

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

**MCLEODUSA
TELECOMMUNICATIONS
SERVICES, INC.**

Petitioner,

v.

QWEST CORPORATION,

Respondent.

Docket No. UT-053024

QWEST CORPORATION'S ANSWER

I. INTRODUCTION

1 Qwest Corporation, ("Qwest"), hereby answers and responds to the Petition of McLeodUSA Telecommunications Services, Inc. (McLeod), for Enforcement of Interconnection Agreement with Qwest. On this same date, Qwest is also filing a Motion to Dismiss the Petition.

2 With regard to the allegations and statements of McLeodUSA Telecommunications Services, Inc. ("McLeod") contained on pages 1 and 2 of its Petition, Qwest responds that this case arises from McLeod's deteriorating financial condition and its failure to live up to its financial obligations to Qwest. The genesis is an unrelated issue between McLeod and Qwest Communications Corporation ("QCC"), regarding charges and payments pertaining to certain

telecommunications traffic. In the course of that dispute, QCC exercised its lawful rights by withholding payments for charges it believes McLeod had incorrectly billed QCC. In retaliation, and even though Qwest was not involved in the McLeod-QCC dispute, McLeod refused to pay certain Qwest charges for Qwest tariffed services in a current total amount of approximately \$2.5 million. McLeod did not state any grounds for withholding such payments from Qwest and, indeed, had no basis for withholding payment for services provisioned by Qwest.

3 Because of the significant amount of money McLeod wrongfully withheld from Qwest and because of recent public statements McLeod made about its bleak financial situation, Qwest became very concerned about its financial exposure to McLeod in the event McLeod files for protection from its creditors in bankruptcy court. Of primary concern to Qwest (and the triggering event to the security deposit demand), was McLeod's 8-K filing on March 17, 2005 to the Securities & Exchange Commission wherein McLeod revealed that its revenues sharply declined in the fourth quarter of 2004; it had to seek forbearance from interest payments to its lenders; and, it was seeking to sell the company. As the 8-K explained, McLeod's "Lenders have agreed to forbear from exercising any remedies as a result of certain specified defaults under the Credit Facilities anticipated by the Company during the forbearance period, including, without limitation, the failure to make scheduled amortization payments under the Credit Facilities and interest payments under the Credit Agreement." Exhibit 3 to Qwest's March 31, 2005 Response to Motion for Emergency Relief, page 3.

4 A press release coincident with the 8-K filing confirmed Qwest's concerns:

There can be no assurance that we will be able to reach an agreement with its lenders regarding a capital restructuring or continued forbearance and covenant relief prior to the end of the initial forbearance period on May 23, 2005. There also can be no assurance that we will be able to identify a suitable strategic partner or buyer In the event these alternatives are not available to the Company, it is *likely* that the Company will elect to

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forgo making future principal and interest payments to its lenders . . . or, alternatively, the *Company could be forced to seek protection from its creditors.*"

Exhibit 4 to Qwest's March 31, 2005 Response to Motion for Emergency Relief, page 4. (emphasis added). On the news of the 8-K filing, McLeod's common stock decreased by almost half in one day. In light of McLeod's own statements of its financial risk and the likelihood of insolvency, Qwest – one of McLeod's largest creditors – took reasonable steps to protect its legitimate interests.

5 Qwest admits that on March 21, 2005, it sent a letter to McLeod demanding security for services provided under the interconnection agreement. Qwest asserts that its demand for security is supported by the parties' interconnection agreement and by state law governing commercial transactions and contracts implied in every contract.

6 Qwest denies McLeod's allegation that all procedures for dispute resolution in the interconnection agreement must be satisfied before Qwest may exercise its rights under the interconnection agreement to demand security, issue a notice of default, or exercise any of its other rights and remedies as stated in the interconnection agreement.

II. JURISDICTION

7 Qwest admits the allegations in paragraph 1 of the Petition.

8 With regard to paragraph 2 of the Petition, Qwest states that pursuant to Section 252 of the Telecommunications Act of 1996, McLeod and Qwest entered into an interconnection agreement resulting from McLeod opting into another interconnection agreement that had been filed with the Commission. The interconnection agreement between McLeod and Qwest was filed with the Commission on June 8, 2000, and was approved by the Commission on August 30, 2000. Qwest is without knowledge or information sufficient to form a belief as to whether all of the relevant portions of the interconnection agreement have been attached

to the Petition, and therefore denies the same.

9 Qwest states that the averments in paragraphs 3 and 4 constitute conclusions of law and as such contain no factual allegation for which Qwest must admit or deny. Subject to the foregoing, Qwest asserts that state commissions have authority to interpret and enforce interconnection agreements to the extent granted by the Telecommunications Act, to the extent granted under state law, and subject to the terms of interconnection agreements. Qwest also asserts that certain issues raised by McLeod in its Petition are not ripe for Commission consideration. Qwest has also filed a separate motion to dismiss the Petition on the basis that it does not present an actual dispute requiring resolution.

