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BEFORE THE ARIZONA CORPORATION COMMISSION

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2006 SEP 22 P 3: 36
AZ CORP COMMISSION
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McLEODUSA TELECOMMUNICATIONS SERVICES, INC.,

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

Complainant,

QWEST CORPORATION'S POST-HEARING REPLY BRIEF

v.

QWEST CORPORATION,

Respondent

Arizona Corporation Commission
DOCKETED
SEP 22 2006

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I. INTRODUCTION

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

1 And, although McLeod pays lip service to the fact that this case is “first and foremost”
2 about the proper interpretation of the Power Measuring Amendment, the truth of the matter is
3 that McLeod knows that its contract claim is wholly unsupported, and so McLeod devotes much
4 of its opening brief to its alternative theory – the theory that Qwest’s Commission-approved
5 Power Plant rates are discriminatory. This theory also lacks merit.

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

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

20 The Commission should therefore hold that Qwest properly charges for power plant
21 capacity on the basis of the CLEC ordered amount, in accordance with previously-approved
22 rates. Accordingly, the Commission should order McLeod to remit to Qwest the amounts
23 withheld for Power Plant charges in the amount of \$192,254.09,¹ and should order McLeod to
24 pay the Power Plant charges on the basis of McLeod’s power order on a going forward basis.

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1 Tr. 223.3

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II. ARGUMENT

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A. *The DC Power Measuring Amendment did not Change the Way DC Power Plant Charges are to be Assessed; those Charges Remain on an As-Ordered Basis*

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1. The Words of the Amendment Support Qwest's Interpretation.

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This Commission must interpret the DC Power Measuring Amendment to affect the intent of the parties at the time the Amendment was executed and approved by the Commission. The evidence of that intent lies first in the words the parties chose to use to express their intent in the Amendment itself, and secondarily in the extrinsic evidence relating to the parties' intent. McLeod does not directly argue this clear and fundamental point of contract law. Indeed, McLeod offers no authority for any other interpretive approach. That is, there is no authority that would permit the Commission to determine based on the language of the DC Power Measuring Amendment (and/or any admissible extrinsic evidence) that the parties did not intend to change the way the DC power plant charges would be assessed, and then rewrite the Amendment under the guise of interpretation to change the way DC power plant charges would be assessed. This approach is consistent with the several Arizona and federal authorities cited in Qwest's opening brief, which give effect to the propositions that contracts must be interpreted according to their terms, and that interconnection agreements in particular are "binding" agreements under 47 USC § 252(a)(1). Indeed, the court in *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003) observed that Commissions lack the authority to change the terms of interconnection agreements, and the court in *Verizon Northwest, Inc. v. WorldCom, Inc.*, 61 Fed. App. 388, 392 (9th Cir. 2003) held that the issue of "contract interpretation . . . is controlled by the terms of the Agreement and state contract law." However, the Commission need not accept McLeod's invitation to ignore the "binding" nature of interconnection agreements under § 252(a)(1), because as set forth in more detail below, assessing power plant charges on an "as-ordered" basis complies with the Act and is not discriminatory.

1 In this light, Qwest's interpretation of the Amendment is more reasonable, and is
2 consistent with the expressed intent of the parties. It gives effect to the entire agreement, and is
3 consistent with the extrinsic evidence of intent. McLeod's arguments rely on twisting the words
4 of the Amendment, ignoring entire sections of the Amendment, and completely discounting the
5 extrinsic evidence of intent. Indeed, the Iowa Utilities Board agreed with Qwest's interpretation
6 of the Amendment in its ruling dated July 27, 2006, which was attached to Qwest's Opening
7 Brief.² The Iowa Board concluded that the Amendment was ambiguous – that both McLeod's
8 and Qwest's proffered interpretations were reasonable – but ultimately concluded based on the
9 extrinsic evidence of intent that the parties intended to alter only the power usage charge in the
10 Amendment, and not the power plant charge. Thus, the Iowa Board held that "Qwest's
11 interpretation of the Amendment correctly reflects the intent of the parties at the time the
12 Amendment was executed."³

13 With due respect to the Iowa Board's conclusion, it is questionable that McLeod's
14 interpretation is reasonable. In this proceeding, McLeod's arguments rely on incomplete and
15 potentially misleading references to the Amendment. For example, McLeod claims at page 4 of
16 its opening brief that the "stated purpose" of the Amendment is to establish billing for "-48 Volt
17 DC Power Usage" on an "as measured" basis. The section to which McLeod cites never states
18 the "purpose" of the Amendment at all. Instead, it merely defines certain terms – and one of the
19 defined terms, AC Power Usage, is not operative in the parties' interconnection agreement in
20 Arizona. Second, the Amendment never refers to "-48 Volt DC Power Usage" without also
21 referencing the key term, often capitalized, "Charge." McLeod conveniently omits the
22 reference to the term "Charge" in its interpretive approach to the Amendment, as it must,
23 because to attach significance to the term "Charge" as written in the Amendment would
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25 ² McLeod has asked the Iowa Board to reconsider its decision. The Board has agreed to
26 consider McLeod's request, but has not changed its order or its conclusions.

³ Iowa Board Order, at 11.

1 undermine McLeod's interpretation under the Exhibit A McLeod offered into evidence at the
2 hearing.⁴

3 With respect to Exhibit A, there is no charge identified with the words "power usage"
4 (item 8.1.4) or "DC Power Usage, per Ampere, per Month" (item 8.1.4.1). There are several
5 charges (plural) identified with other items beneath these headings, but to call 8.1.4 anything
6 different than a "heading" is not only unreasonable given the structure of the Exhibit A, any
7 such argument is inconsistent with even McLeod's discovery responses. As noted in Qwest's
8 opening brief, in Exhibit Q6, response to data request 13, McLeod stated that "Section 8.1.4.1 of
9 exhibit A is a heading entitled "-48 Volt DC Power." **Qwest identifies no particular charge**
10 **associated with 8.1.4.1** but this heading does include three additional rate elements that include
11 monthly recurring charges. . . ." (Emphasis added).

