the interconnection agreement between the parties in this case, and also specifically approved the DC Power Measuring Amendment.³ The rates contained in Exhibit A to the parties' interconnection agreement were approved in Docket T-00000A-00-

² *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003).

³ The Amendment was admitted into evidence as Exhibit M2/MS-2. References to hearing exhibits that are also exhibits to prefiled testimony will include references to the prefiled exhibit designation in the format "Hearing Exhibit Number/Prefiled Exhibit Number."

1 0194, Phase II. Thus, once the parties have mutually assented to their terms, the contracts and
2 rates have the “binding force of law” under federal law, and cannot be changed for any reason.

3 Indeed, in that docket, and as discussed in section III (C) below, the Commission
4 carefully analyzed the rates Qwest presented for consideration – which included a single \$10.75
5 rate for DC Power Plant, charged on a “per amp ordered” basis⁴. Qwest disclosed in its cost
6 study that the rates for Power Plant would be assessed “based on the size of the power feed [or]
7 feeds that the CLEC orders.”⁵ After considering the evidence presented, the Commission
8 ultimately approved the power plant charge as proposed by Qwest. The Commission did not
9 order a different rate design for the power plant rate – that is, the Commission approved the rate
10 for power plant to be charged based on the amount of amps specified in a CLEC’s power feed
11 orders. These rates were ultimately approved by the Commission, and are “just, reasonable, and
12 nondiscriminatory” as required by 47 USC §§ 251 and 252.

13 The Commission’s orders in Docket No. T-00000A-00-0194 preclude both the contract
14 claims and the so-called “discrimination” claims McLeod asserted in its Complaint. It is
15 undisputed that Qwest has been charging McLeod the Commission-approved rate of \$10.75, per
16 amp ordered, for DC Power Plant since the Exhibit A⁶ implementing the rulings in Docket No.
17 T-00000A-00-0194 was approved and implemented into McLeod’s interconnection agreement.
18 Qwest cannot be held to have engaged in discrimination by implementing a DC Power Plant
19 charge according to the rate and rate design, and the Commission cannot retroactively change the
20 rates associated with either the underlying interconnection agreement or the DC Power
21 Measuring Amendment. The Commission has already determined the power plant rate, assessed
22 on a per-amp ordered basis, is just, reasonable, and nondiscriminatory under both Arizona and
23 federal law.

24 McLeod’s arguments are nothing more than an attack on the rate itself. Such claims

25 ⁴ See Exhibit Q2/TKM-1, which is the summary of detailed results presented to the Commission.

26 ⁵ Exhibit Q2/TKM-1, p. 5 of 8.

⁶ Exhibit M2/MS-3.

1 require a different statutory basis than alleged in this proceeding. As such, under both federal
2 and state statutes, the only proper resolution of this case is to determine the terms and conditions
3 to which the parties actually agreed through the DC Power Measuring Amendment. What
4 McLeod now believes the parties might have agreed to, or even should have agreed to, whether
5 for reasons revealed in engineering manuals or a dissection of the cost study supporting the
6 Commission-approved rates in Docket No. T-00000A-00-0194, is ultimately irrelevant. This
7 case is ultimately a fairly straightforward contractual interpretation case, and the result is
8 controlled by the parties' intent as expressed in the written words of the DC Power Measuring
9 Amendment and the parties' conduct surrounding the execution of that Amendment.

10 11 **2. Legal Standards for Contract Interpretation.**

12 Consistent with these authorities, the key issue before the Commission in this case is the
13 determination of what the binding agreement between the parties was intended to mean, through
14 a proper interpretation of the Amendment. In Arizona, "[w]hen interpreting a contract . . . it is
15 fundamental that a court attempt to 'ascertain and give effect to the intention of the parties at the
16 time the contract was made if at all possible.'"⁷ This is accomplished in the first instance by
17 examining the words of the contract. Courts approach contract interpretation with a view to
18 giving effect to every word and every provision of a contract, if possible. An interpretation of a
19 writing which gives effect to all of its provisions is favored over one which renders some of the
20 language meaningless or ineffective.

21 However, in Arizona, the key to interpretation is discerning the parties' intent. "A
22 contract should be read in light of the parties' intentions as reflected by their language and in
23 view of all the circumstances."⁸ Thus, "[i]f, for example, parties use language that is mutually
24 intended to have a special meaning, and that meaning is proved by credible evidence, a court is

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26 ⁷ *Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 175 Ariz. 148, 153 (1993).

⁸ *Id.*

1 obligated to enforce the agreement according to the parties' intent, even if the language ordinarily
2 might mean something different.”⁹

3 Thus, the primary focus of contract interpretation is ascertaining the parties' intention at
4 the time they executed the agreement. In this case, both sides have presented a significant
5 amount of evidence extrinsic to the Amendment and underlying interconnection agreement. This
6 evidence is admissible only for limited purposes under Arizona law. One of these purposes is to
7 determine the circumstances of the Amendment's execution, including the context of the parties'
8 disclosures and manifestations with respect to critical terms.

9 In examining the extrinsic evidence in this case, the Commission must focus its attention
10 on what the parties actually intended at the time the contract was executed. This is because
11 Arizona law forbids imposing on parties an agreement they did not actually reach. Courts will
12 not make a better contract for the parties than they have made for themselves.¹⁰ 5-24 CORBIN ON

13 CONTRACTS § 24.5 notes this same principle:

14 If the parties attach different meanings to a contract term at the
15 time of formation and one party is aware of the second party's
16 meaning or has reason to know of it, and provided the converse is
17 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

18 ⁹ *Id.*

19 ¹⁰ See *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 372 (Ariz. 1999) (“Although we will tolerate ignoring
20 severable portions of a covenant to make it more reasonable, we will not permit courts to add terms or rewrite
21 provisions.”); *Olliver/Pilcher Ins. v. Daniels*, 148 Ariz. 530, 533 (Ariz. 1986) (“Generally, courts do not rewrite
22 contracts for parties.”). See also *Panorama Village Condo. Owners Ass'n Bd. Of Dirs. V. Allstate*, 144 Wn.2d 130,
23 137 (Wash. 2001) citing *Chaffee v. Chaffee*, 19 Wn.2d 607, 625, 145 P.2d 244 (1943) (“[I]t is elementary law,
24 universally accepted, that the courts do not have the power, under the guise of interpretation, to rewrite contracts
25 which the parties have deliberately made for themselves.”). The *Chaffee* court stated the principle eloquently:
26 “Interpretation of an agreement does not include its modification or the creation of a new or different one. A court
is not at liberty to revise an agreement while professing to construe it. Nor does it have the right to make a contract
for the parties – that is, a contract different from that actually entered into by them. Neither abstract justice nor the
rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves or
the imposition upon one party to a contract of an obligation not assumed. Courts cannot make for the parties better
agreements than they themselves have been satisfied to make or rewrite contracts because they operate harshly or
inequitably as to one of the parties. If the parties to a contract adopt a provision which contravenes no principle of
public policy and contains no element of ambiguity, the courts have no right, by a process of interpretation, to
relieve one of them from disadvantageous terms which he has actually made.”

Contracts.

....

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.¹¹

As noted in the Corbin treatise, these principles are also embodied in the RESTATEMENT (SECOND) OF CONTRACTS § 201,¹² 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

¹¹ E. Farnsworth, *Contracts* § 7.9 (2d ed. 2001).

¹² Arizona courts have not yet had the occasion to decide whether to adopt section 201, but the US Supreme Court described the Restatement position as "hornbook contract law" in *United States v. Stuart*, 489 U.S. 353, 355 (U.S. 1989).

1 (a) that party did not know of any different meaning
2 attached by the other, and the other knew the meaning attached by
the first party; or

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

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

7
8 As discussed below, application of these authorities requires rejecting McLeod's claims
9 and granting Qwest's counterclaim.

10 **3. The Language of the DC Power Measuring Amendment does not**
11 **Modify The DC Power Plant Charge.**

12 Qwest's interpretation of the DC Power Measuring Amendment is also the simplest, most
13 straightforward interpretation. It gives effect to the entire agreement, and requires no extrinsic
14 evidence – though Qwest's interpretation is consistent with the extrinsic evidence of intent, as
15 well.¹³ Counted conservatively, the DC Power Measuring Amendment mentions the “DC Power
16 Usage Charge” five times, and mentions the “usage rate” another two times, for a total of seven
17 mentions in less than one page of text. There is no mention of a “Power Plant” charge. Qwest's
18 simple interpretation is supported by the objective manifestations of its intent both before and
19 after the Amendment was executed and approved.

20 There is ample support for Qwest's interpretation in the plain language of both sections
21 1.0 and 2.0 of the Amendment. By way of illustration, Section 1.2 of the Amendment, which
22 generally describes how the measuring process would be implemented, addresses the meaning of
23 the power usage rate to be changed by the Amendment in the first sentence. That sentence
24 provides in relevant part that “the power usage rate [for orders of 60 amps or less] reflects a

25 ¹³ Extrinsic evidence is admissible to interpret, but not vary or contradict, the terms of a contract. *Taylor*, 175 Ariz.
26 at 153. Qwest's extrinsic evidence is consistent with the terms of the Amendment, and provides key insight into
the parties' intent at the time the Amendment was executed.

1 discount from the rates for those feeds greater than sixty (60) amps.” Exhibit A to the underlying
2 interconnection agreement¹⁴ indicates a rate of \$3.64 per amp ordered for power usage for orders
3 of 60 amps or less at item 8.1.4.1.2, and a rate of \$7.27 per amp ordered for power usage for
4 orders of more than sixty amps at item 8.1.4.1.3. This clearly reflects a discount from rates for
5 those feeds greater than sixty amps. In contrast, the rate for power plant is the same for all levels
6 of ordered amperage, and thus does not reflect a discount from the rate for “those feeds greater
7 than sixty (60) amps.” This language, read in the context of the entire agreement, plainly
8 excludes the power plant rate from the rates that would be affected by the DC Power Measuring
9 Amendment.

10 In addition, later in section 1.2, the Amendment indicates that “Qwest will reduce the
11 monthly usage rate to CLEC’s actual use” based on the measurements taken. The reference to
12 “usage rate” contains no reference to a power plant rate, and is also in the singular, which
13 indicates only one charge or rate would be affected. The plain meaning of “usage rate” can only
14 refer to the Power Usage charge at item 8.1.4.1.3. To include “power plant” rates based on this
15 reference strains credulity.

16 In addition, the reference to “Charge” in the Amendment is in the singular. If the parties
17 had intended more than one charge to be impacted by the Amendment, that could and would
18 have been accomplished simply by referring to the “-48 Volt DC Power Usage Charges” in the
19 plural. Qwest’s interpretation gives proper effect to the phrasing the parties actually used.
20 McLeod’s interpretation would require the Commission to ignore or give no effect to the singular
21 reference to “Charge” throughout the Amendment, which would violate a cardinal principle of
22 contractual interpretation.

