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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER – Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
BARRY WONG

IN THE MATTER OF THE COMPLAINT OF
MCLEODUSA TELECOMMUNICATIONS
SERVICES, INC. AGAINST QWEST
CORPORATION.

) DOCKET NO. T-03267A-06-0105
) DOCKET NO. T-01051B-06-0105
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REPLY BRIEF OF

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

Arizona Corporation Commission
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September 22, 2006

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

3 **I. INTRODUCTION**

4 Upon reading the initial post-hearing briefs of both parties, this case may appear to be an
5 instance in which the parties are litigating different cases altogether. Qwest's Initial Brief argues
6 this case as if the meaning of the 2004 DC Power Measuring Amendment ("Amendment") or
7 "Amendment") has never been in doubt, accusing McLeodUSA numerous times of trying to
8 "change" the agreement. When Qwest does argue about the meaning of the Amendment, it relies
9 almost exclusively on extrinsic evidence that resulted from an exchange with another CLEC in its
10 Change Management Process ("CMP") in October 2003, more than nine months before
11 McLeodUSA and Qwest had any direct interaction with respect to the DC Power Amendment at
12 issue here.

13 Throughout its Initial brief, Qwest never acknowledges that it provides collocation power
14 to McLeodUSA subject to the requirements of Section 251(c)(6) of the Telecommunications Act
15 of 1996 ("Act"). Nor does Qwest acknowledge that the underlying interconnection agreement
16 ("ICA") between the parties imposes an obligation on Qwest to provide McLeodUSA access to
17 collocation power on nondiscriminatory rates, terms and conditions.

18 McLeodUSA has a much different view. First, McLeodUSA submits that, in interpreting
19 the ICA as amended by the 2004 Amendment, the Commission must recognize that the amended
20 ICA between Qwest and McLeodUSA is a product of the Telecommunications Act of 1996. ICAs
21 are instruments arising in the context of ongoing state and federal regulation that have provisions
22 to facilitate competition and ensure that carriers are not treated in a discriminatory manner.¹
23 Arizona case law confirms any valid statute automatically becomes part of any contract regardless
24

25 ¹ *E.Spire Communications, Inc. v. New Mexico Public Regulation Commission*, 392 F.3d
26 1204, 1207 (10th Cir. 2004) ("[A]n interconnection agreement is part and parcel of the federal
27 regulatory scheme and bears no resemblance to an ordinary, run-of-the-mill private contract.")
(quoting *Verizon Maryland, Inc. v. RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 552 n.5 (D.
Md. 2002)).

1 of whether such statute is specifically included.² Moreover, where contract language may be
2 incompatible with the statute, the statute controls.³

3 McLeodUSA also does not agree that it is proper to effectively ignore the issue of
4 discrimination, as Qwest's Initial Post-Hearing Brief seeks to do. Qwest boldly tells the
5 Commission that the discrimination issue is a non-issue since the Commission approved both (a)
6 Qwest's collocation rates in 2001 and (b) the 2004 Amendment executed by the parties. Thus,
7 according to Qwest, it cannot be unlawfully discriminating since the Commission has already
8 sanctioned the means by which Qwest bills McLeodUSA for collocation power. A further strand
9 of that argument is Qwest's claim that parties can voluntarily agree to an ICA provision that cannot
10 be undone through a complaint.

11 All these related arguments are part and parcel of Qwest's unsupported and false assertion
12 that McLeodUSA is seeking to "change" the agreement and that McLeodUSA has consented to the
13 billing for power plant based on the size of power feeder cables ordered by McLeodUSA. To the
14 contrary, McLeodUSA has never agreed, consented or in any manner assented to Qwest's billing
15 of the power plant rate on that basis. Nor has McLeodUSA ever agreed to the Qwest interpretation
16 of the Amendment. By filing a complaint, McLeodUSA requested the Commission to decide in
17 the first instance what the 2004 Amendment means. The only way that this can be construed as
18 *changing* the agreement is if one erroneously subscribes to Qwest's self-serving theory that the
19 Amendment is automatically what Qwest says it is.

20 Although the Commission approved Qwest's DC Power rates, it did not approve
21 discriminatory application of those rates. Given the existing ICA between the parties and the legal
22 requirement for nondiscriminatory access to power as required by Section 251(c)(6), McLeodUSA
23 had every right to expect that Qwest had to provision power to McLeodUSA on terms and
24 conditions equal to how Qwest provides power to itself. Further, McLeodUSA had every right to

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26 ² See Lee Moor Contracting Co. v. Hardwicke, 56 Ariz. 149, 152, 106 P.2d 332, 335
27 (1940); Higginbottom v. State of Arizona, 203 Ariz. 139, 142, 51 P.3d 972, 975 (App. 2002).

³ See Higginbottom, *supra*.

1 expect that Qwest would supply an Amendment that would result in a lawful amendment to the
2 ICA that fulfilled the existing nondiscrimination requirements that it had agreed to in the
3 underlying ICA. Certainly, the language in the 2004 Amendment provides no indication that the
4 parties were intending to agree to permit Qwest to provide discriminatory access to collocation
5 power. Moreover, it would be erroneous to presume such intent, especially when the agreement as
6 a whole clearly states the contrary – Qwest must provide McLeodUSA nondiscriminatory access to
7 collocation power.

8 While it is easy to get bogged down in the details of the engineering and the evidence
9 related to TELRIC methodology, as well as arguments over the language of the actual amendment,
10 the Commission should not lose sight of the scope of discrimination Qwest seeks to achieve
11 through its interpretation of the 2004 Amendment. By charging McLeodUSA for the power plant
12 rate element based on the size of the McLeodUSA's order for power feeder cables, Qwest is
13 charging McLeodUSA to recover Qwest's investment in central office power plant as if
14 McLeodUSA were actually using the absolute maximum amount of power plant capacity 24 hours
15 a day, 7 days a week. Just imagine the outrage the ACC would engender if it agreed that Arizona
16 Public Service was entitled to bill every electric customer as if they were using every amp of
17 capacity that the electric feeds to everyone's home or business could provide, 24 by 7. And then
18 imagine the additional outrage when the customers of APS learn that APS does not charge itself in
19 the same manner for its own access to power, but instead only bills itself based on the amount of
20 power APS actually consumes. Of course, the fact that Qwest is trying to discriminate against a
21 *competitor* in this outrageous manner with respect to access to essential bottleneck element of its
22 local network is the very reason why Congress and the FCC have imposed an absolute prohibition
23 against such discriminatory behavior by Qwest.

24 Qwest closes its Initial Brief by noting what it considers to be the "key fact" that Qwest
25 received no legal consideration for the DC Power Measuring Amendment. Qwest essentially
26 claims that it executed the Amendment with McLeodUSA out of the goodness of Qwest's heart,
27

1 without any legal obligation or corresponding benefit to Qwest. If that were true, the Commission
2 *should* take special note because it would be the first time that has ever happened.

3 But it is not true. By executing the Amendment in August 2004, Qwest received
4 significant legal benefit. The parties' ICA previously was silent with respect to how the DC power
5 rates were to be applied.⁴ The Amendment corrected that deficiency. Qwest also had unilaterally
6 implemented an application of approved collocation rates that resulted in Qwest providing
7 unlawfully discriminatory access to collocation power by charging for DC power based on the size
8 of McLeodUSA's power cables, which Qwest does not do to itself. That practice also was
9 fundamentally inconsistent with Qwest's own technical publications and engineering practices.
10 The Amendment, if properly interpreted, brings Qwest's actions with respect to DC power into
11 conformance with the manner in which Qwest treats itself. Qwest thus received more than
12 adequate legal consideration for executing the Amendment.

13 The benefit that McLeodUSA received, on the other hand, was to no longer be the victim
14 of discrimination resulting from rates assessed in a manner that provides Qwest with preferential
15 access to collocation power and a substantial windfall. Qwest, however, seeks to retract some of
16 that benefit by interpreting the Amendment to relieve only a portion of the discrimination. Qwest
17 then adds insult to injury by suggesting that McLeodUSA is being greedy because it is not satisfied
18 that Qwest is providing some reduction in the unlawfully excessive amount of DC power charges
19 that McLeodUSA has been paying.

20 The law does not share Qwest's view that McLeodUSA should be satisfied with merely
21 reducing some – but not all – of the unlawful discrimination. Instead, the law requires access,
22 including the charges for DC power, to be wholly nondiscriminatory (consistent with
23 McLeodUSA's interpretation of the Amendment).

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26 ⁴ Although silent with respect to how rates for power were to be applied, the ICA between
27 the parties is unequivocal that Qwest must provide McLeodUSA power on nondiscriminatory
terms. *See* discussion *infra* at 12-15. Accordingly, any rate application must fulfill this
nondiscrimination obligation even if not specified in the ICA.

1 McLeodUSA and Qwest agree on at least one point: this is largely a case of contract
2 interpretation and the best source of evidence as to the agreement reached by the parties is
3 interconnection agreement as amended by the Amendment itself. The disagreement, however, is
4 about the proper interpretation of the Amendment. If read in its entirety, without manipulation, the
5 DC Power Measuring Amendment requires Qwest to bill McLeodUSA only for the DC power –
6 including power plant capacity – that McLeodUSA actually uses. Contrary to Qwest’s
7 gerrymandering, the language of the Amendment is consistent with this requirement. Neither party
8 manifested any contrary intent prior to the execution of the Amendment. McLeodUSA’s
9 interpretation of the Amendment is also in full accord with Qwest’s engineering principles and
10 practices, as well as Qwest’s collocation cost study.

11 McLeodUSA’s interpretation, moreover, is consistent with the legal requirement of
12 nondiscrimination. Noticeably absent from Qwest’s Initial Brief is any argument addressing the
13 issue of discrimination head on. That is because Qwest has no answer: Qwest’s admitted practice
14 of treating McLeodUSA differently than Qwest treats itself in terms of accessing and paying for
15 DC power plant is clearly discriminatory. While Qwest attempts to argue that its treatment of
16 CLECs is “reasonable,” Qwest never once addresses the nondiscrimination requirements of
17 Section 251(c) of the Act governing Qwest’s obligation to provide McLeodUSA DC power to
18 operate its collocated equipment, nor the equivalent Arizona law, A.R.S. Sec. 40-334 and A.A.C.
19 R14-2-1112.

20 By ignoring the discrimination argument and asking the Commission to bless its
21 interpretation of the 2004 Amendment, Qwest is tacitly advocating that this Commission ignore
22 the legal requirement that Qwest provide McLeodUSA nondiscriminatory access to the central
23 office power plant. The Commission should reject Qwest’s invitation and instead adopt the
24 McLeodUSA interpretation which is consistent with these nondiscrimination requirements,
25 consistent with the way in which Qwest designed the power plant rate, consistent with the manner
26 in which Qwest engineers is power plant, and most importantly, consistent with a plain reading of
27 the Amendment and the underlying ICA. The Commission should, at a minimum, find that

1 Qwest's interpretation of the Amendment results in unlawful discrimination in violation of federal
2 and state law. The record demonstrates that Qwest admittedly treats CLECs differently than itself
3 with regard to provisioning DC power plant, which results in much higher power charges for
4 CLECs and a significant windfall for Qwest.

5 **II. ARGUMENT**

6 **A. The Commission Should Reject Qwest's Attempt To Assume Away the**
7 **Dispute.**

8 In the initial section of its Argument, Qwest tries to assume away the entire controversy.
9 First, Qwest begins its argument with the principle that ICAs between incumbent local exchange
10 carriers ("ILECs") like Qwest and competitive local exchange carriers ("CLECs") like
11 McLeodUSA are binding contracts. McLeodUSA agrees. Then Qwest argues two prior
12 commission actions have created a binding agreement that cannot be undone through this
13 complaint. Qwest also claims that the Commission's decision in the UNE cost proceeding, Docket
14 T-00000A-00-0194, Phase II, "precludes both the contract claims and the so-called
15 'discrimination' claims McLeod asserted in its Complaint."⁵

16 The complaint was filed because McLeodUSA and Qwest disagreed on the meaning of the
17 ICA as amended by the 2004 Amendment. McLeodUSA requested the Commission, as it is
18 authorized to do by law and the underlying ICA, to render its verdict on what ICA means with
19 respect to billing for DC power as amended by the 2004 Amendment. Qwest's constant harping
20 that McLeodUSA is seeking to "change the agreement" is nonsense. By claiming that the
21 agreement means what Qwest says it means when it was signed in August 2004, Qwest is merely
22 trying to assume away the dispute. Qwest's argument is beyond self-serving.

23 Nothing in the ICA between Qwest and McLeodUSA states, much less requires, that DC
24 power plant rates are to be charged based on the size of the power feeder cables that McLeodUSA
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27 ⁵ Qwest Initial Brief at 6.

1 has ordered.⁶ Nothing in original DC Power pricing provision states, much less requires, DC
2 power plant rates to be charged based on the size of the feeder amp cables, or as Qwest calls it, on
3 an “as ordered” basis.⁷ Nor did the Commission order in Docket T-00000A-00-0194, Phase II
4 expressly approve that the DC power plant rates are to be applied based on the size of the order for
5 power feeder cables.⁸ The only such reference is in the Excel spreadsheet that summarizes the
6 results of the collocation cost study that Qwest originally filed in Docket T-00000A-00-0194,
7 Phase II.⁹ That reference is virtually meaningless. It is not part of the ICA, nor did the
8 Commission approve the rates by referencing that comment whatsoever. The comment does not
9 have the preclusive effect Qwest claims.

10 The Commission approved collocation *rates* but never expressly or implicitly approved the
11 *application* of DC power plant rates based on the size of the DC power feeds ordered by the
12 CLEC.¹⁰ The Exhibit A that Qwest filed to incorporate those rates did not include any statement
13 with respect to how those rates were to be applied.¹¹ Qwest’s substantial reliance on the
14 Commission’s “approval” of DC power rates and the subsequent application of those rates in
15 supposed agreement with Qwest’s interpretation of the Amendment is illusory.

16 Qwest’s reliance on *Pac. Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003) is
17 based on its phony claim that McLeodUSA is seeking to “change” the agreement. McLeodUSA
18

19 ⁶ McLeodUSA requests that the Commission take administrative notice of the entire ICA
20 between Qwest and McLeod USA which is on file with the Commission in Docket Nos. T-
01051B-00-0698 and T-03267A-00-0698/ Attached as Appendix A are excerpts of the ICA.

21 ⁷ See ICA excerpts (Part H) (attached as Appendix A hereto).

22 ⁸ Arguably, the Commission rejected billing for collocation power on the basis Qwest
23 currently bills McLeodUSA. The Commission said it was **not** approving billing based on the
24 “maximum capacity of the cabling.” Yet, that is the basis of how Qwest bills McLeodUSA under
25 the 2004 Amendment– based on the maximum capacity of the feeder cables. *In The Matter Of The
Investigation Into Qwest Corporation's Compliance With Certain Wholesale Pricing Requirements
For Unbundled Network Elements And Resale Discounts*, Docket No. T-00000A-00-0194;
Decision No. 64922 at 43-44 (Arizona Corporation Commission June 12, 2002)

26 ⁹ See Ex. Q-2 (Exhibit TKM-2 to the Response Testimony of Teresa Million).

27 ¹⁰ See Decision No. 64922, pages 43-44.

¹¹ See, Ex. M-2 (Exhibit MS-3 to Starkey Rebuttal) (Qwest Arizona SGAT 14th Revision,
3rd Amended Exhibit A, Section 8.1.4 (Docket No. T-01051B-99-0068) (filed Feb. 10, 2005).)

1 has never agreed, consented or in any manner assented to Qwest's interpretation. By filing a
2 complaint, McLeodUSA requested the Commission to decide in the first instance what the 2004
3 Amendment means. The only way that this can be construed as *changing* the agreement is if one
4 erroneously subscribes to Qwest's self-serving theory that the Amendment is automatically what
5 Qwest says it is. Without repeating the argument, the ICA clearly contemplates the Commission
6 has the authority to determine what the 2004 Amendment means in the first instance, and that
7 determination can in no way can be deemed a "change" of the ICA. Accordingly, the *Pac Bell*
8 decision prohibiting a commission from changing an agreement is not applicable.

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

18 **B. McLeodUSA's Interpretation of the Amendment, Unlike Qwest's**
19 **Interpretation, Is Fully Consistent with the Legal Standard for Interpreting**
20 **Interconnection Agreements.**

21 Qwest cites numerous Arizona court cases detailing the black letter law with respect to
22 interpreting ambiguous contracts.¹² Yet, Qwest cites only one case applicable to interpreting ICAs
23 – *Pacific Bell v. Pac-West Telecom. Inc.*, 325 F.3d 1114 (9th Cir. 2003) ("*Pacific Bell*").¹³ And
24 contrary to what Qwest claims, that decision does not prevent this Commission from correcting the
25 unlawful discriminatory treatment to which, as the evidentiary record shows, McLeodUSA has
26 been subjected under Qwest's interpretation of the DC Power Measuring Amendment.

27 ¹² Qwest Initial Brief at 7-10.

¹³ Qwest Initial Brief at 5.

1 The court in *Pacific Bell* reviewed California Public Utilities Commission rulings on the
2 applicability of reciprocal compensation provisions in all ICAs between ILECs and CLECs in
3 California to calls bound for Internet Service Providers (“ISPs”). “[T]hese orders were adopted as
4 part of a generic rule-making proceeding that would affect all existing ‘applicable interconnection
5 agreements’ in California.”¹⁴ The Ninth Circuit invalidated the orders, concluding that the
6 California Commission “lacks authority under the Act to promulgate general ‘generic’ regulations
7 over ISP traffic” in light of the FCC’s determination that such traffic is jurisdictionally interstate
8 “thereby placing it under the purview of federal regulators rather than state public utility
9 commissions.”¹⁵ The court also concluded:

10 The CPUC’s only authority over interstate traffic is its authority under 47 U.S.C. §
11 252 to approve new arbitrated interconnection agreements and to interpret existing
12 ones according to their own terms. By promulgating a generic order binding on
13 existing interconnection agreements without reference to a specific agreement or
14 agreements, the CPUC acted contrary to the Act’s requirement that
interconnection agreements are binding on the parties, or, at the very least, it acted
arbitrarily and capriciously in purporting to interpret “standard” interconnection
agreements.¹⁶

15 The Ninth Circuit’s decision in *Pacific Bell* is a far cry from the case at hand in this
16 proceeding. McLeodUSA filed a complaint seeking Commission enforcement of the specific
17 Amendment to the ICA between McLeodUSA and Qwest. The ICA expressly provides that a
18 dispute under the ICA can be resolved by a complaint to this Commission.¹⁷ That is entirely
19 different than the generic rules governing all ICAs that were before the court in *Pacific Bell*.¹⁸
20 Indeed, the Ninth Circuit overturned the California Commission orders, in part, *because* “it did not
21 consider a specific interconnection agreement or even a specific reciprocal compensation
22

23 ¹⁴ *Pacific Bell*, 325 F.3d at 1125.

24 ¹⁵ *Id.*

25 ¹⁶ *Id.* at 1125-26.

26 ¹⁷ ICA Part A Section 3.17.5 (attached at Appendix A hereto).

27 ¹⁸ Nor can Qwest legitimately claim that the *Pacific Bell* decision precludes McLeodUSA’s
discrimination claim. No such issue was before the Ninth Circuit in that case, and nothing in the
parties’ ICA condones, much less authorizes, discrimination in the provision of DC power. To the
contrary as discussed further below, the ICA expressly requires such provisioning to be
nondiscriminatory.

1 provision.”¹⁹ Both the Amendment and the ICA between McLeodUSA and Qwest are before the
2 Commission in this docket, and the Commission has full authority to interpret those documents.

3 Finally, federal law explicitly preserves the Commission’s authority at issue. Specifically,
4 47 U.S.C. § 251(d)(3) preserves State commission authority to enforce any State regulation, order,
5 or policy that is consistent with Section 251. Since Section 251(c) prohibits discrimination by an
6 ILEC in the provision of collocation power to a CLEC, Section 251(d)(3) preserves the
7 Commission’s authority and duty to enforce the federal prohibition.

8 Qwest’s strict reliance on standard contract interpretation cases is also misplaced. Courts
9 have recognized that ICAs are not traditional contracts. For example, the Tenth Circuit Court of
10 Appeals recognized in a case involving Qwest that an ICA is an instrument arising in the context
11 of ongoing state and federal regulation that have provisions to facilitate competition and ensure
12 that carriers are not treated in a discriminatory manner.²⁰ That means that in interpreting the
13 Amendment, it must be presumed that the intent of the parties entering into an ICA and any
14 amendment thereto must be to properly implement the Act and comparable state law requirements
15 that give rise to the ICA. Thus, the Amendment must be interpreted consistent with state and
16 federal law requirement of nondiscrimination firmly in mind. Such interpretation is justified and
17 is not an impermissible modification of an interconnection agreement.²¹

18
19 ¹⁹ *Id.* at 1128.

20 ²⁰ *E.Spire Communications, Inc. v. New Mexico Public Regulation Commission*, 392 F.3d
21 1204, 1207 (10th Cir. 2004) (“[A]n interconnection agreement is part and parcel of the federal
22 regulatory scheme and bears no resemblance to an ordinary, run-of-the-mill private contract.”)
(quoting *Verizon Maryland, Inc. v. RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 552 n.5 (D.
Md. 2002)).

23 ²¹ *See id.* at 1208. In footnote 10, Qwest cites a line of Arizona cases to support its claim
24 that Courts should not add terms or rewrite a contract. McLeodUSA does not believe its proposed
25 interpretation of the ICA as amended by the 2004 Amendment is an attempt to re-write the
26 agreement whatsoever for the reasons stated herein. However, it is interesting to note that Qwest’s
27 summary of the Arizona case law provides ends by saying that parties are free adopt provisions
that cannot be rewritten by a court. However, the principle relied on by Qwest is clearly caveated
to state that parties may do so long as such provisions do not *contravene principles of public*
policy. Qwest’s interpretation does indeed contravene public policy because it permits Qwest to
avoid its obligation to provide access to collocation power on nondiscriminatory terms.

1 One of the compelling contract interpretation principles that Qwest ignores is that related
2 provisions in a contract must be harmonized, which is equally applicable to ICAs and standard
3 contracts. Accordingly, the Amendment must be interpreted in the context of the entire ICA as
4 amended by the 2004 Amendment.

5 The ICA between Qwest and McLeodUSA makes it very clear that Qwest must provision
6 collocation power to McLeodUSA on terms that are no worse than the terms Qwest provides
7 power to itself:

8 Part D, Section (D)2.1 With respect to any technical requirements or performance
9 standards specified in this Section, U S WEST shall provide Collocation on rates,
terms and conditions that are just, reasonable and non-discriminatory.²²

10 That section of ICA is wholly consistent with the obligation imposed on Qwest by Section
11 251(c)(6) of the Act. Accordingly, as an amendment to the underlying ICA, the Commission must
12 interpret the 2004 Amendment within the context of the ICA and harmonize the Amendment with
13 this requirement - that Qwest must provide collocation power to McLeodUSA using non-
14 discriminatory rates, terms and conditions.²³

15 An interpretation that gives a reasonable, lawful, and effective meaning to all terms is
16 preferred to an interpretation that leaves a part unreasonable, unlawful, or of no effect.²⁴ Thus,
17 absent language in the 2004 Amendment that expressly waives or voids the nondiscrimination
18 obligation set forth in Part D, Section (D) 2.1, the overarching intent of the parties is that Qwest
19 will provide McLeodUSA nondiscriminatory access to collocation power under the 2004
20 Amendment. Qwest's view of the 2004 Amendment is at complete odds with that intent. Qwest
21 believes the 2004 Amendment permits it to bill McLeodUSA for power based on the size of the
22 distribution cable size, *i.e.*, List 2 drain, which is not how Qwest provides itself access to the same

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24 ²² See ICA excerpts (attached at Appendix A hereto).