12 McLeod's reversal of the language it uses to argue against giving effect to the plain
13 meaning of the term "Charge" only underscores the logical problems with its argument on this
14 point. The simple fact is that there are several charges – plural – identified in the Exhibit A,
15 and several charges identified in the section under the heading at item 8.1.4. The Amendment
16 does not refer to a rate grouping; it refers to a "Charge." The different elements under each
17 heading are each identified with separately billed (and, under the cost docket, separately
18 determined) charges. McLeod would read the term "Charge" out of the Amendment, as its
19 interpretive approach assigns the term no significance whatsoever. In order to assign meaning
20 to the term "Charge" as written, the Commission must find that the Amendment intended to
21 change the way a single Charge, for -48 Volt DC Power Usage, for orders greater than sixty
22 amps, was to be billed. Qwest's interpretation gives meaning to every one of these key words,
23 and McLeod's does not.

24 In order to avoid the effect of section (A)3.28 of the underlying interconnection

25 _____
26 ⁴ The Exhibit A was attached to Mr. Starkey's testimony as Exhibit MS-3 and was
admitted into evidence as Exhibit M2.

1 agreement, McLeod attempts to argue that item 8.1.4.1 of the Exhibit A is something more than
2 a heading, because it contains the phrase “per amp”. Even setting aside the fact that McLeod
3 has admitted in discovery that item 8.1.4.1 is a “heading,” McLeod’s argument here is
4 misleading. The argument is misleading because headings may add clarity and context to a
5 provision within the terms of section (A)3.28 – but McLeod argues that the heading in item
6 8.1.4.1 is dispositive – that it changes the meaning of the repeated references in the Amendment
7 to “power usage” rates to mean “power usage rates and power plant rates,” and changes the
8 meaning of “power plant” in the Exhibit A to “power usage.” Had the parties intended such a
9 result, the term “power plant charge” easily could have been added to the Amendment. It was
10 not; and the prohibitions of section (A)3.28 of the parties’ underlying interconnection agreement
11 are included to prevent mere headings from controlling and even changing the meaning of more
12 substantive terms.

13 Moreover, McLeod’s reading of the Amendment almost completely ignores section 1.2.
14 In its discussion of the operation of section 2.2.1, McLeod overlooks the fact that section 2.2.1
15 specifically states that “Qwest will determine the actual usage at the power board as described
16 in Section 1.2.” Thus, both by its own terms and by the reference in section 2.2.1, section 1.2 is
17 the operative section of the Amendment. In that section, there is no reference to the Exhibit A,
18 but only unadorned references to the “usage rate” or the “power usage rate.” As noted in
19 Qwest’s opening brief, the very first sentence of the first operative section of the Amendment
20 absolutely excludes any power plant rate from inclusion in the power usage rate. That sentence
21 notes that “the power usage rate [for feeds less than 60 amps] reflects a discount for those feeds
22 greater than sixty (60) amps.” Because the power plant rates are the same (in Arizona, and
23 higher in some other states) for feeds less than 60 amps, the Amendment cannot refer to “power
24 usage rates” or “usage rates” to include a reference to “power plant rates.” McLeod’s
25 interpretation would read this sentence right out of the Amendment.

26 On the surface, McLeod seems to give great importance to the definitions in section 2.1

1 of the Amendment, particularly the definition for “-48 Volt DC Power Usage Charge,” which
2 states that the charge “is for the capacity of the power plant available for CLEC’s use.” On
3 deeper examination, this definition offers no help to McLeod, because it excludes the actual
4 power used by McLeod, which both parties agree was intended to be included. The “power
5 used by CLEC” is included as part of the “AC Power Usage Charge” definition in section 2.1,
6 and no other provision of the Amendment changes or even mentions the charges for AC Power
7 Usage – yet both parties agree that the Amendment intended to change the way the “power used
8 by CLEC” was to be charged. These definitions should be viewed in the context of the entire
9 Amendment, particularly since Qwest indisputably makes “power plant available for CLEC’s
10 use” at List 2, or ordered, levels. Thus, McLeod’s view would also require reading the
11 definitions of section 2.1 out of the Amendment.

12 Ultimately, McLeod’s arguments fail because they are based on an illogical premise.
13 McLeod repeatedly argues that the DC Power Measuring Amendment failed to exclude power
14 plant charges from the universe of charges that would change as a result of that Amendment.
15 This argument makes no sense. The parties agree that under the underlying ICA, power plant
16 charges were to be assessed on an as-ordered basis. Thus, in order for those charges to be
17 changed, the parties had to amend the underlying ICA. The Amendment itself provides that
18 “except as modified herein, the provisions of the [underlying] Agreement shall remain in full
19 force and effect.” The Amendment did not expressly exclude several other charges irrelevant to
20 this case from its ambit; it does not follow that the absence of an express exclusion means that
21 those charges were changed. It is the same with power plant charges. Qwest and McLeod both
22 knew how to draft an amendment that changed the way power plant charges would be assessed.
23 Such an amendment would be easy to draft, and would include express references to the power
24 plant charge. The Amendment the parties executed contains no such references, and thus
25 cannot be read to change anything about power plant charges.

26

1 **2. The Extrinsic Evidence of Intent Exclusively Supports Qwest's**
2 **Interpretation of the Amendment.**

3 McLeod's next approach is to argue that "past practice" was to charge for both power
4 usage and power plant in the same fashion, *i.e.*, on an as-ordered basis.⁵ In contrast to its other
5 arguments that require eliminating or ignoring much of the Amendment, this argument requires
6 adding terms and languages to the Amendment as it was executed. While it is true that Qwest
7 billed power plant charges and power usage charges at as-ordered levels prior to the
8 Amendment, the only rational inference to draw from this fact is the precise opposite of what
9 McLeod argues. McLeod claims that "there is every reason to believe" that the power plant and
10 power usage elements would continue to be treated in the same fashion.