23 McLeod now appears dissatisfied with Qwest’s simple interpretation. McLeod’s theories
24 on why the Commission should ignore the simple phrasing of the Amendment, and conclude that
25 the parties intended to modify not only the Power Usage Charge for orders of more than 60

26 ¹⁴ Exhibit M2/MS-3.

1 amps, but also the Power Plant Charge, would require ignoring (a) the language of the
2 Amendment, (b) the language of the ICA to which the Amendment relates, (c) the extrinsic
3 evidence related to the parties' intent – and perhaps all three – in favor of recently developed
4 (and incorrect) theories of how competitive carriers *should* pay incumbent carriers for unbundled
5 DC Power elements.

6 First, McLeod argues that the reference to the singular “-48 Volt DC Power Usage
7 Charge” refers to and alters several rates under the heading “Power Usage” in the Exhibit A.
8 Section (A)3.28 of the underlying interconnection agreement between Qwest and McLeod
9 specifically defeats this claim. That Section provides that headings have no force or effect in the
10 interpretation of the agreement:

11 The headings of Sections of this Agreement are for convenience of reference
12 only, and shall in no way define, modify or restrict the meaning or interpretation
of the terms or provisions of this Agreement.¹⁵

13 Even a cursory examination of the Exhibit A to the interconnection agreement reveals
14 that items 8.1.4 (“Power Usage”) and 8.1.4.1 (“DC Power Usage, per ampere, per month”) are
15 mere headings. No “Charge” is associated with either item, and the charges for Power Plant and
16 Usage are indented beneath these section headings. McLeod even used the term “heading” to
17 describe these items in response to Qwest’s discovery request No. 13 in Iowa, stating: “Section
18 8.1.4.1 of Exhibit A is a *heading* entitled ‘-48 Volt DC Power.’ Qwest identifies no particular
19 charge associated with 8.1.4.1 but this *heading* does include three additional rate elements that
20 include monthly recurring charges.”¹⁶ Once confronted with the language of section (A)3.28 of
21 the interconnection agreement, McLeod attempted to attach different labels to these headings,
22 such as a “grouping” of rates or charges.”¹⁷ However, these labels are indistinguishable from the
23 term “heading,” and reflect nothing more than an attempt to spin McLeod’s earlier, accurate
24 assessment of section 8.1.4.1 of the Exhibit A. Those section headings simply cannot “define,

25 ¹⁵ See Easton Prefiled Testimony (Exhibit Q1), page 8-9.

26 ¹⁶ Exhibit Q6 (emphasis added).

¹⁷ E.g., Tr. 21.10-12; 44.23-25.

1 modify, or restrict the meaning or interpretation of the terms or provisions” of the DC Power
2 Measuring Amendment.

3 McLeod’s argument that the section headings in the Exhibit A should control the
4 interpretation of the DC Power Measuring Amendment fails even within the language of the
5 Amendment itself. The Amendment refers to the “-48 DC Power Usage Charge” five times as
6 the charge that would be changed to reflect measured usage. There is no “Charge” associated
7 with either section 8.1.4 or 8.1.4.1 of the Exhibit A. The only “Charges” associated with “Power
8 Usage” are in items 8.1.4.1.2.1 and 8.1.4.1.2.2, and the parties agree that 8.1.4.1.2.1 is not
9 changed by the Amendment. This fact underscores the fact that the headings are meaningless –
10 under the Amendment, only the power usage “Charge” for orders of more than sixty amps is
11 affected.

12 Finally, section 2.2.1 of the Amendment indicates that the “Charge” to be modified
13 “[a]pplies on a per amp basis to all orders of greater than sixty (60) amps.” The same Power
14 Plant charge in Exhibit A indisputably applies to all power orders, regardless of whether the
15 orders are less than or greater than 60 amps. In contrast, there are two different Power Usage
16 charges: one for orders of less than sixty amps (item 8.1.4.1.2.1) and one for orders of more than
17 sixty amps (item 8.1.4.1.2.2). This language would be rendered meaningless if any “Charge” to
18 be modified applied equally regardless whether those orders were greater or less than sixty amps.

19 In response to this plain language, McLeod claims that section 2.1 of the agreement
20 defines the “DC Power Usage Charge” to be “for the capacity of the power plant available for
21 CLEC’s use.” Thus, McLeod argues, the parties intended that the “DC Power Usage Charge” to
22 be modified is actually the “Power Plant” charge. This sentence potentially introduces some
23 ambiguity into the agreement, because interpreting the entire agreement based on that single
24 sentence according to McLeod’s position would produce a result that neither party intended, in
25 violation of the Arizona authorities cited in subsection 2 above. First, it makes no sense for the
26 parties to have defined “Power Usage” to actually mean “Power Plant.” The so-called definition

1 of “DC Power Usage Charge” in section 2.1 would specifically exclude the actual charges for
2 power usage under McLeod’s view, because section 2.1 states that the “AC Usage Charge is for
3 the power used by CLEC,” and the Amendment does not change or otherwise mention the “AC
4 Usage Charge.” All parties agree that “the power used by CLEC” is reflected in the “Power
5 Usage” rate elements at sections 8.1.4.1.2.1 and 8.1.4.1.2.2. Similarly, all parties agree that the
6 Amendment changes the Power Usage charge for item 8.1.4.1.2.2 to a measured usage basis.
7 Applying the interpretation McLeod suggests to section 2.1 is inconsistent with every other
8 remaining provision of the Amendment, because it would yield a result whereby the Amendment
9 that mentions “usage rate” twice and “DC Power Usage Charge” five times would not actually
10 change any Power Usage charge reflected in Exhibit A. McLeod’s view of section 2.1 is simply
11 not sustainable.¹⁸

12 **4. Qwest Objectively Manifested its Intent that the Amendment would**
13 **Alter Only the Power Usage Charge, not the Power Plant Charge, and**
14 **Could Reasonably Suppose that McLeod Understood that Expressed**
15 **Intent.**

15 Qwest plainly, objectively, and openly disclosed its intent regarding the DC Power
16 Measuring Amendment prior to its execution through two avenues in addition to the language of
17 the Amendment. Qwest offers a forum called the Change Management Process (CMP) to the
18 CLECs it does business with. The CMP forum includes, among other things, discussions and
19 information about Qwest products or changes to products that Qwest offers.¹⁹ These changes are
20 typically accompanied by a product catalog (PCAT) made available on Qwest’s website.

21 In this particular case, Qwest offered several documents on its CMP website regarding
22 the power measuring product and associated changes, and notified sixteen McLeod employees of
23

24 ¹⁸ Furthermore, Qwest’s interpretation of the language in Section 2.1 that references the “capacity of the power
25 plant available for CLEC’s use” is consistent with Qwest’s actual practices. Even after the DC Power Measuring
26 Amendment, Qwest continues to make power plant capacity available to CLECs at the number of amps specified in
their power feed orders.

¹⁹ Tr. 231,4-11.

1 their availability (including McLeod's deputy general counsel and Ms. Spocogee).²⁰ Included
2 among these documents was Exhibit WRE-2 to William Easton's prefiled testimony (admitted as
3 Exhibit Q1), which was Qwest's response to several of these issues. The issues Qwest notified
4 McLeod would be discussed included how power measuring would impact monthly recurring
5 charges, how power measuring relates to cost dockets, how Qwest would measure power,
6 whether the power measuring offering would be optional or required, and whether an
7 interconnection amendment would be required. Most specifically, in Exhibit WRE-2 attached to
8 Mr. Easton's prefiled testimony (Exhibit Q1), another CLEC posed the following question:

9 For the following question, assume the collocation is in AZ, we're
10 ordering 120 Amps, the DC Power Measurement is 53, the Power
11 Plant per amp rate is \$10.75, the power usage < 60 amps, per amp
12 is \$3.64 and Power Usage > 60 amps, per Amp is \$7.27. Currently
13 we are billed 120 Amps at \$10.75 and 120 Amps at \$7.27. Per this
14 proposal I interpret that we would be billed 120 Amps @ \$10.75
15 and 53 Amps @ \$3.64. Likewise, if the new DC Power
16 Measurement was 87, we would be billed 120 Amps at \$10.75 and
17 87 Amps at \$7.27. Is that correct?

18 Qwest's response was:

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

25 This response made clear that the \$10.75 Power Plant charge in Arizona would continue
26 to be charged at the level of amps ordered. Even though (1) this information would have alerted
27 McLeod that Qwest's expressed intent at the time differs from the interpretation McLeod now
28 claims,²¹ (2) McLeod admitted that charges for DC power were important to McLeod,²² and (3)
29 McLeod admitted it should pay attention to "the important things" in the CMP process,²³

30 ²⁰ Exhibit Q1, p.11-12.

31 ²¹ See Tr. 236.1-22.

32 ²² Tr. 233.5-13. McLeod had also participated in several regulatory dockets pertaining to DC power charges prior
33 to executing the DC Power Measuring Amendment. Tr. 233.14-22.

34 ²³ Tr. 232.11-15.

1 McLeod now claims it did not meaningfully participate in this CMP process.

2 Qwest followed the CMP process with a detailed explanation of the DC Power
3 Measuring Amendment in its PCAT.²⁴ That document clearly delineated and defined the
4 “Capacity Charge” to “recover[] the cost of the capacity of the power plant available for your
5 use,” and the “Usage Charge” to “recover[] the cost of the power used.”²⁵ In the portion specific
6 to the DC Power Measuring option, the PCAT is clear that only the “usage rate” would be
7 impacted. The PCAT uses language substantively identical to that appearing in the DC Power
8 Measuring Amendment, and its definitional sections specifically separates the definition of the -
9 48 DC Volt Power Usage Charge from the definition of the -48 Volt Capacity Charge.
10 Consistent with the PCAT’s section referring to the Power Measuring Option, the DC Power
11 Measuring Amendment only changes the Power Usage charges to a measured basis, and omits
12 any mention of changes to the Power Capacity, or power plant, charge. Anyone who had seen
13 this document would reasonably understand that the DC Power Measuring Amendment would
14 not affect power plant charges.

15 McLeod attempts to sidestep Qwest’s clear and objective manifestations of intent by
16 belatedly claiming it never saw these documents prior to executing the Amendment. Even if
17 true, McLeod’s failure in this regard was unreasonable, such that McLeod had reason to know
18 Qwest’s interpretation, and Qwest had reason to suppose McLeod was aware of its expressions
19 of intent. Under the RESTATEMENT (SECOND) CONTRACTS § 201 and the other authorities cited
20 above, the Commission need not resolve that question. The Commission need only determine
21 whether McLeod had “reason to know the meaning attached by” Qwest.²⁶ The evidence is clear
22 that McLeod had reason to know Qwest’s intent, objectively manifested in the CMP
23 documentation and PCAT. The evidence is similarly clear that McLeod never communicated the
24

25 ²⁴ Exhibit WRE-1 (Exhibit Q1).

