

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

**MCLEODUSA
TELECOMMUNICATIONS SERVICES,
INC.,**

Petitioner,

v.

QWEST CORPORATION,

Respondent.

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) **Docket No. 05 _____**
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) **PETITION OF MCLEODUSA
TELECOMMUNICATIONS SERVICES,
INC., FOR ENFORCEMENT OF
INTERCONNECTION AGREEMENT
WITH QWEST CORPORATION**
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McLeodUSA Telecommunications Services, Inc. (“McLeodUSA”), through its undersigned counsel, and pursuant to RCW 34.05.479, 80.04.110 & 80.36.610, and WAC 480-07-620, petitions the Commission for enforcement of its interconnection agreement with Qwest Corporation (“Qwest”). 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. Qwest has recently demanded that McLeodUSA pay more than \$15.9 million to Qwest by April 1, 2005 – over \$800,000 in Washington alone – or Qwest will “suspend[] order activity” and “disconnect[] services” provided to McLeodUSA. Rather than follow the clear terms of the interconnection agreement regarding dispute resolution, Qwest has made extortionate demands rather than adopt the approach of established telecommunications carriers that respect their contractual obligations. McLeodUSA seeks an order from this Commission that Qwest may not demand a security deposit and that Qwest may not “suspend order activity” or “disconnect services” until all procedures for dispute resolution in the interconnection agreement have been satisfied.

Because Qwest has threatened to “suspend order activity” and “disconnect services” on April 1, 2005, McLeodUSA asks this Commission to provide McLeodUSA with its requested relief on an expedited, emergency basis, and has filed a Motion for Emergency Relief concurrently with this Petition.

JURISDICTION

1. Both McLeodUSA and Qwest are authorized to provide local exchange services in Washington.
2. Pursuant to Section 252 of the Telecommunications Act of 1996 (“Act”), McLeodUSA opted into an Interconnection Agreement (the “Interconnection Agreement” or “Agreement”) that was filed with the Commission on June 8, 2000 and approved by the Commission on August 30, 2000. A copy of the relevant portions of the Agreement is attached as Exhibit A.
3. State commissions have the authority to interpret and enforce agreements they approve when post-approval disputes arise. *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 583 (6th Cir. 2002); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 868 (6th Cir.), *cert. denied*, 531 U.S. 816 (2000).
4. The Commission has determined that it has authority to enforce interconnection agreements and has established specific procedures for doing so. WAC 480-07-650.¹
5. Thus, the Commission has clear jurisdiction to interpret the terms of the Interconnection Agreement as alleged herein.
6. In addition, the Commission has jurisdiction to consider this Petition pursuant to RCW 34.05.479, 80.04.110 & 80.36.610, and WAC 480-07-620.

¹ McLeodUSA has not invoked these procedures here because Qwest’s threat to discontinue service to McLeodUSA did not provide McLeodUSA with sufficient opportunity to obtain the necessary relief within the time frames established in the rule.

PARTIES

7. McLeodUSA is a competitive local exchange carrier registered to provide local exchange service and intrastate interexchange service in Washington. Correspondence regarding this Petition should be sent to McLeodUSA at the following address:

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- and -

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Qwest is an incumbent local exchange carrier authorized to provide local exchange service and intrastate interexchange service in Washington.

STATEMENT OF FACTS

8. This dispute is about Qwest's attempt to demand a security deposit for services and facilities it provides to McLeodUSA under the terms of the Interconnection Agreement, even though the Interconnection Agreement does not allow Qwest to do so. This dispute is also about Qwest's attempt to ignore the dispute resolution provisions of the Interconnection Agreement and to take unilateral action to terminate service to McLeodUSA, to refuse to process orders for service by McLeodUSA, to terminate the Interconnection Agreement with McLeodUSA, and to effectively leave thousands of customers served by McLeodUSA stranded without access to

telecommunications services. Action by this Commission is needed to compel Qwest to honor the terms of the Agreement it executed with McLeodUSA and to continue to provide services and facilities to McLeodUSA.