11 There are at least three problems with this argument. First, the argument is another
12 instance of McLeod using extrinsic evidence in one breath and condemning Qwest's use of such
13 evidence in the other. At page 9 of its opening brief, McLeod suggests that Qwest asks the
14 Commission "to rely exclusively on documents beyond the Amendment." This misstates
15 Qwest's position. Qwest believes the Commission should follow Arizona law to interpret the
16 Amendment. As discussed at length, and with numerous supporting authorities, in Qwest's
17 opening brief, that requires that the Commission look first to the words of the Amendment, but
18 also requires an examination of extrinsic evidence of intent at the time of contracting to
19 determine whether an ambiguity exists, and if either the language of the agreement or the
20 extrinsic evidence of intent reveal an ambiguity, extrinsic evidence is admissible to establish the
21 parties' intent at the time the Amendment was executed and approved.

22 McLeod has no consistent argument regarding extrinsic evidence. While McLeod
23 condemns relying on "information outside of the Amendment" at page 7 of its opening brief,
24 nearly its entire argument depends on evidence extrinsic to the contract and irrelevant to the
25 parties' intent. The entire testimony of Mr. Morrison, and the vast majority of Mr. Starkey's
26 testimony, consist of nothing but extrinsic evidence offered in support of McLeod's

⁵ McLeod Opening Brief, page 6.

1 interpretation of the Amendment. However, none of that testimony has any bearing whatsoever
2 on the parties' intent, because there is no evidence any person involved in negotiating or
3 evaluating the Amendment, on either side, ever considered anything approaching the
4 engineering or economic analysis presented by Mr. Starkey or Mr. Morrison. Indeed, McLeod's
5 only extrinsic evidence that potentially relates to the parties' intent is its discussion of "past
6 practice" with regard to billing, but even this evidence further undermines McLeod's arguments
7 and supports Qwest's interpretation, which is the second problem with the "past practice"
8 argument.

9 The factual problem with the "past practice" argument is that while McLeod's attorneys
10 now argue that "the only rationale [sic] conclusion is that"⁶ that the parties intended to change
11 the way power plant charges were to be assessed, the evidence is clear that McLeod did not, in
12 fact, have any belief or reach any conclusion (a) that the billing practices for power plant and
13 power usage charges were tied to each other; or (b) that the Amendment would change both
14 rates. As noted in Qwest's opening brief, McLeod did not form any such belief or reach any
15 such conclusion until several months after the Amendment was executed.⁷

16 In its opening brief, McLeod attempts to minimize the responsibilities of the persons who
17 evaluated and obtained the DC Power Measuring Amendment for McLeod, but the fact remains
18 that it was these persons, not McLeod's audit group several months later, who established
19 McLeod's intent at the time the Amendment was executed. The email chain admitted as part of
20 Exhibit Q17 directs McLeod engineers "to track what our savings could be at our Qwest sites
21 after the Amendment to bill on metered usage." Exhibit WRE-3/Q1 was described in that email
22 as "a spreadsheet that should work to track our estimate." These McLeod employees charged
23 with evaluating and obtaining the DC Power Measuring Amendment were not merely

24 ⁶ McLeod Opening Brief, p. 6.

25 ⁷ Qwest Opening Brief, p. 18-20; *see also* Tr. 268.12-16 (Q. And to your knowledge, the
26 first time anyone at McLeod USA came to the interpretation McLeod is now advancing in this
case was in May 2005, again after your group conducted its audit? A. Correct.")

1 determining whether money could be saved, they were determining what all the savings could
2 be. And their evaluations show that McLeod only expected savings on the power usage charge,
3 not power plant charges. McLeod even admits that Exhibits WRE-3 and WRE-4/Q1, the
4 spreadsheets prepared by the group that evaluated and obtained the Amendment “follow[]
5 Qwest’s interpretation of the Agreement.”⁸ These employees were charged with saving
6 McLeod money on its collocation power expenses, and did so, even under Qwest’s
7 interpretation. The Iowa Board took this same view of the spreadsheet information, “find[ing]
8 the McLeodUSA internal spreadsheet tends to support Qwest's interpretation.”⁹

9 Second, the Amendment states that “[e]xcept as modified herein, the provisions of the
10 [underlying interconnection] Agreement shall remain in full force and effect.” If the parties
11 intended to modify the way power plant charges were assessed, they would have said so in the
12 Amendment. There is no mention of power plant charges in the Amendment. Indeed, as noted
13 above, contrary to McLeod’s assertions that nothing in the Amendment suggests that power
14 plant charges were to be billed differently than power usage charges, the first sentence of
15 section 1.2 of the Amendment excludes and differentiates power plant charges from the power
16 usage charges to be changed by the Amendment. Thus, the only reasonable inference to draw
17 from the absence of any mention of power plant charges in the Amendment is that the parties
18 did not intend to change the way power plant charges were assessed in “past practice.”

19 Qwest’s public statements of its intent regarding the Amendment, made months prior to
20 McLeod’s execution of the Amendment, support this interpretation. Qwest provided McLeod
21 with notice of these statements, McLeod agreed these issues were important,¹⁰ and agreed it
22 should pay attention to these important notices and issues.¹¹ Even McLeod’s opening brief
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24 ⁸ McLeod Opening Brief, page 14.

25 ⁹ Iowa Board Order, at 10.

26 ¹⁰ Tr. 233.5-13. McLeod had also participated in several regulatory dockets pertaining to
DC power charges prior to executing the DC Power Measuring Amendment. Tr. 233.14-22.

¹¹ Tr.232.11-15.

1 admits that these same employees who evaluated and obtained the Amendment had worked on
2 similar DC power issues in other states, suggesting that there was sufficient experience and
3 expertise within this group and within McLeod to evaluate the “important” issues presented in
4 the Amendment.

5 McLeod attempts to discount the product catalog (“PCAT”) and Change Management
6 Process (“CMP”) documents in its opening brief by setting up two straw men. With respect to
7 the CMP documentation found at Qwest Exhibit 1.2, McLeod contends that the CMP
8 documentation cannot trump an interconnection agreement, and the CMP documentation stated
9 that an amendment would not be required, in order to argue that the CMP documents are
10 meaningless. But there is no dispute as to whether an amendment would be required. The
11 parties executed an amendment. Moreover, the question of whether an amendment would be
12 required is totally irrelevant to whether Qwest intended to change the power plant charges.
13 Even if no amendment were required, Qwest had stated its plain intent to change only the power
14 usage charges, not the power plant charges. In such an event, McLeod would have no
15 contractual argument that the power plant charges should be changed – which further supports
16 that the Amendment itself did not accomplish something Qwest said would not happen even in
17 the absence of an amendment.