26 ²⁵ Exhibit WRE-1 (Exhibit Q1), p. 1.

²⁶ RESTATEMENT (SECOND) CONTRACTS § 201(2)(b).

1 intent it now claims to Qwest prior to the Amendment's execution.²⁷

2 McLeod's instructions to the persons charged with negotiating and obtaining the DC
3 Power Measuring Amendment also reveal that understanding the provisions of the contract were
4 important to them – those persons were instructed to make sure that the DC Power Measuring
5 Amendment did not result in potentially increased power charges, as had been the case in a
6 similar agreement negotiated in Michigan.²⁸ As noted above, Ms. Spocogee also testified that
7 McLeod had been involved in regulatory proceedings involving power plant charges in several
8 other states for some time prior to executing the DC Power Measuring Amendment.²⁹ Thus,
9 McLeod had experience in negotiating and obtaining interconnection agreements or amendments
10 on the issue of DC power charges, and the issues and potential pitfalls they had confronted in
11 contracting for DC power charges were sufficiently important to warrant instructions to its
12 employees to research potential contracts accordingly. Ultimately, however, the sheer amount of
13 dollars at stake – McLeod claims more than \$800,000 in overcharges in Arizona alone, and more
14 than \$5 million for all Qwest states³⁰ – provides objective evidence of the importance of this
15 issue to McLeod. Indeed, Ms. Spocogee testified that the power plant charge represents more
16 than two thirds of McLeod's total collocation charges in Arizona.³¹ McLeod cannot credibly
17 claim that the issue of DC power charges was unimportant to it, and has admitted that important
18 issues require reasonable diligence in the CMP and PCAT processes. Consistent with Professor
19 Farnsworth's conclusion that contract interpretation "must turn on the meaning that reasonable
20 persons in the positions of the parties would have attached if they had given the matter thought,"
21 the Commission must conclude that if McLeod had given the matter reasonable thought and
22 diligence, it would have discovered the intent Qwest attached to the DC Power Measuring
23 Amendment in the CMP documents and PCAT. Accordingly, under the several Arizona

24 ²⁷ Tr. 229.4-15.

25 ²⁸ Tr. 192.13 – 193.4.

26 ²⁹ Note 27, *supra*.

³⁰ Tr. 188.

³¹ Tr. 233.5-9.

1 authorities cited above, Qwest cannot be burdened with McLeod's unexpressed intent.

2 **5. McLeod's Intent with Regard to The Amendment was Limited to**
3 **Altering Power Usage Charges, Not Power Plant Charges – Until**
4 **Many Months After the Amendment was Executed.**

5 To a certain extent, the above arguments accept for purposes of argument only that
6 McLeod actually possessed an intent at variance with Qwest's interpretation of the DC Power
7 Measuring Amendment, but never expressed it. As Ms. Spocogee's testimony indicates, the
8 evidence shows that not only did McLeod never express a contrary intent to Qwest prior to
9 disputing the charges in mid-2005, McLeod's internal and unexpressed intent reflects an
10 understanding that the DC Power Measuring Amendment would only affect the power usage
11 charge, not the power plant charge.

12 Exhibit Q16 contains McLeod's response to Qwest's discovery request seeking non-
13 privileged internal communications within McLeod relating to the DC Power Measuring
14 Amendment prior to its execution. Importantly, none of these communications contains any
15 reference to potential savings on power plant charges. More specifically, however, these
16 communications reveal an understanding that the DC Power Measuring Amendment would *only*
17 affect power usage charges. Contained in that response is a chain of emails³² in which McLeod
18 employees discussed the proffered Amendment³³ and were instructed to estimate the potential
19 savings that could be realized through the Amendment. In that chain, a spreadsheet³⁴ was
20 developed by a McLeod employee and attached that "should work to track our estimate."³⁵
21 Though the spreadsheet in Exhibit WRE-3 is unpopulated, according to discovery responses,³⁶
22 the spreadsheet was "renamed" and saved as the document appearing in Exhibit WRE-4
23 contained in Exhibit Q1.

24 ³² Exhibit B to Exhibit Q17.

25 ³³ Exhibit Q18, a draft of the Power Measuring Amendment supplied by Qwest for McLeod's consideration, was
26 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.

³⁴ Exhibit WRE-3 (Exhibit Q1).

³⁵ See third page of Exhibit 86; third page of Exhibit B to Exhibit Q17.

³⁶ Exhibit Q17.

1 The persons preparing these spreadsheets had the draft DC Power Measuring
2 Amendment (Exhibit Q18) and the Exhibit A pricing document in front of them as they were
3 building their estimate of savings that would result from the Amendment.³⁷ The spreadsheets
4 that report these expectations track savings on only one rate element – the power usage charge.
5 The unpopulated spreadsheet from Exhibit WRE-3 contains only one column for determining the
6 billing amount. This single column is carried over in Exhibit WRE-4 to reflect a single USOC
7 code: the code for the power usage charge.³⁸ If the spreadsheet from Exhibit WRE-3 or WRE-4
8 was ever populated with a column that reflected savings on power plant charges, that would have
9 been responsive to Qwest’s discovery request and should have been produced.³⁹ But no other
10 version of these spreadsheets was produced, indicating that no other version of these
11 spreadsheets exists. Indeed, Ms. Spocogee confirmed that McLeod “never calculated any
12 potential savings on the power plant charges” until the audit her group performed around May
13 2005, several months after the agreement was entered.⁴⁰ The evidence is clear: The spreadsheet
14 that was developed to track McLeod’s estimated savings from the DC Power Measuring
15 Amendment tracked only savings from the power usage charge, not the power plant charge.
16 McLeod cannot now claim that it “expected” to see savings on the power plant element at the
17 time the Amendment was executed.

18 McLeod’s attempts to distance itself from the savings calculations in these spreadsheets
19 are ineffectual. Ms. Spocogee attempted to minimize the level of responsibility the people on the
20 email chain were assigned, but it is clear from the email chain that one of the persons involved,
21 Jody Ochs, was charged to work with another person on the email chain, Sherry Krewett (a
22 contract administrator for McLeod⁴¹) “on this Qwest Amendment for Power Measurement,” and
23

24 ³⁷ Tr. 241.21 – 242.3.

25 ³⁸ Tr. 243.3-21. This testimony also establishes that the single rate reflected in Exhibit WRE-4 for Arizona is the
power usage rate for orders of greater than sixty amps in Arizona.

26 ³⁹ Tr. 249.7-17.

⁴⁰ Tr. 245.21 – 246.1.

⁴¹ Exhibit Q17; Tr. 252.15-17.

1 was instructed that she “will likely need to get in touch with Kathy Battles [of Qwest].”⁴²
2 McLeod assigned these employees the responsibility to negotiate and obtain the DC Power
3 Measuring Amendment contract, and they determined the savings McLeod expected it would
4 realize from the Amendment.⁴³ Their determinations were limited to the power usage charges to
5 the exclusion of power plant charges, and this Commission should reach the same determination.

6 McLeod’s remaining tactic to distance itself from its calculation of savings is to claim
7 that the persons charged with negotiating the DC Power Measuring Amendment were charged
8 solely with making sure that the rates for DC power did not increase, as they had in a similar
9 negotiation in Michigan.⁴⁴ But again, this evidence only provides further support for Qwest’s
10 arguments in this case. Beyond establishing a background against which it would have been
11 unreasonable for McLeod to fail to examine the CMP and PCAT documentation prior to entering
12 the DC Power Measuring Amendment, this evidence confirms that McLeod had no intent to
13 reduce power plant charges through the Amendment. Even under Qwest’s interpretation of the
14 Amendment, McLeod accomplished its task of avoiding “another Michigan.” That was the
15 extent of their intent prior to negotiations, and Qwest’s interpretation of the DC Power
16 Measuring Amendment is entirely consistent with that claimed intent.

17 Perhaps most damaging to McLeod’s claim of its intent that power plant charges be
18 reduced to measured levels, however, was the testimony of Ms. Spocogee. In the following
19 exchange, Ms. Spocogee admitted the first time McLeod formulated an intent that the DC Power
20 Measuring Amendment should reduce power plant charges was after she conducted her audit in
21 May 2005:

22 Q. The first time that McLeod USA ever looked at the power

23 ⁴² Exhibit Q17; Tr. 252.

24 ⁴³ Tr. 250-251, esp. 250.17-19. Regardless of the titles of the McLeod employees involved in the negotiations and
25 analysis of the Amendment prior to its execution, the Farnsworth treatise cited above notes that the determination of
26 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.

⁴⁴ Tr. 192.20 – 193.4.

1 plant element and calculated power plant savings was in
2 connection with the audit that you, your specific group, Tami
3 Spocogee's group, performed around May 2005, several months
4 after the agreement was entered, correct?

5 A. As far as I know. I have not seen any other documents.

6 Q. And to your knowledge, the first time anyone at McLeod
7 USA came to the interpretation McLeod is now advancing in this
8 case was in May 2005, again after your group conducted its audit?

9 A. Correct.⁴⁵

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

16 **B. Qwest's Interpretation of the Amendment is Consistent with Qwest's Actual**
17 **Network, and with McLeod's Own Collocation Practices.**

18 Nor does any of the ancillary extrinsic evidence offered by McLeod support its
19 interpretation of the Amendment. Indeed, the evidence provided by McLeod about its own
20 collocation practices indicates that Qwest's application of the Power Plant rate on an “as-
21 ordered” basis is wholly consistent with how McLeod charges for power plant when it allows
22 collocation in its own facilities.