9. Qwest's most recent conduct in violation of the Interconnection Agreement comes on the heels of other incidents of unlawful conduct by Qwest in violation of separate contracts with McLeodUSA and in violation of its own tariffs, which are currently the subject of litigation before federal courts in Iowa and Colorado. The substance of those disputes is explained in detail in the Opinion and Temporary Restraining Order granted by a federal judge on March 23, 2005, attached as Exhibit B. Although information regarding those disputes is not necessary to resolve this dispute, the background places Qwest's current conduct in context. McLeodUSA views Qwest's most recent attempt to obtain funds from McLeodUSA in the guise of demanding a security deposit as an exercise of its monopoly power as the provider of essential services and facilities to McLeodUSA to coerce settlement of the certain claims now pending in federal court in Iowa and Colorado on terms unfavorable to McLeodUSA.

10. The issues pending in those cases are completely separate from the issues raised in this Petition. Although Qwest tries to merge those issues with its rights under the Interconnection Agreement, the Commission must act to stop the ploy. At all times, McLeodUSA has performed all of its obligations under the Interconnection Agreement, has paid all invoices for services and facilities provided by Qwest under the Interconnection Agreement, and has otherwise complied in all respects with the terms and conditions of the Interconnection Agreement.

11. On March 21, 2005, McLeodUSA received fourteen (14) letters from Stephen G. Hansen, Vice President, Carrier Relations, Worldwide Wholesale Markets, Qwest

Communications, including one to James LeBlanc of McLeodUSA Telecom and Lauraine Harding of McLeodUSA, Inc., regarding the Agreement for interconnection in the state of Washington (“Qwest Demand Letter”). A copy of the Qwest Demand Letter is attached as Exhibit C.

12. In the Qwest Demand Letter, Qwest notified McLeodUSA that Qwest “requires a security deposit to continue the provisioning of services ordered by [McLeodUSA] under the Interconnection Agreement between the parties.” The basis for the demand was as follows:

After investigation and review of McLeod’s unsatisfactory creditworthiness, recent public statements of McLeodUSA concerning its financial condition, history of late payments, and outstanding balances under the Interconnection Agreement and other agreements, tariffs, or accounts, Qwest demands a deposit, based on two months’ average total billings under the Interconnection Agreement in the State of Washington, to safeguard Qwest’s financial interests.

13. Qwest demanded a security deposit in the amount of \$848,486.28 for the state of Washington that must be received by 5:00 p.m. Mountain Standard Time on April 1, 2005. Similar amounts were demanded in thirteen (13) other states, so that the combined total of deposits that Qwest sought to collect from McLeodUSA within ten days from the date of the Qwest Demand Letter was \$15,920,431.42.

14. The Qwest demand came with a specific threat if the money was not received by the deadline:

Qwest will commence the process of terminating the Interconnection Agreement, suspending order activity, disconnecting services, and/or any other remedy available to it under law or equity in the State of Washington.

15. The Qwest Demand Letter did not refer to any section of the Interconnection Agreement that gave Qwest the right to demand a security deposit. It did not refer to any section of the Agreement that gave Qwest the right to suspend order activity, disconnect services, terminate the Agreement, or seek any of the other relief identified. As McLeodUSA

demonstrates below, the Agreement does not permit Qwest to take any of the actions stated.

Even if Qwest were permitted to demand a security deposit under the Interconnection Agreement – and it is not – the only recourse available to Qwest for McLeodUSA’s failure to comply with such a demand would be to invoke the Dispute Resolution provisions of the Agreement.

16. On March 22, 2005, McLeodUSA responded to the Qwest Demand Letter and informed Qwest that, unless Qwest could identify with specificity the facts that satisfy the requirements for a security deposit, McLeodUSA rejected the Qwest demand. A copy of the McLeodUSA March 22, 2005 response is attached as Exhibit D.