25 ²³ See *id.*

26 ²⁴ *E.g.*, See *Cardon v. Cotton Lane Holdings, Inc.*, 173 Ariz. 203, 207, 841 P.2d 198, 202
27 (1992); *C&T Land & Development Co. v. Bushnell*, 106 Ariz. 21, 22, 470 P.2d 102, 103 (1970);
State ex. rel. Goddard v. R.J. Reynolds Tobacco Co., 206 Ariz. 117, 120, 75 P.3d 1075, 1078
(App. 2003).

1 DC Power Plant. Qwest admits it takes into account only the List 1 Drain for its equipment in
2 accessing the identical power plant facilities. Qwest's interpretation of the 2004 Amendment
3 creates an impermissible inconsistency within the amended ICA and must be rejected.

4 In its Local Competition Order,²⁵ the FCC concluded that the prohibition against
5 discrimination that appears throughout Section 251 of the Act is "unqualified."²⁶ "Unqualified"
6 means "[n]ot modified by conditions or reservations; **absolute**: an *unqualified* refusal." American
7 Heritage College Dictionary 1479 (3rd Edition) (bold added; italics in original). The FCC
8 compared this "unqualified" or absolute prohibition contained in Section 251(c) with the Section
9 202 prohibition that includes qualifying terms such as "undue" or "unjust and unreasonable." The
10 FCC characterized the Section 251 nondiscrimination standard as being more "stringent", which it
11 most definitely is, but the FCC did not leave open the question as to what that stringent standard is
12 - the FCC expressly stated that the Section 251 is an "unqualified" prohibition against
13 discrimination. Thus, the FCC determined there was an absolute prohibition against
14 discrimination under Section 251(c) of the Act.

15 Further discussion by the FCC in its Local Competition Order corroborates that conclusion.
16 For example, in interpreting the prohibition on discrimination under Section 251 of the Act, the
17 FCC stated that:

18 we reject for purposes of section 251, our historical interpretation of "non-
19 discriminatory," which we interpreted to mean a comparison between what
20 the incumbent LEC provided other parties in a regulated monopoly
21 environment. We believe that the term 'nondiscriminatory,' *as used*
22 *throughout section 251*, applies to the terms and conditions an incumbent
23 LEC imposes on third parties *as well as on itself*. In any event, by
24 providing interconnection to a competitor in a manner less efficient than
25 an incumbent LEC provides itself, the incumbent LEC violates the duty to
26 be "just" and "reasonable" under section 251(c)(2)(D).²⁷

24 ²⁵ Implementation of the Local Competition Provisions in the Telecommunications Act of
25 1996, CC Docket No. 96-98, FCC 96-325, First Report and Order, 11 FCC Rcd.15499 (1996)
26 ("Local Competition Order").

26 ²⁶ *Id.* ¶¶ 217, 218.

27 ²⁷ *Id.* ¶218(emphasis added).

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

2 The duty to provide unbundled network elements on "terms, and conditions that
3 are just, reasonable, and nondiscriminatory" means, at a minimum, that whatever
4 those terms and conditions are, they must be offered equally to all requesting
5 carriers, and **where applicable, they must be equal to the terms and conditions
under which the incumbent LEC provisions such elements to itself.**²⁸

6 While the FCC provided this context in discussing nondiscriminatory access to UNEs
7 under 251(c)(3), Section 251(c)(6) contains the identical "just, reasonable and nondiscriminatory"
8 standard as does Section 251(c)(3). Further, this illumination applies with equal force to Section
9 251(c)(6) since, as the FCC stated, the Section 251 "*unqualified*" non-discrimination standard was
10 the same "throughout all of Section 251."²⁹

11 Moreover, any claim that the law does not require Qwest to treat McLeodUSA in a manner
12 that is identical to how Qwest treats itself ignores that the ICA expressly imposes such an
13 obligation on Qwest.³⁰ The ICA was submitted to, and approved by, the Commission, as required
14 by Section 252 and applicable Arizona law. The ICA, therefore, has the force and effect of "law"
15 between the parties. Accordingly, the "law" between Qwest and McLeodUSA with respect to
16 power is that Qwest must treat McLeodUSA in the same manner as it does itself. Thus, Qwest,
17 not McLeodUSA, is the party that seeks to change the agreement by ignoring this obligation to
18 which it agreed to undertake.

19 Any effort by Qwest to water down the unqualified prohibition against discriminatory
20 access by noting immaterial differences such as CLEC equipment being caged while Qwest
21 equipment is not, would be absurd. The FCC explained its rationale for adopting its interpretation
22 of a strict prohibition against discrimination under Section 251(c) was to ensure that CLECs have
23 a "meaningful opportunity to compete."³¹ Obviously, the fact that McLeodUSA, but not Qwest,
24 has its equipment caged is of no moment. That distinction has no discernable impact on

25
26 ²⁸ *Id.* ¶ 315 (emphasis added).

27 ²⁹ *Id.* ¶ 218.

³⁰ ICA, Part D, Section (D) 2.1 (attached as Appendix A hereto).

³¹ Local Competition Order ¶ 315

1 McLeodUSA's ability to effectively compete with Qwest. In contrast, the record in this case
2 amply demonstrates that McLeodUSA is effectively subsidizing Qwest's use of an essential input
3 – DC power – because Qwest charges McLeodUSA based on the size of the power feeder cables
4 *i.e.*, List 2 Drain, which is much higher than the basis on which Qwest assigns costs to itself.
5 According to Ms. Spocogee's testimony, that discriminatory treatment costs McLeodUSA nearly
6 \$40,000 in excessive DC Power charges per month.

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

15 **C. The DC Power Measuring Amendment Requires Qwest to Charge for DC**
16 **Power Plant Based on Actual Power Usage.**

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

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

26 The term actually used in the Amendment five times is "-48 Volt DC Power Usage
27 Charge" which is not the same thing as the "Usage Charge" Qwest contends in making the

1 argument. Twice the Amendment refers to that “-48 Volt DC Power Usage Charge” as being
2 “specified” in (Section 2.2) or “from” (Section 2.2.1) “Exhibit A to the Agreement.” Exhibit A to
3 the agreement uses the identical term “48 Volt DC Power Usage” in section 8.1.4.1 to include *all*
4 charges associated with DC power in the subsections of that section, both “Power Plant” (Section
5 8.1.4.1.1) and “Power Usage” (Section 8.1.4.1.2). Thus, the Amendment and Exhibit A both use
6 the term “48 Volt DC Power Usage” to include the rates for both power plant and power usage.
7 The Amendment, therefore, did not need to use the term “Power Plant Charge” to include the
8 charge for the DC power plant.

9 Nonetheless, the Amendment goes further to remove any confusion. It specifically defines
10 the term “DC Power Usage Charge” (the term upon which Qwest places such dramatic importance
11 in stating that the term is used five times in the Amendment) to include costs associated with the
12 “power plant.” Section 2.1 of the Amendment states that “the DC Power Usage Charge is for the
13 *capacity* of the power plant available for CLEC’s use.” By defining the same “DC Power Usage
14 Charge” as the charge for which, going forward, rates will be applied on a measured-usage basis, it
15 is somewhat perplexing why this language alone does not make the interpretation of the
16 Amendment relatively straightforward for Qwest.

17 Qwest’s attempts to support its construction of the language of the DC Power Measuring
18 Amendment are similarly unpersuasive. For example, Qwest claims that the reference in Section
19 1.2 of the Amendment to a discount for the power usage rate over 60 amps indicates when “read in
20 the context of the entire agreement” that the Amendment does not apply to the power plant rate
21 because it increases for orders over 60 amps. Qwest misconstrues the Amendment. The relevant
22 portions provide:

23 **1.0 Monitoring**

24 1.1 CLEC orders DC power in increments of twenty (20) amps
25 whenever possible. If CLEC orders an increment larger than sixty (60)
26 amps, engineering practice normally terminates such feed on a power
27 board. If CLEC orders an increment smaller than or equal to sixty (60)
 amps, the terminations will normally appear on a Battery Distribution
 Fuse Board (BDFB).

1 1.2 If CLEC orders sixty (60) amps or less, it will normally be
2 placed on a BDFB where no monitoring will occur since the power
3 usage rate reflects a discount from the rates for those feeds greater than
4 sixty (60) amps. If CLEC orders more than sixty (60) amps of power, it
5 normally will be placed on the power board. Qwest will monitor usage
6 at the power board on a semi-annual basis. . . .

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

19 Qwest also claims that Section 1.2 uses the term “usage rate,” which “contains no reference
20 to a power plant rate.” Again implicit in Qwest’s argument is the idea that the word “usage”
21 cannot include “power plant” even though Exhibit A to the Agreement includes Power Plant
22 charges under the larger grouping entitled “-48 Volt DC Power Usage” – the exact term used in
23 the Amendment.

24 Qwest’s own collocation cost study also expressly uses the word “usage” to include power
25 plant charges – in fact, as described by Mr. Starkey, Qwest’s cost study allocates power plant
26 investments based upon an assumed level of usage (indicating that proper application would
27 likewise need to be based upon usage for proper cost recovery). In commenting on the monthly
28 recurring charges for “Power Usage,” for example, Qwest’s cost study states, “Power **usage**
29 **includes** the cost of purchasing power from the electric company and **the cost of the power**

1 **plant.**³² Qwest cannot reasonably claim that the word “usage” when used in the Amendment
2 cannot include “power plant” when Exhibit A and Qwest’s collocation cost study all expressly
3 include “power plant” within the meaning of the word “usage.” All of these documents were
4 drafted by Qwest, and it strains any sense of credibility to suggest that in only one of these
5 documents drafted by Qwest did it intend for the term “usage” not to embody power plant,
6 especially when the result of such an incredulous claim means that Qwest can charge CLECs much
7 more for DC power than Qwest incurs itself.

8 Qwest’s efforts to undermine McLeodUSA’s interpretation of the DC Power Measuring
9 Amendment similarly come to naught. Qwest quotes the provision in the parties’ ICA stating that
10 headings are of no force or effect and argues that “48 Volt DC Power Usage” in Sections 8.1.4 and
11 8.1.4.1 of Exhibit A is a “heading” and thus can have no substantive meaning, even though the
12 Amendment uses virtually the exact same term. As McLeodUSA explained in its Initial Brief (and
13 will not repeat here), that argument ignores common sense and the structure of Exhibit A.³³

14 Qwest also contends that McLeodUSA misplaces reliance on the sentence in Section 2.1 of
15 the Amendment that “The DC Power Usage Charge is for the capacity of the power plant available
16 for CLEC’s use,” because while it “potentially introduces some ambiguity into the agreement,” the
17 sentence is inconsistent with the remainder of the Amendment and thus should be considered
18 essentially meaningless.³⁴ The only inconsistency made evident by this language is the
19 inconsistency between Qwest’s interpretation put forward in this proceeding and the actual
20 language of the Amendment. This sentence does not add ambiguity as Qwest would lead the
21 Commission to conclude but does exactly the opposite by specifically defining the operative term
22

23 ³² Exhibit M-8 (“Detailed Summary of Results” from Qwest collocation cost study) at 5,
24 Cell: A97 Comment (emphasis added); *see* Exhibit M-7 (quoting Power Equipment spreadsheet
25 from Qwest collocation cost study developing power plant costs per amp by dividing total
26 equipment costs by “DC Power Usage”); *accord* Exhibit M-12 (Qwest Response to Iowa DR 03-
27 30).

³³ McLeodUSA Initial Brief at 8-10.

³⁴ Qwest Initial Brief at 13.

1 within the Amendment “DC Power Usage Charge” to include Qwest’s power plant – thereby
2 *removing* the ambiguity that Qwest is desperately trying to create within the Amendment so that
3 the Commission will primarily focus on the extrinsic evidence that Qwest believes supports its
4 interpretation. As such, that sentence is fully consistent with the use of the term “-48 Volt DC
5 Power Usage” throughout the Amendment and Exhibit A, as discussed above. Qwest cannot
6 legitimately urge the Commission to ignore a portion of the plain language of the Amendment,
7 when in fact, the sentence only creates an ambiguity when viewed in the light of Qwest’s
8 interpretation. The sentence itself makes perfect sense when read in conjunction with the language
9 as a whole, Exhibit A, and Qwest’s cost study and supports the only logical and internally
10 consistent interpretation of the Amendment.

11 The language of the Amendment requires Qwest to measure McLeodUSA’s DC power
12 usage and to charge for “-48 Volt DC Power Usage” – including both power usage and power
13 plant rates – based on the amount of power McLeodUSA actually uses. Qwest can only argue to
14 the contrary by ignoring portions of the Amendment and construing others inconsistently with the
15 same terms used by Qwest in related documents upon which Qwest attempts to rely,
16 unsuccessfully, to bolster its case. The Commission should adopt McLeodUSA’s interpretation.

17 **1. Qwest Did Not Objectively Manifest Any Intent Contrary to**
18 **McLeodUSA’s Interpretation of the Amendment.**

19 The language of the Amendment, and especially when read in the context of the entire
20 ICA, speaks for itself and fully supports McLeodUSA’s interpretation of the Amendment as
21 requiring Qwest to charge all DC power usage rates – including the power plant rate – based on
22 McLeodUSA’s actual usage. Qwest, however, claims that Qwest “plainly, objectively, and openly
23 disclosed its intent regarding the DC Power Measuring Amendment prior to its execution through
24 two avenues” – the Change Management Process (“CMP”) and Qwest’s product catalog
25 (“PCAT”).³⁵ This statement is false and particularly misleading.

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³⁵ Qwest Initial Brief at 14.

1 Initially and most fundamentally, the CMP documentation that Qwest introduced into the
2 record does not even reference the DC Power Measuring Amendment that the parties executed,
3 much less indicate Qwest's intent with respect to the Amendment. To the contrary, the CMP
4 documentation states in response to the question of whether "the change from non-measured to
5 measured [will] be automatic or will the CLEC be required to amend their Interconnection
6 Agreement," that "Qwest will initiate the DC Power Reading Process *without the CLEC having to*
7 *amend their Interconnection Agreement.*"³⁶

8 It simply is not plausible for Qwest to argue that McLeodUSA, when confronted with the
9 DC Power Measuring Amendment drafted by Qwest to measure and assess power on a usage-
10 basis, should have recalled and relied on the previous CMP documentation from October 2003 and
11 further assumed that it was applicable to the DC Power Measuring Amendment even when that
12 very information expressly states that no ICA amendment would be required to implement the
13 subject of that CMP exchange nine months prior. Such an assumption is even more strained when
14 the Amendment presented to McLeodUSA by Qwest specifically identified power plant capacity
15 as a component of the DC Power Usage Charge to which measured usage would apply.³⁷

16 Qwest's PCAT does include a link to Qwest's form amendment for a "CLEC wanting to
17 utilize the DC Power Measuring process," but the description of that process is fully consistent
18 with the language in the DC Power Measuring Amendment.³⁸ That description, like Section 1.2 of
19 the Amendment, merely refers to adjusting the "usage rate to the CLEC's actual usage," without
20 using any defined terms or otherwise excluding the power plant rates that are specifically included
21

22 ³⁶ Ex. Q-1 (Qwest Easton Response, Exhibit WRE-2) at 1 (emphasis added).

23 ³⁷ The CMP, moreover, is a *process* that contemplates changes as the process progresses.
24 See Ex. M-2 (Starkey Rebuttal). Discussions at the beginning of the process, such as those in
25 WRE-2 to the response Testimony of Qwest witness Easton (Hearing Exhibit Q-1) , are not
26 necessarily reflective of the result of the process. Indeed, Qwest contends that the end result of
this particular CMP process was the PCAT, Qwest Initial Brief at 14, and the PCAT contains
substantially different terms than those described in the CMP documentation.

27 ³⁸ Compare Ex. Q-1 (Qwest Easton Response, WRE-1 - PCAT) at 2 (language under
heading "Optional DC Power Measuring for feed greater than sixty (60) amps") with Ex. Q-18
(DC Power Measuring Amendment) Section 1.2.

1 as part of “-48 Volt DC Power Usage” as that term is used in the Amendment and the parties’ ICA.
2 Again, nothing in the CMP documentation so highly touted by Qwest could have reasonably given
3 McLeodUSA any reason to believe that the language in the Amendment did not mean what it says.

4 Qwest nevertheless contends that the DC Power Element Descriptions in the PCAT
5 differentiate between a “-48 Volt DC Power Usage Charge” (which “recovers the cost of the
6 power used”) and “-48 Volt DC Power Capacity Charge” (which “recovers the cost of the capacity
7 of the power plant available”) and that McLeodUSA should have known that Qwest intended the
8 term “-48 Volt DC Power Usage Charge” to have the same meaning in the Amendment as it does
9 in the PCAT.³⁹ Qwest, however, conveniently ignores the language at the beginning of the “DC
10 Power Rate Element Descriptions” in the PCAT: “The following language applies in all states,
11 where separate charges for DC Power Capacity and DC Power Usage have been established.”⁴⁰
12 No separate “DC Power Capacity” rate element has been established in Arizona. Indeed, the term
13 “DC Power Capacity” appears nowhere in the ICA between McLeodUSA and Qwest, Exhibit A,
14 or in Qwest’s SGAT. The PCAT’s description of the “DC Power Measuring” option does not use
15 *any* of the terms defined in “DC Power Rate Element Descriptions” section of the PCAT.
16 McLeodUSA, therefore, had no reason to believe that any of the “DC Power Rate Element
17 Descriptions” in the PCAT had any applicability in Arizona in general, or to the Amendment
18 specifically.

19 The fact is that Qwest manifested no intent with respect to the DC Power Measuring
20 Amendment that the parties executed other than the intent included in the language of the
21 Amendment. Even if McLeodUSA had reason to go beyond what McLeodUSA believed to be an
22 unambiguous Amendment, Exhibit A and the underlying ICA, to discover the CMP documentation
23 and the PCAT, this documentation either specifically discounted the need for an Amendment or
24 did not indicate any meaning of the Amendment that varied from its plain language. The CMP
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27 ³⁹ Qwest Initial Brief at 16.

⁴⁰ Ex. Q-1 (Qwest Easton Response, Exhibit WRE-1 – PCAT) at 1.

1 documentation and the PCAT thus are not germane to the interpretation of the Amendment (even
2 to the extent that they support McLeodUSA's position).

3 **2. McLeodUSA Did Not Manifest Any Intent Different than Its Current**
4 **Interpretation of the Amendment.**

5 McLeodUSA has consistently taken the position that the DC Power Measuring
6 Amendment means what it says – all DC power usage, including power plant rates, should be
7 charged based on McLeodUSA's actual usage. This understanding is further corroborated by the
8 statement in the ICA that Qwest has to provide McLeodUSA access to power on a non-
9 discriminatory basis. Qwest disputes that claim and contends that McLeod's "internal and
10 unexpressed intent reflects an understanding that the DC Power Measuring Amendment would
11 only affect the power usage charge, not the power plant charge."⁴¹ Qwest even goes so far as to
12 claim that McLeodUSA's interpretation of the Amendment is an "after the fact" interpretation
13 somehow contrived to gain McLeodUSA an advantage over Qwest. The record evidence does not
14 support Qwest's contentions.

15 The basis for Qwest's bold assertion is a spreadsheet that a McLeodUSA employee
16 prepared to estimate the cost impacts that would result from execution of the Amendment. Qwest
17 maintains that the only rates reflected on this spreadsheet are those billed for power usage, not
18 power plant, allegedly demonstrating that McLeodUSA did not expect to accrue savings based
19 upon Qwest's power plant rates. Qwest, however, ignores the fact that the rate information in the
20 spreadsheet came from price quotes provided by Qwest to McLeodUSA. Indeed, the purpose of
21 the spreadsheet was to track those price quotes and only those price quotes.⁴² The McLeodUSA
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24 ⁴¹ Qwest Initial Brief at 18.

25 ⁴² Ex. M-6 (McLeodUSA Spocogee Rebuttal) at 5-6; *See* also Ex. M-6 (Qwest price
26 quotes). The internal e-mail exchange within the McLeodUSA engineering group corroborates
27 Ms. Spocogee's testimony. When Brian Vanyo, Director of Engineering e-mailed Mark McCune,
Systems Engineer, Mr. Vanyo asked the group to check the "rate per amp" and asked whether the
"rate per amp" would increase. *See* Ex. Q-17 (McLeodUSA Response to Qwest data requests in
Iowa (Exhibit A thereto)). This exchange shows the mindset of the engineering group was that,

1 engineering group did not conduct any independent inquiry into all of the rate elements that would
2 be impacted but simply relied on the documentation provided by Qwest.⁴³ Indeed, as Ms.
3 Spocogee testified, such independent analysis would not be consistent with the engineers' job
4 description – such analysis is left to her organization that ultimately identified the problem and
5 disputed Qwest's charges. Nothing about this spreadsheet, therefore, indicates McLeodUSA's
6 intent with respect to the DC Power Measuring Amendment.

7 McLeodUSA further explained that its engineering group's primary concern leading to the
8 development of the spreadsheet was to ensure that rates would not increase as a result of the
9 Amendment, *i.e.*, they were simply asked to give a “thumbs up” or “thumbs down” analysis with
10 the sole criteria being lower, as opposed to higher, collocation power bills.⁴⁴ Qwest misconstrues
11 this evidence as somehow confirming that “McLeod had no intent to reduce power plant charges
12 through the Amendment” and that “Qwest's interpretation of the DC Power Measuring
13 Amendment is entirely consistent with that claimed intent” to avoid price increases.⁴⁵ The
14 evidence demonstrates no such thing.

15 The McLeodUSA engineering group was charged with ensuring that the Amendment
16 would not have a negative impact. To make this simple determination, the McLeodUSA engineers
17 used Qwest's own quote documents to do a crude analysis that indicated lower, as opposed to
18 higher, collocation power charges. The analysis stopped there because the immediate question had
19 been answered. The spreadsheet, however, does not indicate – and there is no evidence that Qwest
20 has been able to produce that this analysis was intended to indicate – the total amount of the
21 reduction of DC power charges that McLeodUSA would realize once the Amendment was in
22 effect. Such an analysis is not the domain of McLeodUSA's engineers, just as interpreting or
23 implementing the rate provisions of contracts through a review of charges ultimately assessed by
24

25 like the Michigan example Ms. Spocogee explained in her testimony, there was but single power
26 rate element.

27 ⁴³ Ex. M-6 (McLeodUSA Spocogee Rebuttal) at 5.

⁴⁴ *Id.* at 6.

⁴⁵ Qwest Initial Brief at 20.