18 The second straw man McLeod sets up is that the PCAT (Exhibit WRE-1/Q1) mentions a
19 “Capacity Charge,” but the Amendment does not, leading to the conclusion that the Amendment
20 intended to change the power plant charges. First, the PCAT is a document that refers to several
21 DC power product offerings, of which DC Power Measuring is only one. The PCAT only
22 contains a reference to the “Capacity Charge” in the definitional section. Consistent with the
23 Amendment, the Power Measuring product description does not contain a reference to the
24 “Capacity Charge.” The inference to be drawn from the absence of the “Capacity Charge” in
25 the Power Measuring section of the PCAT is the same inference the Commission should draw
26 from the absence of a reference to power plant charges in the Amendment: the Amendment did

1 not intend to change these charges. Under the Restatement (Contracts) § 201, the Commission
2 must conclude that Qwest stated its intent with regard to the charges that would be affected by
3 the Amendment, and McLeod knew – or at a bare minimum had reason to know and elected to
4 ignore the information in the CMP and PCAT documents – that Qwest attached a different
5 meaning than the one McLeod now advances. As a result, the Commission must conclude that
6 the parties intended only to change the way power usage charges would be assessed, not power
7 plant charges.

8 ***B. McLeod’s Interpretation is not Consistent with the Relevant Engineering and***
9 ***Economic Principles, Including Those in Qwest’s Technical Publications and***
10 ***Cost Study***

11 **1. Qwest’s Interpretation of the Amendment is Consistent with How**
12 **Qwest Engineered the Power Plant to Accommodate CLEC Orders,**
13 **and is Non-Discriminatory.**

14 It is telling that in this section of its opening brief, McLeod essentially seems to say
15 “Well, it doesn’t really matter what the parties agreed to, the Commission has to rewrite the
16 parties’ contract if it is to avoid a discriminatory outcome.”¹² In other words, McLeod would
17 have the Commission disregard the fact that the Commission ordered and approved the specific
18 Power Plant rates at issue, disregard the fact that McLeod paid these rates without protest for
19 nearly four years, disregard the fact that McLeod never intended to affect the Power Plant rates
20 at the time it executed the Amendment, disregard the fact that McLeod did indeed order power
21 in the amounts billed, and disregard the fact that McLeod can reduce that ordered amount if it
22 wishes to do so.

23 Instead, McLeod suggests that it is appropriate to interpret the contract in a way that is at
24 odds with all of these factors in order to avoid what McLeod claims is discrimination in the
25

26 ¹² “If the 2004 Amendment is to be interpreted consistent with Qwest’s obligation to provide McLeodUSA non-discriminatory access to DC Power and charged in compliance with total element long-run incremental cost (“TELRIC”) requirements, then the Amendment must be consistent with the efficient engineering of the central office DC Power Plant. *McLeod Opening Brief*, p. 16.

1 application of the rate.

2 However, in a contract interpretation case such as this, the Commission cannot ignore
3 those factors, and is instead bound by them in its interpretation of the Amendment. More
4 importantly, the Commission does not need to rewrite the contract to avoid discrimination,
5 because the Amendment is not discriminatory as intended and interpreted by Qwest.
6 Furthermore, as Qwest demonstrated in its opening brief, McLeod's proposed result is
7 inconsistent with the engineering testimony of both Qwest's witness and McLeod's witness, and
8 in fact would work a significant preference in McLeod's favor.

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

15 McLeod is wrong – this engineering principle is not legitimately in dispute. Qwest's
16 witness presented essentially un rebutted testimony establishing that Qwest did indeed take the
17 full amount of the CLEC order into account when designing and engineering its power plant in
18 connection with the requirement to meet CLEC power orders during the 1999-2000 time
19 frame.¹³ McLeod may argue that it was unreasonable or unwise for Qwest to do so, or even
20 contrary to Qwest's technical publications, but McLeod has not presented any evidence that
21 Qwest did not do so.

22 Before discussing the issues around Qwest's technical publications and Qwest's actual
23 practices in designing and engineering its power plant facilities, it is important to note that each
24 and every McLeod "engineering" argument shares two characteristics – none of them has
25 anything to do with the Amendment, and all of them could have been raised in the cost docket.

26 ¹³ Ashton Testimony, Exhibit Q3, pp. 5-7.

1 This fact illustrates that McLeod's engineering arguments are simply a collateral attack
2 on the cost docket rates. These are rates that apply equally to all CLECs, and Qwest has
3 interpreted and applied the Amendment in the same way as to all CLECs.

4 However, there is ample evidence in the record that McLeod does not comport itself like
5 other CLECs in terms of power ordering, that McLeod tends to over-order capacity, and that
6 McLeod can change its order if it wishes to do so.¹⁴

7 In addition, the evidence of record shows not only that McLeod *expects* the ordered
8 amount of power plant capacity to be available to it if it ever demands that capacity, but does
9 not wish to pay for either the ordered amount, or even what it claims is the properly engineered
10 amount (List 1 Drain). Rather, McLeod would pay only for a small percentage of the power
11 plant capacity that it orders – based on actual usage measured at a particular point in time. This
12 amount corresponds to the red line in Exhibit Q11, not the List 1 Drain amount reflected by the
13 green line at the top of the chart, and not the ordered amount shown by the blue line in the
14 middle of the chart. As such, it is McLeod's interpretation of the Amendment that is clearly at
15 odds with the engineering principles that McLeod claims should be followed.

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

21
22 ***C. The Technical Publications***
23

24 ¹⁴ Mr. Ashton explained how McLeod tends to oversize its cables, unlike many other
25 CLECs. Tr. 341.25-342.4. Mr. Easton discusses Qwest's Power Reduction option. Exhibit Q1,
26 p. 23. Mr. Morrison also testified alternately that McLeod orders according to ultimate List 2
size which will be greater than List 2 (e.g., Tr. 138.23-139.3) and that McLeod orders a larger amount of power based on fuse
size which will be greater than List 2 (e.g., Tr. 141.18-142.12).

