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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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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

Arizona Corporation Commission

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AUG 16 2007

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**EXCEPTIONS OF
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.**

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") respectfully submits its exceptions to the Recommended Opinion and Order ("RO&O") issued on August 8, 2007.

Introduction

McLeodUSA filed this complaint in an effort to: (i) enforce the terms of its interconnection agreement, as amended in 2004, addressing how Qwest Corporation ("Qwest") bills for DC power provided to McLeodUSA's collocations in Qwest central offices and (ii) ensure that McLeodUSA was receiving that DC power in parity with the terms under which Qwest accesses DC power for its own equipment. Non-discriminatory treatment is both required under the 1996 Telecommunications Act and critical for McLeodUSA to provide effective competition in Arizona. However, the RO&O has interpreted the amended interconnection agreement at issue in a manner that is discriminatory and that places McLeodUSA at an improper competitive disadvantage. These exceptions set forth the basis in the record that supports an interpretation of the amendment that is not discriminatory and that comports with the requirements of the 1996 Act. McLeodUSA also proposes specific amendments to the RO&O.

1 The RO&O fundamentally errs in three respects. First, the RO&O focuses exclusively on
2 interpreting the language in the 2004 DC Power Measuring Amendment (“Amendment”) to the
3 interconnection agreement (“ICA”) between McLeodUSA and Qwest. The Commission, however,
4 cannot interpret an amendment to an ICA in isolation. Indeed, the Amendment itself states that all
5 provisions of the ICA not modified by the Amendment remain in full force and effect. The
6 language of the entire ICA, as amended by the DC Power Measuring Amendment, unambiguously
7 requires Qwest to bill McLeodUSA for DC power – including power plant – on the same basis as
8 how Qwest assigns such costs to itself – using actual usage. Thus, when interpreted in the context
9 provided by other provisions of the ICA, the 2004 Amendment is not ambiguous, there is no need
10 to resort to considering extrinsic evidence and Qwest and McLeodUSA are treated equally
11 concerning access to DC power.

12 Second, the RO&O mistakenly places significant weight on certain extrinsic evidence and
13 ignores more compelling extrinsic evidence to reach the wrong conclusion that the ICA, as
14 amended by the 2004 amendment, permits Qwest to bill McLeodUSA based on the size of the
15 distribution cables, not on the amount of power used. That interpretation leads to Qwest treating
16 McLeodUSA differently than it treats itself with respect to DC power. The extrinsic evidence, in
17 fact, supports an interpretation leading to non-discrimination.

18 Third, the RO&O concludes that Qwest may “reasonably” discriminate against
19 McLeodUSA in providing access to power. However, the FCC made it patently clear that the
20 nondiscrimination standard under Section 251(c) of the 1996 Act does not permit incumbent local
21 exchange carriers to “reasonably” discriminate. Using the appropriately “stricter”
22 nondiscrimination standard established by the FCC in the First Report and Order, under the current
23 RO&O, Qwest will be allowed to unlawfully discriminate against McLeodUSA by providing
24 access to collocation power, an essential component of interconnection, on terms and conditions
25 that are materially less favorable than Qwest provides itself for accessing the same power for its
26 own use.

27

1 The Commission, therefore, should amend the RO&O and should interpret the 2004 DC
2 Power Amendment to require Qwest to bill McLeodUSA for DC power – including power plant –
3 based on the amount of power that McLeodUSA actually uses, just as Qwest does for itself.

4 **A. The McLeodUSA/Qwest ICA, as Amended by the 2004 DC Power Measuring**
5 **Amendment, Unambiguously Supports McLeodUSA’s Interpretation.**

6 The RO&O provides:

7 94. We find that the evidence supports Qwest’s
8 interpretation of the meaning of the Amendment, *i.e.*, that the
9 Amendment only changed the method for billing for power usage
10 greater than 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.