1 Qwest is not the purview of McLeodUSA engineers. As Ms. Spocogee testified, those questions
2 fall within her jurisdiction and when confronted with Qwest's bills rendered in conflict with what
3 McLeodUSA believed it had agreed to via the Amendment, Ms. Spocogee filed a dispute.

4 Qwest further mischaracterizes the evidence by stating that "Ms. Spocogee admitted the
5 first time McLeod formulated an intent that the DC Power Measuring Amendment should reduce
6 power plant charges was after she conducted her audit in May 2005."⁴⁶ Ms. Spocogee essentially
7 testified that the first time *she* ever looked at the specific power plant element and calculated
8 power plant savings was in connection with her audit. She also explained that it is common
9 practice to take months and sometimes years to discover and raise billing disputes as her group
10 focuses on certain parts of the bill throughout the year (*i.e.*, Ms. Spocogee's group simply hadn't
11 reviewed the collocation power component of the bill until the timeframe immediately preceding
12 the dispute).⁴⁷ The fact that McLeodUSA did not dispute Qwest's failure to bill McLeodUSA for
13 power plant based on actual usage until May 2005 (nine months after the Amendment was signed)
14 indicates only that it took McLeodUSA that long to discover the error, not that McLeodUSA
15 interpretation was somehow "post hoc."

16 In short, nothing in McLeodUSA's internal communications or analysis is inconsistent
17 with McLeodUSA's position that its understanding of the Amendment is and has always been to
18 require all DC power charges – including power plant rates – to be billed based on actual power
19 usage. Moreover, there is certainly no evidence that it was the intent of McLeodUSA in entering
20 into the Amendment that it was agreeing to Qwest providing DC power to McLeodUSA on terms
21 less favorable than Qwest provides power to itself. In other words, there is no indication that
22 McLeodUSA intended to obliterate its right under Section 251(c), and embodied specifically
23 elsewhere in the ICA, to access power on nondiscriminatory terms and conditions.

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27 ⁴⁶ *Id.*

⁴⁷ Ex. M-6 (McLeodUSA Spocogee Rebuttal) at 8-10.

1 **D. Undisputed Engineering Evidence Supports McLeodUSA's Contract**
2 **Interpretation and Discrimination Claim.**

3 Qwest's response to the engineering evidence is to proclaim *ad nasuem* that McLeodUSA
4 placed an "order" for power, which Qwest unilaterally transforms into an "order for plant
5 capacity," that Qwest "engineered" its power plant to accommodate that "order", and that Qwest
6 made such capacity available to McLeodUSA. Other than Qwest's witnesses making these claims
7 in their testimony, the record is devoid of any evidence corroborating Qwest's claims, and in fact
8 the record proves the contrary is true.

9 First, it is important to understand that ones needs to distinguish between addressing
10 Qwest's claim that it sizes power plant facilities based on a CLECs' orders for power feeder cables
11 *i.e.*, List 2 drain, and why, if Qwest did that, it was in error for it to do so. McLeodUSA will
12 address this issue first. Second, McLeodUSA will address the fact that the evidence belies Qwest's
13 claims that it uses the cable distribution orders to size its power plant facilities. On both fronts,
14 Qwest's arguments fail to support billing McLeodUSA based on the size of cable distribution
15 orders under ICA, as amended by the 2004 Amendment.

16 In reality, the parties agreed on many engineering principles that demonstrate that Qwest
17 should be charging for power plant based on the amount of DC Power McLeodUSA actually uses.
18 However, Qwest mischaracterizes the evidence by asserting, "[t]he essence of McLeod's testimony
19 regarding engineering issues is simply that McLeod wants to place a power order for its ultimate
20 capacity needs, McLeod expects Qwest to make that capacity available, but McLeod only wants to
21 pay based on measured usage, even though Qwest does in fact make the ordered capacity
22 available."⁴⁸ The record does not support this statement. McLeodUSA orders power feeder
23 cables, not power plant capacity to meet the simultaneous List 2 drain that Qwest alleges would
24 occur in the virtually nonexistent circumstance of a complete central office AC power failure.⁴⁹
25 To the extent that CLECs have any expectations about Qwest's ability to provide power plant
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27 ⁴⁸ Qwest Initial Brief at 22.

⁴⁹ Ex. M-4 (McLeodUSA Morrison Rebuttal) at 39.

1 capacity, it is that Qwest will make such capacity available to CLEC equipment as it does to
2 Qwest's own central office equipment.⁵⁰ Qwest, not McLeodUSA, is the party seeking a free ride
3 at the other's expense.

4 **1. McLeodUSA Does Not Order Power Plant Capacity.**

5 Notwithstanding Qwest's repeated claims that McLeodUSA places an order for power
6 plant capacity, the reality is that McLeodUSA orders power feeder cables when it collocates
7 equipment in Qwest's central offices; McLeodUSA does not "order" power plant capacity. The
8 only information regarding McLeodUSA's power needs that Qwest requires a collocating CLEC to
9 submit on the collocation application form written by Qwest is the size of the power feeder cables.
10 Qwest does not even give McLeodUSA the option to order power plant *capacity* via its collocation
11 application. Yet, throughout this proceeding and in its opening brief, Qwest repeatedly (and
12 without any basis in fact) refers to McLeodUSA's request for power feeder cable amperage as
13 McLeodUSA's "power order." Qwest has failed to produce any document showing that the parties
14 agreed or even had an inkling that a CLEC order for power feeder cables was actually an order for
15 power plant capacity. Accordingly, Qwest's multiple claims that an order for power feeder cables
16 was in fact an order for power plant capacity are wholly inaccurate, misleading and willfully
17 inconsistent with the record.

18 If Qwest made a unilateral assumption that McLeodUSA orders for power feeder cables for
19 its collocations was a proxy order for power plant capacity, Qwest did so without any legal basis.
20 First, nothing in the ICA authorized Qwest to make such a misguided assumption with respect to a
21 McLeodUSA order for power feeder cables. Likewise, Qwest's collocation application form also
22 does not give any indication that Qwest would construe the order for power feeder cables, which
23 was required on the form, as an order for power capacity. Simply stated, Qwest's collocation
24 application form contains no place whereby a CLEC can order "power plant capacity" nor is a
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⁵⁰ *Id.* at 41-42.

1 CLEC put on notice that Qwest assumes the order for power feeder cables is an order for power
2 plant capacity.

3 Moreover, were such an assumption made by Qwest in sizing its power plant capacity, that
4 assumption would have been in direct violation of its own Technical Publications. Qwest's
5 Technical Publications expressly state that power plant capacity is sized using List 1 drain.⁵¹ Any
6 CLEC reviewing Qwest's Technical Publications would have been instructed that Qwest uses List
7 2 drain only for sizing "feeder cables, circuit breakers," etc., not power plant capacity.

8 More importantly, if Qwest really had sized its DC Power plant at List 2 for McLeodUSA,
9 then Qwest did so in violation of the ICA and Section 251(c)(6). Part D, Section (D)2.1 of the
10 ICA and Section 251(c)(6) impose a duty on Qwest to provide McLeodUSA collocation in a
11 nondiscriminatory manner. Qwest admits it has always used List 1 Drain to design the capacity of
12 the power plant capacity for itself. Thus, Part D, (D) 2.1 and Section 251(c)(6) required Qwest to
13 do the same thing for McLeodUSA – size power plant capacity using the List 1 Drain of the
14 McLeodUSA equipment. If, in fact, Qwest sized the power plant using the size of power feeder
15 cables orders as a proxy for an order for power plant capacity, then McLeodUSA should not be
16 saddled with ridiculously high DC power costs simply because Qwest unilaterally chose to violate
17 its obligation under the ICA and the law governing its obligation to provide collocation on
18 nondiscriminatory terms and conditions. Qwest's failure to abide by the ICA – provide access to
19 power at parity with how Qwest designs access to power for itself – should not entitle Qwest to
20 apply the power plant rate in a discriminatory manner.

21 However, because, according to Qwest, it makes this amount of power plant capacity
22 "available" to McLeodUSA (a fact that Qwest has never proven or substantiated), Qwest argues
23 that it is justified in charging McLeodUSA the full amount for that much power plant capacity,
24 whether McLeodUSA ever uses it or not. Qwest's logic is thoroughly undermined by an
25 engineering principle that is undisputed in the record.

26
27 ⁵¹ Qwest Technical Publication 77385, 2.4 Engineering Guidelines. See Ex. M-3
(McLeodUSA Morrison Direct) at 32, and Ex. M-4 (Morrison Rebuttal) at 5, 6, and 16.

1 As Mr. Morrison explained, and as confirmed by the Qwest Technical Publications, central
2 office power plant is a shared resource. All power users in a central office, including Qwest, are
3 able to use any amount of the unused power capacity indiscriminately.⁵² The Iowa Utilities Board
4 made such a finding in its Final Order, which finding has not been challenged by Qwest on
5 rehearing. Accordingly, any power plant capacity above the McLeodUSA List 1 drain is equally
6 available for Qwest's equipment to draw as it is for McLeodUSA equipment. Thus, justifying
7 charging McLeodUSA on the basis that Qwest provided McLeodUSA some unique access to
8 power at List 2 Drain compared to the amount of power Qwest is able to access is patently
9 inconsistent with the undisputed notion that the power plant is a shared resource.

10 Qwest also attempts to suggest that its discriminatory practice of charging CLECs based on
11 the size of power feeder cable orders is reasonable from an engineering perspective because a
12 majority of collocators' orders for power cables were received in the 1999-2000 and Qwest had no
13 idea what to expect in terms of collocators' usage, so according to Qwest, the only reasonable
14 option was to build power plant to the capacity of the CLEC power cables.⁵³ Qwest's revisionist
15 history does not pass muster. If Qwest actually built power plant to the capacity of the CLEC
16 power cables as it claims because there was no usage over these cables to measure, this would
17 have been a critical mistake on Qwest's part, and directly inconsistent with Qwest's engineering
18 guidelines, as well as applicable law. No reasonable engineer would have assumed that CLECs
19 would use anything close to the full List 2 drain associated with their power cables given that
20 engineering requirements require power *cables* to be sized on a higher List 2 drain, while power
21 *plant* is sized on a lower List 1 drain – a standard that Qwest was well aware of back in 1999-
22 2000.

23 Qwest revisionist history is also belied by the fact that in 1999-2000, Qwest was already
24 under an obligation to provide nondiscriminatory access to collocation power. As discussed
25 above, the FCC concluded in its 1996 *Local Competition Order* that RBOCs were subject to an
26

27 ⁵² Ex. M-4 (Morrison Rebuttal) at 7.

⁵³ Qwest Initial Brief at 26.

1 *unqualified* prohibition against discrimination when it came to meeting obligations under Section
2 251(c), including their obligation to provide collocation.⁵⁴ According to the FCC, the
3 nondiscrimination prohibition in Section 251(c)(6) obligated Qwest to provide CLECs access to
4 collocation power on the same terms and conditions as it did for itself.⁵⁵ While Qwest may
5 disagree that the FCC adopted a strict nondiscrimination obligation in the 1996 *Local Competition*
6 *Order*, Qwest's revisionist history still fails because ICAs in effect in Arizona at that time imposed
7 the same nondiscrimination obligation on Qwest. For example, the US WEST/AT&T
8 interconnection agreement in effect contained the following provision:

9 Power as referenced in this document refers to any electrical power source
10 supplied by US WEST for AT&T equipment. US WEST will support AT&T
11 equipment at equipment specific DC and AC voltages. ***At a minimum, US***
12 ***WEST shall provide power to AT&T at parity with that provided by US WEST***
to itself.(emphasis added).⁵⁶

13 The US WEST/MCI agreement had the identical provision.⁵⁷ These ICAs were submitted
14 to, and approved by, the Commission as required by Section 252 and applicable Arizona law.
15 These ICAs, therefore, had the force and effect of "law" between those parties. Further, since
16 Qwest could not discriminate among CLECs, the fact that Qwest had agreed to this obligation in
17 these ICAs necessarily means that it had to provide all CLECs access to power at parity with how
18 Qwest did so for itself ever since these ICAs became effective in 1997.⁵⁸

21 ⁵⁴ Local Competition Order ¶ 218.

22 ⁵⁵ *Id.*

23 ⁵⁶ U S WEST/AT&T Interconnection Agreement – Arizona, Part A, Section 40.3.22, dated
24 July 18, 1997 (approved by Decision No. 60353 (August 29, 1997)). McLeod requests the
Commission take administrative notice of the Commission-approved ICAs.

25 ⁵⁷ US WEST/MCI Interconnection Agreement – Arizona, Part A, Section 40.3.22, dated
26 July 18, 1997 (approved by Decision No. 60353 (August 29, 1997)). These provisions are
27 virtually identical to the provision that was in the US WEST/McLeodUSA ICA that is quoted in
the McLeodUSA Application for Rehearing and the Reply to Qwest's Response filed in IUB
Docket No. FCU-06-20. See Appendices B and D hereto.

⁵⁸ Local Competition Order, ¶ 218.

1 Thus, despite Qwest's latest attempt to create a rational basis for giving CLECs different
2 access to power; the fact of the matter is that in 1999-2000, Qwest was already under an obligation
3 to provide CLECs access to power on the same terms and conditions as Qwest provided power for
4 its own use. That means Qwest should have sized the DC Power Plant using the List 1 Drain as it
5 did for its own equipment. Whether or not it was difficult for Qwest to do so, as claimed by Mr.
6 Ashton, is of no moment.⁵⁹ Qwest's excuse for treating CLECs different back in that time frame
7 does not hold water; the law told them to do it on the same basis for CLECs as it did for itself, and
8 in fact, as discussed in the next section, Qwest actually did so.⁶⁰

9 **2. Qwest Provided No Credible Evidence To Support Its Claim That It**
10 **Actually Used CLEC Orders for Power Feeder Cables to Engineer (i.e.**
11 **Size) Its Power Plant Capacity.**

12 In evaluating the parties' evidence, it is important to be mindful that the Arizona hearing
13 on this issue is the fifth in succession. As such there is an established track record wherein Qwest
14 has tweaked its story when prior justifications have been exposed to be unsupported or inaccurate.

15 One of those instances is Qwest's claim that it has "engineered" its power plant based on
16 the List 2 Drain of the CLEC equipment. As Mr. Morrison explained in his testimony, Qwest
17 originally claimed in the Iowa case, which was the first complaint to go to hearing, that the reason
18 Qwest billed CLECs at List 2 Drain was because "large"⁶¹ orders for power feeder cables by

19 ⁵⁹ Of course, as pointed out by Mr. Morrison, Qwest unilaterally chose not to ask CLECs
20 for the List 1 Drain of the collocated equipment on the collocation application form. Thus, since
21 Qwest is responsible for not having the information it required to size its power plant for CLECs
22 on the same basis it did for itself, Qwest cannot be excused from compliance with the law for its
23 own failing.

24 ⁶⁰ It is interesting to note that neither of these provisions are footnoted to an arbitration
25 order in respective the ICAs. That means that Qwest *voluntarily* agreed to provide power to these
26 CLECs at parity with how Qwest provided itself access to power. One would reasonably surmise
27 from Qwest's voluntary agreement to include these provisions in these ICAs means that Qwest
believed at that time that the controlling law in 1997 was that it was obligated to provide CLECs
access to power in parity with how Qwest provided power to itself. Thus, any attempt by Qwest to
claim that the FCC's 1996 Local Competition Order did not impose a strict prohibition against
nondiscriminatory access to collocation power is contrary to Qwest's position as evidenced by its
voluntary agreement to undertake that explicit obligation in 1997.

⁶¹ The Qwest witness in Iowa classified orders as "large" if they were for feeder cables of
175 amps or more.

1 CLECs caused Qwest to augment its power plant to account for the additional capacity that CLECs
2 would need to access.

3 Yet, the evidence in the Iowa case showed Qwest's claims to be false. Despite the fact that
4 McLeodUSA had submitted 54 "large" orders for power feeder cables in Iowa, Qwest had never
5 actually augmented its central office power plants in response to such orders.⁶² That meant that
6 Qwest's claim that it sized the power plant capacity in response to large CLEC orders for power
7 feeder cables, and accordingly, the basis for charging McLeodUSA as if Qwest made that List 2
8 Drain power plant capacity available to McLeodUSA, was not supported by the evidence. The
9 Iowa Utilities Board rejected Qwest's explanation in its Final Order.⁶³

10 Qwest's claim that it has "engineered" for CLECs at List 2 drain is nothing more than a
11 repackaging of Qwest's discredited claim from Iowa that a large order for power feeder cables by
12 McLeodUSA "definitely" would result in Qwest augmenting its power plant capacity. Absent this
13 discredited claim, there is no evidence that Qwest did any sort of "engineering" to accommodate
14 the List 2 drain of the McLeodUSA equipment when McLeodUSA applied for its collocations.
15 Other than Mr. Ashton's claim that Qwest did so, Qwest points to no evidence in the record that
16 supports its repackaged claim. Once again, the record belies this new twist on Qwest's claim.

17 First, any such "engineering" for CLECs collocation at List 2 drain would have
18 contradicted Qwest's Technical Publications. While Qwest belatedly⁶⁴ suggested that these
19 Technical Publications did not apply to CLECs collocations, such claims are demonstrably false.

20 Second, Qwest never produced any other technical documents. One would reasonably
21 expect that were there truly different technical guidelines governing CLEC collocations that Qwest
22

23 ⁶² As the Iowa Utilities Board found, the only time Qwest actually augmented its power
24 plant equipment was because the existing power plant was so old that replacement parts could not
25 be found.

26 ⁶³ IUB Final Order (issued in IUB Docket No. FCU-06—20) at 13 (a copy of the Final
27 Order was attached to Qwest's Initial Brief as Attachment 1).

⁶⁴ As Mr. Morrison noted, it was not until after the conclusion of the Iowa hearing that
Qwest came up with its claim that these technical publications do not apply to CLEC collocations.
Ex. M-4 (McLeodUSA Morrison Rebuttal Testimony) at 4.

1 would have produced such documentation. Moreover, Qwest Technical Publications cited by Mr.
2 Morrison were in fact updated as recently as 2006, and again do not make any distinction between
3 CLEC and Qwest equipment.

4 Finally, the Technical Publications in question do in fact contemplate the existence of
5 CLEC collocated equipment. For instance, Qwest Technical Publication 77386 entitled
6 “Interconnection and Collocation for Transport and Switched Unbundled Network Elements and
7 Finished Services”

8 1.6 General Requirements

9 All equipment (IDE) installed by an Interconnector in a Qwest Wire Center must
10 comply with the requirements of the National Electric Code®. The IDE must also
11 comply with the with Bellcore Network Equipment Building System (NEBS)
12 Level 1 safety standards, GR-63- 96 CORE, *NEBS Requirements: Physical
13 Protection*, and GR-1089-CORE, *Electromagnetic Compatibility and Electrical
14 Safety - Generic Criteria for Network Telecommunications Equipment*.
15 Requirements for fiber optic cables are provided in GR-20-CORE, *Generic
16 Requirements for Optical Fiber and Fiber Optic Cable*.

17 *The following publications will also apply for collocation:*

- 18 • 103 PUB 77350, Central Office Telecommunications Equipment
19 Installation and Removal Guidelines
- 20 • PUB 77351, Qwest Communications, Inc. Engineering Standards
21 (three modules)
- 22 • PUB 77355, Grounding-Central Office and Remote Equipment
23 Environment
- 24 • ***PUB 77385, Power Equipment and Engineering Standards.***

25 *Appropriate sections of the publications must be followed when collocating.*⁶⁵

26 If Qwest followed its Technical Publication 77385, Qwest would only augment, or
27 “engineer,” its power plant facilities based on the total power usage of the entire CO.⁶⁶ The fact
that Qwest never augmented power plant capacity in Iowa despite receiving 54 “large” orders from
McLeodUSA for power feeder cables strongly suggests that Qwest does in fact *engineer* its power

⁶⁵ Ex. M-4 (McLeodUSA Morrison Rebuttal) at 5.

⁶⁶ IUB Final Order at 14.

1 plant capacity in accord with its Technical Publications, notwithstanding Mr. Ashton's statements
2 to the contrary. Again, the evidence that Qwest actually did not augment (*i.e.* engineer) its power
3 plant capacity using the orders for distribution as a proxy for a power plant capacity completely
4 undermines Qwest's claims in this case that it did so.

5 Qwest may also argue in reply that it engineers for CLEC power plant needs at a superior
6 level, not merely at parity, because McLeodUSA always had access power plant capacity equal to
7 the List 2 drain of its equipment though Qwest's equipment somehow only had access to List 1
8 drain. However, this argument is part and parcel of Qwest's earlier argument that Qwest reserves
9 a portion of the DC power plant capacity for McLeodUSA and other CLECs. As previously noted,
10 central office power plant is a shared resource.⁶⁷ Accordingly, any power plant capacity above the
11 McLeodUSA List 1 drain is equally available for Qwest's equipment to draw as it is for
12 McLeodUSA equipment.

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

15 Qwest's technical publications require Qwest to size the shared power plant in its central
16 offices based on the List 1 drain of the equipment in that office, including CLEC collocated
17 equipment.⁶⁸ Indeed, Qwest's own engineering witness confirmed that Qwest would extend its
18 practice of engineering its power plant to the List 1 drain of CLECs' collocated equipment if
19 Qwest only knew the List 1 drain of that equipment.⁶⁹ Qwest claims erroneously that it does not
20 know this information, yet even if it does not, it is only because Qwest does not want to know or
21 has failed to ask.

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26 ⁶⁷ IUB Final Order at 13.

27 ⁶⁸ Ex. M-3 (McLeodUSA Morrison Direct) at 31-35; *see* Ex. M-4(McLeodUSA Morrison
Rebuttal) at 4-6.

⁶⁹ Tr. 344-45 (Qwest Ashton).

1 Qwest has a list of all equipment that McLeodUSA collocates in each Qwest central
2 office.⁷⁰ Qwest knows the List 1 drain for the McLeodUSA equipment that is the same type of
3 equipment used by Qwest. Qwest could also seek the List 1 drain for this equipment from the
4 manufacturer, which Qwest does for its own equipment. On the occasions when Qwest cannot
5 otherwise obtain that information, Qwest's technical publications authorize Qwest to estimate the
6 List 1 drain of the equipment, and Qwest would size its power plant to such estimates rather than
7 to List 2 drain.⁷¹ Finally, Qwest could request that McLeodUSA provide the List 1 drain of its
8 equipment in the very collocation application on which Qwest requires McLeodUSA to list each
9 piece of equipment it will collocate (and further asks McLeodUSA to size its power feeder cables).
10 Mr. Ashton never explained why Qwest's collocation application form does not request that
11 information, although he confirmed that as a power plant engineer, he would prefer to size power
12 plant for all equipment in the central office, including CLEC equipment, consistent with Qwest's
13 own technical publications (at least one of which Mr. Ashton himself authored).⁷²

14 Qwest's insistence that it must size power plant to the List 2 drain of McLeodUSA's
15 collocated equipment is patently unreasonable under these circumstances.⁷³ Indeed, Qwest's
16 position on this issue stands in stark contrast to Qwest's contention that given the importance of
17 the issue to McLeodUSA, it should be required to have used "reasonable thought and diligence" to
18 "discover the intent Qwest attached to the DC Power Measuring Amendment in the CMP
19 documents and PCAT." The engineering of Qwest's power plant is no less important to Qwest
20 than the amount McLeodUSA pays for DC power. Qwest, therefore, cannot reasonably rely on its
21 self-imposed ignorance, especially when such ignorance results in Qwest discriminating against
22 McLeodUSA in violation of the ICA as well as federal and state law.

