

TC05-057

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March 31, 2005

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**HAND DELIVERED**

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MAR 31 2005

**SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION**

Pam Bonrud  
Executive Secretary  
Public Utilities Commission  
500 East Capitol Avenue  
Pierre, SD 57501

RE: Petition Of McLeodUSA Telecommunications Services, Inc., For Enforcement Of  
Interconnection Agreement With Qwest Corporation  
PUC Docket No.:  
Our file: 1924

Dear Pam:

Enclosed please find an original and ten copies of the Supplemental Filing of Exhibit F to the  
McLeodUSA Telecommunications Services, Inc., Motion for Emergency Relief.

Very truly yours.

MAY, ADAM, GERDES & THOMPSON LLP



BRETT M. KOENECKE

BMK:njh

Enclosures

cc: Larry Toll  
Tom Welk  
William Courter



# **EXHIBIT F**

**Part A**

claim, demand or lawsuit has been tendered to the Indemnifying Party in writing and the Indemnifying Party has failed to timely undertake the defense. In no event shall the Indemnifying Party settle or consent to any judgment pertaining to any such action without the prior written consent of the Indemnified Party.

**19. Limitation of Liability**

19.1 Except as otherwise provided in the indemnity section, no Party shall be liable to the other Party for any Loss, defect or equipment failure caused by the conduct of the other Party, the other Party's agents, servants, contractors or others acting in aid or concert with the other Party.

19.2 [Intentionally left blank for numbering consistency.]

19.3 In no event shall either Party have any liability whatsoever to the other Party for any indirect, special, consequential, incidental or punitive damages, including, but not limited to revenue or other economic loss in connection with or arising from anything said, omitted or done hereunder (collectively, "Consequential Damages"), even if the other Party has been advised of the possibility of such damages; provided, that the foregoing shall not limit a Party's obligation to indemnify, defend and hold the other Party harmless against any amounts payable to a third party, including any losses, costs, fines penalties, criminal or civil judgments or settlements, expenses (including attorneys' fees) and Consequential Damages of such third party. Nothing contained in this section shall limit either Party's liability to the other for (i) willful or intentional misconduct (including gross negligence); (ii) bodily injury, death or damage to tangible real or tangible personal property proximately caused by such party's negligent act or omission or that of their respective agents, subcontractors or employees, nor shall anything contained in this section limit the Parties indemnification obligations, as specified above.

19.4 [Intentionally left blank for numbering consistency.]

19.5 Notwithstanding the provisions of Section 19.3, to the extent that U S WEST tariffs contain limitations on liability, McLeod shall submit language for inclusion in its Intrastate retail tariffs, that is substantially similar to the limitation of liability language contained in U S WEST's tariffs, and such limitations of liability shall govern for Customer claims. In addition, notwithstanding the provisions of Section 19.3, to the extent that the Commission's quality of service rules provide for remedies to McLeod or its Customers for Customer claims, then those remedies shall govern as to such claims.

**20. Term of Agreement**

20.1 This Agreement shall be effective upon commission approval and shall expire on March 3<sup>rd</sup>, 2002, and thereafter shall continue in force and effect unless and until a new agreement, addressing all of the terms of this Agreement, becomes effective between the Parties. The Parties shall commence negotiations on a new agreement no later than one year prior to the expiration of the term of this Agreement. Either Party may request resolution of open issues in accordance with the provisions of Section 27 of this Part A of this Agreement, Dispute Resolution, beginning nine (9) months prior to the expiration of this Agreement. Any disputes regarding the terms and conditions of the new interconnection agreement shall be resolved in accordance with Section 27 of this Agreement and the resulting contract shall be

## Part A

submitted to the Commission. This Agreement shall remain in effect until a new interconnection agreement approved by the Commission has become effective.

## 21. Governing Law

21.1 This Agreement shall be governed by and construed in accordance with the Act and FCC rules and regulations, except insofar as state law may control any aspect of this Agreement, in which case the domestic laws of the State of South Dakota, without regard to its conflicts of laws principles, shall govern.

## 22. Cancellation Charges

22.1 Except as provided pursuant to a Bona Fide Request, or as otherwise provided in any applicable tariff or contract referenced herein, no cancellation charges shall apply.

## 23. Regulatory Approvals

23.1 This Agreement, and any amendment or modification hereof, will be submitted to the Commission for approval in accordance with Section 252 of the Act. In the event any governmental authority or agency rejects any provision hereof, the Parties shall negotiate promptly and in good faith such revisions as may reasonably be required to achieve approval.

