ORIGINAL

OPEN MEETING ITEM

0000075255

COMMISSIONERS
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JEFF HATCH-MILLER
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GARY PIERCE

ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission
DOCKETED
AUG 07 2007
DOCKETED BY

DATE: AUGUST 7, 2007

DOCKET NOS: T-03267A-06-0105 and T-01051B-06-0105

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Jane Rodda. The recommendation has been filed in the form of an Opinion and Order on:

MCLEODUSA TELECOMMUNICATION SERVICES, INC. vs.
QWEST CORPORATION
(COMPLAINT)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

AUGUST 16, 2007

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

AUGUST 21, 2007 and AUGUST 22, 2007

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Secretary's Office at (602) 542-3931.

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF: MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., Complainant, vs. QWEST CORPORATION, Respondent.	DOCKET NO. T-03267A-06-0105 DOCKET NO. T-01051B-06-0105 DECISION NO. _____ **OPINION AND ORDER**

DATE OF HEARING:	July 11 and 12, 2006
PLACE OF HEARING:	Phoenix, Arizona
ADMINISTRATIVE LAW JUDGE:	Amy Bjelland and Jane L. Rodda[1]
APPEARANCES:	Michael W. Patten, ROSHKA, DeWULF & PATTEN and William H. Courter on behalf of McLeodUSA Telecommunications Services, Inc.; and Lisa Anderl, Timothy J. Goodwin and Norman G. Curtright on behalf of Qwest Corporation.

BY THE COMMISSION:

* * * * * * * * * *

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

1. On February 21, 2006, McLeodUSA Telecommunications Services, Inc. ("McLeod")

[1] Amy Bjelland conducted the hearing in this matter. Jane L. Rodda prepared the Recommended Opinion and Order.

filed with the Commission a Complaint against Qwest Corporation ("Qwest") alleging that Qwest overcharged McLeod for collocation power charges under the terms of their Interconnection Agreement ("ICA").

2. On March 16, 2006, Qwest filed its Answer to the Complaint and Counterclaim for payment allegedly withheld by McLeod in connection with the dispute.

3. On March 28, 2006, McLeod filed its Reply to Counterclaim.

4. On March 30, 2006, the parties filed a Joint Stipulation containing proposed hearing dates and filing deadlines.

5. On April 5, 2006, by Procedural Order, a hearing and filing deadlines were established.

6. On May 12, 2006, McLeod filed the Direct Testimony of Michael Starkey, Sidney L. Morrison and Tami J. Spocogee.

7. On June 2, 2006, the parties filed a Joint Stipulation of a revised procedural schedule in order to allow McLeod to raise, and Qwest to respond to, issues not raised in the Direct Testimony filed by McLeod on May 12, 2006. The parties requested that the original date for hearing remain the same.

8. By Procedural Order dated June 6, 2006, revised filing deadlines were established.

9. On June 9, 2006, McLeod filed the Supplemental Direct Testimony of Michael Starkey.

10. On June 22, 2006, Qwest filed a Motion to Strike the Supplemental Direct Testimony of Mr. Michael Starkey. Qwest also filed the Direct Testimony of Teresa K. Million, William R. Easton, and Curtis Ashton.

11. On July 5, 2006, McLeod filed the Rebuttal Testimony of Michael Starkey, Sidney L. Morrison and Tami J. Spocogee. McLeod also filed its Opposition to Qwest's Motion to Strike the Supplemental Direct Testimony of Michael Starkey.

12. On July 11 and 12, 2006, the hearing was held as scheduled. At hearing, Qwest's Motion to Strike the Supplemental Direct Testimony of Mr. Michael Starkey was denied. At the conclusion of the hearing, the parties agreed to brief the issues in lieu of making closing statements.

13. On September 8, 2006, the parties filed their Closing Briefs. The parties filed their Reply Briefs on September 22, 2006.

14. On September 29, 2006, Qwest filed a Notice of Filing Supplemental Authority, attaching the Report and Order of the Public Service Commission of Utah, in *In the Matter of the Complaint of McLeodUSA Telecommunications Services, Inc. vs Qwest Corporation for Enforcement of Commission-Approved Interconnection Agreement*, No. 06-2249-01, issued on September 28, 2006.

15. On October 2, 2006, Qwest filed a Second Notice of Filing Supplemental Authority, attaching the "Initial Order: Recommended Decision to Deny Petition for Enforcement" of the Washington State Utilities and Transportation Commission in *McLeodUSA Telecommunications Services, Inc. v. Qwest Corporation*, No. UT-063013, dated September 29, 2006.

16. On October 25, 2006, McLeod filed its Response to Qwest's Filings of Supplemental Authorities. McLeod argues both the Washington and Utah orders make the same legal error by failing to consider the entire Interconnection Agreement.

17. On October 31, 2006, Qwest filed a Motion to Strike or in the Alternative Motion for Leave to File Reply Brief. Qwest argues that the Commission should strike McLeod's Response to Qwest's Supplemental Authorities because it is unauthorized. In the alternative, Qwest sought leave to file a Reply. Qwest included its Reply with its Motion.

18. On November 16, 2006, McLeod filed a Response to Qwest's Motion to Strike or In the Alternative Motion for Leave to File a Reply. McLeod argued its Response was appropriate, and stated it did not object to Qwest's Reply.

19. On February 21, 2007, Qwest filed a Notice of Filing of Third Supplemental Authority. Qwest attached the Final Order Affirming Initial Order; Denying Petition for Enforcement of the Washington State Utilities and Transportation Commission in No. UT-063013.

20. On April 19, 2007, Qwest filed a Notice of Filing of Fourth Supplemental Authority, comprised of the Rehearing Order, reaffirming the July 27, 2006 Order of the Iowa State Department of Commerce Utilities Board, *In re McLeodUSA Telecommunications Services Inc. Qwest Corporation*, No. FCU-06-20, dated April 17, 2007.

21. The Commission can benefit from the filing of supplemental authorities which become available after briefing has concluded in a case; however, in general, the Commission only permits additional legal arguments upon prior authorization. In this case, the arguments made by McLeod and Qwest regarding the supplemental authorities reflect substantially the same arguments McLeod and Qwest made in this proceeding and do not add materially to the record in this proceeding.