24 ⁷⁰ M-2 (McLeodUSA Starkey Rebuttal) at 26-27; *see* Ex. MS-4(Qwest Collocation
25 Application).

26 ⁷¹ Ex. M-4 (McLeodUSA Morrison Rebuttal) at 10-11.

27 ⁷² Tr. 345 (Qwest Ashton).

⁷³ As explained below, federal and state law governing access to DC power does not
require the Commission to find that Qwest's practice is "unreasonable" to rule in favor of
McLeodUSA.

1 Indeed, there can be no debate that Qwest's charging McLeodUSA for power plant
2 capacity based on the size of the power feeder cables violates the nondiscrimination prohibition of
3 Section 251(c)(6) as explained by the FCC. List 2 Drain is the current equipment draws when the
4 power plant is in "worst case" condition of voltage and traffic distress, when the DC power plant's
5 batteries are approaching a condition of total failure.⁷⁴ In other words, List 2 is an extreme
6 circumstance and rarely if ever occurs. It is economically inefficient to size power plant based on
7 a "worst case" scenario.⁷⁵ TELRIC pricing principles require the assumption of an economically
8 efficient network. In fact, Qwest uses that assumption in planning DC Power Plant capacity for its
9 own use, as demonstrated by its Technical Publications that power plant capacity is sized using
10 List 1 drain. It simply makes economic sense to size power plant capacity using the List 1 drain
11 since the cost of building DC power plant to constantly have capacity available to satisfy an
12 extremely rare List 2 drain event far exceeds the benefits of building power plant capacity of that
13 size.⁷⁶

14 As previously noted, the FCC explained that the nondiscrimination requirement throughout
15 Section 251(c) was *unqualified* because it was intended to ensure that CLECs had a "meaningful
16 opportunity to compete."⁷⁷ By charging McLeodUSA for power plant capacity using the power
17 feeder cables, Qwest is requiring McLeodUSA to pay for power plant capacity as if Qwest were
18 designing its power plant on an inefficient basis (*i.e.*, equal to List 2 drain), when Qwest does not
19 do so for itself. Thus, Qwest is foisting inefficient network costs onto McLeodUSA under its
20 interpretation of the ICA as amended by the 2004 Amendment. The FCC has already determined
21 that when an ILEC provides interconnection to a competitor in a manner that is less efficient than
22 the ILEC provides to itself, the ILEC is violating the duty to be "just" and "reasonable" under
23 section 251(c)(2)(D).⁷⁸ Qwest can, and should be required to, determine the List 1 drain of
24

25 ⁷⁴ Ex. M-3 (McLeodUSA Morrison Direct) at 20-21.

26 ⁷⁵ *Id.* at 13.

27 ⁷⁶ *Id.*

⁷⁷ Local Competition Order ¶ 315

⁷⁸ Local Competition Order ¶ 218.

1 McLeodUSA's collocated equipment for purposes of properly sizing Qwest's power plant and
2 charging McLeodUSA accordingly as Qwest does for itself and as its own technical
3 documentation, the DC Power Measuring Amendment, the parties' ICA, and federal law require,
4 and Qwest should, therefore, be billing McLeodUSA for power based on the actual amount of
5 power used.

6
7 **3. The Amendment Requires Qwest to Size and Bill McLeodUSA for the
8 Same Amount of Power Plant.**

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

15 Qwest observes that Section 1.2 of the Amendment provides that "Qwest will perform a
16 maximum of four (4) readings per year on a particular collocation site," and Qwest argues that
17 accordingly the usage for which McLeodUSA pays will necessarily be less than the List 1 drain of
18 its equipment. However, Section 1.2 of the Amendment provides only that "Qwest will monitor
19 usage at the power board on a semi-annual basis."⁷⁹ The Amendment thus affords Qwest a great
20 deal of discretion to determine when Qwest will measure McLeodUSA's DC power usage. Qwest
21 obviously wanted to ensure that it has the maximum flexibility to monitor McLeodUSA's actual
22 usage at the point in time when it is at its peak (and thus matches the highest historical load for the
23 equipment that Qwest uses to size the power plant). Therefore, contrary to Qwest's arguments,
24 McLeodUSA's advocacy and interpretation of the DC Power Measuring Amendment gives Qwest
25 the ability to ensure that the amount of DC power for which McLeodUSA is billed is as close as

26
27 ⁷⁹ Section 1.2 of the Amendment states that in addition to semi-annual monitoring, "Qwest
also agrees to take a reading within thirty (30) Days of a written CLEC request, after CLEC's
installation of new equipment."

1 possible to being the same as the amount of power plant capacity that Qwest has constructed – just
2 as Qwest does for its own central office equipment.

3 McLeodUSA's engineering testimony and exhibits, therefore, provide far more than the
4 ancillary extrinsic evidence that Qwest characterizes them to be. The evidence demonstrates that
5 McLeodUSA's interpretation of the DC Power Measuring Amendment is consistent not only with
6 the language of the Amendment but with Qwest's own engineering principles and practices. The
7 evidence also shows that Qwest's interpretation of the Amendment results in discrimination
8 because Qwest provisions DC power to itself far more favorably than it does to McLeodUSA. The
9 Commission, therefore, should rely on this evidence to interpret the Amendment as McLeodUSA
10 has proposed or to find that Qwest is engaged in unlawful discrimination in violation of the
11 parties' ICA and federal law.

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

15 In a further effort to distract the Commission from Qwest's own discriminatory conduct in
16 charging McLeodUSA for DC power plant based on the capacity of McLeodUSA's power cables
17 rather than on usage as Qwest does for itself, Qwest has claimed that McLeodUSA follows the
18 same practices as Qwest when charging for DC power in McLeodUSA switching centers. Qwest's
19 claims are deficient as a matter of both law and fact.

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

27 As a factual matter, McLeodUSA does not bill collocators for DC power the same way that
Qwest bills McLeodUSA. McLeodUSA asks collocators for the amount of power they anticipate

1 needing (and for which they will be billed) and then McLeodUSA calculates the size of the fuses
2 and power feeder cables needed to supply that power. McLeodUSA explained, “it is the policy of
3 McLeodUSA to bill collocation customers for power on a usage basis, which usage is self-reported
4 by the collocation customer. . . . For example, a customer that orders 20A of usage will be billed
5 for 20A of usage but the breaker is typically sized for 30A and the feed size will typically support
6 up to 60A.” In other words, McLeodUSA effectively asks the collocator for its anticipated actual
7 DC power usage, which Qwest never asks of its collocators. McLeodUSA then sizes the power
8 feeder cables based on the usage identified by the collocator. Such a procedure stands in sharp
9 contrast to Qwest’s procedure, under which Qwest never asks the CLEC how much power it will
10 need but simply bills the CLEC for the much greater capacity of the power cables the CLEC
11 orders. Or to use McLeodUSA’s example, while McLeodUSA would bill the collocator for 20
12 amps of power, Qwest would bill the collocator for 60 amps. McLeodUSA’s practices thus
13 support its discrimination claim.

14 **5. The Iowa Utilities Board Is Reconsidering Its Final Order in the**
15 **Companion Iowa Complaint, and, Therefore, It’s Initial Decision to**
16 **Adopt the Qwest Interpretation Should Not Be Given Any Weight by**
17 **the Commission.**

17 In its initial brief, Qwest cited the Iowa Utilities Board Final Order as support for adopting
18 the Qwest interpretation of the DC Power Measuring Amendment.⁸⁰ There has been subsequent
19 history in that proceeding that renders the ultimate ruling relied on by Qwest to be of no value to
20 the Commission. However, as will be explained, certain factual findings made by the IUB that
21 have not been challenged on rehearing are compelling and actually support the McLeodUSA
22 interpretation of the 2004 Amendment.

23 McLeodUSA filed its Application for Rehearing with the IUB (hereinafter referenced to as
24 “Application”), which request was subsequently joined by the Iowa Department of Justice Office
25 of Consumer Advocate. Qwest filed a Response to the Application for Rehearing on August 31,
26

27 _____
⁸⁰ Qwest Initial Brief at 2, Attachment 1.

1 2006. McLeodUSA filed a Reply to Qwest's Response on September 12, 2006. On the same day,
2 the IUB issued an Order Granting Rehearing for Purposes of Reconsideration. Attached as
3 Appendices B-D to this Reply Brief are copies of the IUB's September 12, 2006, Order Granting
4 Rehearing for the Purpose of Reconsideration and the McLeodUSA Reply to the Qwest Response.
5 McLeodUSA believes its Reply to Qwest's Response may be particularly helpful to the
6 Commission since it addresses many of the identical arguments presented in Qwest's Post-Hearing
7 Brief in this proceeding, plus many arguments that Qwest will likely make in its Reply brief.

8 Obviously, the IUB's decision to grant rehearing to reconsider its decision is noteworthy.
9 However, aside from the fact that the ultimate IUB decision may change after consideration of the
10 arguments submitted on rehearing, even the original Final Order of the IUB supports the
11 McLeodUSA interpretation *if* this Commission properly applies the rules of contract interpretation
12 by interpreting the DC Power Measurement Amendment in accordance with the nondiscrimination
13 requirements of Section 251(c) of the Act and in harmony with the underlying ICA. Rather than
14 repeat the legal arguments detailing the IUB's errors set forth in the Application, McLeodUSA
15 believes it is useful to briefly discuss some of the IUB's factual findings. Based on the factual
16 findings, this Commission should come to the conclusion that the McLeodUSA interpretation of
17 the ICA as amended by the 2004 Amendment is the proper one.

18 For example, the IUB concluded that Qwest was in fact treating McLeodUSA differently
19 than Qwest treats itself.⁸¹ The Arizona record supports the same conclusion. Additionally, the
20 IUB concluded that while Qwest assigns the cost of the DC power plant to McLeodUSA using the
21 size of the distribution power feeder cables, which is equal to List 2 drain, Qwest assigns power
22 plant to itself based on List 1 drain.⁸² The Arizona record supports the same conclusion since
23 Qwest acknowledges it designs power plant for its own equipment using only the List 1 drain,
24 rather than the List 2 drain that results from using the order for feeder cable as a proxy for a power
25 plant order.

26
27 ⁸¹ IUB Order at 13-14.

⁸² IUB Order at 14.

1 The IUB also made a finding that Qwest does not allocate a portion of the DC power plant
2 to McLeodUSA and CLECs. Instead, the IUB agreed with Mr. Morrison that the DC Power Plant
3 is a shared resource used by all users of power within the central office, including Qwest's own
4 equipment. All in all, the IUB agreed with McLeodUSA that Qwest actually engineers its DC
5 power plant as explained by Mr. Morrison in Arizona.

6 Given the Arizona record supports the same findings made by the IUB, proper application
7 of the rules of contract interpretation should lead the Commission to interpret the 2004
8 Amendment as advocated by McLeodUSA. That is because, as previously explained, the
9 governing law and the related provisions of ICA require Qwest to provide power to McLeodUSA
10 on the same terms that Qwest does so for itself. Qwest's proposed interpretation of the 2004
11 permits would create an inconsistent result and render the clear nondiscrimination requirement set
12 forth in Part D.2.1 of the ICA meaningless.

13 **III. SUMMARY AND CONCLUSION**

14 The only interpretation of the DC Power Measuring Amendment that is consistent with
15 Qwest's obligation to provide nondiscriminatory access to DC power is the interpretation put forth
16 by McLeodUSA that requires both power-related rates to be applied on a measured usage basis.
17 Qwest has no legitimate excuse for obtaining the windfall that results when it bills McLeodUSA
18 based on the size of distribution cable orders, or treating McLeodUSA worse than Qwest treats
19 itself. McLeodUSA's interpretation of the agreement is both nondiscriminatory and more
20 equitable; it is also the more logical reading of the Amendment. McLeodUSA's interpretation also
21 follows Qwest's own cost model, as well as how Qwest actually incurs power plant costs.

22 For the foregoing reasons, the Commission should order Qwest to bill for all DC power
23 charges, including power plant, on a measured use basis, and should require Qwest to "true up" its
24 charges to McLeodUSA from the date of the Amendment to the date of the Order.

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RESPECTFULLY SUBMITTED this 22nd day of September 2006.

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

By 

Michael W. Patten
Roshka DeWulf & Patten, PLC
400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004

William A. Haas
Deputy General Counsel
William H. Courter
Associate General Counsel
6400 C Street SW
Cedar Rapids, Iowa 52406

Original and 15 copies of the foregoing
filed this 22nd day of September 2006 with:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Copy of the foregoing hand-delivered/mailed
this 22nd day of September 2006 to:

Amy Bjelland
Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Maureen A. Scott, Esq.
Chief Counsel, Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Ernest G. Johnson
Director, Utilities Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

1 Norman G. Curtright
2 Qwest Corporation
3 20 East Thomas Road, 16th Floor
4 Phoenix, Arizona 85012

5 Lisa A. Anderl
6 Qwest Corporation
7 1600 7th Avenue, Room 3206
8 Seattle, Washington 98191

9
10
11
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13
14
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By Mary Appolito

APPENDIX

"A"

**LOCAL INTERCONNECTION
AGREEMENT**

BETWEEN

U S WEST COMMUNICATIONS, INC.

AND

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

FOR

THE STATE OF ARIZONA

(A)3.16 Survival

Any liabilities or obligations of a Party for acts or omissions prior to the cancellation or termination of this Agreement; any obligation of a Party under the provisions regarding indemnification, Confidential or Proprietary Information, limitations of liability, and any other provisions of this Agreement which, by their terms, are contemplated to survive (or to be performed after) termination of this Agreement, shall survive cancellation or termination hereof.

(A)3.17 Dispute Resolution

(A)3.17.1 If any claim, controversy or dispute between the Parties, their agents, employees, officers, directors or affiliated agents should arise, and the Parties do not resolve it in the ordinary course of their dealings (the "Dispute"), then it shall be resolved in accordance with the dispute resolution process set forth in this Section. Each notice of default, unless cured within the applicable cure period, shall be resolved in accordance herewith.

(A)3.17.2 At the written request of either Party, and prior to any other formal dispute resolution proceedings, each Party shall designate an officer-level employee, at no less than the vice president level, to review, meet, and negotiate, in good faith, to resolve the Dispute. The Parties intend that these negotiations be conducted by non-lawyer, business representatives, and the locations, format, frequency, duration, and conclusions of these discussions shall be at the discretion of the representatives. By mutual agreement, the representatives may use other procedures, such as mediation, to assist in these negotiations. The discussions and correspondence among the representatives for the purposes of these negotiations shall be treated as Confidential Information developed for purposes of settlement, and shall be exempt from discovery and production, and shall not be admissible in any subsequent arbitration or other proceedings without the concurrence of both of the Parties.

(A)3.17.3 If the vice-presidential level representatives have not reached a resolution of the Dispute within thirty (30) calendar days after the matter is referred to them, then either Party may demand that the Dispute be settled by arbitration. Such an arbitration proceeding shall be conducted by a single arbitrator, knowledgeable about the telecommunications industry. The arbitration proceedings shall be conducted under the then current rules of the American Arbitration Association ("AAA"). The Federal Arbitration Act, 9 U.S.C. Sections 1-16, not state law, shall govern the arbitrability of the Dispute. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. Each Party shall bear its own costs and attorneys' fees, and shall share equally in

the fees and expenses of the arbitrator. The arbitration proceedings shall occur in the state where the dispute occurs in a mutually agreed upon city. It is acknowledged that the Parties, by mutual, written agreement, may change any of these arbitration practices for a particular, some, or all Dispute(s).

- (A)3.17.4 Should it become necessary to resort to court proceedings to enforce a Party's compliance with the dispute resolution process set forth herein, and the court directs or otherwise requires compliance herewith, then all of the costs and expenses, including its reasonable attorney fees, incurred by the Party requesting such enforcement shall be reimbursed by the non-complying Party to the requesting Party.
- (A)3.17.5 Nothing in this Section is intended to divest or limit the jurisdiction and authority of the Commission or the Federal Communications Commission as provided by state or federal law.
- (A)3.17.6 No Dispute, regardless of the form of action, arising out of this Agreement, may be brought by either Party more than two (2) years after the cause of action accrues.

(A)3.18 Controlling Law

This Agreement was negotiated by the Parties in accordance with the terms of the Act and the laws of the state where service is provided hereunder. It shall be interpreted solely in accordance with the terms of the Act and the applicable state law in the state where the service is provided.

(A)3.19 Joint Work Product

This Agreement is the joint work product of the Parties and has been negotiated by the Parties and their respective counsel and shall be fairly interpreted in accordance with its terms and, in the event of any ambiguities, no inferences shall be drawn against either Party.

(A)3.20 Responsibility for Environmental Contamination

Neither Party shall be liable to the other for any costs whatsoever resulting from the presence or release of any environmental hazard that either Party did not introduce to the affected work location. Both Parties shall defend and hold harmless the other, its officers, directors and employees from and against any losses, damages, claims, demands, suits, liabilities, fines, penalties and expenses (including reasonable attorneys' fees) that arise out of or result from (i) any environmental hazard that the indemnifying Party, its contractors or agents introduce to the work locations or (ii) the presence or release of any environmental hazard for which the indemnifying Party is responsible under applicable law.

PART D - COLLOCATION

(D)1. Description

(D)1.1 Collocation allows for the placing of telecommunications equipment owned by McLeod within USWC's Central Office for the purpose of accessing Unbundled Network Elements (UNEs) and/or terminating EAS/Local and ancillary traffic.

(D)1.1.1 Virtual Collocation

With a Virtual Collocation arrangement, McLeod is responsible for the procurement of its own telecommunications equipment which USWC installs and maintains. McLeod does not have physical access to its equipment in the USWC Central Office but will be granted access to the appropriate cross-connect for making any cross connections it may require for access to USWC UNEs.

(D)1.1.2 Caged Physical Collocation

Caged Physical Collocation allows McLeod to lease caged floor space approximately in 100 square foot increments, up to a maximum of 400 square feet, for placement of its telecommunications equipment within USWC's Central Office for the purpose of interconnecting with USWC finished services or UNEs. McLeod is responsible for the procurement, installation and on-going maintenance of its equipment as well as the cross connections required at the appropriate cross-connect device for connecting its equipment to USWC UNEs.

(D)1.1.3 Cageless Physical Collocation

Cageless Physical Collocation is a non-caged area within a USWC Central Office. Space will be made available in standard 9 square foot, single bay increments. McLeod will be responsible for the procurement, installation and maintenance of the bays and telecommunications equipment. As with both Virtual and Caged Physical Collocation, Cageless Physical Collocation will also include access to the appropriate cross-connect device in which McLeod can make connections to USWC UNEs.

(D)1.1.4 Shared Space Caged Physical Collocation

Shared Space Caged Physical Collocation offers Co-Providers the opportunity to share a caged physical space with each other for the purpose of interconnecting with UNEs. Each collocator will be responsible for ordering entrance, power and terminations from USWC at time of application. In order to address issues around warehousing of space, the original collocator will not be allowed to charge the shared occupant a per square foot charge in excess of

the rate that the original collocator is presently charged by USWC. There are some limitations set on the original collocator as to rates and terms of the arrangement such as a per square foot charge not exceeding the recurring amount that USWC is charging.

(D)1.1.5 Interconnection Distribution Frame (ICDF) Collocation

Where McLeod does not require its equipment to be placed in a USWC Central Office, but wishes only to combine USWC UNEs, ICDF Collocation is available, where allowed by law.

The combination of the UNEs shall be completed at the appropriate USWC cross-connect device. Such devices will be located within USWC Central Offices for common or dedicated usage. The cross-connect devices accommodate DS0, DS1, DS3 and OCn terminations. Tie cable arrangements between the various USWC distribution frames may be required and will be provided in a nondiscriminatory manner.

(D)1.1.6 Microwave Collocation – See Attachment 1

(D)1.1.7 Adjacent Collocation

(D)1.1.7.1 USWC will accept requests from McLeod for adjacent collocation on an ICB basis. ICB requests will need to include at a minimum the following information: address of adjacent site, description of physical facility (i.e., type of building or structure), dimensions of structure, material of structure, and whether the structure is above ground or below ground. Prior to beginning construction, McLeod must provide proof of compliance with existing building and zoning codes as required by the respective municipality or county. It is McLeod's responsibility to "construct or procure" such an adjacent structure, subject only to reasonable safety and maintenance requirements.

(D)1.1.7.2 It is McLeod's responsibility should McLeod seek a USWC adjacent CEV site, to identify by site or CLLI code where it is seeking to collocate in a USWC owned CEV. Adjacent USWC CEV collocation will require that McLeod identify types, quantities, dimensions, and full NEBS attributes of the equipment to be collocated.

(D)1.1.7.3 USWC may provide some power arrangements in adjacent CEVs on an ICB basis where technically feasible. In each case, the Parties must negotiate for power and any other ancillary requirement.

(D)1.1.7.4 The Parties will mutually develop project timelines to complete each ICB request. If the Parties are unable to reach mutual agreement, the Dispute Resolution process will be utilized.

(D)2. Terms and Conditions – All Collocation

(D)2.1 With respect to any technical requirements or performance standards specified in this Section, USWC shall provide Collocation in a nondiscriminatory manner on rates, terms and conditions that are just, reasonable and nondiscriminatory.

(D)2.2 McLeod will only collocate telecommunications equipment which is necessary for interconnection and access to unbundled elements. McLeod must identify what telecommunications equipment will be installed and the vendor technical specifications of such equipment so that USWC may engineer the power, floor loading, heat release, environmental particulate level, and HVAC.

(D)2.3 Collocation requests require that space be provided for the placement of McLeod telecommunications equipment within or adjacent to USWC's Central Office. USWC will also provide, at a cost to McLeod, the structure that is necessary in support of this equipment. This includes but is not limited to, physical space, a cage (for Caged Physical Collocation), HVAC, any required cabling between McLeod's telecommunications equipment and the Distribution Frame and any other associated hardware.

(D)2.4 All equipment placed will meet NEBS Level 1 standards and will be installed in accordance with USW Technical Publications 77350, 77351, 77355, 77367, 77386 and 77390. USWC shall provide standard Central Office alarming pursuant to Technical Publication 77390.

(D)2.5 Collocation is offered on a first-come, first-served basis. Requests for Collocation may be denied due to the lack of sufficient space in a USWC Central Office for placement of McLeod's equipment. If USWC determines that the amount of space requested by McLeod for Caged Physical Collocation is not available, McLeod will be offered Collocation in the closest 100 square foot increment that is determined to be available in relation to the original request, or McLeod will be offered Cageless Physical Collocation (bay at a time), or Virtual Collocation as an alternative to Caged Physical Collocation.