11 However, this statement erroneously interprets the DC Power Measuring Amendment
12 without giving proper consideration to the related provisions in the ICA governing Qwest’s
13 obligation to provide McLeodUSA access to power for collocations. Instead, the RO&O interprets
14 the Amendment in a vacuum by only considering the words of the Amendment to determine the
15 intent of the parties. The RO&O gives no consideration to the clear intent stated elsewhere in the
16 ICA and Amendment that Qwest is obligated to provide power to McLeodUSA on terms that are
17 at least at parity with how Qwest does so for itself.

18 In fact, the DC Power Measuring Amendment makes clear on its face that it must be
19 construed as part and parcel of the underlying ICA that it amends:

20 The Agreement¹ is hereby amended by adding the terms, conditions
21 and rates for DC Power Measuring, as set forth in Attachment 1,
attached hereto and incorporated herein.

22 ***

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

24 ***

25 The Agreement as amended (including the documents referred to
26 herein) constitutes the full and entire understanding and agreement

27 _____
¹ The “Agreement” referenced is the entire ICA.

1 between the Parties with regard to the subjects of the Agreement as
2 amended

3 Part D, Section (D)2.1 of the ICA obligates Qwest to provide McLeodUSA access to collocation,
4 including DC power, on a nondiscriminatory basis in compliance with federal and state law. Thus,
5 the unquestionable intent of the parties is that Qwest must provide DC power to McLeodUSA
6 collocations on a nondiscriminatory basis. Accordingly, when the 2004 Amendment is interpreted
7 within the context of the ICA as a whole, it unambiguously supports a conclusion that the 2004
8 Amendment required Qwest to bill all collocation power elements on a measured basis because
9 that is how Qwest provides power to itself.

10 Even if the Amendment were ambiguous, the extrinsic evidence in the record would
11 support an interpretation that would require Qwest to provide power to McLeodUSA in the same
12 manner in which it provides power to itself. For example, the RO&O erred in relying on Qwest's
13 Change Management Process ("CMP") as extrinsic evidence in support of Qwest's interpretation,
14 and dismissing as "not determinative" or "minor" other extrinsic evidence from that same CMP
15 process. The RO&O states, at ¶ 103 that "[o]ther than a minor conflict concerning whether an
16 amendment would be required..., there is no evidence that Qwest had an intent prior to execution
17 of the Amendment other than its current interpretation of the Amendment." However, to the
18 contrary, the same CMP documentation shows that Qwest specifically refused to agree to bill
19 unified power rates from Oregon and South Dakota on a measured basis.² Yet, between that time
20 and the execution of the 2004 Amendment, Qwest manifested a different intent with respect to
21 how these unified power rates would be billed in those two states. Qwest witness Million
22 admitted that the unified DC power rates are billed on a measured basis in Oregon and South
23 Dakota.³ Not only was this a change from Qwest's position stated during the CMP, it results in
24 precisely the same billing that McLeodUSA expected in Arizona, and is arguing for in this
25 proceeding – billing for power on a measured basis for all power rate elements. Thus, the RO&O

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² Hearing Ex. Q-1 (Response Testimony of William Easton, Exhibit WRE-2 at 2).

³ Tr. 322.

1 incorrectly ignored that Qwest materially changed its position from that which it had stated during
2 the CMP process, and, in fact, is billing unified power rates in those states on a measured basis.

3 The Commission, therefore, should amend the RO&O to find that the ICA, as amended by
4 the 2004 DC Power Measuring Amendment, unambiguously requires Qwest to charge
5 McLeodUSA for DC power – including power plant – based on the amount of power McLeodUSA
6 actually uses because that is how Qwest assesses power costs to itself.

7 **B. Qwest is Unlawfully Discriminating Against McLeodUSA in Violation of the ICA and**
8 **Applicable Law.**

9 The interpretation of the 2004 DC Power Amendment adopted by the RO&O results in
10 discriminatory treatment against McLeodUSA regarding access to DC power. McLeodUSA
11 simply is not provided access to DC power on the same terms that Qwest provides DC power to
12 itself. However, the RO&O sanctions the discriminatory treatment by applying the wrong legal
13 standard in evaluating whether Qwest is unlawfully discriminating against McLeodUSA in
14 providing access to power wherein it states “[a]n ILEC may charge different rates than it imputes
15 to itself as long as such rates are reasonable.”⁴ Based on an application of this improper
16 “reasonable discrimination” standard, the RO&O finds Qwest’s discriminatory treatment to be
17 reasonable and rejects McLeodUSA’s complaint.