23 McLeod asserts that Qwest is charging for more power plant capacity than is appropriate,
24 and provides the testimony of Sidney Morrison in support of the contention that Qwest's charges
25 are inconsistent with the proper design of a power plant. These allegations simply do not hold
26 water. It is clear from the evidence in this case that Qwest's real world power plant has capacity
27 available to McLeod to provide the ordered amount of power if McLeod should ever demand it.⁴⁶

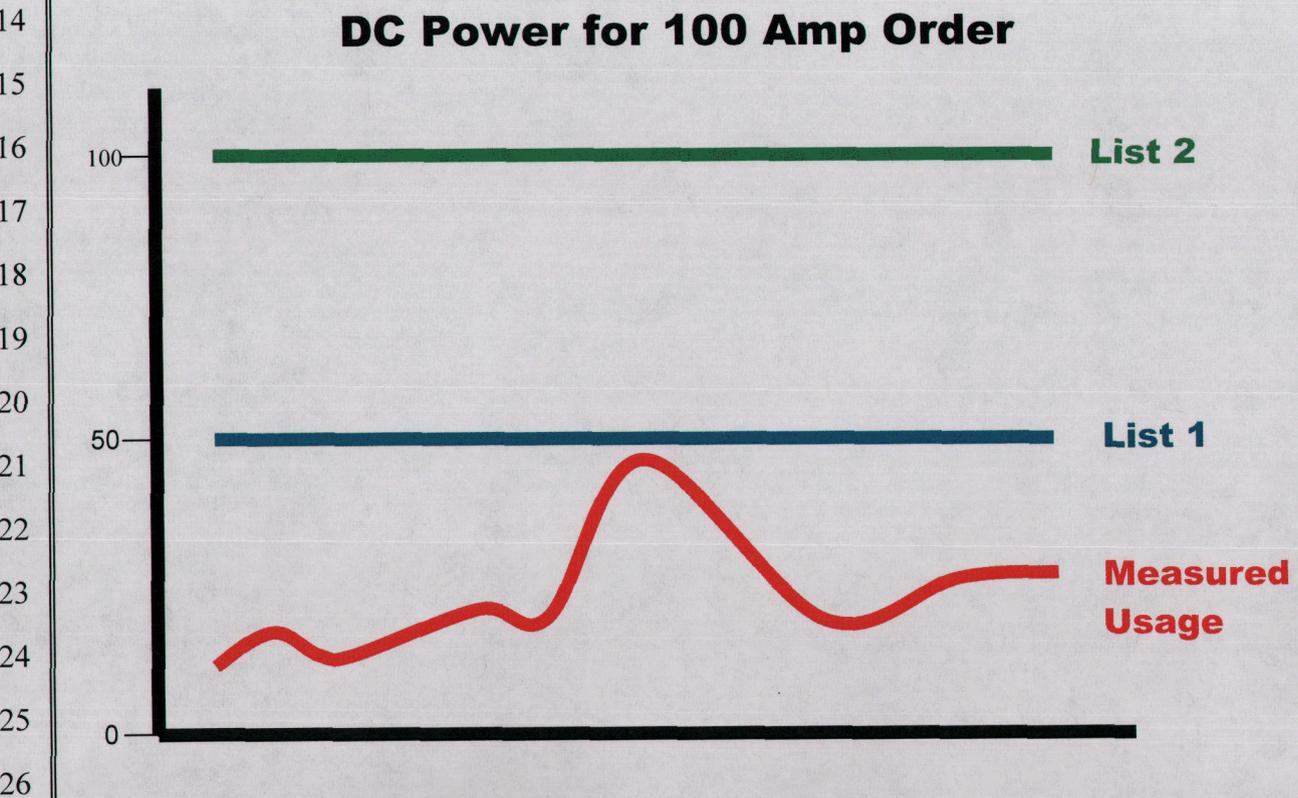
⁴⁵ Tr. 268.4-16.

⁴⁶ Ashton Rebuttal, Exhibit Q3, p. 7.

1 Thus, McLeod's attempts to pay for far less than the ordered amount of capacity should be
2 rejected for what they are – an after-the-fact challenge to the DC Power Plant rate and not an
3 interpretation of the Amendment itself.

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

9 The essence of McLeod's testimony regarding engineering issues is simply that McLeod
10 wants to place a power order for its ultimate capacity needs, McLeod expects Qwest to make that
11 capacity available, but McLeod only wants to pay based on measured usage, even though Qwest
12 does in fact make the ordered capacity available. The manifest inequity of this position is
13 evident, and is illustrated by Exhibit Q11, reproduced below.



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

9 McLeod wants the Commission to require that power plant charges be assessed based on
10 a single point along the red line at the bottom of the chart – an amount that is generally far below
11 what even McLeod contends is the engineering standard. Under McLeod's advocacy, if McLeod
12 ordered 100 amps, and Qwest made that capacity available to McLeod, McLeod would pay only
13 on the 18 or 20 amps that they might draw at any particular point in time. And McLeod takes
14 this position even though McLeod's own expert contends that Qwest should engineer to provide
15 List 1 drain, a capacity of 50 amps in this example – which McLeod agreed would be greater
16 than measured usage except at the point of peak usage, *e.g.*, noon on Mother's Day.⁴⁷ In addition
17 to being inconsistent with even McLeod's view of the language of the Amendment, such a result
18 would be wrong because it would not provide any incentive to McLeod to properly size its power
19 orders, and it would require Qwest to assume all of the risk of having sufficient power plant
20 capacity available to meet those orders, without compensation, essentially requiring Qwest to
21 plan for and make available spare capacity at no cost to any other provider.

22
23 **1. Qwest's Power Plant Pricing is Consistent with McLeod's own**
24 **Collocation Practices.**

25 When McLeod allows collocators into its own facilities, McLeod's pricing practices are

26

⁴⁷ Tr. 145.

1 similar to Qwest's. McLeod charges its collocators for power plant capacity in accordance with
2 the size of their power cables, exactly the same way that Qwest's Power Plant rates are
3 structured. McLeod contends that Qwest's Commission-approved rates for power plant at the
4 level of amps specified in CLECs' power feed or cable orders are improper, but Exhibit Q14
5 shows that in order to obtain a power feed or cable of a certain size, McLeod's collocators *must*
6 *report and be billed for* "usage" at the level of the desired cable size. Because McLeod's
7 collocators must report usage at X amps in order to obtain a cable size of X amps, McLeod's
8 claim that it offers usage-based power pricing is illusory.⁴⁸ Thus, McLeod charges for both
9 power usage and power plant based on the amount of amps reflected in their own collocators'
10 power feed orders, not on a measured basis – the precise practice McLeod condemns as
11 discriminatory by Qwest. And there is no evidence that McLeod offers its collocators the power
12 reduction option Qwest makes available.

13
14 **2. McLeod's Power Order is the Order that McLeod itself Specifies for**
15 **Power Cables, and Reflects the Capacity that McLeod Expects to**
16 **Have Available to it.**

17 McLeod claimed during the hearing that it does not place orders for power plant capacity,
18 but rather only orders power distribution cables. While it is correct that McLeod's power order
19 specifies the size of the distribution cables requested, it is also correct that this is McLeod's
20 power plant order. Qwest's Commission-ordered and approved rates, discussed below, were
21 implemented based on the express representation by Qwest that the size of the power feed
22 specified by the CLEC would constitute the ordered amount for purposes of assessing the Power
23 Plant rates.⁴⁹ Qwest sizes its power plant to accommodate the ordered amount, and makes that
24 capacity available to McLeod. Qwest and McLeod agree that the ordered amount is the List 2

25 ⁴⁸ Although McLeod will *say* it bills on a "usage" basis, it is evident that when McLeod says "usage" it really
26 means "size of the cable feed". Tr. 226-228.

⁴⁹ Exhibit Q2/TKM-1, p. 5 of 8.

1 drain expected on the power plant.⁵⁰

2 While McLeod contends that Qwest should (and does) design its plant in accordance with
3 List 1 drain⁵¹ for both itself and expected CLEC power loads, it is clear from the testimony that it
4 is reasonable for Qwest to size its plant based on CLEC orders.⁵² In fact, McLeod testified that it
5 was reasonable for Qwest to assume that McLeod might need 100 amps of power if McLeod
6 ordered 100 amps of power,⁵³ and also clearly stated during the hearing that McLeod would
7 expect that it “would have the List 2 drain available to it in terms of capacity of the power
8 plant”.⁵⁴ Consistent with that expectation, Qwest designs its power plant to make List 2 drain
9 available simultaneously to all CLECs in a List 2 event.⁵⁵

10
11 **3. It is Reasonable for Qwest to Size its Power Plant based on CLEC**
12 **Power Orders.**

13 McLeod argues that Qwest should size its power plant based on the expected List 1 drain
14 of the CLECs’ equipment.⁵⁶ The flaw with this assertion is that Qwest does not know the List 1
15 drain of the CLECs’ equipment.⁵⁷ Qwest is not familiar with all of the equipment that the
16 CLECs use, and cannot know how fast the CLECs will grow or when to anticipate the amount of

17
18 ⁵⁰ List 2 drain is a “worst case scenario” drain on the power plant. One typical example of when List 2 drain is
19 demanded is associated with the start up of telecommunications equipment after a power outage. In this scenario,
20 the central office runs off AC power supplied by the back up generator until the fuel runs out. If for some reason the
21 generator cannot be refueled, the office would run entirely off of the power supplied by the batteries. After about
22 four hours, the batteries would be unable to provide enough power to run the telecommunications equipment, and
23 the equipment would shut down. When AC power is restored and the equipment begins to power back up, there is a
24 List 2 drain on the power plant. Exhibit Q3, p. 6.

25 ⁵¹ List 1 drain is the average busy day/busy hour current during normal plant operations. Tr. 145.

26 ⁵² Exhibit Q3, p. 6.

⁵³ Tr. 54-55.

⁵⁴ Id. .

⁵⁵ Exhibit Q3, p. 7.

⁵⁶ 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 (Exhibit
M4/SLM-5), that that relationship does not always hold for CLEC equipment. Tr. 137-138, indicating that
measured usage may be 70% of List 2 drain.

⁵⁷ Exhibit Q3, p. 13.

1 power they may need.

2 McLeod has suggested that because Qwest now has five or six years worth of experience
3 with CLEC collocation and power usage, and almost two years worth of experience measuring
4 CLEC power consumption, Qwest should consider that data in sizing its power plant. What
5 McLeod neglects to mention here is that all of McLeod's collocation power orders were placed
6 in 1999 and 2000, and Qwest had to make decisions about sizing the power plant at that time, not
7 with six years of hindsight. At the time Qwest made decisions about sizing the power plant,
8 Qwest had no idea of how fast the CLECs would grow, how much power they would consume,
9 or what their power usage characteristics would be.⁵⁸

10 The issues that Qwest faced in 1999-2000 when it received collocation power orders
11 from McLeod (and many other CLECs as well) were that Qwest did not know the List 1 drain of
12 the McLeod equipment; Qwest did not know the types of customers McLeod would obtain;
13 Qwest did not know how fast McLeod would grow, or whether growth would be linear or
14 "spiky." No subsequent orders for power have been submitted by McLeod for most central
15 offices, and McLeod has not reduced its power orders, so Qwest is left with the fact that it had to
16 make engineering decisions in 1999, based on the information provided by McLeod at that time.