- (D)2.6 Requests for Collocation from McLeod will be prioritized by USWC, but in the event McLeod submits requests for Collocation, such that more than five (5) requests per week, per state are in process by USWC, the following procedure shall apply:
- (D)2.6.1 USWC and McLeod shall work cooperatively and in good faith to establish a project plan and schedule to implement McLeod's requests for Collocation. The project plan shall establish staggered due dates on both the up-front and ready-for-service dates, and outline responsibilities for each Party;
- (D)2.6.2 The project plan established by USWC and McLeod to implement McLeod's request for Collocation may also be used by McLeod to prioritize implementation of Collocation requests in the event that five (5) or fewer requests for Collocation per week, per state submitted by McLeod are being processed by USWC;
- (D)2.6.3 Should the Parties not reach agreement on the project plan, McLeod's requests for Collocation shall be addressed by USWC on an individual case basis.
- (D)2.7 If a request for Collocation is denied due to a total lack of appropriate space in a USWC Central Office, McLeod may request USWC to provide a cost quote for the reclamation of space and/or equipment, or an adjacent collocation arrangement. Quotes will be developed within sixty (60) business days including the estimated time frames for the work that is required in order to satisfy the Collocation request. McLeod has thirty (30) business days to accept the quote. If McLeod accepts the quote, work will begin on receipt of 50% of the quoted charges, with the balance due on completion.

Reclamation may include the following:

Grooming – The moving of circuits from working equipment to other equipment bays with similar functionality for the purpose of providing space for interconnection.

Space Reclamation – Administrative space that can be reconditioned, downsized or modified for the placement of telecommunications equipment.

(D)2.8 Out of Space

USWC will provide documentation with the specific state Commission whenever a Collocation request is denied due to insufficient space. Additionally, if McLeod's request is denied, and McLeod requests the documentation, USWC will furnish a marked copy of that Central Office floor plan to McLeod. Tours of the affected Central Office, when requested, will be arranged through USWC channels, including USWC Legal Department, State Interconnection Management, and Account Management teams.

- (D)2.9 All equipment and installation shall meet the state specific earthquake rating requirements for Virtual or Cageless Collocation.
- (D)2.10 USWC will designate the POI for network Interconnection for Virtual, Physical, Adjacent, Cageless or Caged Physical Collocation arrangements. McLeod will be allowed access to the POI on non-discriminatory terms.
- (D)2.11 McLeod is responsible for providing its own fiber facilities to the POI outside USWC's Central Office. USWC will extend the fiber facility from the POI on a USWC fiber cable from the POI to a Fiber Distribution Panel (FDP). From the FDP additional fiber, conduit and associated riser structure will then be provided by USWC to continue the run to McLeod's telecommunications equipment or Collocation area. Where there is an adjacent collocation arrangement, the specifics will be determined on a site to site basis.
- (D)2.12 The Collocation entrance facility is assumed to be fiber optic cable and meets industry standards (GR. 20 Core). Metallic sheath cable is not considered a standard Collocation entrance facility. Requests for non-standard entrances will be considered on an individual case basis including an evaluation of the feasibility of the request. All costs and provisioning intervals will be developed on an individual case basis.
- (D)2.13 Dual entry into a USWC Central Office will be provided only when two entry points pre-exist and duct space is available. USWC will not initiate construction of a second, separate Collocation entrance facility solely for Collocation. If USWC requires a Collocation entrance facility for its own use, then the needs of McLeod will also be taken into consideration.
- (D)2.14 Where Collocation entrance facilities are not available, USWC will offer McLeod USWC OCn, DS3, or DS1 Private Line Transport Services in accordance with Tariff terms and conditions, in lieu of entrance facilities to be terminated at McLeod's collocated equipment.
- (D)2.15 USWC will review the security requirements and hours of access with McLeod. This will include issuing keys, ID cards, and explaining the access control processes, including but not limited to the requirement that all McLeod approved personnel are subject to trespass violations if outside of designated and approved areas or if found to be providing access to unauthorized individuals. McLeod personnel found outside of designated and approved areas, those being only those areas directly adjacent to McLeod equipment or McLeod terminated equipment, will be escorted away from those non-approved areas and reported to USWC Security. Repeated violations will result in denial of access to USWC facilities and a possibility of criminal penalties.
- (D)2.16 USWC shall provide access to existing eyewash stations, bathrooms, and drinking water within the collocated facility on a twenty-four (24) hours per day, seven (7) days per week basis for McLeod personnel and its designated agents.

- (D)2.17 McLeod shall be restricted to corridors, stairways, and elevators that provide direct access to McLeod's space, or to the nearest restroom facility from McLeod's designated space, and such direct access will be outlined during McLeod's orientation meeting. Access shall not be permitted to any other portion of the building, except to the roof top where microwave collocation has been installed.
- (D)2.18 Nothing herein shall be construed to limit McLeod's ability to obtain any or all types of USWC Caged Physical Collocation in a single location, provided space is available.
- (D)2.19 Conversion of the Virtual Collocation (e.g., Virtual-to-Cageless Physical) is available upon request and submission of a Quote Preparation Fee (QPF) by McLeod. McLeod must pay all associated conversion charges. Conversions shall be in accordance with USWC's standard Collocation provisioning processes. If required, McLeod will submit separate service orders for grooming McLeod's existing end user circuits to the new Collocation. Upon request, McLeod may convert a non-completed Virtual Collocation Order to a Cageless Physical Collocation. USWC will consider requests to use existing time frames if possible; such requests shall not be unreasonably denied.

(D)3. Collocation Terms and Conditions - Virtual Collocation

- (D)3.1 USWC is responsible for installing and maintaining Virtually Collocated equipment for the purpose of Interconnection of the mutual networks and to access UNEs.
- (D)3.2 McLeod will be responsible for obtaining and providing to USWC administrative codes, (e.g., common language codes, for all equipment provided by McLeod and installed in Wire Center buildings).
- (D)3.3 McLeod shall ensure that upon receipt of McLeod's Virtually Collocated equipment by USWC, all warranties and access to ongoing technical support are passed through to USWC, all at McLeod's expense. McLeod shall advise the manufacturer and seller of the virtually collocated equipment that McLeod's equipment will be possessed, installed and maintained by USWC.
- (D)3.4 McLeod's virtually collocated equipment must comply with the safety and engineering standards USWC applies to its own equipment for new installations. These standards are the Bellcore Network Equipment Building System (NEBS) Level 3 Generic Equipment Requirements TR-NWT-000063, USWC Wire Center environmental and transmission standards and any statutory (local, state or federal) and/or regulatory requirements in effect at the time of equipment installation or that subsequently become effective. USWC will not object to the collocation of McLeod's equipment on the grounds the equipment fails to comply with NEBS performance standards. McLeod shall provide USWC interface specifications (e.g., electrical, functional, physical and software) of McLeod's virtually collocated equipment.

Part H
Rates

Rate Element	Rates	
MOU		
- Tandem Switched Transport		
- Tandem Switching, per MOU	\$ 0.0014	N/A
- Tandem Transmission, per minute	\$ 0.00088	N/A
- Cancellation Charge (LIS Trunks)	USWC Arizona State Switched Access Tariff	
- Expedite Charge	USWC Arizona State Switched Access Tariff	
- Construction Charges	ICB	ICB
- Exchange Access (IntraLATA Toll)	USWC's Arizona Switched Access Tariff	
- Transit Traffic		
- Exchange Service (EAS/Local) Transit	\$ 0.00932	N/A
- Exchange Access (IntraLATA Toll) Transit	USWC's Arizona Switched Access Tariff At assumed 9 miles	
Category 11 Mechanized Record	\$ 0.0025	N/A
	Recurring Charge	Nonrecurring Charge
H3. Collocation		
- All Collocation		
- Quote Prep. Fee	N/A	\$ 1381.54
- Collocation Entrance Facility- 2 Fibers	\$ 1.52	\$ 1184.74
- Express Fiber Entrance Facility per total	\$15.36	\$19,994.39
- Cross Connect Fiber Entrance Facility per fiber	\$2.96	\$2825.51
- Collocation Entrance		
- Manhole, per month, per manhole	\$ 13.81	N/A
- Handhole, per month, per handhole	\$ 7.61	N/A
- Conduit/Innerduct POI to vault, per foot	\$ 0.21	N/A
- Core drill, per occurrence	N/A	\$ 181.57
- Riser, vault to equipment, per foot	\$ 0.24	N/A
- Fiber Optic cable, per	\$ 0.03	N/A

Part H
Rates

Rate Element	Rates	
24 fibers, per foot		
- Fiber Placement in conduit and riser, per foot	N/A	\$0.83
- Copper 25 pair, per foot	\$ 0.006	N/A
- Copper splicing, per splice	N/A	\$ 45.64
- Copper placement conduit and riser, per foot	N/A	\$ 0.83
- Coax placement, per foot	\$ 0.10	N/A
- Cable Splicing		
- Per set-up	N/A	\$ 375.40
- Per fiber spliced	N/A	\$ 15.79
-Power (all)		
- 48 Volt DC Power, per ampere	\$ 12.89	N/A
- 48 Volt DC Power Cable, per ampere, per foot, per A and B feeder		
- 20 Ampere Capacity	\$ 0.21	\$ 59.14
- 40 Ampere Capacity	\$ 0.29	\$ 80.69
- 60 Ampere Capacity	\$ 0.35	\$ 95.34
- 100 Ampere Capacity	\$ 0.22	\$ 133.28
- 200 Ampere Capacity	\$ 0.35	\$ 208.78
- 300 Ampere Capacity	\$ 0.48	\$ 288.33
- 400 Ampere Capacity	\$ 0.62	\$ 372.89
	Recurring Charge	Nonrecurring Charge
- AC Power, Per Watt, per month	\$ 0.03	N/A
- Inspector, per ½ hour		
- During business hours	N/A	\$ 24.49
- After business hours	N/A	\$ 36.24
- Cross Connect Terminations		
- Per Termination		
- DS0	\$ 0.0107	\$ 5.30
- DS1	\$ 0.0393	\$ 12.54
- DS3	\$ 0.3169	\$ 190.07
- OCn	ICB	ICB
- Block Terminations		
- DS0	\$ 1.45	\$ 716.57
- DS1	\$ 0.9174	\$ 550.32

Part H
Rates

Rate Element	Rates	
- DS3	\$ 0.5149	\$ 308.87
- OCn	ICB	ICB
- Security *		
- Per Employee, Per C.O.	\$ 6.40	N/A
* If escort is required additional charges will apply on an ICB.		
- Cable Racking, per foot, per termination		
- Per DS0, 2-wire	N/A	\$ 0.0137
- Per DS0, 4-wire	N/A	\$ 0.0274
- Per DS1	N/A	\$ 0.0411
- Per DS3	N/A	\$ 0.6846
- OCn	N/A	ICB
- Channel Regeneration		
- DS1 Regeneration		\$ 0
- DS3 Regeneration	\$ 41.32	\$ 0
- Grounding (with the exception of Virtual Collocation)		
- 2 AWG	\$ 0.1194	\$ 5.97
- 1/0 AWG	\$ 0.1763	\$ 8.82
- 4/0 AWG	\$ 0.2096	\$ 10.48
- 350 kcmil	\$ 0.3228	\$ 16.14
- 500 kcmil	\$ 0.3765	\$ 18.83
- 750 kcmil	\$ 0.4672	\$ 23.36
- CO (Central Office) Synchronization, per equipment bay	\$8.32	N/A
- Virtual Collocation		
- Maintenance Labor, per ½ hour		
- During business hours	N/A	\$ 22.20
- After business hours	N/A	\$ 31.57
- Training Labor, per ½ hour	N/A	\$ 23.95
- Engineering, per ½ hour		
- During business hours	N/A	\$ 24.55
- After business hours	N/A	\$ 35.25
- Installation, per ½ hour		
- During business hours	N/A	\$ 23.73

Part H
Rates

Rate Element	Rates	
- After business hours	N/A	\$ 33.20
- Equip. Bay, per shelf	\$ 6.41	N/A
- Physical Collocation		
- Space Construction and Space Preparation	N/A	ICB
- Floor Space Lease		
- Zone 1	\$ 2.75	N/A
- Zone 2	\$ 2.26	N/A
- Zone 3	\$ 2.06	N/A
- Back-up AC Power, per foot, per AMP	Recurring Charge	Nonrecurring Charge
- 20 Amp, Single Phase	\$ 0.02	\$ 9.78
- 20 Amp, Three Phase	\$ 0.02	\$ 11.08
- 30 Amp, Single Phase	\$ 0.02	\$ 10.21
- 30 Amp, Three Phase	\$ 0.02	\$ 12.38
- 40 Amp, Single Phase	\$ 0.02	\$ 11.23
- 40 Amp, Three Phase	\$ 0.02	\$ 13.82
- 50 Amp, Single Phase	\$ 0.02	\$ 12.52
- 50 Amp, Three Phase	\$ 0.03	\$ 15.74
- 60 Amp, Single Phase	\$ 0.02	\$ 13.58
- 60 Amp, Three Phase	\$ 0.03	\$ 17.46
- 100 Amp, Single Phase	\$ 0.03	\$ 15.78
- 100 Amp, Three Phase	\$ 0.04	\$ 22.18
- Humidification	\$ 28.03	N/A
- Cageless Physical Collocation	N/A	ICB
H4. UNEs (Unbundled Network Elements)		
- ITP (Interconnection Tie Pairs) (Also known as EICT)		
- ITP, Per Termination		

APPENDIX

"B"

FILED WITH
Executive Secretary

AUG 15 2006

IOWA UTILITIES BOARD

Date: August 15, 2006

Company Name: McLeodUSA Telecommunications Services, Inc.

Subject Matter: Application for Rehearing

Person to Contact: Bret A. Dublinske
Krista K. Tanner
Dickinson, Mackaman, Tyler & Hagen, P.C.
699 Walnut Street, Ste. 1600
Des Moines, Iowa 50309
Telephone: 515/244-2600
Facsimile: 515/246-4550
bdublins@dickinsonlaw.com
ktanner@dickinsonlaw.com

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STATE OF IOWA
DEPARTMENT OF COMMERCE
IOWA UTILITIES BOARD

FILED WITH
Executive Secretary

AUG 15 2006

IOWA UTILITIES BOARD

MCLEODUSA TELECOMMUNICATIONS
SERVICES, INC.

v.

QWEST COMMUNICATIONS, INC.

)
)
) DOCKET NO. FCU-06-20

)
) APPLICATION FOR
) REHEARING
)
)
)

COMES NOW McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), and pursuant to Iowa Code § 476.12 files this Application for Rehearing in Docket FCU-06-20. In support of its Application, McLeodUSA states:

BACKGROUND

McLeodUSA filed a complaint on February 8, 2006, against Qwest Corporation ("Qwest") alleging violations of Iowa and federal law in applying an amendment to the Interconnection Agreement executed by the parties in August 2004. McLeodUSA also filed a separate count alleging that Qwest had improperly high collocation power rates. On February 20, 2006, Qwest filed its Answer and a counterclaim alleging that McLeodUSA had improperly failed to pay amounts withheld from disputed invoices.

On March 6, 2006, the Iowa Utilities Board ("IUB") issued an order dismissing without prejudice Count II, dealing with the collocation rate level, and setting a procedural schedule. A hearing was held on May 10 and 11, 2006. Briefs were filed by McLeodUSA, Qwest, and the Office of Consumer Advocate on June 2, 2006. Oral arguments were held on June 15, 2006, in lieu of reply briefs.

On July 27, 2006, the IUB issued its written Final Order. In its Final Order, the IUB discussed the facts but did not reach any particular holdings on the law. The IUB determined that the 2004 Amendment was ambiguous, and based solely on extrinsic evidence, concluded that Qwest's interpretation of the 2004 Amendment was proper. The IUB further determined that although it appears that Qwest is treating McLeodUSA differently than it treats itself, the IUB did not believe the record on this issue had been fully developed. The IUB further stated that it was not *clear* that it had the authority to grant McLeodUSA immediate relief. McLeodUSA respectfully disagrees, and requests the Board reconsider its decision.

With respect to applications for reconsideration, Board Rule 7.27(2) provides

[a]pplications for rehearing or reconsideration shall specify the findings of fact and conclusions of law claimed to be erroneous, with a brief statement of the alleged grounds of error.

The Final Order did not separately specify any factual findings or legal conclusions.

McLeodUSA makes the following specification of the issues and aspects of the Board's decision that McLeodUSA believes are in error and should be reconsidered by the Board.

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

The Board did not apply proper standards of contract interpretation when interpreting the 2004 Amendment. The Board erred by relying on extrinsic evidence to rule in Qwest's favor when in fact the contract itself clearly supports the McLeodUSA interpretation of the 2004 Amendment.

Before determining that a contract provision is ambiguous, and consequently, before it is permissible for the Board to rely on extrinsic evidence to ascertain the parties' intent in

interpreting the 2004 Amendment, the Board must first review the four corners of the agreement to determine the parties' intentions. The parties' intent is controlling.¹

It is black letter contract law that related provisions in a contract must be harmonized.² The DC Power Measuring Amendment amends the interconnection agreement ("ICA") between Qwest and McLeodUSA. As an amendment to the underlying ICA, the Board must interpret the 2004 Amendment within the context of the entire ICA and harmonize the 2004 Amendment with its related provisions.³ Iowa case law makes it clear that an interpretation that gives a reasonable, lawful, and effective meaning to all terms is preferred to interpretation that leaves a part unreasonable, unlawful, or of no effect.⁴

Part IV of the ICA⁵ defines Collocation as an Ancillary Function. Collocation expressly includes "the ILEC providing resources necessary for the operation and economical use of collocated equipment." ICA Section 39.1. It is indisputable that power is one such resource that is necessary for McLeodUSA to use its collocated equipment.

Section 40 of the ICA is entitled "Standards for Ancillary Functions." This section of the ICA unequivocally states that Qwest must provide McLeodUSA access to ancillary functions, *i.e.* collocation power in this instance, on non-discriminatory terms. "Each Ancillary Function provided by ILEC to CLEC shall be at least equal in the quality of design, performance, features, functions and other characteristics, including, but not limited to levels and types of redundant equipment and facilities for diversity and security, that the ILEC provides in the ILEC network

¹ *Iowa National Mutual Insurance Company, v. Fidelity and Casualty Company of New York*, 256 N.W.2d 723, 726 (Iowa 1964). It is improper to consider extrinsic evidence to change the meaning of the actual agreement in absence of an ambiguity. *RPC Liquidation v. Iowa Department of Transportation*, 717 N.W.2d 317 (Iowa 2006).

² *Greene v. Day*, 34 Iowa 328 (1872).

³ *Id.*

⁴ *FashionFabrics of Iowa, Inc. v. Retail Investors Corp.*, 266 N.W.2d 22, 26 (Iowa 1978).

⁵ The Board took official notice of the entire ICA between Qwest and McLeodUSA. The relevant sections of Part IV of the ICA discussed herein are attached as Reconsideration Exhibit A for ease of reference. The relevant section

to itself and to any other party.” ICA Section 40.1 (emphasis added).⁶

Additionally, Attachment 4 to the ICA contains service descriptions of the Ancillary Functions and imposes the identical non-discrimination obligation on Qwest as that imposed in Section 40.1, Part IV. This section specifically imposes the non-discrimination obligation with respect to Qwest’s provision of power to McLeodUSA:

2.2.24 Power as referenced in this document refers to any electrical power source supplied by the ILEC for the CLEC equipment. It includes all superstructure, infrastructure, and overhead facilities, including, but not limited to cable, cable racks and bus bars. The ILEC will supply power to support the CLEC equipment at equipment specific DC and AC voltages. *At a minimum, the ILEC shall provide power to the CLEC at parity with that provided by the ILEC to itself or to any third party.....*(emphasis added).⁷

Barring a clear statement to the contrary in the 2004 Amendment, the 2004 Amendment must be interpreted in a manor that harmonizes the 2004 Amendment with Part IV, Section 40.1 and Attachment 4, Section 2.2.24 governing Qwest’s obligation to provide McLeodUSA access to power to support its collocation equipment. In other words, the 2004 Amendment must be interpreted to ensure that Qwest is providing power to support the McLeodUSA collocated equipment on terms that is equal to how Qwest provides such power to itself. Interpreting the 2004 Amendment as Qwest advocated results in inconsistent provisions within the ICA governing access to this Ancillary Function of collocation power.

The Board’s Final Order provides no indication, and Qwest has never argued, that the 2004 Amendment contains any language that either expressly or impliedly undoes or in any way alters the Standards of Ancillary Functions set forth in Section 40.1, or the clear non-

to Attachment 4 of the ICA is attached as Reconsideration Exhibit B.

⁶ Reconsideration Exhibit A.

⁷ Reconsideration Exhibit B. Both sections of the ICA make it clear that Qwest cannot validly claim that its discrimination is lawful since it is equally discriminating amongst CLECs.

discrimination obligation with respect to power in Attachment 4, Section 2.2.24, or otherwise exempts collocation power as an Ancillary Function subject to the non-discrimination requirement. That is not surprising because the 2004 Amendment does not contain any provision indicating that it is the intent of the parties to amend or alter Part IV, Section 40.1 or Attachment 4, Section 2.2.24 of the ICA. Nor has Qwest ever identified another provision within the ICA or the 2004 Amendment that would support a conclusion that the parties intended to create an exception to either of these other ICA provisions governing Qwest's obligations to provide McLeodUSA collocation power on a non-discriminatory basis.

By failing to review the four corners of the ICA in interpreting the 2004 Amendment that requires Qwest to provide McLeodUSA non-discriminatory access to power, the Board erred as a matter of law in interpreting the 2004 Amendment. Unless the ruling is changed upon reconsideration, the Board is sanctioning Qwest to provide McLeodUSA access to power on terms less favorable than Qwest provides to itself under the 2004 Amendment. Such a result is wholly inconsistent with the clear intent of the parties as evidenced by the language in Part IV, Section 40.1, and Attachment 4, Section 2.2.24 of the ICA. The Board's interpretation is, therefore, erroneous as a matter of law and should be reconsidered.

The Board also erred in its interpretation of the 2004 Amendment by failing to recognize that ICAs are not traditional contracts. As highlighted in the concurring opinion of Boardmember Stamp, the Tenth Circuit Court of Appeals recognized in a case involving Qwest that an ICA is an instrument arising in the context of ongoing state and federal regulation that have provisions to facilitate competition and ensure that carriers are not treated in a discriminatory manner.⁸ Iowa case law similarly requires the Board to interpret the 2004

⁸ *E.Spire Communications, Inc. v. New Mexico Public Regulation Commission*, 392 F.3d 1204, 1207 (10th Cir.

Amendment under the presumption that it incorporates applicable statutes into the contracts.⁹ That means that in interpreting the 2004 Amendment, the Board should have presumed the intent of the parties entering into an ICA and any amendment is to properly implement the Act and comparable state law requirements that give rise to the ICA. Thus, the 2004 Amendment must be interpreted consistent with state and federal law requirement of nondiscrimination firmly in mind. Such interpretation is justified and is not an impermissible modification of an interconnection agreement.¹⁰

The Board also erred by interpreting the 2004 Amendment without giving due consideration to Qwest's Section 251(c) obligations that give rise to McLeodUSA's access to collocation power. The Board's Final Order is devoid of any discussion of Section 251(c). The parties' intention in entering into the 2004 Amendment must be presumed to be consistent with Qwest's obligation under Section 251(c) of the Act.¹¹ There is certainly no evidence that either party intended to eliminate Qwest's legal obligations under Section 251(c) and the existing ICA by signing the 2004 Amendment.¹²

To the contrary, given the existing ICA between the parties and the legal requirement for non-discriminatory access to power as required by Section 251(c), McLeodUSA had every right to expect that Qwest had to provision power under the 2004 Amendment to McLeodUSA on

2004) (“[A]n interconnection agreement is part and parcel of the federal regulatory scheme and bears no resemblance to an ordinary, run-of-the-mill private contract.”) (citations omitted).

