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UTILITIES COMMISSION

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BEFORE THE PUBLIC UTILITIES COMMISSION OF IDAHO

IN RE:) **Docket No. MTI-T-05-01**
)
PETITION OF MCLEODUSA) **QWEST CORPORATION'S**
TELECOMMUNICATIONS SERVICES,) **MOTION TO DISMISS**
INC., FOR ENFORCEMENT OF)
INTERCONNECTION AGREEMENT)
WITH QWEST CORPORATION)
_____)

Qwest Corporation ("Qwest") by and through its undersigned attorneys and pursuant to IPUC Rule of Practice and Procedure 56, files this motion requesting the Idaho Public Utilities Commission ("Commission") to dismiss McLeodUSA Telecommunication Services, Inc. ("McLeod's") Petition for Enforcement of Interconnection Agreement with Qwest Corporation ("Petition"). On this same date, Qwest is also filing its Answer to the Petition. For the reasons set forth herein, the issues raised in McLeod's Petition are now moot and this case should be dismissed.¹ At most, McLeod's petition constitutes a request for a declaratory judgment, and it does not meet the standards for entry of a declaratory order.

¹ On April 1, 2005, Qwest filed its response to McLeod's motion for emergency relief. In that response,

I. BACKGROUND

1. This docket was opened on March 30, 2005, when McLeod filed its Petition, and emergency motion, seeking to prevent Qwest from demanding a security deposit and from discontinuing services or disconnecting McLeod pursuant to the parties' interconnection agreement ("ICA").² McLeod filed its Petition and emergency motion after receiving a letter from Qwest on March 21, 2005, demanding a security deposit pursuant to the parties' ICA.

2. Since filing its Petition, however, McLeod has engaged in discussions with Qwest about Qwest's demand for a security deposit. During those discussions, McLeod has assured Qwest that it would remain current on its monthly payments under the ICA's in each of the fourteen states in Qwest's region. McLeod's assurance to Qwest that it will remain current on its payment obligations under the ICAs in each state has satisfied Qwest's need for security. As a result, Qwest has withdrawn its March 21, 2005 demand for a security deposit under the ICA.³

II. DISCUSSION

3. The withdrawal of the demand for security under the ICA renders moot all of the issues and requests for relief presented in McLeod's Petition. In the second sentence of the Petition, McLeod defines the basis for commencing the case: "This Petition stems from a dispute between McLeodUSA and Qwest over Qwest's right under the interconnection agreement to demand security deposits from McLeodUSA for services provided under the

Qwest argued that the issues in McLeod's Petition were not ripe, and that Qwest was prevented from demanding a security deposit from McLeod based on the temporary restraining order issued by the Federal District Court for the Northern District of Iowa. In addition to the information supporting Qwest's response, and as explained herein, Qwest also believes that the issues raised in McLeod's Petition are now moot. For that reason Qwest is now filing this Motion to Dismiss.

² In addition to its Idaho Petition, McLeod filed petitions against Qwest in the states of Arizona, Colorado, Iowa, Minnesota, New Mexico, Oregon, Nebraska, North Dakota, South Dakota, Washington and Wyoming.

³ A copy of Qwest's letter withdrawing the demand for a security deposit is attached as Exhibit 1, and incorporated herein by reference.

agreement, and to discontinue services to McLeodUSA should McLeodUSA not comply with Qwest's demand." Petition at p. 1. McLeod's Petition then asserts that Qwest's demand for security should have followed the dispute resolution provision of the ICA. *Id.*

4. McLeod's "Request for Relief" found at page 11 of its Petition is also premised upon the March 21, 2005 demand for security under the ICA:

McLeodUSA asks the Commission to open a contested case proceeding based on this Petition, and following such hearings or procedures to which the Parties may be entitled, rule that Qwest may not *demand a security deposit from McLeodUSA at this time*. McLeodUSA further requests that *in the event of a default* under the Interconnection Agreement, Qwest must follow the dispute resolution provisions in the Interconnection Agreement and may not "suspend order activity," "disconnect services," or terminate the Agreement until those dispute resolution procedures have been completed.

Petition at 11 (Emphasis added).

5. The references to the "demand for a security deposit at this time," and "in the event of a default," rest upon the March 21, 2005 demand for a security deposit. Thus, the factual premise to McLeod's Petition, and for an interpretation of the parties' rights under the ICA, is Qwest's March 21, 2005 demand for security. With Qwest's withdrawal of that demand, there is no controversy between the parties under the ICA, and McLeod's Petition is moot. Furthermore, any request to resolve the issues on a prospective basis presents a claim that is not yet ripe for adjudication. If the Commission were to act on either request, it would be stepping into the prohibited area of advisory opinions.

6. Because the circumstances giving rise to this controversy have been eliminated through Qwest's withdrawal of its demand for a security deposit, the Commission should now dismiss McLeod's Petition. Courts have historically refused to issue advisory opinions, declaring that in order to properly invoke the court's jurisdiction, there must be a justiciable controversy. In determining whether such a controversy exists, the court looks to various

factors: (1) there must be an actual, present and existing dispute as distinguished from a dispute of a hypothetical or abstract character or one that is academic or moot; (2) the controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests; and (3) it must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. *See Harris v. Cassia County 106 Idaho 513,516, 681 P. 2d 988,991 (1984)* and cases cited therein.