10 Qwest states that the averments in paragraph 5 constitute conclusions of law and as such contain no factual allegations for Qwest must admit or deny. Subject to the foregoing, Qwest states that on March 22, 2005, McLeod filed for a temporary restraining order (“TRO”) in federal district court in Iowa seeking to prevent Qwest from demanding security deposits and payments and from terminating services to McLeod. The Iowa court granted McLeod’s motion and the TRO, which was in effect until April 12, 2005, and stated in pertinent part that Qwest and QCC are “restrained from . . . terminating or threatening to terminate services to McLeodUSA or requiring security from McLeodUSA as a precondition to the start or continuation or any such services. . . .” The restraining language in the order issued by the Iowa federal court is broad and does not exclude services provided under interconnection agreements. Accordingly, McLeod injected into the Iowa TRO the issues relating to payment, security deposits, and termination of services provided under the interconnection agreements. Thereafter, on April 1, 2005, the Iowa federal court transferred the case to the Colorado federal court after Qwest assured the Iowa federal court that Qwest would not disconnect services or stop taking orders unless the Colorado federal court vacates, modifies or otherwise changes the existing TRO. Accordingly, the protections of the TRO are still in effect until the Colorado

federal court vacates, modifies or otherwise changes it. Further, on April 13, Qwest withdrew its demand for security under the interconnection agreement, thus rendering moot McLeod's claims and requests for relief. Accordingly, there is no actual case or controversy before the Commission. Based upon the above, Qwest denies McLeod's allegation that the Commission has clear jurisdiction to interpret the terms of the interconnection agreement.

11 Qwest states that the averments in paragraph 6 constitute conclusions of law and as such contain no factual allegations for which Qwest must admit or deny. Subject to the foregoing, for the reasons stated in Qwest's answer to paragraph 5 of the Petition, Qwest denies that the Commission has jurisdiction to consider this Petition.

III. PARTIES

12 Qwest admits the allegations in paragraph 7 of the Petition.

IV. STATEMENT OF FACTS

13 Answering paragraph 8 of the Petition, Qwest incorporates its response to the Introductory Paragraphs of McLeod's Petition. Qwest denies that the terms of the interconnection agreement do not allow Qwest to demand a security deposit. Qwest further states that it has withdrawn its demand for security, thus rendering moot the allegations stated in this paragraph. Qwest denies each and every remaining allegation contained in paragraph 8.

14 Answering paragraph 9 of the Petition, Qwest denies that its conduct is in violation of its interconnection agreement or any of its tariffs. The Opinion and Temporary Restraining Order issued by the Iowa federal court speaks for itself. Qwest denies the remaining allegations contained in paragraph 9 of the Petition.

15 Answering paragraph 10 of the Petition, Qwest asserts that McLeod has improperly failed to separate issues regarding Qwest and QCC, and it is McLeod's failure that serves as the

background to disputes between the parties. Qwest denies that it has merged issues regarding QCC or Qwest tariffed services with rights under the interconnection agreement. Qwest admits that McLeod has paid its invoices for services provided by Qwest under the interconnection agreements, but Qwest denies that McLeod has performed all of its obligations under the interconnection agreement, which included posting of adequate security in light of McLeod's own admissions of financial instability. Qwest denies each and every remaining allegation contained in paragraph 10.

16 Answering paragraph 11 of the Petition, Qwest admits the allegations contained therein.

17 Answering paragraph 12 of the Petition, Qwest states that the Demand Letter speaks for itself. Qwest also asserts that on April 13, 2005 it withdrew the Demand Letter, rendering moot McLeod's claims in this Petition and its allegations regarding the Demand Letter.

18 Answering paragraph 13 of the Petition, Qwest states that the Demand Letters for Washington and for the other thirteen in-region states speak for themselves. Qwest also asserts that on April 13, 2005 it withdrew the Demand Letter rendering moot McLeod's claims in this Petition and its allegations regarding the Demand Letter.

19 Answering paragraph 14 of the Petition, Qwest states that the Demand Letter speaks for itself. Qwest also asserts that on April 13, 2005 it withdrew the Demand Letter, rendering moot McLeod's claims in this Petition and its allegations regarding the Demand Letter. Qwest denies each and every remaining allegation contained in paragraph 14.

20 Answering paragraph 15 of the Petition, Qwest states that the Demand Letter speaks for itself. Qwest asserts that on April 13, 2005 it withdrew the Demand Letter rendering moot McLeod's claims in this Petition and its allegations regarding the Demand Letter. Qwest asserts that the terms of the Interconnection Agreement allow Qwest to demand a security deposit. Qwest also

asserts that Qwest's demands for security and following the notice of default, default, and other remedial procedures under the interconnection agreement are not conditioned upon first invoking the dispute resolution process of the interconnection agreement. Qwest denies each and every remaining allegation contained in paragraph 15.