⁹ *Miller v. Marshall County*, 641 N.W.2d 742, 751 (Iowa 2002).

¹⁰ See *E Spire*, 392 F.3d at 1208.

¹¹ *Miller*, 641 N.W.2d at 751.

¹² Moreover, while McLeodUSA acknowledges that the ICA includes a provision that it was jointly negotiated and therefore ambiguity should not be resolved against either party, the evidence was clear on the record that with respect to the DC Power Measuring Amendment, Qwest drafted and presented that document. At the very least, it should not get the benefit of any ambiguity or be permitted to take shelter in drafting problems that are of its own making.

terms equal to how Qwest provides power to itself. Further, McLeodUSA had every right to expect that the 2004 Amendment would result in a lawful amendment to the ICA that fulfilled the existing non-discrimination requirements of the ICA since there was no expressed intent in the 2004 Amendment to the contrary. Indeed, there is not one scintilla of evidence that McLeodUSA intended to agree to discriminatory access to power by signing the 2004 Amendment.¹³

As required by law governing interconnection and access to elements of the ILEC's local network, the ICA embodies Qwest's obligation under section 251(c)(6) of the Act to provide McLeodUSA access to the necessary element of DC power as part of Qwest's obligation to provide collocation "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." The DC Power Measuring Amendment, as interpreted by the Board, is at odds with Part IV, Section 40.1 and Attachment 4, Section 2.2.24 of the ICA and Qwest's obligations under federal and Iowa law. In contrast, the McLeodUSA interpretation harmonizes all ICA provisions governing access to DC Power, maintains the consistency of the entire ICA, and fulfills the nondiscrimination requirements of federal and state law. When 2004 Amendment is interpreted in accordance with the rules of contract interpretation, there is no basis to look beyond the terms of the 2004 Amendment and the related ICA provisions, Part IV, Section 40.1 and Attachment 4, Section 2.2.24 of the underlying ICA. The Board should reconsider its interpretation of the 2004 Amendment, and upon reconsideration, adopt the McLeodUSA

¹³ In addition, it is noteworthy that even if the Board were permitted to consider extrinsic evidence proffered by Qwest in interpreting the 2004 Amendment, there is no evidence that either party, including Qwest, was intending to void Qwest's legal obligation to provide CLECs non-discriminatory access to collocation power by executing the 2004 Amendment. If there is no evidence that either party expressed an intent to void this clear legal obligation under Section 251(c), then it would be improper to find that such an intent was implicit within the language drafted by Qwest. Along similar lines, once it reached the issue of extrinsic evidence, the Board failed to properly weigh the uncontradicted testimony that McLeodUSA's intent was to get power plant charges in Iowa treated more like they are treated in Illinois: on a measured basis. The Board's interpretation of the intent of the parties requires

interpretation.

B. The Record is Adequate to Find Unlawful Discrimination, and Qwest is Not Entitled to a Chance to Change its Discredited Explanation for its Discriminatory Practices.

In its Final Order, the Board made the following findings with respect to DC Power Plant and the access Qwest provides to McLeodUSA:

- DC power plant is designed to provide sufficient power to accommodate the peak requirements of all DC-powered telecommunications equipment in a central office, including Qwest and CLEC equipment.
- Peak usage is measured by the busy day/busy hour for the central office
- Qwest's engineering standards for DC power plant equipment state the criteria to be used when sizing the equipment to serve a maximum power draw that occurs on the busy day/busy hour.
- Qwest sizes its power plant to meet List 1 Drain or an approximation of it by sizing the power plant at 40-70 percent of List 2 Drain.
- List 2 Drain is used to size power cables and other components that make up the feeder distribution system.
- Qwest has not expended capital on power plant capacity augmentation that would equate to McLeodUSA "ordered power."¹⁴
- Power plant facilities are not dedicated to individual companies but are common to all those within the central office, including Qwest.
- Qwest charges CLECs based on the basis of "power ordered," or List 2 Drain, while Qwest assigns the same costs to itself at List 1 drain.

Despite these findings, the Board stated that, with regard to discrimination, "the record has not been fully developed on this issue." *Final Order* at 14. The Board went on to state that "[a]lthough *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. . ." *Id* (emphasis added). The Board concludes that "[t]his subject should be revisited. . . in an appropriate docket". *Id.* at 15. McLeodUSA respectfully asserts that the Board's conclusion is in error.

believing the unlikely scenario that McLeodUSA intended to perpetuate its own subsidy of Qwest.

¹⁴ McLeodUSA has consistently maintained throughout this proceeding that its order for distribution cables amperage cannot and should not be construed as an order for DC power capacity. The collocation form evidences no indication that an order for such cables is an order for "power." Without any explanation or record citation, the Board adopts this Qwest misnomer in its analyses on discrimination. There is no basis to find that an order for

The record is certainly developed as to the fact that discrimination exists. Qwest admits as much in numerous places in the record. The Board finds this to be the case in the Final Order. Yet, the Final Order inexplicably indicates that Qwest should have an additional opportunity to present reasons in a future proceeding for discrimination that the Board might find acceptable. The Board should reconsider its ruling with respect to its analyses of discriminatory access to power provided by Qwest to McLeodUSA.

First, the issue of discrimination was clearly presented in the Complaint. Qwest had every opportunity and an obligation to present its full defense to the evidence of discrimination entered into the record by McLeodUSA. And indeed, Qwest did so: Qwest witness Hubbard testified extensively that the reason CLECs had to be billed for power plant based on the size of their power cable order is that each time "McLeod submits orders asking for large amounts of DC power. . . even 175 amps, this will definitely trigger a power plant capacity growth job." See Tr. 579:12-14. It just so happens that Qwest's chosen defense against the discrimination claim completely fell apart under cross-examination. However, that does not mean the Board lacks an adequate record; the Board has an adequate record upon which it should be concluded that Qwest's discrimination is indefensible. There is no precedent in the law for telling a complainant to "come back later and let the defendant produce evidence supporting a different theory." Such a result is clearly prejudicial to McLeodUSA and there is no basis in law for the Board's decision to give Qwest a second bite at the apple in proving the reasonableness of its discrimination. Certainly, the Board cites no evidence nor provides any legal justification for granting Qwest an opportunity to come up with a better theory and supporting evidence in the next case; nor did Qwest provide support for such a theory in its post-hearing briefing.

distribution cables is an order for "power".

More importantly, however, is that under the controlling law and the ICA between the parties, it is wholly irrelevant whether Qwest can subsequently produce a reasonable excuse for its discriminatory treatment of McLeodUSA that it was unable to explain in the current proceeding. Section 251(c) of the federal Telecommunications Act does not distinguish between “reasonable” and “unreasonable” discrimination – the prohibition on discrimination is *absolute*.

As explained in detail in the McLeodUSA Post hearing brief, the FCC has stated

By comparison [with section 202], section 251(c)(2) creates a duty for incumbent LECs "to provide . . . any requesting telecommunications carrier, interconnection with a LEC's network on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." The nondiscrimination requirement in section 251(c)(2) is not qualified by the "unjust or unreasonable" language of section 202(a). We therefore conclude that Congress did not intend that the term "nondiscriminatory" in the 1996 Act be synonymous with "unjust and unreasonable discrimination" used in the 1934 Act, but rather, intended a more stringent standard.¹⁵

Furthermore, as previously detailed, the Qwest-McLeodUSA ICA contains the same unqualified non-discrimination requirement with regard to collocation power.¹⁶ So even if Qwest were somehow entitled to proffer a different defense in a future case, and even were Qwest somehow able to provide evidence of a reasonable basis for discrimination in that future proceeding, such evidence could not change the lawful outcome. The law and existing ICA are absolutely clear: Qwest must provide power to McLeodUSA on terms and conditions that are on equal terms to how Qwest provides itself access to power.

Upon reconsideration, the Board should, consistent with Section 251(c) and the ICA, find that Qwest is unlawfully discriminating against McLeodUSA in the providing access to power.

¹⁵ Qwest must provide collocation “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory,” *id.*, which is exactly the obligation as Qwest has to provide unbundled network elements under Section 251(c)(3). See, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325, First Report and Order, 11 FCC Rcd.15499 para. 217 (1996)(“*Local Competition Order*”)

C. **The Board Has Ample Authority to Address Qwest's Discrimination in this Proceeding.**

As previously discussed, the Board erred in interpreting the 2004 Amendment by failing to interpret it within the context of the four corners of the integrated ICA and in accordance with federal and state law. Upon reconsideration if the Board properly interprets the 2004 Amendment, then the discrimination issue discussed below is moot. The discrimination is eliminated by the proper implementation of the 2004 Amendment. However, upon reconsideration if the Board continues to interpret the 2004 Amendment as an agreement between Qwest and McLeodUSA for Qwest to bill McLeodUSA for the power plant element based on the size of the distribution cables originally ordered by McLeodUSA, then the Board must still address the discrimination issue set forth below on reconsideration to remedy the discrimination on a going forward basis.

In the Final Order, although the Board conceded that it appears that Qwest is treating McLeodUSA different than Qwest treats itself, the Board— the sole regulator of telecommunications services in Iowa – finds “it is not clear that the Board can remedy the situation.” *Id.* It is an untenable result that the Board can find discrimination by the ILEC— discrimination which diminishes the ability of competitors to compete, discrimination that results in an improper subsidy to Qwest, discrimination that ultimately raises rates for consumers in Iowa – and then state an unwillingness to promptly require the ILEC to immediately cease the unlawful discrimination. If the Board cannot fulfill this function, who can? Boardmember Stamp in concurrence states that he has “trouble accepting that if an agreement is being applied in a discriminatory manner that a CLEC has no remedy for relief other than waiting for the next

(emphasis added).

¹⁶ Part IV: Ancillary Functions, Section 40.1 discussed *supra*.

round of negotiations” of its interconnection agreement. *See Final Order* at 19-20. Boardmember Stamp is correct: the Board should not accept such a result. The Board should reconsider its erroneous conclusion that it lacks legal authority to remedy the unlawfully discriminatory treatment.

Pacific Bell v. Pac-West Telecom. Inc., 325 F.3d 1114 (9th Cir. 2003) (“*Pacific Bell*”) does not stand for the principle that an agency cannot remedy discrimination it has already found to exist. Contrary to what Qwest claimed, that decision does not prevent this Board from correcting the unlawful discriminatory treatment to which the evidentiary record shows McLeodUSA has been subjected under Qwest’s interpretation of the DC Power Measuring Amendment.

The court in *Pacific Bell* reviewed California Public Utilities Commission rulings on the applicability of reciprocal compensation provisions in all ICAs between ILECs and CLECs in California to calls bound for Internet Service Providers (“ISPs”). “[T]hese orders were adopted as part of a generic rule-making proceeding that would affect all existing ‘applicable interconnection agreements’ in California.” *Id.* at 1125. The Ninth Circuit invalidated the orders, concluding that the California Commission “lacks authority under the Act to promulgate general ‘generic’ regulations over ISP traffic” in light of the FCC’s determination that such traffic is jurisdictionally interstate “thereby placing it under the purview of federal regulators rather than state public utility commissions.”¹⁷ The court also concluded:

The CPUC’s only authority over interstate traffic is its authority under 47 U.S.C. § 252 to approve new arbitrated interconnection agreements and to interpret existing ones according to their own terms. By promulgating a generic order binding on existing interconnection agreements without reference to a specific agreement

¹⁷ *Id.*

or agreements, the CPUC acted contrary to the Act's requirement that interconnection agreements are binding on the parties, or, at the very least, it acted arbitrarily and capriciously in purporting to interpret "standard" interconnection agreements.¹⁸

The Ninth Circuit's decision in *Pacific Bell* is a far cry from the case at hand in this proceeding.

The Ninth Circuit based its ruling on the fact that the FCC declared that ISP traffic was interstate in nature, and therefore, outside of the California PUC's authority. In contrast, there is no doubt that the Board has jurisdiction over disputes involving the ICA between Qwest and McLeodUSA. In fact, the ICA expressly provides that a dispute under the ICA can be resolved by a complaint to this Board.¹⁹ That is entirely different than the generic rules governing all ICAs that were before the court in *Pacific Bell*.²⁰ Indeed, the Ninth Circuit overturned the California Commission orders, in part, *because* "it did not consider a specific interconnection agreement or even a specific reciprocal compensation provision."²¹ Both the Amendment and the ICA between McLeodUSA and Qwest are before the Board in this docket, and the Board has full authority to interpret those documents.²²

Therefore, the Board's refusal to redress the unlawful discrimination due to a perceived lack of authority to do so must be reconsidered. The Board does, in fact, have proper jurisdiction and authority to remedy the discrimination found to exist in this proceeding, and in fact the

¹⁸ *Id.* at 1125-26.

¹⁹ ICA Attachment 1, Section 2.1. "Either party to this Agreement may invoke the informal and formal complaint procedures of the Iowa Utilities Board for any dispute arising out of this Agreement. (emphasis added).

²⁰ Nor can Qwest legitimately claim that the *Pacific Bell* decision precludes McLeodUSA's discrimination claim. No such issue was before the Ninth Circuit in that case, and nothing in the parties' ICA condones, much less authorizes, discrimination in the provision of DC power. To the contrary as discussed further below, the ICA expressly requires such provisioning to be nondiscriminatory.

²¹ *Id.* at 1128.

²² Again, it is important to note that the *Pacific Bell* decision has no relevance with respect to the proper interpretation of the 2004 Amendment. That ruling has absolutely no bearing on the interpretation of an ICA amendment. And for the reasons stated in this section, the *Pacific Bell* ruling also does not prohibit this Board from resolving a dispute under the ICA. The ICA expressly provides the Board the authority to do so.

Agreement requires the Board to do so.

D. The Record Does not Support a Finding that Exhibit A “As Ordered” Should be Based on the Order for Distribution Cables; Reaching this Necessary Issue Allows the Board Another Avenue to Remedy the Discrimination.

Assuming the Board was correct that Qwest’s interpretation of the DC Power Measuring Amendment is proper (something McLeodUSA disputes), that means that power plant is to be billed on an “as ordered” rather than an “as measured” basis. *But the Board failed to address a necessary issue in this case: what does “as ordered” mean?* McLeodUSA and the Consumer Advocate demonstrated – and Qwest ultimately conceded – that Qwest receives no such thing as an order for an amount of power plant. Because the term “as ordered” is not defined anywhere, because the Agreement is silent on that issue, the Board still must determine how Qwest can apply the term “as ordered.” Reaching this issue is yet another way the Board can, and should, immediately remedy the discrimination it has found exists in this case even if the Board does not change its interpretation of the 2004 Amendment on reconsideration.

There are two reasonable answers supported by the record. One, the actual real-time draw of power from the power plant can be viewed as the “order,” which would result in McLeodUSA being charged for actual consumption. It is likely that this most closely approximates what Qwest actually imputes to itself. Alternatively, because Qwest concedes that it builds power plant to List 1 drain, the CLEC “order” could reasonably be defined consistent with that as the sum of the CLEC equipment’s List 1 drain. Either result resolves the ambiguity in the use of the term “as ordered,” and either minimizes the discrimination presently occurring. What is clear is that Qwest’s current practice of using initial power cable orders as a proxy for the “as ordered” power plant capacity requirements is improper.

The record confirms that McLeodUSA orders power distribution cables when it

collocates equipment in Qwest's central offices. Indeed, that is the only information regarding McLeodUSA's power needs that Qwest requires a collocating CLEC to submit on the collocation application form written by Qwest. Qwest does not give CLECs the option to order "power plant capacity" via its collocation application. Yet, throughout this proceeding, Qwest repeatedly (and without any basis in fact) refers to McLeodUSA's request for power feeder cable amperage as McLeodUSA's "power order." Such references are inaccurate, misleading and willfully inconsistent with the record of this case.

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

In point of fact, such an assumption is in direct violation of Qwest's internal technical documentation and the manner by which it constructs power plant. The technical documents would not lead anyone to believe that an order for distribution cables would be assumed to be an order for power capacity. It is undisputed in this record that Qwest's technical publications state that central office power plant are to be designed to "List 1 drain," and that the List 2 drain of the power cable capacity is not used to size the power plant capacity. There simply is no evidentiary basis to find that the "as ordered" means List 2 drain.

Upon reconsideration, if the Board does not change its interpretation of the 2004 Amendment, the Board should construe "as ordered" to be the actual amount of the power used by McLeodUSA since that is what McLeodUSA is actually "ordering" from Qwest as it is being

used.

CONCLUSION

In summary, the Board should reconsider its interpretation of the DC Power Measuring Amendment in light of the totality of the Interconnection Agreement between the parties, and the requirements of Iowa law on contracts, as well as the state and federal telecommunications laws requiring non-discriminatory treatment of competitors. Should the Board maintain its interpretation of the Agreement, the Board should reconsider the separate issue of unlawful discrimination. The record is strong that discrimination exists; the Board erred in asking whether such discrimination is "reasonable." In any event, the Board can resolve this issue by looking at the application of the term "as ordered," and ordering that presently undefined term to be applied in a competitively neutral manner. The Board should reconsider its decision, and should grant McLeodUSA the appropriate relief requested in its Complaint.

Respectfully submitted this 15th day of August, 2006.



BRET A. DUBLINSKE
Dickinson, Mackaman, Tyler & Hagen, P.C.
699 Walnut Street, Ste. 1600
Des Moines, Iowa 50309-3986
Telephone: (515) 244-2600
Facsimile: (515) 246-4550
Email: bdublins@dickinsonlaw.com

And

WILLIAM A. HAAS, Deputy General Counsel
WILLIAM H. COURTER, Assoc. General Counsel
McLeodUSA Telecommunications Services
P.O. Box 3177, 6400 C Street SW
Cedar Rapids, Iowa 52406
Telephone: (319) 790-7744
Facsimile: (319) 790-7901

ATTORNEYS FOR MCLEODUSA

37.14.11 In the event of a dispute under this Section 37.14, the Parties agree to seek expedited Board resolution of the dispute, with a request to the Board to be completed within twenty (20) days of the ILEC's response that declined the CLEC's BFR, and in no event more than thirty (30) days after the the filing of the CLEC's petition.

PART IV: ANCILLARY FUNCTIONS

38. Introduction

38.1 This Part IV sets forth the Ancillary Functions that the ILEC agrees to offer to the CLEC so that the CLEC may obtain and use unbundled Network Elements or the ILEC services to provide services to its customers.

39. The ILEC Provision of Ancillary Functions

The ILEC will offer Ancillary Functions to the CLEC on rates, terms and conditions that are just, reasonable, and non-discriminatory and in accordance with the terms and conditions of this Agreement. The ILEC will permit the CLEC to interconnect the CLEC's equipment and facilities or equipment and facilities provided by the CLEC or by third parties at any point designated by the CLEC that is technically feasible.

The CLEC may use any Ancillary Function to provide any feature, function, or service option that such Ancillary Function is capable of providing.

Subsections 39.1 through 39.3 below list the Ancillary Functions that the CLEC and the ILEC have identified as of the Effective Date of this Agreement. The CLEC and the ILEC agree that the Ancillary Functions identified in this Part IV are not exclusive. Either party may identify additional or revised Ancillary Functions as necessary to improve services to customers, to improve network or service efficiencies or to accommodate changing technologies, customer demand, or regulatory requirements. Upon the identification of a new or revised Ancillary Function, the party so identifying the new or revised Ancillary Function shall notify the other party of the existence of and the technical characteristics of the new or revised Ancillary Function. If the parties do not agree on the existence of and the technical characteristics of the newly identified or revised Ancillary Function, any issues that have not been resolved by the parties within thirty days of notification shall be submitted to the Dispute Resolution Procedures as set forth in Attachment 1. Within thirty (30) days of the CLEC and the ILEC agreeing on the technical characteristics of the new or revised Ancillary

Function, the parties will attempt to agree on the rates, terms and conditions that would apply to such Ancillary Function and the effects, if any, on the price, performance or other terms and conditions of existing Network Elements or Ancillary Functions. If the parties do not agree on rates, terms and conditions and other matters set forth herein, any issues that have not been resolved by the parties within thirty days shall be submitted to the Dispute Resolution Procedures as set forth in this Agreement. Additionally, if the ILEC provides any Ancillary Function that is not identified in this Agreement to itself, to its own customers, to a ILEC affiliate or to any other entity, the ILEC will provide the same Ancillary Function to the CLEC at rates, terms and conditions no less favorable to the CLEC than those provided by the ILEC to itself or to any other party. The Ancillary Functions are described below. Additional descriptions, and requirements for each Ancillary Function are set forth in Attachment 4.

39.1 Collocation

"Collocation" is the right of the CLEC to obtain dedicated space in the ILEC Local Serving Office (LSO) or at other ILEC locations and to place equipment in such spaces to interconnect with the ILEC network. Collocation also includes the ILEC providing resources necessary for the operation and economical use of collocated equipment.

39.2 Right of Way (ROW), Conduits and Pole Attachments

"Right of Way (ROW)" is the right to use the land or other property of another party to place poles, conduits, cables, other structures and equipment, or to provide passage to access such structures and equipment. A ROW may run under, on, or above public or private property (including air space above public or private property) and may include the right to use discrete space in buildings, building complexes or other locations.

"Conduit" is a tube or protected trough that may be used to house communication or electrical cables. Conduit may be underground or above ground (for example, inside buildings) and may contain one or more inner ducts.

"Pole attachment" is the connection of a facility to a utility pole. Some examples of facilities are mechanical hardware, grounding and transmission cable, and equipment boxes.

39.3 Unused Transmission Media

"Unused Transmission Media" are physical inter-office transmission media (e.g., optical fiber, copper twisted pairs, coaxial cable) which have no lightwave or electronic transmission equipment terminated to such media

to operationalize their transmission capabilities. This media may exist in aerial or underground structure or within a building.

Dark Fiber, one type of unused transmission media, is unused strands of optical fiber. Dark Fiber also includes strands of optical fiber existing in aerial or underground structure which have lightwave repeater (regenerator or optical amplifier) equipment interspliced to it at appropriate distances, but which has no line terminating elements terminated to such strands to operationalize its transmission capabilities. Alternately, Dark Fiber means unused wavelengths within a fiber strand for purposes of coarse or dense wavelength division multiplexed (WDM) applications. Typical single wavelength transmission involves propagation of optical signals at single wavelengths (1.3 or 1.55 micron wavelengths). In WDM applications, a WDM device is used to combine optical signals at different wavelengths on to a single fiber strand. The combined signal is then transported over the fiber strand. For coarse WDM applications, one signal each at 1.3 micron and 1.55 micron wavelength are combined. For dense WDM applications, many signals in the vicinity of 1.3 micron wavelength or 1.55 micron wavelength are combined. Spare wavelengths on a fiber strand (for coarse or dense WDM) are considered Dark Fiber.