7. These judicial principles should guide the Commission in deciding whether it should expend its resources in hearing this dispute. McLeod's request that the Commission declare the parties' rights and obligations under the interconnection agreement, under some set of undefined future circumstances, is exactly the sort of advisory opinion that an Idaho court is prohibited from entering under the case law.

8. Moreover, on April 11, 2005, McLeod withdrew its Petition in Minnesota.⁴ Although Qwest does not agree with the representations made in McLeod's Petition as to agreements between the parties, it is unclear why McLeod has not also withdrawn its petition here. Furthermore, McLeod's action in dismissing the Minnesota complaint demonstrates the absence of any real continuing controversy between the parties.

III. CONCLUSION

Based on the foregoing, Qwest requests an order of this Commission dismissing McLeod's Petition as moot.

⁴ A copy of McLeod's Petition to the Minnesota Public Utilities Commission withdrawing its complaint is attached as Exhibit 2, and is incorporated herein by reference.

DATED this 20th day of April, 2005.



Mary S. Hobson
Stoel Rives LLP

Adam Sherr
Qwest

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2005, I served the foregoing **QWEST CORPORATION'S MOTION TO DISMISS** upon all parties of record in this matter as follows:

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
P.O. Box 83720
Boise, Idaho 83720-0074
jjewell@puc.state.id.us

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William Courter
McLeodUSA Telecommunications Services, Inc.
6400 C Street SW
Cedar Rapids, IA 52406

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Brandi L. Gearhart, PLS
Legal Secretary to Mary S. Hobson
Stoel Rives LLP

EXHIBIT 1



Qwest Corporation
1801 California Street
Suite 2400
Denver, CO 80202
Telephone: 303-896-4686
Facsimile: 303-896-8887

Larry Christensen
Director, Carrier Relations
Worldwide Wholesale Markets

April 13, 2005

Via Overnight Mail & Facsimile
James LeBlanc
Vendor Manager
McLeodUSA Telecom
First Place Tower
15 E. 5th St., Ste. 1500
Tulsa, Oklahoma 74103

Lauraine Harding
Sr. Manager, Interconnect Negotiation
McLeodUSA, Inc.
6400 C Street SW
P.O. Box 3177
Cedar Rapids, IA 52406-1377

RE: Notice of Withdrawal of ICA Security Deposit Demands

Dear Sir/Madam,

This letter is to notify you that, based on assurances by McLeod that it will remain current on its monthly payments under the ICAs, Qwest Corporation ("Qwest") is withdrawing its March 21, 2005 letters of demand for security deposit from McLeodUSA Telecommunications Services, Inc. and its CLEC affiliates (collectively, "McLeodUSA") under the Interconnection Agreements ("ICAs") between the parties. This withdrawal applies solely to the interconnection agreement demands noticed for the States of Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, New Mexico, Oregon, Nebraska, North Dakota, South Dakota, Utah, Washington, and Wyoming. This withdrawal does *not* affect the letters of default and demands for security deposit in connection with Qwest tariffed services and Qwest Communications Corp. services (dated March 18, 2005) in litigation before the United States District Court for the District of Colorado. Qwest reserves all its legal rights with respect to the security deposit demanded under those disputes and all other rights in that litigation.

The withdrawal of the letters of demand for security under the Interconnection Agreements does not constitute an admission by Qwest of the truth, accuracy or merit of any fact or principle of law asserted by McLeod, including but not limited to any purported interpretation of any term or condition of any of the Interconnection Agreements. Qwest does not waive and expressly reserves any and all rights to take any action with respect to any other security deposit demand, any notice of default or default, or any conduct taken in the future under the Interconnection Agreements.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry Christensen", written over a horizontal line.

Larry Christensen

Cc: Ken Burkhardt, CFO

EXHIBIT 2

MOSS & BARNETT

A Professional Association

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90 South Seventh Street
Minneapolis, MN 55402-4129
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DAN LIPSCHULTZ
612.347.0306
LipschultzD@moss-barnett.com

April 11, 2005

Dr. Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 Seventh Place E, Suite 350
St. Paul, MN 55101-2147

APR 12

Re: In the Matter of a Complaint by McLeodUSA Telecommunications Services, Inc. against Qwest Corporation for Demand of Security Deposit for an Approved Interconnect Agreement
MPUC Docket No.: P421/C-05-523

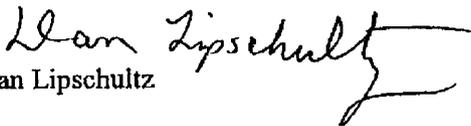
Dear Dr. Haar:

Enclosed please find an original and fifteen copies of the Petition to Withdraw Complaint, Request for Expedited Proceeding and Request for Temporary Relief on behalf of McLeodUSA Telecommunications Services, Inc. in the above-entitled matter. Also enclosed is an Affidavit of Service.

Please call if there are questions regarding this filing.