17 Under these circumstances, the only reasonable approach was the one Qwest took – size
18 to McLeod's power order, which is List 2 drain.⁵⁹ This approach meets the CLECs' expectations
19 with regard to the availability of power plant capacity and is consistent with the rate structure
20 ordered by the Commission in Docket No. T-00000A-00-0194 which calls for Power Plant to be
21 charged (and presumably made available) at the number of amps specified in CLEC power feed
22 orders. Qwest's approach is also one which allows the CLEC to control and dictate how much
23 power plant capacity will be available to it. Qwest, who has no visibility to the CLECs'
24 marketing plans or forecasts of future growth, cannot be expected to know and plan for power

25 ⁵⁸ Mr. Morrison explains how difficult it is to forecast usage, describing how two identical pieces of equipment
26 can have very different usage characteristics. Exhibit M3, p. 11.

⁵⁹ Exhibit Q3, p. 6.

1 needs other than those specified by the company placing the power order.

2 If anything, Qwest has chosen to make available to the CLECs a higher level of
3 confidence and security that the requested power plant capacity will be available, taking into
4 account the fact that CLECs' demand on power plant will constantly vary, and may grow over
5 time. This does not constitute granting a preference to itself. Indeed, 47 CFR § 51.323(f)(3)
6 requires that "[w]hen planning renovations of existing facilities or constructing or leasing new
7 facilities, an incumbent LEC shall take into account projected demand for collocation of
8 equipment." Relevant to this case, this principle means that when constructing power facilities,
9 Qwest is required to take into account the fact that the DC power demands of McLeod and other
10 collocators will not always be at current, measured levels. Power demand is difficult to forecast,
11 as Mr. Morrison noted in his testimony.⁶⁰ DC power demand may peak on Mother's Day or
12 similar occasions, collocators may gain customers, add equipment, or otherwise increase their
13 power needs. It is fair and under these regulations perhaps required for Qwest to provide, and
14 CLECs to pay, for providing DC power plant capacity at levels that recognize and enable growth
15 in CLEC power demand.

16 Thus, with full disclosure in terms of how it planned to apply the power plant rates,
17 Qwest received approval for that proposal, and in fact McLeod consented to it. That the CLECs
18 should pay in accordance with the power plant capacity made available to them does not
19 disadvantage them in any way, especially because Qwest offers a way to reduce the ordered
20 amount, as described below and in Mr. Easton's testimony.

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

26 ⁶⁰ Exhibit M3, p. 11.

1 4. **Charging for Power Plant “As Consumed” As Opposed to “As**
2 **Ordered” Would Allow McLeod to Pay for Less Capacity than is**
3 **Available to McLeod for Its Use.**

4 As is apparent from the testimony, argument, and briefing to date, Qwest strongly
5 disagrees with McLeod’s assertions that it should pay for power plant capacity on an “as
6 consumed” basis.⁶¹ Upon closer examination, it is apparent that McLeod’s position is itself
7 contrary to how McLeod claims Qwest should (or does) construct its power plant. To examine
8 that contention a bit further, Mr. Morrison’s testimony is instructive.

9 McLeod asserts again and again that Qwest should construct power plant capacity in
10 accordance with the CLEC’s List 1 drain.⁶² There is no dispute between Qwest and McLeod that
11 List 1 drain may be approximated by the busy day/busy hour drain on the power plant during
12 normal operation, for example, the peak load on Mother’s Day.⁶³ And, there is also no dispute
13 that under the Power Measuring Amendment, Qwest is required to measure power usage at least
14 twice and as many as four times a year based on CLEC request.⁶⁴ Yet, if McLeod is billed for
15 power plant on the basis of actual measured power usage, that actual measured usage will fall
16 below List 1 drain, sometimes *far below* List 1 drain. Mr. Morrison makes this clear in his
17 testimony on several occasions. For example, he states that “actual measured usage at any
18 particular point in time will fall below List 1 drain . . . and sometimes far below that.”⁶⁵ Thus,
19 unless Qwest was somehow able to show up and take a measurement at the exact time of the List
20 1 drain, the number of amps that measured will be less than the List 1 Drain⁶⁶ – the amount of
21 capacity that even McLeod contends that Qwest constructs and makes available to CLECs. Even
22 then, Qwest is required to measure at least twice and up to four times per year, so it is guaranteed
23 that the measured amounts will not always be the List 1 drain. Moreover, even Mr. Morrison

24 ⁶¹ Indeed, the very contention is contrary to reality – power plant, a fixed investment as discussed below, is not
25 “consumed” per se (Tr. 112.20-23), and the costs associated with power plant do not vary with power usage.

26 ⁶² E.g., Exhibit M4, p. 9.

⁶³ Tr. 145.

⁶⁴ Exhibit M2/MS-2, paragraph 1.2.

⁶⁵ Exhibit M4, p. 51.

⁶⁶ Tr. 169.18-170.1.

1 agreed that “I am not endorsing this data [the actual measurements] be used by Qwest to size DC
2 power plant.”⁶⁷

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

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

14 **C. Qwest’s Interpretation of the Amendment is Consistent with its Filed and**
15 **Approved Cost Study.**

16 As discussed above, because the interconnection agreement between Qwest and McLeod,
17 including the Commission-approved rates incorporated in that agreement, carries the binding
18 force of law, McLeod should not be permitted, in this expedited proceeding, to launch a
19 collateral attack on the previously filed and approved Power Plant rate.

20 McLeod attempts nevertheless to argue that Qwest’s cost studies do not support charging
21 power plant on an as ordered basis. This argument is based on a flawed logical premise. The
22 Commission already determined what rates and rate designs Qwest’s cost study did and did not
23 support when it reached its decision in the cost docket.

24 McLeod cannot now collaterally attack the Commission’s decision. Arguing about
25 Qwest’s cost studies asks the wrong question. The real question is what rates did the

26 ⁶⁷ Ex. M4, p. 22, n. 17 ; Tr. 173.21-174.1

1 Commission approve, and the Commission indisputably approved the power plant rates, at as-
2 ordered levels, both in the cost docket, and its approval of Qwest's compliance filings. But
3 McLeod's after-the-fact assertions with regard to how the contract should be interpreted amount
4 to just that – a collateral attack on approved rates. As such, the Commission should give little if
5 any weight to McLeod's arguments regarding Qwest's cost support for the Power Plant rate and
6 how that rate was developed in the cost study.

7 That said, to the extent that the Commission does consider the cost study, two things are
8 readily apparent. First, the Power Plant rate is a lawful rate, approved by the Commission after
9 full disclosure as to how it was developed, and paid by McLeod on a per-amp-ordered basis for
10 years prior to the execution of the Amendment at issue here.⁶⁸ Second, to the extent that the cost
11 study is evidence of the parties' intent regarding how the costs should be applied, the study is
12 clear that the costs were developed to recover a fixed investment that does not vary with usage,
13 and the rate is to be applied on a "per-amp-ordered" basis, not on a usage sensitive basis.⁶⁹

14
15 **1. The Cost Study Supporting the Power Plant Rate Element was Filed**
16 **with the Commission and Approved in a Cost Docket.**

17 Collocation costs were the subject of a cost docket in Arizona in 2000 and 2001. Part A
18 of Docket No. T-00000A-00-0194 established Qwest's collocation costs and rates for Arizona,
19 and those rates were incorporated into the pricing exhibits (the Exhibit A) in McLeod's ICA.
20 That docket was a fully contested proceeding in which McLeod had an opportunity to
21 participate. In that proceeding, all parties had the right and the opportunity to evaluate Qwest's
22 cost study and advocate for the proper rates relative to that study. McLeod did not do so, and the
23 Commission-approved rates should not be subject to attack in this proceeding.

24 In Docket No. T-00000A-00-0194, Qwest filed cost support for a number of rate
25

26 ⁶⁸ Tr. 221.18-222.11.
⁶⁹ Exhibit Q2/TKM-1.

1 elements, including collocation rates. The testimony and exhibits filed in that docket make it
2 clear that Qwest's cost studies properly model costs in accordance with TELRIC (total element
3 long run incremental costs) principles. There was ample opportunity in that docket for any
4 interested party to evaluate and challenge both the costs and the resulting proposed rates.
5 Indeed, all of Qwest's collocation costs, including the Power Plant costs, were evaluated in that
6 docket. The Commission subsequently approved a compliance filing containing Qwest's
7 collocation rates, including the Power Plant rates. However, as noted above, this proceeding
8 does not constitute a proper venue to complain against those rates.

9 Because the Power Measuring Amendment in this case does not discuss the Power Plant
10 rate element, and because McLeod did not bargain for or expect a reduction in that Commission-
11 approved rate element, McLeod should not be permitted to bootstrap a challenge to that rate into
12 this proceeding simply by alleging discrimination.⁷⁰

13
14 **2. The Cost Study is Very Clear that the Power Plant Rate is Developed**
15 **to Recover Fixed Investment and is to be Charged on a Per Amp**
16 **Ordered Basis.**

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

20 Qwest's collocation cost study uses a TELRIC methodology and determines the average
21 cost per Amp for the types and amounts of power equipment that would be necessary to produce
22 a hypothetical 1000 Amps of power plant *capacity* in any given location.⁷¹ The study, a portion
23 of which was identified as Hearing Exhibit 52, shows that the Power Plant rate is to be charged
24 on a per-amp-ordered basis. Qwest explained in discovery that the cost study is not usage-based,

25 ⁷⁰ Nor is McLeod saved by a positioning its challenge as a challenge to the rate design as opposed to the rate itself.
26 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.

⁷¹ Exhibit Q2, p. 8.

1 and makes no assumptions about the amount of power usage.⁷² And, Ms. Million explained that
2 the investment assumptions do not have “anything to do with the actual electrical current that
3 any telecommunications equipment in a central office might consume.”⁷³

4 The cost study assumes that the power plant is built all at once, and that costs are
5 incurred, up front, by Qwest, to make power plant capacity available. McLeod agreed that the
6 cost study calculates a per-amp rate on the power plant⁷⁴ and that the rate will be charged on an
7 as-ordered basis.⁷⁵ McLeod further agreed that the study contains no assumptions about
8 McLeod’s or any other CLEC’s level of usage.⁷⁶ Finally, McLeod agreed that the costs in the
9 cost study are based on the *capacity* of the power plant.⁷⁷

10 Under these circumstances, it is preposterous to claim that the cost study supports
11 charging the Power Plant rate element on a usage basis. It is a capacity charge, designed to
12 recover fixed costs that do not vary with usage. Thus, it is consistent with the cost study that
13 Qwest would assess this rate on a per-amp-ordered basis. As discussed above in Section B., this
14 ordered amount is the amount of capacity available to the CLEC. And, as noted in Section A.,
15 this is consistent with the reference to “power plant” in the Amendment – though the language in
16 the Amendment contains a reference to “power plant”, it is clear that the Amendment does not
17 operate to change the Power Plant rate to a measured charge.

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

21 Even beyond the fact that McLeod finds no support in the cost study for its positions,
22 McLeod’s interpretation of the cost study, and its recommendation for charging Power Plant on a
23 measured basis, violate TELRIC costing and pricing principles. During discovery in this matter,

24 ⁷² Exhibits Q4 and Q5.