18 In its Local Competition Order, the FCC expressly rejected use of a “reasonable
19 discrimination” standard under Section 251:

20
21 The nondiscrimination requirement in section 251(c)(2) is not
22 qualified by the "unjust or unreasonable" language of section
23 202(a). We therefore conclude that Congress did not intend that the
24 term "nondiscriminatory" in the 1996 Act be synonymous with
25 "unjust and unreasonable discrimination" used in the 1934 Act, but
26 rather, intended a more stringent standard.⁵

27 ⁴ RO&O at 107.

⁵ 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”) at ¶ 217.

1 Accordingly, the RO&O's rejection of the discrimination claim based on the use of a "reasonable
2 discrimination" standard is in error and must be corrected.

3 The FCC was equally clear in its Local Competition Order as to what nondiscrimination
4 standard must be applied in evaluating the access to power Qwest is obligated to provide to
5 McLeodUSA under Section 251(c)(6). First, the FCC made it clear that the Section 251(c)
6 nondiscrimination standard "applies to the terms and conditions an incumbent LEC imposes on
7 third parties *as well as on itself.*"⁶ Thus, one cannot deem Qwest's treatment of CLECs as
8 nondiscriminatory simply because it treats all CLECs equally; the Section 251(c)
9 nondiscrimination standard prohibits an ILEC from advantaging itself simply by treating CLECs
10 equally poorly. The FCC elaborated on the Section 251(c) nondiscrimination standard later in its
11 order by again proclaiming that the incumbent local exchange carrier had to provide CLECs access
12 to these essential elements on terms that, at a minimum, were offered equally to all requesting
13 carriers, and, where applicable, equal to the terms and conditions under which the incumbent LEC
14 provisions such elements to itself.⁷ While the FCC made this statement in the context of
15 discussing nondiscriminatory access to UNEs under Section 251(c)(3), Section 251(c)(6) contains
16 the identical "just, reasonable and nondiscriminatory" standard as does Section 251(c)(3). Further,
17 this illumination applies with equal force to Section 251(c)(6) since, as the FCC stated, the Section
18 251 "*unqualified*" non-discrimination standard was identical "throughout Section 251."⁸

19 Second, the FCC discussed its rationale for adoption of this unqualified stringent (*i.e.*,
20 absolute) standard of nondiscrimination at several points in its order, and all are instructive and
21 support the McLeodUSA interpretation of the Section 251(c) standard that Qwest has violated by
22 providing discriminatory access to power. For example, the FCC concluded:

23
24 Given that the incumbent LEC will be providing interconnection to
25 its competitors pursuant to the purpose of the 1996 Act, the LEC
26 has the incentive to discriminate against its competitors by

27 ⁶ Id. at ¶ 218.

⁷ Id. at ¶ 315.

⁸ Id. at ¶ 218.

1 providing them *less favorable terms and conditions of*
2 *interconnection than it provides itself.* Permitting such
3 circumstances is inconsistent with the procompetitive purpose of
4 the Act.⁹

5 The FCC further explained that a strict prohibition against discrimination under Section
6 251(c) was required to ensure that CLECs have a “meaningful opportunity to compete...Such
7 terms and conditions should serve to promote fair and efficient competition. This means, for
8 example, that incumbent LECs may not provision unbundled elements that are inferior in quality
9 to what the incumbent provides itself because this would likely deny an efficient competitor a
10 meaningful opportunity to compete... Moreover, the *incumbent must provide access to these*
11 *functions under the same terms and conditions that they provide these services to themselves or*
12 *their customers.*¹⁰