The Amendment at Issue

22. McLeod and Qwest entered into a DC[2] Power Amendment to their existing ICA in August of 2004 (the "Amendment"). It was filed with the Commission and became effective by operation of law on September 30, 2004. The language of the Amendment at issue in this proceeding is as follows:

ATTACHMENT 1

DC Power Measuring

1.0 Monitoring

1.1 CLEC orders DC power in increments of twenty (20) amps whenever possible. If CLEC orders an increment larger than sixty (60) amps, engineering practice normally terminates such feed on a power 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).

1.2 If CLEC orders sixty (60) amps or less, it will normally be placed on a BDFB where no monitoring will occur since the power usage rate reflects a discount from the rates for those feeds greater than sixty (60) amps. If CLEC orders more than sixty (60) amps of power, it normally will be placed on the power board. Qwest will monitor usage at the power board on a semi-annual basis. However, Qwest also agrees to take a reading within thirty (30) Days of a written CLEC request, after CLEC's installation of new equipment. Qwest will perform a maximum of four (4) readings per year on a particular collocation site. Based on these readings, if CLEC is utilizing less than the ordered amount of power, Qwest will reduce the monthly usage rate to CLEC's actual use. If CLEC is utilizing more than the ordered amount, Qwest will increase the monthly usage rate to the CLEC's actual use. Until such time that CLEC places equipment and a request is received from CLEC to monitor, Qwest will bill CLEC based on the amount *of* power ordered. Once Qwest receives a CLEC monitoring request, it will bill the actual power usage rate from the date of the CLEC's

[2] Direct Current.

monitoring request until the next reading. The next reading date may be generated as a result of the CLEC request or a Qwest routine reading and Billing will be adjusted on whichever date comes first.

2.0 Rate Elements - All Collocation

2.1 -48 Volt DC Power Usage and AC Usage Charges. Provide -48 volt DC power to CLEC collocated equipment and (sic) is fused at one hundred twenty-five percent (125%) of request. The DC Power Usage Charge is for the capacity of the power plant available for CLEC's use. The AC Usage Charge is for the power used by CLEC. Both the DC Power Usage Charge and the AC Usage Charge are applied on a per ampere basis.

2.2 The -48 Volt DC Power Usage Charge is specified in Exhibit A of the Agreement and applies to the quantity of -48 Volt Capacity specified by the CLEC in its order.

2.2.1 -48 Volt DC Power Usage Charge - Applies on a per amp basis to all orders of greater than sixty (60) amps. Qwest will initially apply the -48 Volt DC Power Usage Charge from Exhibit A of the Agreement to the quantity of power ordered by CLEC. Qwest will determine the actual usage at the power board as described in Section 1.2 There is a one (1) amp minimum charge for -48 Volt DC Power Usage.

2.3 CLEC rates for Collocation must be included in CLEC's existing Interconnection Agreement with Qwest prior to amending with DC Power Monitoring (Measuring) Amendment.

23. Exhibit A to the Interconnection Agreement sets forth the rate elements at issue as follows:

				Recurring Charge
8.1.4	Power Usage			
	8.1.4.1	-48 Volt DC Power Usage, per Ampere, per Month		
		8.1.4.1.1	Power Plant	
			8.1.4.1.1.1 Greater Than 60 Amps	$10.75
			8.1.4.1.1.2 Equal to 60 Amps	$10.75
			8.1.4.1.1.3 Less Than 60 Amps	$10.75
		8.1.4.1.2	Power Usage	
			8.1.4.1.2.1 Less Than 60 Amps, per Amp	$3.84
			8.1.4.1.2.2 More Than 60 Amps, per Amp	$7.27

24. DC power is provided from the DC power plant in the incumbent local exchange carrier ("ILEC") central office ("CO") where AC power from the power utility is converted to DC

power by rectifiers (backed up by batteries and generators) for use by all communications equipment housed in the CO. The DC power is delivered over distribution, or feeder, cables to McLeod and other competitive local exchange carriers ("CLECs") collocated in the CO.

25. According to the Amendment, the DC Power Usage Charge is for the capacity of the power plant made available to the CLEC. The AC Usage Charge is the power used by the CLEC.

26. Prior to entering into the Amendment, Qwest billed McLeod both the Power Usage charges and the DC Power Plant Charges based on the number of amps McLeod specified in the power feed orders. (Tr at 221-222)

27. Qwest and McLeod agree that the Amendment changed the billing method for the rate element "8.1.4.2.2 Power Usage – More than 60 Amps, per Amp" from an "as ordered" to an "as measured" basis. Thus, for power cables greater than 60 amps, Qwest would charge McLeod for the actual power used.

28. The parties disagree, however, as to how the Amendment affected the DC Power Plant rate element. McLeod argues that the Amendment requires that charges for "DC Power Plant – Greater than 60 amps" also be billed on an "as measured" basis. Qwest argues that the Amendment did not change the method of billing for any DC Power Plant rate element, but only affected the Power Usage rate element. McLeod claims that Qwest's billing of the DC Power Plant is discriminatory because Qwest charges McLeod more for the power plant than Qwest charges itself.

McLeod's Position

Language of the Amendment

29. McLeod argues that the language of the Amendment provides that DC Power Plant should be billed on an "as measured" use basis. McLeod relies on Subsection 2.2.1 of the Amendment which provides that "Qwest will determine the actual usage at the power board . . . ." McLeod states that the "actual usage" measured at the power board is applied to "-48 Volt DC Power Usage" as "specified in Exhibit A of the Agreement." McLeod notes that Exhibit A (the pricing index) shows that line item 8.1.4.1, the "-48 Volt DC Power Usage," covers both power plant and usage charges. Thus, according to McLeod, the Amendment is referring specifically to line 8.1.4.1 when defining the rates to be billed on a "measured-use" basis.

30. According to McLeod, the language of the Rates Table in Exhibit A confirms that the heading in 8.1.4.1 of "-48Volt DC Power Usage, per Ampere, per Month" must include and apply to the Power Plant rates in 8.1.4.1.1. McLeod asserts that if 8.1.4.1 did not relate to the Power Plant rates, the actual rate would simply be $10.75 regardless of the amperes, that is, if they were not connected, the Power Plant rates would be rendered meaningless because there would be no units of power plant being billed. According to McLeod, treating 8.1.4.1 as a "mere heading" as Qwest claims, would mean that Section 2.2.1 of the Amendment contains a meaningless reference. McLeod argues that an interpretation that renders contract terms meaningless must be avoided.[3]

31. In addition, McLeod argues Section 2.1 of the Amendment removes all doubt as to whether the Power Plant rate element should be billed on a measured-use basis when it states unequivocally that "the DC Power Usage charge is for the capacity of the power plant available for CLEC's use." (emphasis added).

