

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

**MCLEODUSA
TELECOMMUNICATIONS
SERVICES, INC.**

Petitioner,

v.

QWEST CORPORATION,

Respondent.

Docket No. UT-053024

**QWEST CORPORATION'S MOTION TO
DISMISS**

1 Pursuant to WAC 480-07-380(1) Qwest Corporation ("Qwest") hereby files this motion requesting the Washington Utilities and Transportation 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.

2 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

¹ On March 31, 2005, Qwest filed its response to McLeod's motion for emergency relief. In that response, 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.

judgment, and it does not meet the standards for entry of a declaratory order.

3 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. 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 As a result, Qwest has withdrawn its March 21, 2005 demand for a security deposit under the ICA.³

4 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 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.* The Petition's Request for Relief 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

² McLeod filed Petitions against Qwest in the States of Arizona, Colorado, Idaho, 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.

may be entitled, rule that Qwest may not disconnect or discontinue providing telecommunications services under the Parties' Interconnection Agreement or *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 p. 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 withdraw 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 four factors: (1) there must be an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive. *See, Diversified Industries Development Corp. v. Ripley*, 82 Wn.2d 811, 814-815 (1973,) and cases cited therein.

7 These judicial principles are equally applicable to Commission proceedings and are reflected in the Commission's statutory authority to issue declaratory orders. RCW 34.05.240 states that in order to request a declaratory order, the petitioner must demonstrate, among other things, that there is an "uncertainty necessitating resolution " and that "there is an actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion." 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 is prohibited by statute and 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.

9 Therefore, Qwest requests an order of this Commission dismissing McLeod's Petition as moot.

DATED this 15th day of April, 2005.

QWEST

Lisa A. Anderl, WSBA #13236
Adam L. Sherr, WSBA #25291
1600 7th Avenue, Room 3206
Seattle, WA 98191
Phone: (206) 398-2500

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.