13 The record in this case amply demonstrates that Qwest is favoring itself in providing itself
14 access to an essential element – DC power – because Qwest charges McLeodUSA based on the
15 size of the power feeder cables *i.e.*, List 2 Drain, which results in much higher power charges, than
16 the basis on which Qwest assigns costs to itself for using the same DC power. According to Ms.
17 Spocogee’s testimony, that discriminatory treatment costs McLeodUSA nearly \$40,000 in
18 excessive DC Power charges *per month.*¹¹ The fact that the incumbent can foist an extra \$40,000
19 per month in excessive DC power charges onto a single CLEC by providing discriminatory access
20 to power is thoroughly inconsistent with the FCC’s rationale for adopting the stringent
21 nondiscrimination standard in Section 251(c). Such discrimination harms McLeodUSA’s ability
22 to meaningfully compete against Qwest using facilities-based services that require power to
23 operate the McLeodUSA collocations. The legal standard applied in the RO&O on the issue of
24 discrimination is simply at odds with the standard adopted by FCC in the Local Competition Order
25 and must be corrected by the Commission.

26 ⁹ Id. at ¶ 218 (emphasis added).

27 ¹⁰ Id. at 315 and 316 (emphasis added). As previously explained, while the FCC provided this explanation of the
Section 251(c) nondiscrimination standard in the context of 251(c)(3) UNEs, the nondiscrimination standard is
identical “throughout Section 251.” Id. at ¶218.

¹¹ Hearing Ex. M-5 CF (Confidential Direct Testimony of Tami J. Spocogee, pp. 3-4).

1 Moreover, while the RO&O states that Qwest provided evidence that distinguishes its
2 situation from that of a collocating CLEC, the RO&O does not identify the evidence relied on for
3 its statement. Qwest's Post-Hearing Brief argued it was "reasonably" discriminating based on Mr.
4 Ashton's testimony that it was appropriate for Qwest to use the List 2 drain for CLECs since
5 Qwest did not have the List 1 drain, used by Qwest to size power plant for its own equipment,
6 from CLECs. In its Post Hearing Reply Brief, Qwest makes its oft repeated argument that it can
7 treat CLECs differently because CLECs have caged collocation spaces and incumbent local
8 exchange carriers do not house their equipment in that manner. Neither justification entitles
9 Qwest to discriminate against McLeodUSA under the appropriate standard of nondiscrimination.

10 First, Mr. Ashton's claim was thoroughly inconsistent with Qwest's own engineering
11 guidelines.¹² No reasonable engineer would size power plant to List 2 drain associated with their
12 power distribution cables (whether those cables are CLEC cables or Qwest cables) given that
13 Qwest's engineering requirements require power *cables* to be sized on a higher List 2 drain, while
14 Qwest's manuals direct that power *plant* be sized on a lower List 1 drain – a standard that Qwest
15 was well aware of back in 1999-2000.¹³

16 Second, excusing discrimination on this basis emasculates the more stringent Section
17 251(c) nondiscrimination standard. In essence, it effectively endorses Qwest's position that the
18 nondiscrimination prohibition of Section 251(c) can be circumvented by an incumbent local
19 exchange carrier's failure (intentional or not) to secure information that would otherwise enable
20 the incumbent LEC to provide access to power on the same terms and conditions as provided for
21 its own use. It is undisputed that Qwest's collocation order form only asked for the size of the
22 cable order; the List 1 drain of CLEC equipment was never requested by Qwest.¹⁴ Nor does
23 Qwest's collocation order form state anywhere that the order for power feeder cables would be
24 construed by Qwest an order for power plant capacity.¹⁵

25

26 ¹² Hearing Ex. M-3 CF (Confidential Direct Testimony of Sidney Morrison, pp. 31-36).
27 ¹³ Hearing Ex. M-2 (Rebuttal Testimony of Michael Starkey, pp. 32-33).
¹⁴ Hearing Ex. M-2 (Rebuttal Testimony of Michael Starkey, pp. 26-27).
¹⁵ Hearing Ex. M-2 (Rebuttal Testimony of Michael Starkey, Exhibit MS-4).