⁷³ Exhibit Q2, p. 9.

25 ⁷⁴ Tr. 61.2-5.

⁷⁵ Tr. 57.14-17.

26 ⁷⁶ Tr. 62.2-4.

⁷⁷ Tr. 70.11-16.

1 McLeod compared TELRIC principles with other costing and pricing principles, including short
2 run marginal costs. McLeod's response is included in Exhibit Q6, response to request 24.

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

9 In sum, Qwest does not believe that the cost study is relevant to determining the central
10 issue in this case, which is the proper interpretation of the contract. Proper interpretation of the
11 contract should give effect to the mutual intent of the parties, and that intent may be discerned by
12 extrinsic evidence of objective manifestations of intent in connection with the formation of the
13 contract. The collocation cost study was filed in 2000, and has no connection with the parties'
14 discussions of the Amendment in 2004. McLeod is not claiming that it relied on the cost study
15 in any way, only that the study supports McLeod's after-the-fact interpretation of the
16 Amendment. Because McLeod did not rely on the cost study in connection with its negotiations,
17 and because the study in fact supports Qwest's position, the Commission should not give any
18 weight to McLeod's claims about the study.

19 20 **IV. CONCLUSION**

21 The change initiated by the DC Power Measuring Amendment is limited to the power
22 usage charge. This conclusion is reasonable, logical, and gives effect to the entire Amendment.
23 Qwest's intent with respect to the Amendment is clear, and was reasonably available to McLeod,
24 which in the exercise of reasonable business prudence, should have learned before entering the
25 Amendment. Qwest's interpretation of the Amendment is also consistent with its practice in
26 making List 2 drain available to CLECs according to their power orders, which is consistent with

1 the Commission's approval of the power plant rates in Docket No. T-00000A-00-0194. In
2 contrast, McLeod's current interpretation of the Amendment ignores its plain language, would
3 give effect to only portions of the agreement, and is contradicted by the evidence of McLeod's
4 internal but unexpressed intent that it only expected savings on power usage charges, not power
5 plant charges. McLeod's current view of the Amendment was not formulated until nine months
6 after the Amendment was executed and approved. Moreover, McLeod's interpretation of the
7 Amendment is inconsistent with how even its own expert witnesses testify that Qwest should
8 engineer its power plant.

9 In resolving these evidentiary issues, Qwest would note one key fact in closing. McLeod
10 gave up nothing in order to gain the savings on power usage charges it has realized over the past
11 two years. McLeod did not have to pay a higher rate for power usage, or agree to purchase
12 additional quantities or commit to longer terms, or agree to more onerous conditions for the
13 offering of any DC Power element or other element of interconnection. Qwest was not ordered
14 or otherwise forced to provide the Amendment to CLECs like McLeod. Indeed, but for the
15 Commission's approval of the interconnection agreement, Qwest might successfully argue that
16 the Amendment was not supported by any consideration from McLeod. Despite this lack of
17 legal consideration, McLeod has saved more than \$25,000 per month in Arizona alone,⁷⁸ and
18 more than \$165,000 per month throughout Qwest's operating region.⁷⁹ McLeod has not been
19 injured, discriminated against, or otherwise disadvantaged by the DC Power Measuring
20 Amendment; it has only benefited. Against this backdrop, the evidence of the Amendment's
21 language and the parties' intent is even more compellingly in Qwest's favor. Qwest asks that the
22 Commission deny McLeod's claims in their entirety, and grant Qwest's claims as indicated
23 above.

24
25
26 ⁷⁸ Exhibit M5; Tr. 253.5.

⁷⁹ *Id.*

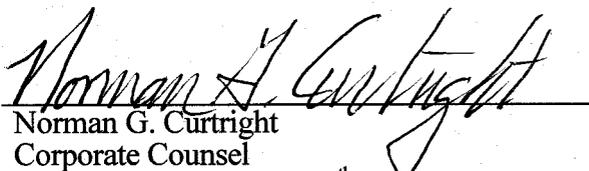
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RESPECTFULLY SUBMITTED this 8th day of September, 2006.

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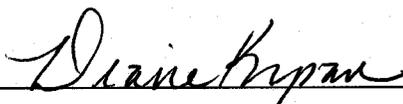
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ATTACHMENT 1

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.,</p> <p style="text-align:center">Complainant,</p> <p style="text-align:center">v.</p> <p>QWEST CORPORATION,</p> <p style="text-align:center">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-06-20</p>
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FINAL ORDER

(Issued July 27, 2006)

PROCEDURAL HISTORY

On February 9, 2006, McLeodUSA Telecommunications Services, Inc. (McLeodUSA), filed with the Utilities Board (Board) a complaint against Qwest Corporation (Qwest) pursuant to Iowa Code §§ 476.100 and 476.101. McLeodUSA alleges it is being overcharged by Qwest for collocation power charges in violation of Iowa law and the interconnection agreement between the parties. On March 6, 2006, the Board issued its "Order Docketing Complaint, Granting Partial Dismissal, and Setting Procedural Schedule."

Specifically, McLeodUSA alleges that Qwest, in violation of its amended interconnection agreement with McLeodUSA, has continued to bill certain collocation power charges using "ordered" levels rather than based on actual usage.

McLeodUSA suggests that this constitutes a violation of Iowa Code §§ 476.100(2),

476.100(3), 476.100(5), and 476.100(7). Additionally, McLeodUSA claims Qwest's action violates 47 U.S.C. §§ 201(b) and 251(c)(3)(D).

In addition to its allegation that the method of calculating the direct current power charges is incorrect, Count II of McLeodUSA's complaint was based on an argument that the rate being charged per amp is unreasonable.

On February 20, 2006, Qwest filed its answer to the complaint, admitting that it entered into an amendment to its interconnection agreement with McLeodUSA on August 18, 2004. However, Qwest argues that only one element of the direct current power charges was addressed by that amendment. According to Qwest, three separate charges relate to direct current power that are listed in its Statement of Generally Available Terms (SGAT) including "Power Plant," "Power Usage Less Than 60 Amps," and "Power Usage More Than 60 Amps." Qwest argues that the amendment affected only one of the three separate charges related to direct current power, specifically the "Power Usage More Than 60 Amps" charge.

Qwest also filed a motion for partial dismissal, directed at Count II of the complaint, arguing that a two-party complaint docket is not the proper venue for contesting a rate. Instead, Qwest suggested that McLeodUSA should initiate a formal objection to the rate pursuant to Iowa Code § 476.3(1) to begin a limited cost docket proceeding, if McLeodUSA wants to challenge the rate.

Additionally, Qwest filed a counterclaim on February 20, 2006, alleging that McLeodUSA improperly failed to pay amounts withheld from invoices. Qwest asks the Board to direct McLeodUSA to immediately pay all amounts due under Qwest's

invoices, plus interest and late payment fees pursuant to the interconnection agreement.

On February 27, 2006, McLeodUSA filed an answer to Qwest's counterclaim and a response to the motion to dismiss Count II of its complaint.

In response to the counterclaim filed by Qwest, McLeodUSA asserts that, as noted in its initial complaint, McLeodUSA began withholding disputed amounts in September 2005 when McLeodUSA initiated its billing dispute. McLeodUSA also indicates that it ceased withholding disputed amounts in December 2005 while still reserving its right to challenge all the billings.

McLeodUSA urged the Board to deny the partial motion to dismiss, arguing that Iowa Code § 476.3(1) specifically provides for formal complaints to be used to challenge a rate. Further, McLeodUSA reasoned that the numerous provisions of § 476.100 are to ensure interconnecting competitors are treated fairly. Because improperly high rates for collocation power interfere with the provision of adequate and non-discriminatory interconnection and can serve as a barrier to competitors, the rate challenge is entitled to expedited treatment under § 476.101(8), according to McLeodUSA.

On March 6, 2006, the Board issued an order docketing the complaint, dismissing the rate element (Count II) portion of the complaint, and setting a procedural schedule.

The Board granted motions to compel Qwest to respond to data requests on two occasions (March 8, 2006, and April 13, 2006).

A hearing was held on May 10 and 11, 2006. Briefs were filed June 2, 2006, by McLeodUSA, Qwest, and the Consumer Advocate Division of the Department of Justice (Consumer Advocate). Oral argument in lieu of reply briefs was held on June 15, 2006. By agreement of the parties, the Board must issue its order no later than July 28, 2006.

ISSUES AND ANALYSIS

A. Is the language of the DC Power Measuring Amendment to the Interconnection Agreement between Qwest and McLeodUSA clear on its face, such that the Board's analysis is limited to the four corners of the amended agreement?

The Board has heard testimony and argument from both parties regarding the specific language of the DC Power Measuring Amendment (Amendment) to the interconnection agreement, entered into on August 18, 2004.¹ Both McLeodUSA and Qwest argue that the plain language of the amendment supports their individual positions.

McLeodUSA suggests the pertinent language upon which this disagreement is based is contained in "Attachment 1: DC Power Measuring" to the Amendment. The Amendment provides that if a competitive local exchange carrier (CLEC) orders more than sixty (60) amps of power, it will be placed on the power board and Qwest will monitor power usage on a semi-annual basis when requested to do so by the CLEC. The Amendment also provides that "[b]ased on these readings, if CLEC is utilizing less than the ordered amount of power, Qwest will reduce the monthly usage rate to CLEC's actual use." (Exhibit 5 at Attachment 1, Section 1.2).

¹ Exh. 5.

McLeodUSA further argues that Section 2.2.1 of Attachment 1, states that Qwest is initially to bill "-48 Volt DC Power Usage Charge" based on the quantity ordered. However, Section 2.2.1 goes on to state that for the "-48 Volt DC Power Usage Charge," Qwest will determine the actual usage at the power board as described in Section 1.2. Section 1.2 provides that once Qwest receives a request from a CLEC to monitor the power usage, it will bill the actual power usage rate from the date of the CLEC monitoring request until the next reading.

There is no dispute that McLeodUSA made a valid monitoring request, nor that Qwest appropriately monitored power usage at the McLeodUSA collocations at which 60 amps had originally been ordered.

The dispute arises because Qwest, in billing McLeodUSA, billed one "-48 Volt DC Power Usage" rate element (Power Usage More Than 60 amps) at the lower usage measurement, but believes the Amendment did not change responsibility for the second "-48 Volt DC Power Usage" rate element (Power Plant). It continued to bill McLeodUSA for that rate element based on the quantity ordered. This resulted in higher bills to McLeodUSA than it believes it is responsible for under the Amendment.²

Exhibit A (the pricing pages) to the Interconnection Agreement specifies the following:

8.1.4.1	-48 Volt DC Power Usage	
	Power Plant, per Amp	\$12.17
	Power Usage Less Than 60 Amps, per Amp	\$2.19
	Power Usage More Than 60 Amps, per Amp	\$4.37

² The parties did not agree upon a total amount at issue, but during the time that McLeodUSA withheld payment of the disputed amounts (September to December 2005), the total amount withheld was approximately \$313,106.33. Tr. 421. McLeodUSA testified that the disputed practice results in excess monthly operating costs to McLeodUSA of over \$63,000. Tr. 420.