40. Standards for Ancillary Functions

40.1 Each Ancillary Function shall meet the requirements set forth in the technical references, as well as the performance and other requirements, identified herein. If another Bell Communications Research, Inc. ("Bellcore"), or industry standard (e.g., American National Standards Institute ("ANSI")) technical reference sets forth a different requirement, the later requirement applies unless the parties mutually elect a different standard.

Each Ancillary Function provided by the ILEC to the CLEC shall be at least equal in the quality of design, performance, features, functions and other characteristics, including, but not limited to levels and types of redundant equipment and facilities for diversity and security, that the ILEC provides in the ILEC network to itself and to any other party.

The ILEC shall provide to the CLEC, upon reasonable request, such engineering, design, performance and other network data sufficient for the CLEC to determine that the requirements of this Agreement are being met. In the event that such data indicates that the requirements of this Agreement are not being met, the ILEC shall, within 30 days, cure any design, performance or other deficiency and provide new data sufficient for the CLEC to determine that such deficiencies have been cured.

The ILEC agrees to work cooperatively with the CLEC to provide Ancillary

Functions that will meet the CLEC's needs in providing services to its customers.

Unless otherwise designated by the CLEC, each Ancillary Function provided by the ILEC to the CLEC shall be made available to the CLEC on a priority basis that is at least equal to the priorities that the ILEC provides to itself and to any other party.

PART V: PRICING

41. General Principles

41.1 All services currently provided hereunder (including resold Local Services), Network Elements, and all new and additional services or Network Elements to be provided hereunder, shall be priced in accordance with all applicable provisions of the Act and the rules and orders of the Board.

All services that the ILEC provides at retail to subscribers who are not telecommunications carriers shall be provided at wholesale rates. Wholesale rates shall be determined on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the ILEC.

All such charges for Network Elements shall be nondiscriminatory.

42. Price Schedules

Local Service Resale - Schedule 1

Unbundled Network Elements - Schedule 2

Charges for Network Elements will be based on rates as determined by the Board.

43. Construction Charges

43.1 All rates, charges and initial service periods specified in this Agreement contemplate the provision of network interconnection services and access to Network Elements to the extent existing facilities are available. In addition, the ILEC will provide modifications to existing facilities necessary to accommodate interconnection and access to Network Elements provided for in this Agreement. ILEC will consider requests to build additional or further facilities for network interconnection and access to

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Operations

Site and Building Managers

Environmental and Safety

2.2.23.4 Escalation process for the ILEC representatives (names, telephone numbers and the escalation order) for any disputes or problems that might arise pursuant to the CLEC's collocation.

2.2.23.5 Architectural quality drawings depicting the exact location, dimensions, physical obstructions and other pertinent information regarding the proposed collocated space.

2.2.23.6 Installer access restrictions.

2.2.23.7 Vendor/supplier certification requirements.

2.2.23.8 Installation intervals from the application date through the completion date.

2.2.24 Power as referenced in this document refers to any electrical power source supplied by the ILEC for the CLEC equipment. It includes all superstructure, infrastructure, and overhead facilities, including, but not limited to, cable, cable racks and bus bars. The ILEC will supply power to support the CLEC equipment at equipment specific DC and AC voltages. At a minimum, the ILEC shall supply power to the CLEC at parity with that provided by the ILEC to itself or to any third party. If the ILEC performance, availability, or restoration falls below industry standards, the ILEC shall bring itself into compliance with such industry standards as soon as technologically feasible.

2.2.24.1 Central office power supplied by the ILEC into the CLEC equipment area, shall be supplied in the form of power feeders (cables) on cable racking into the designated CLEC equipment area. The power feeders (cables) shall efficiently and economically support the requested quantity and capacity of the CLEC equipment. The termination location shall be as requested by the CLEC.

CERTIFICATE OF SERVICE

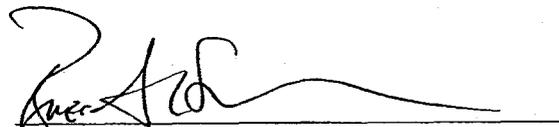
I hereby certify that I have this day hand delivered a copy of the document attached to the following person at the address below. Further, I have supplemented service by hand delivery with delivery by electronic mail to the address listed below:

Mr. Tim Goodwin
Qwest Communications
925 High Street, 9S9
Des Moines, Iowa 50309
tim.goodwin@qwest.com

I hereby certify that I have this day hand delivered a copy of the document attached to the following person at the address below.

Office of the Consumer Advocate
310 Maple Street
Des Moines, Iowa 50319

Dated in Des Moines, Iowa, on August 15, 2006.


BRET A. DUBLINSKE

APPENDIX

"C"

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE:

MCLEODUSA TELECOMMUNICATIONS
SERVICES, INC.,

Complainant,

v.

QWEST CORPORATION,

Respondent.

DOCKET NO. FCU-06-20

ORDER GRANTING REHEARING FOR PURPOSES OF RECONSIDERATION

(Issued September 12, 2006)

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 alleged it is being overcharged by Qwest for collocation power charges in violation of Iowa law and the interconnection agreement between the parties. On July 27, 2006, the Board issued a final order finding, in summary, that the language of the amended interconnection agreement is ambiguous and that extrinsic evidence supported Qwest's proposed interpretation. The Board also determined that Qwest was treating McLeodUSA differently than it treats itself in terms of power supply, but found that the record was not sufficiently developed to support a conclusion that the difference in

treatment is discriminatory. Further, the Board expressed concerns regarding its authority to grant McLeodUSA immediate relief, if relief were shown to be appropriate.

On August 15, 2006, McLeodUSA filed an application for rehearing, pursuant to Iowa Code § 476.12. In its application, McLeodUSA requests reconsideration of the Board's final order. McLeodUSA argues that the interconnection agreement, as amended, is not ambiguous because it clearly prohibits discrimination when providing power. McLeodUSA argues it is entitled to power on terms equal to the terms Qwest provides to itself and the interconnection agreement should be interpreted to produce that result.

Next, McLeodUSA argues that the record before the Board is adequate to find unlawful discrimination on the part of Qwest. Once discrimination is found, then the Board has the authority to address the issue; McLeodUSA points to Attachment 1, § 2.1 of the Agreement as giving authority to the Board to resolve all disputes concerning the interconnection agreement.

Finally, McLeodUSA argues that the Board should consider and decide the question of what the amended interconnection agreement means when it says that McLeodUSA is to be billed for power capacity as ordered, but Qwest admits that there are no actual orders to be used for this purpose.

McLeodUSA asks that the Board reconsider its final decision and grant it the relief requested. McLeodUSA does not request additional hearings or briefing.

On August 17, 2006, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a joinder in McLeodUSA's application for rehearing. Consumer Advocate offers arguments supplementing and expanding upon McLeodUSA's arguments and also asks that the Board reconsider its final order, but does not request additional hearings or briefing.

On August 28, 2006, Qwest filed a motion for an extension of time to respond to the application for rehearing and the joinder. No objections have been filed and the Board will grant the motion for extension of time.

On August 31, 2006, Qwest filed its response. As an initial matter, Qwest argues that Consumer Advocate's application for rehearing was filed late and should not be considered. Qwest then generally argues that McLeodUSA and Consumer Advocate are asking the Board to change the interconnection agreement, not amend it, and this the Board should not, and cannot, do.

More specifically, Qwest argues that the Board interpreted the amended interconnection agreement correctly in its final order, for all of the reasons described in that order. Qwest also argues that its power plant charges are not discriminatory for a variety of reasons. First, Qwest says that McLeodUSA is basically arguing that it does not matter what the parties agreed to or intended when they negotiated and amended the interconnection agreement, that the Board should rewrite the agreement to avoid an alleged discriminatory outcome. Qwest says there is no legal or factual basis for this argument. Instead, Qwest notes that McLeodUSA agreed to

pay power plant charges on an as-ordered basis and there is no evidence that McLeodUSA is treated differently than other, similarly-situated competitive local exchange carriers (CLECs). Qwest argues that its practices do not give any preference or advantage to Qwest, even if it is treated differently and that the difference in treatment is a natural consequence of the fact that Qwest does not collocate in its own buildings. This difference in the manner in which the various parties are present in the buildings makes a meaningful comparison between Qwest's treatment of itself and its treatment of the CLECs difficult, at best.

With respect to McLeodUSA's claim that the Board must interpret the agreement's reference to billing for power capacity "as ordered," Qwest argues that orders for power feeds are orders for power plant capacity, according to Exhibit 127. This interpretation is supported by the fact that McLeodUSA paid Qwest on this basis for four years, according to Qwest.

Overall, Qwest asserts that this docket is not the appropriate vehicle for addressing what power rates would be just, reasonable, and non-discriminatory on a going-forward basis. Finally, Qwest asks for correction of the Board's final order in one respect, relating to the amount of money withheld by McLeodUSA during this dispute and the proper amount that should be paid by McLeodUSA to Qwest.

Iowa Code § 476.12 provides that when an application for rehearing is filed with the Board, the Board must either grant or refuse the application within 30 days or give the interested parties notice and opportunity to be heard and then consider all

facts, including but not limited to facts arising since the final order was issued, in determining whether to abrogate or modify the final order. In this case, McLeodUSA and Consumer Advocate have not asked for the opportunity to submit additional facts or argument; they ask only that the Board reconsider its final order in light of the arguments presented in their applications. Similarly, Qwest has not asked for the opportunity to submit additional facts or argument. Therefore, the Board will grant rehearing in this matter solely for the purpose of giving further consideration to the existing record and the arguments presented to date.

IT IS THEREFORE ORDERED:

1. The motion for extension of time filed by Qwest Corporation on August 28, 2006, is granted.
2. To the extent the joinder in application for rehearing filed on August 17, 2006, by the Consumer Advocate Division of the Department of Justice can be considered an untimely application for rehearing, the Board finds any possible prejudice to Qwest from that late filing is cured by granting Qwest's motion for extension of time, so the Board may consider the arguments presented by Consumer Advocate.
3. Pursuant to Iowa Code § 476.12, the Board will grant the application for rehearing filed on August 15, 2006, by McLeodUSA Telecommunications Services, Inc., solely for purposes of further consideration. No additional filings or submissions

DOCKET NO. FCU-06-20
PAGE 6

by the parties are desired or authorized at this time. The Board will issue another order when it decides whether to modify its final order.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 12th day of September, 2006.

APPENDIX

"D"

FILED WITH
Executive Secretary

SEP 12 2006

IOWA UTILITIES BOARD

Date: September 12, 2006

Company Name: McLeodUSA Telecommunications Services, Inc.

Subject Matter: Response to Qwest's Objections to Reconsideration

Person to Contact: Bret A. Dublinske
Krista K. Tanner
Dickinson, Mackaman, Tyler & Hagen, P.C.
699 Walnut Street, Ste. 1600
Des Moines, Iowa 50309
Telephone: 515/244-2600
Facsimile: 515/246-4550
bdublins@dickinsonlaw.com
ktanner@dickinsonlaw.com

Initial Filing: Yes No

Docket No. (if any): FCU-06-20

Copies Filed: Original + 10

SEP 12 2006

STATE OF IOWA
DEPARTMENT OF COMMERCE
IOWA UTILITIES BOARD

IOWA UTILITIES BOARD

MCLEODUSA TELECOMMUNICATIONS
SERVICES, INC.

v.

QWEST COMMUNICATIONS, INC.

)
)
) DOCKET NO. FCU-06-20

)
) REPLY TO RESPONSE
) TO APPLICATION FOR
) REHEARING

COMES NOW McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), and files its Reply to Qwest's Response to Application for Rehearings in Docket FCU-06-20. In support of its Reply, McLeodUSA states:

INTRODUCTION

Qwest's Response offers the Iowa Utilities Board ("Board") a dangerous option to support the Board ruling with respect to the Power Measuring Amendment (also herein referred to as the "2004 Amendment"): the Board can contravene clear federal and Iowa law and other sections of the ICA between the parties and rule that Qwest can provide McLeodUSA discriminatory access to DC power that impedes McLeodUSA's ability to effectively compete with Qwest. It apparently is of no consequence to Qwest that it is taking such a position even though its CLEC affiliate is aggressively seeking consumption based power charges, or in effect, exactly the opposite result in other states such as Illinois. Qwest should not be permitted to benefit from taking thoroughly inconsistent positions. It is absolutely essential that the Board reject the notion that the ILEC is empowered to discriminate in the manner in which Qwest does. Indeed, Qwest's claim that McLeodUSA has not been harmed and is actually benefiting from

Qwest's scheme of applying the Power Plant charge based on the size of McLeodUSA power cable orders is offensive and defies common sense. The discriminatory treatment that McLeodUSA has been subjected to by Qwest under the interpretation of the 2004 Amendment adopted by the Board has cost McLeodUSA more than \$500,000 in Iowa alone compared to what McLeodUSA should be paying for were Qwest providing power on a nondiscriminatory basis in compliance with federal and state laws, as well what as the ICA expressly requires of Qwest.

Finally, although Qwest did not apply for rehearing, Response relies on factual claims and arguments previously rejected by the Board. While Qwest declares that Office of Consumer Advocate's ("OCA") Joinder in the McLeodUSA Application for Rehearing is impermissible, it is noteworthy that Qwest is willing to rely on arguments and claims already rejected by the Board when Qwest itself did not seek reconsideration of these findings.

I. THE BOARD ERRED BY FAILING TO INTERPRET THE 2004 AMENDMENT TO FULFILL THE INTENT OF THE PARTIES THAT QWEST MUST PROVIDE MCLEODUSA ACCESS TO POWER ON NON-DISCRIMINATORY TERMS.

Qwest claims that McLeodUSA is not "challeng[ing] the interpretation as much as they seek to change the agreement."¹ To the contrary, the complaint was filed because McLeodUSA and Qwest disagreed on the meaning of the 2004 Amendment. McLeodUSA requested the Board, as it is authorized to do by law and the underlying ICA, to render its verdict on what the 2004 Amendment means. Qwest's constant harping that McLeodUSA is seeking to "change the

¹ Qwest's Response to Applications For Rehearing at 2. In fact, Qwest makes this claim about 15 times throughout its Response. See pages 2, 3, 4, 5, 6, 7, 8, 9,10, 15, & 16. While repeating something ad nasuem may work in the political arena to create one's own reality," that tactic does not work in the quasi-judicial context. McLeodUSA is not trying to "change" or "rewrite" the agreement. In fact, as later discussed, Qwest is the only party that is trying to re-write the

agreement” is nonsense. By claiming that the agreement means what Qwest says it means when it was signed in August 2004, Qwest is merely trying to assume away the dispute. Qwest’s argument is beyond self-serving.

Qwest argues that the evidence of the parties’ intent lies first in the words “of the Amendment itself, and secondarily in the extrinsic evidence relating to the parties’ intent.” Qwest then accuses McLeodUSA of not arguing this clear and fundamental point of contract law, and further claims “[i]ndeed, McLeod offers no authority for any other interpretative approach.”²

Apparently, rather than addressing the arguments detailing the *other interpretative approaches* based on Iowa case law set forth on pages 4-8 of the McLeodUSA Application for Rehearing, Qwest has chosen to respond as if such arguments were never made. In effect, Qwest’s reply advocates the Board should ignore Iowa case law in rejecting the McLeodUSA Application for Rehearing. Deliberately ignoring the line of cases detailing the proper means by which an agreement should be interpreted is not something the Board has that luxury of doing. The interpretation of the ICA, as amended by the 2004 Amendment, is a legal issue. Accordingly, the Board must provide a reasoned opinion for going beyond the four corners of the ICA as amended by the 2004 Amendment and adopting an interpretation based solely on extrinsic evidence.³

In the Final Order, the Board determined that language of the Amendment was unclear and that both parties’ interpretations were reasonable.⁴ However, rather than resort to extrinsic

agreement.

² Qwest Response at 4 (emphasis added).

³ Iowa Code Section 17A.16 (2005).

⁴ Final Order at 6.

evidence as the Board did, Iowa case law dictates that, absent an ambiguity in the contract, the intent of the parties must be gleaned from the words of the Agreement.⁵ In its Response, Qwest limits the analysis of the “words used” to a consideration of only the words in the Amendment – rather than looking at the words of the Agreement, as amended, before turning to extrinsic evidence to determine the parties’ intent. Qwest cites no case authority to support its claim that the Board’s analysis is properly limited in that manner.⁶

To the contrary, the Amendment is not a stand-alone contract. It is part and parcel of the ICA. Indeed, 2004 Amendment itself makes this clear on its face:

The Agreement⁷ is hereby amended by adding the terms, conditions and rates for DC Power Measuring, as set forth in Attachment 1, attached hereto and incorporated herein.

Except as modified herein, the *provisions of the Agreement shall remain in full force and effect....*

The Agreement as amended (including the documents referred to herein) *constitutes the full and entire understanding and agreement between the Parties with regard to the subjects of the Agreement as amended*⁸

Indeed, the 2004 Amendment would make absolutely no sense outside the context of the underlying ICA. Yet, Qwest apparently believes that only certain parts of the ICA are relevant to determine the meaning of the 2004 Amendment. Indeed, that’s the only plausible explanation

⁵ *Smith Barney, Inc. v. Keeney*, 570 N.W.2d 75 (Iowa 1997)

⁶ Throughout the proceeding, Qwest has cited case law establishing the black letter principle that the intent of the parties should be determined at the *time the agreement was executed*. (Qwest Response 4). Yet, the primary evidence that Qwest consistently championed as definitive evidence of intent, and unfortunately, the evidence relied on by the Board in its Final Order, was the CMP documentation from October 2003, some nine months before the execution of the 2004 Amendment. The lengthy period of time from October 2003 and the actual execution of the Amendment certainly undermines the usefulness of relying on that documentation in proving intent in August 2004.

⁷ Obviously, the “Agreement” referenced is the Interconnection Agreement.

for Qwest's complete silence with respect to Sections 39 & 40 and Attachment 4 of the ICA that were detailed in the McLeodUSA Application for Rehearing.

While Qwest barely acknowledges in its Response that related provisions in the ICA exist addressing Qwest's obligations to provide McLeodUSA power, the Board cannot ignore these other provisions. It has been Iowa law for over 100 years that related provisions in a contract must be harmonized.⁹ An interpretation that gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation that leaves a part unreasonable, unlawful, or of no effect.¹⁰ When these principles of contract interpretation are properly applied, the intent of the parties set forth in the ICA, as amended by the 2004 Amendment, is clear and must be given effect. There is no basis for considering any extrinsic evidence. The interpretation adopted by the Board in the Final Order must be changed upon reconsideration.

Both Section 40 and Attachment 4 to the ICA clearly state that the intent of the parties is that Qwest must provide McLeodUSA non-discriminatory access to power. Section 2.2.24 could not be any clearer:

Power as referenced in this document refers to any electrical power source supplied by the ILEC for the CLEC equipment. It includes all superstructure, infrastructure, and overhead facilities, including, but not limited to cable, cable racks and bus bars. The ILEC will supply power to support the CLEC equipment at equipment specific DC and AC voltages. *At a minimum, the ILEC shall provide power to the CLEC at parity with that provided by the ILEC to itself or to any third party.....(emphasis added).*¹¹

Barring a clear statement to the contrary in the 2004 Amendment, the 2004 Amendment must be interpreted in a manor that harmonizes the 2004 Amendment with Section 40.1 and

⁸ Exhibit 5, p. 1 (emphasis added).

⁹ *Greene v. Day*, 34 Iowa 328 (1872).

¹⁰ *FashionFabrics of Iowa, Inc. v. Retail Investors Corp*, 266 N.W.2d 22, 26 (Iowa 1978).

Attachment 4, Section 2.2.24. In other words, the 2004 Amendment must be interpreted to ensure that Qwest is providing power to support the McLeodUSA collocated equipment on terms that are equal to how Qwest provides such power to itself.

In its response, Qwest made no attempt to identify any provision in the 2004 Amendment that expresses an intent to supercede or change the obligations set forth in Section 40.1 or Attachment 4, Section 2.2.24. Instead, as will be discussed later, Qwest's only answer is to argue that these related sections do not mean what they clearly say.¹² Of course, the fact that Qwest is forced to misrepresent what these related provisions require of Qwest is quite telling. Qwest's response in this regard is nothing less than an admission that its interpretation of the 2004 Amendment is inconsistent with these related ICA provisions governing its obligation to provide power.

It was erroneous as a matter of Iowa case law to rely on extrinsic evidence before reviewing the four corners of the entire ICA to interpret the 2004 Amendment. Iowa courts have consistently relied on the language of the Agreement before resorting to extrinsic evidence to ascertain the intent of the parties. Unless the ruling is changed upon reconsideration, the Board is sanctioning Qwest to provide McLeodUSA access to power under the 2004 Amendment on terms less favorable than Qwest provides power to itself. That misguided interpretation wrongfully creates a conflict within the Agreement, and is wholly inconsistent with the clear intent of the parties as evidenced by the language in Attachment 4, Section 40.1, and Attachment 4, Section 2.2.24 of the ICA. Adopting an interpretation of the 2004 Amendment that creates a

¹¹ Section 40 and Part 4 of the ICA, attached to Application for Reconsideration, Exhibit B.

¹² Qwest Response at 9-10.

conflict with other sections of the ICA is clearly inconsistent with Iowa precedent.¹³

Qwest's continued reliance on *Pac. Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003) is based on its phony claim that McLeodUSA is seeking to "change" the agreement. McLeodUSA has never agreed, consented or in any manner assented to Qwest's interpretation. By filing a complaint, McLeodUSA requested the Board to decide in the first instance what the 2004 Amendment means. The only way that this can be construed as *changing* the agreement is if one erroneously subscribes to Qwest's self-serving theory that the Amendment is automatically what Qwest says it is. Without repeating the argument, the ICA clearly contemplates the Board has the authority to determine what the 2004 Amendment means in the first instance, and that determination can in no way can be deemed a "change" of the ICA. Accordingly, the *Pac Bell* order is not applicable.

II. SECTION 251(C)(6), IOWA CODE 476.100(2), AND THE ICA REQUIRE QWEST TO PROVIDE NON-DISCRIMINATORY ACCESS TO POWER ON TERMS THAT PUTS MCLEODUSA ON EQUAL FOOTING WITH QWEST; THE QWEST INTERPRETATION OF THE 2004 AMENDMENT ADOPTED BY THE BOARD IS INCONSISTENT WITH THE NON-DISCRIMINATION OBLIGATIONS UNDER THE LAW AND THE ICA.

Starting at page 11 of its Response, Qwest attempts to rewrite the non-discrimination requirements of Section 251. Notably absent from the Qwest Response is any citation supporting its claims that some undefined level of discriminatory treatment is permissible under Section 251.¹⁴

¹³ *Fashion Fabrics of Iowa, Inc. v. Retail Investors Corporation*, 266 N.W. 2d 22, 26 (Iowa 1978).