17. On March 24, 2005, McLeodUSA provided a second response the Qwest Demand Letter and notified Qwest that McLeodUSA was invoking the Dispute Resolution provisions of the Interconnection Agreement and designated Joseph Ceryanec, Group Vice President, Controller and Treasurer, as the McLeodUSA representative authorized to resolve the dispute. A copy of the McLeodUSA March 24, 2005 response is attached as Exhibit E.

18. It is clear not only that Qwest’s most recent demand for money has no basis in the Interconnection Agreement, but the remedy that Qwest seeks is also in complete disregard of the terms and conditions in the Agreement.

19. The Interconnection Agreement applies only to those services specifically identified in the Agreement and related to the local competition provisions in the Act. In particular, the scope of the Interconnection Agreement is limited to unbundled network elements, interconnection facilities, reciprocal compensation arrangements, and resale of Qwest’s retail services.

20. McLeodUSA has never been delinquent in payments to Qwest for services provided to McLeodUSA under the Interconnection Agreement. Services provided by Qwest

under the Interconnection Agreement are invoiced separately from services provided under either Qwest's tariffs or the Wholesale Services Agreement.² McLeodUSA is current on all invoices from Qwest for services provided under the Interconnection Agreement.

A. Qwest Has No Right to Demand a Security Deposit under the Agreement

21. Nothing in the Interconnection Agreement gives Qwest the right to demand a security deposit from McLeodUSA at this time. Section 5.4.5 of the General Terms provides Qwest's rights to a security deposit under certain conditions, but none of the conditions allowing Qwest to invoke those rights have been satisfied. First, Section 5.4.5 is a subsection of Section 5.4 titled "Payment." Section 5.4.1 defines the scope of Section 5.4: "Amounts payable under this Agreement are due and payable within thirty (30) calendar days after the date of invoice." (Emphasis added.) Thus, any rights to a security deposit under Section 5.4.5 are limited to security for payments made for services provided under the Interconnection Agreement. Therefore, Qwest is wrong to make the connection as it does in the Qwest Demand Letter that "outstanding balances under the Interconnection Agreement and other agreements, tariffs, or accounts," justify its demand that McLeodUSA provide Qwest with a security deposit. Section 5.4.5 does not grant rights to Qwest to demand a security deposit for payments under another agreement or under a Qwest tariff.

22. Section 5.4.5 provides in relevant part as follows:

[Qwest] will determine [McLeod's] credit status based on previous payment history with {Qwest} or credit reports such as Dun and Bradstreet. If [McLeod] has not established satisfactory credit with [Qwest] or if [McLeod] is repeatedly delinquent in making its payments, [Qwest] may require a deposit to be held as security for the payment of charges. "Repeatedly delinquent" means any payment received thirty (30) calendar days or more after the due date, three (3) or more times during a twelve (12) month period.

² To the extent McLeodUSA has withheld payment as a defensive measure to counter Qwest's withholding of funds owed for McLeodUSA's provision of exchange access services, those withheld payments were for services provided either under the Qwest tariffs or under a separate Wholesale Services Agreement. See Exhibit B at 5.

23. Qwest fails to satisfy any of these conditions. Taking the second condition first, Qwest does not allege, and could certainly not prove, that McLeodUSA has been “repeatedly delinquent” on any payments under the Interconnection Agreement. As stated above, McLeodUSA is current on all invoices for services provided by Qwest under the Agreement and has paid all previous invoices from Qwest in a timely fashion.

24. The other condition that if satisfied would permit Qwest to demand a security deposit is whether McLeodUSA has established “satisfactory credit” with Qwest. The previous sentence of the section defines what determines McLeodUSA’s credit status and what constitutes “satisfactory credit”: previous payment history by McLeodUSA or credit reports such as Dun and Bradstreet. As stated above, McLeodUSA is current on all invoices for services provided by Qwest under the Interconnection Agreement, and has paid all previous invoices from Qwest in a timely fashion. Therefore, McLeodUSA’s “previous payment history” under the Interconnection Agreement is stellar. As for “credit reports such as Dun and Bradstreet,” reliance on these reports was clearly intended to be a substitute in the absence of a previous payment history. Since McLeodUSA has established an exemplary history of payments under the Interconnection Agreement, there is no basis to refer to any other source to determine McLeodUSA’s creditworthiness.