1
2 At pages 18-20 of its Opening Brief, McLeod argues that all of Qwest's technical
3 publications specify that Qwest should engineer to List 1 drain. From that, McLeod concludes
4 that any Qwest testimony stating that Qwest engineered to List 2 drain for CLECs is simply not
5 credible. However, McLeod ignores several critical facts.

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

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

11 Third, Qwest does not claim that "the power requirements of CLECs required a special
12 engineering scheme for sizing" power plant. *McLeod Opening Brief p. 20*. Indeed, McLeod
13 itself contends that overall CLEC power needs are but a small component of Qwest's overall
14 power capacity.¹⁵ Rather, as Qwest has explained, for the CLEC orders that generally all came
15 in over the same 18-24 month period, Qwest in essence made a "battlefield decision" about how
16 to make sure that it had sufficient capacity to meet CLEC orders. There was simply no need to
17 memorialize that in the technical publications. But it was that decision that informed the
18 subsequent pricing decision, litigated and approved in the cost docket, to charge CLECs in
19 accordance with their ordered amount of power.

20
21 ***D. List 1 Drain for CLEC Equipment***

22
23 McLeod next contends that Qwest should have or could have known the List 1 drain for
24 CLEC equipment. *McLeod Opening Brief pp. 20-21*. This is not the case. Again, here McLeod
25 makes a number of arguments that it could have made in the cost docket, alleging that

26 ¹⁵ Tr. 136.19-25.

1 McLeod's order for power cables "is not an order for power plant capacity." *McLeod Opening*
2 *Brief, p. 21*. Contrary to McLeod's assertion, the order for power cable is precisely that – an
3 order for power plant capacity. Qwest explained this in the cost docket (Exhibit Q2) and the
4 Commission accepted Qwest's proposal with regard to the application of the Power Plant rates
5 on an as-ordered basis.

6 With regard to the argument that Qwest could have known or calculated List 1 drain for
7 the CLEC equipment, Qwest disagrees, and McLeod's own evidence supports Qwest. Qwest
8 presented evidence showing that it is not familiar with a significant amount of the CLEC
9 equipment, and that Qwest did not (and does not) know when or whether any particular CLEC
10 might demand power at the ordered level of capacity.¹⁶ Nor does the other information that
11 McLeod provides in terms of forecasts for trunks and circuits shed any light on the timing of
12 when McLeod might demand power plant capacity at its ordered level. Further, the fact that
13 Qwest *now* has CLEC power usage information cannot be used to reengineer the power plant
14 with the benefit of hindsight. In addition, all of the proxies that McLeod contends would have
15 worked to produce a List 1 drain for CLEC equipment (*McLeod Opening Brief p. 23*) fail in
16 connection with McLeod's own equipment. If Qwest had used a 30-40% factor to estimate
17 McLeod's List 1 drain from the stated List 2 drain Qwest could have been wrong by a factor of
18 nearly 100%.¹⁷ Thus, McLeod's suggestion that Qwest could have estimated McLeod's List 1
19 drain is disproved by McLeod's own evidence.

20 McLeod next contends that because Qwest erred in failing to request List 1 drain, Qwest
21 should bear the responsibility of that error. *McLeod Opening Brief pp. 21-22*. Qwest disputes
22 that any error was made. The fact that Qwest might, at some point in time, with all of its
23 accumulated experience, decide to provide only List 1 drain to the CLECs, does not change
24 Qwest's decision, reasonable at the time, to engineer to List 2 for CLEC orders. The fact is that

25
26 ¹⁶ Tr. 341.

¹⁷ See, Tr. 137-138, indicating that CLEC measured usage may be 70% of List 2 drain.

1 McLeod candidly admits that it *expects* to have the ordered capacity available to it if it should
2 ever demand it.¹⁸ This alone supports Qwest's engineering decisions, and establishes that
3 Qwest did not unreasonably fail to capture necessary information at the time it was fulfilling
4 CLEC power orders.

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

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

15
16 ***E. Actual Construction of Power Plant Facilities***

17
18 Surprisingly, McLeod next argues the question of whether Qwest has actually had to add
19 power plant capacity as a result of CLEC orders. *McLeod Opening Brief p. 24*. This is
20 surprising because it is entirely irrelevant to the issue of the interpretation of the Amendment or
21 the proper application of Power Plant rates. McLeod has admitted that Qwest does not
22 necessarily have to invest in additional power plant equipment relative to a particular CLEC's
23 collocation order before it can legitimately assess its collocation power rates.¹⁹ As such, this
24 issue does not seem to be legitimately in dispute.

25
26 ¹⁸ Tr. 54-55.0

¹⁹ Exhibit M2, p. 30, lines 735-741.

1 If, for example, Qwest's 2000 amp power plant has 1000 amps of capacity available, it
2 will not necessarily add capacity in response to a McLeod order for 200 amps. Qwest will,
3 however, be 200 amps closer to needing additional capacity than it otherwise would be. If the
4 power plant did not have sufficient capacity to accommodate McLeod's order, Qwest would in
5 fact augment.²⁰ McLeod agrees that power plant additions do not dictate whether Qwest can
6 charge power plant rates. Thus, the question of when and whether Qwest's engineering
7 practices and the management of its power facilities necessitates a power plant addition has no
8 real bearing on any of the questions presented in this case.

9
10 ***F. Power Plant as a Shared Resource***

11
12 Finally, McLeod argues that Qwest is not justified in charging its Power Plant rate on an
13 "as ordered" basis because the power plant capacity is pooled and shared by all
14 telecommunications equipment in the office, regardless of ownership. *McLeod Opening Brief* p.
15 24. McLeod contends that because it is not possible to "reserve" or "assign" a given level of
16 power plant capacity for any individual users, it is inappropriate to charge based on the ordered
17 amount. Instead, McLeod would correlate the amount of power consumed at any given point in
18 time to the amount of power plant capacity "consumed" by that particular user.

19 Again, although it is wrong, this argument might legitimately have been made in the cost
20 docket, or in ICA negotiations, in opposition to Qwest's proposed rate design. However, made
21 in the context of this proceeding, this argument does not shed any light on the interpretation of
22 the language of the Amendment and does not tend to prove or disprove McLeod's
23 discrimination claim. It also provides no basis upon which to conclude that the application of
24

25 ²⁰ "Qwest plans its DC power plant capacity so that if a CLEC orders a certain amount of
26 power capacity in its power feeds, that amount of power capacity is made available to them in
the power plant." Exhibit Q3, p. 5.