21 Answering paragraph 16 of the Petition, Qwest states that McLeod's March 22, 2005 response speaks for itself.

22 Answering paragraph 17 of the Petition, Qwest states that McLeod's March 24, 2005 response speaks for itself.

23 Answering paragraph 18 of the Petition, Qwest denies the allegations contained therein.

24 Answering paragraph 19 of the Petition, Qwest states that the Parties' interconnection agreement speaks for itself, and the scope of the agreement is as set forth in that agreement. To the extent that McLeod's allegations in paragraph 19 suggest that Qwest may not consider payment for services outside of the interconnection agreement in determining McLeod's credit worthiness under the interconnection agreement, Qwest denies that allegation and denies the remaining allegations contained in paragraph 19.

25 Answering paragraph 20 of the Petition, at this time Qwest is without knowledge or information sufficient to form a belief as to the truth of whether McLeod has "never" been delinquent in payments to Qwest for services provided to McLeod under the interconnection agreement and therefore denies the same. Qwest admits that services provided under the interconnection agreement are invoiced separately from service provided under either Qwest's tariffs or the QCC Wholesale Service Agreement. Qwest admits that with respect to the most recent invoice for services provided under the interconnection agreement on the date of this Answer, McLeod is current.

- 26 Answering paragraph 21 of the Petition, Qwest denies that the terms of the interconnection agreement did not allow Qwest to demand a security deposit under the circumstances. Qwest also asserts that on April 13, 2005 it withdrew the Demand Letter rendering moot McLeod's claims in this Petition and its allegations regarding the Demand Letter. As to the remaining allegations contained in paragraph 21, the cited provisions of the interconnection agreement speak for themselves.
- 27 Answering paragraph 22 of the Petition, Qwest states that the cited provisions of the interconnection agreement speak for themselves.
- 28 Answering paragraph 23 of the Petition, Qwest denies that repeated delinquency is the sole condition permitting it to demand a security deposit. Qwest admits that with respect to the most recent invoice for services provided under the interconnection agreement on the date of this Answer, McLeod is current. Qwest denies each and every remaining allegation contained in paragraph 23.
- 29 Answering paragraph 24 of the Petition, Qwest states that the cited provisions of the interconnection agreement speak for themselves. Qwest further states that McLeod is incorrect in its interpretation of Sections 5.4.1 and 5.4.5 of the ICA. McLeod claims that Section 5.4.1 defines the scope of Section 5.4 and that the entire section is limited to payments "under this Agreement." McLeod's interpretation is refuted by the very language in that section of the interconnection agreement. Sections 5.4.1, 5.4.2, 5.4.3, and 5.4.4 all refer to payments "under this Agreement," thereby limiting those sections to payments under the ICA. In stark contrast to these sections, Section 5.4.5 allows Qwest to determine McLeod's credit-worthiness based on its "previous payment history with [Qwest]". Nowhere is that payment history limited to payments "under this Agreement." Thus, McLeod's entire credit history is legitimately under consideration in determining whether a deposit will be demanded under the interconnection

agreement.

30 Answering paragraph 25 of the Petition, Qwest denies the allegations contained therein.

31 Answering paragraph 26 of the Petition, Qwest denies the allegations contained therein.

32 Qwest states that the averments in paragraph 27 of the Petition constitute conclusions of law and as such do not contain allegations which Qwest must admit or deny.

33 Answering paragraph 28 of the Petition Qwest admits that McLeod would have thirty days to cure a default. Qwest denies the remainder of the allegations in paragraph 28.

34 Answering paragraphs 29 -31 of the Petition, Qwest states that the cited provisions of the interconnection agreement speak for themselves. Qwest denies that the interconnection agreement does not permit Qwest to act unilaterally, and Qwest denies that demands for security and, following the notice of default, default, and other remedial procedures under the interconnection agreement are conditioned upon first invoking the dispute resolution process of the interconnection agreement. Qwest denies the remainder of the allegations in these paragraphs.

V. REQUESTED RELIEF

35 Qwest requests an order of the Commission denying McLeod's requested relief. Qwest also asserts that due to Qwest's withdrawal of its March 21, 2005 demand letter under the interconnection agreement, McLeod's allegations, claims, and requested relief are rendered moot.

VI. QWEST'S AFFIRMATIVE DEFENSES

36 McLeod's claim for relief has been rendered moot.

37 McLeod's claim and request for relief are not ripe.

38 Due to McLeod's own actions, issues raised by McLeod's Petition and its requests for interim and other relief are the subject of the action before the United States District Court for the District of Colorado, and in the interests of judicial efficiency and to avoid potentially conflicting orders, this Commission should dismiss, stay, or defer this case pending further proceedings before the federal court.

DATED this 15th day of April, 2005.

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