According to McLeodUSA, the Amendment which specifies that "-48 Volt DC Power Usage" charges are to be billed based on actual usage where more than 60 amps of DC Power is used clearly applies to both the "Power Plant, per Amp" and "Power Usage More Than 60 Amps, per Amp" rate elements.

Qwest argues that the term "-48 Volt DC Power Usage Charge" does not mean the entire group of rate elements in Section 8.1.4.1, but rather refers to only one of those rate elements, specifically, the "Power Usage More Than 60 Amps, per Amp." Both parties agree that prior to the execution of the Amendment, Qwest and McLeodUSA had agreed that McLeodUSA would pay both the DC Power Usage charge and the DC Power Plant charge based on the capacity McLeodUSA specified in its original order for power distribution. According to Qwest, the Amendment changed one of these charges, but did not mention the other. Qwest argues that the Amendment identifies the "DC Power Usage Charge" a number of times within the language of the Amendment, but never mentions the "DC Power Plant" charge, which is therefore a separate charge that was not addressed in the Amendment.

The preliminary question for determination by the Board is whether the language of the Amendment is clear, such that the Board's analysis can be limited to the four corners of the amended agreement. The Board has looked at the specific language of the Amendment and determined that the language of the Amendment is not clear. Each party has provided an interpretation that supports its desired outcome, and both interpretations are reasonable. The terminology of the Amendment does not precisely match the terms used in the pricing pages, creating ambiguity. Indeed, the very fact that either party's interpretation is sustainable leads

to the conclusion that the language is not clear on its face and the Board must therefore look to other evidence in the record to determine the proper interpretation of the Amendment.³

B. Does the extrinsic evidence in the record support the interpretation presented by either party?

Qwest argues that it openly disclosed its intent regarding the Amendment prior to its execution through its Change Management Process (CMP) and then with a detailed explanation of the DC Power Measuring Amendment in its product catalog (PCAT). Qwest argues these prior disclosures support its interpretation of the Amendment by making it clear that Qwest intended to amend only one rate element.

Qwest's CMP process involves a forum that includes, among other things, discussions and information about Qwest products or changes to products that Qwest offers.⁴ These product changes often require a change to an interconnection agreement and are typically accompanied by a PCAT that is made available on Qwest's Website. Qwest entered into evidence several documents from its CMP website regarding the power measuring product and associated changes.⁵ Qwest specifically relied upon a set of questions from CLECs and responses provided by Qwest during the CMP process. Those responses discuss issues such as how power measuring would impact monthly recurring charges, how power measuring relates to cost dockets, how Qwest would measure power, whether the power measuring offering would be optional or required, and whether an interconnection

³ *RPC Liquidation v. Iowa Dept. of Transportation*, 2006 Iowa Sup. LEXIS 79, 10.

⁴ Tr. 479.

⁵ Qwest also provided an email contact list to which CMP notices were distributed that included 16 McLeodUSA employees. See Exh. 122.

amendment would be required.⁶ In Exhibit 102, the following question was posed by a CLEC and answered by Qwest:

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 Response:

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

Qwest argues that this colloquy makes it clear that Qwest always intended that the Amendment should only apply to DC Power Usage Charge and not to the DC Power Plant charge.

McLeodUSA testified at the hearing that it did not see these documents prior to executing the Amendment. McLeodUSA's witness testified that she probably received email notification of these documents, but she receives approximately three to four hundred emails a day and does not always pay close attention to each and every CMP notification.⁷

⁶ See Exh. 102.

⁷ See discussion at Tr. 480-83.

Qwest also presented an Excel spreadsheet that, according to Qwest, shows that McLeodUSA understood that the intent of the Amendment was to change the manner of billing for only one of the "-48 Volt DC Power Usage Charge" rate elements.⁸ The spreadsheet, prepared by McLeodUSA for internal use around the time the Amendment was executed, appears to depict the estimated savings McLeodUSA expected from the Amendment. The spreadsheet does not contain any reference to billing the Power Plant rate element on a measured basis. Qwest argues that this shows McLeodUSA did not really expect the Power Plant rate element to change as a result of the Amendment.

McLeodUSA testified that this spreadsheet was prepared by clerical staff, rather than by technical staff, and was simply a ministerial act of placing part of the desired information into spreadsheet form. McLeodUSA argues that the record is therefore not clear that McLeodUSA believed the savings shown on the spreadsheet were all of the power savings it was entitled to pursuant to the Amendment.

The Board has reviewed the extrinsic evidence presented and determines that the majority of the evidence presented supports Qwest's position that the Amendment was only intended to apply to the DC Power Usage Charge and that the DC Power Plant charge was to continue to be billed based on the amount of power ordered. The evidence can be summarized as follows.

First, there was a time span of about six months following the first measurement pursuant to the Amendment and McLeodUSA's first protest following the September 2005 billing. If McLeodUSA had really expected the substantial

⁸ Exh. 112.

savings it is now claiming, a reasonable person might expect that McLeodUSA would have protested as soon as it received a bill that was higher than expected.

Second, the Board finds the McLeodUSA internal spreadsheet tends to support Qwest's interpretation. The spreadsheet is dated August 12, 2004, very close to the execution of the Amendment on August 18, 2004.⁹ It does not show, or even contemplate, savings associated with the Power Plant rate element. The Board understands McLeodUSA's explanation that the spreadsheet is, in effect, the result of a clerical error, but if that is the case, one would expect to see a corrected spreadsheet showing larger projected savings. The absence of a contemporaneous correction lends support to Qwest's interpretation of the facts and undercuts McLeodUSA's explanation.

On McLeodUSA's side of the balance, the only significant extrinsic evidence appears to be the very existence of the Amendment. It could be argued that if the Amendment were only intended to change the one rate element, then the same or similar result could have been achieved through the documents developed through Qwest's CMP process and presented in Qwest's PCAT. Therefore, according to this line of reasoning, the Amendment must have been intended to accomplish something more. The problem with this argument is that McLeodUSA's witness testified that she was unaware of the CMP notices on this issue,¹⁰ so McLeodUSA cannot really rely on this logic.¹¹

⁹ See Exh. 5 and 112.

¹⁰ Tr. 480-83.

¹¹ McLeodUSA has not, in fact, made this argument in these terms; the Board includes it here only because it is the one item of extrinsic evidence that conceivably weighs on McLeodUSA's side.

Thus, the language of the Amendment is ambiguous and the extrinsic evidence supports Qwest's interpretation that the Amendment was intended to affect only the Power Usage More Than 60 amps power charge rate element. The Board finds that Qwest's interpretation of the Amendment correctly reflects the intent of the parties at the time the Amendment was executed.

- C. Is there a violation of Iowa Code § 476.100(2)? The statute provides that a local exchange carrier shall not discriminate against a CLEC by offering services on terms and conditions that are less favorable than the ILEC provides to itself.**

Iowa Code § 476.100 prohibits local exchange carriers from conduct that is harmful to local exchange competition and specifies a number of prohibited acts.

Section 476.100(2) provides that a local exchange carrier shall not:

Discriminate against another provider of communications services by refusing or delaying access to essential facilities on terms and conditions no less favorable than those the local exchange carrier provides to itself and its affiliates.

Consumer Advocate presents the issue to the Board as follows:

Does Qwest's application of the DC power plant rate to the amps of current capacity of the DC power distribution cables ordered by McLeodUSA (or any CLEC) violate any provision of Iowa Code § 476.100 (2005)?

According to Consumer Advocate, the answer depends upon Qwest's actual sizing of DC power plant to serve both its own equipment and the equipment of CLECs and, therefore, the costs Qwest incurs for itself and for CLECs.¹²

DC power plant is designed to provide sufficient power to accommodate the peak requirements of all DC-powered telecommunications equipment in a central

¹² Consumer Advocate brief, p. 5.

office, including Qwest equipment and all CLEC equipment, where peak usage is measured by the busy day/busy hour for the central office.¹³ Qwest's engineering standards for DC power plant equipment state the criteria to be used when sizing the equipment to serve the maximum power draw that occurs on the busy day/busy hour. This maximum power draw is referred to as the "List 1 Drain." Qwest confirmed that it sizes its power plant to meet the List 1 Drain¹⁴ or an approximation of it by sizing the power plant at 40 to 70 percent of "List 2 Drain."¹⁵

The List 2 Drain is the total current the equipment will draw in a worst-case scenario. According to Qwest's engineering documents, the List 2 Drain is used for sizing the feeder cables, circuit breakers, fuses, and other components that make up the DC Power distribution system.

McLeodUSA points out that Qwest bills McLeodUSA for DC power plant based on the size of the delivery cables McLeodUSA orders when it establishes collocation.¹⁶ This equates to being charged based on List 2 Drain for power plant that has been sized, purchased, and installed based on List 1 Drain. McLeodUSA argues that this allows Qwest to overcharge McLeodUSA and all other CLECs.

McLeodUSA argues that Qwest's practice of billing CLECs for power plant based on the amount of power ordered is discriminatory because it charges CLECs for additional investment in power plant when none is actually incurred and because

¹³ Tr. 53.

¹⁴ Tr. 544.

¹⁵ Tr. 599-600.

¹⁶ Tr. 643.

Qwest imputes to itself only the costs of power consumed.¹⁷ Thus, McLeodUSA argues, Qwest is offering this service to CLECs on terms less favorable than it provides to itself.

Qwest states that the claim of discrimination brought by McLeodUSA and Consumer Advocate is an attack on the practice of charging the power plant rate based on an "as ordered" basis. Qwest believes that the Board has already addressed these discrimination claims through its dismissal of Count II of the Complaint, involving a challenge to Qwest's power rates.¹⁸

While the Board declined to hear Count II at the complaint, that does not preclude examination of the manner in which Qwest engineers and allocates cost for power plant. It appears that Qwest has not expended capital on power capacity augmentation that would equate to McLeodUSA power ordered.¹⁹ Only one instance of power plant augmentation (directly attributable to McLeodUSA) was shown at the hearing and that installation was necessary due to the age and obsolescence of the existing power plant.²⁰

Further, power plant facilities are not dedicated to individual companies, but are common to all those within a central office. This includes Qwest and all CLECs collocating in that office. Typically, an order for power from an individual CLEC does not require additional investment in power plant facilities. Instead, it is the total power

¹⁷ Exhibit 103 shows that McLeodUSA has 54 collocations with Qwest in Iowa. Exhibit 105 was produced to show augmentations Qwest attributed to McLeodUSA orders. However, testimony showed that the jobs were to add circuit breaker panels, fuse panels, and battery distribution fuse bays, which are not power plant capacity. See Tr. 586; 605-08.