23.2 U S WEST shall provide McLeod a summary describing the proposed change(s) to each Telecommunications Service which is available pursuant to this Agreement. U S WEST shall also provide McLeod a summary describing the proposed change(s) of each intrastate and interstate tariff which provides for an Interconnection, unbundled Network Element or Ancillary Service that is available pursuant to this Agreement. Such summaries shall be available through an Internet Web page to be posted on the same day the proposed change is filed with the Commission or the FCC or at least thirty (30) days in advance of its effective date, whichever is earlier.

23.3 In the event any governmental authority or agency orders U S WEST to provide any service covered by this Agreement in accordance with any terms or conditions that individually differ from one or more corresponding terms or conditions of this Agreement, McLeod may elect to amend this Agreement to reflect any such differing terms or conditions contained in such decision or order, with effect from the date McLeod makes such election. The other services covered by this Agreement and not covered by such decision or order shall remain unaffected and shall remain in full force and effect.

23.4 The Parties intend that any additional services requested by either Party relating to the subject matter of this Agreement will be incorporated into this Agreement by amendment.

23.5 Each Party shall be responsible for maintaining such regulatory approvals as necessary for it to perform under this Agreement. Each Party shall have an obligation to cooperate with the other Party in obtaining and maintaining necessary regulatory approvals.<sup>12</sup>

## 24. Compliance

<sup>12</sup> Per First Order at page 5, Paragraph 26.

## Part A

"Voluntary Federal Subscriber Financial Assistance Programs" are Telecommunications Services provided to low-income subscribers, pursuant to requirements established by the appropriate federal or state regulatory body.

"Wire Center" denotes, for the purposes of Collocation, a building or space within a building, that serves as an aggregation point on a given carrier's network, where transmission facilities and circuits are connected or switched. Wire Center can also denote a building where one or more central offices, used for the provision of Telecommunications Services and Access Services, are located. Wire Center shall mean those points eligible for such connections as specified in FCC Docket No. 91-141, and rules adopted pursuant thereto.

## TERMS AND CONDITIONS

### 1. General Provisions

- 1.1 Each Party is individually responsible to provide facilities within its network which are necessary for routing, transporting, measuring, and billing traffic from the other Party's network and for delivering such traffic to the other Party's network in the standard format compatible with McLeod's network and to terminate the traffic it receives in that standard format or the proper address on its network. The Parties are each solely responsible for participation in and compliance with national network plans, including the National Network Security Plan and the Emergency Preparedness Plan.
- 1.2 Neither Party shall impair the quality of service to other carriers or to either Party's Customers, and each Party may discontinue or refuse service if the other Party violates this provision. Upon such violation, either Party shall provide the other Party notice of such violation, at the earliest practicable time.
- 1.3 [Intentionally left blank for numbering consistency]

### 2. Most Favored Nation Terms and Treatment

- 2.1 Until such time as there is a final court determination interpreting Section 252(j) of the Act, U S WEST shall make available to McLeod the terms and conditions of any other agreement for interconnection, unbundled Network Elements and resale services approved by the Commission under Section 252 of the Act, in that agreement's entirety. If McLeod selects the terms and conditions of another agreement in that agreement's entirety, McLeod may do so only after expiration of this Agreement. After there is a final court determination interpreting Section 252(j) of the Act, the Parties agree to revise this Section 2.1 to reflect such interpretation.<sup>4</sup>

### 3. Payment

- 3.1 In consideration of the services provided by U S WEST under this Agreement, McLeod shall pay the charges set forth in Attachment 1. The billing procedures for charges incurred by McLeod hereunder are set forth in Attachment 5 to this Agreement.
- 3.2 Amounts payable under this Agreement, unless reasonably disputed, are due and payable within thirty (30) days after the date of U S WEST's invoice<sup>5</sup> or within twenty (20) days

<sup>4</sup> Per Commission Order in Docket TC96-184, March 20, 1997 ("First Order") Per First Order at page 5, Paragraph 21.

<sup>5</sup> Per First Order at page 4, Paragraph 13.

## Part A

after receipt of the invoice, whichever is later. If the payment due date is not a Business Day, the payment shall be made the next Business Day.