32. McLeod also argues that past practice of the parties supports its reading of the plain language of the Amendment. McLeod states that prior to the Amendment, Qwest billed all DC power elements consistently based on the size of the power cable connecting McLeod's collocation arrangement to the DC power plant, and that the Amendment changed the manner in which DC Power Usage was to be billed (i.e., on a going forward basis, usage would be billed on a measured-use basis). McLeod states that the only rational conclusion is that all elements would continue to be treated in the same fashion under the Amendment – i.e., all DC Power elements would be billed on measured-use basis for collocations over 60 Amps. McLeod states that Qwest can point to no place in the Amendment that excludes any elements from measured-usage billing. McLeod argues there is no language in the Amendment or Exhibit A that plausibly suggests that the "-48 Volt DC Power usage" element is to be charged on an "as ordered" basis, while the sub-rate element" ("Power Usage – More than 60 Amps"), is meant to be charged on an "as measured" basis.

33. McLeod further asserts that Qwest's attempt to interpret the plain language of the Amendment improperly looks outside of the document, relies on strained and illogical interpretations,

[3] *Chandler Medical Building Partners v. Chandler Dental Group*, 175 Ariz. 273, 277, 855 P.2d 787, 791 (1993).

and has no merit. McLeod argues that the Amendment itself expressly states that any reliance on external documents is inappropriate:

> The Agreement as amended . . . constitutes the full and entire understanding and agreement between the Parties . . . and supersedes any prior understandings, agreements, or representations between the parties, written or oral.

Change Management Process

34. Qwest claims that based on an e-mail notification in the context of Qwest's Change Management Process ("CMP"),[4] and the content of the October 2003 exchange between Qwest and another CLEC, that McLeod knew, or should have known, that the Amendment comports with, Qwest's interpretation. McLeod believes such claim is not sustainable, and would require the Commission to make several unrealistic leaps: (i) to ignore inconsistent statements contained in the same CMP documentation, (ii) to discard the actual language of the Amendment, and (iii) to generally cast a blind eye to the self-serving nature of Qwest's CMP forum.

35. According to McLeod, the former McLeod employee who attended the October 2003 CMP meeting in question was a member of the Service Delivery organization whose sole purpose was to keep abreast of information regarding order processing issues.

36. Furthermore, McLeod notes that CMP documentation expressly states that ICAs and associated amendments trump anything that is developed under the CMP process. The CMP documentation also states that "no ICA amendment will be required to implement measured power . . . ." Yet, McLeod notes, Qwest later changed its mind and determined an Amendment was required. McLeod argues it is illogical to believe that the documentation of the CMP process some nine months prior to the Amendment should be given weight as to Qwest's intentions, when that documentation states that no amendment is required.

37. McLeod also relies on the statement set forth in Qwest's own CMP document, "Note: in cases of conflict between the changes implemented through this notification and any CLEC interconnection agreement, whether based on the Qwest SGAT or not, the rates, terms and conditions

[4] The CMP is a forum in which Qwest provides information to CLECs, and the parties can engage in discussions, about Qwest products and changes to products that Qwest offers.

of such interconnection agreement shall prevail as between Qwest and the CLEC party." (Ex. WRE-2)

38. Furthermore, McLeod argues the early language pertaining to power measurement in the CMP process is not found in the Amendment.

39. McLeod states the CMP document discussed a "Capacity Charge" and indicates that it would not be impacted by measured-use billing, while the Amendment does not include a reference to "Capacity Charge" and does not exclude Power Plant from the elements billed on a measured-use basis as the language in Qwest's Product Catalogue ("PCAT") does. (Ex Q-1 Response Testimony of William Easton) McLeod argues that the Commission should presume these omissions in the Amendment are intentional and instructive as to the intent of the Amendment.

40. Similarly, McLeod argues that Qwest's reliance on spreadsheets prepared by McLeod is misplaced.[5] Although Qwest asserts the spreadsheets which Qwest claims purport to show that McLeod intended that only the usage rate element would be billed on a measured-use basis, McLeod asserts the spreadsheets were prepared by an engineering group comprised of members who were not rate specialists and who were only summarizing data in Qwest's initial spreadsheets.

Cost Study

41. McLeod also argues that Qwest's reliance on its 2001 Collocation Cost Study is misplaced. McLeod argues that although the test column of the cost study uses the term "as ordered," the substance of the Arizona cost study shows that the rate was developed to recover the DC power plant investment based on amps used. (Ex M-7, Supplemental Direct Testimony of Michael Starkey at 2-3)

42. McLeod believes that of greater significance is that the cost study labels are obviously not controlling for although the cost study schedule provides that "DC Power Usage More than 60 amps" will be billed on an "as ordered" basis, given that McLeod and Qwest agree that the Amendment changed that application for "Usage More Than 60 amps" on a going forward basis to be applied on a measured-use basis. McLeod argues that a comment made by Qwest in its 2001 cost

[5] At the time the Amendment was being proffered, McLeod performed an analysis of the expected savings of the proposed change.

study is not controlling on the meaning of the 2004 Amendment.

43. McLeod argues that no Commission order supports Qwest's application of the power plant charge on an "as ordered" basis. According to McLeod, such interpretation is inconsistent with how the cost study develops the power plant rate. (Ex M-7 Starkey Supplement Direct at 2-3) McLeod notes that the cost study develops the power plant rate by using the amount of power plant capacity actually "used", and that applying the Commission–approved rate based on the size of cable ordered results in Qwest over-recovering power plant costs. According to McLeod, using usage to set the rate, and then applying it to a larger measure of the quantity of which a CLEC is billed results in a mismatch, and is inequitable.

44. McLeod argues further that in Phase II of the Cost Docket (T-00000A-00-0194) the Commission did not expressly approve that the DC power plant rates are to be applied based on the size of the power cables. McLeod states that the Excel spreadsheet on which Qwest relies and that refers to cable size billing is meaningless because it was not part of the ICA, nor did the Commission reference it when it approved the rates.