¹⁸ Tr. 741.

¹⁹ See Exh. 105.

²⁰ Tr. 618; Exh. 105.

consumption by Qwest and all the CLECs that would trigger the need for additional power plant facilities. As a result, the sum of the total power ordered is typically greater than the total of the power plant available.²¹ However, Qwest charges each CLEC on the basis of the power ordered.

Because Qwest is assessing the power plant based on the number of amps included in a CLEC's original order for power delivery cables, the CLECs may be subsidizing Qwest and thereby reducing Qwest's cost of providing service to its own end users. Moreover, Qwest admits that it assigns Power Plant costs to itself based on List 1 drain (which approximates its actual use), but charges CLECs based on the amount of power ordered (which approximates List 2 Drain).²²

The available evidence indicates a valid concern exists regarding possible discrimination, but the record has not been fully developed on this issue. Although it is clear that Qwest treats CLECs differently in this respect, it is not so clear whether there is a reasonable basis for this difference or that the resulting difference is significant. This issue was not well developed in the prefiled testimony; instead, it evolved as the hearing progressed. As a result, it is not clear what, if any, steps the Board should take to remedy the situation, if a remedy is required.

Additionally, it is not clear that the Board can remedy the situation. The Board may lack jurisdiction to give McLeodUSA any immediate relief because these charges are terms of the interconnection agreement between the parties. Under federal law, the Board cannot change the terms of an approved interconnection

²¹ See Tr. 631-35.

²² Tr. 658-59.

agreement. A state commission's only authority "over interstate traffic" under 47 U.S.C. § 252 is its authority "to approve new arbitrated interconnection agreements and to interpret existing ones according to their own terms."²³ The Amendment was filed with the Board, no party filed comments claiming discrimination existed, and the Amendment was approved, so it is now a binding part of the interconnection agreement between the parties.

Based on the limited record available in this docket, the Board is concerned about Qwest's practices in this respect. This subject should be revisited, and more fully developed, in an appropriate docket, that is, one in which the Board can order relief, if appropriate. That may be an interconnection cost docket, an arbitration docket, or some other proceeding.

D. Is McLeod required to pay or credit Qwest the amounts withheld (\$326,116.04), plus interest for the amounts withheld?

McLeodUSA began withholding disputed amounts in September 2005 and ceased withholding disputed amounts in December 2005.²⁴ Qwest has argued that Section 15 of Attachment 7 to the interconnection agreement requires that interest be paid on the amounts withheld.

Based on the previous determinations, the Board concludes that McLeodUSA is required to pay Qwest the amounts that were withheld. However, the section of the interconnection agreement cited by Qwest as requiring the payment of interest involves "Late Payment Charges" and does not appear to apply to amounts withheld

²³ *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1125 (9th Cir. 2003). See also, *e.spire Communs., Inc. v. N.M. Pub. Regulation Comm'n*, 392 F.3d 1204 (10th Cir. 2004) and *Southwestern Bell Tel. Co. v. Brooks Fiber Communs. of Okla., Inc.*, 235 F.3d 493 (10th Cir. 2000).

²⁴ Complaint ¶ 9.

pursuant to a good faith billing dispute. Section 2.1 of the Interconnection Agreement indicates that amounts payable are due within 30 days after receipt of the ILEC's invoice "unless properly disputed." McLeodUSA notified Qwest of the dispute involving these amounts and filed its complaint with the Board in a timely manner, making the withheld amounts "properly disputed," rather than "late." The Board concludes that interest is not owed on these properly disputed withheld amounts.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

McLeodUSA Telecommunications Services, Inc., is directed to pay Qwest Corporation the amount withheld from September 2005 through December 2005, in connection with the disputed collocation power charges, shown on this record to be \$313,106.33.²⁵

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

²⁵ Tr. 421.

CONCURRENCE OF CURTIS W. STAMP

Power Measuring Amendment

While I support the result in this case, I do so reluctantly. I think the interpretation of the Power Measuring Amendment (Amendment) offered by McLeodUSA is reasonable and reflective of the practices employed for power plant construction and utilization in collocations; however, the record developed in this case was not sufficient to get the Board to that result. As a quasi-judicial body, the Board must make its decisions on the record presented.

One of the more challenging parts of this case was the lack of consistent language between the various documents that refer to pricing for collocation power (e.g., original interconnection agreement, SGAT, PCAT, and the Amendment). For example, Section 2.1 of the Amendment states the Power Usage Charge is for the capacity of power plant available, which seems to imply that McLeodUSA's interpretation that both the Power Plant and Usage rate elements would be impacted by the Amendment. At the same time, in Section 1.2 of the Amendment, the language that states the monthly usage rate will be reduced to reflect McLeodUSA's actual use could be said to weigh in Qwest's favor because a reasonable reading of that section could lead one to conclude that only the Power Usage More Than 60 Amps element was impacted by the Amendment.

Making the whole thing even more confusing are Sections 2.2 and 2.2.1 of the Amendment. Section 2.2 states that the -48 Volt DC Power Usage Charge applies to the quantity of -48 Volt Capacity specified in the McLeodUSA order. Of course,

there is no rate element on the pricing pages (Exhibit A to the Interconnection Agreement) that is a reference to “-48 Volt Capacity.” While the Amendment may be read to only apply to the “monthly usage” rate element, it is quite reasonable to accept McLeodUSA’s interpretation that the Amendment applied both to the Power Plant and Power Usage rate elements.

Section 8.1.4.1 of Exhibit A represents the pricing pages from the interconnection agreement between Qwest and McLeodUSA. Section 2.2 of the Amendment specifically states that the pricing under the Amendment shall be in accordance with Exhibit A. The Power Plant, Power Usage Less Than 60 Amps, and Power Usage More Than 60 Amps all appear under the general heading “-48 Volt DC Power Usage” which is slightly different than the term “-48 Volt DC Power Usage Charge” which is used in the Amendment, but more like that term than the individual Power Plant and Power Usage terms listed for the various rate elements.

From the discussion above, it is clear that the only thing about this Amendment that is abundantly clear is its ambiguity. When interpreting a written contract, the intent of the parties controls, and unless the contract is ambiguous, the intent of the parties is determined from the contract itself. *Estate of Pearson v. Interstate Power and Light*, 700 N.W.2d 333, 343 (Iowa 2005) (citing Iowa R. App. P. 6.14(6)(n)). A contract that is not ambiguous will be enforced as written. *RPC Liquidation v. Iowa Dept. of Transportation*, 2006 Iowa Sup LEXIS 79 *10 (2006). When a contract is ambiguous, extrinsic evidence is used to interpret any language or terms contained in a contract. *Echols v. State of Iowa*, 440 N.W.2d 402, 405 (Iowa 1989).

As discussed in the Order, little extrinsic evidence was presented by McLeodUSA that was helpful in the Board's interpretation of the Amendment. At the same time, the extrinsic evidence offered by Qwest is a little thin in spots. For example, I do not find it overly telling that because McLeodUSA did not notice the alleged overbilling for nearly six months as acquiescence to Qwest's interpretation of the Amendment. I would tend to accept McLeodUSA's explanation that given the volume of bills it receives, it may very well take six months or longer for an auditor to discover a discrepancy.

As a matter of policy, McLeodUSA's interpretation of the Amendment makes sense. The nonrecurring charges are (or should be) sufficient to allow Qwest to recover the cost of constructing and making power available for collocation. McLeodUSA should not be charged for power plant it is not using, but the record before us is not sufficient to yield that outcome.

Iowa Code § 476.100(2)

I agree with my colleagues that there may be a reasonable or justifiable reason for Qwest treating itself differently when it comes to engineering and installing power plant than it does for collocators such as McLeodUSA. Sufficient time was not given to this issue, and thus the record as it relates to the issue was not fully developed. I am hopeful that sooner, rather than later, the issue can be addressed more fully before the Board.

While some would argue that the Board cannot alter the terms of a negotiated or arbitrated interconnection agreement, I have trouble accepting that if an

agreement is being applied in a discriminatory manner that a CLEC has no remedy for relief other than waiting until the next round of negotiations.

Section 252 of the Telecommunications Act of 1996 grants to the states the authority to approve, reject, and arbitrate interconnection agreements. Implicit in that authority is also the authority to interpret and enforce the specific provisions of those agreements. *E. Spire Communications, Inc. v. New Mexico Public Regulation Commission*, 392 F.3d 1204, 1207 (10th Cir. 2004).

Interconnection agreements are not the same as traditional contracts but rather an instrument arising in the context of ongoing state and federal regulation. *Id.* State and federal law to facilitate competition and ensure that carriers are not treated in a discriminatory manner in the marketplace bind us. See, e.g., Iowa Code § 476.100 et seq. and 47 U.S.C. § 251 et seq. If no justifiable reason for the way in which Qwest discriminates against McLeodUSA and other CLECs in the way it engineers, and more importantly allocates costs, for central office power plant exists, the Board would have the duty to order Qwest to remedy the situation. Interpretation consistent with Board orders and state and federal law would be justified as such, and not as impermissible modifications of the interconnection agreement. 392 F.3d at 1208.

I struggle with the argument that the parties negotiated the Amendment and are therefore bound by the results, even if it means Qwest is treated differently (and perhaps to its competitive advantage). An interconnection agreement is essentially the terms and conditions under which the parties will interconnect their networks and the prices Qwest will charge McLeodUSA for various services provided (such as

collocation power). What is absent in the interconnection agreement is the price and terms under which Qwest governs itself; i.e., nowhere does the Amendment mention how Qwest engineers or bills itself for DC Power. Even when the provisions of the Amendment are voluntarily negotiated, they are cabined by the obvious recognition that the parties had to agree within parameters of state and federal law. *MCI Worldcom Communications, Inc. v. Dept. of Telecommunications and Energy*, 810 N.E.2d 802, 810 (Mass. 2004). For that reason, the Board has the authority and obligation to correct matters of unfair discrimination that are inconsistent with state and federal law even in the context of a negotiated and approved interconnection agreement.

As was stated in the Order, however, the record on this issue was not fully developed and it is unclear as to whether the discrimination in this case is reasonable and consistent with state and federal law. For that reason, I do not disagree with the result on this issue, but clarify that given a fully developed record, the Board would have the authority to order the parties to comply with state and federal law, even if to do so might be inconsistent with an interconnection agreement. It would be my thought that any remedy ordered would only be prospective in nature.

/s/ Curtis W. Stamp

ATTEST:

/s/ Margaret Munson
Executive Secretary, Deputy

Dated at Des Moines, Iowa, this 27th day of July, 2006.