3.3 A late payment charge<sup>6</sup> of 1.5% applies to all billed balances, not reasonably disputed, which are not paid within the applicable time period set forth in Section 3.2 above. To the extent McLeod pays the billed balance on time, but the amount of the billed balance is reasonably disputed by McLeod, and, it is later determined that a refund is due McLeod, interest shall be payable on the refunded amount in the amount of 1.5% per month. To the extent McLeod pays the billed balance on time, but the amount of the billed balance is reasonably disputed by McLeod, and, it is later determined that no refund is due McLeod, no interest shall be payable on the disputed amount.

3.4 Late payment charges shall not be used as a "credit" to a deposit, if any, without the express approval of U S WEST.

3.5 Unless specified otherwise in this Agreement, U S WEST shall bill all amounts due from McLeod for each resold service in accordance with the terms and conditions as specified in the U S WEST tariff.

#### 4. Taxes

4.1 Any federal, state or local excise, sales, or use taxes (excluding any taxes levied on income) resulting from the performance of this Agreement shall be borne by the Party upon which the obligation for payment is imposed under applicable law, even if the obligation to collect and remit such taxes is placed upon the other Party. Any such taxes shall be shown as separate items on applicable billing documents between the Parties. The Party so obligated to pay any such taxes may contest the same in good faith, at its own expense, and shall be entitled to the benefit of any refund or recovery, provided that such Party shall not permit any lien to exist on any asset of the other Party by reason of the contest. The Party obligated to collect and remit taxes shall cooperate fully in any such contest by the other Party by providing records, testimony and such additional information or assistance as may reasonably be necessary to pursue the contest. To the extent a sale is claimed to be for resale tax exemption, the purchasing Party shall furnish the providing Party a proper resale tax exemption certificate as authorized or required by statute or regulation by the jurisdiction providing said resale tax exemption. Failure to timely provide said resale tax exemption certificate will result in no exemption being available to the purchasing Party during the applicable reporting period.

#### 5. Intellectual Property.

5.1 **Obligations of Party Requesting Access.** As a condition to the access or use of patents, copyright, trade secrets, and other intellectual property (including software) owned or controlled by a third party to the extent necessary to implement this Agreement or specifically required by the then applicable federal and state rules and regulations relating to interconnection and access to telecommunications facilities and services ("Third Party Intellectual Property"), the Party providing access may require the other, upon written notice from time to time, to obtain a license or permission for such access or use of Third Party Intellectual Property, make all

<sup>6</sup> Per First Order at page 4, Paragraph 13.

## Part A

hours, McLeod may obtain replacement services for those services affected by such labor dispute or strike or work stoppage, in which event any liability of McLeod for the affected services shall be suspended for the period of the work stoppage or labor dispute or strike. In the event of such performance delay or failure by U S WEST, U S WEST agrees to resume performance in a nondiscriminatory manner and not favor its own provision of Telecommunications Services above that of McLeod.

**26. Escalation Procedures**

- 26.1 McLeod and U S WEST agree to exchange escalation lists which reflect contact personnel including vice president-level officers. These lists shall include name, department, title, phone number, and fax number for each person. McLeod and U S WEST agree to exchange up-to-date lists as reasonably necessary.

**27. Dispute Resolution**

- 27.1 If any claim, controversy or dispute between the Parties, their agents, employees, officers, directors or affiliated agents ("Dispute") cannot be settled through negotiation, it may be resolved by arbitration conducted by a single arbitrator engaged in the practice of law, under the then current rules of the American Arbitration Association ("AAA"). The Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all Disputes. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof and shall be noticed to the Commission. The arbitrator shall determine which Party or Parties will bear the costs of arbitration, including apportionment, if appropriate. The arbitration shall occur in Denver, Colorado and the governing law shall be in accordance with Section 21.1 above.
- 27.2 In the event McLeod and U S WEST are unable to agree on certain issues during the term of the Agreement, the Parties may identify such issues for arbitration before the Commission. Only those points identified by the Parties for arbitration will be submitted.
- 27.3 If a Dispute is submitted to arbitration pursuant to Section 27.1 above, the procedures described in this Section 27.3 shall apply, notwithstanding the then current rules of the AAA. Discovery shall be controlled by the arbitrator and shall be permitted to the extent set forth below. Each Party may submit in writing to a Party, and that Party shall so respond, to an agreed amount of the following: interrogatories, demands to produce documents, and requests for admission. Not less than ten (10) days prior to the arbitration hearing, the Parties shall exchange witness and exhibit lists. Deposition discovery shall be controlled by the arbitrator. Additional discovery may be permitted upon mutual agreement of the Parties or the determination of the arbitrator. The arbitration hearing held in accordance with the provisions of Section 27.1 shall be commenced within thirty (30) days after a demand for arbitration by either Party, and shall be held in Denver, Colorado. The arbitrator shall control the scheduling so as to process the matter expeditiously. The Parties may submit written briefs. The arbitrator shall rule on the dispute by issuing a written opinion within seven (7) days after the close of hearings. The times specified in this section may be extended upon mutual agreement of the Parties or by the arbitrator upon a showing of good cause. The decision of the arbitrator shall be final and entered in a court having jurisdiction. The decision shall also be submitted to the Commission.