Engineering and Economic Support

45. McLeod argues that Qwest's interpretation of the Amendment to allow it to bill McLeod for DC power plant based on distribution cable size amperage is inconsistent with sound engineering principles and the proper sizing of Qwest's DC power plant. Qwest maintains that the proper manner to recover its power plant investments is by means of a charge assessed on the size of the CLEC's order for its power cables. McLeod argues, however, that in fact, Qwest does not size its power plant on the basis of CLEC orders for distribution cables, but rather sizes its power plant based on the peak usage under normal operating conditions (List 1 drain) of the entire central office (including the List 1 drain of both Qwest and CLEC equipment).[6] Thus, McLeod argues the proper manner for Qwest to recover its investment in power plant is by assessing charges on the various users of the power plant based on their relative power plant usage.

46. McLeod charges that Qwest's interpretation of how power plant capacity is to be

[6] List 1 drain is the peak usage under normal operating conditions. List 2 drain is the peak drain under worse case conditions of voltage, traffic, etc. List 2 drain is larger than List 1 drain.

billed is contrary to Qwest's own technical publications which show that "batteries and chargers" (power plant) are to be sized based upon the List 1 drain, but that feeder cables (not power plant) should be sized to the larger List 2 drain. McLeod identifies five separate Qwest engineering manuals used to size DC power plant, which McLeod claims all focus on the List 1 drain, and not the List 2 drain for sizing power plant.

47. In response to Qwest claims that it has to use List 2 drain (based on the size of the power cable) to size its power plant because it does not know the CLECs' List 1 drains (actual usage), McLeod asserts there are good reasons for McLeod to size its power cables larger than it would ever require under normal operating conditions. (Ex M-3, Morrison Dir at 29-31) McLeod argues that if Qwest relied on McLeod's power cable sizing as need for equivalent power plant capacity, Qwest did so without consulting McLeod, in contravention of Qwest's technical manuals and in contravention of sound engineering practices which dictate that power distribution cables far exceed any expected normal load amperage.

48. McLeod states that Qwest never asked McLeod for its List 1 drain information, nor provided any means for the CLEC to provide this information during the collocation application process. McLeod asserts that Qwest's reliance on the amperage of the power cables to determine the power plant capacity they require is incorrect and results in too much power plant being engineered. McLeod argues Qwest should not be rewarded for failing to gather the necessary information.

49. McLeod argues that Qwest's claim that it cannot size DC power plant to List 1 drain for CLECs because it does not have the List 1 drain information for all CLEC collocated equipment is inconsistent with the facts. McLeod states that Qwest uses some of the same pieces of equipment that are housed in a typical McLeod collocation for which Qwest knows the List 1 drain. But further, the List 1 drain for equipment can be obtained from the manufacturer. McLeod states that Qwest's manuals require it to make "every effort . . . to obtain the List 1 drains for suppliers." Where it cannot, the technical publications explain that a List 1 drain proxy can be derived based on the known List 2 drain data.

50. McLeod states that despite several large distribution cable orders placed by McLeod in Qwest central offices, Qwest virtually never augmented its power plant to accommodate the List 2

drain. (Ex M-4, Morrison Rebuttal at 46-48).

51. McLeod believes that Qwest's claim that it must have the unique capacity available to meet each CLEC's maximum List 2 demand is false. According to McLeod, central office power plant capacity is pooled and shared by all telecommunications equipment in the central office, and thus it is not possible for Qwest to "reserve" or "assign" a given level of power plant capacity for any individual user(s). McLeod argues that all equipment in the central office has equal access to the power plant capacity on an "as needed" basis, and as such, the cost of that equipment is best distributed based upon the relative use of the equipment by each user on an "usage" or "as measured" basis as opposed to an "as ordered" basis.

52. Further, McLeod asserts that the method McLeod uses to bill collocators in its own central offices is irrelevant because McLeod and Qwest are not subject to the same legal requirements for providing collocators access to DC power. McLeod notes that it is not subject to Section 251(c) of the Telecommunications Act of 1996 (the "1996 Act) which requires Qwest to provide nondiscriminatory access to DC power.[7]

Discrimination

53. Finally, McLeod argues that agreements are interpreted in light of the body of law existing at the time the agreement was executed. Both the Act and Arizona law requires non-discriminatory collocation, and competitive parity between ILECs and CLECs. In the *Local Competition Order*[8], the FCC provided 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.

54. McLeod asserts that courts recognize that ICAs are not traditional contracts but that an ICA is an instrument arising in the contract of ongoing facilities competition and ensure that carriers

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[7] McLeod states that it does not bill collocators for DC power the same way that Qwest bills McLeod. McLeod explains that it asks collocators for the amount of power they anticipate needing and for which they will be billed. (McLeod Reply Brief at 37-38)

[8] *Implementation of the Local Competition Provision in the Telecommunications act of 1996*, CC Docket No. 96-98, FCC 96-325, First Report and Order, 11 FCC Rcd 15499 ¶ 315. (1999) ("*Local Competition Order*")

are not treated in a discriminatory manner. McLeod argues it must be presumed that the ICA and its Amendment implement the Act and comparable state laws. Thus, the Amendment must be interpreted consistent with state and federal requirements of nondiscrimination. Such interpretation, McLeod argues, would not be an impermissible modification as Qwest argues.

55. McLeod argues that Qwest ignores the principle of contract interpretation that provisions of a contract must be harmonized. McLeod claims the ICA is clear that Qwest must provision collocation power on terms no worse than the terms Qwest provides power to itself:

> Part D, Section (D)2.1 with respect to any technical requirements or performance standards specified in this Section, US WEST shall provide Collocation on rates, terms and conditions that are just, reasonable and non-discriminatory.

56. McLeod believes that because Qwest provisions power plant to itself based on the List 1 drain, Qwest's interpretation of the Amendment as permitting it to bill McLeod based on List 2 drain creates an impermissible inconsistency within the ICA.

57. McLeod asserts the prohibition against discrimination in Section 251 of the Act is unqualified. In ¶218 of the *Local Competition Order*, the FCC held "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(a)(2)(D). Paragraph 315 of the *Local Competition Order* provides:

> 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.

58. Thus, McLeod asserts that the requirement to assure reasonable and unconditional nondiscriminatory physical collocation, the Commission's decision interpreting the Amendment must reflect terms and conditions for access to DC Power that will achieve competitive parity between Qwest and McLeod.

59. McLeod argues the record shows that Qwest is unlawfully discriminating against

McLeod by: 1) not making any effort to engineer power plant for CLECs like it does for itself; and 2) by charging for power plant based on amperage "as ordered" while it imputes power plant costs for itself at no greater than the List 1 drain.