Very truly yours,

MOSS & BARNETT
A Professional Association


Dan Lipschultz

OF COUNSEL
THOMAS E. HARMS
ARTHUR J. GLASSMAN

DL/ijh
Enclosures
cc: All parties of record
764692v1

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

In Re: In the Matter of the Complaint by McLeodUSA
Telecommunications Services, Inc. against Qwest
Corporation for Demand of Security Deposit for
an Approved Interconnection Agreement

MPUC Docket No.:

Kim R. Manney, being first duly sworn on oath, deposes and states that on the 11th day of April, 2005, copies of the Petition to Withdraw Complaint, Request for Expedited Proceeding, and Request for Temporary Relief on behalf of the McLeodUSA Telecommunications Services, Inc. in the above referenced matter were hand delivered or mailed by United States first class mail, postage prepaid thereon, to the following:

Dr. Burl W. Haar
Executive Secretary
MN Public Utilities Commission
121 Seventh Place E, Suite 350
St. Paul, MN 55101

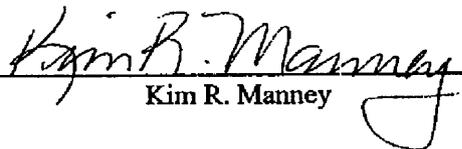
Linda Chavez
Minnesota Department of Commerce
85 Seventh Place East, Suite 500
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Minneapolis, MN 55402

William Courter
McLeodUSA Telecom, Inc.
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6400 C Street SW
Cedar Rapids, IA 52404

William Haas
McLeodUSA Telecom, Inc.
Tech Park
6400 C Street SW
Cedar Rapids, IA 52404


Kim R. Manney

SWORN TO BEFORE ME this
11th day of April, 2005


NOTARY PUBLIC



STATE OF MINNESOTA
BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
Marshall Johnson
Kenneth Nickolai
Thomas Pugh
Phyllis Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Complaint by McLeodUSA
Telecommunications Services, Inc. against Qwest
Corporation for Demand of Security Deposit for
an Approved Interconnect Agreement

MPUC Docket No.: P421/C-05-523

**PETITION TO WITHDRAW COMPLAINT, REQUEST FOR EXPEDITED
PROCEEDING AND REQUEST FOR TEMPORARY RELIEF**

On March 31, 2005, McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") filed a *Complaint, Request for Expedited Proceeding and Request for Temporary Relief* ("Complaint") with the Minnesota Public Utilities Commission ("Commission") in response to Qwest Corporation's ("Qwest") letter demanding payment under the Interconnection Agreement ("ICA") of a security deposit of \$2,098,141.82 in Minnesota by 5:00 p.m. on April 1, 2005, or risk having McLeodUSA's order activity suspended and services disconnected. The Complaint seeks temporarily relief prohibiting Qwest from disconnecting service to McLeodUSA and its end-user customers or suspending order activity. The Complaint also seeks an expedited proceeding and order precluding Qwest from demanding a security deposit.

McLeodUSA respectfully requests to withdraw its Complaint without prejudice based on Qwest's assurances in its April 5, 2005 filing with the Commission ("Qwest Response")¹ that it will not disconnect service or suspend ordering activity without following the "processes required for it to gain relief." Qwest Response at p. 4. Following the required processes would include compliance with the ICA, including its dispute resolution procedures, and with State law

¹ *Response of Qwest Corporation to McLeodUSA Telecommunications Services, Inc.'s Request for Emergency Relief*, dated April 5, 2005.

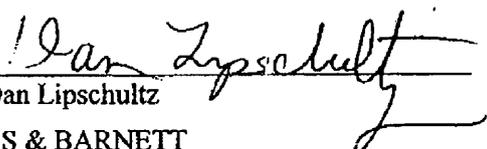
regarding interconnecting carriers such as McLeodUSA and Qwest. It is McLeodUSA's understanding that state law precludes one carrier from disconnecting without prior Commission approval. McLeodUSA may file an amended complaint or request for dispute resolution under its ICA.

McLeodUSA would also like to take this opportunity to correct the record with regard to several assertions in the Qwest Response. Specifically, in the second paragraph on page 5, Qwest asserts that it "could initiate the process of Section 26.12 regarding default . . ." In fact, the ICA between McLeodUSA and Qwest does not include a Section 26.12 or any other provision establishing rights and procedures for declaring a default. Similarly, in the first paragraph on page 6, Qwest cites Section 11.9.1 of the ICA and asserts under that Section what it characterizes as its "unconditioned right to request such a deposit if McLeodUSA becomes a credit risk." In fact, the ICA does not contain a section 11.9.1. Nor does any provision of the current ICA grant Qwest an "unconditioned right" to a security deposit. To the contrary, Sections 2.1 and 2.2 of the ICA set forth terms and conditions under which a security deposit *may* be required and McLeodUSA believes it has "satisfactory credit" with Qwest under those sections. In any event, whether and to what extent a security deposit may be required is subject to resolution by the Commission under Section 11 of the ICA.

Dated: April 11, 2005

Respectfully submitted,

By


Dan Lipschultz

MOSS & BARNETT
A Professional Association

Attorneys on Behalf of McLeod
Telecommunications Services, Inc.