- 31.2 U S WEST warrants that it has provided, and during the term of this Agreement it will continue to provide, to McLeod true and complete copies of all material agreements in effect between U S WEST and any third party (including Affiliates) providing any services to McLeod on behalf of or under contract to U S WEST in connection with U S WEST's performance of this Agreement, or from whom U S WEST has obtained licenses or other rights used by U S WEST to perform its obligations under this Agreement, provided, however, that U S WEST may provide such agreements under appropriate protective order.

## 32. Default

- 32.1 In the event of a breach of any material provision of this Agreement by either Party, the non-breaching Party shall give the other Party and the Commission written notice thereof, and:

32.1.1 if such material breach is for non-payment of amounts due hereunder pursuant to Section 3.2 of Part A of this Agreement, the breaching Party shall cure such breach within thirty (30) calendar days of receiving such notice. The non-breaching Party shall be entitled to pursue all available legal and equitable remedies for such breach. Amounts disputed in good faith and withheld or set off shall not be deemed "amounts due hereunder" for the purpose of this provision.

32.1.2 if such material breach is for any failure to perform in accordance with this Agreement, which, in the sole judgment of the non-breaching Party, adversely affects the non-breaching Party's subscribers, the non-breaching Party shall give notice of the breach and the breaching Party shall cure such breach to the non-breaching Party's reasonable satisfaction within ten (10) calendar days or within a period of time equivalent to the applicable interval required by this Agreement, whichever is shorter. If the breaching Party does not cure such breach within the applicable time period, the non-breaching Party may, at its sole option, terminate this Agreement, or any parts hereof. The non-breaching Party shall be entitled to pursue all available legal and equitable remedies for such breach. Notice under this Subsection 32.1.2 may be given electronically or by facsimile, provided that a hard copy or original of such notice is sent by overnight delivery service.

32.1.3 if such material breach is for any other failure to perform in accordance with this Agreement, the breaching Party shall cure such breach to the non-breaching Party's reasonable satisfaction within forty-five (45) calendar days, and if it does not, the non-breaching Party may, at its sole option, terminate this Agreement, or any parts hereof. The non-breaching Party shall be entitled to pursue all available legal and equitable remedies for such breach.

32.2 This Agreement may be terminated by either party in whole at any time only for cause upon sixty (60) calendar days' prior written notice.<sup>13</sup>

32.3 In the event of any termination under this Section 32, U S WEST and McLeod agree to cooperate to provide for an uninterrupted transition of services to McLeod or another vendor designated by McLeod to the extent that U S WEST has the ability to provide such cooperation.

32.4 Notwithstanding any termination hereof, the Parties shall continue to comply with their obligations under the Act.

<sup>13</sup> Per First Order at page 3, Paragraph 12.

chargeable traffic types shall be totaled for the entire monthly bill cycle, rounded to the next whole minute and then billed at the contract rate. For Resale Services provided under Attachment 2 of this Agreement the total conversation time shall be measured in accordance with U S WEST's retail tariff and billed at the contract rate.