Qwest's Position

60. Qwest asserts that the Amendment only applies to the usage component of the power charges, and not the Power Plant rate element. Qwest argues such interpretation is consistent with the language of the Amendment, with information provided to all CLECs, including McLeod, prior to its execution, and the evidence at the time McLeod entered into the Amendment shows that McLeod did not seek an amendment to reduce the power plant charge and did not anticipate that the Amendment would do so.

61. Furthermore, Qwest states the Commission approved the interconnection agreement and specifically approved the Amendment. The rates contained in Exhibit A to the parties' ICA were approved in Docket No. T-00000A-00-0194, Phase II of the Cost Docket. Qwest asserts that once the parties mutually assented to the terms of the ICA, the contract and rates have the "binding force of law" under federal law and cannot be changed.

62. Qwest notes that the McLeod witnesses who testified that McLeod had an expectation that the Amendment would result in measured billing for the power plant rate were retained experts who were not employees of McLeod and who did not participate in the negotiations for or execution of the Amendment. Qwest states that the only McLeod employee to testify at the hearing confirmed that McLeod's only issue prior to entering into the Amendment was a concern that rates not go up. (Tr at 192-193) Qwest asserts that internal McLeod documentation establishes that no savings on the Power Plant portion of the charge were anticipated. Further, Qwest notes that McLeod admitted it did not reach its current interpretation of the Amendment until nine months after its execution in May 2005. (Tr at 268)

Amendment Language

63. Qwest notes that its interpretation of the Amendment is the simplest, most straightforward interpretation, as it gives effect to the entire agreement and requires no extrinsic evidence. According to Qwest, the Amendment mentions "DC Power Usage Charge" five times and

the "usage rate" another two times, with no mention of a "power plant" charge. The Power Usage and Power Plant charges are reflected as separate charges in Exhibit A. Thus, Qwest argues the Amendment only affects the usage charge, and was not intended to affect the way the power plant charge was to be applied.

64. Qwest argues the Amendment's language read in the context of the entire agreement, plainly excludes the power plant rate from the rates that would be affected by the Amendment. According to Qwest, Section 1.2 of the Amendment describes generally how the measuring process would be implemented. The first sentence of section 1.2 of the provides in relevant part that "the power usage rate [for orders of 60 amps or less] reflects a discount from the rates for those feeds greater than sixty (60) amps." Qwest notes that Exhibit A to the underlying ICA indicates a rate of $3.64 per amp ordered for power usage for orders of 60 amps or less at item 8.1.4.1.2, and a rate of $7.27 per amp ordered for power usage for orders of more than sixty amps at item 8.1.4.1.3. This, Qwest states, reflects a discount from rates for those feeds greater than sixty amps. In contrast, Qwest notes, the rate for power plant is the same for all levels of ordered amperage, and does not reflect a discount from the rate for "those feeds greater than sixty (60) amps."

65. In addition, Qwest notes that later in Section 1.2, the Amendment indicates that "Qwest will reduce the monthly usage rate to CLEC's actual use" based on the measurements taken. The reference to "usage rate" contains no reference to a power plant rate, and is also in the singular, which indicates only one charge or rate would be affected. Qwest argues the plain meaning of "usage rate" can only refer to the Power Usage Charge at item 8.1.4.1.3. Qwest asserts that including "power plant" rates based on this reference simply does not make sense.

66. Qwest notes further that the reference to "Charge" in the Amendment is in the singular, and if the parties had intended more than one charge to be impacted, they would have referenced "Charges". Qwest states its interpretation gives proper effect to the phrasing the parties actually used, while McLeod's interpretation ignores, or gives no effect to, the singular reference to "Charge" throughout the Amendment. McLeod's interpretation, Qwest argues, would violate a cardinal principle of contractual interpretation.

67. In response to McLeod's argument that the reference to "-48 Volt DC Power Usage

Charge" refers to the rates under the heading "Power Usage" in Exhibit A, Qwest notes that Section (A) 3.28 of the ICA specifically provides that headings are for convenience or reference only and "in no way define, modify or restrict the meaning or interpretation of the terms". Qwest believes an examination of Exhibit A shows that items 8.1.4 ("Power Usage") and 8.1.4.1 ("DC Power Usage, per ampere, per month") are headings. No charge is associated with either item, the charges for Power Plant and Usage are indented beneath these hearings. Qwest states that in responding to Qwest's discovery requests, McLeod itself refers to these items as "headings".

68. Finally, Qwest points out that Section 2.2.1 of the Amendment indicates that the "Charge" to be modified "[a]pplies on a per amp basis to all orders of greater than sixty (60) amps." Qwest states that the Power Plant charge in Exhibit A clearly applies to all power orders, regardless of whether the orders are less than or greater than 60 amps. In contrast, Qwest notes there are two different Power Usage charges: one for orders less than 60 amps (item 8.1.4.1.2.1) and one for orders greater than 60 amps (item 8.1.4.1.2.2). Qwest states this language would be rendered meaningless if the "charge" being modified applied equally regardless of whether those orders were greater or less than 60 amps.

CMP and PCAT

69. Qwest claims it made it very clear to all CLECs, including McLeod, through the CMP and the Product Catalog ("PCAT") what the Amendment would and would not accomplish. The CMP forum includes discussions and information about Qwest's products or changes to products that Qwest offers. The changes are typically accompanied by a PCAT made available on Qwest's website.

70. Qwest offered several documents on its CMP website regarding the power measuring product and associated changes, and notified 16 McLeod employees of their availability. Qwest offered evidence of an exchange between Qwest and another CLEC in the CMP concerning how Qwest would measure power. (Ex Q-1, Easton testimony, Ex WRE-2) Another CLEC posed the following question:

> For the following question, assume the collection is in AZ, we're ordering 120 Amps, the DC Power measurement is 53, the Power Plant per amp rate is $10.75, the power usage < 60 amps, per amp is $3.64 and Power Usage > 60 amps, per Amp is $7.27. Currently

> we are billed 120 Amps at $10.75 and 120 Amps at $7.27. Per this proposal I interpret that we would be billed 120 Amps at $7.27. Per this proposal I interpret that we would be billed 120 Amps @$10.75 and 53 Amps @3.64(sic). Likewise, if the new DC Power Measurement was 87, we would be billed 120 Amps at $10.75 and 87 Amps at $7.27. Is that correct?

