BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.,	)	
	)	Docket No. UT-053024
Petitioner,	)	
	)	MCLEODUSA OPPOSITION TO QWEST MOTION TO DISMISS
v.	)	
QWEST CORPORATION,	)	
Respondent.	)	

1. McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") provides this Opposition to the Motion of Qwest Corporation ("Qwest") to dismiss McLeodUSA's Petition for Enforcement of Interconnection Agreement with Qwest ("Petition"). Qwest's eleventh hour withdrawal of its March 21, 2005, letters demanding security deposits of approximately $16 million ("March 21 Letters"), does not resolve the issue of Qwest's authority to demand any such deposit when McLeodUSA has an unblemished payment history under the parties' Interconnection Agreement ("ICA" or "Agreement"). Nor does that letter address Qwest's continuing contention that it need not comply with the dispute resolution provisions of the Agreement when McLeodUSA contests a deposit demand. Those issues remain in dispute. The Commission has primary jurisdiction over interpretation and enforcement of ICAs governing the relationship between Qwest and other carriers in Washington,[1] and the Commission should not

[1] *E.g., Contact Communications v. Qwest*, 246 F. Supp. 2d 1184 (D. Wyo. 2003).

abdicate that responsibility. Rather, the Commission should retain jurisdiction and should require Qwest to comply with the provisions of the parties' Agreement.

BACKGROUND

2. McLeodUSA's Petition provides the principle background information on the issues presented to the Commission for resolution. McLeodUSA will not repeat that information here, but supplements it by explaining subsequent events that are relevant to responding to Qwest's Motion.

3. By letter dated April 13, 2005, Qwest notified McLeodUSA that Qwest was withdrawing its March 21 Letters ("April 13 Letter"). Qwest, however, expressly reserved any and all rights to demand future security deposits under the same conditions as those underlying the March 21 Letters. McLeodUSA also learned that on April 13, 2005, a Qwest representative contacted McLeodUSA's largest customer and suggested that it was in jeopardy of losing its telephone service because of millions of dollars that McLeodUSA allegedly owed Qwest in security deposits. Affidavit of Thomas B. McCoy ("McCoy Aff.") (attached as Exhibit A). Qwest thus adheres to its position that it can demand a deposit from McLeodUSA under the current circumstances, and Qwest continues to threaten such action.

DISCUSSION

4. Qwest's April 13 Letter essentially represents Qwest's attempt to undermine the Commission's jurisdiction to resolve the dispute between Qwest and McLeodUSA under their ICA. Qwest's withdrawal of its unlawful demand for a security deposit under the ICA does not render McLeodUSA's Petition moot. Courts universally hold that voluntary cessation of a challenged practice does not deprive a tribunal of jurisdiction to determine the legality of that

practice, unless the party asserting mootness can prove that it cannot reasonably be expected to engage in that conduct in the future. The Supreme Court, for example, stated:

> It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of a practice." "[I]f it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *The "heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.*[2]

The Washington Supreme Court agrees:

> Cessation of illegal conduct does not deprive a tribunal of the power to hear and determine the case; *i.e.*, it does not render the case moot. A court may need to settle an existing controversy over the legality of the challenged practices. Also, if a court declares a case moot, a defendant may resume the prior illegal practices. . . .
>
> Nevertheless, the issuance of an injunction may be moot if the defendant can demonstrate that "events make it absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Courts place a heavier burden on the parties alleging abandonment of practices where the practices are discontinued subsequent to institution of the suit.*[3]

5. Qwest has not even approached carrying this burden. Qwest's April 13 Letter does not resolve the parties' underlying disputes concerning the applicability of the ICA's dispute resolution process to deposit demands or Qwest's ability to demand a deposit when McLeodUSA has an unblemished record of timely payments under the ICA. To the contrary, the second paragraph of that letter states:

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[2] *Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610, 632 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968)) (citations omitted and emphasis added).

[3] *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 312, 553 P.2d 423 (1976) (emphasis added).

> 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.