- 4.1.9 U S WEST shall provide to McLeod at no additional charge a Single Point of Contact for handling any Connectivity Billing questions or problems that may arise during the implementation and performance of the terms and conditions of this Agreement.
- 4.1.10 U S WEST shall provide Single Point of Contact for handling of any data exchange questions or problems that may arise during the implementation and performance of the terms and conditions of this Agreement.
- 4.1.11 Upon request by either Party, each Party shall provide the other Party written notice of which form of the monthly Connectivity Bill is to be deemed the official bill to assist the Parties in resolving any conflicts that may arise between the official bill and another form of bill received via a different media which purportedly contains the same charges as are on the official bill.
- 4.1.12 If either Party requests an additional copy(ies) of a bill, such Party shall pay the other Party a reasonable fee per additional bill copy, unless such copy was requested due to errors, omissions, or corrections or the failure of the transmission to comply with the specifications set forth in this Agreement.
- 4.1.13 When sending Connectivity Bills via electronic transmission, to avoid transmission failures or the receipt of Connectivity Billing information that cannot be processed, McLeod shall provide U S WEST process specifications. U S WEST shall comply with mutually agreed upon processing specifications when U S WEST transmits Connectivity Billing data to McLeod. McLeod shall provide to U S WEST notice if a Connectivity Billing transmission is not received that does not meet mutually agreed upon McLeod specifications. Faulty or failed transmissions shall be corrected and resubmitted to McLeod, at U S WEST's sole expense.
- 4.1.14 U S WEST shall deliver to a location specified by McLeod, billing information via Connect Direct, magnetic tape or paper, as agreed to by McLeod and U S WEST. In the event of an emergency, system failure or other such condition which prevents U S WEST from transmitting via Connect Direct, U S WEST shall notify McLeod of such difficulties within two (2) hours of detection. U S WEST shall deliver to a location specified by McLeod billing information via magnetic tape or paper, as agreed to by McLeod and U S WEST. The Parties acknowledge that all tapes transmitted to the other Party via U.S. Mail or overnight delivery service and which contain Connectivity Billing data shall not be returned to the sending party.
- 4.1.15 [Intentionally left blank for numbering consistency.]
- 4.1.16 Billed amounts which are being reasonably disputed or reasonably queried, or for which reasonable claims have been filed are not due for payment until such disputes, claims or queries have been fully resolved by both McLeod and U S WEST.
- 4.1.17 [Intentionally left blank for numbering consistency.]

#### 4.1.18 Bill Reconciliation

4.1.18.1 Each Party agrees to notify the other Party upon the discovery of a billing discrepancy ("Notice of Discrepancy").

4.1.18.2 In the event of such Notice of Discrepancy, the Parties shall endeavor to resolve the discrepancy within sixty (60) calendar days after the Notice of Discrepancy is issued using normal business procedures. If the discrepancy is disputed, resolution of such dispute is expected to occur at the first level of management resulting in a recommendation for settlement of the dispute and closure of a specific billing period.

4.1.18.3 Closure of a specific billing period shall occur by joint agreement of the Parties whereby the Parties agree that such billing period is closed to any further analysis and financial transactions, except those resulting from an Audit. Closure shall take place within nine (9) months of the Bill Date. The month being closed represents those Connectivity Charges that were billed or should have been billed by the applicable bill date.

4.1.18.4 If the dispute is not resolved within the allotted time frame, the following resolution procedure shall begin:

4.1.18.4.1 If the dispute is not resolved within sixty (60) days of the Notice of Discrepancy, the dispute shall be escalated to the second level of management for resolution.

4.1.18.4.2 If the dispute is not resolved within ninety (90) days of Notice of Discrepancy, the dispute shall be escalated to the third level of management for resolution.

4.1.18.4.3 If the dispute is not resolved within one hundred and twenty (120) days of the Notice of Discrepancy, upon the written request of either Party within such one hundred and twenty (120) day period, the dispute may be resolved pursuant to the dispute resolution provision set forth in Part A of this Agreement.

4.1.19 U S WEST shall reimburse McLeod for incorrect Connectivity Billing charges, including, without limitation: overcharges, services ordered or requested but not delivered, interrupted services, services of poor quality and installation problems, if such problems are caused by U S WEST. Such reimbursements shall be set forth in the appropriate section of the Connectivity Bill pursuant to appropriate standards.

4.1.20 The Parties agree to record call information in accordance with this Section 4.1. To the extent technically feasible, each Party shall record all call detail information associated with every call that one Party bills to the other Party. McLeod may request, through the BFR process the recording of call records and/or call detail information that is not currently recorded by U S WEST. These records shall be provided and retained pursuant to Section 5 of this Attachment.

4.1.21 When McLeod collocates with U S WEST in U S WEST's facility as described in this Agreement, capital expenditures (e.g., costs associated with building the "cage"), shall not be included in the Connectivity Bill provided to McLeod pursuant to this Attachment 5. All such capital expenses shall be given a unique BAN and