Qwest responded:

> The rate that will be applied to the measured amount will be dependent on the amount that was ordered not the amount measured. In other words you would be billed 120 Amps at $10.75 per amp and the measures of 53 amps and 87 amps would have the usage rate or (sic) $7.27 per amp because the ordered amount was greater than 60 amp (120). Qwest Opening Brief at 15.

71. Qwest claims that the PCAT, which followed the CMP process, delineated and defined the "Capacity Charge" to "recover[ ] the cost of the capacity of the power plant available for your use," and the "Usage Charge" to "recover[ ] the cost of the power used." (Ex Q-1, WRE-1, p 1) Qwest asserts that the PCAT language is substantively identical to the Amendment and specifically separates the definitions of the -48 DC Volt Power Usage Charge from the definitions of the -48 Volt Capacity Charge.

72. Qwest argues that if, as McLeod claims, it never saw the CMP and PCAT documents McLeod's failure was unreasonable, such that it had reason to know of Qwest's interpretation and Qwest had reason to suppose that McLeod was aware of Qwest's expression of intent. Relying on the RESTATEMENT (SECOND) CONTRACTS § 201(2)(b),[9] Qwest's argues the Commission only need resolve the question of whether McLeod had "reason to know the meaning attached by" Qwest. Qwest states further that evidence is clear that McLeod never communicated the intent it now claims to Qwest prior to the Amendment's execution. (Tr at 229, 4-15)

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[9] Section 201 of the RESTATEMEMT (SECOND) OF CONTRACTS provides:

(1) Where the parties have attached the same meaning to a promise of term thereof, it is interpreted in accordance with that meaning.

(2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made

a. That party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or

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

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

73. Qwest further argues the evidence shows that McLeod found power charges and understanding the provisions of the ICA were important to it. (Tr 192 – 193) Thus, Qwest argues, with such importance given the issue, McLeod should have given the matter sufficient interest to discover Qwest's intent. Thus, Qwest states it cannot be burdened with McLeod's unexpressed intent.

74. Qwest asserts that the evidence shows that not only did McLeod never express an intent contrary to Qwest's prior to executing the Amendment, but that McLeod's understanding of the Amendment at the time was that the Amendment would only affect the power usage charge and not the power plant charge. Qwest notes that no McLeod communications relating to the Amendment prior to its execution contains any reference to potential savings on power plant charges. Qwest states such communications show a specific understanding that the Amendment would only affect power usage charges. A spreadsheet prepared by McLeod employees at the time tracked savings only for the Power Usage Charge rate element. McLeod admits that McLeod "never calculated any potential savings on the power plant charges" until an audit performed around May 2005, several months after the Amendment was executed. (Tr at 245-246)

Cost Study

75. Qwest does not believe the cost study is relevant to determining the central issue of this case, which is the interpretation of the contract. The collocation cost study was filed in 2000 and Qwest believes it has no connection to the parties' discussions of the Amendment in 2004. Qwest notes that McLeod does not claim that it relied on the cost study, only that the study supports its interpretation of the Amendment. In any case, Qwest argues the cost study, in fact, supports Qwest's position.

76. Qwest argues its cost study requested that the Power Plant rates would be charged on a "per amp ordered" basis, and that the Commission reviewed Qwest's requested rates in rate structure in Phase II of Docket No, T-00000A-00-0194 prior to approval of those rates.

77. Qwest's cost study disclosed that the rates for Power Plant would be based on the size of the feeds that the CLECs orders. The comment attached to Qwest's cost study for Power Usage provides:

> 1.4 Power Usage
> Recurring Monthly charge

> There are recurring monthly charges for power usage. Power usage includes the cost of purchasing power from the electric company and the cost of the power plant. Power usage is broken down into three rates:
>
> 1. A rate for the use of the power plant that is charged based on the size of the power feed of (sic) feeds that the CLEC orders;
> 2. A flat monthly power usage rate for each type of power feed that is smaller than 100 AMPs; and
> 3. A per AMP rate for power usage that is delivered on power feeds that are larger than 60 AMP.
>
> The power plant consists of the backup power generator, rectifiers, power boards, battery distribution frame boards ("BDFB's); batteries and the cable and support structure that connects all these components. The power plant generates and stores power for use during potential outages converts standard AC power to the DC power used by the telecommunications equipment and distributes the power to those areas of the central office where the power is to be used. The monthly charge reflects the capital and maintenance costs associated with maintaining this system. The monthly charge is based on the size of the power feed requested by the CLEC. (Ex Q-2, Million testimony, ex TKM-1 at p 5 of 8)

78. Qwest asserts the power plant rate and method of charging were confirmed when the Commission approved Qwest's power costs in Phase II of the Cost Docket in Decision No. 64922 (June 12, 2002). Qwest states that in order to approve the requested rates and rate design, the Commission necessarily concluded that Qwest's power plant rate was TELRIC-compliant, as well as just, reasonable and non-discriminatory. Qwest states that McLeod could have argued in the Phase II Cost Docket that charging for the power plant based on amps ordered was not just and reasonable and non-discriminatory, but that McLeod did not so argue. (Ex Q-2, Million testimony at 6)

79. Qwest argues that the Commission's Orders in Docket No. T-00000A-00-0194 preclude both the contract claims and the "discrimination" claims raised by McLeod in its Complaint. Because the Commission approved the power plant rates, at as-ordered levels, in both the Cost Docket and in Qwest's compliance filings, Qwest argues that McLeod's Complaint is a collateral attack on approved rates. Qwest asserts the cost study shows that the power plant rate is a lawful rate, approved after full disclosure and is evidence of the parties' intent regarding costs.

80. Qwest contends the cost study is clear that the Power Plant rate element is a capacity charge, and thus consistent with charging on a per-amp ordered basis. Qwest asserts there is no basis to claim the cost study supports charging the power plant rate element on a usage basis.

81. Qwest claims that McLeod's interpretation of the cost study, as allowing charging

power plant on a measured basis, violates TELRIC costing and pricing principles.

Engineering

82. Qwest states it makes the ordered amount of power plant capacity available to McLeod if McLeod should ever demand it. (Ex Q-3, Ashton Rebuttal at 7) Qwest asserts that it makes decisions about building power plant capacity based on the need to be able to provide the ordered amount. Qwest argues that McLeod's attempts to pay for less than the ordered amount of capacity should be rejected as an "after-the-fact" challenge to the DC Power Plant rate and not an interpretation of the Amendment itself.