1 Qwest witness Mr. Ashton admitted that if Qwest knew the List 1 drain of CLEC
2 equipment when evaluating the power plant capacity that would be required to support that
3 equipment, Qwest would design power plant required by the CLEC to the CLEC's List 1 drain
4 (*i.e.*, a measure of the CLEC's power *usage*).¹⁶ However, Mr. Ashton admitted that Qwest never
5 asked McLeodUSA for its List 1 drain information, nor provided any means on the collocation
6 application it designed where a CLEC could provide this information if it so desired. Qwest
7 cannot be rewarded for its self-serving ignorance illustrated by its failure to gather the necessary
8 information and admitted defiance of its own Technical Publications for proper engineering.
9 Furthermore, McLeodUSA provided evidence from Qwest's own Technical Publications –
10 documentation written by Qwest's engineering witness, Mr. Ashton, showing that Qwest could
11 estimate List 1 drain based on information that Qwest actually had in hand. Thus, Qwest could
12 have estimated every CLEC's List 1 drain to size power plant in a nondiscriminatory fashion in
13 fulfillment of its duty to provide access to power on equal terms to how Qwest provides access to
14 power for itself – using List 1 drain.¹⁷ Qwest's claims regarding the way it sizes and charges for
15 power plant differently for CLECs than it does for itself defines the very type of discriminatory
16 treatment the FCC said was improper under Section 251(c).

17 Indeed, there is no debate that Qwest's charging McLeodUSA for power plant capacity
18 based on the size of the power feeder cables (which Qwest assumes is List 2 drain) violates the
19 nondiscrimination prohibition of Section 251(c)(6) as explained by the FCC. List 2 Drain is the
20 current equipment draws when the power plant is in "worst case" condition of voltage and traffic
21 distress, when the DC power plant's batteries are approaching a condition of total failure.¹⁸ In
22 other words, List 2 is an extreme circumstance and rarely if ever occurs. It is economically
23 inefficient to size power plant based on a "worst case" scenario.¹⁹ TELRIC pricing principles
24 require the assumption of an economically efficient network. In fact, Qwest uses that assumption
25

26 ¹⁶ Tr. at 344-345.

27 ¹⁷ Hearing Ex. M-4 (Public Rebuttal Testimony of Sidney Morrison, p. 10).

¹⁸ Hearing Ex. M-3 CF (Confidential Direct Testimony of Sidney Morrison, pp. 21-22 and 32 and Ex. SLM-3).

¹⁹ *Id.* at 12 and 46.

1 in planning DC Power Plant capacity for its own use, as demonstrated by its Technical
2 Publications that power plant capacity is sized using List 1 drain.²⁰ It simply makes economic
3 sense to size power plant capacity using the List 1 drain since the cost of building DC power plant
4 to constantly have capacity available to satisfy an extremely rare List 2 drain event far exceeds the
5 benefits of building power plant capacity of that size.

6 Indeed, it appears that the Commission has already recognized that using cable amperage to
7 bill for DC power was inconsistent with TELRIC pricing principles in Qwest's prior cost docket,
8 which ruling Qwest apparently chose to ignore. The Commission said it was **not** approving billing
9 for power based on the "maximum capacity of the cabling." *In The Matter Of The Investigation*
10 *Into Qwest Corporation's Compliance With Certain Wholesale Pricing Requirements For*
11 *Unbundled Network Elements And Resale Discounts*, Docket No. T-00000A-00-0194; Decision
12 No. 64922 at 43-44 (Arizona Corporation Commission June 12, 2002). Yet, that is exactly the
13 basis of how Qwest has billed McLeodUSA since Qwest implemented the rates approved in the
14 2002 proceeding, and it continues to do so under the 2004 Amendment— based on the "maximum
15 capacity of the cabling." The RO&O completely failed to explain why, given the Commission's
16 explicit ruling against using cabling size as the basis for billing for DC power, it was permissible
17 to Qwest to bill McLeodUSA on that basis since that cost docket.