1 the rate “as ordered” is improper.

2 Perhaps the most telling information on this “shared resource” argument is that even
3 though McLeod wants to be *charged* on a usage basis, McLeod very specifically states that it
4 would *not* recommend that Qwest base its engineering decisions on McLeod’s usage
5 characteristics.²¹ This supports a conclusion that McLeod would like to have plenty of spare
6 power plant capacity available to it, and have Qwest bear the costs.

7 In fact, the power plant capacity that is made available to the CLEC corresponds to the
8 ordered amount, in accordance with Qwest’s testimony on this issue. On an order of 100 amps,
9 McLeod might be consuming 18 amps of power during one measurement, 37 amps the next, and
10 42 amps the next time a measurement is taken. But Qwest has made 100 amps of power plant
11 capacity available to McLeod, in accordance with its order. That power plant is in place, ready
12 to provide the requested capacity, regardless of how much power is actually consumed.

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

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

26 ²¹ Exhibit M4, p. 22, fn. 17 and Tr. 173.21-174.1.

1 power plant capacity appropriately.

2
3 **G. *Qwest's Use of Cable Orders to Charge for Power Plant is Consistent with***
4 ***Qwest's Cost Study and Non-Discriminatory.***

5 McLeod's arguments on the cost study fall into two main categories. First, McLeod
6 argues that Qwest's application of the rate is inconsistent with how the rate was developed in
7 the cost study. *McLeod Opening Brief* p. 26. Next, McLeod argues that the application of the
8 rate on an as-ordered basis is discriminatory. *McLeod Opening Brief* pp. 27-29. Qwest
9 disagrees.

10 The cost study is relevant, if at all, only to corroborate Qwest's position that its
11 interpretation of the Amendment is consistent with how Qwest told the Commission the rate
12 would be applied, and it does in fact do just that. To go further, as McLeod does, and challenge
13 the application of the rate, is to attack the rate itself. This is especially true here, where if
14 McLeod's arguments are correct, they would have applied with equal force prior to the
15 execution of the Amendment, yet McLeod paid the Power Plant rates on an as ordered basis for
16 years without complaint.²² This is a clear illustration that McLeod, now unhappy with the effect
17 and intent of the Amendment, is seeking to force Qwest to lower its rates by claiming
18 discrimination. Again, McLeod's arguments on this point are nothing more than a collateral
19 attack on the Commission's cost docket order. Mr. Starkey ultimately agreed that the relief
20 McLeod is seeking would require the Commission to change the outcome of the Arizona cost
21 docket.²³

22 The simple fact of the matter is that the cost study is neither usage-based nor is it order-
23 based in terms of the actual cost calculation. As Qwest explained, the cost study simply
24

25 _____
26 ²² Tr. 222.

²³ Tr. 75-80

1 develops a cost per amp of capacity.²⁴ The question of how to apply that cost per amp was also
2 a part of the cost docket though, and information about Qwest's proposed rate design (i.e., that
3 the rate applied on a per amp ordered basis), was contained in the cost study documentation, in
4 evidence as Exhibit TKM-1/Q2.

5 For McLeod to say that the study is usage-based is simply wrong. The study does not
6 contain usage assumptions.²⁵ Nor does it employ a fill factor,²⁶ even though use of a fill factor
7 is a hallmark of a usage-based study.²⁷ And, the study assumes that all of the investment to
8 provide the power plant capacity is added at once, not incrementally or based on demand. In
9 addition, Qwest explained that the study was not usage based in two separate data request
10 responses, admitted into evidence as Exhibits Q4 and Q5.

11 McLeod's discrimination arguments are also not supported by the cost study. McLeod's
12 arguments rely on McLeod's erroneous conclusion that the cost study develops a cost on a "per
13 amp used" basis. As shown herein, and in Qwest's Opening Brief, that is simply not the case.
14 Thus, McLeod's Examples A, B, and C in its Opening Brief, relying as they do on this incorrect
15 assumption, are not helpful in evaluating McLeod's claims. As Ms. Million explained, if Qwest
16 were to determine that the demand on its power plant was going to be 1000 amps, it would
17 install more than 1000 amps of power plant capacity.²⁸ Thus, the baseline "facts" that are
18 assumed to support the examples are wrong – Qwest would have assumed an installed capacity
19 of greater than 1000 amps on these facts, thereby increasing the investment, and rendering the
20 resulting examples meaningless. In fact, McLeod's over-recovery claims, purportedly
21 illustrated by Example C, are pure speculation, as there is simply no evidence in this record that

22
23 ²⁴ Exhibit Q2, p. 7.

²⁵ Tr. 315.

24 ²⁶ Tr. 73.10-12

25 ²⁷ Tr. 315 and Exhibit M2, p. 47, where Mr. Starkey describes how a fill factor would be
employed in a usage based study, even though he does not contend that Qwest's cost study does

26 ^{SO.}

²⁸ Exhibit Q2, pp. 10-11.

1 supports Example C, or suggests that it is even vaguely grounded in fact.

2 Indeed, McLeod demanded information from Qwest to enable it to “prove” that Qwest
3 over-recovers in the manner described in Example C (McLeod asked Qwest to provide its
4 response to Washington Record Requisition No. 01, a request that sought information of that
5 nature). Qwest objected, but nevertheless provided the requested information. Yet McLeod did
6 not offer it in evidence, and does not discuss it on brief. The only reasonable inference to draw
7 from McLeod’s failure to do so is that the available information simply does not support
8 McLeod’s contention, so that McLeod’s only recourse is to argue the point as a hypothetical.
9 However, a hypothetical which is not supported by record evidence cannot form a basis for any
10 decision in this matter.