83. Qwest argues that its interpretation of the Amendment is consistent with Qwest's actual network and with McLeod's own charges for power plant when it allows collocation in its own facilities. Qwest asserts that the evidence shows that McLeod's collocators must report and be billed for "usage" at the level of the desired cable size. (Tr at 226-228)

84. Qwest argues it is reasonable for Qwest to size its power plant based on CLEC power orders. Qwest states it does not know the List 1 drain of the CLEC equipment, is not familiar with all of the equipment the CLECs use and cannot know how quickly the CLECs will grown or when to anticipate the amount of power they may need.

85. Qwest notes that 47 CFR § 51.323(f)(3) requires that '[w]hen planning renovations of existing facilities or constructing or leasing new facilities, an incumbent LEC shall take into account projected demand for collocation of equipment." Qwest argues that when constructing power plant facilities, Qwest is required to take into account the fact that the DC power demands of McLeod and other collocators will not always be at current, measured levels.

86. Qwest asserts that charging for power plant "as consumed" as opposed to "as ordered" would allow McLeod to pay for less capacity than is available to McLeod for its use.

87. Qwest contends that if McLeod is billed for power plant on the basis of actual measured power usage, that actual measured usage will fall below List 1 drain. Qwest asserts that List 1 drain can be approximated by the busy day/busy hour drain on the power plant during normal operations, but unless Qwest is able to take a measurement at the exact time of the List 1 drain, the number of amps measured will be less than the List 1 drain. The agreement requires Qwest to

measure at least twice, and up to four times, per year, which guarantees that the measured amounts will not always be the List 1 drain. Qwest points out that McLeod's own witness does not endorse using actual measurements to size DC power plant. (Tr at 173 – 174)

Discrimination Charge

88. Qwest argues that it is not violating the language of the Amendment and is not discriminating against McLeod by applying the Power Plant rate on an as-ordered basis. Qwest argues that McLeod's discrimination claim fails because: 1) McLeod agreed to pay the Power Plant charges on an as-ordered basis; 2) there is no evidence to establish that Qwest treats McLeod differently from other similarly situated CLECs; 3) Qwest makes available to CLECs the amount of power plant capacity they ordered and charges in accordance with Commission-approved rates; 4) McLeod charges its collocators for power plant capacity in accordance with the size of their power cables in the same way that Qwest's Power Plant rates are structured; 5) McLeod has failed to take advantage of Qwest's offer to re-fuse its existing power cables in order to lower the "ordered amount" of capacity; and 6) the Commission cannot and should not make conclusions about discriminatory impacts based on the experience of only one CLEC. (Qwest Reply Brief at 22-23)

89. Qwest asserts that McLeod consented to the application of the power plant rates on an as-ordered basis in the ICA. Qwest asserts further there is no evidence that McLeod tried to obtain a different rate or rate design at the time the contract was formed, that Qwest failed to apply the rate as originally agreed or that Qwest changed the way it operates between the execution of the ICA and the present. Qwest states that it does not agree that the Power Plant rate is discriminatory, but assuming, *arguendo*, that it is, McLeod's voluntary agreement to that rate structure, makes it non-discriminatory. Qwest looks to Section 252(a)(1) of the 1996 Act which provides that "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsection (b) and (c) of section 251 of this title." Qwest notes that subsections (b) and (c) of Section 251 contain the non-discrimination standards upon which McLeod relies.

90. In response to McLeod's claim that the ICA prohibits discrimination in any form and requires Qwest to provide power plant capacity to McLeod at parity with how it provides such

capacity to itself, Qwest asserts that Qwest does not "charge" itself power plant rates. It engineers for its own needs at List 1 drain. Qwest engineers for CLEC power plant needs at a superior level, not merely at parity, and these terms and conditions are not less favorable for the CLECs, and provides the CLECs with the power plant capacity they order and expect.

91. Qwest asserts that because it owns the central office in which CLECs are collocated it is difficult to draw comparisons with how Qwest provisions collocation to itself. Nevertheless, Qwest claims the provision of power plant capacity to itself is not preferential vis-a-vis its provision of capacity to CLECs. Qwest argues that the law does not require that Qwest treat McLeod in a manner that is identical to how it treats itself. If anything, Qwest asserts it makes available to CLECs a higher level of confidence and security that the requested power plant capacity will be available, which it argues does not constitute granting a preference to itself. Qwest claims it provided McLeod full disclosure of how the new power plant rates would be applied and received McLeod's consent. Qwest asserts that requiring CLECs to pay for the power plant capacity made available to them does not disadvantage them, especially since Qwest offers a way to reduce the ordered amount.

92. Qwest argues that its collocation power provisioning is non-discriminatory because the CLECs are getting what they pay for, and paying for what they get. Qwest makes available to CLECs the amount of power plant capacity that they order, and Qwest then charges for the power plant in accordance with Commission-approved rates. Qwest asserts that both it and CLECs incur power plant costs relative to the amount of power plant capacity made available to them. In the real world, Qwest incurs costs for the spare capacity of the plant, and costs for the central office to house the plant, and costs associated with planning for future power needs, which all benefit the CLECs in some non-quantifiable way. Thus, Qwest claims there is simply insufficient basis to find that Qwest's pricing structure for power plant is discriminatory.

93. Qwest asserts that although McLeod says it bills on a "usage" basis, the evidence in this proceeding shows that "usage" is really "size of the cable feed." (Tr at 225-228) Qwest points to Exhibit Q14 to show that in order to obtain a power feed or cable of a certain size, McLeod's collocators must report usage at X amps in order to obtain a cable size of X amps. Thus, Qwest believes that McLeod's claim that it offers usage-based power pricing is illusory.

94. Qwest argues that the Commission should not make decisions about a pricing scheme outside of a cost docket with broad participation. McLeod's power ordering practices may or may not be reflective of what other CLECs do, and Qwest states McLeod may be over-sizing its cables, and may not be reflective of the larger CLEC community.

Discussion and Resolution

95. We find that the evidence supports Qwest's interpretation of the meaning of the Amendment, i.e. that the Amendment only changed the method of billing for power usage greater that 60 amps, and did not change the method of billing for power plant capacity. This interpretation is supported by the language of the Amendment itself, as further supported by extrinsic evidence.