18 This Commission's prior ruling is on all fours with the FCC's Section 251(c)
19 nondiscrimination analysis, wherein the FCC explained that the nondiscrimination requirement
20 throughout Section 251(c) was *unqualified* because it was intended to ensure that CLECs had a
21 "meaningful opportunity to compete."²¹ By charging McLeodUSA for power plant capacity using
22 the maximum capacity of the power feeder cables, Qwest is requiring McLeodUSA to pay for
23 power plant capacity as if Qwest were designing power plant on an inefficient basis for
24 McLeodUSA (*i.e.*, equal to List 2 drain, the worst case scenario), when Qwest does not do so for
25 itself. Thus, Qwest is foisting inefficient network costs onto McLeodUSA under its interpretation

26 _____
27 ²⁰ See Hearing Ex. M-2 (Rebuttal Testimony of Michael Starkey, p. 29) and Hearing Ex. M-3 CF (Confidential Direct
Testimony of Sidney Morrison, pp. 32-35).

²¹ Local Competition Order ¶ 315.

1 of the ICA as amended by the 2004 Amendment.

2 The FCC stated unequivocally in its Local Competition Order that when an ILEC provides
3 interconnection to a competitor in a manner that is less efficient than the ILEC provides to itself,
4 the ILEC is violating the duty to be “just” and “reasonable” under section 251(c)(2)(D).²² Qwest
5 can, and should be required to size power plant for McLeodUSA as Qwest does for itself in accord
6 with its own technical documentation, the DC Power Measuring Amendment, the parties’ ICA,
7 and federal law. And even if Qwest actually overbuilds central office power plant in contravention
8 of engineering requirements, the parties’ ICA and the FCC’s rules and orders preclude Qwest from
9 charging McLeodUSA for this inefficiency. As such, Qwest’s interpretation of the Interconnection
10 Agreement, as amended by the 2004 Amendment, to allow Qwest to charge for power plant based
11 on the size of McLeodUSA’s power distribution cables, should be rejected.

12 **Conclusion**

13 For the foregoing reasons, and the reasons set forth in McLeodUSA’s opening and reply
14 briefs, the Commission should amend the RO&O to find that the ICA and applicable law require
15 Qwest to charge McLeodUSA for DC power, including power plant, based on the amount of
16 power that McLeodUSA actually uses. Proposed amendments achieving this proper result are
17 attached at Appendix A to these Exceptions.

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27 ²² Local Competition Order ¶ 218. Thus, not only is Qwest providing unlawfully discriminatory access, it is also violating the just and reasonable standard established by the FCC under Section 251.

1 MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

2
3
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26
27

1 APPENDIX "A"

2 **Proposed Amendment**

3
4 **Delete Findings of Fact Paragraph 95 and**

5 **Insert:**

6 "95. We find that the evidence supports McLeod's interpretation of the meaning of the
7 Amendment, i.e. that the Amendment changed the method of billing for power usage greater than
8 60 amps and the method of billing for power plant capacity. This interpretation is supported by
9 the language of the Amendment itself and the language of the Interconnection Agreement between
10 McLeodUSA and Qwest, and is consistent with Qwest's Section 251(c) obligations."
11

12 **Delete Findings of Fact Paragraphs 96 through 107 and**

13 **Insert:**

14 "96. The evidence in record that Qwest's current practice to charge CLECs for
15 collocation power differently from how Qwest imputes the costs of such power to itself is
16 sufficient to support a finding that Qwest's current DC power charges are improperly
17 discriminatory. The record in this proceeding further supports a finding that McLeod's
18 interpretation of the Amendment avoids improper discrimination against McLeod."
19

20
21 **Delete Conclusions of Law Paragraphs 7 through 10 and**

22 **Insert:**

23 "7. The language of the Amendment and Exhibit A to the ICA demonstrates that when
24 the Amendment was executed, the parties intended that Qwest was to bill all DC power charges on
25 an "as used" basis.

26 8. McLeod has demonstrated on the record in this proceeding that Qwest's current DC
27 Power rate impermissibly discriminates against McLeod.

1 9. McLeod is not obligated to refund to Qwest payment of all funds withheld by
2 McLeod in connection with the disputed collocation DC power charges.”

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5 At Page 26, line 13, **Replace** “denied” with “granted.”

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8 At Page 27, **Delete** lines 1-3.

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