25. Section 5.4.7 does not permit Qwest to demand a security deposit at this time either. It provides, “[Qwest] may review [McLeod’s] credit standing and modify the amount of deposit required.” This provision permits Qwest to modify the amount collected as a security deposit, but only if Qwest first has the right to demand a security deposit. Because Qwest does not have that right, Section 5.4.7 is not applicable.

B. Even If Qwest Were Permitted To Demand a Security Deposit from McLeodUSA, Failure to Pay the Security Deposit Only Triggers the Default Provisions of the Agreement

26. As demonstrated above, Qwest has no right under the Interconnection Agreement to demand a security deposit from McLeodUSA at this time. Even if Qwest had the right to demand a security deposit, failure by McLeodUSA to pay the security deposit triggers only the default provisions of the Agreement and does not permit Qwest to “suspend order activity” or “disconnect services” as Qwest has threatened to do.

27. If Qwest were to have the right to demand a security deposit from McLeodUSA, and McLeodUSA were to fail to comply with the Qwest demand, McLeodUSA’s conduct could constitute a “default in the payment of any amount due” under the Interconnection Agreement. Section 5.13 of the Agreement provides the remedy available to Qwest in the event of a default. First, Qwest must provide McLeodUSA with written notice of the default. Obviously, such notice cannot be provided prior to the date of default because there would have been no default prior to the deadline for performance. Therefore, assuming Qwest has the right to demand payment of a security deposit by April 1, 2005, and assuming McLeodUSA was not to comply with the demand, Qwest would be obligated to provide written notice of default to McLeodUSA on or after April 1, 2005.

28. McLeodUSA then would have thirty (30) days to cure the default. If McLeodUSA were to not cure the default within thirty days, the Interconnection Agreement permits Qwest only to seek relief in accordance with the Dispute Resolution provisions. In no situation does a “default in the payment of any amount due” under the Agreement permit Qwest to “suspend order activity,” “disconnect services,” or even terminate the Interconnection Agreement.

C. Qwest Is Obligated To Follow the Dispute Resolution Provisions of the Interconnection Agreement In The Event Of a Default

29. In the event of a “default in the payment of any amount due” under the Interconnection Agreement, written notice by Qwest, and a McLeodUSA failure to cure the default in a timely manner, Qwest would be obligated to follow the dispute resolution provisions of the Agreement.

30. Formal dispute resolution under the Interconnection Agreement is initiated by written request. Section 5.18.3 of the General Terms and Conditions requires the parties to designate an officer-level employee at no less than the level of a Vice President to meet and negotiate resolution of the dispute. The parties are required to negotiate a resolution of the dispute for at least thirty (30) days. If the parties are unable to resolve the dispute within thirty days, then either party may demand arbitration of the dispute before a panel of three arbitrators knowledgeable about the telecommunications industry. Nothing in the dispute resolution provisions permits Qwest to short-circuit the dispute resolution process by “suspending order activity” or “disconnecting services” prior to a decision by the arbitrator.

31. Based on the foregoing, it is clear that Qwest does not have the right under the Interconnection Agreement to demand a security deposit from McLeodUSA at this time. Even if Qwest were to have such a right, and if McLeodUSA were not to comply with the demand, Qwest would be required to follow the dispute resolution provisions of the Agreement. Nothing in the Interconnection Agreement permits Qwest to take the actions that Qwest has threatened to take, namely “suspend order activity” or “disconnect services.”


REQUESTED RELIEF

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 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.

RESPECTFULLY SUBMITTED this 30th day of March, 2005.

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Services, Inc.

By



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