96. We find further that McLeod has not demonstrated that the Amendment is discriminatory against McLeod.

97. Section 1.2 of the Amendment appears to address only the power usage rate. However, ambiguity is introduced into the Amendment from the language and interrelationship of several provisions in section 2 of the Amendment. Section 2.1 provides in part: "The DC Power Usage Charge is for the capacity of the power plant available for CLECs use." Section 2.2 provides: "The -48 Volt DC Power Usage Charge is specified in Exhibit A of the Agreement and applies to the quantity of -48 Volt Capacity specified by the CLEC in its order." Section 2.2.1 provides in relevant part: "Qwest will initially apply the -48 Volt DC Power Usage Charge from Exhibit A of the Agreement to the quantity of power ordered by CLEC. Qwest will determine the actual usage at the power board as described in Section 1.2."

98. The only time the term "-48 Volt DC Power Usage" appears in Exhibit A is as a heading, designated as line item 8.1.4.1. There is no rate element associated with item 8.1.4.1, it is clearly a heading, under which there appear two distinct charges: "Power Plant" and "Power Usage."

99. Qwest's interpretation, that the Amendment only affects the Power Usage component for cables greater than 60 amps, is consistent with the language of the Amendment. However, because Section 2.2.1 appears to reference "as measured billing" to the entire scope of "-48 Volt DC Power Usage" which encompasses both the Power Plant and Power Usage rate elements, we cannot find that the Amendment is without ambiguity, or that McLeod is wrong in its interpretation solely by

looking at the language of the Amendment.

100. Extrinsic evidence supports Qwest's interpretation.

101. Prior to entering into the Amendment, Qwest billed McLeod for DC Power based on two separate charges, one for capacity and one for usage. Each were billed on an "as ordered" basis. McLeod was, or should have been aware, there were two separate charges. When it was analyzing the Amendment, and concerned about the effect it would have on its power costs, McLeod focused solely on the Power Usage portion of the charges. McLeod did not object to Qwest's billing method until several months after the Amendment was executed. There is no evidence that McLeod had any belief that the Power Plant portion of the charges would change under the Amendment, but there is evidence that McLeod understood there would be a change in the Power Usage charge for orders greater than 60 amps. In analyzing the affect of the Amendment, McLeod personnel prepared a spreadsheet that focused solely on the Power Usage Charge.

102. None of the McLeod witnesses reviewed the Amendment prior to its execution. *See* Tr. Vol. I, pp. 34, 35 (Starkey), pp. 103, 104 (Morrison), Tr. Vol. II, p. 268 (Spocogee). According to Ms. Spocogee, the first time any McLeod employees did a cost analysis of the Amendment was months after the parties executed the Amendment. Tr. Vol. II, p. 268 (Spocogee). Nor were there any negotiations between Qwest and McLeod regarding the amendment. Tr. Vol. I, p. 35 (Starkey).

103. The evidence surrounding Qwest's CMP and PCAT indicate that Qwest had an intent that only the application of the Power Usage rate element would change. Other than a minor conflict concerning whether an amendment would be required to effect the changes as discussed in the CMP, there is no evidence that Qwest had an intent prior to the execution of the Amendment other than its current interpretation of the Amendment. The argument of whether an Amendment would be required is not determinative of the ultimate disposition of the intent of how charges would be applied.

104. The collocation cost study that was submitted in Phase II of the Cost Docket is consistent with Qwest's interpretation of how McLeod has been billed under the ICA and Amendment. The rates were developed on an "as-ordered" basis. However, the 2001 cost study has little bearing on what Qwest and McLeod intended when they entered into the Amendment.

105. McLeod's evidence concerning engineering practices is not persuasive concerning the determination of the parties' intent in entering into the Amendment. Such evidence appears more relevant to developing the rate in a cost docket.

106. The record in this proceeding does not support a finding that Qwest's interpretation of the Amendment discriminates against McLeod. Section 252 of the Act provides that carriers can negotiate and enter into ICAs without regard to the non-discrimination provides of the Act. McLeod voluntarily paid the capacity charge on an "as-ordered" basis for several years.

107. McLeod's evidence that Qwest charges CLECs for collocation power differently from how Qwest imputes the costs of such power to itself is not sufficient to support a finding that Qwest's DC power charges are improperly discriminatory. An ILEC may charge different rates than it imputes to itself as long as such rates are reasonable. Qwest provided evidence that distinguishes its situation from that of a collocating CLEC and that would support and justify its billing practices. We find that McLeod has not demonstrated on this record that Qwest is improperly discriminating against it in the imposition of the DC Power charges.

CONCLUSIONS OF LAW

1. Qwest is a public service corporation pursuant to Article XV of the Arizona Constitution and Arizona Revised Statutes, Title 40 generally.

2. Qwest is an incumbent local exchange carrier, as defined in the Telecommunications Act of 1996 and is certificated to provide telecommunication services in the state of Arizona.

3. McLeod is a competitive local exchange carrier, as defined in the Act, and is certificated to do business in the state of Arizona.

4. Pursuant to sections 251 and 252 of the 1996 Act, the Commission is designated as the agency responsible for arbitrating and approving interconnection agreements between telecommunications carriers.

5. The Commission has jurisdiction over the parties and the subject matter of the complaint pursuant to the 1996 Act, and A.R.S. §§40-203, 40-246, 40-334 and 40-361.

6. Pursuant to the law of contract interpretation, the intent of the parties in entering into a contract is determined by the four corners of the contract itself, unless the contract language is

ambiguous, in which case the Commission may review extrinsic evidence to determine the intent of the parties with respect to the contract.

7. The language of the Amendment and Exhibit A to the ICA are ambiguous on their face as to the intent of the parties concerning the method of billing for the DC Power Charges.

8. McLeod has not demonstrated that when the Amendment was executed, that the parties intended that Qwest was to bill all DC power charges on an "as used" basis.

9. McLeod has not demonstrated on the record in this proceeding that Qwest's DC Power rate impermissibly discriminates against McLeod.

10. Qwest is entitled to payment of all funds withheld by McLeod in connection with the disputed collocation DC power charges.

ORDER

IT IS THEREFORE ORDERED that McLeodUSA Telecommunications Services, Inc.'s claim for overcharges of collocation DC power charges as set forth in its complaint is denied.

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IT IS FURTHER ORDERED that McLeodUSA Telecommunications Services, Inc. shall pay to Qwest Corporation the amounts withheld in connection with the disputed collocation DC power charges.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN COMMISSIONER

COMMISSIONER COMMISSIONER COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this _____ day of _____, 2007.

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____

SERVICE LIST FOR: MCLEODUSA TELECOMMUNICATIONS SERVICES, INC. V. QWEST CORPORATION

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

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