6. Far from proving with absolute clarity that its conduct giving rise to the Petition will *not* recur, Qwest expressly reserves its alleged right to repeat that same conduct, virtually guarantying that it *will* recur. Qwest sales representatives, moreover, are suggesting to McLeodUSA customers that their service is "in jeopardy of being disconnected because of millions of dollars in deposits that McLeodUSA owed Qwest." McCoy Aff. (Exhibit A). Qwest obviously continues to believe that there is a live and continuing dispute. Qwest's withdrawal of its March 21 Letters, coming two weeks after McLeodUSA filed its Petition, thus is nothing more than a ploy to get the Commission to dismiss the Petition.

7. The Third U.S. Circuit Court of Appeals refused to dismiss a case as moot under comparable circumstances in *Dow Chemical Co. v. U.S. Environmental Protection Agency*, 605 F.2d 673 (3d Cir. 1979). In that case, the EPA sought dismissal of an appeal because the agency had withdrawn its regulation that was the basis of the underlying suit. The court, however, concluded that the case was not moot because a concrete dispute existed between the parties, and that the EPA had not changed its legal position with respect to that dispute:

> The EPA has not altered its substantive stance, it has merely withdrawn its regulation for technical reasons with the declaration that it will be resubmitted. If this action by the EPA were alone sufficient to render a live dispute moot, the timing and venue of judicial review could be effectively controlled by the agency.[4]

[4] *Id*. at 679.

Similarly here, Qwest has not altered its substantive position that it may demand a deposit under the ICA regardless of McLeodUSA's payment history under the Agreement and that Qwest need not comply with the dispute resolution provisions of the ICA when McLeodUSA disputes such a demand.

8. The court in *Dow Chemical* also found that the EPA's adherence to its legal position could continue to have a present effect on the company: "To delay adjudication here would not leave the parties in the same position they occupied before the EPA took action – rather it would leave Dow under a non-speculative threat of agency action while delaying any decision on the legality of that action."[5] Qwest's interpretation of the ICA also leaves McLeodUSA under the non-speculative threat of another deposit demand while delaying any decision on the legality of such a demand. McLeodUSA also continues to be subject to Qwest's efforts to use the threat of a deposit demand to frighten McLeodUSA's customers into obtaining service from Qwest. The Commission, like the Third Circuit, should not "dismiss a genuine and concrete controversy for what in this case amounts to a technical reason, brought about by the party seeking such dismissal."[6]

9. McLeodUSA's Petition will not become moot unless Qwest concedes that it only may demand a deposit under the parties' ICA if McLeodUSA fails to make timely payments under the Agreement and that the ICA's dispute resolution process applies to a dispute over any

[5] *Id*.

[6] *Id*.; *see Hooker Chemical Co. v. EPA*, 642 F.2d 48, 52 (3rd Cir. 1981) (stating, "A controversy still smolders when the defendant has voluntarily, but not necessarily permanently, ceased to engage in the allegedly wrongful conduct," and concluding "that an appeal will not be deemed moot if there is a reasonable likelihood that the parties will contest the same issues in a subsequent proceeding").

future deposit demand.[7] Until Qwest makes such binding representations, the Commission remains presented with a controversy that it should resolve.

CONCLUSION

10. Qwest cannot deprive the Commission of jurisdiction to hear McLeodUSA's Petition by strategically withdrawing its deposit demand letter only after McLeodUSA filed its Petition and when a controversy still exists over Qwest's authority to demand a deposit under the ICA. The Commission, therefore, should deny Qwest's Motion.

RESPECTFULLY SUBMITTED this 21st day of April, 2005.

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[7] McLeodUSA's withdrawal of its petition in Minnesota is not to the contrary. That filing had nothing to do with the April 13 Letter and was, in fact, filed on April 11, two days before Qwest's April 13 letter. The withdrawal was filed for entirely procedural reasons to clear the way for a subsequent filing. It was not intended to suggest the absence of a dispute regarding Qwest's claim that it is entitled to a security deposit contrary to the provisions of the ICA or Qwest's refusal to abide by the dispute resolution provisions of the Agreement.