11
12 ***H. Qwest is Not Violating the Language of the Amendment and is Not***
13 ***Discriminating Against McLeod.***

14 In Section III of its Opening Brief, McLeod asserts that Qwest is in violation of the
15 language of the Amendment, and is discriminating against McLeod in the application of the
16 Power Plant rate on an as-ordered basis. *McLeod Opening Brief p. 29.* McLeod’s
17 discrimination claim must fail for a number of reasons:

18 First, and most importantly, McLeod *agreed*, in its ICA, to pay the Power Plant charges
19 on an as-ordered basis. Once the Commission has found that the Amendment did not alter those
20 charges, McLeod cannot unilaterally amend the underlying agreement by claiming that a term to
21 which it previously *freely agreed* is discriminatory.

22 Second, there is absolutely no evidence in the record to establish that Qwest treats
23 McLeod differently than other similarly situated CLECs, which is the essence of a
24 discrimination claim. To the extent that McLeod is alleging that Qwest grants itself a
25 preference, Qwest’s evidence shows that McLeod is wrong. Qwest does not actually provide
26 “collocation” to itself – Qwest owns the central offices in which CLECs are collocated – thus, it

1 is difficult to draw the comparison that McLeod seeks with regard to Qwest's provision of
2 collocation to itself. Nevertheless, Qwest's provision of power plant capacity to itself is not
3 preferential vis-à-vis its provision of capacity to CLECs.

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

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

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

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

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

15
16 ***I. McLeod Consented to Having the Power Plant Rate Assessed on an As-Ordered***
17 ***Basis***

18 McLeod's discussion of discrimination contains a very telling admission, set forth here in
19 its entirety. McLeod states, at page 34 of its Opening Brief, that "[t]he nondiscrimination
20 mandate of § 251 of the Act is unconditional. If Qwest sizes DC power plant for itself at List 1
21 drain, and would therefore impute (at a maximum) the related costs at List 1 drain, then Qwest
22 *must* impute the same costs to McLeodUSA as well. Any other course, *absent the consent of*
23 *the CLEC*, is a clear violation of § 251 of the Act and A.R.S. § 40-334." (second emphasis
24 added).

25 That is just the point. McLeod *did* consent to the application of the power plant rates on
26 an as-ordered basis in its interconnection agreement. There is no evidence that McLeod tried to

1 obtain a different rate or rate design at the time the contract was formed. There is no evidence
2 that Qwest has failed to apply the rate as originally agreed. There is no evidence that Qwest
3 somehow changed the way it operates between the execution of the interconnection agreement
4 and the present to somehow shift the playing field to disadvantage McLeod. To the contrary,
5 the bargain that the parties struck is the one that is still in place, on terms and conditions and
6 with rates already determined by the Commission to be non-discriminatory.

7 As noted above, the Commission does not have jurisdiction to rewrite the parties'
8 Commission-approved interconnection agreement. That agreement is a binding contract that the
9 Commission has authority to enforce, but not change outside the context of an arbitration.²⁹
10 Once the Commission has found that the Amendment did not alter those charges, as it must,
11 McLeod cannot unilaterally amend the underlying agreement by claiming that a term to which it
12 previously *freely agreed*, regarding a rate approved by the Commission as non-discriminatory,
13 within an agreement separately approved by the Commission as non-discriminatory, is
14 discriminatory. Which brings us back to what this case is really all about, and that is what the
15 parties consented to in the ICA and the Amendment. As McLeod correctly observes in the
16 above-quoted passage, the parties can consent to any manner of terms and conditions and rates,
17 and with consent, there is no discrimination. Qwest does not agree that the Power Plant rate
18 structure disadvantages McLeod, for all the reasons discussed in this and Qwest's Opening
19 Brief. Nevertheless, assuming, *arguendo*, that it does, it is nevertheless non-discriminatory
20 because of McLeod's voluntary agreement to that rate structure. *See, e.g.*, Section 252(a)(1)
21 which provides that "an incumbent local exchange carrier may negotiate and enter into a
22 binding agreement with the requesting telecommunications carrier or carriers without regard to
23 the standards set forth in subsections (b) and (c) of section 251 of this title." Subsections (b)

24
25 ²⁹ Changing the terms of interconnection agreements "contravenes the Act's mandate that
26 interconnection agreements have the binding force of law." *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003).

1 and (c) of Section 251 contain the non-discrimination standards upon which McLeod relies.
2 Furthermore, as discussed below, Qwest is not discriminating against McLeod in any event.

3 McLeod will claim that other provisions in the ICA flatly prohibit discrimination in any
4 form, and require Qwest to provide power plant capacity to McLeod at parity with how it
5 provides such capacity to itself. McLeod will further claim that Qwest charges McLeod on an
6 “as-ordered” basis, which is a higher charge than it effectively assesses on itself. This argument
7 misses the point, and does not prove discrimination. First, Qwest does not “charge” itself power
8 plant rates – Qwest engineers for its own needs at List 1 drain. Qwest engineers for CLEC
9 power plant needs at a superior level, not merely at parity. These terms and conditions are not
10 less favorable for the CLECs, and in fact provide the CLECs with the power plant capacity they
11 order and expect. This engineering construct and resulting rate design was vetted through the
12 cost docket and approved in Qwest’s SGAT filings as compliant with applicable state and
13 federal law. These rates are just, reasonable, and non-discriminatory, and McLeod’s arguments
14 to the contrary are unavailing.

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

18
19 ***J. Qwest Provides Collocation and DC Power Plant on a Non-Discriminatory***
20 ***Basis***

21 There is absolutely no evidence in the record to establish that Qwest treats McLeod
22 differently than other similarly situated CLECs, which is the essence of a discrimination claim.
23 All CLECs are treated the same under Qwest’s Power Plant rate structure, and billed in
24 accordance with the ordered amount. Nor does McLeod seem to contend that it is treated
25 differently from other CLECs. Rather, McLeod contends that Qwest prefers its own operations
26 in the provision of collocation and DC power plant capacity. As noted though, Qwest does not

1 actually provide "collocation" to itself – Qwest owns the central offices in which CLECs are
2 collocated – thus, it is difficult to draw the comparison that McLeod seeks with regard to
3 Qwest's provision of collocation to itself. Nevertheless, Qwest's provision of power plant
4 capacity to itself is not preferential vis-à-vis its provision of capacity to CLECs.