¹⁴ Qwest's response does not even attempt to address Iowa Code Section 476.100(2), which as explained in the OCA Joinder, imposes virtually the same "non-discrimination" standard. Rather than using the term "non-discriminatory, Iowa Code Section 476.100(2) prohibits a local exchange carrier from discriminating against another provider of communications services by

Qwest disagrees that Section 251 requires Qwest to treat McLeodUSA in a manner that is at parity with how Qwest treats itself. Qwest argues that “[n]o case of FCC has ever imposed an ‘absolute’ standard of non-discrimination.” Instead, Qwest claims the FCC only determined that the standard under 251 is “more stringent.”¹⁵ Qwest’s limited view of the FCC’s determination in Local Competition Order is demonstrably wrong.¹⁶

In its Local Competition Order, the FCC concluded that the prohibition against discrimination that appears throughout Section 251 of the Act is “unqualified.”¹⁷ “Unqualified” means “[n]ot modified by conditions or reservations; **absolute**: an *unqualified* refusal.” AMERICAN HERITAGE COLLEGE DICTIONARY 1479 (3rd Edition) (bold added; italics in original). The FCC compared this “unqualified” or absolute prohibition contained in Section 251(c) with the Section 202 prohibition that includes qualifying terms such as “undue” or “unjust and unreasonable.” The FCC characterized the Section 251 nondiscrimination standard as being more “stringent”, which it most definitely is, but the FCC did not, as Qwest avers, leave open the question as to what that stringent standard is - the FCC expressly stated that the Section 251 is an “unqualified” prohibition against discrimination. Thus, the FCC determined there was an absolute prohibition against discrimination under Section 251(c) of the Act.

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. Iowa Code Section 476.100(2) (2005).

¹⁵ Qwest Response at 11.

¹⁶ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, First Report and Order, 11 FCC Rcd.15499 (1996) (“Local Competition Order”).

¹⁶ *Id.* ¶ 218.

¹⁷ *Id.* ¶ 217.

¹⁷ *Id.* ¶ 218.

Further discussion by the FCC in its Local Competition Order corroborates that conclusion. For example, in interpreting the prohibition on discrimination under Section 251 of the Act, the FCC stated that:

we reject for purposes of section 251, our historical interpretation of "non-discriminatory," which we interpreted to mean a comparison between what the incumbent LEC provided other parties in a regulated monopoly environment. We believe that the term 'nondiscriminatory,' *as used throughout section 251*, applies to the terms and conditions an incumbent LEC imposes on third parties *as well as on itself*. In any event, by providing interconnection to a competitor in a manner less efficient than an incumbent LEC provides itself, the incumbent LEC violates the duty to be "just" and "reasonable" under section 251(c)(2)(D).¹⁸

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

The duty to provide unbundled network elements on "terms, and conditions that are just, reasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and **where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.**¹⁹

While the FCC provided this context in discussing nondiscriminatory access to UNES under 251(c)(3), Section 251(c)(6) contains the identical "just, reasonable and nondiscriminatory" standard as does Section 251(c)(3). Further, this illumination applies with equal force to Section 251(c)(6) since, as the FCC stated, the Section 251 "*unqualified*" non-discrimination standard was the same "throughout all of Section 251."²⁰

Moreover, Qwest's claim that the law does not require it to treat McLeodUSA in a

¹⁸ *Id.* (emphasis added).

¹⁹ *Id.* ¶ 315.

²⁰ *Id.* ¶ 218.

manner that is identical to how it treats itself ignores that the ICA expressly imposes such an obligation on Qwest.²¹ The ICA was submitted to, and approved by, the Board as required by Section 252 and applicable Iowa law. The ICA, therefore, has the force and effect of “law” between the parties.

Accordingly, the “law” between Qwest and McLeodUSA with respect to power is that Qwest must treat McLeodUSA in the same manner as it does itself. To paraphrase something Qwest repeatedly states in its Response, Qwest consented to provide McLeodUSA access to power in the same manner as it does for itself. Accordingly, Qwest, not McLeodUSA, is the party that seeks to change the agreement by ignoring this obligation to which it agreed to undertake.²²

Qwest’s effort to water down the unqualified prohibition against discriminatory access by noting immaterial differences such as CLEC equipment being caged while Qwest equipment is not, is absurd. The FCC explained its rationale for adopting its interpretation of a strict prohibition against discrimination under Section 251(c) was to ensure that CLECs have a “meaningful opportunity to compete.”²³ Obviously, the fact that McLeodUSA has its equipment caged while Qwest does not, is of no moment. That distinction has no discernable impact on McLeodUSA’s ability to effectively compete with Qwest. In contrast, the record in this case amply demonstrates that McLeodUSA is effectively subsidizing Qwest’s use of an essential

²¹ ICA, Attachment 4 Section 2.2.24

²² While the ICA is clear that Qwest consented in to this nondiscriminatory treatment of McLeodUSA with respect to access to power, as explained *supra*, Qwest’s claim that McLeodUSA “consented” to being billed for power on an “as ordered” is not supported by any provision in the ICA. Again, Qwest merely assumes its application of the Board approved rate was approved in the cost docket and that its interpretation of the 2004 Amendment is what the parties agree to.

²³ Local Competition Order ¶ 315

input – DC power – because Qwest charges McLeodUSA based on the size of the power feeder cables *i.e.*, List 2 Drain, which is much higher than the basis on which Qwest assigns costs to itself. According to Ms. Spocogee’s testimony, that discriminatory treatment costs McLeodUSA upwards of \$50,000 in excessive DC Power charges *per month*. It is indefensible to trivialize the impact on McLeodUSA resulting from that level of excessive monthly operating costs by comparing it to the impact, if any, of caged versus not caged equipment.

Finally, Qwest makes what appears to be an admission in its Response that should be of interest to the Board. Qwest argues it is not discriminating because “it does not ‘charge’ itself power plant rates – Qwest engineers for its own needs at List 1 drain.”²⁴ First, Qwest’s claim is directly counter to a finding made by the Board in its Final Order.²⁵ More importantly, IAC Rule 190-38.5 requires Qwest to impute the costs of elements (such as DC power) its retail rates.²⁶ Given Qwest’s statement, it is questionable whether Qwest is complying with the Board’s imputation requirement if it does not charge itself for power. Perhaps Qwest’s admission merely confirms what McLeodUSA has suspected throughout this proceeding – that Qwest’s recovers all DC Power Plant costs from McLeodUSA and other CLECs through overcharges, thereby eliminating any costs for Qwest to recoup from its own retail customers.

III. MCLEODUSA HAS NEVER CONSENTED OR AGREED TO QWEST’S BILLING FOR POWER BASED ON THE SIZE OF MCLEODUSA’S PWER CABLES.

At several different points in its Response, Qwest argues that McLeodUSA has agreed or consented to discriminatory treatment with respect to power charges.²⁷ Without record or

²⁴ Qwest Response at 9.

²⁵ Final Order at 14, citing Transcript 658-59.

²⁶ 199 IAC 38.5.

²⁷ Qwest Response at 7-10.

document citations in Qwest's Response, the basis of its misguided assertions is unclear.

On page 7, Qwest states that "McLeodUSA does not dispute that it *agreed*, in its ICA, to pay the Power Plant charges in an as-ordered basis."²⁸ Qwest further claims that McLeodUSA "consented" to the application of the Power Plant rate on an "as-ordered" basis. Is Qwest referring to the 1997 ICA or the amended ICA in 2004? Either way, Qwest claims are without merit.

McLeodUSA has consistently disputed that it agreed to pay for Power Plant based on the size of its power feeder cables under the 2004 Amendment. If the basis of the claim is that McLeodUSA did not challenge the billings under the 2004 Amendment until nine months after the 2004 Amendment was signed, Ms. Spocogee provided an explanation for the delay – McLeodUSA first raised concerns with Qwest immediately after the first full audit after the 2004 Amendment was implemented.

If the basis is that billings based on the size of the feeder cables was implemented by Qwest after the 2001 rate approval by the Board without objection, the fact that McLeodUSA did not dispute the billings cannot be deemed a consent or acquiescence to the billings. The ICA clearly states that any waiver to a right a party has under the Agreement shall not be effective unless in writing and signed by the party against whom such waiver or consent is claimed.²⁹ Both Section 40 and Attachment 4 of the ICA gave McLeodUSA the right to access power for its collocation equipment on the terms and conditions that were at parity with how Qwest provides power to itself. Unless there is a document signed by McLeodUSA that expressly waives that right, there is no basis to claim that McLeodUSA consented or otherwise waived its right to

²⁸ Qwest Response at 7 (emphasis in original).

²⁹ ICA Section 19.1.

challenge the failure of Qwest to meet its obligations clearly set forth in those sections of the ICA.

Further, Qwest cites no ICA provision that states that the Power Plant charge will be billed based on the size of the feeder cables, and in fact Qwest has not done so throughout this proceeding. Exhibit A to the ICA merely states that power plant will be billed on a per amp basis, just like the Power Usage charge. The only thing Qwest can possibly point to is the comment it embedded in a spreadsheet cell in its cost study, which, obviously, is not part of the ICA.

The 2004 Amendment contains no provision that states that McLeodUSA is waiving its right to have access to power on nondiscriminatory terms as the ICA obligated Qwest to provide in Section 40 and Attachment 4. Accordingly, there was no reason for McLeodUSA to ask for a different rate or rate design with respect to the 2004 Amendment since McLeodUSA had no reason to believe that the Amendment would not result in what McLeodUSA was already entitled to- nondiscriminatory access to power.

Of course, the underlying premise of Qwest's claim is its unsupported assertion that the Board approved its application of the Power Plant rate approved in RPU-01-06 on the size of the CLEC feeder cables. To date, Qwest has not provided any citation to the Board's order approving the collocation power rates where the Board actually approved the application of the rate on this basis. The Board order merely approved the rates. The Board did not approve the application of the rate, and the Board had every right to expect that Qwest would apply the rate in a non-discriminatory manner since that the law required Qwest to do so. While Qwest claims that the concepts of setting a rate and the application of a rate cannot be separated, distinct

approvals of rate levels and rate designs is not unusual, and in fact is routine in a utility rate setting. The fact of the matter is the Board never expressly approved Qwest's application of the Power Plant rate based on the size of the feeder cables. Improper application of an approved rate has always been subject to challenge, and by virtue of this complaint, the Board can remedy Qwest's misapplication.

As the evidence at the hearing demonstrated, even if the Board approved the supporting spreadsheet (and there is no indication the Board's approval of Qwest's rate extended to an approval of Qwest's workpapers), the spreadsheet itself, while using the term "as ordered," in fact used a rate calculation based on something less as shown by the use of a "loading assumption." Moreover, even if the Board approved assessing DC power rates based on the size of the feeder cables, the evidence shows that the order for a particular size of power cable is *not* an order for power plant capacity.

IV. QWEST'S RESPONSE IMPROPERLY SEEKS TO UPHOLD THE FINAL ORDER BASED ON FACTUAL CLAIMS REJECTED BY THE BOARD IN THE FINAL ORDER.

Qwest seeks to rebut the claim of discriminatory access to power by repeating discredited or unsupported engineering claims, several of which the Board explicitly rejected in its Final Order. Indeed, Qwest's Response contains so many unsupported engineering claims that it is difficult to respond to each claim. More importantly, Qwest's extensive efforts to justify the disparate treatment of McLeodUSA merely serves to confirm the Board's original determination that Qwest is, in fact, providing McLeodUSA access to power on terms that are distinctly different than how Qwest provides power to itself. That once again proves that Qwest's interpretation of the 2004 Amendment results in discriminatory treatment of McLeodUSA.

Again, such discriminatory treatment cannot be justified as “reasonable” under the governing law of section 251(c)(6), Iowa Code Section 476.100(2) and the ICA.

For instance, Qwest claims that it “engineered” its central office power plant to take into account the List 2 Drain for CLECs.³⁰ The claim that Qwest “engineered” for CLECs at List 2 is nothing more than a repackaging of Mr. Hubbard’s discredited claim that a large order for distribution cables by McLeodUSA “definitely” would result in Qwest augmenting its power plant capacity. The Board explicitly rejected that claim in its Final Order.³¹ Absent Mr. Hubbard’s discredited claim, there is no evidence that Qwest did any sort of “engineering” to accommodate the List 2 drain of the McLeodUSA equipment when McLeodUSA applied for its collocations. Indeed, after Qwest’s claim of a need for “definite” augmentation in response to an order for 175 amp or more feeder cables was thoroughly discredited in Iowa, Qwest merely changed its testimony in subsequent states to make the more nebulous claim that it “engineered” to List 2 drain for CLECs. Yet, Qwest points to no evidence in the Iowa record³² that supports its new claim. Once again, the Iowa record belies this new twist on Qwest’s rejected argument.

Indeed, any such “engineering” for CLECs collocation at List 2 drain would have contradicted Qwest’s technical publications. While Qwest belatedly suggested during oral argument that such technical publications did not apply to CLECs collocations, such claims are demonstrably false. First, Qwest never produced any other technical documents. One would reasonably expect that were there truly different technical guidelines governing CLEC collocations that Qwest would have produced such documentation. Second, the Qwest Technical

³⁰ Qwest Response at 8

³¹ Final Order at 13.

³² McLeodUSA also believes Qwest has not produced any such evidence in subsequent proceedings as well.

Publications cited by Mr. Morrison were in fact updated as recently as 2006, and again do not make any distinction between CLEC and Qwest equipment. Finally, the Technical Publications in question do in fact contemplate the existence of CLEC collocated equipment.

“Engineering” would require the use of judgment in applying specialized knowledge to facts. To the contrary, Qwest never sought the facts regarding the List 1 drain of McLeodUSA’s equipment (or any other measure of actual power needs), and never applied any judgment. Qwest merely applied, in a cookie-cutter fashion without any engineering at all, the improper proxy of power cable size as if it were an order for DC power plant.

As Mr. Morrison detailed in his testimony, Qwest’s technical publications clearly state that it sizes DC Power Plant based on the List 1 drain of the entire central office³³ which means that Qwest only augments, or “engineers,” its power plant facilities based on the total power usage of the entire CO.³⁴ Though Qwest claims boldly that McLeodUSA “did not present any evidence that Qwest did not engineer Power Plant on the List 2 basis for CLECs, the burden is not on McLeodUSA to disprove something unproved in the first instance. Qwest that failed to produce evidence that it actually engineered to List 2 drain for CLECs. McLeodUSA soundly rebutted the original Qwest claim that it augmented its DC Power plant in response to a large CLEC order for distribution cables. Further, McLeodUSA produced Qwest’s technical manuals that clearly stated that Qwest sized power plant to List 1 drain. The Board found that to be the case – Qwest sizes its DC power plant to the List 1 drain.³⁵ McLeodUSA cannot be required to disprove a point that Qwest never proved in the first place.

Qwest also argues that it engineers for CLEC power plant needs at a “superior level, not

³³ Exhibit 16, p. 2-7.

³⁴ Final Order at 14.

merely at parity,” because McLeodUSA always had access power plant capacity equal to the List 2 drain of its equipment though Qwest’s equipment somehow only had access to List 1 drain.³⁶ However, this argument is part and parcel of Qwest’s earlier argument rejected by the Board that Qwest reserves a portion of the DC power plant capacity for McLeodUSA and other CLECs. The Board correctly found that the central office power plant is a shared resource.³⁷ Accordingly, any power plant capacity above List 1 drain is equally available for Qwest’s equipment to draw as it is for McLeodUSA equipment. Thus, justifying charging McLeodUSA on the basis that Qwest provided McLeodUSA some unique access to power at List 2 drain compared to the amount of power had was able to access is patently inconsistent with the Board’s finding.

Qwest’s claim that it provides superior access to DC Power plant is further undermined, once again, by its own Technical Publications and the ICA. Part of the DC Power Plant is the battery reserve capacity.³⁸ If Qwest was, in fact, providing McLeodUSA “superior” access to power plant, then one would expect the ICA to obligate Qwest to provide McLeodUSA *at least*

³⁵ *Id.*

³⁶ Qwest Response at 9 and 11. Qwest characterizes its alleged engineering to List 2 for McLeodUSA as a benefit. List 2 Drain is the current equipment draws when the power plant is in worst case condition of voltage and traffic distress, when the DC power plant’s batteries are approaching a condition of total failure. In other words, List 2 is an extreme circumstance and rarely if ever occurs. As Mr. Starkey explained, it is economically inefficient to size power plant based on a worst case scenario, and TELRIC pricing principles require the assumption of an economically efficient network. And in fact Qwest uses that assumption for itself, as demonstrated by its Technical Publications that it clear that power plant is sized using List 1 drain. It simply makes economic sense since the cost of building DC power plant to meet a rare occurrence of List 2 drain event far exceeds the benefits of building power plant of that size. While Qwest says McLeodUSA “benefits” from having it pay for excessive costs designed to meet a rare List 2 event, the only true beneficiary of this alleged practice is most certainly Qwest, since it gets paid by CLECs for this providing this “benefit.”

³⁷ Final Order at 13.

³⁸ Morrison Direct testimony at 18.

the same battery reserve capacity as Qwest provides to itself. Yet, comparing the ICA to, Qwest's technical publication shows that is not the case:

	ICA Attachment 4 ³⁹	Qwest Tech Publication ⁴⁰
Battery reserve with no back up generator	8 hours	8 hours
Battery Reserve with back up generator	2 hours	4 hours

Again, there is no evidence to conclude that Qwest provides "superior" access to DC Power.

More importantly, if Qwest really had sized its DC Power plant at List 2 for McLeodUSA, then Qwest did so in violation of the ICA. Section 40 of the ICA imposes a duty on Qwest to provide Ancillary Functions to McLeodUSA at parity with how Qwest "designs" such services for itself. The Board found that Qwest used List 1 drain to design the power plant capacity for itself. Thus, Section 40 requires Qwest to do the same thing for McLeodUSA – size power plant using the List 1 drain of the McLeodUSA equipment. McLeodUSA should not be saddled with ridiculously high DC power costs simply because Qwest unilaterally chose to violate its obligation under the ICA. Qwest's failure to abide by the ICA – provide access to power at parity with how Qwest designs access to this Ancillary Service for itself – should not entitle Qwest to apply the power plant rate in a discriminatory manner.

McLeodUSA continues to maintain that all these related Qwest claims that it provides superior access to power plant capacity are a red herring. They serve to create a smoke screen for something Qwest really did not do – use the order for feeder cables by McLeodUSA to size its DC Power Plant capacity. The Board rightfully determined that Qwest sized its DC Power

³⁹ ICA Attachment 4, Section 2.2.24.5.

⁴⁰ Qwest Technical Publication 77385 at 49.

Plant based on List 1 drain as demonstrated the fact that Qwest never augmented its power plant in Iowa when McLeodUSA placed orders for large cable distribution cables.

V. Numerous Qwest Claims are Inconsistent with The ICA.

In multiple places Qwest claims that it cannot be expected to provide access to power in a nondiscriminatory manner because Qwest does not provide “collocation to itself.”⁴¹ Qwest’s claim is nothing less than an attempt to exclude collocation and collocation power from Section 40 and Attachment 4; in effect Qwest is trying to re-write Section 40 and Part 4 to exclude power as an Ancillary Service subject to the nondiscrimination requirements.

The plain language of ICA is unquestionably answers Qwest’s argument. Collocation, and, specifically including power supplied to a collocation space, are Ancillary Services covered by Section 40 and Part 4. Section 40 states that Qwest must “design” access to these Ancillary Services as it provides “in the ILEC network to itself...”. Part 4, Section 2.2.24 further clarifies that Qwest “will supply power to support the CLEC equipment at equipment specific DC and AC voltages. *At a minimum*, the ILEC shall supply power to the CLEC *at parity* with that provided by the ILEC to itself or to any third party.

If Qwest did not think that it was reasonable to compare the provision of power to a CLEC’s collocation cage to how Qwest provides power to itself, then Qwest should not have agreed to this provision. To simply claim now that it is not a reasonable comparison is to ignore the clear language of the agreement. The Board must clearly reject Qwest’s belated attempt to exclude power as an Ancillary Service subject to the nondiscrimination requirements of the ICA.

Also at several different points in its Response, Qwest repeats another claim that the record and the ICA does not support. “McLeod did indeed order power in the

amounts billed”; “Qwest makes available to CLECs the amount of power plant capacity they ordered”; “McLeod ordered some level of power plant capacity.”⁴²

CLECs do not “order” DC power plant capacity. There is no place on Qwest’s “Collocation Application Form” for McLeodUSA to request Qwest to make available a specified amount of DC power capacity.⁴³ (Tr. 625-26). The form, however, does require the CLEC to specify, among other things, the feeder cable amps and quantities; and the description of the equipment to be installed including manufacturer, model number, functionality, dimensions, and quantity.

Further, like other matters in its Response, Qwest’s claim is based a claim already rejected by the Board. Since the central office power plant is shared resource,⁴⁴ Qwest cannot reserves power plant capacity for a CLEC. Accordingly, it would make no sense for a CLEC to order an y power plant capacity.” Indeed, per Qwest’s Technical Publications, a CLEC could only expect Qwest to have power plant capacity equal to the List I drain.

Finally, Qwest offers no citation to any reference in the ICA where a CLEC would expect its order for distribution cables would be deemed an order for power plant capacity. If Qwest unilaterally chose to equate an order for Distribution Cables to equate to an order for power capacity, it did so in violation of its own technical publications.

CONCLUSION

Upon reconsideration, for the reasons stated in the Application for Rehearing and in this Reply, the Board should apply the principles of contract interpretation and conclude that the

⁴¹ Qwest Response at 7,

⁴² Qwest Response at 2, 3, 6, 7, 10, 12, 13, 14, 15

⁴³ OCA Ex. 201; Tr. 625-26).

⁴⁴ Final Order at 13.

2004 Amendment, in harmony with other provisions governing Qwest's obligation to provide nondiscriminatory access to collocation power, an Ancillary Service, requires Qwest to charge both the usage and power plant power charges on a measured basis. Qwest should be ordered to fully refund the overcharges for power plant charges that it has charged McLeodUSA since the 2004 Amendment became effective in August 2004.

Respectfully submitted this 12th day of September, 2006.



BRET A. DUBLINSKE
Dickinson, Mackaman, Tyler & Hagen, P.C.
699 Walnut Street, Ste. 1600
Des Moines, Iowa 50309-3986
Telephone: (515) 244-2600
Facsimile: (515) 246-4550
Email: bdublins@dickinsonlaw.com

And

WILLIAM A. HAAS, Deputy General Counsel
WILLIAM H. COURTER, Assoc. General Counsel
McLeodUSA Telecommunications Services
P.O. Box 3177, 6400 C Street SW
Cedar Rapids, Iowa 52406
Telephone: (319) 790-7744
Facsimile: (319) 790-7901

ATTORNEYS FOR MCLEODUSA

CERTIFICATE OF SERVICE

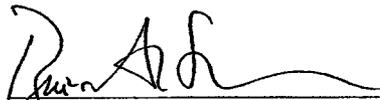
I hereby certify that I have this day hand delivered a copy of the document attached to the following person at the address below. Further, I have supplemented service by hand delivery with delivery by electronic mail to the address listed below:

Mr. Tim Goodwin
Qwest Communications
925 High Street, 9S9
Des Moines, Iowa 50309
tim.goodwin@qwest.com

I hereby certify that I have this day hand delivered a copy of the document attached to the following person at the address below.

Office of the Consumer Advocate
310 Maple Street
Des Moines, Iowa 50319

Dated in Des Moines, Iowa, on September 12, 2006.


BRET A. DUBLINSKE