

TC05-057

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March 30, 2005

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**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 a Petition Of McLeodUSA
Telecommunications Services, Inc., For Enforcement Of Interconnection Agreement With Qwest
Corporation, and McLeodUSA Telecommunications Services, Inc., Motion for Emergency
Relief.

Very truly yours.

MAY, ADAM, GERDES & THOMPSON LLP


BRETT M. KOENECKE

BMK:njh

Enclosures

cc:

security deposit and that Qwest may not “suspend order activity” or “disconnect services” until all procedures for dispute resolution in the 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 the State of South Dakota pursuant to certificates issued by this Commission.

2. Pursuant to Section 252 of the Telecommunications Act of 1996 (the “Act”), McLeodUSA opted into Interconnection Agreement (the “Interconnection Agreement” or “Agreement”) that was approved by the Commission on July 23, 1999. A copy of the relevant portions of the Agreement are attached as Exhibit A and incorporated herein.

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. Thus, the Commission has clear jurisdiction to interpret the terms of the Agreement as alleged herein.

5. The Commission has jurisdiction to consider this Petition pursuant to SDCL 49-13-1.

PARTIES

6. McLeodUSA is a competitive local exchange carrier certified to provide local exchange service in South Dakota. Correspondence regarding this Petition should be sent to

McLeodUSA at the following address:

William Courter
Assistant General Counsel
McLeodUSA
6400 C Street, SW
Cedar Rapids, IA 52406

- and -

Brett Koenecke
May, Adam, Gerdes & Thompson LLP
503 South Pierre Street
P.O. Box 160
Pierre, SD 57501-0160

7. Qwest is an incumbent local exchange carrier certified to provide local exchange service in South Dakota. Correspondence regarding this Petition should be sent to Qwest at:

Larry Toll
Qwest President for South Dakota
125 S. Dakota Ave.
Sioux Falls, SD 57194

- and -

Tom Welk
Boyce, Greenfield, Pashby and Welk
Box 5015
Sioux Falls, SD 57117

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 Agreement, even though the Agreement does not allow Qwest to do so. This dispute is also about Qwest's attempt to ignore the dispute resolution provisions of the Agreement and threats to take unilateral action to terminate service to McLeodUSA, to refuse to process orders for service by McLeodUSA, to terminate the Agreement with McLeodUSA, and to effectively leave customers served by

McLeodUSA stranded without access to customers served by carriers other than McLeodUSA. 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 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 extort 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 Agreement, the Commission must act to stop Qwest's actions and eliminate Qwest's threats. At all times, McLeodUSA has performed all of its obligations under the Agreement, has paid all invoices for services and facilities provided by Qwest under the Agreement, and has otherwise complied in all respects with the terms and conditions of the 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 in the state of South Dakota (“Qwest Demand Letter”). A copy of the Qwest Demand Letter is attached as Exhibit C and incorporated herein.

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 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 South Dakota, to safeguard Qwest’s financial interests.

13. Qwest demanded a security deposit in the amount of \$313,869.42 for the state of South Dakota 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 South Dakota.

15. The Qwest Demand Letter did not refer to any section of the 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 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 and incorporated herein.

17. On March 24, 2005, McLeodUSA provided a second response to the Qwest Demand Letter and notified Qwest that McLeodUSA was invoking the Dispute Resolution provisions of the 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 and incorporated herein.

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

19. The 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 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 Agreement. Services provided by Qwest under the Agreement are invoiced separately from services provided under either Qwest's tariffs or the

Wholesale Services Agreement.¹ McLeodUSA is current on all invoices from Qwest for services provided under the Agreement.

A. Qwest Has No Right To Demand A Security Deposit Under The Interconnection Agreement

21. Qwest has already agreed with McLeod that no security deposit is required under the Agreement. 12.2 of attachment 2 states in pertinent part:

“For purposes of this Agreement, a deposit will not be required from McLeod.”

Qwest may have other agreements in other states that speak in different terms but the South Dakota agreement appears clear. The Qwest actions complained of here are completely contrary to the Agreement and should be stopped.

Furthermore, nothing in the Agreement permits Qwest to demand payment of a security deposit, for any reason. Unlike other interconnection agreements between McLeodUSA and Qwest in which Qwest may demand a security deposit if McLeodUSA were “repeatedly delinquent” in its payments to Qwest, the South Dakota Agreement contains no provision permitting security deposits. There is no contractual basis, whatsoever, for Qwest to make the demand for a security deposit.

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

22. As demonstrated above, Qwest has no right under the 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

¹ 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.

“disconnect services” as Qwest has threatened to do.

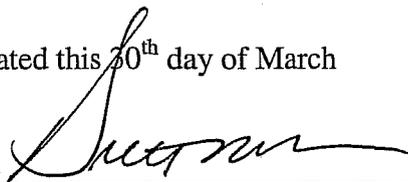
23. Because nothing in the Agreement gives Qwest the right to demand a security deposit, there can be no default or violation of the Agreement if McLeodUSA refuses to comply with a Qwest demand for a security deposit.

24. Based on the foregoing, it is clear that Qwest does not have the right under the 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 Agreement permits Qwest to take the actions that Qwest has threatened to take, namely “suspend order activity” or “disconnect services.”

REQUESTED RELIEF

25. 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 demand a security deposit from McLeodUSA at this time. McLeodUSA further requests that in the event of a default under the Agreement, Qwest must follow the dispute resolution provisions in the Agreement and may not “suspend order activity,” “disconnect services,” or terminate the Agreement until those dispute resolution procedures have been completed.

Dated this 30th day of March



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ATTORNEYS FOR MCLEODUSA