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

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

17 Qwest's collocation power provisioning is also non-discriminatory because the CLECs
18 are getting what they pay for, and paying for what they get. Mr. Ashton's testimony explains
19 how Qwest makes available to CLECs the amount of power plant capacity they ordered. Qwest
20 then charges for power plant in accordance with Commission-approved rates. Both Qwest and
21 the CLECs incur power plant costs relative to the amount of power plant capacity made
22 available to them. Of course it may be that in the real world Qwest also incurs costs for the
23 spare capacity of the plant, and costs for the central office to house the plant, and costs
24 associated with planning for future power needs, all of which benefit the CLECs in some non-
25 quantifiable way. Thus, there is simply insufficient basis upon which to find that Qwest's
26 pricing structure for power plant is discriminatory, which is why these rates are set in a cost

1 docket in the first instance, where these types of issues can be explored.

2 As described in Qwest's Opening Brief, McLeod's own practices regarding collocation
3 pricing undercut McLeod's discrimination claims. When McLeod allows collocators into its
4 own facilities, McLeod's pricing practices are similar to Qwest's. McLeod also charges its
5 collocators for power plant capacity in accordance with the size of their power cables, exactly
6 the same way that Qwest's Power Plant rates are structured. McLeod contends that Qwest's
7 Commission-approved rates for power plant at the level of amps specified in CLECs' power
8 feed or cable orders are improper, but Exhibit Q14 shows that in order to obtain a power feed or
9 cable of a certain size, McLeod's collocators *must report and be billed for* "usage" at the level
10 of the desired cable size. Because McLeod's collocators must report usage at X amps in order
11 to obtain a cable size of X amps, McLeod's claim that it offers usage-based power pricing is
12 illusory.³⁰ Thus, McLeod charges for both power usage and power plant based on the amount
13 of amps reflected in their own collocators' power feed orders, not on a measured basis – the
14 precise practice McLeod condemns as discriminatory by Qwest. And there is no evidence that
15 McLeod offers its collocators the power reduction option Qwest makes available.

16 McLeod has failed to take advantage of Qwest's offer to re-fuse its existing power cables,
17 thereby lowering the "ordered amount" and correspondingly lowering the amount billed.³¹
18 McLeod cannot be heard to claim that Qwest is overcharging it for power plant when the ability
19 to lower those charges is in McLeod's control.

20 _____
21 ³⁰ Though McLeod *says* it bills on a "usage" basis, it is evident from the transcript that
22 when McLeod says "usage" it really means "size of the cable feed". Tr. 225-228.

23 ³¹ Power Reduction is an option that allows a CLEC to change its power capacity by
24 reducing its ordered amps. Power Reduction can either be ordered "with Reservation" or
25 "without Reservation". DC Power Reduction with Reservation allows a CLEC to reduce ordered
26 amps on a secondary feed to zero while at the same time reserving the fuse position on the Power
Distribution Board. The charge for this reservation holds the power cabling and fuse positions in
place for potential future power restoration requests. Power Reduction without Reservation
allows a CLEC to reduce the power on primary and secondary feeds down to a minimum of 20
amps. Billing for the initial power ordered at the collocation site will be modified to reflect the
reduced amount of power. Exhibit Q1, p. 23.

1 Finally, the Commission cannot and should not make conclusions about discriminatory
2 impacts based on the experience of only one CLEC, McLeod, whose practices and claims may
3 or may not be reflective of the larger CLEC community as a whole. As Qwest has previously
4 explained, McLeod's power ordering practices may or may not be reflective of what other
5 CLECs do, and in fact it is likely that McLeod oversizes its cable. The terms and conditions
6 and prices for power plant are the same for all CLECs – they are billed on an “as ordered” basis.
7 The Commission should not make decisions about that pricing scheme outside of a cost docket
8 with broad participation. This is particularly true in a case such as this one where a significant
9 number of CLECs have the same Amendment terms as McLeod, yet none is making the same
10 complaint.³²

11 12 III. SUMMARY AND CONCLUSION

13
14 The only interpretation of the Power Measuring Amendment that is consistent with all of
15 the language in the Amendment is Qwest's. Qwest's interpretation is also consistent with
16 Qwest's obligation to provide collocation on a non-discriminatory basis. Contrary to McLeod's
17 contentions, Qwest does not obtain a windfall from the Commission-approved, cost-docket-
18 vetted Power Plant rates that it charges to McLeod. McLeod knows, when it places a cable
19 order, that it will be billed in accordance with the size of that order for the power plant
20 component of the DC power rates.

21 Nor does Qwest treat itself “better” than McLeod in this regard, as McLeod has available
22 to it the full amount of power plant capacity ordered. McLeod's interpretation of the agreement
23 is simply not grounded in either the language of the Amendment or the parties' actual intent
24 when the Amendment was executed. McLeod's interpretation is neither equitable nor is it non-
25 discriminatory – in fact, McLeod recommends an interpretation that would allow it to pay for

26 ³² Exhibit Q1, p. 20.

1 far less power plant capacity than is actually available to it, and even far less than McLeod
2 claims that Qwest should make available from an engineering standpoint.
3 Further, the way Qwest assesses power plant charges is precisely the same way that McLeod
4 assesses power plant charges to the collocators in McLeod's own facilities. It is unlikely that
5 McLeod believes that it is discriminating against its collocation customers by employing a rate
6 structure that charges for power plant on a "per amp ordered" basis. Finally, Qwest's reading of
7 the Amendment is also more consistent with Qwest's own cost model and with how Qwest
8 actually incurs power plant costs.

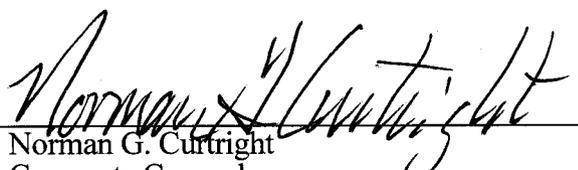
9 The Commission should thus deny McLeod's complaint, and hold that Qwest has
10 properly implemented the Power Measuring Amendment by assessing the usage rate, but not the
11 power plant rate, on a measured basis.

12 RESPECTFULLY SUBMITTED this 22nd day of September, 2006.

13
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